Federal Court  Cour fédérale

Date: 20170712

Docket: T-578-13

Citation: 2017 FC 669

BETWEEN:

THE CANADIAN COPYRIGHT LICENSING AGENCY ("ACCESS COPYRIGHT")

Plaintiff/
Defendant by Counterclaim

and

YORK UNIVERSITY

Defendant/
Plaintiff by Counterclaim

REASONS FOR JUDGMENT

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PHELAN J.

I. Introduction

[1] This is an action by The Canadian Copyright Licensing Agency ("Access Copyright") [Access] against York University [York] to enforce an Interim Tariff first issued by the Copyright Board of Canada [Copyright Board or Board] on December 23, 2010 (as subsequently varied during its term) in respect to copying activities engaged in by its employees in the period September 1, 2011 to December 31, 2013.

[2] York counterclaims seeking a declaration that any reproductions made fell within the Fair Dealing Guidelines it issued and therefore constitute the exception for "fair dealing" under s 29 of the *Copyright Act*, RSC 1985, c C-42 [Act]. The declaration sought covers all reproductions of all copyright-protected works made prior to April 8, 2013 and thereafter, regardless of whether such works are part of Access's repertoire.

[3] For ease of reference, the key provisions of the Guidelines are outlined below while the full text is attached as Schedule A.

II. FAIR DEALING GUIDELINES

1. Teaching Staff* and Other Staff** may copy, in paper or electronic form, Short Excerpts (defined below) from a copyright protected work, which includes literary works, musical scores, sound recordings, and audiovisual works (collectively, a "**Work**" within the university environment for the purposes of research, private study, criticism, review, news reporting, education, satire or parody in accordance with these Guidelines. [Definitions omitted]

2. The copy must be a "**Short Excerpt**", which means that it is either:

10% or less of a Work, *or*

No more than:

a) one chapter from a book;

b) a single article from a periodical;

c) an entire artistic work (including a painting, photograph, diagram, drawing, map, chart and plan) from a Work containing other artistic works;

d) an entire newspaper article or page;

e) an entire single poem or musical score from a Work containing other poems or musical scores; or

f) an entire entry from an encyclopedia, annotated bibliography, dictionary or similar reference work,

whichever is greater.

3. The Short Excerpt in each case must contain no more of the work than is required in order to achieve the fair dealing purpose;

4. A single copy of a short excerpt from a copyright-protected work may be provided or communicated to each student enroled in a class or course:

a) as a class handout;

b) as a posting to a learning or course management system (e.g. Moodle or Quickr) that is password protected or otherwise restricted to students of the university; or

c) as part of a course pack.

[4] The amount of material that this case touches upon is vast – it covers virtually all of York's libraries and course content. The evidence was similarly vast and the case difficult and complex. But for the work of the case management judge, Prothonotary Aalto, this trial would have been unmanageable despite the best efforts of counsel for the parties.

II. Issues

[5] In the main action, the issue is "whether the interim tariff issued by the Copyright Board on December 23, 2010 as amended is enforceable against York".

In the counterclaim, the issue is "was York's dealings fair for the purposes of s 29 of the Act". The net effect would be that if the Interim Tariff was enforceable and royalties were therefore payable, York would be exempt from paying because of "fair dealing".

[6] The trial management process set out the specific issues as follows:

A. Main Action

1. The issues relating to whether the Interim Tariff is enforceable against York are:

    a) Whether Access can sue for amounts allegedly due under the Interim Tariff, namely:

        i) Is the Interim Tariff an "approved tariff" for the purposes of section 68.2(1) of the *Copyright Act*?

ii) Is the Interim Tariff otherwise enforceable pursuant to section 66.7(2) of the *Copyright Act* and Rule 424(2) of the *Federal Courts Rules*?

b) Whether the Interim Tariff is voluntary, whether York can elect whether or not to operate under it, and whether it has any application to York.

c) Whether, after August 31, 2011, any "employee" of York, "Student", "Professor", "Library Worker", "volunteer", or "other persons" (as those terms are used in the Interim Tariff) was a "Licensee" under the Interim Tariff. (It was not necessary to answer this question given the finding on York's vicarious liability nor was the issue substantially addressed.)

2. Whether the Interim Tariff extends to acts of authorizing the reproduction of copyright-protected works falling within the ambit of the Interim Tariff.

3. Whether the activities of the professors relating to reproductions alleged to have been made by Keele Copy Centre Inc. of the Schedule B Works are activities for which York is responsible.

B. Counterclaim

4. Whether any reproductions made that fall within York's Fair Dealing Guidelines constitute fair dealing pursuant to ss 29, 29.1 or 29.2 of the *Copyright Act*.

5. Whether the declaratory relief sought in subparagraphs 25(a)(i), (ii), and (iii) of York's amended statement of defence and counterclaim should be granted.

III. Summary of Conclusions

A. *Interim Tariff – Main Action*

[7] The Interim Tariff is mandatory and enforceable against York. To hold otherwise would be to frustrate the purpose of the tariff scheme of the Act and the broad powers given to the Board to make an interim decision pursuant to s 66.51 of the Act, and to choose form over substance. The Act is quite specific in terms of the Board's powers in this regard:

66.51 The Board may, on application, make an interim decision.	**66.51** La Commission peut, sur demande, rendre des décisions provisoires.

[8] The Interim Tariff was imposed because of objections to the proposed final tariff governing the photocopying at York and other post-secondary educational institutions. The Interim Tariff was not published in the Canada Gazette (and this was one of York's principal defences against enforcement). However, all of the interested parties were already part of the process by virtue of the tariff application filed by Access (including the then-named Association of Universities and Community Colleges [AUCC], which represented the interests of York) and the parties had actual notice of the Interim Tariff by virtue of their participation in the tariff application process.

[9] In addition, public notice was effected by the Board's order to Access to post the interim decision on Access's website and take all reasonable steps to alert the community of post-secondary educational institutions of the Board's order.

[10] It is noteworthy that the Interim Tariff was never judicially reviewed. York's defence against the action for enforcement of the Interim Tariff smacked of a collateral attack on the Board's decision.

[11] In the final analysis, I find that the Interim Tariff is mandatory, not voluntary. Many factors point to the mandatory nature of the Interim Tariff including the scheme of the Act, the Act's legislative history, and the ordinary meaning of the term "tariff".

[12] York's reliance on the Supreme Court's decision in *Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57, [2015] 3 SCR 615 [*SODRAC*], is misplaced because the

provision for tariff setting in the present case is distinct from the provisions for licence-term arbitration relevant to the *SODRAC* decision.

[13] While there are several exceptions to the Act and to the provisions governing tariff setting, including statutory defences such as "fair dealing" and exceptions for obtaining permission for reproduction, these are nevertheless exceptions to an otherwise mandatory scheme. Further, those exceptions are not applicable in these circumstances.

B. *Fair Dealing – Counterclaim*

[14] York's own Fair Dealing Guidelines [Guidelines] are not fair in either their terms or their application. The Guidelines do not withstand the application of the two-part test laid down by Supreme Court of Canada jurisprudence to determine this issue. The relevant provisions state:

29 Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.	**29** L'utilisation équitable d'une oeuvre ou de tout autre objet du droit d'auteur aux fins d'étude privée, de recherche, d'éducation, de parodie ou de satire ne constitue pas une violation du droit d'auteur.
29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:	**29.1** L'utilisation équitable d'une oeuvre ou de tout autre objet du droit d'auteur aux fins de critique ou de compte rendu ne constitue pas une violation du droit d'auteur à la condition que soient mentionnés :
(a) the source; and	**a)** d'une part, la source;
(b) if given in the source, the name of the	**b)** d'autre part, si ces renseignements figurent dans la source :

(i) author, in the case of a work,	**(i)** dans le cas d'une oeuvre, le nom de l'auteur,
(ii) performer, in the case of a performer's performance,	**(ii)** dans le cas d'une prestation, le nom de l'artiste-interprète,
(iii) maker, in the case of a sound recording, or	**(iii)** dans le cas d'un enregistrement sonore, le nom du producteur,
(iv) broadcaster, in the case of a communication signal.	**(iv)** dans le cas d'un signal de communication, le nom du radiodiffuseur.
29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:	**29.2** L'utilisation équitable d'une oeuvre ou de tout autre objet du droit d'auteur pour la communication des nouvelles ne constitue pas une violation du droit d'auteur à la condition que soient mentionnés :
(a) the source; and	**a)** d'une part, la source;
(b) if given in the source, the name of the	**b)** d'autre part, si ces renseignements figurent dans la source :
(i) author, in the case of a work,	**(i)** dans le cas d'une oeuvre, le nom de l'auteur,
(ii) performer, in the case of a performer's performance,	**(ii)** dans le cas d'une prestation, le nom de l'artiste-interprète,
(iii) maker, in the case of a sound recording, or	**(iii)** dans le cas d'un enregistrement sonore, le nom du producteur,
(iv) broadcaster, in the case of a communication signal.	**(iv)** dans le cas d'un signal de communication, le nom du radiodiffuseur.

[15] York's dealing with copyrighted material satisfies part one of the test in that it falls within the enumerated activities in s 29 – specifically, education, research, and private study. There is no real issue that York met the first prong of the fair dealing provision – that the photocopying was done for allowable educational purposes.

[16] This finding only in part addresses the first factor of the second part of the test – the purpose of the dealing. The remaining factors to be considered under the second part of the test are the character of the dealing, the amount of the dealing, alternatives to the dealing, the nature of the work, and the effect of the dealing.

[17] In respect of the "character of the dealing" factor, the Court finds that the better measure of the dealing is the overall number of exposures (as per Gauthier's evidence) rather than the number of exposures per full-time equivalent [FTE] student (as per Wilk's evidence). The FTE evidence suffered from significant reliability concerns.

Further, the FTE evidence is less useful because (a) the data is not sufficiently disaggregated to draw conclusions about smaller sub-groups and (b) it would obscure the Court's perspective to focus only on the copying per FTE rather than the entire amount of copying done at York.

[18] The character of the dealing factor is not particularly helpful on its own, but it becomes more meaningful when considered together with the other fairness factors. However, this wide-ranging, large volume copying tends toward unfairness.

[19] Under the factor of the "amount of the dealing", the Court had to consider how much of a work was copied and whether the delineated allowable amount or "threshold" under the Guidelines (10% of a book or articles in a journal, etc.) is fair. This was a core area of focus in this case.

[20] Quantitatively, the Guidelines set these fixed and arbitrary limits on copying (thresholds) without addressing what makes these limits fair. The fact that the Guidelines could allow for copying of up to 100% of the work of a particular author, so long as the copying was divided up between courses, indicates that the Guidelines are arbitrary and are not soundly based in principle.

[21] An example suffices to illustrate. The classic story, *The Hockey Sweater*, would benefit from copyright protection if it was copied on its own, but is deprived of protection if it is copied from an anthology. The Guidelines make an arbitrary distinction for protection based on the format of publication.

York has not satisfied the fairness aspect of the quantitative amount of the dealing. There is no explanation why 10% or a single article or any other limitation is <u>fair</u>.

[22] Qualitatively, the parts copied can be the core of an author's work, even to the extent of 100% of the work. No explanation is given for this provision of the Guidelines. This is equally as unfair as the quantitative aspect.

[23] In regards to "alternatives to the dealing", York has not made out a case that there are no alternatives to its dealing. The dealing at issue includes copying entire required course readings (coursepacks) without compensation to the author or publisher, simply because such copying can be done digitally with the product residing in a computer database rather than on the stacks in a library.

[24] The justification of cheaper access cannot be a determinative factor, since in that respect it is always better for users to get for free that which they have had to pay for in the past.

[25] The effect of the dealing on the market is complicated in this case. It is almost axiomatic that allowing universities to copy for free that which they previously paid for would have a direct and adverse effect on writers and publishers. In terms of a more thorough analysis of those impacts, I prefer the expert evidence of Dobner over that of Chodorowicz and Davidson, whose evidence did not survive cross-examination. Dobner's evidence shows the nature and extent of the adverse impacts.

[26] The question of impacts on the market from a broader perspective is more complicated because of the multitude of factors impacting publication generally. This whole field is in flux with the transition over the last decade to digitalization, increased peer-to-peer sharing, and the use of databases and programs as a means of distributing materials to students (such as Moodle). It would be impossible to isolate each factor and separately weigh its contribution to market impacts. It is sufficient here for Access to prove, as it has, that the market for the works (and physical copying thereof) has decreased because of the Guidelines, along with other factors. It is

also sufficient for Access to establish, as it did, that copying done under the Guidelines is likely to compete in the market for the original works.

[27] These negative impacts, from both a narrow and broader perspective, further point to the unfairness of York's dealing.

[28] A further and final factor of the fairness of the Guidelines is that York has made no real effort to review, audit, or enforce its own Guidelines. As became evident, educational efforts on setting their copyright rules are insufficient because there was no effective compliance mechanism. Even professors operating outside of the Guidelines are not held accountable. The complete abrogation of any meaningful effort to ensure compliance with the Guidelines – as if the Guidelines put copyright compliance on autopilot – underscores the unfairness of York's Guidelines.

[29] These points are discussed more fully in the body of these Reasons.

IV. The Parties

A. *Access Copyright*

[30] Access is a collective society under the Act. It administers the reproduction rights of copyright in published literary works in Canada, except for the Province of Quebec, on behalf of creators and publishers that hold copyright in those works.

[31] The *Copyright Act*, RSC 1970, c C-30 [the 1970 Act] and its predecessor legislation provided for the collective administration of performance rights, one of three copyrights covered by the Act. The other two copyrights, the right to reproduce a work and the right to communicate a work to the public, were excluded from collective administration.

[32] Section 48 of the 1970 Act provided that the performing rights society [PRS] was required to file lists of the works in respect of which it had authority to issue or grant performing licences. The respective PRS was required to file, with the then Minister of Consumer and Corporate Affairs, statements of fees, charges, and royalties that it proposed to collect in exchange for the issuance or grant of licences for the performance of works in Canada.

[33] Access licenses the reproduction of published works in its repertoire (effectively its copyrighted holdings) to users of the works, collects license fees from users, and distributes royalties to creators and publishers.

[34] In addition, Access receives authorization to administer reproduction rights through affiliation agreements with Canadian creators and publishers and through bilateral agreements with similar PRSs in other countries and in Quebec.

[35] Access's role is to license the right to copy a work in its repertoire. It does not provide actual access to any published works or collect royalties which are generally done through licensees which are then remitted to Access.

B. *York University*

[36] York is a university established by the Legislative Assembly of the Province of Ontario under *The York Act 1959* and continued under *The York University Act 1965*.

[37] York is the second largest university in Ontario and the third largest university in Canada, with eleven different faculties covering undergraduate, post-graduate, and professional fields of education located at two campuses in Toronto: Keele Campus and Glendon Campus.

[38] York runs on an academic year basis, from September in one year to August in the next. There are three semesters: Fall, Winter, and Summer. Courses are usually run for a semester or they may be run on a "full year" basis, which is September to April (two semesters).

York uses a credit system – a semester course is three credits and a full load for an undergraduate student is 30 credits over two semesters in the academic year.

[39] Between 2008 and 2014, the number of undergraduate and graduate students at York ranged from 51,989 in 2008 to a high of 54,590 in 2012 to 52,879 in 2014.

[40] An important metric both in this case and in educational reporting each year to the Ontario Ministry of Training, Colleges and Universities for funding purposes is the number of FTEs for undergraduate and graduate students.

Because of the method of calculation of FTEs, which accounts for the number of York students who do not carry a full course load, the total number of FTEs is typically lower than the total number of students at York in any given year.

[41] Between 2008-2009 and 2014-2015, the total FTEs in each respective academic year ranged from 45,383 to 48,967.

[42] In regard to teaching staff, which consisted of full-time faculty and contract/part-time members, the full-time faculty fluctuated between 1,528 and 1,465 over the 2008-2014 period, and contract/part-time faculty ranged from 1,774 to 1,582 over that same period.

V. Subject Matter

[43] The subject matter of this litigation is the new methods of distributing published materials to students. Generally, gone is the single textbook for a course, gone is pulling books and publications from library stacks, and gone is finding a way to pay for photocopying at library run photocopiers. In part, this case involves the intersection of traditional copying with the digital world.

[44] At York, courses may be comprised of lectures, labs, and/or tutorials. For a large enrolment course, it may be offered in more than one section and taught by different instructors.

[45] Consistent with the principle of academic freedom, instructors choose the materials to be used in their courses. Typically, these materials include books, journal articles, newspaper

articles, portions from collections of works, encyclopaedia, music, video, film, software, data sets, and other published materials. Key forms of published materials are the "printed coursepack" and the "learning management system".

[46] While books to be used are generally purchased by students at the university bookstore, much of the other material used for teaching is licensed to York's various libraries by authors, publishers, PRSs, and other libraries.

A. *Coursepacks*

[47] A coursepack is a bound compilation of materials selected by the instructors and made available to students. It often contains a course outline or syllabus, course notes, and course materials such as excerpts from books, journal articles, and other miscellaneous materials.

[48] During the period covered by this litigation, coursepacks used by York students were produced internally at York by the University Printing Services or externally at third party print shops which were supposed to be licensed by Access. As evidenced in this case, that was not always the case and some instructors went to a non-licensed print shop, Keele Copy Centre [Keele], for which no sanctions were imposed by the York administration. This is the foundation for Access's claim that York breached Access's Interim Tariff.

[49] However, York instructors generally used internal print shops that were licensed by Access and for which Access is paid royalties on materials in their repertoire. These authorized print shops invoice York directly for the coursepacks.

[50] After August 31, 2011, when York "opted out" of Access's Interim Tariff, York also used another Access licensed print shop, Gilmore, to produce coursepacks.

[51] In the usual manner, coursepacks produced at York or by Gilmore are ordered through York's Copyright Clearance Centre [York's CCC], which is an organization within the university's Printing Services unit.

