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Fair Dealing for the Purpose of Education: *York University v The Canadian Copyright Licensing Agency*

Pascale Chapdelaine*

1. Introduction

In *York University v The Canadian Copyright Licensing Agency* (“Access Copyright”),¹ the Federal Court of Appeal (FCA) was confronted with two issues at the heart of ongoing debates in Canadian copyright law. The first is whether tariffs of copyright collective societies are mandatory, a question that was not addressed by courts at such length in recent times.² The second issue, and primary focus of this comment, concerns the application of fair dealing for the purpose of education to York (and other educational institutions). Recently added to the *Copyright Act*³ fair dealing for the purpose of education had not been dealt with by courts prior to this litigation opposing Access Copyright and York.

Since the FCA decision was issued in April 2020, both Access Copyright and York applications for leave to appeal to the Supreme Court were granted.⁴ The Supreme Court

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¹ *York University v The Canadian Copyright Licensing Agency* (“Access Copyright”), 2020 FCA 77 [FCA decision].

² *Ibid* at paras 195-199 (the FCA citing previous decisions where tariffs were enforced against copyright infringers, often through default judgments or where the (non)mandatory nature of tariff was not discussed at length). The FCA refers to and applies various decisions relevant to the enforceability of tariffs including the more recent Supreme Court decision: *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57.

³ RSC, 1985, c C-42 [the *Act*]; *Copyright Modernization Act*, S.C. 2012, c. 20, s. 21 (amended fair dealing provisions by adding the allowable purpose of education to other purposes).

⁴ *York University, et al. v. Canadian Copyright Licensing Agency* (“Access Copyright”), *et al.* (15 October 2020), Canada, SCC 39222 (Applications for Leave), online: <<https://decisions.scc-csc.ca/scc-csc/scc-l-csc-a/en/18507/1/document.do>>.

decision is highly anticipated given the stakes involved for educational institutions and users of copyright works more generally, as well as for copyright collective societies and the copyright holders they represent.

Starting with an overview of the litigation, the comment will contextualize Access Copyright's licences and Interim Tariff,⁵ York's decision to opt out of it, and York's Fair Dealing Guidelines (Guidelines). It will then proceed to analyse the two main issues at hand. First, I briefly look at the implications of the (non)mandatory nature of tariffs for Access Copyright and other collective societies generally. Second and the greater focus of this comment, I examine the challenges of applying fair dealing for the purpose of education to large institutions and in particular, to institutional practices such as the Guidelines implemented by York.

While fair dealing has been characterized as a "user right" by the Supreme Court in *CCH Canadian Ltd v Law Society of Upper Canada*⁶ and subsequent decisions,⁷ this comment points to some of the shortcomings of fair dealing as the vehicle to promote access to educational materials. It highlights how the Federal Court (FC) and FCA failed to take into account important contextual elements of York Guidelines that might have led to different conclusions. It provides some guidance on how fair dealing for the purpose of education should be interpreted. I conclude by highlighting the challenges that lie ahead on the application of fair dealing to educational institutions, and by broadening the debate of access to educational materials beyond the fair dealing doctrine.

2. Background to Litigation

Access Copyright is a collective society that administers reproduction rights in published literary works, including the collection and distribution of royalties with respect to copyright works in Access Copyright's repertoire. From 1994 to 2010, Access Copyright and York

⁵ See *infra* note 10.

⁶ 2004 SCC 13 at para 48 [*CCH*].

⁷ *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36 at para 11[*SOCAM*]; *Alberta v Canadian Copyright Licensing Agency*, 2012 SCC 37 at para 22 [*Alberta Education*]; *Keatley Surveying Ltd. v. Teranet Inc.*, 2019 SCC 43 at paras 44-46 [*Keatley*].

had a licence agreement that allowed York to reproduce portions of textbooks found in Access Copyright's repertoire. In March 2010, Access Copyright submitted a tariff for approval to the Copyright Board ("Proposed Tariff") with respect to post-secondary educational institutions covering the years 2011-2013.⁸ The Proposed Tariff contained a new royalty rate model, and was subject to several objections.⁹ With the fast approaching expiry of the licence agreement, Access Copyright sought approval for an interim tariff (the "Interim Tariff") from the Copyright Board. The Copyright Board granted Access Copyright's application and the Interim Tariff came into force on January 1, 2011.¹⁰ The Interim Tariff incorporated the royalty rates of the licence agreement between Access Copyright and York. Initially, York complied with the Interim Tariff. In July 2011 however, York notified Access Copyright it would opt-out from the Interim Tariff. Access Copyright commenced an action to enforce the Interim Tariff and alleged York infringed the copyright of works in its repertoire. York filed a counterclaim for a declaration that any reproductions made followed its Guidelines and therefore benefited from the fair dealing exception under the *Act*.¹¹ The FC held that Access Copyright's Interim Tariff was mandatory and hence enforceable against York. The Court also dismissed York's counterclaim and held that York Guidelines were not fair.¹²

York appealed the FC decision on the mandatory nature of the Interim Tariff and challenged FC's finding that copies of works made under its Guidelines did not amount

⁸ Copyright Board, (2010) C Gaz I (Supp), online: <https://gazette.gc.ca/rp-pr/p1/2010/2010-06-12/pdf/g1-14424.pdf> (Statement of Proposed Royalties).

⁹ FCA decision, *supra* note 1 at para 8.

¹⁰ *Re Access Copyright - Interim Tariff for Post-Secondary Educational Institution, 2011-2013* (23 December 2010), online: Copyright Board of Canada <https://decisia.lexum.com/cb-cda/decisions/en/item/366699/index.do?q=Access+Copyright+interim+tariff+december+23+2010>; *Re Access Copyright - Interim Tariff for Post-Secondary Educational Institutions, 2011-2013* (16 March 2011), online: Copyright Board of Canada < <https://decisia.lexum.com/cb-cda/decisions/en/item/366712/index.do> > (Interim Tariff as amended) [Interim Tariff].

¹¹ *Canadian Copyright Licensing Agency v. York University*, 2017 FC 669 at para 2 (Declaration sought with respect to all reproductions of copyright works made before April 8, 2013 and thereafter, and with respect to all relevant copyright works within and beyond Access Copyright's repertoire) [FC decision].

