Court File No. A-259-17

FEDERAL COURT OF APPEAL

B E T W E E N:

YORK UNIVERSITY

Appellant

- and -

THE CANADIAN COPYRIGHT LICENSING AGENCY ("ACCESS COPYRIGHT")

Respondent

AFFIDAVIT OF VICTORIA OWEN
in support of MOTION FOR LEAVE TO INTERVENE
by CANADIAN ASSOCIATION OF RESEARCH LIBRARIES

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I. Introduction

1. I, Victoria Owen, of the City of Toronto, Ontario, affirm as follows:

2. This affidavit is in support of a motion to intervene by the Canadian Association of Research Libraries ("CARL") in the pending appeal of the July 12, 2017 decision of the Federal Court in *Canadian Copyright Licensing Agency v. York University*, 2017 FC 669 (CanLII), http://canlii.ca/t/h4s07[1] (the "trial decision") and *Canadian Copyright Licensing Agency v. York University***,** 2017 FC 670 (CanLII), http://canlii.ca/t/h54mj[2] (the "trial judgment"). Canadian Copyright Licensing Agency is hereinafter referred to as "Access Copyright" and York University is hereinafter referred to as "York". Except as otherwise indicated, I have personal knowledge of the matters stated in this affidavit. I have been provided with certain documents from the record in this case by CARL's counsel.

3. In summary, and as will be further explained and documented below, CARL, if permitted to intervene, would make submissions on the following issues.

4. First, the fundamental legal error in the trial decision was the holding that tariffs, such as those proposed by Access Copyright, whether interim or final, are mandatory for users:

    a. Specifically, CARL will argue that the trial decision holding that an approved tariff is mandatory on users misconstrues the statutory scheme, the intention of Parliament, and contradicts established case law, including the most recent holding from the Supreme Court of Canada (hereinafter "SCC"), which has clearly stated in 2015 in *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.* that "licences fixed by the [Copyright] Board do not have mandatory binding force over a user". As the Supreme Court explained, while the Board has the statutory authority to fix the terms of licences "a user retains the ability to decide whether to become a licensee and operate pursuant to that licence, or to decline"[3];

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[1] Moving Party's Motion Record (hereinafter "MMR") Tab 3B.
[2] Moving Party's Motion Record MMR Tab 3C.
[3] *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, [2015] 3 SCR 615, 2015 SCC 57 (CanLII), <http://canlii.ca/t/gm8b0> hereinafter "*CBC v. SODRAC*", para. 113. MMR Tab 3D

b. CARL will argue that this holding from *CBC v. SODRAC*, which itself reaffirmed earlier case law, is controlling, that it is not limited to proceedings under section 70.2 of the *Copyright Act*,[4] and that the trial decision attempt to distinguish that holding was ill-founded; and,

c. CARL will argue that the "mandatory tariff" issue is by far the main issue and, indeed, a threshold issue which, if it had been correctly decided at an early stage, could have ended this litigation long ago. This issue can and should be correctly dealt with now, thereby avoiding the need for a costly and unnecessary "Phase II" proceeding and potentially considerable further uncertainty and litigation, some of which has recently commenced, as will be shown below.

5. Second, CARL will submit that the Court below need not have and should not have dealt with the issue of infringement and fair dealing. CARL will argue that this case was not a copyright infringement case: Access Copyright does not have standing to sue for copyright infringement. It is not the owner of the copyright in the works allegedly infringed by York, nor does it have any other interest in the copyright which would entitle it to initiate proceedings with respect to such alleged infringement. Accordingly, York did not have to defend itself against those allegations, much less to seek a declaration as to the legitimacy of its fair dealing guidelines, and the Court below should not have made any finding on that matter:

    a. CARL will submit that, notwithstanding the parties' desire that the Court address the issues of infringement and fair dealing, the Court below, doubtless unwittingly, committed a serious error in being willing to adjudicate and make finding on these issues, and it should have declined to do so.

