

Federal Court



Cour fédérale

Date: 20210513

Docket: T-1663-19

Citation: 2021 FC 425

Ottawa, Ontario, May 13, 2021

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

**CANADIAN BROADCASTING
CORPORATION / SOCIÉTÉ RADIO-
CANADA**

Applicant

and

**CONSERVATIVE PARTY OF CANADA and
CONSERVATIVE FUND CANADA**

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] In summary, this is a case about political criticism and whether the Canadian Broadcasting Corporation/Société Radio-Canada [CBC] can prevent political parties from using CBC's copyright protected works for this purpose.

[2] CBC brings this application in copyright infringement in respect of the use of their “Works” by the Conservative Party of Canada [Party or CPC] for what are commonly called “attack ads” shown at the time of the 2019 federal election.

The Works are brief excerpts of CBC news reports which appeared in an election advertisement and also brief excerpts from the English language federal leadership debate distributed in a series of four tweets.

II. Background

[3] CBC had asked for a very wide ranging injunctive relief preventing CPC from ever reproducing or disseminating excerpts from any CBC news or commentary program. That relief was significantly pared back days before the hearing of its application. The remaining relief requested is a form of declaration as to CBC’s rights and CPC’s breach of them. CBC is not asking for a monetary award.

[4] The CBC is Canada’s national broadcaster with a mandate to provide programming that informs, enlightens and entertains individuals across Canada. To meet its obligations under the *Broadcasting Act*, SC 1991, c 11, the CBC enacted its own Journalistic Standards and Practices which states that the CBC’s coverage during an election will be “fair and balanced”.

[5] The CPC is a federal political party and the Conservative Fund Canada [Fund] is its Chief Agent – collectively the Respondents.

[6] The materials at issue are described in the following paragraphs but the actual videos, tweets and other materials (print and video) were filed in evidence.

A. Legislative Framework

[7] The *Copyright Act*, RSC 1985, c. C-42 [Act], provides the relevant statutory framework for this matter, particularly the provisions governing “fair dealing”.

Definitions

2 In this Act,

...

cinematographic work
includes any work expressed by any process analogous to cinematography, whether or not accompanied by a soundtrack; (*oeuvre cinématographique*)

...

maker means

(a) in relation to a cinematographic work, the person by whom the arrangements necessary for the making of the work are undertaken, or

(b) in relation to a sound recording, the person by whom the arrangements necessary for the first fixation of the sounds are undertaken; (*producteur*)

Définitions

2 Les définitions qui suivent s'appliquent à la présente loi.

[...]

oeuvre cinématographique
Y est assimilée toute oeuvre exprimée par un procédé analogue à la cinématographie, qu'elle soit accompagnée ou non d'une bande sonore.
(*cinematographic work*)

[...]

producteur La personne qui effectue les opérations nécessaires à la confection d'une oeuvre cinématographique, ou à la première fixation de sons dans le cas d'un enregistrement sonore. (*maker*)

...

[...]

Copyright in works**Droit d'auteur sur l'oeuvre**

3 (1) For the purposes of this Act, copyright, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

3 (1) Le droit d'auteur sur l'oeuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l'oeuvre, sous une forme matérielle quelconque, d'en exécuter ou d'en représenter la totalité ou une partie importante en public et, si l'oeuvre n'est pas publiée, d'en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif :

(a) to produce, reproduce, perform or publish any translation of the work,

a) de produire, reproduire, représenter ou publier une traduction de l'oeuvre;

(b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,

b) s'il s'agit d'une oeuvre dramatique, de la transformer en un roman ou en une autre oeuvre non dramatique;

(c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,

c) s'il s'agit d'un roman ou d'une autre oeuvre non dramatique, ou d'une oeuvre artistique, de transformer cette oeuvre en une oeuvre dramatique, par voie de représentation publique ou autrement;

(d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,

d) s'il s'agit d'une oeuvre littéraire, dramatique ou musicale, d'en faire un enregistrement sonore, film cinématographique ou autre support, à l'aide desquels l'oeuvre peut être