[52] In the past, the instructors gave the York CCC the full bibliographic details of the materials made from the coursepack and the CCC was supposed to take over from there. In that regard, the CCC determines the licence status of the materials, obtains transactional licences where necessary, and/or contacts copyright owners or copyright licensing organizations to obtain the necessary permissions. If the CCC cannot obtain timely approvals, it is supposed to send the coursepacks to Gilmore for production and payment to Access where appropriate or obtain transactional licenses for materials not in Access's repertoire.

B. *Learning Management Systems*

[53] Instructors may choose to use a learning management system [LMS] provided by York.

[54] An LMS is a software platform by which an instructor can organize certain course materials and make them available to students electronically. An LMS may also provide various functionalities to facilitate learning, including a calendar system for assignment due dates, discussion forums, portals for the submission of assignments, and means for returning graded

assignments and for accessing York Libraries' electronic resources and catalogue. York has been using LMSs since approximately 2000.

[55] Each course and course section has its own site on an LMS. While an LMS site can be made available to each course and course section offered by York, use of an LMS is optional and not all instructors choose to use an LMS for their courses.

[56] While there are different LMSs, the most common LMS platform used at York is called Moodle. Moodle currently accounts for over 70% of all LMS course sites at York. By the end of Summer 2016, it was anticipated that Moodle would account for approximately 92% of all LMS course sites at York.

[57] An LMS provides instructors with the ability to post course materials in various digital formats (such as PDF, Word documents, PowerPoint slides, image files, audio files, video files, etc.) for access by students enrolled in their courses. An LMS also allows instructors to create links to electronic resources, including resources licensed by York's libraries and materials on the internet, to direct students to pertinent materials.

[58] While York says that it has developed a number of safeguards to ensure that materials on an LMS are only accessible by authorized users, York has no monitoring or enforcement mechanisms to address compliance with copyright laws or even its own policies.

[59] As the Director of Information, Privacy and Copyright at York, Patricia Lynch, confirmed, her initial role included compliance monitoring and enforcement and this was changed in that monitoring and enforcement were deleted. York developed an educational program for faculty and staff to deal with copyright, as well as some other not very effective procedures. It developed a "copyright attestation" requirement to remind instructors, staff, and students of the importance of complying with copyright guidelines when using an LMS. In as early as July 2012, some LMSs required instructors to agree to comply with copyright guidelines before gaining access to their course sites. And since the Fall of 2013, users (including instructors and students) cannot gain access to Moodle course sites until they agree to comply with York's copyright guidelines.

[60] It is not completely accurate to say that York ignored copyright. It did set up programs where instructors and students agreed to copy within York's copyright guidelines and it did initiate procedures on Moodle sites to remind users of copyright obligations. However, there was no evidence that any of these actions were effective.

[61] York's Copyright Support Office [CSO] was created in 2013 and provided copyright support services to instructors and staff in all faculties, including services with respect to the review and preparation of course materials for an LMS and the provision of information sessions.

[62] Some of the services provided by the CSO are assistance to instructors and their support staff in identifying the copyright status of the course materials they wish to upload to their course

sites, reviewing course materials for copyright compliance, and securing transactional licences from copyright owners and copyright licensing organizations for posting materials on course sites. But, as noted earlier, compliance monitoring and enforcement were not part of the CSO's role, nor of anyone else's role.

VI. Summary of Key Lay Witnesses

[63] It is not the Court's intention to summarize all of the evidence heard in this case, but rather to highlight some of the key elements heard by the Court. More specific findings are made throughout these Reasons.

A. *Plaintiff's Lay Witnesses*

(1) Roanie Levy

[64] Roanie Levy, Executive Director of Access, testified generally as to the objectives and operations of Access including its organizational structure. She explained the importance of the educational sector to the writers and publishers for whom Access acts. She also outlined the impact of York's refusal (and the refusal of other universities who were acting similarly) to abide by the Interim Tariff and to pay the substantial amounts said to be owing. Her evidence was unshaken by cross-examination. The history of the relationship between Access and York is discussed later in these Reasons.

(2) Matthew Williams

[65] Matthew Williams, Vice-President of Publishing Operations at House of Anansi Press and Groundwood Books, appeared also in his capacity as President of the Association of Canadian Publishers. His corporate evidence related primarily to trade bookstores rather than education; however, he gave evidence on behalf of the Association and particularly on the impact of the York Guidelines in reducing revenues for publishers. In cross-examination he showed how royalties to Anansi had been declining, particularly at York (details of which were given in confidence). His evidence also underscored the changes in the publishing world from traditional books to e-books.

(3) Michael Andrews

[66] Along the same lines but with greater experience, Michael Andrews, Senior Vice-President and Chief Financial Officer of Nelson Education and Interim CEO, gave evidence which was particularly germane and balanced. Nelson Education is Canada's largest educational publisher for grades K-12 and higher education. Some of the details of the financial aspects of the business are confidential and need not be repeated here. Higher education was a significant part of the company's business.

In describing post-secondary educational products, he divided them into three groups – indigenous (Canadian origin or Canadianization by adaptation of another country's work), agency (another country's work unchanged), and custom (bringing different chapters together to create what a professor requires).

[67] He described how the higher education market had been in decline for at least five years. Illegal sites and peer-to-peer sharing, plus copying done by professors in coursepacks and Moodle, have contributed to this decline. While coursepacks for professors contributed to the decline in publication, the relationship with professors is complex because professors are also the authors of materials published by publishers such as Nelson.

[68] Importantly, Andrews' evidence of the decline in Access's revenues and the adverse impact on this educational publisher is consistent with the expert evidence called by Access (including, to some extent, the survey evidence filed). Also importantly, he admitted that conversion to new digital products would happen with or without fair dealing guidelines – that this is a market reality.

(4) Glenn Rollans

[69] Glenn Rollans, Co-owner of Brush Education (an independent higher education publisher), President of the Book Publishers Association of Alberta, and Vice-President of the Association of Canadian Publishers, gave similar evidence of the decline in Canadian educational publishing and the impact of changing technology. He confirmed, as did others, that York did not involve his organizations in the development of their Guidelines.

(5) David Swail

[70] The Plaintiff also called David Swail, Executive Director of the Canadian Publishers' Council and former President and CEO of McGraw-Hill Ryerson. His evidence, garnered from

years of experience, was helpful in understanding the causes of the decline in the sale of primary resources. The principal causes were unauthorized copying (peer-to-peer sharing, unauthorized physical copying). He also outlined the increasing role of e-books and the ability to buy individual chapters through e-book platforms. Given the terms of the Guidelines, this is a significant factor as discussed later in the context of alternatives to copying and the Guidelines.

(6) Writers' Union

[71] Evidence from the Writers' Union also confirmed the decline in revenues and the absence of contact from York when York developed its Guidelines.

B. *Defendant's Lay Witnesses*

[72] The Defendant called fourteen (14) lay witnesses in addition to its three (3) experts. Some were called in respect to the Interim Tariff, others in respect of the Guidelines, and some covered both issues.

(1) Patricia Lynch

[73] Patricia Lynch played a significant role, both in respect of York's defence to the Interim Tariff claim as well as in the counterclaim regarding the Guidelines.

[74] Lynch was the Director of Information, Privacy and Copyright at York. She was the principal administrator of license agreements with Access, which involved ensuring that copying was done according to York's agreement with Access and that relevant fees were paid.

[75] Lynch described the process by which York moved away from dealing with Access. She explained that by September 1, 2011, York was not operating with Access through either an agreement or a tariff. She indicated that her role became that of an educator on copyright, and she ran non-mandatory educational sessions (for which attendance was not recorded) on the new regime of Fair Dealing Guidelines.

She spearheaded the matter of authorized copy shops and encouraged the use of the Copyright Office in preparing materials, even offering to review copyrighted material used in courses in any format.

[76] Her evidence confirmed that while she was committed to the protection of copyright, there was no organizational support for monitoring or enforcement of copyright obligations including compliance with the Guidelines. Her job description referred to a role of monitoring and auditing compliance, but she never engaged in those roles and her job evolved away from such mechanisms to one of persuasion and education.

[77] According to Lynch, the York University Faculty Association objected to any form of monitoring or enforcement of compliance with the Guidelines implemented in December 2010.

[78] As established in Lynch's cross-examination, there was no auditing, sampling, or monitoring of compliance. York did not implement safeguards such as periodic reviews. Of the 27% of exposures described as exceeding the Guidelines by the expert Wilk (discussed later), no transactional permissions were sought. York did not produce a single permission document for any the 1,252 items captured in the sampling.

[79] In sum, Lynch's evidence established that while her intentions to educate were sincere, there was a complete absence of meaningful review of compliance with the Guidelines.

(2) Professors and Administrators

[80] York called a number of professors to give evidence of their use of teaching materials. The professors confirmed their freedom to choose material, their use of copied material, and their strong preference for using coursepacks and Moodle. None of the professors were subject to any form of process to ensure compliance with the Guidelines.

[81] Vice-Provost Academic Alice Pitt gave evidence about the importance of academic freedom. She stated that any form of monitoring would have staffing and cost implications. She also feared that any form of compliance monitoring or auditing would raise issues of academic freedom with faculty and staff.

[82] It appeared, from the evidence of professors and academic administrators, that compliance with the Guidelines raised internal academic freedom issues that were not worth the "battle".

VII. Summary of Key Expert Evidence

A. *General*

[83] A significant problem in this case is that there is no record of the number of copyrighted pages actually copied. That issue not only affects the compensation owed to Access, but also

implicates one of the factors the Court is required to assess when considering whether the Fair Dealing Guidelines actually are fair (that is, the amount of the dealing).

[84] Neither party realistically suggests that the impugned copying was *de minimis* or insignificant, but precise calculation was a problem. A surrogate for data on the actual "copied" pages was to use sampling data and to extrapolate estimates of copying from this sampling data. A secondary issue of that exercise is the appropriate measure of copying – by student (FTE) or by exposure (assumed to be a photocopy per page).

[85] In addition to this quantification exercise, the Court had to consider, under the operation of the Guidelines, the impact of the Guidelines on persons who had an interest in the works – Access, authors, and publishers. This raised the issue of the use of surveys, to which York objected. For reasons given at trial, the survey evidence was admitted; however, this case is not an exercise of the quantification of harm, so the impact of the surveys was more confirmatory of what common sense suggests – that if one is deprived of revenue which had been received in the past, one is likely to be adversely affected. It is important to recognize that this litigation is not about government assisted funding to the "arts" or other similar matters of broad social policy. It is also not about subsidies (overt or opaque) to writers and publishers.

[86] Finally, as a general rule, the Court found the expert evidence of the Plaintiff more credible and compelling. It was more rigorous, coherent, and consistent, and it suffered from fewer flaws than the evidence of the Defendant.

B. *Sampling Issues*

[87] Due to the volume of materials which could be covered by this litigation – essentially all the works in York libraries and the non-recorded copying of materials distributed to students – it was necessary to devise a means to calculate the amount of materials which could have been copied and would have been subject to the Interim Tariff and/or encompassed by the Fair Dealing Guidelines.

[88] The parties conducted sampling of two different types of items at York: a) items in coursepacks produced internally by York's Printing Services and b) PDFs posted on LMSs by York's staff. The sampling was done as a "pre-test" (to ensure that the sampling would work) and "main" (the sampling itself) and covered the period September 1, 2011 to December 31, 2013 (the period of the Interim Tariff after York stopped operating under the Interim Tariff).

[89] A total of 565 items were selected for the coursepack sampling and a total of 1,247 PDFs were selected for the LMS sampling. The details of the samplings, contents, and sources are set out in the evidence and need not be repeated here.

[90] As indicated earlier, both the FTEs and the number of unique users were used in the respective experts' analyses.

[91] In respect of the published works in the sample items, York adduced a number and variety of documents and records to demonstrate that there were permissions to use many of the works used in the coursepacks and on the LMSs.

As indicated later in these Reasons, York's reliance on permissions was misplaced and of no assistance.

[92] The results of the sampling, the extrapolations therefrom, and the conclusions drawn by the respective experts have been previously discussed and the Court's acceptance of the Plaintiff's experts underscored. The differences between the experts on some matters were significant. For example, Gauthier, on behalf of Access, estimated that over 160,000 items were copied for coursepacks at York between January 2005 and August 2011 – more than 20,000 per year.

[93] York dismissed this matter by contending that the copying was either subject to permissions or was within the quantitative limits of the Guidelines, despite the Guidelines not being in effect in that period and the matter of permissions/licences being of no real assistance.

[94] Discounting permissions and licences, both parties' experts concluded that approximately 11% of documents in the LMS sample exceeded the Guidelines. Not only is this a significant amount of unauthorized copying even if the Guidelines are assumed to be a valid response to copyright claims, but if the Guidelines are not valid (as found by this Court), then the amount of unauthorized copying is significantly higher.

C. *Plaintiff's Experts*

(1) Benoît Gauthier

[95] A principal expert in this litigation was Benoît Gauthier, a business evaluator with experience in surveys. His qualifications were not challenged, subject to the Defendant's objection to his survey evidence.

[96] Gauthier had a four-fold mandate:

1. To advise on sampling methodology to collect relevant data in order to measure the volume of print and digital copying of published works at York from September 1, 2011 to December 31, 2013, and to perform calculations on various data sets to report information about such copying to Access;
2. To perform calculations on various data sets in order to report information about copying for the production of coursepacks (through the internal printing services and external copy shops) to Access;
3. To assist in the development of a 2014 online survey questionnaire addressed to member companies of the Association of Canadian Publishers and to provide feedback regarding the wording and design of the questionnaire, to design an online version, to conduct a pre-test of the online questionnaire, to manage the online data collection for September to October 2014, and to provide the data collected to PricewaterhouseCoopers LLP; and,

4. To design and conduct a 2013 survey of Access's creator affiliates concerning the copying of their published works in the educational sector and to provide a report that was filed in proceedings before the Board.

[97] In summary, Gauthier's evidence was that:

a) From January 2005 to August 2011, York's internal coursepack printing services made approximately 122 million print exposures of published works that were included in coursepacks for which York remitted royalty payments to Access. Approximately 80% of those print exposures came from books.

b) From January 2011 to December 2015, copy shops made, on behalf of York, approximately 29 million print exposures of published works included in coursepacks. Over 90% of that copying was from books.

c) From September 2011 to December 2013, York Printing Services made approximately 2.9 million print exposures of published works included in coursepacks that are, according to Access, relevant to York's Fair Dealing Guidelines counterclaim. Relevance to the counterclaim in this instance means that Access has identified the work as requiring permission, authorization, or payment to copy.

d) The volume of coursepacks produced internally by York decreased significantly after August 2011.

e) From September 2011 to December 2013, over 16 million digital exposures of published works (that are, according to Access, relevant to York's Fair Dealing Guidelines) were posted and copied on York's LMSs.

f) From 2012 to 2013, the volume of digital exposures of published works purportedly relevant to York's Fair Dealing Guidelines counterclaim doubled from approximately 4.5 million to 9 million.

g) A comparison of the volume of print copying versus digital copying from 2011-2013 suggests that copying behaviour at York is shifting from print coursepacks to posting and copying works on an LMS.

[98] While Gauthier did not adjust his estimate of print and digital exposures to account for York's claim that some of the items captured in the sampling were copied or posted with permission, this does not significantly undermine the conclusions which can be drawn. The report may overstate some of the copying, but since York had the data it was incumbent on them to establish quantum and materiality.

[99] The data on coursepacks was voluminous. As an example, between January 1, 2005 and August 31, 2011, there were 122 million exposures. The vast majority of this material and of similar material for copy shop exposures and internal coursepacks produced by York fell within the quantitative limits set by York's Guidelines.

[100] In respect of LMSs, Access and York agreed to design and implement a study of the copying of published work by staff on LMSs. The result was that 16.3 million digital exposures relevant to fair dealing were posted on York's LMSs between September 2011 and December 2013. Generally, 70% of the volume of copying on LMS systems fell within the quantitative limits of York's Guidelines.

[101] An issue arose as to the best representative base from which to assess the copies – enrolment versus unique user access (essentially the number of people with an access number). Gauthier was instructed to use enrolment.

[102] The evidence establishes that neither base is necessarily superior and that each had its flaws. I have concluded that the base used by Gauthier was reasonable and therefore his conclusions stand.

[103] Gauthier's role in the Publisher's Survey was to assist in the development of the survey, to ensure the questionnaire was valid and reliable, and to ensure that it had integrity. He did not, however, analyse the data. The survey was sent to 150 publishers of the 600 Access affiliates. The survey was not directed specifically at copying at York or income produced and used at York.

[104] Gauthier's role with respect to the Creator's Survey was somewhat the same as to design, reliability, and validity. The survey had a 42% response rate, which is a high response for surveys.

[105] Gauthier established the reliability, integrity, and validity of both surveys, which is a threshold issue on the admissibility of survey evidence. However, the Creator's Survey in particular produced little significant evidence relevant to this case.

(2) Michael Dobner

[106] Gauthier's evidence was also in support of the expert opinion report of Michael Dobner of PricewaterhouseCoopers LLP [PwC]. Dobner had post-graduate education in economics and expertise in business valuations. He was qualified, without objection, to give expert evidence in respect of the economic losses to a business from a specific event or events.

As indicated earlier, I found his evidence to be thorough, thoughtful, and compelling. His evidence provided considerable assistance to the Court. His opinions on various matters were consistent with the other evidence heard at this trial. They are particularly relevant to the analysis of the "fair dealing" exception and the determination of whether York's Guidelines are fair in light of the effects of the dealing.

[107] PwC was retained to prepare a report of its assessment of the apparent and expected impacts:

1. The adoption of the Fair Dealing Guidelines by York on the market for copyright-protected works produced, used, and copied in the post-secondary education market; and,
2. The adoption of identical or substantially similar guidelines on that market by:
    a. Universities Canada;
    b. Colleges and Institutes Canada;
    c. The Council of Ministers of Education, Canada [CMEC]; and,
    d. Canadian post-secondary educational institutions.