¹² See Ariel Katz, "Access Copyright v. York University: An Anatomy of a Predictable But Avoidable Loss" (27 July 2017), online: *University of Toronto Faculty of Law Blog* <www.law.utoronto.ca/blog/faculty/access-copyright-v-york-university-anatomy-predictable-avoidable-loss> (for a detailed analysis of the FC decision, in particular on the relationship between Access Copyright's claim and York's counterclaim).

to fair dealing under the *Act*.¹³ The FCA, under the pen of Justice Pelletier, overturned the FC decision and held that tariffs approved by the Copyright Board are consensual in nature and hence not mandatory on users of the relevant copyright works. As a result, Access Copyright's Interim Tariff is not enforceable against York who had opted out of it. As Access Copyright's standing is limited to enforcing its tariffs and licences, and does not extend to suing users directly for copyright infringement,¹⁴ Access Copyright had no other cause of action against York. With respect to the declaratory relief sought by York, the FCA upheld the FC decision that York Guidelines are not fair.¹⁵

3. Contextualizing York's Opting-Out from Access Copyright Interim Tariff

The fact that York did not renew a licence agreement (and subsequently opted out from the Interim Tariff) under which York paid fees to Access Copyright for over 16 years, played a large, albeit not overt role in the FC and FCA decisions. On the one hand, the FCA confirmed that York's opting out from the Interim Tariff as a non-mandatory instrument was legitimate. On the other hand, the same court endorsed FC's assessment that the opting out by York (and other educational institutions) of paying fees to Access Copyright had a major detrimental impact on the educational material publishers' market. York's main motivations to opt out of Access Copyright's Interim Tariff and to implement its Guidelines were characterized negatively as a way for York to "to obtain for free that which [it] had previously paid for".¹⁶ York's interruption of the licence to Access Copyright's repertoire tainted the fair dealing analysis portion of the FC and FCA decisions to York's detriment.

Neither the FC or FCA decision situated Access Copyright licence (and Interim Tariff) and York's Guidelines for fair dealing in the broader context of York's yearly expenditures for

¹³ *Act*, *supra* note 3, s 29.

¹⁴ *Supra* note 1 at para 205. This is pursuant to the agreements between Access Copyright and the copyright holders for which it acts. This is unlike other copyright collectives such as SOCAN, who by the terms of their agreements with the authors they represent, can sue alleged infringers directly for copyright infringement as well as enforce the tariffs and user licences they conclude on behalf of their members: *ibid*, at para 197.

¹⁵ See below section 5. "Fair dealing in Canadian Copyright Law".

¹⁶ See e.g. FCA decision, *supra* note 1 at para 240.

library materials. The overall amounts for digital collection licences and printed books that York paid annually to various publishers during the relevant period were not highlighted in either decision.¹⁷ Nor did it transpire from the reasons on the fairness of York's Guidelines that expenditures for library materials have continued to increase over the years, for York as well as for other Canadian post-secondary educational institutions.¹⁸

York and other educational institutions decision to opt out from Access Copyright's licence (and subsequently Interim Tariff) should be examined in the context of the dramatic shift in the last decades toward publishers' licensing of online digital collections that cover a significant portion of educational institution user needs. For a large part of scientific fields and knowledge, the more recent materials (increasingly available in digital format through publisher transactional licences) hold the bulk of educational value as older materials quickly become outdated. In this context, the relevance of Access Copyright's licences and Interim Tariff to its repertoire (which could be relevant e.g. with respect to reproductions of older printed books not yet in the public domain and not covered by the digital licences) has and will considerably decline over time relative to the needs of York and other educational institutions.¹⁹ The impact of the various publishers' licences that York and other educational institutions subscribe to, on Access Copyright's licences and Interim Tariff, was not explored by the FC and FCA.²⁰ On that front, the lack of

¹⁷ 2012-2013 Statistics, 3, online (pdf): *Canadian Association of Research Libraries* <www.carl-abrc.ca/doc/2013_CARLABRC_Stats_no_sans_Comment.pdf>. For the initial period covered by the litigation opposing Access Copyright to York, York spent over \$12,105,040.00 in library materials, including for digital licences and printed books (i.e. part of 2011 to 2013).

¹⁸ 2017-2018 Statistics (December 2019), online (pdf): *Canadian Association of Research Libraries* www.carl-abrc.ca/wp-content/uploads/2019/12/CARL-ABRC_Stats_Pub_2017-18.pdf. For the period 2017-2018, last available report, York spent \$13,310,588.00; total expenditures for library materials in Canada overall were \$355,886,675.00 compared to \$289,191,995 in 2012-2013).

¹⁹ Several educational institutions have opted out from Access Copyright's licences: see *Statements of royalties to be collected by access copyright for the reprographic reproduction, in Canada, of works in its repertoire, Post-Secondary Educational Institutions (2011-2014; 2015-2017)* (6 December 2019), CB-CDA 2019-082 at para 204, online: Copyright Board <decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/453965/index.do> [Approved Tariff Decision]. See Michael Geist, "Why Universities Should Not Sign the Access Copyright – AUCC Model Licence" (24 May 2012) online: *Michael Geist* <<https://www.michaelgeist.ca/2012/05/access-copyright-model-licence/>> (listing various reasons why Universities do not need to sign a licence with Access Copyright, including the large increase of open source journals and materials made available online).

²⁰ The impact of the interaction between third party transactional licences and Access Copyright's Tariff was raised by York before Copyright Board in proceedings leading to approval of Access Copyright final

transparency and disclosure regarding the content of Access Copyright's repertoire has been a point of contention and an important obstacle to assessing the overall value of Access Copyright licences and tariffs.²¹

In parallel to major shifts in the market with increased online access to licensed digital education materials, the scope of fair dealing has broadened in the last two decades, with the addition of allowable purposes in the *Act*, and as a user right, calling for a large and liberal interpretation of its application.²² The scope of the specific user rights for educational institutions has also expanded, notably with respect to works available through the Internet.²³ As a result of these developments, several educational institutions across the country have adopted fair dealing Guidelines modelled on the AUCC guidelines²⁴ to articulate fair dealing as a user right for the benefit of their students and faculty members within the confines of the law.²⁵ This expansion of user rights under the *Act* should necessarily impact the overall value of Access Copyright's licence to educational institutions downwards.²⁶ It is in the light of these two important developments that Access Copyright's licence and Interim Tariff, York's decision to opt out of it, and York fair dealing Guidelines need to be assessed. With these preambles in mind, I now turn to the two legal issues addressed by the FCA.

tariff for post-secondary educational institutions. Copyright Board refused to consider this interaction for lack of evidence provided by York: Approved Tariff Decision, *supra* note 19 at paras 272, 275, 278-279 295.