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|---|---|
| | reproduite, représentée ou exécutée mécaniquement; |
| (e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work, | e) s'il s'agit d'une oeuvre littéraire, dramatique, musicale ou artistique, de reproduire, d'adapter et de présenter publiquement l'oeuvre en tant qu'oeuvre cinématographique; |
| (f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication, | f) de communiquer au public, par télécommunication, une oeuvre littéraire, dramatique, musicale ou artistique; |
| (g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan, | g) de présenter au public lors d'une exposition, à des fins autres que la vente ou la location, une oeuvre artistique — autre qu'une carte géographique ou marine, un plan ou un graphique — créée après le 7 juin 1988; |
| (h) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program, | h) de louer un programme d'ordinateur qui peut être reproduit dans le cadre normal de son utilisation, sauf la reproduction effectuée pendant son exécution avec un ordinateur ou autre machine ou appareil; |
| (i) in the case of a musical work, to rent out a sound recording in which the work is embodied, and | i) s'il s'agit d'une oeuvre musicale, d'en louer tout enregistrement sonore; |
| (j) in the case of a work that is in the form of a tangible object, to sell or | j) s'il s'agit d'une oeuvre sous forme d'un objet tangible, d'effectuer le |

otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner,

transfert de propriété, notamment par vente, de l'objet, dans la mesure où la propriété de celui-ci n'a jamais été transférée au Canada ou à l'étranger avec l'autorisation du titulaire du droit d'auteur.

and to authorize any such acts.

Est inclus dans la présente définition le droit exclusif d'autoriser ces actes.

...

[...]

Exceptions

Exceptions

Fair Dealing

Utilisation équitable

Research, private study, etc.

Étude privée, recherche, etc.

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.

Criticism or review

Critique et compte rendu

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. |

B. CBC Works – The Advertisement

[8] During the 2019 federal election period, the Respondents published an advertisement called “Look at what we’ve done” [Advertisement] and four (4) tweets [Tweets] that each reproduced excerpts from CBC original TV segments. CBC claims ownership of the copyrights in all of this material – the “CBC Works”.

[9] These clips were taken from CBC’s programs including two segments (“At Issue” and “Point of View”) from “The National” (CBC’s leading national English evening television program) and from the “Power Panel” segment of “Power and Politics”.

C. The Advertisement

[10] The Advertisement is part of the Respondents’ political campaign criticizing the Liberal government and Prime Minister Trudeau. More particularly, the Advertisement was one of a

series of negative ads - “Justin Trudeau – Not As Advertised”. The Advertisement challenges the Prime Minister’s management (mismanagement) of issues varying from the federal deficit to the SNC-Lavalin controversy to adverse conflict of interest findings as well as other matters.

The Respondents targeted as the potential audience anyone who might be “open to voting for the Conservative Party”.

[11] This video is 1.46 minutes long, and includes excerpts from various publicly broadcast English-language news programs including not just CBC but CTV News, Citytv and Global News.

[12] The Advertisement contains five excerpts [the CBC Clips]:

1. “The Coyne Clip” - a non-CBC employee says “And the Prime Minister broke the law in four different places and that’s just talking about the Conflict of Interest Act.” It is a 4-second excerpt from a 5:12 minute segment from The National, originally broadcast on December 20, 2017 [At Issue Segment].
2. “The Town Hall Clip” - Prime Minister Trudeau asked “Why are we still fighting against certain veterans’ groups ... because they are asking for more than we are able to give right now.” Other than a “jump cut” that removed the two words “in court,” the statement made by Mr. Trudeau in the Town Hall Clip was exactly as it appeared during the town hall meeting. This clip is an 8-second excerpt from a 102 minute broadcast of a town hall event with Prime Minister Trudeau, originally broadcast on February 1, 2018 [the Town Hall Video]. Following the Town Hall Clip, there is a short clip whose ownership is disputed by the parties.
3. The “Tasker Clip” is a 5-second clip from the Power Panel Segment. In it, a CBC-employee, Mr. Tasker asks questions about a publicly-funded Loblaws bail out. This is a 5-second clip from an 8:12 minute segment from the Power and Politics program, originally broadcast on April 9, 2019 [Power Panel Segment].
4. “The Murphy Clip” is a 7-second clip from the Point of View Segment in which Rex Murphy, a then-CBC freelance commentator states that Mr. Butts and Ms. Telford (senior personnel in the Prime Minister’s Office) received moving expenses totalling over \$200,000. This is a 7-second clip from a 3:30 minute segment from The National, originally broadcast on September 22, 2016 [Point of View Segment].