PwC was also asked to estimate the loss of royalty revenue by publishers and creators arising from the adoption of the Guidelines by York and other post-secondary institutions.

[108] In summary, Dobner's findings and opinions were:

a) The post-secondary educational publishing industry in Canada, which has been facing numerous challenges in recent years, cannot withstand the adoption of the Guidelines without significant adverse impacts on the works it produces.

b) Based on the data available, the estimated result of full adoption of the Guidelines by post-secondary institutions in Canada (outside of Quebec) would be an annual loss of licensing royalties in the range of $10,041,000 to $14,675,000. York's share of that amount would be $800,000 to $1,285,000.

c) Since the introduction of the Guidelines, there has been an acceleration in the decline in sales of works produced by content producers for the post-secondary market.

d) Since the introduction of the Guidelines, there has been a transfer of wealth from content producers to content users, somewhat offset in the short-term by an increase of prices for published works.

e) The adoption of the Guidelines by York and other post-secondary institutions has led to a lack of transparency regarding copying activities, meaning that content producers are unable to effectively detect infringement or to assert their intellectual property rights in a meaningful way. Evidence suggests that this has led to an atmosphere in which copying in excess of the Guidelines occurs and is tolerated by the institutions.

f) The educational publishing industry is currently in a period of transition from traditional textbook publishing to digital content and services, but this requires significant investment. The financial impact of the Guidelines limits the publishing industry's ability and incentives to invest in this economy. Small to medium-sized enterprises [SMEs] are substantially more vulnerable.

g) The likely long-term impacts of the adoption of the Guidelines is that:

- Some SME publishers producing educational content are expected to exit the business;
- Creators are expected to reduce the number of works they create, the time they spend creating, and the focus on post-secondary educational content;
- Content producers are expected to produce less content and invest less in the Canadian market. In particular, they will reduce product offerings for subjects without sufficient scale, demand, and requirements for current content;
- Continued decline in sales will force publishers to increase prices to offset loss of economies of scale; and,
- Users of post-secondary educational content will be faced with deterioration in the quality, diversity, and ingenuity of works in certain subjects, as well as higher prices.

h) The adoption of the Guidelines will have significant negative implications for the industry's economic footprint in Canada, which totaled an estimated $550 million and $490 million in 2011 and 2015, respectively. Negative impacts will likely emerge in the long run, including:

- loss of high paying jobs,
- reduced investment that will limit productivity growth,
- a shift in some areas from content production in Canada to imported content, and
- a consolidation in the post-secondary educational market (i.e. large, mostly foreign-based publishers).

[109] Dobner had some important observations about the role of collectives which are consistent with the purpose of collectives as recognized in the legislation. An aspect of copyright, a right recognized by the Supreme Court of Canada as a shared right, is the encouragement and incentive to produce new, original, and creative works. Part of that incentive is the compensation to be paid to creators. Copyright collectives reduce the transaction cost associated with administering copyright while ensuring that owners (creators) are remunerated for use of their works.

[110] Dobner also recognized the problem posed by the significant number of works affected by the Guidelines and the difficulty of establishing the effect of the dealing on a particular work. He also acknowledged the difficulty in detecting the full impact of the adoption of the Guidelines on the market for the works as a whole because some of the negative impacts resulted from other factors, many of which are technological changes such as digitalization.

[111] Having recognized that there are limitations to the information and the ability to analyse the impacts of the Guidelines, I find that the impacts are those which Dobner described. The impacts are more qualitative and directional than quantitative.

[112] However, there are some quantitative aspects which support the qualitative conclusions. For example:

a) Access's post-secondary distributions of licensing revenue to content producers declined from $14.2 million in 2008 to $9.8 million in 2010. Between 2010 and 2014, revenues fluctuated before declining to $6.6 million in 2015.

b) The most recent decline is primarily the result of a reduction in the number of institutions that held licensing agreements with Access and the level of coursepack reporting from external copy shops. Distributions are expected to decline to $1.3 million in 2016.

c) Since the introduction of the Guidelines, permissions licensing requests and associated revenues have declined substantially and are considered insignificant.

d) The economic footprint of the post-secondary educational publishing market is significant in the Canadian economy in terms of output, jobs, GDP, and tax revenue, but this footprint has shrunk in recent years. The industry's estimated GDP footprint declined by 11% from 2011 to 2015. Publishing industry jobs are relatively high value (with an average salary more than 45% higher than the Canadian average across all industries):

- The total economic footprint of the post-secondary educational publishing industry was $1.06 billion in 2011, with a GDP of $550 million. This can be contrasted with its 2015 output of $950 million and $490 million GDP.
- The post-secondary educational publishing industry has a significant economic footprint comprising over 5,000 jobs on a full-time equivalent basis across numerous industries in 2015. This is an 11% decline from 2011.

[113] Furthermore, sales revenue declined by 13% from 2010-2015 in the post-secondary market. The declining sales have weakened the industry's ability to change its business model to develop innovative digital content and services.

[114] The decline in the market size is driven by:

a) the transition to digital publishing,

b) the growth of the used book market,

c) rental programs for post-secondary textbooks,

d) technological advancements that make copying easier,

e) the prevalence of copyright infringement, evidenced in an increase in peer-to-peer file sharing and downloading, and

f) the adoption of the Guidelines, which have exacerbated the infringement issue.

[115] Dobner's Report contained fairly detailed descriptions of the impacts of the Guidelines, both at York and, if adopted, across Canada. A critical aspect is that copies are substitutes for the

original and excerpts can be suitable substitutes for the original works. As such, the demand for the original works will decline with the corresponding negative effects on owners.

[116] Dobner points out that copying in excess of the Guidelines is a significant problem – for example, as Gauthier reported, 29% of the copying of books at York on the LMSs from September 2011 to December 2013 exceeded or would have exceeded the Guidelines.

[117] The problem, succinctly put, is that the Guidelines, assuming they are fair, become unfair or, alternatively, the unfairness of the Guidelines is exacerbated because of the amount of non-Guideline compliant copying.

[118] This expert evidence confirmed the concerns expressed by Access and by its witnesses, both with respect to the problem of non-remunerated copying but equally importantly with respect to the long-term effect into the future.

[119] As the evidence of the York witnesses confirmed, post-secondary education budgets are being tightened but the demand for services (materials) is expanding. The absence of tariff payments, the Guidelines, and their non-compliance results in the wealth transfer referred to by Dobner from copyright owners to educational institutions.

D. *Defendant's Experts*

[120] To counter the Plaintiff's experts, the Defendant called three experts: Dr. Piotr Wilk, A. Scott Davidson, and Dustin Chodorowicz. They were not able, either collectively or individually,

to overcome the merits of the Plaintiff's experts. These experts were much more focused on criticizing the Plaintiff's experts than on providing the Court with alternative conclusions.

(1) Dr. Piotr Wilk

[121] Wilk held post-graduate degrees and teaching experience in methods of data collection and in data analysis. He was qualified to give expert evidence in sampling methods, analysis, and explanation.

His mandate was to analyse the data collected in the two studies (the Coursepack Study and the LMS Study), to advise York's counsel on various elements of the sampling design of the two studies, and to review and perform an independent analysis of the Gauthier Report.

[122] In summary, Wilk's evidence was that:

a) From September 1, 2011 to December 31, 2013, an estimated 6,147,123 print exposures of published and unpublished works were included in all coursepacks produced by York's printing services. 82,340,348 digital exposures were produced on LMSs during that period.

b) 63.7% of printed volume (3,914,111 exposures) and 27.2% of digital volume (22,381,560 exposures) were of published works.

c) 77.2% of printed volume and 59.4% of digital volume were relevant to the Fair Dealing Guidelines counterclaim. The remaining volume of copying was classified as public domain, open access, creative commons, or government documents.

d) For a portion of the volume of copying relevant for the Fair Dealing Guidelines counterclaim, York had permissions and/or library licences. For printed volume, 1.4% relevant to the counterclaim was not covered by one of those permissions or licences. For digital volume, 67.3% were not covered by those permissions or licences.

e) For printed volume, all 40,864 exposures (1.4%) not affected by permissions or licences fell within the Fair Dealing Guidelines. Thus, between September 1, 2011 and December 31, 2013, there were no copies of published works that were included in coursepacks produced by York that exceeded the Guidelines threshold.

f) For digital volume, 72.6% of the volume not affected by permissions or licences fell within the Guidelines. Between September 1, 2011 and December 31, 2013, there were 2,448,859 exposures posed on LMSs that exceeded the Guidelines. In terms of documents, this translates to 1,591 documents containing excerpts from books posted on LMSs between September 1, 2011 and December 31, 2013 that exceeded the Guidelines. This translates into approximately 0.01 documents posted on an LMS per FTE student.

g) The trend analysis suggests that there was a decline in the overall volume of printed copying by York (34.3%) and an even steeper decline in the volume of copying relevant to the Fair Dealing Guidelines counterclaim (58.7%) between 2001 and 2013. The reverse trend was observed with respect to LMS postings. Between 2011 and 2013, the overall volume of digital copying increased by

34.4% and the volume of digital copying relevant to the Guidelines counterclaim increased by 71.1%.

h) 14.0% of the printed volume of copying relevant to the counterclaim was published in Canada (18.9% for the digital volume). There does not appear to be a concentration of printed and digital copying within a small group of publishers.

[123] Wilk was involved in the Coursepack Study, which was a study to estimate the exposures of printed volumes included in coursepacks by York during the relevant period. There were significant differences between Gauthier and Wilk in terms of calculated exposures and in the "sealing up" of the sampling. Wilk took a different approach to Gauthier, particularly with respect to the copying done according to "permissions" held by York.

[124] Wilk was also involved in the LMS Study designed to estimate the volume of digital exposures of published works posted on York's LMSs during the relevant period. The critical difference between Wilk's estimation of copying and Gauthier's estimation is attributable to the use of unique user data by Wilk as opposed to the use of enrolment data by Gauthier. This resulted in a difference of 13 million copies of materials for Wilk versus 16 million for Gauthier. There were greater differences between the two experts in respect of the coursepack analysis.

[125] Wilk's evidence was seriously undermined during cross-examination. He made a number of assumptions without support – for example, he did not look at any underlying documentation to verify licensing status information. This failure to "dig deeper" affected the accuracy of his permissions analysis and his digital exposures analysis in the LMS sample.

[126] His study of the List of Publishers (Table 2.10 of his Report) was also based on unverified assumptions. Likewise, several of his other Tables were suspect (see, for example, Table 3.7).

[127] As exposed in cross-examination, Wilk's failure to validate data undermined significant parts of his evidence and his opinions. In addition, as pointed out by Gauthier in his expert report and underscored in his oral testimony, Wilk's reliance on unique user access was of questionable reliability.

[128] Overall, Wilk underestimated the results of the copying analysis. Where his evidence conflicts with that of Gauthier, I favour that of Gauthier.

(2) A. Scott Davidson

[129] The Defendant also relied on the expert evidence of A. Scott Davidson, Managing Director of Duff & Phelps. Davidson had experience in valuations but no real experience in the publishing business. He was qualified as an expert without objection.

[130] Davidson's principal role was to review and critique the PwC Report and to provide some observations, conclusions, and analysis. His Report was essentially a criticism of PwC, outlining what he saw was wrong with the PwC analysis but without providing the Court with a helpful analysis of what the Court should conclude from the evidence. This approach is less helpful to the Court than the approach taken by PwC and Gauthier.

[131] In summary, his opinion was that:

a) There is no basis, or there is an inadequate basis, for the Dobner Report's conclusions regarding the apparent and expected impacts of implementing the Guidelines at York and more broadly at Canadian post-secondary institutions.

b) From a business and financial perspective, the supporting analysis presented by PwC is generally insufficient to establish either or both of the conclusions that:

- The alleged events have occurred or are likely to occur; and/or,
- Implementation of the Guidelines did or will have a material influence on the alleged events.

c) The Dobner Report's conclusions are speculative as the validity and strength of the conclusions could have been tested but were not.

d) There are a number of concerns with Dobner's approach in quantifying the alleged loss of licensing income.

e) There are a number of trends and factors impacting educational publishing industry:

- The educational publishing industry has historically been large and profitable, but revenues and margins are facing increasing pressure from alternative sources of content.
- The options available for students to obtain materials have increased. Students may buy used, rent or borrow textbooks, purchase electronic versions, or download materials legally and illegally. Students have reduced their total spending on course materials.

- The transition to a digital marketplace presents challenges and opportunities. New participants are interrupting a mature industry which previously enjoyed high barriers to entry.
- Guidance on fair dealing in key court decisions in 2012 led to the development of a series of fair dealing guidelines.

[132] While Davidson criticized Dobner's qualitative analysis approach, he was unable to provide a quantitative analysis or even to say that such was possible. He was even unwilling to opine on whether the educational publishing sector could survive the full implementation of the Guidelines.

[133] Davidson seemed to dispute that copying is a substitute for the original works, even though the evidence is overwhelming that it is. This also led to his conclusion that the Guidelines have not had and will not have a negative impact on revenues of owners – he indicated that other factors are the cause of the decline in revenues. However, he appeared to acknowledge that even by Wilk's calculations, 27% of the York copying was outside either its licence or the Guidelines.

[134] Davidson's lack of familiarity with the background facts was made clear during cross-examination. This unfamiliarity meant that many of his assumptions and responses were not forthcoming or clear enough to assist the Court.

[135] The Court recognizes that Davidson had a limited mandate, which negatively impacted the weight to be given his evidence. However, the Court can place little reliance on his evidence to the extent that he was attempting to undermine the Plaintiff's case.

(3) Dustin Chodorowicz

[136] The Defendant's final expert was Chodorowicz, a partner in Nordicity who works as a strategic, policy, and economic advisor in the "creative" business sector. He had expertise in quantitative analysis methods and econometric modelling. His expertise and qualifications were not challenged.

[137] Chodorowicz's mandate was, like that of Davidson, to review and comment on the PwC Report. He does not offer a substantial alternative viewpoint but merely offers criticism of PwC.

[138] To summarize his opinion, he was of the view that:

a) There is not sufficient empirical support in the PwC Report to conclude that the Guidelines adopted by York and other universities have had an impact on the sales of primary works (and thereby the industry's revenues).

b) A number of factors will dampen investment by publishers in the post-secondary educational market, including lower profitability, more promising alternative markets, digitalization, and uncertainty. Although a number of factors have resulted in the industry's decline, PwC has not presented information leading to the conclusion that the decline is linked to the Guidelines.

c) There is insufficient empirical support to ground the conclusion that the Guidelines will accelerate current trends in the sector toward lower overall sales volume.

d) The post-secondary educational market is broadly comparable to other sectors with respect to sale of content in terms of disruption from digital technology. Accordingly, broader issues should be factored into any conclusion about the potential causes of alleged negative impacts.

e) Declines in revenues may not always happen as predicted. Creators and publishers may find other product categories, distribution channels, and international markets to sustain or grow their incomes.

[139] His opinion contained significant speculation as to what different methods or approaches might inform any analysis, but he did little of that type of work. While Chodorowicz did not substantially dispute the basis of the PwC Report, he drew different conclusions from the underlying information.

[140] With respect, Chodorowicz used virtually no material references and was frequently evasive when challenged. His ultimate conclusion in testimony is that the Guidelines did not cause economic harm. That conclusion flies in the face of overwhelming evidence to the contrary.

[141] Chodorowicz admitted that it would be difficult to do a proper quantitative analysis because of problems with respect to the volume of copies and the establishing of control groups.

These are matters about which Dobner also expressed concern, which led him to engage in a qualitative analysis.

[142] Significantly, Chodorowicz, having criticized Dobner/PwC and its approach, conceded that, as a quantitative approach was not feasible, the only option was a qualitative approach.

[143] I have concluded that Chodorowicz's admissions do more to assist the Plaintiff than the Defendant. Any suggestion that the Guidelines have not and will not have negative impacts on copyright owners or publishers is not tenable. There is no question that the evidence has established that on the matter of impacts in the fairness analysis, the Plaintiff has made out its thesis completely.

E. *Survey Evidence*

[144] Access put in evidence of three surveys. The introduction of this evidence was challenged by York and the Court dismissed this objection. Survey evidence is becoming increasingly prevalent in certain cases, and the reliability of surveys is improving but is never guaranteed. The prospect of the alternative to surveys – parading hundreds or even thousands of individuals before the Court to give their particular evidence – runs counter to any notion of effective and efficient modern trials.

Having recognized the necessity of such evidence, courts must be cautious in accepting the conclusions of surveys. There are frailties inherent in surveys generally which may be more marked in respect of any particular survey.

[145] As indicated earlier, the surveys provided context and directional guidance, but the absolute numbers were not particularly important. Many of the conclusions of the surveys accord with common sense – for example, losing royalties is not beneficial to the recipients of those royalties, and losing royalties in the arts/creative community may have serious negative impacts on that community.

[146] The first survey, by Gauthier's firm of Access creator affiliates, dealt with post-secondary institutions generally and dealt in hypothetical impacts. The survey respondents come from varying perspectives – some were largely dependent on royalties, others not so much. Approximately 50% of respondents believed that the cessation of Access payments would have no impact on their creative output while about 40% believed there would be a reduction.

[147] From the other evidence, from professors who write as part of their academic interests and duties, the Court can only conclude that some large percentage but not necessarily the majority of creators will be adversely affected by the Guidelines, even if they are properly enforced. The amount is uncertain but not *de minimis*.

[148] The second survey, of members of the Association of Canadian Publishers in 2014, also dealt with hypothetical impacts and was not directed specifically at York. There was some confusion or contradiction with respect to the roles played by Dobner and Gauthier in the design and interpretation of the survey data, and Dobner had no qualifications in survey design.

