

Federal Court of Appeal



Cour d'appel fédérale

Date: 20170127

Docket: A-93-16

Citation: 2017 FCA 16

**CORAM: NADON J.A.
DAWSON J.A.
GAUTHIER J.A.**

BETWEEN:

**THE CANADIAN COPYRIGHT LICENSING
AGENCY, OPERATING AS ACCESS
COPYRIGHT**

Applicant

and

**BRITISH COLUMBIA MINISTRY OF
EDUCATION AND ALL ENTITIES NAMED
IN SCHEDULE "A" HERETO**

Respondents

Heard at Ottawa, Ontario, on November 22, 2016.

Judgment delivered at Ottawa, Ontario, on January 27, 2017.

REASONS FOR JUDGMENT BY:

GAUTHIER J.A.

CONCURRED IN BY:

**NADON J.A.
DAWSON J.A.**

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] The Canadian Copyright Licensing Agency, operating as Access Copyright (Access) seeks judicial review of a decision of the Copyright Board of Canada (the Board), certifying the royalty rates to be collected by Access for the reproduction of works in its repertoire by

elementary and secondary educational institutions (K-12 schools) represented by twelve provincial and territorial ministries of education (outside of Quebec) and all Ontario school boards (collectively the Consortium) during the 2010-2012 (First Tariff) and 2013-2015 (Second Tariff) tariff periods.

I. Background

[2] In its decision, the Board approved an annual royalty rate of \$2.46 per full-time equivalent student (FTE) for the First Tariff and \$2.41 per FTE for the Second Tariff. It applied a “volume times value” methodology, pursuant to which the volume of compensable copying is multiplied by the estimated value of each page of the copied work for one of the four genres included in Access’ repertoire — books, periodicals, newspapers and “consumables”.

[3] This methodology had been proposed by the parties and adopted by the Board in its previous decision issued in June 2009 dealing with a previous tariff of Access for K-12 schools (*Access Copyright (Educational Institutions) 2005-2009* (26 June 2009) [*K-12 (2009)*]). This decision was challenged before our Court and was ultimately quashed by the Supreme Court of Canada in *Alberta (Education) v. Canadian Copyright Licencing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345 [*Alberta*]. As the Supreme Court had identified several issues that rendered the Board’s assessment of the fair dealing exception unreasonable, the current decision under review was meant to comply with the teachings of *Alberta*. The Board held a hearing over nine days in April, May and September 2014. It heard the oral arguments in September 2014. In June 2014 and after the September hearing, the Board put several technical questions to the parties and the evidentiary record was only perfected on December 19, 2014

once the parties answered the Board's additional questions. The decision was issued in February 2016.

[4] Because of the high cost of the evidence required to apply the methodology referred to at paragraph 2 above, the parties agreed to rely on the results of the volume study, previously undertaken by them in 2005-2006, as a reasonable proxy for the copying taking place during the two tariff periods at issue here.

[5] As mentioned, the Board, in applying the agreed methodology, had to determine the volume of compensable copying or compensable exposures. To do so, it had to first identify which of the copied works came within Access' repertoire. Then, the Board had to assess which of those copying events reproduced a "substantial part" of the work involved within the meaning of section 3 of the *Copyright Act*, R.S.C., 1985, c. C-42 (the Act).

[6] The next step required the Board to exclude from these compensable exposures the copying that should be excluded from compensability pursuant to any applicable provision of the Act. The only exclusion relevant to this proceeding is the copying that falls within the user's right as set out at section 29 of the Act, which provides that fair dealing for the purposes of education and private study does not infringe copyright. The Board also deducted any copying required for a test or examination (subsection 29.4(2) of the Act) as well as those for display for the purposes of education or training (subsection 29.4(1) of the Act). These findings are not challenged.

[7] Access accepts most of the findings made by the Board in its detailed and lengthy decision. With respect to what works should be included in its repertoire, Access only contests the Board's decision to disregard any errors in coding made in the volume study in respect of who owned the copyright, as well as its decision to exclude from the volume of compensable exposures any copying of a book that included less than one or two pages per copying event on the basis that these events did not involve the reproduction of "a substantial part" of the work within the meaning of the Act (see section 3 of the Act in Appendix).

[8] The other six issues raised by Access all relate to the deductions made to the total number of compensable exposures on the basis of fair dealing in respect of books, newspapers and periodicals, including the methodology used by the Board to quantify those deductions, which Access argues was procedurally unfair and fundamentally flawed.

[9] Rather than summarizing the lengthy decision of the Board under a distinct heading, I will refer to the most relevant findings when dealing with each issue. I will also refer to the applicable standard of review under each separate heading.

II. Analysis

[10] I have regrouped the issues raised by Access under the following headings:

A. Repertoire

- (1) Did the Board err in ignoring expert evidence provided by Access to correct and clarify the breadth of its repertoire as described in the volume study?
- (2) Did the Board err in restricting the "substantiality" (term used by the parties) of compensable exposure under section 3 of the Act?

B. Fair Dealing

- (1) Did the Board err in its application of the burden of proof?
- (2) Did the Board breach its duty to act fairly?
- (3) Was the Board's methodology unreasonable and did it err in assessing the relevant factors?

A. Repertoire

- (1) Did the Board err in ignoring expert evidence provided by Access to correct and clarify the breadth of its repertoire as described in the volume study?

[11] In *K-12 (2009)*, the Board found that the works captured by the volume study that were published by non-affiliated rights holders (NARH) would be included in Access' repertoire for the purpose of calculating the tariff on the basis of an implied agency relationship where the NARH ratified Access' administration of their rights by accepting the payment of royalties (*K-12 (2009)* at para. 133).

[12] In the proceeding at issue, the Consortium objected to such an inclusion with respect to the First Tariff and Second Tariff stating that this category of rightholders should not be considered. In its reasons (Reasons), the Board rejected Access' argument that issue estoppel applied because the decision was only quashed by the Supreme Court in respect of the fair dealing exclusions. In refusing to apply "issue estoppel", the Board exercised its discretion to ensure the fairness of the First Tariff and the Second Tariff. Additionally, the Board noted that Access itself sought to revisit other findings made during the *K-12 (2009)* proceeding (Reasons at paras. 125-126). The Board's conclusion on issue estoppel is not contested by Access in the present proceeding.

[13] Because of its position that issue estoppel applied, Access says that there was no need for it to correct the coding errors made in the volume study where some works were wrongly attributed to NARH or no coding at all was given (0). Indeed, the Board had included all these works in Access' repertoire in its *K-12 (2009)* decision.

[14] However, this information became more relevant to answer specific technical questions posed by the Board that asked Access to confirm and clarify the meaning of certain fields in the data used, including identifying who signed agreements with Access and whether such entity owned the copyright (see Access' letter to the Board dated October 14, 2014).