5. “The Singh Clip” - a *Times of India* employee states that “Trudeau’s visit to India has been a colossal failure”. For two seconds, this clip’s audio overlaps with non-CBC footage. This is a 5-second clip from a 9:10 minute CBC News Network segment, originally broadcast on February 24, 2018 [News Network Segment].

[13] The Advertisement was viewed over two million times since it was first published on October 4, 2019. It was widely disseminated in mass emailing, on the Party’s Facebook page, Youtube channel and the “Not as Advertised” website, and as a paid advertisement on the Postmedia website. The Advertisement was removed on October 10, 2019.

D. The Tweets

[14] The four tweets at issue in this case were published on the Party’s French- and English-language Twitter accounts on October 7 and 8, 2019. Each Tweet includes a video clip [collectively, the Debate Clips] from the full two-hour broadcast of the 2019 federal election’s leaders’ debate [the Leaders’ Debate]:

1. The “First Tweet” included a 42-second clip of Andrew Scheer (CPC Leader) speaking at the Leaders’ Debate.
2. The “Second Tweet” included a 21-second clip of Mr. Scheer and Jagmeet Singh (NDP Leader) speaking at the Debate.
3. The “Third Tweet” included the same clip as the Second Tweet, but with a different (French) caption.
4. The “Fourth Tweet” included a 14-second clip of Mr. Scheer and Mr. Trudeau speaking at the debate.

[15] The Leaders’ Debate was originally broadcast on 15 different online platforms and by 10 different TV networks including the CBC on October 7, 2019. It was produced by the Canadian Debate Production Partnership [CDPP], a non-partisan group of broadcasters chaired

by the CBC's general manager and editor-in-chief. Neither the CDPP nor any of the other broadcasters have raised any concerns about the use of the Twitter Clips.

[16] The CDPP was selected to be the debate producer on the condition that it would ensure the Debate reached "the greatest number of Canadians" and that it would maintain "high journalistic standards", namely to allocate equitable time to all political parties for partisan political programming in respect of the debates.

[17] The political parties agreed not to edit the Leaders' Debate themselves, but rather to use only the full-length Video or the 63 CBC-approved clips from the Debate available from the CDPP Youtube Channel (CDPP Clips).

[18] As a member of the CDPP, the CBC participated in the producing, broadcasting and organizing the Debate. The CBC holds the copyright in the Leaders' Debate Video on behalf of the CDPP as well as by contract.

[19] While it is unclear how many times the Tweets have been viewed before they were taken down, there is evidence that some of the Tweets were "re-tweeted" and "liked" hundreds of times.

[20] Between October 7 and 8, 2019, CBC's Law Department sent five letters threatening injunctive relief if the Advertisement and Tweets were not removed. On October 10, they were removed without an admission of liability.

[21] Just before the 2019 federal election, this action was commenced. Originally, it included two prominent journalists as co-applicants but these individuals were removed from the action.

III. Analysis

[22] The principal legal issues in this matter are:

1. Did the Respondents exhibiting of the Advertisement and Tweets constitute “taking” a substantial part of CBC’s Works?
2. Do the Respondents’ actions constitute “fair dealings”?
3. What is the appropriate remedy?

A. Preliminary

[23] The first preliminary matter is mootness as the infringement matters have been removed even before the election day. Mootness is a further issue arising from CBC dropping the request for injunctive relief leaving the sole remedy of declaration. The Respondents say that a bare declaration cannot be issued.

The second preliminary matter is whether CBC owns the Works in issue. It spent considerable effort on this issue although it was not nor could it be seriously challenged by the Respondents as discussed later.

B. Mootness

[24] The Court raised with the parties whether the case was moot and if it was, whether it should be decided in these circumstances in accordance with the principles in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*].

[25] The issue of mootness due to the removal of the advertising had been raised by previous counsel to the Respondents but was not later pursued.

[26] As indicated in *Borowski*, if a matter is moot, it is a matter of principled discretion whether a court should proceed to decide the matter in any event. In my view, it should in this instance.

[27] There is an adversarial context. Neither party concedes the other's position; there is no suggestion that the Respondents will not engage in the same type of use in the future. In the current circumstances, an election is a possibility in the near to mid future.