[149] This survey was of limited assistance to the Court. The major conclusions were axiomatic: it was poor business not to receive royalties and the negative impact depended on the nature of each publisher's business.

[150] The third survey, of Canadian Authors on Educational Copying, was introduced by a fact witness, John Degen. The survey's results were that the majority of authors who responded – 25% of those canvassed – were of the opinion that the AUCC guidelines were unfair. This is hardly a surprising result considering that many authors might experience a decline in revenues if the AUCC guidelines were adopted by all universities in a manner approximating York's adoption.

[151] Some of these matters are touched upon in the following analysis in respect of Fair Dealing.

VIII. Key Events – Main Action

[152] The events at Keele seemed to have the same impact in the context of the Access-York relationship as the shot fired at Sarajevo in 1914.

A. *Keele Copy Centre*

[153] York had had licensing agreements with Access from 1994 to the end of 2010. The licences typically provided for the payment of license fees a) at a per page fee for pages copied

and sold to students (e.g. coursepacks) and b) at a per FTE fee to cover any other copying that was not for a coursepack. By 2010, the fees were $0.10 per page and $3.38 per FTE.

[154] As part of Access's obligation to enforce copyrights and collect fees, Access periodically made "sweeps" of copy shops believed to be copying without paying fees.

[155] Keele had been caught up in one of these sweeps in 2008. In 2010, Access obtained a consent judgment against Keele for unauthorized copying.

[156] Keele is a digital printing and photocopying facility located in a strip mall directly across from the main entrance to York on Keele Street.

[157] In January 2012, Access carried out enforcement activities against Keele, including unannounced inspections of its premises. As disclosed in the trial, Access counsel Simon Hitchens was involved in these enforcement activities. From a review of Keele's computer records and e-mails, he established that 10-15 professors were involved in having Keele perform unauthorized (and unpaid) copying of coursepacks and loose material. Five of those professors gave evidence at the trial [the Five Professors].

[158] York contended that it was unaware of this unauthorized copying at Keele by a number of York professors.

[159] In any event, York's response was to compile a list of copy shops which were licensed directly by Access and to send a memorandum which listed these authorized copy shops to faculty and staff.

[160] York did not take any disciplinary or corrective action against the professors in question and in this action took the position that York was not responsible for the actions of these employees, despite acknowledging that their actions were contrary to York policy.

[161] The Five Professors appeared at the trial to attempt to explain what they had done. Two professors assumed that copyright had somehow been taken care of, without taking any steps to confirm this one way or the other. One of the five assumed that Keele had obtained the necessary licences and the remaining two professors assumed (Court underlining) that the copying was covered under fair dealing.

The end result, however, is that the appropriate fees were not paid.

B. *Interim Tariff Events*

[162] In respect of the license agreements referred to immediately above, these agreements only covered paper copies (not digital copies) of works in Access's repertoire and only covered certain amounts of the works. Moreover, the agreements did not cover copying of excerpts that were available for purchase as standalone works.

[163] In March 2010, Access filed a proposed tariff with the Board for post-secondary educational institutions covering the years 2011-2013 [the Proposed Tariff]. It proposed a flat tariff rate of $45 per FTE per year.

The Proposed Tariff was published in the Canada Gazette.

[164] The Proposed Tariff was introduced against the background of the expiration of the last agreement between York and Access set for December 31, 2010.

[165] It was also introduced against the background of the failed negotiation between Access and the AUCC to establish a model license agreement.

[166] York was well aware of the Proposed Tariff and the looming expiry of its license agreement. The Proposed Tariff posed a problem for York because York had previously passed on the per page copying charge to students but had absorbed the FTE charge (which was $3.38 in 2010). York was faced with the question of how to handle the elimination of the per page charge and the increase from $3.38 per FTE to $45 per FTE. It was also concerned with the increased record keeping and reporting obligations imposed by the Proposed Tariff, especially with respect to digital copies.

[167] As matters developed, it chose to ignore the FTE charge, ignore any reporting or record keeping obligations, and develop its own Fair Dealing Guidelines to shield it from the consequences of copyright claims.

[168] On December 23, 2010, the Board granted Access's application for an interim decision and set the terms of the Interim Tariff. The Interim Tariff incorporated the terms of the then existing AUCC model license agreement to the extent possible.

[169] On that same day, York was formally informed of the terms of the Interim Tariff.

[170] York then operated under the Interim Tariff from that point until August 31, 2011 – a period of eight months, coinciding with the end of one academic year and the beginning of another.

[171] However, on July 4, 2011, York provided Access with formal notice of its unilateral decision to "opt out" of the Interim Tariff as of August 31, 2011. York took the position that the Interim Tariff was a voluntary matter as was the payment of copyright fees.

[172] Despite only giving notice on July 4, 2011, Lynch admitted that York had been preparing since 2010 to opt out of any Interim Tariff authorized by the Board.

As of September 1, 2011, York was operating outside the Interim Tariff and under its Fair Dealing Guidelines.

IX. The Fair Dealing Guidelines Story/Key Events in the Counterclaim

[173] Even as York was subject to its agreements with Access, it was planning to avoid future agreements and was examining the use of fair dealing guidelines. On December 22, 2010, it implemented its own Guidelines modelled on those developed by the AUCC.

[174] Just before the expiry of the York-Access agreement, York administration advised its faculty and staff that upon such expiry, copies could still be made if there was permission or a licence from the copyright owner or if copying was done within its definition of "fair dealing".

[175] By way of background, it was the AUCC who first developed a fair dealing policy in 2004 following the decision in *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339 [*CCH*]. That policy was revised from time to time but the most recent iteration, relevant to this litigation, was in 2012.

[176] The 2012 revision to the AUCC policy resulted from the Supreme Court of Canada decision in *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 SCR 345 [*Alberta (Education)*], and the passage of the *Copyright Modernization Act*, SC 2012, c 20.

[177] AUCC engaged external legal counsel to develop the revised policy and instructed counsel to consult the university community (meaning university libraries, vice-presidents, and academics).

That consultation did not engage the copyright owners (writers, publishers, or Access). No explanation was ever given for this one-sided consultation process.

[178] The new AUCC policy was approved in October 2012, after which York revised its own Guidelines. There was little substantive difference between the revised AUCC policy and York's Guidelines other than incorporating certain exceptions – education, satire, and parody – and

providing that each student enrolled in a class or a course may be provided with a single copy of a handout either through a coursepack, or a posting on an LMS, or a Moodle-like posting.

[179] The York Guidelines as revised in 2012 remain in effect today and are at issue in this litigation.

A. *York - Publication/Copy Distribution*

[180] York's libraries (York University Libraries and Osgoode Hall Law Library) play a critical role in the access to and dissemination of educational materials, including hard copy collections (printed monographs and periodicals) as well as electronic collections. Osgoode Hall Law Library is not part of this litigation.

[181] Electronic resources in the past few years have been increasingly demanded by professors and students. York has been acquiring various electronic resources in increasing numbers.

However, print collections remain an important part of York's libraries.

[182] Access to electronic resources by York is generally by way of licences from publishers and subscriptions to databases. The licences and subscriptions may be indirectly acquired through library consortia or directly acquired by York. These licences and subscriptions permit certain uses to be made of the content, which is in contrast to Access's licence or its Interim Tariff which simply provides for the ability to copy.

[183] York provided evidence of its use of consortia, particularly the Canadian Research Knowledge Network and the Ontario Council of University Libraries. That evidence included the various safeguards for electronic resources. There is no dispute between the parties on the use of consortia or of electronic resources. It provided the Court with useful background on the extent of the dealings and some of the difficulties posed in this case in marshalling the vast amount of material which is subject to copyright.

It did not, however, allay concerns about whether the dealing was fair.

[184] York also led evidence on York's governance structures. An area of concern was that in some fashion the principle of "academic freedom" would be imperiled if copyright laws were enforced.

[185] As indicated earlier, several professors gave evidence as to the ways that they dealt with course materials but expressed a concern that ensuring copyright law compliance would infringe their academic freedom, whereas payment of other university obligations (water and electricity, taxes, etc.) would not.

[186] None of these witnesses advanced any feasible method for ensuring copyright law compliance, thereby effectively reading "fair dealing" out of s 29 and relying solely on the fact that the materials were used for education.

[187] The evidence of the professors underscored the dual nature of the academic community's relationship with copyright. Academics are users of copyrighted material, but they are also creators of copyrighted material.

There is a mutual dependence between libraries/professors and the copyright regime which may suggest that a better system of protection and more certain criteria (such as in a licence or in a tariff) would assist all parties interested in education and access to educational materials.

X. Legal Conclusions

A. *Main Action – Was the Interim Tariff enforceable against York?*

(1) Preliminary

[188] Access alleges that it is entitled to recover royalties from York pursuant to the Interim Tariff. Its position is encapsulated in paragraph 23 of its closing submissions:

> Applying the principles of statutory interpretation and considering both the legislative history and evolution of section 68.2 of the *Act*, Access Copyright submits that an approved tariff is enforceable against *all* users, such as York, who: 1) reproduce copyright-protected works in Access Copyright's repertoire; 2) who have not otherwise obtained permission for that reproduction; and 3) which reproductions are not covered by a statutory exception (e.g. fair dealing).

[189] York's position is that the Interim Tariff is not an approved tariff because it did not result from a tariff certification process, particularly having regard to ss 70.13 to 70.15 of the Act. It is also not an approved tariff because the Interim Tariff was not published in the Canada Gazette.

As the Interim Tariff is not an approved tariff, it cannot be enforced under s 68.2 and is only binding on a user who consents to it – which, effective September 1, 2011, York did not.

[190] The word "tariff" is not defined in the Act. However, "tariffs" are frequently referred to in connection with fees or charges which must be paid – examples exist in respect of fields as diverse as energy and harbour charges.

[191] As seen in Alberta Utilities Commission legislation and expressed in *ENMAX Power Corp (Re)*, [2004] AEUBD No 58 (QL), decided by the then-Alberta Energy and Utilities Board, tariffs are approved by a board and involve binding charges. Likewise, in the context of the Canadian Radio-television and Telecommunications Commission [CRTC], a tariff includes terms and conditions and charges.

[192] This notion of a tariff as binding runs through not only boards such as the National Energy Board, CRTC, Nova Scotia Utility and Review Board, and Ontario Energy Board, but also includes tariffs of fees fixed by the executive as seen in *Algoma Central Corporation v Canada*, 2009 FC 1287, 358 FTR 236, where a Minister could set the tariff of fees.

[193] Section 2 of the *Interpretation Act*, RSC 1985, c I-21, refers to tariffs in respect of "costs or fees" within the definition of "regulation". This connotes at least an element of compulsion or requirement to pay.

(2) Scheme of the Act

[194] In April 1997, s 68.2(1) of the Act came into effect, providing for the ability of collective societies, such as Access, to collect royalties established in an approved tariff:

68.2 (1) Without prejudice to any other remedies available to it, a collective society may, for the period specified in its approved tariff, collect the royalties specified in the tariff and, in default of their payment, recover them in a court of competent jurisdiction.	**68.2 (1)** La société de gestion peut, pour la période mentionnée au tarif homologué, percevoir les redevances qui y figurent et, indépendamment de tout autre recours, le cas échéant, en poursuivre le recouvrement en justice.

[195] Considering the scheme of the Act, tariffs and the enforcement of tariffs (both final and interim) are an integral part of the legislative scheme created by Parliament for the collective administration of copyright.

Parliament recognized the difficulties copyright owners might face in enforcing their rights individually against those who copied copyright protected works.

[196] The Act provided mechanisms for the protection of those rights, particularly through the unified structures of a collective society as had previously been done.

[197] Under earlier provisions of the 1970 Act (ss 48-50), PRSs filed lists of works for which they had the authority to issue licences. Proposed “statements” of fees, charges, and royalties were filed for the issuance of licences. The process of approval of these statements went to the

Copyright Appeal Board, which dealt with any objections and which approved (with or without amendments) or rejected the statements.

The approved statement set out the fees, royalties, and charges that the performing rights societies were legally entitled to collect for the issuance or grant of licences to users in respect of the works in the repertoire of the PRSs.

[198] The PRSs were entitled to sue and collect the fees approved by the Copyright Appeal Board in respect of the issuance or grant by it of licences for the performance of any or all of the works. Despite the broad wording, the enforcement action was limited to situations where a user had entered into a binding agreement/licence. The PRSs were limited to an action for copyright infringement (see *Performing Rights Organization of Canada Ltd v Lion D'Or (1981) Ltée et al* (1988), 16 FTR 104, 17 CPR (3d) 542 (TD)).

[199] In recognition of the limitation on enforcement, Parliament, in 1989, amended the Act such that after Board approval, a PRS had the right to collect royalties specified in the statement or "in default of their payment, recover them in a court of competent jurisdiction". Enforcement was no longer tied to whether a user had entered into a license agreement.

[200] These 1989 legislative changes also permitted new "licensing bodies" to collectively administer copyrights, including reproduction rights. Among the new licensing bodies flowing from this amendment was Access.

[201] The Board's jurisdiction in respect of the new licensing bodies was to fix royalties to be paid by a user (to the licensing body) as well as other terms and conditions.

[202] As a result, and unlike the rights of a PRS, the new licensing bodies were not accorded the right to file with the Copyright Appeal Board proposed statements and had no enforcement remedies equivalent to those of PRSs.

[203] However, necessitated in part by the problems of enforcement of copyright against users, the rights of the collectives were expanded in the 1997 revisions: firstly, to file proposed tariffs with the Board as an alternative to entering into agreements with users and, secondly, in respect of a Board approved tariff, the collectives were afforded the right to collect royalties specified in the tariff and, in case of default in payment, the collective could recover the royalties in the Federal Court. In this regard, the rights of these new licensing bodies like Access paralleled the rights of such organizations as the Society of Composers, Authors and Music Publishers of Canada (SOCAN).

[204] I concur with Access's view that the legislative history, and particularly the development of the modern enforcement provisions, confirm the legislative intent to provide collectives with effective enforcement mechanisms against users who are not subject to an agreement and who reproduce, without authority from owners or without the benefit of an exception (e.g. fair dealing), copyright protected works covered by the collectives, such as those works in Access's repertoire.

(3) Statutory Interpretation

[205] The modern approach to statutory interpretation, as laid out in numerous cases including *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, 154 DLR (4th) 193, instructs that the words of legislation are to be examined as follows:

> … Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. …

[206] The notion of compulsion, as opposed to a voluntary payment, is consistent with the legislative history of the amendments in 1997. Those amendments dealt in part with the enforceability of rights to be exercised by collectives.

[207] The *Interpretation Act* defines a regulation as including a tariff of costs or fees. As such, a tariff is subordinate legislation:

regulation includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established	***règlement*** Règlement proprement dit, décret, ordonnance, proclamation, arrêté, règle judiciaire ou autre, règlement administratif, formulaire, tarif de droits, de frais ou d'honoraires, lettres patentes, commission, mandat, résolution ou autre acte pris :
(a) in the execution of a power conferred by or under the authority of an Act, or	**a)** soit dans l'exercice d'un pouvoir conféré sous le régime d'une loi fédérale;

(b) by or under the authority of the Governor in Council; (*règlement*)	**b)** soit par le gouverneur en conseil ou sous son autorité. (*regulation*)
(Court's underlining)	(La Cour souligne)

[208] Courts are also to interpret legislation in accordance with the *Interpretation Act*, particularly s 12:

12 Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.	**12** Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

[209] While the word "tariff" is not defined in the Act, it is a word found in other contexts to indicate an imposed charge, as discussed earlier.

[210] The use of the term "tariff" is consistent with the provisions of the Act directed at ensuring that copyright owners are paid for the reproduction of their works and is also consistent with the role of collectives, such as Access, in collecting the amounts which are due or become due. Section 68.2(1) indicates the mandatory nature of payment for copying.

[211] The compulsory nature of a tariff is also evidenced by the nature of the tariff setting process. Under s 70.12, either a tariff is filed or the relevant parties enter into an agreement. The agreement option is voluntary and is in contrast to the mandatory nature of a tariff.

[212] Further, under s 70, where there is public notification of the tariff process, the provision for Board approval and certification of a tariff is also consistent with the mandatory nature of the result of the Board's certification. There is no suggestion of "opting out" in these provisions.

[213] As indicated earlier, York's reliance on the Supreme Court's decision in *SODRAC* is misplaced. The Supreme Court of Canada's decision is distinguishable from the provisions (ss 70.1-70.191 of the Act) at issue in this case.

[214] The Supreme Court of Canada in *SODRAC* was dealing with a different regime: licensing royalties and terms and conditions under s 70.2 of the Act. The regime in the present case is tariff setting. Most importantly, under the licensing regime, s 70.2 read in conjunction with s 70.4 was permissive such that a user could avail itself of the terms and conditions set by the Board. The language of s 70.4 allowed a user/licensee to opt out of the licence terms:

70.2 (1) Where a collective society and any person not otherwise authorized to do an act mentioned in section 3, 15, 18 or 21, as the case may be, in respect of the works, sound recordings or communication signals included in the collective society's repertoire are unable to agree on the royalties to be paid for the right to do the act or on their related terms and conditions, either of them or a representative of either may, after giving notice to the other, apply to the Board to fix the royalties and their related terms and conditions.	**70.2 (1)** À défaut d'une entente sur les redevances, ou les modalités afférentes, relatives à une licence autorisant l'intéressé à accomplir tel des actes mentionnés aux articles 3, 15, 18 ou 21, selon le cas, la société de gestion ou l'intéressé, ou leurs représentants, peuvent, après en avoir avisé l'autre partie, demander à la Commission de fixer ces redevances ou modalités.