[15] In Access' reply letter dated October 14, 2014, Access raised the issue of coding errors in response to the Board's technical questions. It further explained that if the Board rejected its issue estoppel argument, Access would need to conduct a more detailed analysis of the data in order to correct the breadth of its repertoire since the coding errors had the effect of significantly underestimating the number of copied works comprised in Access' repertoire.

[16] After the Consortium submitted its own expert report dated October 14, 2014 (also filed in reply to these questions of the Board), Access did provide such a detailed report and quantified the impact of the underestimation. The expert report prepared by Circum Network Inc. (Circum) dated November, 28, 2014 is attached to a letter dated December 5, 2014. This report makes it clear that the calculations provided by the Consortium's experts should not be accepted because of the underestimation resulting from the Consortium's assumption that only works expressly attributed (i.e. coded as such) to an affiliated rightholder or to organizations in other

jurisdictions (referred to as “Reproduction Rights Organizations” (RROs)) should be considered as part of Access’ repertoire.

[17] Access’ December 5, 2014 submissions and expert report dated November 28, 2014 were accepted by the Board and exhibit numbers (AC-114 and AC-114A) were attributed to this evidence.

[18] The Consortium did not object to the filing of this evidence, nor did it offer any comments as to its validity. In fact, the Consortium itself filed on December 5, 2014, another expert report in reply to Access’ October 14, 2014 letter. The December 5, 2014 letter did not offer any comment by the Consortium in reply to Access’ submission that its repertoire was underestimated in the Consortium material because of coding errors. As mentioned, the record was perfected on December 19, 2014.

[19] It is not disputed that if Circum’s calculations had been accepted, this would represent a sizeable increase in the royalties to be paid to Access, which it estimates to represent approximately \$500,000.00 per year, or \$3 million dollars over the two tariff periods. Before us, the Consortium did not offer any other estimate of the potential impact of these coding errors, saying that it would have to review the validity of Access’ calculations should the matter be reconsidered by the Board as its experts had not yet had the opportunity to comment on Access’ calculations.

[20] In its Reasons, the Board deals with this question as follows at paragraph 405:

[405] In a filing responding to the Board's technical questions, Access explained some problems with these variables.²⁶¹ In particular, Access claimed that using these variables to measure the volume of copying of works owned by its affiliates or authorized by bilateral agreements with RROs greatly underestimates the volume of such copying. We reject this claim for three reasons. First, Access has provided no evidence of the degree of underestimation. Second, Access has had many years to correct the underestimation but has chosen not to do so. Third, to the extent that the underestimation is related to works that were not in Access' repertoire in 2005-2006 when the copies were made but now are, we do not want to make that correction. (Emphasis added)

[21] Footnote 261 mentioned in the quote reproduced above refers to Access' letter dated October 14, 2014 where, as mentioned, Access only raised the issue of coding errors and how it could have a serious impact on the Board's calculation of compensable exposures.

[22] Although the Consortium argued that this finding was based on the weight given to the evidence by the Board, a matter with which this Court should not lightly intervene, it is difficult to conclude anything other than that the Board, through oversight, overlooked the expert evidence and submissions it accepted as exhibits AC-114 and AC-114A on December 5, 2014.

[23] The Board's clear wording that Access provided no evidence rebuts the presumption that a decision-maker has considered all the evidence before it.

[24] There is no ambiguity in the reasons expressed at paragraph 405 of the Board's Reasons reproduced above. The Board failed to consider that expert evidence had been filed to estimate the degree of the underestimation, that Access had chosen to correct the underestimation and that it explained in detail why it had not done so before. Access' statement that the corrections proposed by its expert did not result from an expansion of Access' repertoire in the years

subsequent to the data collected in the 2005-2006 volume study was not challenged before us. Thus, the Board's refusal to consider whether the repertoire was underestimated is unreasonable.

[25] This Court is not in a position to assess the weight, if any, to be given to Circum's report dated November 28, 2014. This issue is so clearly material that in my view, the Court should intervene and require the Board to assess the impact, if any, on the volume of compensable exposures. I note, however, that this is such a discrete issue that the parties may well be in a position to facilitate this exercise by jointly proposing the necessary adjustments that could then be approved by the Board.

- (2) Did the Board err in restricting the "substantiality" (term used by the parties) of compensable exposure under section 3 of the Act?

[26] As mentioned earlier, the first issue to be determined by the Board was the volume of compensable exposures. To do this, it had to determine if all the copying reported in the volume study reproduced "the work or any substantial part thereof" within the meaning of section 3 of the Act.

[27] The Board reviewed the principles applicable to this exercise at paragraphs 212-217 of its Reasons. Access agrees that although it had initially characterized the issue before us as a question of law, the Board properly articulated the legal principles. The Board considered the Supreme Court of Canada's teachings in *Cinar Corporation v. Robinson*, 2013 SCC 73, [2013] 3 S.C.R. 1168 [*Cinar*], which states that a qualitative assessment is required to determine whether "a substantial portion of the author's skill and judgment" has been copied (*Cinar* at para. 26).

Thus, whether the Board misapplied these principles to the facts of this case is a question of mixed fact and law reviewable on the reasonableness standard.

[28] To meet its burden of establishing that the copying captured by the volume study should all be considered as coming within the ambit of section 3 of the Act, Access proposed two approaches: first, it suggested that the Board should assume that if a teacher of K-12 schools values the ability to copy certain portions of a work, even very small excerpts from a work within Access' repertoire, it must be because the excerpts are qualitatively relevant and as such, can never be considered unimportant or unsubstantial copying. Second, Access presented some evidence supporting its view that even one or two pages of a book may constitute a substantial part of the book from which it is taken. The relevant evidence in respect of "substantiality" is set out in footnotes 42 to 44 of Access' Memorandum of Fact and Law and in its Compendium, with the most relevant evidence having been reproduced at tabs 20 to 22 of the Compendium.

[29] Access submits that the Board failed to properly consider this evidence, including, more particularly, some samples of pages copied from books, which should have enabled the Board to confirm the qualitative value of the content, of even as few as two pages.

[30] Finally, Access argues that the Board did not give due consideration to the evidence of compound copying; the Board did not include it in its calculations. According to Access, the Board could not set any bright-line rule based on the number of pages copied. While there were instances where one or two pages from the same book were copied more than once, it did not necessarily mean that the same pages were copied.

[31] There is little to be said about Access' argument that the Board did not consider compound copying. It is clear that the Board was aware of this argument. It devoted several paragraphs to it (see Reasons at paras. 188-202). At the hearing, when asked what evidence would have enabled the Board to estimate what adjustment should be made on that basis, Access acknowledged that there was no such evidence. I have not been convinced that the Board made a reviewable error in concluding that, based on considerations described in paragraph 202 of its Reasons, it would not make any adjustments on the basis of compound copying. This is especially so when one considers the Board's comments at paragraph 195 that Access had acknowledged that it was not possible to empirically assess the incidence or volume of compound copying captured by the volume study. Thus, although the Board agreed that compound copying was relevant in theory, in practice, it could simply not measure this phenomenon.