²¹ The accessibility of Access Copyright's repertoire was raised by the Canadian Association of Research Libraries, asking the Copyright Board to mandate Access Copyright to disclose its repertoire. The Board declined to make a decision on that point: Approved Tariff Decision, *supra* note 19 at paras 348-349, 351.

²² *Supra* note 6, 7.

²³ *Act*, *supra* note 3, s. 30.04 (allowing educational institutions to reproduce, perform other acts, of works available online without copyright holders' authorization, subject to meeting listed conditions).

²⁴ Association of Universities and Colleges of Canada (AUCC) (now Universities Canada). See FCA decision, *supra* note 1 at para 12.

²⁵ See Rumi Graham, "Recalibrating Some Copyright Conceptions: Toward a Shared and Balanced Approach to Educational Copying" (2014) 9:2 Partnership: The Canadian Journal of Library and Information Practice and Research, online: <doi.org/10.21083/partnership.v9i2.3127> (on the need to rethink the traditional model of reprographic blanket licences for educational institutions in light of fair dealing jurisprudential developments and amendments to the *Act*).

²⁶ Approved Tariff Decision, *supra* note 19 at paras 210-216.

4. The Non-Mandatory Nature of Access Copyright Interim Tariff

The first issue facing the FCA was whether tariffs of AC and other collective societies are mandatory. In his reasons, Justice Pelletier recognized two distinct regimes under which a copyright user liability may arise.²⁷ First, in the absence of a binding approved tariff or licence agreement, a person who infringes copyright is liable in damages to the copyright owner for damages suffered from the infringement.²⁸ Those damages are assessed by the court.²⁹ Second, in the presence of an approved tariff (or licence agreement) to which a user is bound, the owner's legal claim is based on enforcing the tariff (or licence agreement) not copyright infringement, allowing collection of royalties set out in the tariff (or licence agreement).³⁰ Justice Pelletier noted this distinction is blurred when courts use a collective society approved tariff to calculate damages in instances of copyright infringement. This might explain why an assumption that collective societies can enforce tariffs against any copyright infringers has developed over time.³¹ The FCA scrutinized the veracity of this assumption to determine when is a user of copyright works actually bound by a tariff, triggering its enforcement in case of non payment, as opposed to the general regime of liability for damages in case of copyright infringement.

Following a detailed historical statutory analysis of the *Act* concerning collective societies, tariffs, individual license agreements, the approval process by the Copyright Board, Justice Pelletier came to the conclusion that tariffs are non-mandatory but rather consensual between the user and the collective society.³² The FCA interpreted successive amendments to the *Act* and relied on a decision of the Supreme Court which interpreted licence agreements with royalty rates fixed by the Copyright Board as

²⁷ *Supra* note 1 at para 38.

²⁸ *Act*, *supra* note 3, s 35(1).

²⁹ *Supra* note 1 at para 38.

³⁰ *Ibid.*

³¹ *Supra* note 1 at paras 38-39.

³² *Ibid* at para 202. The FCA acknowledged referring to the analysis provided by Professor Ariel Katz, "Spectre: Canadian Copyright and the Mandatory Tariff – Part I" (2015) 27 IPJ 151 (arguing that tariffs approved by the Copyright Board are not mandatory).

remaining voluntary for users: *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*³³ In doing so, the FCA rejected Access Copyright's argument that tariffs approved by the Copyright Board gave rise to a regime distinct from licence agreements that collective societies conclude with specific users from time to time (e.g. licence agreement between SODRAC and CBC).³⁴ Tariffs and licence agreements are two different means to achieve the same result, the former being typically intended for general application to different undefined users in the future, and in the latter case to specific pre-determined user(s).³⁵

The requirement of Copyright Board approval for tariffs and licence agreements is meant to safeguard the public interest against the strong powers that a collective society may otherwise exert against potential copyright users.³⁶ The more general application of tariffs to a potentially larger group of users (allowing lower transaction costs for collective societies and users)³⁷ than a specific license agreement, does not detract from tariffs' consensual nature. As a result, Access Copyright is not entitled to enforce the terms of its approved or interim tariffs against non-licensees such as is the case with York.³⁸ And while Justice Pelletier acknowledged the more limited appeal for Access Copyright and other collective societies to file tariffs for approval if they are not mandatory (i.e. not enforceable against all alleged infringing users performing acts falling within the scope of any given approved tariff), this alone is insufficient to support their mandatory nature in light of the statutory history and analysis pointing to the contrary.³⁹

The FCA reasons for judgment are compelling and the decision is important as it is the first to address in recent times the enforceability of collective society tariffs at such

³³ *Supra* note 2 at paras 105-107 (on the interpretation of the *Act*, *supra* note 3, s. 70.2); FCA decision, *supra* note 1 at paras 112-114 (citing the SCC on the general principle requiring explicit terms in the *Act* if the intent was to mandatorily impose a pecuniary burden on users without their consent).

³⁴ *Supra* note 1 at paras 43,44,97, 116, 132-132, 151, 138-146 (on Access Copyright pointing to amendments to the *Act* which separated tariffs approved by the Copyright Board and administered by collective societies, and arguing that tariffs were a form of regulation, and on reasons for rejecting those arguments, difference in language in *Act*, *supra* note 3, s. 68.2(1) being inconsequential when read in conjunction with mission of collective societies).

³⁵ *Ibid* at paras 178-179.

³⁶ *Ibid* at para 191.

³⁷ *Ibid* at paras 200-201.

³⁸ *Ibid* at para 204.