(2) The Board may fix the royalties and their related terms and conditions in respect of a licence during such period of not less than one year as the Board may specify and, as soon as practicable after rendering its decision, the Board shall send a copy thereof, together with the reasons therefor, to the collective society and the person concerned or that person's representative.	**(2)** La Commission peut, selon les modalités, mais pour une période minimale d'un an, qu'elle arrête, fixer les redevances et les modalités afférentes relatives à la licence. Dès que possible après la fixation, elle en communique un double, accompagné des motifs de sa décision, à la société de gestion et à l'intéressé, ou au représentant de celui-ci.
…	[…]
70.4 Where any royalties are fixed for a period pursuant to subsection 70.2(2), the person concerned may, during the period, subject to the related terms and conditions fixed by the Board and to the terms and conditions set out in the scheme and on paying or offering to pay the royalties, do the act with respect to which the royalties and their related terms and conditions are fixed and the collective society may, without prejudice to any other remedies available to it, collect the royalties or, in default of their payment, recover them in a court of competent jurisdiction.	**70.4** L'intéressé peut, pour la période arrêtée par la Commission, accomplir les actes à l'égard desquels des redevances ont été fixées, moyennant paiement ou offre de paiement de ces redevances et conformément aux modalités afférentes fixées par la Commission et à celles établies par la société de gestion au titre de son système d'octroi de licences. La société de gestion peut, pour la même période, percevoir les redevances ainsi fixées et, indépendamment de tout autre recours, en poursuivre le recouvrement en justice.

[215] That language of "opting out" does not appear in ss 70.1-70.191 (see Schedule B). The fact that it does not strongly suggests that tariffs are mandatory, particularly when contrasted with the permissive language of the licensing regime.

[216] The Supreme Court of Canada makes no comment on the tariff regime, the Board's tariff fixing jurisdiction, or any other aspect of the approval and enforcement of tariffs.

[217] Not only is the *SODRAC* decision not on point, it teaches in a different direction than that advocated by York. The language of the two sets of provisions (ss 70.1-70.191 versus ss 70.2-70.4) evidences a clear legislative intent to separate tariff fixing from arbitrary licence terms. One is compulsory, and the other is permissive.

[218] The Court has concluded that an approved tariff is a form of subordinate legislation which is mandatory and binding on any person to whom it pertains. There is no opting out.

[219] The copying of works in Access's repertoire, the scope of that repertoire, and the accounting and payment by York for such copying by its employees is deferred to Phase II of this action (the Damages Phase).

[220] If York did not copy any works in Access's repertoire, if it obtained proper permission to copy those works, or if the copying was exempt by law – the fair dealing defence and counterclaim – then the tariff would not be applicable. Absent these conditions, the tariff is mandatory.

(4) Status of Interim Tariff

[221] With the license agreements between York and Access coming to an end and no prospect of an extension or renewed agreement, Access filed the Proposed Tariff on March 30, 2010.

In October 2010, Access filed an application under s 66.5 of the Act requesting an interim decision for the interim payment of royalties for copying at all post-secondary educational institutions for the period January 1, 2011 to the date the Board certified the tariff.

[222] Following strong opposition to the Proposed Tariff, the Board decided that the interim decision would be in the form of an interim tariff. The Interim Tariff was issued on December 23, 2010 and was effective January 1, 2011.

[223] The Board ordered Access to post the Board's decision and the terms of the Interim Tariff on Access's website and to take all reasonable steps to alert the post-secondary educational community of the Interim Tariff.

The Interim Tariff was not published in the Canada Gazette.

[224] As indicated in the Board's decision, the Interim Tariff was issued to address the vacuum that would exist if there was no agreement between users and owners.

[225] As to the legal status of the Interim Tariff, the Board found that enforcement of an approved tariff under s 70.17 of the Act was engaged whether or not the tariff was interim or final.

No judicial review was taken of the Board's decision.

[226] York now says that the Interim Tariff is not enforceable. It contends that the Interim Tariff is not an approved tariff. However, York was in a position to apply to judicially review the

Board's decision and had sufficient knowledge and the legal status to do so – it did not. It waited until these proceedings to question the Board's decision. In fact, it complied with the Interim Tariff until it implemented the Guidelines. It appears that York's position was that it could opt out of the Interim Tariff at any point it chose.

[227] The Supreme Court of Canada has repeatedly condemned the collateral attack of administrative decisions – which is what is suggested by York's defence.

[228] York's position not only challenges the compulsory nature of the Interim Tariff, its argument about posting the Interim Tariff is also a direct challenge to the Board's decision, inherent in its posting instructions, that posting in the Canada Gazette was not "practicable".

[229] While it is not necessary to decide this matter on the collateral attack issue, York's position smacks of collateral attack. Collateral attack in the context of administrative law has been considered where "a second proceeding involves the non-compliance with an administrative order that has not been previously challenged through the administrative appeal process but is challenged in the second proceeding" (Donald J Lange, *The Doctrine of Res Judicata in Canada*, 4th ed (Markham, ON: LexisNexis Canada, 2015) at 465).

[230] The judicial policy rationale for the principle was well described in *Consolidated Maybrun Mines Ltd et al v The Queen*, [1998] 1 SCR 706, 158 DLR (4th) 193:

> 22 … Although administrative orders like the one in the case at bar can be subject to judicial review by the superior courts, the problem before us presupposes, *inter alia*, that the affected party did not apply for review. …

> …
>
> 26 Finally, in resolving the problem of collateral attacks on administrative orders, it is necessary to bear in mind the role and importance of administrative structures in the organization of the various sectors of activity characteristic of contemporary society. The growing number of regulatory mechanisms and the corresponding administrative structures are a reflection of the state's will to intervene in spheres of activity, such as economics, communications media, health technology or the environment, whose growing complexity requires constantly evolving expertise and normative instruments permitting a pointed and rapid intervention consistent with the specific circumstances of the situation. …

[231] Judicial review is an important process in this case. The scope and enforceability of the Interim Tariff are matters squarely within the Board's jurisdiction. The resolution of these issues would engage the Board's expertise – something which Parliament clearly intended as a matter of substance (see *SODRAC*). These issues are ones for which the Board is entitled to deference by this Court.

[232] York argues that the Interim Tariff is not an approved tariff because it was not published in the Canada Gazette as required by s 68(4):

68 (4) The Board shall **(a)** publish the approved tariffs in the *Canada Gazette* as soon as practicable; and **(b)** send a copy of each approved tariff, together with the reasons for the Board's decision, to each collective society that filed a proposed tariff and to any person who filed an objection.	**68 (4)** Elle publie dès que possible dans la *Gazette du Canada* les tarifs homologués; elle en envoie copie, accompagnée des motifs de sa décision, à chaque société de gestion ayant déposé un projet de tarif et aux opposants.

[233] It was the Board which had the obligation, such as it was, to publish in the Canada Gazette. However, given the circumstances and the urgency (as expressed in the Board's decision) to prevent a vacuum, the Board apparently decided that publication was not practicable – a matter which is within its discretion to decide.

[234] The purpose of publication in the Canada Gazette is to give notice to affected parties. In this case, York had actual knowledge of the Interim Tariff.

York's position, if accepted, would be a triumph of form over substance. That argument is unsustainable.

[235] Therefore, the Court dismisses York's arguments that the Interim Tariff is neither mandatory nor properly established.

[236] York's last major point in its challenge to the operation of the Interim Tariff is that there was no breach of the Interim Tariff and, if there was, York is not responsible for the breaches of the Interim Tariff.

[237] Quite apart from the significant copying done under the auspices of fair dealing (and the absence of payment for that copying), there is the evidence of at least five full-time instructors at York (that is, the Five Professors) having had copies made of copyright protected materials by the unlicensed copy shop Keele – mostly complete book chapters for coursepacks.

[238] Section 7 of Schedule C of the Interim Tariff prohibited York's instructors from assembling into coursepacks copies of published works covered under authority of s 2(a) of the Interim Tariff.

[239] There is no doubt that the actions of the Five Professors, in conjunction with Keele, were contrary to the Interim Tariff. Further, the sampling exercise done for the purposes of this litigation established that multiple sets of coursepacks were printed without the permission of the owner. This type of printing went unreported to Access and unpaid, despite the requirements of the Interim Tariff.

[240] The Five Professors were direct participants in the infringement even though some of them assumed that the copying was in accordance with copyright obligations. Keele was the agent for these professors, who in turn were employees of York. The role of the professors was more than merely providing authorization to Keele – the actions of copying were theirs, although they were carried out by their agent.

[241] The unauthorized copying triggered obligations under the Interim Tariff. Those obligations were the obligations of York, which is legally responsible for that copying.

[242] There is no issue that the instructors were employees of York who were acting within the scope of their employment and for the benefit of York. The selection and reproduction of course materials were central activities of York instructors. The actions were not performed for the sole benefit of the instructors independent of their teaching responsibilities.

[243] While York may not have specifically authorized the offending copying, those acts were so closely connected to the professors' authorized employment activities as to render York vicariously liable.

[244] It is instructive that, despite York's acceptance that the Keele copying was outside of the Guidelines, it produced no evidence of any disciplinary actions taken against the professors, nor did it take any significant or effective remedial action.

[245] York's approach to these copyright infringing actions is consistent with its wilfully blind approach to ensuring compliance with copyright obligations, whether under the Interim Tariff or under the Fair Dealing Guidelines.

(5) Conclusion – Main Action

[246] The Plaintiff is entitled to the declaration of entitlement to and payment of royalties as pleaded and the ancillary relief set forth in this Judgment, including injunctive relief (where needed), costs, and pre- and post-judgment interest.

[247] The Court retains jurisdiction to deal with the calculation of amounts owing and other matters as contemplated in Phase II, upon request of the Plaintiff.

[248] The Defendant has pleaded the exception of fair dealing in respect of education, as is more fully discussed in the next section of these Reasons.

B. *Counterclaim*

(1) General

[249] Both parties emphasize the consideration of the purpose of copyright and its exceptions, particularly fair dealing. The Supreme Court of Canada has described copyright law as "a balance between promoting the public interest in the encouragement and dissemination of works in the arts and intellect and obtaining a just reward for the creator" (*Théberge v Galerie d'Art du Petit Champlain inc*, 2002 SCR 34 at para 30, [2002] 2 SCR 336 [*Théberge*]).

[250] The exceptions to copyright infringement enacted by Parliament serve to counterbalance the exclusive rights of copyright owners. One of the most important exceptions to infringement is "fair dealing" as set forth in ss 29, 29.1, and 29.2 of the Act.

[251] Following the *Théberge* decision, the Supreme Court of Canada rendered the decision in *CCH*. As the Supreme Court of Canada made clear, "fair dealing" is a positive user right, not merely a defence to infringement. However, the burden of establishing fair dealing rests with the party asserting the right.

[252] *CCH* provided guidance to courts considering fair dealing in three areas:

- The analysis is a two-step process: first, the authorized purpose (in this case education) must be established and second, the dealing must be fair;
- "Fair" is not defined and is a question of fact depending on the circumstances of each case; and,

- The fairness analysis engages six non-exhaustive factors:

    a) purpose of the dealing,

    b) the character of the dealing,

    c) the amount of the dealing (amount of copying),

    d) alternatives to the dealing,

    e) the nature of the work, and

    f) the effect of the dealing on the work.

The first five features must be established by York. To the extent Access claims a negative effect of the dealing, the burden shifts to it to establish that factor.

[253] Through the pentalogy of cases, particularly *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36, [2012] 2 SCR 326 [*SOCAN*], and *Alberta (Education)*, the Supreme Court of Canada provided further guidance and underscored the importance of the rights of content users. However, importance does not equate with exclusivity or dominance. The analysis/fairness assessment requires a balancing of interests.

[254] The jurisprudence permits the fairness assessment to be done on the basis of individual dealing as well as on the basis of policies and/or practices (*CCH* at para 63).

[255] As was also made clear in *CCH*, the fairness assessment looks at the text of the policies, the rationale for the policies, and the practical or real dealing by the users of the owners' works. Both the Guidelines themselves and the practices under the Guidelines must be fair.

[256] The fairness assessment is only engaged if the Court is satisfied that the dealing was for an "allowable purpose" under s 29 (i.e., research, private study, education, parody, or satire). It is a low threshold to meet and there is no real issue that York has established that the dealing (copying) was for the allowable purpose of education. Having established an allowable purpose, the Court must turn to the second step in the analysis, which does not incorporate considerations of "education" as being "fair" or of education being part of the fairness factor assessment.

[257] It is the second stage of the analysis – the fairness of the dealing – on which there is debate and for which many copies were made, as indicated by the size of the record.

[258] York seeks a determination of whether copying within the Guidelines constitutes fair dealing.

[259] York puts great reliance on the *CCH* decision. It sees the instant case as being parallel with *CCH* and the Great Library's Access Law Policy.

[260] Other than the legal principles annunciated in *CCH*, that decision is more of a burden than a benefit to York. One important distinction is that the copying done at the Great Library was for others, not for the Library itself. In York's situation, the copying and the Guidelines serve York's interests and the interests of its faculty and students. There is an objectivity in *CCH* which is absent in York's case.

[261] Of even greater significance is that in *CCH*, the copying at issue was that of a single copy of a reported decision, case summary, statute, regulation, or limited selection of text from a treatise. It was not the mass copying of portions of books, texts, articles, entire artistic work, or portions of collections, nor was it the multiple copying of those materials into coursepacks or digital formats.

[262] Furthermore, the manner in which the Access Law Policy was implemented and practised was markedly different from the York Guidelines. These differences included:

- Copying at a single location under the supervision and control of research librarians in the Great Library contrasted with no effective supervision, control, or other method of "gatekeeping" at York;
- A policy strictly applied and enforced by librarians versus virtually no enforcement of the Guidelines by anyone in authority at York;
- Single copies made versus multiple copies;
- A large amount of *ad hoc* or situational copying for users at the Great Library contrasted with the mass systemic and systematic copying at York; and,
- An absence of negative impacts on publishers in *CCH* as contrasted with the negative impacts on creators and publishers caused or at least significantly contributed to by York.

[263] Those positive features at the Great Library pointed to the fairness of its policy. By contrast, the absence of those features in the York situation points to the unfairness of its Guidelines.

(2) The Fairness Factors

(a) *The Purpose of the Dealing*

[264] There is a certain degree of overlap in the case law between the purpose at stage one ("allowable purpose") and the purpose of the dealing as one of the stage two factors. However, the stage two purpose consideration examines matters from the users' perspective. In this case, there are two users – the university which is assembling material, copying, and distributing the material as the publisher, and the student who is the end user of the material.

[265] In *CCH*, the Court approached this factor from the perspective of the Great Library's policy and the safeguards for ensuring that the copying was done for research purposes. Anyone requesting copies had to identify the purpose of copying and any concerns about the purpose were referred to the Reference Librarian. In *SOCAN*, the Court considered the safeguards in place to ensure copying was done for research purposes.

[266] Safeguards were virtually non-existent in the York system. Neither the Copyright Officer nor the librarians (nor anyone else, for that matter) played any role in ensuring compliance with the Guidelines. The notice of copyright obligations and the acknowledgement of copyright policies by faculty have proven not to be sufficient to ensure compliance. The absence of safeguards tends towards unfairness.

[267] However, there is no dispute that the copying by York was done for educational purposes generally. The conflating of the purpose considerations of stage one and stage two is problematic.

[268] The Board has established a practice of referring to the purpose part of the stage two analysis as the "goal of the dealing" – in this case the goal of the Guidelines – to avoid the problem of conflation:

> 259 Some confusion may have arisen from the fact that the English text of the *CCH* decision refers to two different parts of the fair-dealing test as the "purpose" of the dealing: the purpose considered in the first step of the test, and the purpose factor considered in the second step of the test. This nomenclature appears to have led Parties to make arguments that are applicable to the first step when discussing the second step, and vice-versa. For this reason, inspired by the phrase "le but de l'utilisation" used in paragraph 54 of the French version of the *CCH* decision, we find it preferable to use the expression "goal of the dealing" when referring to the first factor of the second step in English. [citations omitted]
>
> …
>
> 264 The evaluation of ["the goal of the dealing"] involves considering the fairness of the goal for which the permitted (under the first step) activity (e.g., research, private study) took place. In *CCH*, this involved examining the fairness of research for the goal of providing legal advice in a commercial context. In *Bell*, it was the fairness of research for the goal of deciding whether to purchase musical works online. The fact that research or another permitted activity are undertaken for a further or additional goal does not, in itself, make this factor tend towards unfairness.
>
> (*Reproduction of Literary Works, Re*, 2015 CarswellNat 1792 (WL Can) at paras 259, 264 (Copyright Board); see also *Reproduction of Literary Works, Re*, 2016 CarswellNat 436 (WL Can) at para 246 (Copyright Board)).

[269] The Board's method of referring to this stage of the analysis as the "goal of the dealing" instead of the "purpose of the dealing" to avoid conflation between stage one and part one of stage two of the test is a useful reference point. Even in the case at bar, York tended to return to the part one purpose throughout its argument on part two of the test.

[270] Under the "goal of the dealing", the focus is on considering the fairness of the goal for which the permitted activity (e.g. research, education) took place. In this context, the question is the fairness of the goal of allowing students to access required course materials for education. Considered in isolation, this would tend toward fairness (although if considered in tandem with access to alternatives, its character may actually change to less fair). Of course, cost saving could be a goal of this activity as well, but as fair dealing embeds the ability of the user to access the content without compensating the creator that feature would be present in all fair dealing situations.

[271] However, in this case, the history of the dispute is a relevant consideration. In July 2011, York advised Access of its intention to opt out of the Interim Tariff – as described by Lynch, the opting out was motivated by Access's proposed tariff rate of $45 per FTE student.

In the Spring of 2012, York chose not to enter into the 2012 AUCC model licence offered by Access because the cost was $26 per FTE, despite the fact that in 2010 York had effectively paid Access $38 per FTE (the sum of fixed and variable rate) just for permission to photocopy.