    b. Moreover, CARL will show that key errors in the trial decision's holding on fair dealing stemmed from the fact that the owners of the copyright of the works in question, who could have had standing to sue York, but which have chosen not to sue, were at least necessary parties. They were absent from this litigation, and their absence led the Court to conduct an unnecessarily prolonged and complicated

[4] See *Copyright Act* excerpts in MMR Tab 3A.

proceeding. Unmoored from any concrete legal dispute between an actual right holder and a defendant, the Court below conducted an extraordinarily massive proceeding about hypothetical copyright infringement, from which many basic substantive, evidentiary, and procedural safeguards were missing. CARL believes that it is important that this Honourable Court will recognize this error so as to ensure that the flaws of the proceedings below do not impact thousands of researchers, students, librarians, and their institutions, not to mention the overall public interest, for years to come.

c. CARL will submit that the Court's comments on fair dealing are at most *obiter dicta* in addition to being seriously incorrect, in particular with respect to the need for monitoring and supervision, and the issue of aggregate copying.

6. Third, in its submissions, CARL will demonstrate the impact of these errors on the delicate balance between the rights of copyright owners and those of users in general, and their particularly harmful effect on libraries, their patrons, on scholars, students, and research in Canada. CARL will show why, unless reversed, the error of the trial decision will seriously undermine this balance, the cornerstone of Canadian copyright jurisprudence, and render meaningless users' right to fairly deal with works. CARL will address this issue from the unique perspective of libraries and their long established institutional role in the advancement of learning.

7. CARL believes that it must intervene in this appeal because the fundamental threshold issues of the so-called "mandatory tariff" and Access Copyright's lack of standing to sue for infringement were not fully and forcefully addressed at trial by York. As documented below, at trial York's counsel repeatedly told the trial judge that he need not decide whether final approved tariffs are mandatory and that the 2015 SCC decision on this issue in *CBC v. SODRAC* was merely "instructive" and not binding. York is now finally attempting in its memorandum in this appeal filed February 2, 2018 (hereinafter the "York Memorandum")[5] to argue that approved tariffs are not mandatory. However, the argument is incomplete, ambiguous, and clearly secondary to York's concern with fair dealing. Accordingly, CARL

[5] See attached Exhibit "A".

is concerned that its position on this issue in particular and the other issues raised in this affidavit will not be adequately defended on appeal unless CARL is granted leave to intervene.

8. Unless reversed, CARL believes that the trial decision will prove to be the single most incorrect and harmful decision in the history of copyright law in Canada. It will effectively undo all three SCC decisions[6] on fair dealing since 2004, a SCC decision of 2015 declaring that Copyright Board tariffs are not mandatory for users, and Parliament's explicit recognition of "education" by the addition of that word to the s. 29 fair dealing provision during the 2012 amendment to the *Copyright Act*[7]. At stake are not only supposedly mandatory payments of hundreds of millions of dollars in potential retroactive, current and future liability that Parliament never intended; unless reversed, the trial decision will also cause incalculable damaging and chilling effects on all aspects to teaching, learning and research in Canadian universities and research-oriented institutions. Thus, CARL's interest is direct, tangible, and immediate. By seeking to right a legal and jurisprudential wrong, CARL is protecting both the interests of research libraries and the public interest.

9. I believe that CARL can assist this Court in presenting a fuller picture of these issue than the one that presented by the parties or other proposed interveners.

II. History of this Litigation

10. A brief history of this litigation is attached as Exhibit "B" to this affidavit.[8]

III. About CARL and the Deponent

11. CARL represents research libraries at 31 of Canada's most research-intensive universities and federal government institutions, which are listed in Exhibit "C" attached to this

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[6] *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36, [2012] 2 SCR 326 [SOCAN], and *Alberta v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 SCR 345. These authorities are included with CARL's written representation.

[7] See *Copyright Act* excerpts in MMR Tab 3A.

[8] See attached Exhibit "B".

affidavit.[9] Research libraries and the professionals who staff them are at the frontline of all aspects of copyright in their institutions. This includes the development of guidelines, education and awareness, clearance, licensing, determination of compliance where guidance is sought regarding, for example, fair dealing or insubstantial copying.