[32] Given that Access raises an issue with respect to the Consortium's burden of proof to establish the fairness of its dealing, it is worth mentioning that Access bore the legal burden of establishing that all copying in the volume study constituted potential violations of the copyright in the works of its repertoire. In theory, this means that it had to satisfy the Board that each copying event involved a substantial part of a protected work within its repertoire. As there were thousands of copying events involved, Access obviously could not produce a case by case qualitative assessment.

[33] The Board discussed the testimony of Ms. Gerrish, Access' main (if not the only) witness on this issue (Reasons at paras. 218-220). It concluded that she provided anecdotal evidence that

did not provide the Board with a reasonable basis on which to appreciate the qualitative characteristics of portions of books in Access' repertoire that were actually copied (Reasons at para. 220). The Board refused to draw the inference proposed by Access that because in the one or two books identified by Ms. Gerrish, one or two pages could represent a substantial amount of skill, labour and judgment in certain books (only one textbook illustration was given), it should infer that this was so in respect of all the books referenced in the volume study (Reasons at paras. 217, 220). However, the Board did draw such an inference in respect of newspaper and magazine articles on the basis that these were much shorter works which, by their nature, could be treated differently (Reasons at para. 225).

[34] The Board expressly rejected the proposition that what is worth copying is *prima facie* worth protecting, having found that this test had been discarded long ago (see footnote 136 of the Reasons). At the hearing before us, it became quite clear that Access could not explain how the copying choices made by a teacher for the purposes of preparing a lesson are related to assessing "substantiality". The Board came to this same conclusion when it found that copying for the purposes of meeting a student's educational needs is not a suitable proxy for substantiality (Reasons at para. 217). This seems altogether reasonable to me in the context of tariff setting proceedings.

[35] The Board also found that the subsample produced by Access, where actual copies of the excerpts involved in the copying event were produced, was too small to serve as a basis for the qualitative assessment of all the books in the repertoire.

[36] The Board did not expressly state that little could be gained from a review of these pages without the benefit of an expert or even a lay person that would carry out a reasoned analysis. I believe that it is implicit in the Reasons that a simple review of this limited evidence would not normally be sufficient to reach an appropriate conclusion on substantiality. This is confirmed by the Board's comments about how quantitative assessments are done when referencing *Cinar* where numerous expert witnesses, conflicting testimony and voluminous supporting evidence were produced to determine the qualitative part of the work taken (see Reasons at para. 222).

[37] I have not been persuaded by Access that the Board ignored any evidence produced by Access. Indeed, the Board considered it and found that it did not provide a reasonable basis to assess the qualitative nature of the thousands of copying excerpts at issue.

[38] That said, the Board had a couple of options. First, if it had applied the approach proposed by Access in respect of the Consortium's burden of proof under the fair dealing analysis (see paragraph 81 below), the Board could have concluded that Access had not established that the exposures reported in the volume study amounted to reproduction of "a substantial part of the books" in its repertoire (this is the only genre in respect of which the finding of the Board is contested) given the lack of probative evidence produced by Access in this respect. Second, and what the Board chose to do, was to determine that because it did not have the benefit of a qualitative analysis applicable to the majority of cases, it was reasonable in the particular circumstances of the matter before it (fulfilling its statutory mandate to set a tariff where the parties only presented evidence on an aggregate basis) to infer that the copying of one or two pages from a book was not qualitatively substantial. This approach resulted in a smaller

volume of copying being classified as non-substantial than if a threshold of 1% of each such work was adopted (Reasons at paras. 226-227).

[39] It is the task of a tribunal or trial court to fulfil its mandate, despite the paucity or quality of the evidence before them. Such decision-makers must determine if they are satisfied that a certain question of fact has been established. This task is at the very core of the expertise of tribunals such as the Board. Inferences, like findings of facts, are owed considerable deference.

[40] In my view, in the particular circumstances of this case, and considering the mandate of the Board under the Act, it was not unreasonable for the Board to infer that the copying of one or two pages of a book did not constitute reproduction of a “substantial part of the work” within the meaning of section 3 of the Act. It should be clear however that, in my view, such an inference would rarely be within the range of acceptable outcomes when there is evidence produced about each work at issue and would normally constitute an overriding and palpable error in the context of civil litigation proceedings where infringement is at issue.

[41] Finally, I note that considering the application of fair dealing and of section 29.4 of the Act to the exposures, most of the so called “non-substantial copying” in respect of books would have been deducted anyway from the compensable exposures (see tables 24 and 25 of Appendix A to the Reasons).

B. Fair Dealing

[42] Before reviewing the parties' arguments under this heading, a few general comments are warranted.

[43] In *Alberta*, Justice Abella, writing for a majority described the concept of fair dealing and the test to be applied as follows:

[12] As discussed in the companion appeal *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, [2012] 2 S.C.R. 326 (*SOCAN v. Bell*), the concept of fair dealing allows users to engage in some activities that might otherwise amount to copyright infringement. The test for fair dealing was articulated in *CCH* as involving two steps. The first is to determine whether the dealing is for the allowable purpose of “research or private study” under s. 29, “criticism or review” under s. 29.1, or “news reporting” under s. 29.2 of the *Act*. The second step of *CCH* assesses whether the dealing is “fair”. The onus is on the person invoking “fair dealing” to satisfy all aspects of the test. To assist in determining whether the dealing is “fair”, this Court set out a number of fairness factors: the purpose, character, and amount of the dealing; the existence of any alternatives to the dealing; the nature of the work; and the effect of the dealing on the work.

[44] Justice Rothstein, writing in dissent, made useful and indisputable comments when he wrote:

[39] ... This appeal is about fair dealing under s. 29 of the *Copyright Act*, R.S.C. 1985, c. C-42 (“Act”). Whether something is fair is a question of fact (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, at para. 52 (“*CCH*”). Fair dealing is “a matter of impression” (*CCH*, at para. 52, citing *Hubbard v. Vosper*, [1972] 1 All E.R. 1023 (C.A.), at p. 1027). In *CCH*, this Court found that the factors proposed by Linden J.A., at the Federal Court of Appeal (2002 FCA 187, [2002] 4 F.C. 213, at para. 150), to help assess whether a dealing is fair, provided a “useful analytical framework to govern determinations of fairness in future cases” (para. 53). While useful for purposes of the fair dealing analysis, the factors are not statutory requirements. (Emphasis added)

[45] In *Alberta*, the Supreme Court focused on fair-dealing for the purpose of private study.

The Court had to deal with the viewpoint from which fair dealing for this purpose is to be

assessed – the teacher or the student, particularly when multiple copies are made for one or more classes. Shortly thereafter, the Act was amended to include “education” as another purpose in respect of which users could rely on section 29 of the Act. In my view, this addition removed the dichotomy between teachers’ or students’ viewpoints under the section 29 analysis, when education is the relevant purpose.