[272] It is evident that York created the Guidelines and operated under them primarily to obtain for free that which they had previously paid for. One may legitimately ask how such "works for free" could be fair if fairness encompasses more than one person's unilateral benefit.

[273] The goal of the dealing was multifaceted. Education was a principal goal, specifically education for end user. But the goal of the dealing was also, from York's perspective, to keep enrolment up by keeping student costs down and to use whatever savings there may be in other parts of the university's operation.

[274] I do not accept Access's contention that the "purpose" must be transformational to tend toward fairness – the case law does not support such a submission.

[275] In this case, while the goal of the dealing is mixed and is a factor to be considered, it is not a strong factor in the fairness analysis.

(b) *Character of Dealing*

[276] Under this factor, courts must examine how the work was dealt with, the number of copies made, and the extent of dissemination. For example, multiple widely distributed copies will tend to be unfair. In contrast, if the copy is destroyed after its use, then this may lean towards a finding of fairness. It may be relevant to consider the custom or practice in the industry to determine whether the character of the dealing is fair (see *CCH* at para 55; *SOCAN* at para 37).

[277] However, the Supreme Court of Canada has cautioned that the "character" and "amount" inquiries must not be conflated. Specifically, the "character factor" involves a quantification of the total number of pages copied (i.e. a quantitative assessment based on aggregate use), whereas the "amount factor" is an examination of the proportion between the excerpted copy and the entire work (*Alberta (Education)* at paras 28-30; *SOCAN* at para 42).

[278] In *CCH*, the character factor supported fair dealing. Under the Great Library's policy, only single copies of works for specific purposes were allowed. The Supreme Court of Canada noted that "[c]opying a work for the purpose of research on a specific legal topic is generally fair dealing" (*CCH* at para 67).

[279] In *SOCAN*, it was found that no copy existed after the song preview was heard. As previews were streamed, users did not obtain permanent copies and the files were automatically deleted from the user's computer after listening. This supported fairness of dealing.

[280] However, in the instant case, there were no such limitations on the number of copies or on the "life" of such copies. The number of copies made, and which could be made in the future, is significant.

[281] In assessing this quantification, the Court had to rely on conflicting expert opinions. Wilk's expert report was riddled with assumptions and was further rendered unhelpful due to the admittedly inaccurate licensing information provided by York. As indicated earlier, I preferred the report of Gauthier.

[282] While the use of the unique access number and its statistics would, at first, seem to be a more consistent basis upon which to determine how many students actually accessed material as compared to enrolment data, on the facts in this case it was less reliable than one expected.

[283] By using enrolment as a basis for calculation, Gauthier had to estimate the number of "exposures" on LMSs during the sample period.

[284] However, like much of the data provided by York, the unique user access data was very unreliable. Because of the deficient unique user access data combined with the other weaknesses of Wilk's evidence, and bearing in mind that York had the burden of proof on this factor, the Court is forced to rely on enrolment data as a basis for the total number copied.

[285] This data's usefulness is also undermined by the fact that no disaggregation was attempted. For example, the number of exposures per FTE per year is significantly low when considered from an art's degree perspective but quite high for a science lab-based degree.

[286] However, recognizing some of the limitations in the data, it is appropriate to view the copies in total despite York's argument that this approach disadvantages large institutions. It is York's practices that are at issue and it is its data that is raising the issue.

[287] York has argued that because it has separate licences and permissions, the amount of copying at issue is reduced. However, York has conceded that its evidence on licensing

information is inaccurate and its ability to marry up copies with the relevant licence or permission is impossible to rely upon.

[288] Access suggested that pre-meditated copying was presumptively less fair. Certainly the facts in *CCH* and *Alberta (Education)* were more cases of situational/spontaneous copying than the institutional copying at York. However, *SOCAN* was a pre-planned and coordinated music preview system.

One cannot extrapolate from these cases that institutional copying is inherently less fair; however, as the copying is institutionalized, the institutional criteria for permitted copying (i.e. number of chapters allowed to be copied), protections, restrictions, and compulsory compliance regimes take on added importance under the other factors at issue.

[289] Given the expert evidence, and with recognition of the problems with the data, the character of dealing in this case tends toward the unfairness end of the spectrum.

(c) *Amount of the Dealing*

[290] The "amount" refers to the quantity of the work taken. In *SOCAN*, the Supreme Court of Canada found that the "amount of dealing" factor was to be based on the individual use and the proportion of the excerpt used in relation to the whole work (para 41; see also *Alberta (Education)* at para 29). This factor requires an assessment of both the quantitative amount of the dealing and the qualitative importance of the part copied (*CCH* at para 56).

(i) Quantitative

[291] The quantity of the work taken will not be determinative of fairness; however, it can help in that determination. As held in *CCH* at para 56, it may be possible to deal fairly with an entire work.

[292] In *CCH*, the amount of the dealing indicated fair dealing. The Great Library's policy noted that it would typically honour requests for a copy of one case, article, or statutory reference. However, the Reference Librarian would review requests for a copy of more than 5% of a secondary source. Further, there was no evidence of specific patrons submitting numerous requests for multiple reported judicial decisions from the same reported series over a short period of time (*CCH* at para 68). Again, *CCH* is distinguishable on the facts that tended to indicate "fairness" in that case and whose absence shows unfairness in this case.

[293] Under this factor, the courts are to consider the "thresholds" for copying – how much is copied out of different types of works. In this case, this Court is to consider the thresholds in the Guidelines, the rationale for these thresholds, and the amount of any one type of work which can be copied.

[294] This factor is particularly important in this case. It is also a very problematic area for York and its attempt to cast the Guidelines as being fair.

[295] The "amount of the dealing" factor is an examination of the proportion between the excerpted copy and the entire work. The Guidelines delineate certain thresholds of what is presumptively fair (i.e. two chapters of a book or no more than 10%), without any attention to the second part of the analysis for the amount of the dealing or the qualitative importance of the part copied.

(ii) Qualitative

[296] In absolute terms, the amount of coursepack copying by York and the volume of coursepack and LMS copying that occurred during the period of September 1, 2011 to December 31, 2013 (the agreed sampling period) was significant.

[297] In terms of Access, York was the largest producer of coursepacks of any licensed post-secondary institution. Between 2005-2011, York Printing Services copied 122 million print exposures for use in coursepacks – an average of 17.5 million exposures per year. A student would receive 387 exposures per year in coursepacks, 80% of which came from books.

[298] Following York's decision to "opt out" of the Interim Tariff, York outsourced the majority of its coursepack production to three external copy shops which copied between 4.4 million and 7.6 million exposures per year for York between 2011 and 2013 – 90% of which were from books.

[299] Although a portion of this copying was pursuant to permissions, York's evidence on permissions, including its tracking of permissions, was suspect and cannot be relied upon.

[300] The evidence is that if the requested declaration is granted, the majority of copying will revert in-house to York without payment of copyright charges.

[301] It is relevant to consider the aggregate volume of copying by all post-secondary institutions that would be allowed if the Guidelines or similar policies were adopted. There is a problem with the current data because of unreported copying. However, when all such institutions were licensed, they produced 120 million exposures of published works per year in printed coursepacks alone.

[302] In respect of LMSs, the story of the quantum is much the same as the evidence of Gauthier establishes.

[303] It would be counter to all of the evidence to suggest that copying at York is insignificant. In 2013, York copied an aggregate volume of 17.6 million exposures of materials relevant to the Guidelines in either coursepacks or LMSs. The trend is toward digital copying, which York contends is free.

[304] Therefore, the qualitative copying is immense and the Guidelines are relevant to a large portion of the copying.

[305] In a copying regime based on policy or guidelines, part of the fairness analysis must consider the fairness of the delineated amounts and types. The Court must be able to examine the rationale for these thresholds. It is incumbent on the user institution to explain the basis for the

delineated amounts and types (the thresholds) and to explain why they are, in and of themselves or in combination with other features, fair.

[306] York did not provide a meaningful response or any evidence with respect to the above. For example, there was no rationale advanced for any threshold such as the selection of 10% of a work or of one of anything else specified (whichever is greater).

[307] It is no response to the issue to say that the thresholds are fair because AUCC determined that they were fair. The AUCC witnesses did not explain the choice of thresholds. The evidence of AUCC's development of the thresholds shows no external basis for the thresholds – for example, there was no outside consultation, there were no studies conducted, and there was no comparative analysis done on fair dealing criteria in other jurisdictions.

[308] This failure to justify the choice of thresholds seriously undermines the overall fairness of the York Guidelines.

[309] While arbitrary or bright line thresholds may be convenient, convenience of the user is not a factor that the Supreme Court of Canada had directed courts to consider. Even if it was, there must still be an acceptable rationale for such thresholds.

[310] As became apparent during the course of the trial and as is clear from the terms of the Guidelines, the permitted copying can, in fact, be 100% or such a large part of a work as to

appropriate the whole (e.g. for a journal article in a periodical, a short story in an anthology, or a chapter in an edited book).

[311] Examples referred to in the trial included the classic Canadian short story *The Hockey Sweater*, which could be copied freely if it appeared in an anthology but would have copyright protection if copied on its own.

Similarly, referring in argument and questioning to Margaret MacMillan's superb book *Paris 1919: Six Months That Changed the World*, numerous chapters could individually be segregated for use in different courses, effectively eviscerating the copyright protection on the book.

[312] To the consideration of this form of overcoming copyright must be added the matter of compound copying as demonstrated by Access. Not only are the works copied in whole, but they are also copied multiple times.

[313] The Court is not persuaded that the purposes of education, private study, and research point towards fair dealing, as was argued by York, when such larger portions are copied. This argument is to rely on the stage one analysis of permitted purpose to support fairness. This is circular reasoning amounting to nothing more than saying that copying for educational purposes is fair because it is copying for the purposes of education.

[314] The unfairness evident in this part of the six-factor exercise is compounded by the absence of any meaningful control over the portions of publications copied or any monitoring of

compliance, be it pre- or post-copying, which also serves to render the thresholds largely meaningless.

[315] As a further part of the analysis of this factor, some consideration is to be given to the importance of the work. This consideration has not been clearly defined in the jurisprudence, and basing the consideration on the user's view of importance introduces highly subjective and difficult-to-assess influences.

[316] Aspects of this qualitative importance are subsumed in the above quantitative analysis. York failed to adduce any evidence with respect to the qualitative importance of the parts copied.

[317] However, given the thresholds of the Guidelines, parts which may be copied can be the qualitative core of the work, and the example of *The Hockey Sweater* is but one example. Where a chapter from a book can stand alone and be important enough to be taken from the whole for inclusion in a course's required reading, there is little doubt that the copied part is qualitatively significant to the work and to the author's contribution.

(iii) Conclusion on the Amount of the Dealing

[318] In summary on this factor, York fails almost completely both quantitatively and qualitatively. In the context of the case, this is a critical factor which establishes that there is nothing fair about the amount of the dealing.

(d) *Alternatives to the Dealing*

[319] The Supreme Court of Canada in *CCH* conveniently summarized this factor as follows:

> 57 Alternatives to dealing with the infringed work may affect the determination of fairness. If there is a non-copyrighted equivalent of the work that could have been used instead of the copyrighted work, this should be considered by the court. I agree with the Court of Appeal that it will also be useful for courts to attempt to determine whether the dealing was reasonably necessary to achieve the ultimate purpose. For example, if a criticism would be equally effective if it did not actually reproduce the copyrighted work it was criticizing, this may weigh against a finding of fairness. [Emphasis added]

[320] The availability of a licence is not a relevant alternative in deciding whether a dealing is fair. This is because "[i]f a copyright owner were allowed to license people to use its work and then point to a person's decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner's monopoly" (*CCH* at para 70).

[321] In *CCH*, it was not apparent that there were alternatives to the Great Library's custom photocopy service given that patrons could not always be expected to conduct research on-site – twenty percent of requesters lived outside of Toronto, and researchers could not borrow materials due to heavy demand (para 69).

[322] In *SOCAN*, the Supreme Court of Canada found that the alternative of allowing returns for downloading the wrong musical track was expensive, technologically complicated, and market inhibiting. Further, none of the alternatives (such as providing users with album artwork, textual descriptions, or album reviews) would allow the customer to preview what the music

sounds like. Accordingly, the short, low-quality streamed previews were found to be reasonably necessary to assist consumers in researching what to purchase.

[323] In *Alberta (Education)*, the Supreme Court of Canada held that buying books for each student was not a realistic alternative to teachers copying short excerpts to supplement student textbooks. This was in part justified by the fact that the schools had already purchased originals and were simply facilitating access.

[324] However, the situations contemplated in *Alberta (Education)* bear little resemblance to the facts of this case. It is one thing for a teacher to have the school librarian run off some copies of a book or article in order to supplement school texts, and it is quite another for York to produce coursepacks and materials for distribution through LMSs, which stand in place of course textbooks, through copying on a massive scale.

As became clear in this case, the term "short excerpt" was used to describe much more than a few lines or a snippet of a work.

[325] In *CCH*, courts were directed to the question of whether the dealing (copying) was reasonably necessary to achieve the ultimate purpose.

[326] The ultimate purpose in this case must be the education of the student. The Court accepts the evidence of a number of professors that the days of one principal textbook used to teach a course are gone. This is particularly so in more advanced courses. Core course material is now sourced from multiple publications and resources.

[327] Quite apart from any issue of academic freedom, to premise this analysis on the presumption of the availability of a core single resource for a course is to potentially limit the educational opportunities of students.

[328] The use of copying is reasonably necessary to achieve the ultimate purpose of education, whether this is physical photocopying or digital copying.

[329] While as a general principle this factor favours York and its asserted fairness, the level of fairness is diminished because York has not actively engaged in the consideration or use of alternatives which exist or are in development.

[330] There are alternatives – these include using custom book services, purchasing individual chapters or articles from the publisher, or purchasing more of the necessary books and articles. There is just no reasonable free alternative to copying.

[331] With the mix of factors and the weighing thereof, this factor favours York but not as strongly as it has argued.

(e) *Nature of the Work*

[332] The "nature of the work" factor has not been held to be a determinative factor. In *CCH*, this factor was linked to the following question: is the work of such a nature that its reproduction would lead to a wider public dissemination of the work? This is one of the goals of copyright law.

[333] The works at issue in this case are published original works such as poems, chapters from books, short stories, learned journal articles, newspaper articles, and even comics. These works were developed through the use of creativity, complex analytical analysis, skill, perspective, and judgment by authors. Typically, the works required substantial research, editorial judgment, and pedagogical expertise and merit – otherwise, as professors testified, they would not be selected for inclusion in coursepacks and LMSs.

[334] From the publisher perspective, there is significant skill, effort, and investment involved in bringing a book to publication or in selecting materials for inclusion in journals and collections. Some works are tailor made for post-secondary students and others for a wider audience of whom students are only a part.

[335] The evidence is that higher education publishing involves highly specialized publishing of very complex information. A textbook likely involves significant work, research, skill, and expense to bring to publication. In the Canadian educational context, many publications focus just on the Canadian perspective and other publications need to be carefully Canadianized.

[336] Not all the works at issue are written by scholars and faculty who do so as part of their academic duties. Many of the works covered by the Guidelines are written by professional writers or by academics acting beyond their purely academic role. The works are published by professional commercial publishers. Most of these people are attempting to make a living from writing and publishing.

[337] Aside from the dependency or reliance on income from writing and publishing, the notion of the benefits of dissemination must be carefully considered. The Guidelines are not established to motivate dissemination. There is no evidence that these professional writers and publishers need the Guidelines to assist in the dissemination of their works. Dissemination may improve because under the Guidelines the works are free, but the same can be said of any goods or services that are provided for free.

[338] While the nature of the work has been held not to be a determinative factor, it is part of the balancing exercise in determining whether the Guidelines are fair. This factor tends towards the negative end of the fairness spectrum due to the way in which the nature of the works is treated and the manner in which the Guidelines are applied.

(f) *Effect of the Dealing*

[339] The effect of the dealing – that is, the negative impacts of the dealing on the creators and publishers – is a matter for which Access bears the burden.

[340] This factor is an important one but, as instructed in *CCH*, it is neither the only factor nor is it the most important factor that the Court must consider (para 59).

[341] The Court is required to look at the competition between the reproduced work and the original, as such competition may suggest that the dealing is not fair.

> 59 … If the reproduced work is *likely to compete* with the market of the original work, this may suggest that the dealing is not fair. Although the effect of the dealing on the market of the

> copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair. … [Emphasis added]

[342] *Alberta (Education)* is instructive in this regard. The Supreme Court of Canada concluded that a decline in sales, without sufficient evidence of a link to the photocopying of short excerpts, was not enough to find that copying had such an impact as to be unfair (para 35). The Supreme Court of Canada instructed that there must be evidence of a link, without saying that copying had to be the only or dominant reason for the decline.

[343] Also of relevance to this case is that the Supreme Court of Canada found it difficult to see how teachers' copying competed with the market for textbooks given the finding that the teachers' copying was limited to short excerpts of complementary textbooks. In the absence of photocopies, students would either do without the material or consult a copy of the book already owned by the school.

[344] There is no parallel in the present case to the limited copying of excerpts discussed in *Alberta (Education)*. The Guidelines permit significant copying of portions of books, articles, journals, and other works. Copying at York is a mass and massive enterprise where coursepacks and materials distributed through LMSs operate as the source material for education. York professors indicated the undesirability and/or impracticality of requiring students to purchase the source material or of having such originals set aside in the library.

This is not a fault of York, it is the manner of modern education – however, that does not necessarily mean that it is fair when no compensation is paid.

[345] The Court has already discussed the expert evidence and its finding that the Plaintiff's evidence of Dobner and Gauthier is to be preferred.

[346] The parties acknowledged that there had been declines in sales and in Access's licensing revenues in respect of post-secondary institutions. The dispute is as to the "cause", with York seeking to pass all material negative impacts off to developing technologies.