³⁹ *Ibid* at para 203.

length.⁴⁰ If upheld by the Supreme Court, the short term gain for York and other educational institutions having opted out of the Interim Tariff is that Access Copyright has no recourse for royalty payments until York and others agree to be bound by the Interim Tariff or through separate negotiated licence agreement between the parties. And unless Access Copyright gains standing to sue for copyright infringement on behalf of copyright holders to its repertoire (as is the case for other collective societies),⁴¹ copyright holders, assignees, and exclusive licensees alone can file such claims directly against York and other educational institutions. The recognized consensual nature of licence agreements and tariffs alike could also encourage openness between the negotiating parties, including greater transparency with respect to Access Copyright's repertoire.

Given the shift towards digital collections licensing increasingly covering a large part of educational institution needs, and correlatively, the progressively declining value of Access Copyright licence to its repertoire, some value could remain in agreeing to be bound by Access Copyright's Interim Tariff or licence. Access Copyright licences provide a broad indemnification to licensees against copyright infringement claims,⁴² and the *Act* limits the liability of educational institutions against copyright holders not covered by collective societies schemes when a licence agreement or tariff is in place.⁴³ A licence agreement or tariff may thus act as a risk management tool and offer peace of mind to educational institutions. The question is to what extent this additional peace of mind is required and what it is worth.⁴⁴ Additionally, the value of an Access Copyright licence to educational institutions is tied to the scope of their user rights to copyright materials encapsulated in large part in the fair dealing provisions of the *Act*, which is explored next.

⁴⁰ *Ibid* at paras 195-199 (FCA citing previous decisions where tariffs were enforced against copyright infringers, often through default judgments or where the (non)mandatory nature of tariff was not discussed at length).

⁴¹ See *supra* note 14.

⁴² AUCC Model licence and Interim Tariff, *supra* note 10 at para 2, provide an indemnity to licensed users. However the final tariff approved by the Copyright Board does not contain an indemnity clause, the Copyright Board deeming it not necessary after removing "non-affiliates" from scope of Access Copyright's license: Approved Tariff Decision, *supra* note 19 at paras 68, 198, 154,155.

⁴³ *Act*, *supra* note 3, s. 38.2.

⁴⁴ Geist, *supra* note 19 (arguing there is limited legal risk of not signing a licence with Access Copyright overall).

5. Fair Dealing in Canadian Copyright Law

In the second part of the decision, Justice Pelletier turned to York's counterclaim seeking declaratory relief on whether York's Guidelines constituted fair dealing under the *Act*.⁴⁵ Fair dealing with a work does not constitute copyright infringement and does not require authorization or remuneration from the copyright holder. Normally raised as a defence to copyright infringement, here the fair dealing analysis did not follow a copyright infringement claim against York, Access Copyright having no standing against York for such claim.⁴⁶

Having ruled that the Interim Tariff was not mandatory hence not enforceable against York, the possible relationship between the Interim Tariff and York's fair dealing became moot, at least regarding the litigation opposing Access Copyright to York. The value of the declaratory relief remained to provide guidance to York (and similar educational institutions) on an unsettled legal matter, and vis-à-vis copyright holders who may contemplate a copyright infringement suit against York in the future. Accordingly, the FCA proceeded on the fair dealing analysis.

In a trilogy of cases, i.e. *CCH*,⁴⁷ followed by *SOCAN*,⁴⁸ and *Alberta Education*,⁴⁹ the Supreme Court developed a two-step test to determine the fairness of a dealing with copyright work(s). The first part of the test asks whether the use falls within one allowable purpose and the second part whether the dealing is fair.

How should the two-step test apply to guidelines set by large educational institutions? Whose perspective matters in assessing fairness? York's? Its instructors'? The students'? How may York's practices with copyright works as exemplified in York's (and other) Guidelines have an impact on the relevant market segment for copyright holders? These

⁴⁵ *Act*, *supra* note 3, ss. 29-29.2.

⁴⁶ See *Supra* note 14.

⁴⁷ *Supra* note 6.

⁴⁸ *Supra* note 7.

⁴⁹ *Ibid*.

have been controversial questions at the heart of copyright law debates of the last decade⁵⁰ and the ones facing the FCA.

(i) First step: Allowable Purposes

Starting with the first step of the test, the FCA pointed out that it was met by York without contention, i.e. that its practices under the Guidelines were for one of the allowable purposes of education,⁵¹ although York's counterclaim did not limit itself solely to the purpose of education.⁵² Placing less emphasis on the first part of the test as the FCA did is consistent with the approach adopted in *CCH* and in *SOCAN*, calling for a large and liberal interpretation of the allowable purposes enumerated in the fair dealing provisions.⁵³

The FCA (and the FC before that) did not elaborate on what the purpose of education entails and this is unfortunate for at least two reasons. First, "education" is among the newcomers of allowable purposes introduced to the *Act* in 2012, and it has not yet been addressed by Canadian courts. The addition by Parliament of "education" in 2012 ought to bear a distinct meaning from the other listed purposes in the *Act*, in particular "research or private study", or "criticism and review", also relevant for educational institutions.⁵⁴ The addition of "education" to fair dealing also ought to be interpreted in light of the already pre-existing detailed list of specific exceptions to copyright infringement for educational institutions.⁵⁵ The education purpose was added to the fair dealing provisions to offer

⁵⁰ Standing Committee on Industry, Science and Technology, Statutory Review of the Copyright Act, (June 2019) at 55- 65, online (pdf): *Our Commons* <www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf> (Review of various submissions regarding fair dealing for the purpose of education, the Committee recommending more consultation and data gathering, with no amendments to the *Act* at this point).

⁵¹ FCA decision, *supra* note 1 at para 211.

⁵² *Ibid* at para 2 (i.e. that all copying made in compliance with the Guidelines constituted fair dealing under the *Act*, ss. 29, 29.1 or 29.2).

⁵³ *CCH*, *supra* note 6 at paras 48, 51; *SOCAN*, *supra* note 7, at para 27 (stating that *CCH* set a relatively low threshold for the first part of the test and that the "heavy-hitting" took place at the second step of the test, when establishing the fairness of the dealing).

⁵⁴ Prior to the addition of "education" to the fair dealing provisions in 2012, the Supreme Court had suggested otherwise in *Alberta Education*, *supra* note 7 at para 23 (regarding purpose of research and private study and purpose of educating as being tautological).