[46] It is also well-known and reiterated in *Alberta* that the factors set out in *CCH* originate from the decision of Lord Denning in *Hubbard v. Vosper*, [1972] 1 All E.R.1023 (C.A.), at 1027. A review of these last two decisions makes it abundantly clear that not all the fairness factors are relevant in all cases nor is any one factor usually determinative.

[47] To fulfill its mandate, the Board had to balance the public interest in compensating the copyright owners for the taking of substantial parts of their work against the public interest in giving certain users the right to reproduce such parts for certain purposes including education and private study.

[48] This is what the second step of the test established in *CCH* and applied in *Alberta* is meant to do.

[49] The Board dealt with fair dealing in section XIII of its Reasons (see paras. 229-351). It then described its statistical approach to fair dealing at paragraphs 418 to 457. Finally, its calculation of same can be found in Appendix B to the Reasons, which starts at page 168 of the decision.

[50] I will now turn to the first issue raised by Access in respect of the Board's analysis of fair dealing. But first, for ease of comprehension, I will re-enumerate the recognized six fair dealing factors. They are: the purpose, character, and amount of the dealing; the existence of any alternatives to the dealing; the nature of the work; and the effect of the dealing on the work.

(1) Did the Board err in its application of the burden of proof?

[51] Access states that, contrary to what it did in other decisions, the Board did not expressly refer to the burden of proof in its reasons except to recognize the general principles set out in *CCH* and *Alberta*. Access submits that there are sufficient indications in the Reasons and in the methodology used by the Board on which to conclude that the Board failed to properly apply the legal and evidential burden imposed by law on the Consortium.

[52] In Access' view, the Consortium had to meet its burden of establishing that the first five factors tended to make its copying activities fair. Access recognizes that because it was in possession of more information than the Consortium in respect of the sixth factor (effect of the dealing), it had to provide evidence in respect of that factor. In its view, it met this burden. This issue is dealt with later on in these reasons.

[53] Based on its comments at paragraph 350 of the Reasons, that "the parties did not adequately address fair dealing," Access argues that the Board should have concluded that the Consortium had failed to meet its burden under the second step of the test for the application of the fair dealing use and refuse to deduct any exposure from the volume of compensable exposures that are in dispute.

[54] Finally, Access states that by creating a neutral category in the statistical methodology adopted, the Board disregarded the applicable burden of proof (see outline of oral argument at para. 41). In its view, anything falling in the neutral category should be considered as not fair (i.e. in the unfair category). Access submits that even if the Board, as an administrative decision-maker, did not have to follow formal rules of evidence, it was still bound to apply the legal burden as expressed by the Supreme Court in *Alberta* (see *Alberta* at para. 12).

[55] I agree that, as a matter of law, the Board cannot ignore the burden on the Consortium to establish that it was entitled to the application of section 29 of the Act. This question is reviewable on the correctness standard. However, I have not been persuaded by Access' arguments that the Board disregarded the burden of proof in this case.

[56] The question of who bears the legal burden is rarely relevant when reaching a conclusion based on the evidence. It is usually only determinative in cases when there is no evidence or no evidence capable of establishing a fact, or when the evidence is so evenly weighted that a decision-maker will determine an issue on that basis.

[57] In this case, to put the Board's comments and findings in context, it is useful to review in broad terms how the parties chose to fulfill their respective burdens in respect of the second step of the fairness test.

[58] The Consortium chose to present its case using two different approaches. First, the Consortium presented evidence in respect of guidelines issued in 2012 (see *Copyright Matters!*

Some Key Questions & Answers for Teachers, 3rd ed., Respondents' Record [RR], Vol. 1 at Tab 4) (the Guidelines)), and the fact that they had been widely distributed to K-12 school teachers. This was presented as evidence of a general practice of the type referred to at paragraph 63 of *CCH*. The Consortium argued that any copy made following those Guidelines would necessarily be fair (presumably these would only be relevant for the period covered by the Second Tariff). Ultimately, the Board found that it could not rely on the Guidelines for the purpose of setting the royalty rates (Reasons at paras. 233-234).

[59] Although both parties were clearly disappointed by the fact that the Board did not offer any detailed comments on their evidence relating to those Guidelines, Access did not challenge this finding, which was based on its assessment of the weight of the evidence. This was a wise decision, for indeed, the Board's conclusion was clearly open to it on the evidentiary record.

[60] Access argued extensively in its memorandum (not at the hearing or in its outline of oral argument) that the Board was wrong to discard the Guidelines as they were the best evidence of the behaviour to be assessed to determine the issue of fairness. This resulted, according to Access, in the rejection of what Access believed was the Consortium's better case. Yet, in my view, Access does not indicate how the Board's actions on this point render its analysis unreasonable.

[61] That said, contrary to Access' submissions, the Guidelines were not the only evidence tendered by the Consortium to meet the second part of the *CCH* test (i.e. weighing the fairness factors).

[62] It is apparent from a review of the expert report filed by the Consortium (RR, Vol. 2 at Tab 17) that the Consortium did present a second approach based on an evaluation of the *CCH* factors. I note that the Consortium's experts even offered alternative calculations, for example, in respect of "the amount of the dealing" factor, although it assumed based on the instructions received, that reproduction of 10% or less of a book would be considered fair, the said experts also calculated the impact of the Board's finding that only the reproduction of 7%, 5%, 3% or 1% of each work would be fair (RR, Vol. 2, Tab 17 at 438).

[63] Access had, for its part and as mentioned, marshalled evidence in respect of the sixth factor given that in its view, this factor militated towards finding that the dealing was not fair because of the considerable effect that copying had on the market for those works. Its expert had also calculated what would be fair by using and adjusting the Board's previous calculations in 2009 to account for what it considered fair based on *Alberta* (Applicant's Record [AR], Vol. 1, Tab I at 887-889). Access had also taken the position that the Guidelines were flawed and indeed promoted unfairness (Reasons at para. 231). In its view, the Board could only deduct the exposures that Access had conceded met the fairness test.

[64] It is now appropriate to put paragraph 350 of the Reasons on which Access relies in context by reproducing paragraphs 340 to 350:

[340] Unless we were to accept, in their entirety, the contentions of one party or the other on fair dealing—which we do not—the calculations by the parties cannot be accepted as they are. Nor is it apparent that the data can be readily disaggregated. This poses some difficulties in the evaluation of the amount of fair dealing that we expect occurred during the 2010-2015 period.

[341] Since fair dealing is a matter of impression, one approach would be to consider the copying as a group, or in groups, the latter of which the Board did in the *K-12 (2009)* decision and its redetermination in the *K-12 (2013)* decision.