[347] Dobner concluded that since the introduction of the Guidelines, there has been an acceleration of the decline in the sale of works produced for the post-secondary educational market and a transfer of wealth from content producers to content users. He stated that "the magnitude of the overall impact [of dealing in a work] is indicative of the significance of the impact on individual works".

[348] I agree with Access that in considering the "effect of the dealing" as part of the Court's overall assessment of fairness, the Court should consider all actual and likely impacts on all original content contributors, both publishers and creators, who contribute works that are used and copied under the Guidelines in the post-secondary educational market, including whether the copying acts as a substitute for the original work.

[349] The Court has commented a number of times on the substitutability of the copies for the original works in these circumstances and has found the copying to be a meaningful substitute.

[350] As pointed out by Access, the problem of quantifying the impact of the Guidelines on sales is that copying under the limits now set out in the Guidelines has been occurring for 20 years. There is no baseline for quantification because the copying had already been substituted for the original.

However, under the prior circumstances, the creators and publishers were paid. The loss of revenue to Access is an appropriate surrogate for the nature and quantity of copying and for the negative impacts.

[351] The impact of the Guidelines can be summarized as follows:

- They contributed to a drop in sales and accelerated the drop in unit sales – up to 6.9% per year and 3.4% in revenues between 2012 and 2015. Precise allocation of the amounts attributable to the Guidelines is not possible, but it was a material contribution.
- They caused a loss of licensing income to creators and publishers as evidenced by the loss of licensing income. PwC calculated the range of loss to Access alone at between $800,000 and $1.2 million per year.
- Actual and expected loss of licensing income resulting from the Guidelines has a negative impact on publishers. Licensing revenues represented about 20% of publishers' revenues.
- Actual and expected loss of licensing income has a negative impact on creators. While the Writers' Union survey had some problems, it confirmed the importance of licensing revenue to most writers and the materiality of a loss of revenue.

- On a balance of probability and recognizing the inherent unreliability of predicting the future, there is likely to be adverse long-term impacts of the Guidelines on investment, content, and quality.

[352] While much of Access's evidence of impacts on the market was general in nature, it establishes that the likelihood of negative impacts from York's own Guidelines will be similar. This is sensible given the massive amounts of copying at issue, the history of payments to Access prior to York opting out of the Interim Tariff, and the size of York as the second largest university in Ontario.

[353] Therefore, the Court concludes that the Guidelines have caused and will cause material negative impacts on the market for which Access would otherwise have been compensated for York's copying.

[354] The Court does share York's desire to emphasize the statement in *CCH* that the effect of the dealing on the market is neither the only factor nor the most important factor to be considered.

However, the impacts are negative and this points to unfairness.

[355] To address an additional argument raised by York that Parliament was aware of the potential negative impacts when it amended the legislation, the Court is not persuaded to read the "fairness" requirements differently than precedents have taught.

If Parliament had chosen to dismiss these concerns when it was considering the amendments, it could have easily written “fair dealing” out of s 29.

(3) Conclusion

[356] Weighing the factors and considering the whole of the issue of fair dealing in the context of the facts of this case, the Court concludes that the York Fair Dealing Guidelines are not fair. The declaration requested will be denied with costs to the Plaintiff.

[357] In view of the need for the parties to plan for the new academic year, this Judgment and Reasons are being issued in one language with translation to follow as quickly as is feasible.

"Michael L. Phelan"
Judge

Ottawa, Ontario
July 12, 2017

SCHEDULE A

Fair Dealing Guidelines for York Faculty and Staff (11/13/12)

I. BACKGROUND

An important exception to the right of copyright owners to control the reproduction of their works is known as the "**fair dealing**" exception. This exception attempts to balance the rights of the copyright owner with the needs of others, who require access to copyrighted material to pursue their research and studies. The fair dealing provision in the Copyright Act permits use of a copyright-protected work without permission from the copyright owner or the payment of copyright royalties. To qualify for fair dealing, two tests must be passed.

First, the "dealing" must be for a purpose stated in the Copyright Act:

- research;
- private study;
- criticism, review;
- news reporting;
- education;
- satire; or
- parody.

The second test is that the dealing must be "fair". The Supreme Court of Canada has provided guidance as to what this test means in educational institutions.

York University's Fair Dealing Guidelines provide direction to Teaching Staff** and Other Staff* on how the Fair Dealing Exception applies to certain copying practices at York while providing reasonable safeguards for the copyright holders of copyright-protected works in accordance with Canadian copyright law.

Note: There may be other requirements related to interlibrary loans, university library reserves and document delivery to patrons of the York University Libraries.

II. FAIR DEALING GUIDELINES

1. Teaching Staff* and Other Staff** may copy, in paper or electronic form, Short Excerpts (defined below) from a copyright protected work, which includes literary works, musical scores, sound recordings, and audiovisual works (collectively, a "**Work**" within the university environment for the purposes of research, private study, criticism, review, news reporting, education, satire or parody in accordance with these Guidelines.

2. The copy must be a "**Short Excerpt**", which means that it is either:

10% or less of a Work, *or*

no more than:

a) one chapter from a book;

b) a single article from a periodical;

c) an entire artistic work (including a painting, photograph, diagram, drawing, map, chart and plan) from a Work containing other artistic works;

d) an entire newspaper article or page;

e) an entire single poem or musical score from a Work containing other poems or musical scores; or

f) an entire entry from an encyclopedia, annotated bibliography, dictionary or similar reference work,

whichever is greater.

3. The Short Excerpt in each case must contain no more of the work than is required in order to achieve the fair dealing purpose;

4. A single copy of a short excerpt from a copyright-protected work may be provided or communicated to each student enroled in a class or course:

a) as a class handout;

b) as a posting to a learning or course management system (e.g. Moodle or Quickr) that is password protected or otherwise restricted to students of the university; or

c) as part of a course pack.

5. Any fee charged by York for copying a Short Excerpt must not exceed the costs, including overhead costs, of the making of the copy.

6. Copies of Short Excerpts made for the purpose of news reporting, criticism or review should mention the source and, if given in the source, the name of the author(s) or creator(s) of the Work.

7. Where the Fair Dealing Exception allows the copying of only a portion of a Work, no member of the Teaching Staff or Other Staff may make copies of multiple Short Excerpts with the effect of exceeding the copying limits set out in Section 2 of the Guidelines.

III. YORK UNIVERSITY SUPPORT

8. The circumstances that qualify within the Fair Dealing Exception may vary from case to case. The Fair Dealing Exception will cover copying that you undertake in accordance with these Guidelines. The Fair Dealing Exception may also cover certain instances of copying that are not described under these Guidelines. If you have a request for copying that you believe should be covered by the Fair Dealing Exception but is not explicitly permitted by these Guidelines, please contact the Copyright Office at copy@yorku.ca. A

determination will be made as to whether the proposed copies fall within the Fair Dealing Exception, considering all of the relevant circumstances, including:

a) the purpose of the proposed copying, including whether it is for research, private study, criticism, review, news reporting; education, satire or parody;

b) the character of the proposed copying, including whether it involves single or multiple copies, and whether the copy is destroyed after it is used for its specific intended purpose;

c) the amount of the dealing from the individual user's perspective, including the proportion of the Work that is proposed to be copied and the importance of that excerpt in relation to the whole Work;

d) alternatives to copying the Work, including whether there is a non-copyrighted equivalent available;

e) the nature of the Work, including whether it is published or unpublished; and

f) the effect of the copying on the Work, including whether the copy will compete with the commercial market of the original Work.

9. Other sources of permission (including permission from a copyright holder) will be required where the copy falls outside of these Guidelines. For assistance in obtaining the permission required for this copying or posting, contact York University's Copyright Office at copy@yorku.ca.

Selected definitions

"**Teaching Staff**"* means any person who teaches at or under the auspices of York University, including without limitation faculty members, adjunct and clinical faculty, lecturers, instructors, and teaching assistants.

"**Other Staff**"** means full-time and part-time staff members of York University and any other person who works at or under the auspices of York University who is not Teaching Staff.

SCHEDULE B

Main Action

Copyright Act, RSC 1985, c C-42

Interim decisions	**Décisions provisoires**
66.51 The Board may, on application, make an interim decision.	**66.51** La Commission peut, sur demande, rendre des décisions provisoires.
…	[…]
Publication of approved tariffs	**Publication du tarif homologué**
68 (4) The Board shall **(a)** publish the approved tariffs in the *Canada Gazette* as soon as practicable; and **(b)** send a copy of each approved tariff, together with the reasons for the Board's decision, to each collective society that filed a proposed tariff and to any person who filed an objection.	**68 (4)** Elle publie dès que possible dans la *Gazette du Canada* les tarifs homologués; elle en envoie copie, accompagnée des motifs de sa décision, à chaque société de gestion ayant déposé un projet de tarif et aux opposants.
…	[…]
Effect of fixing royalties	**Portée de l'homologation**
68.2 (1) Without prejudice to any other remedies available to it, a collective society may, for the period specified in its approved tariff, collect the royalties specified in the tariff and, in default of their payment, recover them in a court of competent jurisdiction.	**68.2 (1)** La société de gestion peut, pour la période mentionnée au tarif homologué, percevoir les redevances qui y figurent et, indépendamment de tout autre recours, le cas échéant, en poursuivre le recouvrement en justice.
…	[…]

Collective societies

70.1 Sections 70.11 to 70.6 apply in respect of a collective society that operates

(a) a licensing scheme, applicable in relation to a repertoire of works of more than one author, pursuant to which the society sets out the classes of uses for which and the royalties and terms and conditions on which it agrees to authorize the doing of an act mentioned in section 3 in respect of those works;

(a.1) a licensing scheme, applicable in relation to a repertoire of performer's performances of more than one performer, pursuant to which the society sets out the classes of uses for which and the royalties and terms and conditions on which it agrees to authorize the doing of an act mentioned in section 15 in respect of those performer's performances;

(b) a licensing scheme, applicable in relation to a repertoire of sound recordings of more than one maker, pursuant to which the society sets out the classes of uses for which and the royalties and terms and conditions on which it agrees to authorize the doing of an act mentioned in section 18 in respect of those sound

Sociétés de gestion

70.1 Les articles 70.11 à 70.6 s'appliquent dans le cas des sociétés de gestion chargées d'octroyer des licences établissant :

a) à l'égard d'un répertoire d'oeuvres de plusieurs auteurs, les catégories d'utilisation à l'égard desquelles l'accomplissement de tout acte mentionné à l'article 3 est autorisé ainsi que les redevances à verser et les modalités à respecter pour obtenir une licence;

a.1) à l'égard d'un répertoire de prestations de plusieurs artistes-interprètes, les catégories d'utilisation à l'égard desquelles l'accomplissement de tout acte mentionné à l'article 15 est autorisé ainsi que les redevances à verser et les modalités à respecter pour obtenir une licence;

b) à l'égard d'un répertoire d'enregistrements sonores de plusieurs producteurs d'enregistrements sonores, les catégories d'utilisation à l'égard desquelles l'accomplissement de tout acte mentionné à l'article 18 est autorisé ainsi que les redevances à verser et les modalités à respecter pour obtenir une licence;

recordings; or

(c) a licensing scheme, applicable in relation to a repertoire of communication signals of more than one broadcaster, pursuant to which the society sets out the classes of uses for which and the royalties and terms and conditions on which it agrees to authorize the doing of an act mentioned in section 21 in respect of those communication signals.

c) à l'égard d'un répertoire de signaux de communication de plusieurs radiodiffuseurs, les catégories d'utilisation à l'égard desquelles l'accomplissement de tout acte mentionné à l'article 21 est autorisé ainsi que les redevances à verser et les modalités à respecter pour obtenir une licence.

Public information

70.11 A collective society referred to in section 70.1 must answer within a reasonable time all reasonable requests from the public for information about its repertoire of works, performer's performances, sound recordings or communication signals.

Demandes de renseignements

70.11 Ces sociétés de gestion sont tenues de répondre, dans un délai raisonnable, aux demandes de renseignements raisonnables du public concernant le répertoire de telles oeuvres, de telles prestations, de tels enregistrements sonores ou de tels signaux de communication, selon le cas.

Tariff or agreement

70.12 A collective society may, for the purpose of setting out by licence the royalties and terms and conditions relating to classes of uses,

(a) file a proposed tariff with the Board; or

(b) enter into agreements with users.

Projets de tarif ou ententes

70.12 Les sociétés de gestion peuvent, en vue d'établir par licence les redevances à verser et les modalités à respecter relativement aux catégories d'utilisation :

a) soit déposer auprès de la Commission un projet de tarif;

b) soit conclure des ententes avec les utilisateurs.

Filing of proposed tariffs

70.13 (1) Each collective society referred to in section 70.1 may, on or before the March 31 immediately before the date when its last tariff approved pursuant to subsection 70.15(1) expires, file with the Board a proposed tariff, in both official languages, of royalties to be collected by the collective society for issuing licences.

Dépôt d'un projet de tarif

70.13 (1) Les sociétés de gestion peuvent déposer auprès de la Commission, au plus tard le 31 mars précédant la cessation d'effet d'un tarif homologué au titre du paragraphe 70.15(1), un projet de tarif, dans les deux langues officielles, des redevances à percevoir pour l'octroi de licences.

Where no previous tariff

(2) A collective society referred to in subsection (1) in respect of which no tariff has been approved pursuant to subsection 70.15(1) shall file with the Board its proposed tariff, in both official languages, of all royalties to be collected by it for issuing licences, on or before the March 31 immediately before its proposed effective date.

Sociétés non régies par un tarif homologué

(2) Lorsque les sociétés de gestion ne sont pas régies par un tarif homologué au titre du paragraphe 70.15(1), le dépôt du projet de tarif auprès de la Commission doit s'effectuer au plus tard le 31 mars précédant la date prévue pour sa prise d'effet.

Application of certain provisions

70.14 Where a proposed tariff is filed under section 70.13, subsections 67.1(3) and (5) and subsection 68(1) apply, with such modifications as the circumstances require.

Application de certaines dispositions

70.14 Dans le cas du dépôt, conformément à l'article 70.13, d'un projet de tarif, les paragraphes 67.1(3) et (5) et 68(1) s'appliquent avec les adaptations nécessaires.

Certification

70.15 (1) The Board shall certify the tariffs as approved, with such alterations to the royalties and to the terms and

Homologation

70.15 (1) La Commission homologue les projets de tarifs après avoir apporté aux redevances et aux modalités

conditions related thereto as the Board considers necessary, having regard to any objections to the tariffs.

afférentes les modifications qu'elle estime nécessaires compte tenu, le cas échéant, des oppositions.

Application of certain provisions

(2) Where a tariff is approved under subsection (1), subsections 68(4) and 68.2(1) apply, with such modifications as the circumstances require.

Application de certaines dispositions

(2) Dans le cas d'un tarif homologué, les paragraphes 68(4) et 68.2(1) s'appliquent avec les adaptations nécessaires.

Distribution, publication of notices

70.16 Independently of any other provision of this Act relating to the distribution or publication of information or documents by the Board, the Board shall notify persons affected by a proposed tariff, by

(a) distributing or publishing a notice, or

(b) directing another person or body to distribute or publish a notice,

in such manner and on such terms and conditions as the Board sees fit.

Publication d'avis

70.16 La Commission doit ordonner l'envoi ou la publication d'un avis à l'intention des personnes visées par le projet de tarif, indépendamment de toute autre disposition de la présente loi relative à l'envoi ou à la publication de renseignements ou de documents, ou y procéder elle-même, et ce de la manière et aux conditions qu'elle estime indiquées.

Prohibition of enforcement

70.17 Subject to section 70.19, no proceedings may be brought for the infringement of a right referred to in section 3, 15, 18 or 21 against a person who has paid or offered to pay the royalties specified in an approved tariff.

Interdiction des recours

70.17 Sous réserve de l'article 70.19, il ne peut être intenté aucun recours pour violation d'un droit prévu aux articles 3, 15, 18 ou 21 contre quiconque a payé ou offert de payer les redevances figurant au tarif homologué.

Continuation of rights

70.18 Subject to section 70.19, where a collective society files a proposed tariff in accordance with section 70.13,

(a) any person authorized by the collective society to do an act referred to in section 3, 15, 18 or 21, as the case may be, pursuant to the previous tariff may do so, even though the royalties set out therein have ceased to be in effect, and

(b) the collective society may collect the royalties in accordance with the previous tariff,

until the proposed tariff is approved.

Maintien des droits

70.18 Sous réserve de l'article 70.19 et malgré la cessation d'effet du tarif, toute personne autorisée par la société de gestion à accomplir tel des actes visés aux articles 3, 15, 18 ou 21, selon le cas, a le droit, dès lors qu'un projet de tarif est déposé conformément à l'article 70.13, d'accomplir cet acte et ce jusqu'à l'homologation d'un nouveau tarif. Par ailleurs, la société de gestion intéressée peut percevoir les redevances prévues par le tarif antérieur jusqu'à cette homologation.

Where agreement exists

70.19 If there is an agreement mentioned in paragraph 70.12(b), sections 70.17 and 70.18 do not apply in respect of the matters covered by the agreement.

Non-application des articles 70.17 et 70.18

70.19 Les articles 70.17 et 70.18 ne s'appliquent pas aux questions réglées par toute entente visée à l'alinéa 70.12b).

Agreement

70.191 An approved tariff does not apply where there is an agreement between a collective society and a person authorized to do an act mentioned in section 3, 15, 18 or 21, as the case may be, if the agreement is in effect during the period covered by the approved tariff.

Entente

70.191 Le tarif homologué ne s'applique pas en cas de conclusion d'une entente entre une société de gestion et une personne autorisée à accomplir tel des actes visés aux articles 3, 15, 18 ou 21, selon le cas, si cette entente est exécutoire pendant la période d'application du tarif

homologué.

Fixing of Royalties in Individual Cases

Fixation des redevances dans des cas particuliers

Application to fix amount of royalty, etc.