⁵⁵ *Act*, *supra* note 3, ss 29.4-30.04. For instance, and unlike these specific exceptions, nothing suggests that fair dealing for the purpose of education can only be invoked by educational institutions. See *CCH*,

more flexibility to educational institutions than a specific list of permitted acts allows, and by the same token expand the scope of permissible acts without the consent of copyright holders.⁵⁶

Second and more importantly, the purpose of the dealing is pivotal to the fairness assessment (second part) of the test, e.g. when courts evaluate fairness in light of the amount of the dealing of the relevant work(s).⁵⁷ Elaborating on the purpose of education could have alleviated some of the difficulties the FCA (and the FC before that) faced in assessing the fairness of York's Guidelines. It would help further expand the jurisprudence directly relevant to educational institutions beyond *Alberta Education*, where the Supreme Court applied fair dealing, but for the purpose of research and private study, not education, which had not then come into force.⁵⁸

The added purpose of "education" requires one to think as much about the teachers and instructors as users and beneficiaries of the works, and not just the students. Education involves a process that is by no means linear or unidirectional.⁵⁹ The selection of materials is central to instructors' course design, objectives, and teaching philosophy. Instructors' course objectives, skill, creativity, and unique teaching style are an integral part of that selection process. Flexibility is required as part of that process,⁶⁰ even more so at post-secondary level, where academic freedom is a defining trait of the relationship instructor-

supra note 6 at para 49 (on the co-existence between fair dealing and specific exceptions to copyright infringement, as not being mutually exclusive). See Carys J. Craig & Bob Tarantino "An Hundred Stories in Ten Days": COVID-19 Lessons for Culture, Learning, and Copyright Law" (2020) 57 Osgoode Hall Law Journal 567, at 591-592 (commenting on the complexity of various user rights or exceptions to copyright infringement as being less than optimal for educational institutions).

⁵⁶ Michael Geist, "Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use", in M. Geist ed. *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (UOP, 2013) 157 at 176-180 (commenting on expansion of listed purposes under fair dealing provisions and jurisprudential developments bringing fair dealing in Canada closer to fair use model where there is no closed list of stated purposes).

⁵⁷ See discussion below on the second part of the test where courts assess the fairness of the dealing through a six-factor analysis.

⁵⁸ See *supra* note 3.

⁵⁹ Canadian Oxford Dictionary, 2d (2004) "education", refers to "the act or process of educating or being educated".

⁶⁰ See FC decision, *supra* note 11 at paras 326-7 (court accepting evidence that days of single textbooks per course are long gone and pointing to educational benefits for instructors and students to tailor unique course packs).

students and instructor-institution. In a fair dealing analysis “for the purpose of education”, instructors need to be included among (if not as main) users of copyright works, as immediate beneficiaries of the materials selected for their course, along with the students,.

A deeper assessment of the scope of the purpose of education in the first part of the fair dealing analysis would have assisted the FCA (and FC prior to that) in answering the following central questions in the second part of the test: who are the users? Should we assess the fairness of the dealing from the perspective of York as institution? From the perspective of York’s instructors? Its students? From all?

(ii) Second Step: Assessing Fairness

The second step of the fair dealing analysis considers the non-exhaustive list of six factors laid out in *CCH* to determine whether the dealing is “fair”, with varying degrees of relevance and application on a case by case basis.⁶¹ The factors are: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work”.⁶² The party relying on “fair dealing” has the burden of satisfying elements under the *CCH* test, except for the last factor, which falls on the plaintiff.⁶³ When the dealing in question is a general practice such as York’s Guidelines, the burden of proof can be discharged by proving the fairness of the practice without having to prove that each dealing pursuant to the practice is fair.⁶⁴

In considering the fairness factors and their application in *CCH*, *SOCAN*, and *Alberta Education*, the FCA upheld the FC decision that reproductions made under York’s Guidelines did not necessarily constitute fair dealing, York having failed to show that the FC erred in its assessment of the fair dealing factors subject to the applicable standard

⁶¹ *CCH supra* note 6 at para 53.

⁶² *Ibid.*

⁶³ *Ibid* at para 72.

⁶⁴ *Ibid* at para 63.

of review. The FCA devoted a significant portion of its fairness analysis to the first factor, the “purpose of the dealing”. This factor is often conflated with the first part of the test regarding the allowable purposes, as the FCA noted, commenting on the FC decision.⁶⁵ While the purpose of the dealing in the first part of the test is relevant throughout the fairness assessment of the dealing, the purpose factor looks into the goal or motive of the dealing (e.g. whether the research and private study is performed to a commercial or charitable end),⁶⁶ or a separate interest of the entity dealing the work(s) from the allowable purpose, which could tilt the dealing toward unfairness.⁶⁷ The FCA left the FC’s factual assessment undisturbed, i.e. that York’s purpose in issuing its Guidelines was “to obtain for free that which [it] had previously paid for” and “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”.⁶⁸

Distinguishing this case from *CCH*, *SOCAN* and *Alberta Education*, the FCA held that in an institutional claim based on general practice, it is the institution’s perspective (i.e. York) that matters in assessing the fairness of the dealing at the second part of the test.⁶⁹ The FCA did so by likening this case to *CCH* whereby in the opinion of the FCA, the Supreme Court considered the perspective of the Great Library in assessing the fairness of its Access Policy under which the Great Library and its patrons could reproduce works protected by copyright.⁷⁰ The FCA distinguished this case from *SOCAN* whereby the streaming of excerpts of musical works was made by potential buyers directly⁷¹ which justified the Supreme Court to focus on the end users’ individual perspective and not the one of Bell Canada in the aggregate. The FCA also distinguished this case from *Alberta Education* which as characterized by the FCA, concerned reproductions made by teachers on an *ad hoc* basis, not pursuant to institutionalized general practices,⁷² and

⁶⁵ *Supra* note 1 at para 241 (FCA pointing out that FC made an overriding and palpable error in bringing in the education purpose under the analysis of the first factor of the fairness analysis).

⁶⁶ *CCH*, *supra* note 6 at para 56.

⁶⁷ *Alberta Education*, *supra* note 7 at para 22.

⁶⁸ *Supra* note 1 at para 240.

⁶⁹ *Ibid* at para 238.

⁷⁰ *Ibid* at paras 219-222.

⁷¹ *Ibid* at para 223.