[342] In *K-12 (2009)*, the Board identified four categories of copies that met the first step (i.e., the purpose) of the fair-dealing test. It then considered whether such copies were fair. Following the redetermination in the *K-12 (2013)* decision, all four categories were found to be fair dealing. In other words: all copies that were identified as having been done for a permitted fair-dealing purpose were found to be fair.

[343] In relation to genres that were compensable in *K-12 (2009)* (namely: books, newspapers, and magazines) the evidence does not suggest that the copying identified as Categories 1 through 4 in *K-12 (2009)* has characteristics that differ from copying that was not placed into a category. The only potential difference between copying that was placed into Categories 1 through 4 and that which was not, is in their purpose of the dealing and goal of the dealing.

[344] As noted above in our consideration of the purpose of the dealing, in Part XIII.C, approximately 75 per cent of all copying of books, newspapers and magazines in this matter was done for the purposes of “student instruction, assignments and class work,” and qualifies to be considered for fair dealing, but was not considered for fair dealing in the *K-12 (2009)* decision nor in its redetermination in *K-12 (2013)*. As per our discussion in our consideration of the goal of the dealing,²³⁰ above, the goal of such a dealing would tend towards fairness.

[345] Given that copying identified in Categories 1 through 4 were all found to be fair, and given that copying done for the purposes of “student instruction, assignments and class work” shares the characteristics of copying identified in those categories, were copying of books, newspapers, and magazines to be considered in a group, or groups, it is likely that we would conclude, in relation to those copies made for a permitted purpose, that such dealings were fair.

[346] However, it is unlikely that it is actually the case that all copies under consideration that were made for a permitted purpose are non-infringing. In the absence of evidence of a sufficiently followed practice, and among such a large and varied number of institutions, the approximation created by such a group-based approach likely be too rough of a measure.

[347] We therefore require some means of establishing an actual measure of fair-dealing copying. In this matter, since the data adduced by the parties is at the aggregate level, we approximate the amount of fair-dealing copying by using this data.

[348] We generally proceed with our calculations in the same manner as the parties, by determining the number of copies that were made for a permitted purpose, and, of those, how many were fair. However, in order to use the aggregate information in evidence, we must make the assumption that the characteristics of copying (such as the goal of the dealing, the amount of the dealing, or nature of the work) are independent of one another. For example,

whether a copy is made for one purpose or another, the amount of the work copied is not dependant on the purpose. This assumption is necessary, since the data that was adduced by the parties from the Volume Study does not let us correlate such characteristics with one another with any confidence.

[349] Given that the information in relation to consumables, which were not compensable under the *K-12 (2013)* decision, is also drawn from the 2006 Volume Study, and was also provided to the Board in aggregate form, we use the same method for approximating the amount of fair dealing in relation to consumables as well.

[350] The full methodology and calculations are discussed in Part XVI.E and in Appendix B. The methodology is of our own design, inspired however by submissions of the parties, particularly those of the Objectors. The calculations use data that is part of the evidence. Our assumptions and inferences are also based on the evidence. Because we are of the opinion that the parties did not adequately address fair dealing, we had no choice but to fashion a methodology of our own.

[65] On a fair reading of paragraph 350 of its Reasons, it is clear that the Board did not err as Access alleges. In my view, the Board did not find that the Consortium failed to file evidence that was capable of meeting its burden. Rather, the Board was not prepared to accept the calculations and assumptions of either party. Thus, it had to use the data produced in evidence to make its own inferences and calculations of what would in this case be fair. The Board's purpose was to come to its own "impression" of what was fair in the best manner possible considering that both parties had agreed to use aggregate data to establish the volume of copying during the relevant period.

[66] Turning to the neutral column included by the Board in its methodology, I understand that the Board classified exposures of books in this category when the evidence adduced did not help the Board to form an "impression" either way as to the fairness of the dealing. While classifying an exposure as neutral may have affected the Board's overall fair dealing

“impression” with respect to books, I do not agree that unless an exposure is considered as tending to fairness, it can only be viewed as tending to the unfairness of the dealing. This would make each factor a statutory requirement that must be met and mean that each factor necessarily applies in the same way to all copying events. As mentioned, this is simply not the law. I cannot conclude from the simple fact that the methodology included a neutral category that this means that the Board erred in law by failing to have due regard to where the burden of proof lied.

[67] I will now deal with Access’ argument that the Board breached its duty to act fairly when it failed to seek comments on the methodology it applied to form its “impression” in respect to books.

(2) Did the Board breach its duty to act fairly?

[68] At paragraph 351 of its Reasons, the Board wrote:

[351] The use of our own methodology raises the issue of whether or not we should submit it to the parties for comments. We decline to do so, for three reasons. First, allowing the parties to comment on the methodology issue would introduce several months of needless delay. We believe that the record is complete enough as it is. Second, the methodology is fundamentally based on the six-factor legal framework from CCH. This is a well-known framework, on which the parties have already commented extensively. Finally, the methodology uses data found in the evidence. The later has been extensively examined and cross-examined by the parties.

[69] Access submits that by adopting this methodology, the Board changed completely the case that it had to meet because it eliminated the main basis on which the Consortium had presented its case, namely, the Guidelines. To establish this, it referred to paragraphs 34-36 of the Consortium’s statement of case (see RR, Vol. 1, Tab 1 at 191). Access submits that it had a

legitimate expectation that the Board would give it an opportunity to comment on its methodology as it resulted in the exclusion of a very large portion of compensable exposures. Access adds that had it known that the Board would use this methodology, it would have presented evidence addressing this methodology. However, when asked what type of evidence this would include, Access could not offer any details. It simply said that its expert could have offered comments on the validity of this approach.

[70] After a careful review of Access' submissions, its memorandum, its outline of oral argument and its compendium, it appears that what Access wants is the chance to present arguments as to why considering each factor independently of each other leads to an absurd result. This it can do before us as it is also contesting the reasonableness of the Board's assessment.

[71] As to the seriousness of the impact of using this methodology, I note that the Board's method actually reduced the number of compensable exposures that the Consortium and its experts had put forward as fair. Although I agree that the first reason given by the Board (additional delay) is not a good answer or even an appropriate consideration on the facts of this case, Access has not persuaded me that the Board erred when it held that; i) the record was complete enough to determine if its methodology was satisfactory; and that ii) it used the *CCH* factors and data on which both parties had the opportunity to comment on at length and to examine extensively including through cross-examination.

[72] As mentioned, the Consortium did not ground its case only on the fairness of copying behaviour in accordance with the Guidelines (see RR, Vol. 1, Tab 1 at 193). Counsel for the Consortium confirmed at the hearing before us that indeed their experts had, using the criteria provided by counsel, conducted an analysis of the thousands of copying events in the volume study to assess whether each transaction was fair by considering the non-exhaustive list of factors set out in *CCH* (RR, Vol. 2 at Tab 17). It is clear that Access had a full opportunity to comment on the validity of the instructions given by counsel. Moreover, I note that the Consortium's experts had calculated as fair any exposure that met only three of the relevant *CCH* factors. This certainly provided Access with an opportunity to argue that the factors needed to be considered as a whole rather than individually. Finally, Access does not say that the Board erred in its statistical calculations.