12. CARL invited me to depose on its behalf because of my national and international experience with intellectual property and copyright related to libraries and educational institutions, my national and international experience in information and copyright policy matters and my academic qualifications in library science and law.

13. I am the Chief Librarian at the University of Toronto Scarborough, where I am a permanent status (tenured) Librarian IV. The University of Toronto is a member of CARL. However, the positions taken here and those that will be taken should leave to intervene be granted are made on behalf of CARL alone and not on behalf of the University of Toronto.

14. My formal qualifications are as follows: Bachelor of Arts, (University of Western Ontario) 1977; Master of Library and Information Science, (University of Western Ontario) 1980; Master of Laws, Specializing in Intellectual Property Law (Osgoode Hall Law School, York University) 2012. I am the author of numerous articles on copyright and libraries and received a national award for my publication "Who Safeguards the Public Interest in Copyright in Canada?".[10]

15. I am a member of the CARL Policy Committee, the chair of the Canadian Federation of Library Associations' Copyright Committee, a member of the Ontario Library Association's Copyright Users' Group, and the International Federation of Library Association's (IFLA) Governing Board representative on the Copyright and Other Legal Matters Committee, and its past chair. I am the IFLA representative on the Board of World Intellectual Property Organization's (WIPO) Accessible Book Consortium. Through these roles in professional organizations I have appeared before Canadian Parliamentary committees, both Senate and Legislative committees, and on numerous occasions in Geneva, Switzerland, at the WIPO

[9] See attached Exhibit "C".
[10] Victoria Owen, "Who Safeguards the Public Interest in Copyright in Canada?" (2012) 59:4 J Copy't Soc'y USA 803. See attached Exhibit "D".

Standing Committee on Copyright and Related Rights.

16. CARL supports research libraries and the professionals who work in them. The librarian's role encompasses seeking the most effective methods to acquire, preserve, and disseminate knowledge to serve their community's needs. CARL's members are singularly focused on their professional and ethical responsibilities inherent in their historical role in "promotion of science" and the "encouragement of learning".

17. Librarians' roles lie at the interface where the interests and concerns of the various stakeholders in the scholarly community convene: management, researchers, scholars, students, and the public at large. Although most of CARL libraries are housed in universities, its membership is not limited to university libraries, and in any event, staff members in research libraries have a unique and more focused perspective on copyright than university management, faculty or students.

18. A recent study that examined the "locus of responsibility for institutional policy relating to copyright compliance and use of copyrighted materials" found that "by far the campus unit most often holding this responsibility, alone or in a joint capacity, was the library…"[11] In fact, all but six of the CARL universities have either copyright offices inside of their libraries or have made the library responsible or closely connected to copyright management at their institutions.

19. In the study cited above, Graham and Winter finish by stating that "Canadian universities have evidently augmented the attention and resources dedicated to ensuring their communities, on the one hand, understand and comply with Canadian copyright law, and on the other hand, are aware of and fully exercise the *Copyright Act*'s provisions for user's rights such as fair dealing".[12] Universities have become much more aware of and accountable for the statutory requirements listed in the *Copyright Act*, with clearly defined policies designed to facilitate the legal use of copyrighted works, and have built the capacity,

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[11] Rumi Graham and Christina Winter, "What Happened After the 2012 Shift in Canadian Copyright Law? An Updated Survey on How Copyright Is Managed across Canadian Universities," (2017) 12:3 Evidence Based Lib & Info Practice 132, at 140, https://doi.org/10.18438/B8G953. See attached Exhibit "E".
[12] *Ibid* at 153.

with the active and ongoing role of librarians, to support that use through education and services.