⁷² *Supra* note 1 at paras 232-233.

whereby the Supreme Court found that the purpose of teachers aligned with the purpose of its students' research and private study.⁷³

The FCA's position that it is York's perspective that matters in institutional claims based on general practice sets aside York's argument that the students' perspective is the one that matters, which in effect would lead to an individualized approach to the dealings rather than looking at the reproductions made at the institutional level, in the aggregate. With respect, this part of the FCA analysis is flawed for at least three reasons.

First, it is not entirely accurate to state that in *CCH*, it was solely the perspective of the Great Library that mattered to assess the fairness of the dealing,⁷⁴ nor was it the case in *SOCAN*.⁷⁵ In each decision, the Supreme Court evaluated the fairness of the dealing both through the steps that were taken at the institutional or company level and at the level of its intended beneficiaries or end users (i.e. library patrons, consumers, or students).

Second, to the extent that the allowed purpose of education ought to be given a distinct meaning from research or private study, Faculty and instructors are individually end users as much if not more than the students. As a result, York is both dealing with the works at the institutional level in setting and implementing the Guidelines, and a user beneficiary of the works reproduced through its instructors. It is thus more accurate to assess the fairness of the dealing from the perspective of York as an institution setting the Guidelines and through its faculty and instructors, as well as from the students' perspective. This might provide a more nuanced view of fairness than was portrayed by the FCA, by recognizing that in large part the dealing made by instructors is for their direct individual benefit in pursuing their mandate and goals as educators and for the benefit of each student within the purview of the allowable purpose of education.

⁷³ *Alberta Education*, *supra* note 7 at paras 228-231.

⁷⁴ *CCH* *supra* note 6 at para 56 (while considering the practice of the Great Library in its fairness analysis, the Supreme Court also considers the end user perspective, i.e. whether the research or private study is for commercial or charitable purposes).

⁷⁵ *SOCAN*, *supra* note 7 at para 34 (Supreme Court emphasized the perspective of the end users in addressing the fairness of the dealing).

Third, to characterize York's motive behind the Guidelines as primarily one to get away with paying fees to Access Copyright by having opted out of the Interim Tariff misses important and reasonable goals for York to implement Guidelines. Ensuring a systematic approach to making full use of fair dealing for its own benefit and the one of its students, addressing lawfulness, and managing the risk of copyright infringement are legitimate goals that York's Guidelines sought to achieve, pointing toward more fairness than that portrayed by the FC and FCA. On this point, it is somewhat counter intuitive that the FCA and FC had *a priori* more sympathy to find fairness in what they characterized as ad hoc type of reproductions made by teachers in *Alberta Education*, than for a more systematic and concerted approach normally found in general practices similar to York's Guidelines.⁷⁶

The "character of the dealing" (second factor of the fairness analysis) looks at how the work is dealt with, i.e. the amount of reproductions made; multiple as opposed to single copies of a work tending toward unfairness.⁷⁷ The FCA distinguished this case from *CCH* where evidence pointed toward single copies being made under the Great Library Access Policy whereas under York Guidelines, multiple copies of works were made for multiple users and therefore pointed toward unfairness.⁷⁸ As noted by the FC and FCA, referring to *CCH*, this factor tends to disfavour educational institutions where instructors' dealing with works will ordinarily and necessarily involve multiple copies.⁷⁹ The FCA suggested how guidelines restricting further copying by students and asking for destruction of copies after use could make the dealing more fair, pointing out to the absence of such safeguards in York's Guidelines.⁸⁰

The character of the dealing factor highlights perhaps more than any other the current gap of direction on how to apply fair dealing for the purpose of education, as most dealings

⁷⁶ *Supra* note 1 at paras 232- 233 (distinguishing the facts in *Alberta Education* from *CCH* and the present case as in *Alberta Education* the copies were not made pursuant to a policy or guidelines ("the absence of a practice or system suggests that the copying was *ad hoc* and not systematic").

⁷⁷ *CCH*, *supra* note 6 at paras 55, 67.

⁷⁸ *Supra* note 1 at para 256.

⁷⁹ *Ibid* at paras 243,244,256.

⁸⁰ *Ibid* at para 253.

might be viewed as unfair under this factor. This view, as entertained by the FC and FCA should be resisted. The dealing of works through multiple reproductions will more often than not be a requirement in an educational context. Multiple copies should not be viewed as unfair or inconsistent with *CCH* because they are typically confined to a specific classroom or group; they are not *widely distributed*.⁸¹ In addition, and contrary to what the FCA suggests, *Alberta Education* involved multiple copies of works made upon several teachers' initiative for the benefit of their students, which dealing was held to be made for research and private study and to be fair.⁸² Finally, holding that multiple reproductions tend toward unfairness would significantly reduce fair dealing in scope when applied to the purpose of education and devoid it of substance. Such interpretation is antithetical to the purpose of education and is inconsistent with *CCH* and subsequent decisions by the Supreme Court stating that fair dealing as a user right calls for a large and liberal interpretation.⁸³

By contrast to the character of the dealing, the third factor, "amount of the dealing" deals with the portion of the work that is copied relative to the whole work. The FCA acknowledged that this factor did not involve any assessment of the amount of copies made in the aggregate.⁸⁴ The fairness needs to be assessed relative to the underlying purpose of the dealing;⁸⁵ for example the reproduction of a whole painting might be fair in the context of criticism and review while the reproduction of a whole book would likely not under most circumstances or purposes. The application of this factor illustrates how the second step of the fair dealing test is intimately tied to the first. The FCA noted how in *CCH*, the Great Library Access Policy contained safeguards for any copying that exceeded the permitted percentage of copying. By contrast, the FCA underscored that York had failed to prove how its Guidelines were fair from the perspective of the student users, e.g. by justifying the basis of the percentage of copying of the whole work set by

⁸¹ *CCH*, *supra* note 6 at para 55 (referring to multiple copies being *widely distributed* as leaning toward unfairness [emphasis added]).

⁸² *Supra* note 7 at para 7, 11.

⁸³ *CCH*, *supra* note 6 at para 48, 51; *SOCAN*, *supra* note 7 at para 11; *Keatey*, *supra* note 7 at para 45.

⁸⁴ *Supra* note 1 at para 279 (acknowledging the FC palpable but not overriding error on that point).