[73] Thus, although this Court is reviewing any alleged breach of procedural fairness on the standard of correctness, I cannot conclude that the Board breached its duty in this matter. The Board did not introduce any new principle of law. It used the very factors that the parties had commented upon. The methodology is simply a practical and mathematical way of reflecting the relative weight given by the Board to the various factors used to form its "impression".

[74] I will now review Access' argument in respect of the reasonableness of the Board's methodology. Then I will deal with the arguments it put forth in respect of 4 of the 6 *CCH* factors, which in its view would justify quashing the decision even if one were to assume that the Board's methodology was reasonably sound. As held in *Alberta*, the assessment of fair dealing is a question of fact reviewable on the reasonableness standard.

(3) Was the Board's methodology unreasonable and did it err in assessing the relevant factors?

(a) General Approach

[75] Access did not say much to support its statement that the Board's methodology is fundamentally flawed. It reargued that introducing a neutral column was wrong as it ignored the Consortium's evidentiary burden, which was dealt with above.

[76] Access' other argument on this point is that the Board's methodology, which considers each factor independently of the other, leads to absurd results. Access contends that the Board ought to have followed the instructions in *CCH* and assess the evidence in respect of all the interdependent relevant factors as a whole since fair dealing is "a matter of impression".

[77] At the hearing, counsel for Access said that one of the effects of considering each factor independently is that instances where a whole book is copied would be found to be fair dealing since the "amount of the dealing" factor is not linked in any way to the Board's assessment of the "alternatives to the dealing" factor. Access argued that had the Board assessed the factors as a whole, it would have found that the copying of an entire book is unfair since buying a book is a realistic alternative.

[78] Counsel for the Consortium noted that this is pure speculation since the data reveals that there is no instance where a whole book was copied. Moreover, the Board adopted a scale that accounted for the varying proportions of each work copied. Given that the Board considered as

unfair (as opposed to neutral) any copying over 10% of a book, that the buying of a book has been held to be an unrealistic alternative to teachers copying short excerpts to supplement student textbooks and that the same volume study (and thus copied excerpts of books) relied on in *Alberta* are at issue here (*Alberta* at para. 32), the Board's methodology can hardly be described as being absurd.

[79] It may well be that the Board's methodology is not perfect, but again, given the particular circumstances of this case, I have not been persuaded that its overall determination that a large portion of the exposures were fair (again this was much less than the numbers proposed by the Consortium using a similar statistical approach) was unreasonable because of the method it chose to weigh the evidence in forming its overall impression of the fair dealing factors.

[80] I will now examine the specific issues raised in respect of the Board's assessment of four factors, namely, the amount of the dealing, the character of the dealing, the effect of the dealing and the alternatives available at the relevant time.

(b) Contested fair dealing factors

(i) Amount of the Dealing

[81] Access argues that the Board failed to consider the qualitative importance of the excerpts copied. It says that because the Consortium failed to present thousands of case by case analysis to meet its evidentiary burden in respect to this factor (Reasons at para. 280), the Board had to apply a solely quantitative (Reasons at para. 288) and arbitrary approximation, which again

unreasonably disregarded all of its evidence of “compound copying” (Reasons at paras. 286-289).

[82] In fact, the Board did what it understood the Supreme Court told it to do in *Alberta* and what our highest tribunal actually did consider in *CCH*, *Alberta* and *Bell*, where only the quantitative proportion of the work was considered (Reasons at paras. 279-282). I find no error in the Board’s reasoning in this respect.

[83] Considering that invoking the right to fairly use a work for the purpose of education pursuant to section 29 of the Act is only necessary when one would otherwise infringe the copyright in the work, it would make little sense to reconsider whether one has reproduced “a substantial part of the work” in the qualitative sense at the second step of the test. Indeed, if the copying did not reproduce a substantial part of the work, Access would not have the right to seek a royalty for that copy. Hence, by focusing on the proportion between the excerpt copied and the entire work, one already assumes that all that was copied was qualitatively relevant.

[84] As to the general importance of the works copied, Access appears to equate this to the “qualitative assessment” of the copying. I cannot agree. In *CCH*, the Supreme Court refers to “the importance of the work” not of the copying. Access did not refer to any evidence that would enable me to conclude that this particular aspect was relevant here. As mentioned, not all considerations referred to by the Supreme Court apply in every case.

[85] Access has not persuaded me that the Board made a reviewable error in assessing this factor.

(ii) Character of the Dealing

[86] According to Access, here the Board failed to consider the aggregate amount of copying of works in its repertoire, the whole as instructed in *Alberta* (at para. 29). In its view the fact that there were about 300 million exposures per year, or approximately 90 exposures per student per year was particularly significant and tended to establish that the dealing was not fair.

[87] *CCH* teaches that in assessing the character of the dealing, “courts must examine how the works were dealt with. If multiple copies of works are being widely distributed, this will tend to be unfair. If, however, a single copy of a work is used for a specific legitimate purpose, then it may be easier to conclude that it was a fair dealing” (*CCH* at para. 55).

[88] The Board held that the “character of the dealing” factor looks at “the size of a particular transaction or a set of transactions involving the same work” rather than the aggregate volume of total pages copied (Reasons at para. 269). It came to this conclusion in part based on its previous ruling in *Access Copyright (Provincial and Territorial Governments) 2005-2014* (22 May 2015)[*Governments*], where it had decided that the fact that the total number of copies made “by all users that benefit from the tariff ended up in the hands of many people does not automatically mean that each of those dealings was an instance where a ‘wide’ dissemination occurred.” (Reasons at para. 289, relying on the Board’s decision in *Governments* at para. 289). The Board

also found that the person or group for whom the copy was made is a relevant consideration under this factor since it is an “indication of the breadth of distribution” (Reasons at para. 428).

[89] Also, after examining all the evidence and the arguments, the Board concluded at paragraph 272 of its Reasons:

[272] Given the above, and given the absence of evidence that would give us a more nuanced appreciation of how many copies of a particular work were made, be it in the course of one transaction, by one teacher, or in one school, we conclude that for copies made for distribution within the school, this factor does not tend to make the dealing fair or unfair.

[90] In my view, this means that the Board did not consider that this factor was particularly useful to determine the fairness in this particular case.

[91] As mentioned, Access argues that the Board ought to have followed the Supreme Court’s teachings in *CCH* and *Alberta* and ought to have considered evidence of the aggregate volume of the total pages copied - this is not the teaching of these cases.