[28] In terms of judicial economy, the parties and the Court have prepared for and fully argued the issue. The time and effort would be foregone if the matter is not decided.

[29] A most relevant factor is that the issues between the parties can be addressed absent the urgency and general disruption of an injunction hearing held against the backdrop of an impending election day.

[30] This is a matter which is reasonably likely to occur again. It is an appropriate role for the Court to resolve the issue to avoid a repetition of the matter in dispute. The Court's resolution would not be academic and would assist potentially the parties in their plans for any future election campaign.

[31] I am therefore satisfied that this is a proper issue for the Court to exercise its discretion to resolve in this context.

[32] With the exception of the "Singh Clip" and the "Stammering Clip", there is no real dispute that CBC owns the Works. CBC, as the maker of a cinematographic work, is presumed to be the owner of that work. (See *Interbox Promotion Corp v 9012-4314 Québec Inc*, 2003 FC 1254 at paras 19 and 24)

CBC has asserted its ownership by having its name, logo and/or brand appearing on the clips clearly and repeatedly. This is an important matter for s 19.1 (the attribution provision) of the Act in respect of criticism under s 29.1.

C. The "Maker"

[33] The Act presumes copyright to subsist in the "cinematographic work" and the "maker" shall be presumed as the owner of that work unless the contrary is proved (s 34.1(1)).

[34] While there is no definition of "cinematography" to accompany the statutory definition "cinematographic work", I adopt the comments in S. Handa, *Copyright Law in Canada* (2002) at

p 178 and J. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs* (3rd ed., 2000).

The gravamen of these publications in this instance is that the dictionary definition of “cinematography” of “the art of taking and producing films” is sufficient and that video recordings qualify as a process “analogous to cinematography”.

[35] Importantly, in this case given s 29.1’s requirement for source identification, all of the CBC Works have the CBC name, logo and/or brand appearing on them clearly and repeatedly.

[36] Having set the legislative framework and disposed of the uncontested matter of ownership, the next issue is whether the Advertisement and the Tweets constitute a substantial part of CBC’s copyright works.

D. Substantial Part

[37] In *Cinar Corporation v Robinson*, 2013 SCC 73 [*Cinar*], the Supreme Court set the approach to determining “substantial part” as “qualitative and holistic”. The Court recognized the importance of striking a balance between the rights of authors to have their skill and judgment protected and the rights of users to keep ideas in the public domain, for anyone to draw upon. The test for determining substantial part should not break copied features into component parts as this “abstraction” prevents a holistic assessment.

[38] The Respondents take the position that, in the context of quantitative and qualitative analysis, the portions of CBC Works taken by them is not substantive.

[39] On the matter of quantitative taking, the Respondents say that each CBC Clip in the Advertisement and the Tweets consist of less than 0.5% on average of the underlying work from which it was taken. As pointed out in *Warman v Fournier*, 2012 FC 803, taking 32% of a work did not, in that case, constitute a substantial taking.

[40] At a micro level the Respondents relied on such factors as: that the CBC Clips are merely one or two sentences taken from a speaker in a single shot; that the Advertisement of 1 minute, 46 seconds contained short clips not only from CBC but also CTV, CityTV and Global; that the Advertisement Clips each consisted of 0.25% or less of CBC programs; that the Coyne Clip was a 4 seconds excerpt. The Respondents' submissions contain similar quantitative figures for the other Works at issue.

[41] On the qualitative aspect, the Respondents argue that the CBC Clips reproduce some of CBC's editorial or administrative contributions which do not give rise to originality nor do the Advertisement or Tweets.

[42] The Respondents take the position that as a result of the decision in *Cinar*, the proper focus of the inquiry is on quality and quantity and that other factors cited by CBC have fallen away and are no longer relevant to a substantiality analysis.

[43] Even if the Respondents are correct, they do not meet the qualitative aspect of the test to which they admit being subject.

[44] In *Cinar*, the Supreme Court set out five factors to consider in determining whether a reproduction constitutes a “substantial part” of the original work:

- a) the quality and quantity of the material taken, including the importance of the parts taken to the plaintiff’s work and the extent of originality of the parts taken.
- b) the extent to which the impugned use adversely affects the plaintiff’s activities and diminishes the value of the plaintiff’s copyright.
- c) whether the material taken is the proper subject-matter of copyright.
- d) the purpose for which the material is taken, including whether the defendant intentionally appropriated the plaintiff’s work to save time and effort.
- e) whether the material is used in the same or similar fashion as the plaintiff’s.