⁸⁵ *CCH*, *supra* note 6 at para 56.

the Guidelines.⁸⁶ As a result, the FCA sided with the FC application of this factor pointing toward unfairness. Regarding the reasonableness of the thresholds, consideration could have been given to AUCC Guidelines and guidelines similar to York's used by several post-secondary educational institutions as indication of accepted and followed norms.⁸⁷

The fourth factor "alternatives to the dealing" requires one, as per *CCH*, to assess whether the dealing was reasonably necessary to achieve the allowable purpose and whether there are available non-copyright alternatives to the dealing.⁸⁸ In *CCH*, the Supreme Court also stated that the availability of a licence is irrelevant to assess fairness under this factor, as to hold otherwise would unduly favour copyright holders in a manner inconsistent with the balance within copyright law.⁸⁹ The FCA reasons are brief on this factor, leaving undisturbed FC's finding that York's dealing was reasonably necessary for the ultimate purpose of educating students, while noting that the reproductions involved were systematic and significantly larger than in *Alberta Education*, and that York did not actively pursue alternatives. In the end, this factor tended toward fairness and favoured York.⁹⁰

It is notable that the FCA does not consider this factor more closely from the perspective of York and the Guidelines as an institutional practice and that it did not distinguish the case at hand from *CCH*, as it did with the other factors. One may wonder in the context of educational institution guidelines, the extent to which the availability of a licence is *always* irrelevant to the assessment of fairness, and whether some distinction from *CCH* is warranted.

From a fairness assessment standpoint, the availability of a licence should not be determinant and is irrelevant in many instances, e.g. when reproductions are made for purposes of criticism, review, news reporting, or parody, for which it would be impractical

⁸⁶ *Supra* note 1 at paras 280-281.

⁸⁷ See *CCH*, *supra* note 6 at para 55 (on the value of resorting to Industry customary practices).

⁸⁸ *Ibid* at para 57.

⁸⁹ *Ibid* at para 70.

⁹⁰ *Supra* note 1 at paras 284-292.

if not impossible to obtain a licence. To say otherwise would eviscerate the core function of the fair dealing doctrine as a user right which sets boundaries to exclusive copyrights by allowing certain uses and dissemination of works, the creation of new ones, and respect for freedom of expression in conformity with the *Canadian Charter of Rights and Freedoms*.⁹¹

It is quite a different thing to say that the availability of a licence should be irrelevant *in all cases*.⁹² From a fairness perspective, the availability of a licence meeting the needs of an instructor could be relevant at the early stages of developing course materials, while for obvious practicality reasons, it may not be as relevant in the middle of a course with respect to ad hoc copying, where time constraints may preclude an instructor from accessing the licence but barring access to the work would impede spontaneity and deprive the instructor and the students accessing important material for their learning. As the fairness of a dealing weighs in the importance of accessing and disseminating works relative to the exclusive copyrights involved, the convenience factor ought to be considered regarding the relevance of an existing licence as it was in *CCH* (for other matter than availability of the licence).⁹³ For instance when there is an exact same licenced alternative available on the market, such as licensing segments vs purchasing entire works, arguing that the availability of a licence would be entirely irrelevant would go against the “effect of the dealing” considered in a fairness analysis, which we now turn to.

⁹¹ s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11. On the interaction between Canadian copyright law and freedom of expression, see e.g. Graham Reynolds, “Moving Past Michelin: Towards Judicial Reconsideration of the Intersection of Copyright and the Charter Right to Freedom of Expression” (2017) 30 I.P.J. 25.

⁹² In a US context, see e.g. *Cambridge University Press v. Patton*, 769 F.3d 1232 (2014), at 1276-1277 (in the context of a fair use analysis pursuant to *Copyright Act*, 17 USC, s. 107, stating that availability of licence for educational institutions not determinative although its presence may make the use less fair than if no licence is available for the unauthorized use). See however Amira Dotan, Niva Elkin-Koren, Orit Fischman-Afori & Ronit Haramati-Alpern, “Fair Use Best Practices for Higher Education Institutions: The Israeli Experience (2010) 57 J. Copyright Soc’y U.S.A. 447, at 452 (“The selection of teaching materials should not be based on the ability to acquire a license, the restrictions of a license or the license fee”).

⁹³ *CCH*, *supra* note 6 at para 69, where the convenience factor weighed in the analysis of alternatives to the dealing in a different manner, i.e. having patrons come to the Great Library to view the materials was not a reasonable alternative to Great Library staff faxing reproductions of said works to them.

The fifth factor that the FCA considered, “effect of the dealing”, looks at the impact of the dealing on the market of the original copyright works; competition with such market leaning toward unfairness.⁹⁴ Although an important factor, the Supreme Court in *CCH* emphasized it was not the most important one. This is in keeping with the Court recognizing the breadth and scope that befits “user rights”. It signals that some impinging effect on the market of the original work would not necessarily be a bar to a dealing being fair overall.

The FCA underscored that the copying allowed pursuant to the York Guidelines was significantly higher than in any of the Supreme Court trilogy of cases. York failed to prove an overriding and palpable error in FC’s conclusion that the Guidelines had (will) cause significant negative impacts on the market for which Access Copyright would otherwise be compensated for York’s copying.⁹⁵

To accept a likely correlation between decline in revenue for the post-secondary education market and the Guidelines, causing significant negative impacts in the market, is perplexing for many reasons. First, guidelines give direction and boundaries for reproduction and other uses of copyright works when the same are not already covered under transactional digital licences or specific user rights under the *Act*,⁹⁶ they do not command a predictable amount of copying at any given point in time, making it near to impossible to make such correlation.

Second, the FC resorting to the difference between a licence fee and no licence fee paid to Access Copyright to show the negative effect of the Guidelines on the market for the works covered by Access Copyright’s repertoire assumes that such licence fees were actually owed to AC.⁹⁷ As discussed earlier, there are legitimate reasons why York and other educational institutions may decide that Access Copyright’s licence is not required,

⁹⁴ *Supra* note 1 at para 302; *CCH*, *supra* note 6 at para 59.

⁹⁵ FC decision, *supra* note 11 at para 353; *Supra* note 1 at para 306: York’s copying leaning toward unfairness.