[92] As discussed above, *CCH* merely teaches that what is to be examined under this factor is how works are dealt with, such as whether the copies are widely distributed. Moreover, in *Alberta*, while the Supreme Court states that the “quantification of the total number of pages copied” is considered under the “character of the dealing factor” (*Alberta* at para. 29), it goes on to say that the Board in that case had considered the quantification of total pages copied by looking at whether “multiple copies of the texts were distributed to entire classes” (*Alberta* at para. 30). The Supreme Court did not find any error on the part of the Board in this regard.

[93] On my reading of these decisions, the Supreme Court does not restrict the manner in which the Board may assess this factor to solely looking at the aggregate volume of pages copied or otherwise. In explaining why looking at the aggregate volume of copies was not helpful to its assessment of whether the copies were widely distributed, the Board reasonably applied the Supreme Court's teachings in *CCH* and *Alberta*. I find no reviewable error on the part of the Board in this respect. In fact, this finding is reasonable even if one were to consider that the overall number of copies represents approximately 90 pages per student per year. I agree with the Consortium that this figure does not support the view that this factor could only tend to a conclusion that the dealing was not fair. I thus cannot conclude that the Board erred in concluding that this factor, on the facts of this case, was not particularly useful to reach its ultimate conclusion on fairness. This is why almost all exposures were classified in the neutral column for this factor (see also Reasons at para. 428).

(iii) Effect of the Dealing

[94] Access contests the Board's finding that this factor would only tend toward "unfairness" in 20% of exposures. It submits that this error is due to a misunderstanding of paragraph 72 of *CCH*. It adds that, as a result of this misunderstanding, the Board restricted its analysis of this factor to the effects of the dealing on the particular works copied in the volume study (Reasons at paras. 316-318) and disregarded evidence tendered by both parties that established that the K-12 schools' copying behaviours under the Guidelines have had and are likely to have, significant negative market impacts.

[95] Again, I find that the Board made no reviewable error, having merely applied *CCH*, which teaches that “[i]f the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair” (*CCH* at para. 59; *Alberta* at para. 33; see also *Reasons* at paras. 316-317). On my reading of paragraph 72 of *CCH*, the Supreme Court’s reference to “publisher’s markets” does not alter the meaning given to this factor at paragraph 59 of *CCH*.

[96] In the portion of its *Reasons* dealing with this factor (*Reasons* at paras. 315-338), the Board expressly dealt with why *Access*’ evidence based on the *Guidelines* is not relevant for the purpose of assessing the fairness of the dealing. The Board reiterated that the volume study was much better evidence of the copying behaviour of the K-12 schools (*Reasons* at paras. 319 and 235). It must be recalled that the Board had found that it could not rely on the *Guidelines* for various reasons (see paragraphs 59-61 above and *Reasons* at paras. 231-234). Thus, the Board notes at paragraph 319 of its *Reasons* that *Access*’ arguments based on the *Guidelines* were not relevant.

[97] The Board then discussed other evidence adduced by *Access* (*Reasons* at paras. 319-322). It found that while the said evidence was “mostly general in nature... there [was] sufficient circumstantial evidence in this matter to conclude that some unlicensed copying of works will have a direct negative effect on the market for the copied work” (*Reasons* at para. 337).

[98] It reached this conclusion after considering the testimony of Dr. McIntyre who, on cross-examination by counsel for the Consortium, agreed that the open educational resources

movement, digital sharing and the general emergence of new technologies could be responsible for declining book sales (Reasons at para. 322).

[99] In my view, it was open to the Board to find that if the volume study was representative of the behaviour of the K-12 schools, the arguments and evidence based on the Guidelines were irrelevant. I also conclude that the Board made no other error as it indeed considered the effect of the dealings on the market of the copied works as instructed by the Supreme Court. The Board did not disregard the parties' evidence. It simply found that Access had only demonstrated that the copying was only one of many causes attributed to a decrease in book sales (i.e. the market of the original works).

(iv) Realistic Alternatives

[100] Access argues that it was unreasonable for the Board to disregard its evidence in respect of the availability of alternatives throughout 2010-2015 (such as McGraw Hill Ryerson's iLit digital database which allows teachers to pick and choose works from the publisher's online database to create their own custom "book of excerpts" as an alternative to buying several works (see Access' Compendium at Tab 47) on the grounds that these alternatives were not available in 2006 when the volume study was carried out. It argues that the Board failed to appreciate the nature of the agreement between the parties with respect to the relevance of the volume study.

The Board found that:

[305] The evidence in this matter does not show any realistic alternatives being available at the time the copies were made (as this is what is being evaluated). The little evidence that was adduced shows only that some alternatives, for some resources, have become available more recently.

[101] I agree that if the Board's sole basis for rejecting the evidence was grounded in the fact that these alternatives were not available at the time the volume study was conducted, then its finding would be unreasonable. However, a fair reading of paragraph 305 of the Board's decision, and my consideration of all the evidence relied on by Access to which it refers to in its outline of oral argument (see Access' Compendium at Tab 47), leads me to conclude that this factor does not support a finding of unfairness given that Access' evidence on this point is greatly limited in scope and detail. It was on this basis that the Board concluded that this factor tended towards fairness in relation to all copying of non-consumable works (Reasons at paras. 305-306).

[102] Access did not attempt to quantify the number of non-consumable works that could be purchased on a segregated basis (i.e. short excerpts or chapters of works). Its evidence as to when some alternatives (other than the purchase of a full book) became available was quite vague.

[103] While Access did adduce some evidence establishing that members of the Consortium expressly asked for additional materials to be made available on a segregated basis, which request McGraw Hill fulfilled by creating its iLit database, and that other works are available on the internet, this is not sufficient to conclude that the finding of the Board was unreasonable. In the absence of any evidence as to the availability of alternatives in relation to the majority of works at issue during the relevant periods (2010-2015), I cannot conclude that the Board's finding does not fall within a range of acceptable outcomes.

[104] I conclude that Access has not established that the Board's assessment of the amount of exposures that should be excluded for compensability on the basis of fair dealing pursuant to section 29 of the Act is unreasonable.

III. CONCLUSION

[105] In light of the foregoing, the only reviewable error that justifies reconsideration by the Board is the one concerning the impact of the coding errors on the repertoire of Access. I would therefore only grant the application of Access in part and I would refer the matter back to the Board for reconsideration of this issue.

[106] As the Consortium was substantially successful, I would award costs to it calculated on the basis of the lower number of units in column III of Tariff B.

"Johanne Gauthier"

J.A.

"I agree
M. Nadon J.A."

"I agree
Eleanor R. Dawson J.A."

APPENDIX

Copyright Act, R.S.C., 1985, c. C-42

Copyright in works

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

(a) to produce, reproduce, perform or publish any translation of the work,
 (b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,
 (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,

(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,

(e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

(g) to present at a public exhibition, for a purpose other than sale or hire,

Droit d'auteur sur l'oeuvre

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) de produire, reproduire, représenter ou publier une traduction de l'oeuvre;
 b) s'il s'agit d'une oeuvre dramatique, de la transformer en un roman ou en une autre oeuvre non dramatique;

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) 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 reproduite, représentée ou exécutée mécaniquement;

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) de communiquer au public, par télécommunication, une oeuvre littéraire, dramatique, musicale ou artistique;

g) de présenter au public lors d'une exposition, à des fins autres que la

an artistic work created after June 7, 1988, other than a map, chart or plan,

(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,

(i) in the case of a musical work, to rent out a sound recording in which the work is embodied, and

(j) in the case of a work that is in the form of a tangible object, to sell or 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,

and to authorize any such acts.