E. Quality and Quantity

[45] Consistent with the approach in *Cinar*, these two aspects are of fundamental importance. The other factors add nuance and context to these two factors. *Cinar*, at para 26, put emphasis on the qualitative aspect.

[46] Following on the *Cinar* decision, this Court in *Davydiuk v Internet Archive Canada*, 2016 FC 1313, emphasized that the substantiality analysis is not a purely mathematical exercise; whether a vital part of copyrighted work has been reproduced is a qualitative, not quantitative exercise. Even a single still image can represent a substantial reproduction of a cinematographic work.

[47] Quantitatively the CBC and Debate Clips constitute minor portions of the full length of the CBC Works and Leaders' Debate. This is a factor which may be more relevant to the second stage of the "fair dealing" analysis – character of the dealing.

[48] In the qualitative analysis, irrespective of the amount copied, as held at para 36 of *Cinar*, a copied feature can reproduce a "substantial part" of the work if it represents a substantial portion of the skill and judgment expressed in the underlying work. The Respondents took all of the copyrighted work in the brief clips they used as they took all the skill and judgement used to create the original.

[49] What is at issue is not the "sound bite" or words spoken as copyright in these elements belong to the interviewer or the speaker (*Hager v ECW Press Ltd*, [1998] FCJ No 1830 (FCTD) [*Hager*]).

[50] It is the artistic design, production services (lighting, camera work, audio, etc.) and journalistic decisions (i.e. the flow of discussions and the election and posing of questions) which are the skill and judgment of the CBC and their employees.

[51] While the facts, information and ideas are not protected by copyright, the taking was of the CBC style of audio-visual material. Some of the material came from some of CBC's most popular and widely recognized programs: *The National* and *Power and Politics*.

[52] The Respondents rely on this CBC recognition and brand identity in its argument that it meets the attribution requirements of s 29.1, in order to assert the exception to liability for criticism.

[53] In terms of the qualitative aspect of the Works, examined subjectively, it was the Respondents who selected the Works – it was not an incidental infringement.

From an objective perspective, the Works are clearly a taking of CBC and its employees' skill and judgment discussed above. That taking involved the Respondents' selectivity and manipulation of the CBC Works. The comments taken are qualitatively significant in delivering the Respondents' "message" to voters.

[54] With respect to the other factors, the CBC has not established that it has suffered some adverse impacts from the Respondents' use of its Works in the "attack ads", nor should such adverse impacts be assumed. In so holding, the Court recognizes that such impacts are difficult to quantify (see *ITAL-Press Ltd v Sicoli*, [1999] FCJ No 837 (FCTD)). However, absent something more than intangible and speculative concerns, the CBC's brand would seem to be strong enough to counter any suggestion of involvement in partisan politics.

[55] The CBC, as a state owned enterprise, is being reasonable in its concern to neither be nor appear to be politically partisan. It is unfair to allege, as the Respondents do, that the adverse impacts arise from its commencing this litigation. There is no evidence to support the accusation that CBC is acting irrationally in protecting its rights. To do otherwise is to open it to a Catch 22

situation of being accused of favouring a party if it did not exert its rights against them and criticized as partisan when it does assert its rights.

[56] I concur with the CBC's argument that the CBC Works and Leaders' Debate are all the proper subject matter of copyright.

[57] With respect to the purpose for which the material was taken, I would not limit the inquiry to only whether the appropriation was to save time and effort. As held in *Wiseau Studio, LLC v Harper*, 2020 ONSC 2504 [*Wiseau*], the substantial part analysis includes the importance of the materials, adverse impacts, proper copyright subject matter as well as the reason for copying.

[58] The evidence establishes that the appropriation was to create a political ad that was designed to show Mr. Trudeau in an unfavourable light and consequently seek support (votes, money or both) from viewers.

[59] While there may be other marketing techniques to convey the ineptitude which the Respondents seem to want to exhibit, one of the most powerful techniques in any advocacy is to turn an opponent's works and actions back on them. And one of the fastest and easiest techniques is to use video and audio excerpts to convey that message.