⁹⁶ *Act*, *supra* note 3, ss. 29.4-30.04 (exceptions to copyright infringement for educational institutions).

⁹⁷ *Supra* note 1 at paras 350-351.

i.e. considering all other digital licences to which York is already a party, as well as given the expansion of fair dealing and other user rights under the *Act*. Resorting to the difference between York paying or not paying AC's Interim Tariff (or licence fee before that) as evidence of the negative effect of the dealing on the market is flawed. It amounts to making a foregone conclusion about the intrinsic value of Access Copyright's licence which in turn creates an impediment to making a successful claim of fair dealing, a matter quite distinct from Access Copyright's Interim Tariff or licences.

Finally, in case of reproduction for the purpose of research, private study, education, it is difficult to clearly delineate the actual effect of reproductions on the market of the original work. Unlike dealings for the purpose of criticism or review, parody or satire where it may be clearer to assert that the product incorporating the original work (e.g. the criticism or parody) is distinct and therefore no substitute for the original work, reproductions for research, private study, or education will usually be identical to (portions of) the original work. This said, save clear cases where a reproduction is a reasonable substitution for the work and therefore competes with it (e.g. reproducing an entire book) it will be near impossible to prove when a reproduction actually competes with the market for the original work. For that, one would need to prove that had the user had no access to a reproduction, they would most likely have purchased or licenced a copy. Allowing reproductions as fair dealing in that indeterminate zone expands dissemination of the work without competing with the market of the right holder, not only benefiting users but copyright holders as well. The difficulty lies in assessing where the tipping point lies. At the same time, as this factor is not the most important one, some potential impingement on the market of right holders will not be a bar to successfully relying on fair dealing overall, allowing some wiggle room for the scope of allowable reproductions or other acts without the authorization of copyright holders.

This is where the effect of the dealing on the market of the work ties to the previous factor, i.e., alternatives to the dealing. The evolution of different licensing models redefines the market of right holders. For example, publishers may be willing to license book chapters for limited duration rather than require purchase of an entire book. In such a scenario, the

reproduction of a chapter becomes a substitute for the existing licence to the chapter and would compete directly with that offering. As such, to discard the existence of such licences as irrelevant would go against the application of the factor looking at the effect of the dealing on the original work as it is currently interpreted.

The FCA addressed the nature of the work as the last factor, very briefly. In line with *CCH*, and *SOCAN*, the FC noted that works in Access Copyright repertoire are meant to be disseminated, while pointing out that authors did not need York Guidelines to achieve this goal.⁹⁸ The FCA noted FC's reasons, uncontested by York, that this factor pointed toward unfairness. In arriving at this conclusion, the FC seems to have disregarded the fact that the works in Access Copyright's repertoire were meant to be widely disseminated, which should have pointed the dealing toward fairness. Rather, the FC resorted back to the other factors such as the character of the dealing and the manner in which the Guidelines were applied.

6. Conclusion

Four observations follow from the FC and FCA decisions on the unfairness of York's Guidelines. First, specific to this case, York's decision to opt out of Access Copyright's Interim Tariff led to the inference that York Guidelines were used as a shield to avoid paying for the Access Copyright licence or Interim Tariff and copyright materials more generally. York's ongoing investments in library materials and publisher licensing agreements paint a different picture. York's opting out of Access Copyright's Interim Tariff combined with the implementation of York's Guidelines led the FC and FCA to conclude that York's Guidelines were unfair. York's opting out of the Interim Tariff led to the inference that the Guidelines impacted the educational publishing market negatively, and toward a finding of unfairness. The facts of the case failed to present the extent to which York had to resort to fair dealing, i.e. the amount of reproductions not already covered by the transactional licences between York and various publishers. Nor did the facts present

⁹⁸ *Ibid* at para 337.

what the Access Copyright Interim Tariff covered relative to the publishers' transactional licences. Viewed in this light, one may question the links the FCA and FC made between York's opting out of Access Copyright's Interim Tariff and the fairness of York's Guidelines.

Second, the FCA and FC decisions illustrate the important test fair dealing is being put through when it comes to large educational institution general guidelines. For almost two decades, much hope has been placed in fair dealing as a doctrine facilitating a more balanced copyright system, through a recognition that user rights are integral to it. Can fair dealing live up to such expectations when applied to guidelines with potentially broad application and ramifications in educational institution environments?⁹⁹ Or will fair dealing be relegated to successfully applying only to ad hoc, limited copying as suggested by the FC and FCA, in reference to *Alberta Education*? As much as fair dealing calls for flexibility and broadness in its application, too many unknowns regarding the magnitude of reproductions involved will tend to play against the educational institution seeking to establish fairness.

Third, given that educational institutions bear the bulk of the burden of proof, demonstrating fairness will require narrowing the gap of unknowns when it comes to general guidelines of broad application. Documenting and communicating how fair dealing guidelines fall within the broader educational institution day-to-day handling of copyright works (e.g. acts already allowed under transactional publisher licences, handling of course packs, application of other exceptions to copyright infringement)¹⁰⁰ will help narrow a perceived gap toward fairness. In that vein, the role of librarians as educators and gatekeepers will continue to be instrumental toward ensuring and documenting fairness.

⁹⁹ Dotan et al, *supra* note 92 at 447.

¹⁰⁰ E.g., *Act*, *supra* note 3, s. 30.04 (allowing educational institutions to reproduce, perform other acts, of works available through the Internet without copyright holders' authorization, subject to meeting listed conditions).

Finally, fair dealing is only one among several vehicles toward promoting adequate availability and access to educational materials. The essence of copyright and other intellectual property rights is to enable authors and other right holders to choose when and how they allow others to access their works. More can be done by educational institutions, public research funding agencies, faculty members to promote and encourage even more open access models of scholarship dissemination.¹⁰¹

¹⁰¹ Emily Hudson & Paul Wragg, "Proposals for Copyright Law and Education During the Covid-19 Pandemic" (2020) at 24-25, online: SSRN <papers.ssrn.com/sol3/papers.cfm?abstract_id=3617720>; Craig & Tarantino, *supra* note 55 at 600 (on the need to rethink traditional publication models toward more open educational resources, in light of various obstacles to access resulting from the Covid-19 pandemic).