Exceptions

Fair Dealing

Research, private study, etc.

29 Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.

R.S., 1985, c. C-42, s. 29; R.S., 1985, c. 10 (4th Supp.), s. 7; 1994, c. 47, s. 61; 1997, c. 24, s. 18; 2012, c. 20, s. 21.

Educational Institutions

Reproduction for instruction

29.4 (1) It is not an infringement of copyright for an educational institution or a person acting under its authority for the purposes of education or training on its premises to reproduce a work, or do any other

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) 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) s'il s'agit d'une oeuvre musicale, d'en louer tout enregistrement sonore;

j) s'il s'agit d'une oeuvre sous forme d'un objet tangible, d'effectuer le 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.

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

Exceptions

Utilisation équitable

Étude privée, recherche, etc.

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.

L.R. (1985), ch. C-42, art. 29; L.R. (1985), ch. 10 (4e suppl.), art. 7; 1994, ch. 47, art. 61; 1997, ch. 24, art. 18; 2012, ch. 20, art. 21.

Établissements d'enseignement

Reproduction à des fins pédagogiques

29.4 (1) Ne constitue pas une violation du droit d'auteur le fait, pour un établissement d'enseignement ou une personne agissant sous l'autorité de celui-ci, de reproduire une oeuvre pour la présenter visuellement à des

necessary act, in order to display it.

Reproduction for examinations, etc.

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

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

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

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

fins pédagogiques et dans les locaux de l'établissement et d'accomplir tout autre acte nécessaire pour la présenter à ces fins.

Questions d'examen

(2) Ne constituent pas des violations du droit d'auteur, si elles sont faites par un établissement d'enseignement ou une personne agissant sous l'autorité de celui-ci dans le cadre d'un examen ou d'un contrôle :

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

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

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-93-16

**APPEAL FROM A DECISION OF THE COPYRIGHT BOARD OF CANADA DATED
FEBRUARY 19, 2016**

DOCKET: A-93-16

STYLE OF CAUSE: THE CANADIAN COPYRIGHT
LICENSING AGENCY,
OPERATING AS ACCESS
COPYRIGHT v. BRITISH
COLUMBIA MINISTRY OF
EDUCATION AND ALL
ENTITIES NAMED IN
SCHEDULE "A" HERETO

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: NOVEMBER 22, 2016

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: NADON J.A.
DAWSON J.A.

DATED: JANUARY 27, 2017

APPEARANCES:

Arthur Renaud
Erin Finlay
Jessica Zagar

FOR THE APPLICANT

J. Aiden O'Neill
Ariel Thomas
Wanda Noel

FOR THE RESPONDENTS

SOLICITORS OF RECORD:

The Canadian Copyright Licensing Agency

Fasken Martineau DuMoulin LLP

FOR THE APPLICANT

FOR THE RESPONDENTS

Schedule “A”

Alberta Education
Manitoba Education and Advanced Learning
New Brunswick Department of Education and Early Childhood Development
Newfoundland and Labrador Department of Education and Early Childhood Development
Nova Scotia Department of Education and Early Childhood Development
Northwest Territories Department of Education, Culture and Employment
Nunavut Department of Education
Ontario Ministry of Education
Prince Edward Island Department of Education, Early Learning and Culture
Saskatchewan Ministry of Education
Yukon Department of Education
Algoma District School Board
Algonquin and Lakeshore Catholic District School Board
Avon Maitland District School Board
Bloorview School Authority
Bluewater District School Board
Brant Haldimand Norfolk Catholic District School Board
Bruce-Grey Catholic District School Board
Campbell Children’s School Authority
Catholic District School Board of Eastern Ontario
Conseil des écoles publiques de l’Est de l’Ontario
Conseil scolaire de district catholique Centre-Sud
Conseil scolaire de district catholique de l’Est de l’ontarien
Conseil scolaire de district catholique des Aurores boréales
Conseil scolaire de district catholique des Grandes Rivières
Conseil scolaire de district catholique du Centre-Est de l’Ontario
Conseil scolaire de district catholique du Nouvel-Ontario
Conseil scolaire de district catholique Franco-Nord
Conseil scolaire de district des écoles catholiques du Sud-Ouest
Conseil scolaire Viamonde
Conseil scolaire de district du Grand Nord de l’Ontario
Conseil scolaire de district du Nord-Est de l’Ontario
District School Board of Niagara
District School Board Ontario North East
Dufferin-Peel Catholic District School Board
Durham Catholic District School Board
Durham District School Board
Grand Erie District School Board
Greater Essex County District School Board
Halton Catholic District School Board
Halton District School Board
Hamilton-Wentworth Catholic District School Board
Hamilton-Wentworth District School Board
Hastings and Prince Edward District School Board

Huron Perth Catholic District School Board
Huron-Superior Catholic District School Board
James Bay Lowlands Secondary School Board
John McGivney Children's Centre School Authority
Kawartha Pine Ridge District School Board
Keewatin-Patricia District School Board
Kenora Catholic District School Board
KidsAbility School Authority
Lakehead District School Board
Lambton Kent District School Board
Limestone District School Board
London District Catholic School Board
Moose Factory Island District School Area Board
Moosonee District School Area Board
Near North District School Board
Niagara Catholic District School Board
Niagara Peninsula Children's Centre School Authority
Nipissing-Parry Sound Catholic District School Board
Northeastern Catholic District School Board
Northwest Catholic District School Board
Ottawa Catholic District School Board
Ottawa Children's Treatment Centre School Authority
Ottawa-Carleton District School Board
Peel District School Board
Protestant Separate School Board of the Town of Penetanguishene
Peterborough Victoria Northumberland and Clarington Catholic District School Board
Rainbow District School Board
Rainy River District School Board
Renfrew County Catholic District School Board
Renfrew County District School Board
Simcoe County District School Board
Simcoe Muskoka Catholic District School Board
St. Clair Catholic District School Board
Sudbury Catholic District School Board
Superior North Catholic District School Board
Superior-Greenstone District 3 School Board
Thames Valley District School Board
Thunder Bay Catholic District School Board
Toronto Catholic District School Board
Toronto District School Board
Trillium Lakelands District School Board
Upper Canada District School Board
Upper Grand District School Board
Waterloo Catholic District School Board
Waterloo Region District School Board
Wellington Catholic District School Board

Windsor-Essex Catholic District School Board
York Catholic District School Board
York Region District School Board