[60] In my view, the appropriation was not just to save time and effort (although that was an aspect) but also the impactful nature of clips showing an opponent saying and doing things that hold them up to potential ridicule and criticism.

[61] As the Court found in *United Airlines, Inc v Cooperstock*, 2017 FC 616, the Court must establish the true purpose behind the taking of copyright. In that case, the Court concluded that the purpose was not to engage in parody but to defame the airline. This is also a factor to consider under “fair dealing”, where the appropriation was for political gain and to undermine a political opponent.

[62] The Respondents contend that the materials were not created to solicit donations. They say that they gained nothing monetarily from the Tweets and a mere \$2,000 from the Advertisement. Despite these alleged failures, the Respondents have not committed to not do something similar in future elections. While it is often said that the public do not like attack ads, political parties seem to repeatedly engage in them and there must be some public support for them.

[63] In considering the purpose of an appropriation, it would be an error to focus solely on money. In the political context, votes are currency and securing votes is the ultimate game – money just allows a political party the opportunity to pursue votes.

[64] In the context of a political campaign, I conclude that the purpose of the appropriation was saving time and money, and creating an impactful political campaign and influencing voters. All of this supports the qualitative taking and the substantiality criteria.

[65] In respect of the issue of whether the material was used in the same or similar fashion as the plaintiff's use, there is no basis for contending that there was similar use. While this weighs against a substantiality finding, it is of minor importance in the weighing exercise in which the Court engaged in this case.

[66] Therefore, the Court concludes that the Respondents took in respect of the Advertisement and Tweets a substantial part of CBC's copyrighted Works.

[67] The next issue is whether such appropriation is permitted as "fair dealing".

F. Fair Dealing

[68] Having concluded that the Respondents appropriated a "substantial" part of the CBC Works, it is incumbent upon them to establish that the taking was "fair dealing" under the Act. This issue engages a two-step analysis – (1) the dealing must be for an allowable purpose; and (2) the dealing must be fair (*Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36 [SOCAN]).

[69] Whether the matter of fair dealing is a "user's right" or a "user's defence" is of no moment in this case. The provisions addressing fair dealing must, as with all enactments, follow

s 12 of the *Interpretation Act*, RSC 1985, c I-21, and *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, to give the words such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[70] The object of “fair dealings” is to provide a user the opportunity to use copyrighted materials for specific purposes and in specific ways. There is no reason to give the provisions a narrow, restrictive meaning so long as the balance between users’ interests and those of owners is maintained. As held in *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 [CCH], the provisions are to be given a large and liberal interpretation in respect of allowable purpose so as to properly balance the rights of owners and users.

(1) Allowable Purpose

[71] In this regard, the Court cannot adopt CBC’s approach to this issue. CBC gives to the provision a narrow technical interpretation that frustrates the purpose of the provisions. That approach is contrary to the Supreme Court’s approach in *SOCAN* at para 27.

[72] The CBC, in focusing the inquiry on the scope of “criticism”, ignores the words of s 29 that focuses the inquiry on the purpose of the taking not just on the type of communication or composition.

[73] The Respondents rely on the allowable purposes of criticism and review, satire and education. In my view, only criticism is seriously at issue here.

[74] While satire includes elements of ridicule, irony or sarcasm, the overall tenor of the CBC Works, as used by the Respondents, contains elements of satire but is less “Monty Python” and more “Sports 40 Best Bloopers”.

A poem or (in later use) a novel, film, or other work of art which uses humour, irony, exaggeration, or ridicule to expose and criticize prevailing immorality or foolishness, esp. as a form of social or political commentary.

Oxford English Dictionary

[75] The Respondents’ purpose is not just to make fun of the Prime Minister or ridicule his works and behaviour, but also to criticize the ideas and actions of the Prime Minister and the Liberal Party in the sense of fault finding.

[76] CBC argues that the purpose of “criticism” must be restricted to criticism of the work itself. This is too narrow an interpretation of the provision and would undermine the purpose of allowing ideas and conduct to be challenged in a particular manner. The focus would be on form not content.

[77] Lord Denning, in *Hubbard v Vosper*, [1972] 2 QB 84 (Eng CA), noted that fair dealing cannot be precisely defined. If the taking was used for criticism, including the philosophy behind Scientology (as in that case), copied works can criticize the work’s style as well as the thoughts expressed therein.