70.2 (1) Where a collective society and any person not otherwise authorized to do an act mentioned in section 3, 15, 18 or 21, as the case may be, in respect of the works, sound recordings or communication signals included in the collective society's repertoire are unable to agree on the royalties to be paid for the right to do the act or on their related terms and conditions, either of them or a representative of either may, after giving notice to the other, apply to the Board to fix the royalties and their related terms and conditions.

Demande de fixation de redevances

70.2 (1) À défaut d'une entente sur les redevances, ou les modalités afférentes, relatives à une licence autorisant l'intéressé à accomplir tel des actes mentionnés aux articles 3, 15, 18 ou 21, selon le cas, la société de gestion ou l'intéressé, ou leurs représentants, peuvent, après en avoir avisé l'autre partie, demander à la Commission de fixer ces redevances ou modalités.

Fixing royalties, etc.

(2) The Board may fix the royalties and their related terms and conditions in respect of a licence during such period of not less than one year as the Board may specify and, as soon as practicable after rendering its decision, the Board shall send a copy thereof, together with the reasons therefor, to the collective society and the person concerned or that person's representative.

Modalités de la fixation

(2) La Commission peut, selon les modalités, mais pour une période minimale d'un an, qu'elle arrête, fixer les redevances et les modalités afférentes relatives à la licence. Dès que possible après la fixation, elle en communique un double, accompagné des motifs de sa décision, à la société de gestion et à l'intéressé, ou au représentant de celui-ci.

…

[…]

Effect of Board decision	**Portée de la fixation**
70.4 Where any royalties are fixed for a period pursuant to subsection 70.2(2), the person concerned may, during the period, subject to the related terms and conditions fixed by the Board and to the terms and conditions set out in the scheme and on paying or offering to pay the royalties, do the act with respect to which the royalties and their related terms and conditions are fixed and the collective society may, without prejudice to any other remedies available to it, collect the royalties or, in default of their payment, recover them in a court of competent jurisdiction.	**70.4** L'intéressé peut, pour la période arrêtée par la Commission, accomplir les actes à l'égard desquels des redevances ont été fixées, moyennant paiement ou offre de paiement de ces redevances et conformément aux modalités afférentes fixées par la Commission et à celles établies par la société de gestion au titre de son système d'octroi de licences. La société de gestion peut, pour la même période, percevoir les redevances ainsi fixées et, indépendamment de tout autre recours, en poursuivre le recouvrement en justice.

Counterclaim

Copyright Act, RSC 1985, c C-42

Interpretation	**Définitions et dispositions interprétatives**
Definitions	**Définitions**
2 In this Act,	**2** Les définitions qui suivent s'appliquent à la présente loi.
…	[…]
educational institution means	***établissement d'enseignement*** :
(a) a non-profit institution licensed or recognized by or under an Act of Parliament or the legislature of a province to provide pre-school, elementary, secondary or	**a)** Établissement sans but lucratif agréé aux termes des lois fédérales ou provinciales pour dispenser de l'enseignement aux niveaux préscolaire, élémentaire,

post-secondary education,	secondaire ou postsecondaire, ou reconnu comme tel;
(b) a non-profit institution that is directed or controlled by a board of education regulated by or under an Act of the legislature of a province and that provides continuing, professional or vocational education or training,	**b)** établissement sans but lucratif placé sous l'autorité d'un conseil scolaire régi par une loi provinciale et qui dispense des cours d'éducation ou de formation permanente, technique ou professionnelle;
(c) a department or agency of any order of government, or any non-profit body, that controls or supervises education or training referred to in paragraph (a) or (b), or	**c)** ministère ou organisme, quel que soit l'ordre de gouvernement, ou entité sans but lucratif qui exerce une autorité sur l'enseignement et la formation visés aux alinéas a) et b);
(d) any other non-profit institution prescribed by regulation; (*établissement d'enseignement*)	**d)** tout autre établissement sans but lucratif visé par règlement. (*educational institution*)
…	[…]
Idem	**Idem**
2.1 (2) The mere fact that a work is included in a compilation does not increase, decrease or otherwise affect the protection conferred by this Act in respect of the copyright in the work or the moral rights in respect of the work.	**2.1 (2)** L'incorporation d'une oeuvre dans une compilation ne modifie pas la protection conférée par la présente loi à l'oeuvre au titre du droit d'auteur ou des droits moraux.
…	[…]
Fair Dealing	**Utilisation équitable**
Research, private study, etc.	**Étude privée, recherche, etc.**
29 Fair dealing for the purpose of research, private study,	**29** L'utilisation équitable d'une oeuvre ou de tout autre

education, parody or satire does not infringe copyright.

objet du droit d'auteur aux fins d'étude privée, de recherche, d'éducation, de parodie ou de satire ne constitue pas une violation du droit d'auteur.

Criticism or review

29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

Critique et compte rendu

29.1 L'utilisation équitable d'une oeuvre ou de tout autre objet du droit d'auteur aux fins de critique ou de compte rendu ne constitue pas une violation du droit d'auteur à la condition que soient mentionnés :

(a) the source; and

a) d'une part, la source;

(b) if given in the source, the name of the

b) d'autre part, si ces renseignements figurent dans la source :

(i) author, in the case of a work,

(i) dans le cas d'une oeuvre, le nom de l'auteur,

(ii) performer, in the case of a performer's performance,

(ii) dans le cas d'une prestation, le nom de l'artiste-interprète,

(iii) maker, in the case of a sound recording, or

(iii) dans le cas d'un enregistrement sonore, le nom du producteur,

(iv) broadcaster, in the case of a communication signal.

(iv) dans le cas d'un signal de communication, le nom du radiodiffuseur.

News reporting

29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

Communication des nouvelles

29.2 L'utilisation équitable d'une oeuvre ou de tout autre objet du droit d'auteur pour la communication des nouvelles ne constitue pas une violation du droit d'auteur à la condition que soient mentionnés :

(a) the source; and	**a)** d'une part, la source;
(b) if given in the source, the name of the	**b)** d'autre part, si ces renseignements figurent dans la source :
(i) author, in the case of a work,	**(i)** dans le cas d'une oeuvre, le nom de l'auteur,
(ii) performer, in the case of a performer's performance,	**(ii)** dans le cas d'une prestation, le nom de l'artiste-interprète,
(iii) maker, in the case of a sound recording, or	**(iii)** dans le cas d'un enregistrement sonore, le nom du producteur,
(iv) broadcaster, in the case of a communication signal.	**(iv)** dans le cas d'un signal de communication, le nom du radiodiffuseur.
…	[…]
Educational Institutions	**Établissements d'enseignement**
Reproduction for instruction	**Reproduction à des fins pédagogiques**
29.4 (1) It is not an infringement of copyright for an educational institution or a person acting under its authority for the purposes of education or training on its premises to reproduce a work, or do any other necessary act, in order to display it.	**29.4 (1)** Ne constitue pas une violation du droit d'auteur le fait, pour un établissement d'enseignement ou une personne agissant sous l'autorité de celui-ci, de reproduire une oeuvre pour la présenter visuellement à des fins pédagogiques et dans les locaux de l'établissement et d'accomplir tout autre acte nécessaire pour la présenter à ces fins.
Reproduction for examinations, etc.	**Questions d'examen**
(2) It is not an infringement of copyright for an educational	**(2)** Ne constituent pas des violations du droit d'auteur, si

institution or a person acting under its authority to

elles sont faites par un établissement d'enseignement ou une personne agissant sous l'autorité de celui-ci dans le cadre d'un examen ou d'un contrôle :

(a) reproduce, translate or perform in public on the premises of the educational institution, or

a) la reproduction, la traduction ou l'exécution en public d'une oeuvre ou de tout autre objet du droit d'auteur dans les locaux de l'établissement;

(b) communicate by telecommunication to the public situated on the premises of the educational institution

b) la communication par télécommunication d'une oeuvre ou de tout autre objet du droit d'auteur au public se trouvant dans les locaux de l'établissement.

a work or other subject-matter as required for a test or examination.

If work commercially available

(3) Except in the case of manual reproduction, the exemption from copyright infringement provided by subsections (1) and (2) does not apply if the work or other subject-matter is ***commercially available***, within the meaning of paragraph (a) of the definition commercially available in section 2, in a medium that is appropriate for the purposes referred to in those subsections.

Accessibilité sur le marché

(3) Sauf cas de reproduction manuscrite, les exceptions prévues aux paragraphes (1) et (2) ne s'appliquent pas si l'oeuvre ou l'autre objet du droit d'auteur sont accessibles sur le marché — au sens de l'alinéa a) de la définition de ce terme à l'article 2 — sur un support approprié, aux fins visées par ces dispositions.

Performances

29.5 It is not an infringement of copyright for an educational institution or a person acting

Représentations

29.5 Ne constituent pas des violations du droit d'auteur les actes ci-après, s'ils sont

under its authority to do the following acts if they are done on the premises of an educational institution for educational or training purposes and not for profit, before an audience consisting primarily of students of the educational institution, instructors acting under the authority of the educational institution or any person who is directly responsible for setting a curriculum for the educational institution:

accomplis par un établissement d'enseignement ou une personne agissant sous l'autorité de celui-ci, dans les locaux de celui-ci, à des fins pédagogiques et non en vue d'un profit, devant un auditoire formé principalement d'élèves de l'établissement, d'enseignants agissant sous l'autorité de l'établissement ou d'autres personnes qui sont directement responsables de programmes d'études pour cet établissement :

(a) the live performance in public, primarily by students of the educational institution, of a work;

a) l'exécution en direct et en public d'une oeuvre, principalement par des élèves de l'établissement;

(b) the performance in public of a sound recording, or of a work or performer's performance that is embodied in a sound recording, as long as the sound recording is not an infringing copy or the person responsible for the performance has no reasonable grounds to believe that it is an infringing copy;

b) l'exécution en public tant de l'enregistrement sonore que de l'oeuvre ou de la prestation qui le constituent, à condition que l'enregistrement ne soit pas un exemplaire contrefait ou que la personne qui l'exécute n'ait aucun motif raisonnable de croire qu'il s'agit d'un exemplaire contrefait;

(c) the performance in public of a work or other subject-matter at the time of its communication to the public by telecommunication; and

c) l'exécution en public d'une oeuvre ou de tout autre objet du droit d'auteur lors de leur communication au public par télécommunication;

(d) the performance in public of a cinematographic work, as long as the work is not an infringing copy or the person responsible for the performance has no reasonable grounds to believe

d) l'exécution en public d'une oeuvre cinématographique, à condition que l'oeuvre ne soit pas un exemplaire contrefait ou que la personne qui l'exécute n'ait aucun

that it is an infringing copy.

motif raisonnable de croire qu'il s'agit d'un exemplaire contrefait.

News and commentary

Actualités et commentaires

29.6 (1) It is not an infringement of copyright for an educational institution or a person acting under its authority to

29.6 (1) Les actes ci-après ne constituent pas des violations du droit d'auteur s'ils sont accomplis par un établissement d'enseignement ou une personne agissant sous l'autorité de celui-ci :

(a) make, at the time of its communication to the public by telecommunication, a single copy of a news program or a news commentary program, excluding documentaries, for the purposes of performing the copy for the students of the educational institution for educational or training purposes; and

a) la reproduction à des fins pédagogiques, en un seul exemplaire, d'émissions d'actualités ou de commentaires d'actualités, à l'exclusion des documentaires, lors de leur communication au public par télécommunication en vue de leur présentation aux élèves de l'établissement;

(b) perform the copy in public before an audience consisting primarily of students of the educational institution on its premises for educational or training purposes.

b) les exécutions en public de l'exemplaire devant un auditoire formé principalement d'élèves de l'établissement dans les locaux de l'établissement et à des fins pédagogiques.

Reproduction of broadcast

Reproduction d'émissions

29.7 (1) Subject to subsection (2) and section 29.9, it is not an infringement of copyright for an educational institution or a person acting under its authority to

29.7 (1) Sous réserve du paragraphe (2) et de l'article 29.9, les actes ci-après ne constituent pas des violations du droit d'auteur s'ils sont accomplis par un établissement d'enseignement ou une personne agissant sous l'autorité de celui-ci :

(a) make a single copy of a work or other subject-matter at the time that it is communicated to the public by telecommunication; and

a) la reproduction à des fins pédagogiques, en un seul exemplaire, d'une oeuvre ou de tout autre objet du droit d'auteur lors de leur communication au public par télécommunication;

(b) keep the copy for up to thirty days to decide whether to perform the copy for educational or training purposes.

b) la conservation de l'exemplaire pour une période maximale de trente jours afin d'en déterminer la valeur du point de vue pédagogique.

Royalties for reproduction

(2) An educational institution that has not destroyed the copy by the expiration of the thirty days infringes copyright in the work or other subject-matter unless it pays any royalties, and complies with any terms and conditions, fixed under this Act for the making of the copy.

Paiement des redevances ou destruction

(2) L'établissement d'enseignement qui n'a pas détruit l'exemplaire à l'expiration des trente jours viole le droit d'auteur s'il n'acquitte pas les redevances ni ne respecte les modalités fixées sous le régime de la présente loi pour la reproduction.

Royalties for performance

(3) It is not an infringement of copyright for the educational institution or a person acting under its authority to perform the copy in public for educational or training purposes on the premises of the educational institution before an audience consisting primarily of students of the educational institution if the educational institution pays the royalties and complies with any terms and conditions fixed under this Act for the

Exécution en public

(3) L'exécution en public, devant un auditoire formé principalement d'élèves de l'établissement, de l'exemplaire dans les locaux de l'établissement et à des fins pédagogiques, par l'établissement ou une personne agissant sous l'autorité de celui-ci, ne constitue pas une violation du droit d'auteur si l'établissement acquitte les redevances et respecte les modalités fixées sous le régime de la présente loi pour

performance in public.

l’exécution en public.

Unlawful reception

Réception illicite

29.8 The exceptions to infringement of copyright provided for under sections 29.5 to 29.7 do not apply where the communication to the public by telecommunication was received by unlawful means.

29.8 Les exceptions prévues aux articles 29.5 à 29.7 ne s’appliquent pas si la communication au public par télécommunication a été captée par des moyens illicites.

Records and marking

Obligations relatives à l’étiquetage

29.9 (1) Where an educational institution or person acting under its authority

29.9 (1) L’établissement d’enseignement est tenu de consigner les renseignements prévus par règlement, selon les modalités réglementaires, quant aux reproductions et destructions qu’il fait et aux exécutions en public pour lesquelles des redevances doivent être acquittées sous le régime de la présente loi, et d’étiqueter les exemplaires selon les modalités réglementaires, dans les cas suivants :

(a) [Repealed, 2012, c. 20, s. 26]

a) [Abrogé, 2012, ch. 20, art. 26]

(b) makes a copy of a work or other subject-matter communicated to the public by telecommunication and performs it pursuant to section 29.7,

b) reproduction d’une oeuvre ou de tout autre objet du droit d’auteur lors de sa communication au public par télécommunication et exécution de l’exemplaire, dans le cadre de l’article 29.7.

the educational institution shall keep a record of the information prescribed by regulation in relation to the making of the copy, the

destruction of it or any performance in public of it for which royalties are payable under this Act and shall, in addition, mark the copy in the manner prescribed by regulation.

Regulations

(2) The Board may, with the approval of the Governor in Council, make regulations

(a) prescribing the information in relation to the making, destruction, performance and marking of copies that must be kept under subsection (1),

(b) prescribing the manner and form in which records referred to in that subsection must be kept and copies destroyed or marked, and

(c) respecting the sending of information to collective societies referred to in section 71.

Literary collections

30 The publication in a collection, mainly composed of non-copyright matter, intended for the use of educational institutions, and so described in the title and in any advertisements issued by the publisher, of short passages

Règlements

(2) La Commission peut, par règlement et avec l'approbation du gouverneur en conseil, préciser :

a) les renseignements relatifs aux reproductions, destructions et exécutions en public visées au paragraphe (1) que doivent consigner les établissements d'enseignement et qui doivent figurer sur les étiquettes;

b) les modalités de consignation de ces renseignements, et d'étiquetage et de destruction des exemplaires;

c) les modalités de transmission de ces renseignements aux sociétés de gestion visées à l'article 71.

Recueils

30 La publication de courts extraits d'oeuvres littéraires encore protégées, publiées et non destinées elles-mêmes à l'usage des établissements d'enseignement, dans un recueil qui est composé principalement de matières non

from published literary works in which copyright subsists and not themselves published for the use of educational institutions, does not infringe copyright in those published literary works if

protégées, préparé pour être utilisé dans les établissements d'enseignement et désigné comme tel dans le titre et dans les annonces faites par l'éditeur ne constitue pas une violation du droit d'auteur sur ces oeuvres littéraires publiées à condition que :

(a) not more than two passages from works by the same author are published by the same publisher within five years;

a) le même éditeur ne publie pas plus de deux passages tirés des oeuvres du même auteur dans l'espace de cinq ans;

(b) the source from which the passages are taken is acknowledged; and

b) la source de l'emprunt soit indiquée;

(c) the name of the author, if given in the source, is mentioned.

c) le nom de l'auteur, s'il figure dans la source, soit mentionné.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Arthur B. Renaud Erin Finlay Jessica Zagar	FOR THE PLAINTIFF/ DEFENDANT BY COUNTERCLAIM
John C. Cotter Janet Chong Barry Fong Lillian Wallace Evan Thomas	FOR THE DEFENDANT/ PLAINTIFF BY COUNTERCLAIM

SOLICITORS OF RECORD:

The Canadian Copyright Licensing Agency Toronto, Ontario	FOR THE PLAINTIFF/ DEFENDANT BY COUNTERCLAIM
Osler, Hoskin & Harcourt LLP Barristers and Solicitors Toronto, Ontario	FOR THE DEFENDANT/ PLAINTIFF BY COUNTERCLAIM