[78] In the same vein, in *Fraser Health Authority v Hospital Employees’ Union*, 2003 BCSC 807 at para 53, the BC Supreme Court concluded that fair dealing for the purpose of criticism

does not only pertain to criticism of the work's style but to the ideas found therein and its moral and social implications.

[79] In summary, Canadian jurisprudence has established that it is not merely the text or composition of a work that may be the object of criticism but also the idea set out in the work and the social or moral implications of those ideas (see *Hager*). As held in the UK, a party is entitled to criticize not only the literary style, but also the doctrine or philosophy as expounded in the work. Criticism, satire and review are intellectual challenges to particular thoughts, words and actions.

[80] Section 29.1's reference to criticism must be read in context of review, parody or satire where fair dealing allows for the challenge to content not just format of the expression. It would be artificial to limit criticisms to the expression of how the work was produced but preclude showing the ideas or actions being challenged.

[81] Criticism is embedded in the CBC Works that the Respondents used. For example, the Advertisement juxtaposed a short clip of the Prime Minister asking the viewer to "look at what we've done" with the news clip that invited unfavourable conclusion about his performance and the mistakes he supposedly made.

[82] The Tweets did much the same in criticising the Prime Minister's performance, both in office and at the Leaders' Debate by reference to words spoken at the Leader's Debate.

[83] The Ad Clips contain elements of satire by juxtaposing the invitation to “look at what we’ve done” with media coverage critical of the Prime Minister’s record, using examples to criticize the Prime Minister.

[84] The Respondents rely on “education” as an allowable purpose. The difficulty with the Respondents’ position is that it so dilutes the meaning and notion of education as to be meaningless. The Court must look at the true purpose of the Respondents’ campaign. It is doubtless designed to inform and to persuade to a particular view, as is advertising for consumer commodities for example, but it is not designed to train, to discipline or to pass on knowledge other than for the transitory period of an election campaign.

[85] Lastly, for the Respondents to succeed in their claim of criticism, s 29.1 requires mention of the “source”. Source is not defined for this type of situation of an “owner”. Again, the Court must not become microscopic in its analysis. The purpose of the provision is met if the source is identified or identifiable to a reasonably informed watcher. However, it is an important requirement as acknowledged by *Michelin v Caw*, [1997] 2 FC 306 (FCTD).

[86] In this case, the Tasker Clip, Town Hall Clip and Fourth Twitter Clip displayed the CBC logo. Other excerpts disclose the source in other ways, through easily recognized core program site, TV personality – all of which CBC acknowledges as identification with itself.

[87] Having concluded that the appropriation of the CBC Works was for an allowable purpose, the Court must consider whether the dealing was “fair”.

(2) Fairness Requirement

[88] As held in *SOCAN*, the fairness inquiry engages six (6) factors:

- i. the purpose of the dealing;
- ii. the character of the dealing;
- iii. the amount of the dealing;
- iv. the existence of any alternatives;
- v. the nature of the work; and
- vi. the effect of the dealing on the work.

In summary, I conclude that these factors weigh in favour of fairness.

(a) Purpose of the dealing

[89] It has been established that the taking was for an allowable purpose – that of criticism at the very least. But this was not criticism for the sake of criticism and the Court must examine the real purpose or motive for the “purpose of criticism”.

[90] The ultimate purpose was to mount a political campaign to secure votes to form a government. In that respect, the purpose was one of engaging in the democratic process. Even a purpose of raising funds in this context is part of an election process.

[91] While a court must be cautious in wrapping the analysis too much in the flag of democracy – where rhetoric overshadows reason – the evidence is that the use of the CBC Works was for this legitimate political purpose.

As such, this factor points to fairness.

(b) Character of the dealing

[92] This factor focuses on the distribution of and number of copies produced. A single copy tends to be fairer than multiple copies (*SOCAN*, para 55). However, the Supreme Court cautioned, particularly in light of modern communications assets such as the internet, in quantifying the “aggregate amount” of disseminated digital works as compared to non-digital ones may undermine the goal of technical neutrality.

[93] The Respondents’ attempt to correlate the Advertisement and Tweets with the safeguards referred to in *SOCAN* is misplaced. In *SOCAN*, the music previews were short, of lower quality than the copyrighted musical works and were automatically deleted once heard. None of these features exist here.

[94] There is little detail on distribution and viewing, although the Advertisement was viewed two million times despite allegedly being available for six days on the Respondents’ social media account. It is known that the Tweets were “retweeted” and “liked” hundreds of times without knowing how many times the Tweets were viewed.

[95] It is the Respondents’ burden to establish “fairness” and on this factor, it has not done so.

(c) Amount of Dealing

[96] This factor refers to the quantity of the Works taken where the Court must assess the proportion of the excerpt used in relation to the whole of the work. The Respondents, as indicated earlier, put considerable emphasis on the small propositions taken from the whole. For example, on average, each Clip is 0.5 – 3% of the original work from which it was excerpted. Similarly, the Debate Clips are a small fraction of the two hour Leaders' Debate.

[97] While the use of CBC material was neither excessive nor trivial, and the Clips were important footage, the Advertisement was not solely CBC Clips or CBC materials but contained elements of news broadcasts from other media sources.

[98] Overall, this factor favours a fairness finding.

(d) Alternatives to the Dealing

[99] CBC contends that there were many other effective ways the Respondents could have communicated the same message without infringement.

[100] There were alternatives, for example, encouraging people to watch the Debates rather than use clips or using actors being interviewed about their disappointment with Mr. Trudeau (the Betrayed Ad) or the Joly Video of various Conservative Party members speaking with citizens about Mr. Trudeau's decisions.

[101] The real issue is whether these alternatives were as reasonably effective as direct statements or actions of the targeted politicians. For example, it is difficult to see a reasonable alternative to Mr. Trudeau’s India dance scene or his handling of awkward questions about veterans’ compensation.

[102] At best, this is a neutral factor in the fairness analysis.

(e) Nature of the Work

[103] As *Wiseau* (para 192) explains, this factor considers “the nature of the copyrighted work, and the extent to which it has already been disseminated”. In *CCH*, the Court observed that reproducing confidential work is likely less fair than reproducing published work.

[104] As a public broadcaster, CBC content is clearly designed for public viewing. Its content can be viewed in all types of settings from homes to offices to bars and over many platforms. In fact, the CBC has a mandate to distribute its content and in situations like the Leaders’ Debate, the CDPP had an obligation of wide distribution.

[105] The nature of the work, being news or news-like content, favours a fairness conclusion.

(f) Effect of the Work

[106] The CBC expresses concern that its material is being used in a non-partisan way which affects its journalistic integrity and damages its reputation for neutrality.

[107] This is not a situation of the reproduced work competing in the market of the original work except to the extent that the segments shown may cause people to ignore the original work, such as not watching the Leaders' Debate.

[108] There is no objective evidence of the likelihood of any reputational damage. After all the years of political coverage in multiple democracies, there was no evidence presented that a broadcaster's segment disclosed in a partisan setting reflected adversely on the broadcaster.

[109] As noted earlier, the CBC's concern for its neutrality is reasonable. The role of the CBC itself has been a political topic. There may be situations in the future where the manner of use and distribution of CBC material may adversely affect the CBC – however, that is not the case here. Fear and speculation cannot ground a finding of unfairness in this factor.

(3) Summary

[110] Weighing all these factors, the Court concludes that the Respondents' use of the CBC Works was, on these facts, fair.

IV. Relief

[111] As indicated at the outset of this Decision, the CBC had requested a wide ranging injunction. The terms of such an injunction would have been to create a code for the Respondents to follow in its political advertising. Such a code is difficult to craft and to enforce.

CBC amended its requested relief to a declaration of right alone. This is an unusual remedy but not unknown either in principle or practice (*Ewert v Canada*, 2018 SCC 30).

[112] However, given the Court's disposition, a simple dismissal is the appropriate and necessary remedy.

V. Conclusion

[113] Given the Court's findings that the Respondents' use of CBC copyrighted material was for an allowable purpose and was "fair dealing", this matter must be dismissed with costs at the usual scale.

JUDGMENT in T-1663-19

THIS COURT'S JUDGMENT is that the application is dismissed with costs at the usual scale.

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1663-19

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SOCIÉTÉ RADIO-CANADA v CONSERVATIVE
PARTY OF CANADA AND CONSERVATIVE FUND
CANADA

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OTTAWA, ONTARIO (THE COURT) AND
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