20. In line with its members' unique perspective, rooted in libraries' and librarians' expertise and in the core values and ethical duties of their profession, CARL has been an active advocate on issues relating to copyright law and policy. Independently of the institutions that house many of its members, CARL routinely represents research library interests to legislators and governments, most recently appearing before the Senate Committee on Banking, Trade and Commerce on access to copyrighted works for persons with disabilities and the Marrakesh Treaty; the Standing Committee on Access to Information, Privacy and Ethics on privacy and the Right to be Forgotten; the Standing Committee on International Trade on the library community's position on the intellectual property provisions of the Trans-Pacific Partnership Agreement; and in hearings on every past copyright bill. It participated in the recent review of the Copyright Board and filed an objection on July 19, 2017 to the Board regarding Access Copyright's proposed post-secondary tariff, which included reference to the mandatory tariff issue and which is attached as Exhibit "F".[13] CARL also maintains a close relationship with the US based Association of Research Libraries, which actively represents research libraries' interests in US Congressional and judicial matters, and which has been involved in several important high-profile case in the US courts, including the US Supreme Court.

21. Further information about the role of CARL and its member research libraries is provided in Exhibit "G" attached to this affidavit.[14]

IV. The Main Issues in This Appeal

22. The main issues in this appeal as framed in the York Memorandum are as follows:

> *(a) Did the trial judge err in concluding that copying done under York's Guidelines is not fair dealing?*

[13] See attached Exhibit "F".
[14] See attached Exhibit "G".

(b) Did the trial judge err in concluding that ***the Interim Tariff was mandatory****, not voluntary, and enforceable against York?*

(c) Did the trial judge deny York procedural fairness by rendering judgment on matters outside the scope of the Phase I trial?[15]

(emphasis added)

23. CARL approaches these issues very differently, as set forth in this affidavit and summarized above at paragraphs 4-7. In particular, CARL believes that the issue of whether all final approved tariffs are mandatory must be confronted – it is not sufficient that a decision be made only as to whether the "Interim Tariff" is mandatory. Moreover, while CARL agrees with York that the trial judge made serious errors in his analysis of the fair dealing issue, it believes, unlike York, that the trial judge should not have dealt with this issue at all.

24. CARL will also argue that the learned judge need not and should not have heard the submissions on fair dealing generally or the York guidelines in particular. In the alternative, CARL would argue the pronouncements by the Federal Court in this instance were no more than *obiter dicta.*

25. However, in the event that this Honourable Court disagrees, CARL would, if permitted, make brief submissions as follows, based upon three clear and binding decisions of the Supreme Court of Canada that were misapplied by the learned trial Judge:

    a. The trial decision was incorrect with respect to its conclusions on "aggregate" copying; and

    b. The trial decision was incorrect with respect to its conclusions on monitoring and supervision.

26. CARL is hopeful that York and other interveners will address in detail numerous other errors concerning fair dealing in the trial decision. However, if it appears that this will not be the case, CARL wishes to reserve its right to address some of these issues in further detail, time and space permitting.

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[15] York Memorandum, para 26. See attached Exhibit "A".

V. Reasons for Seeking Leave to Intervene

27. CARL seeks leave to intervene in this appeal because it can assist the Court in resolving the legal issues before it. As I explain below, this appeal raises legal issues of the utmost public interest and its outcome will directly affect CARL members. CARL will submit that appeal provides the most efficient forum and opportunity for correctly deciding those legal issues. If granted leave to intervene, CARL will make arguments and offer perspective that no other party will address or not address adequately. In order to assist this Honourable Court, I have organized the following to show how I believe that CARL's motion to intervene meets the Rothmans' factors and other tests that interveners are expected to satisfy.

a. CARL Members are Directly Affected

28. CARL members will be directly affected by the outcome of this case. Professional librarians are on the front line of copyright issues in the post-secondary education realm in Canada. Most institutions delegate to their libraries and their staff copyright clearance matters, the explanation of copyright law, institutional guidelines and in many cases the responsibility to allow or deny inclusion or provision of specific material. Librarians must respect the policies of their employer and be cognizant of the applicable legislation and jurisprudence in assessing particular questions. The personal reputation, professional responsibility and career prospects of CARL members' librarians depend on properly serving their community. It is part of CARL's role and that of its members to contribute their expertise to the development of sound legislation and jurisprudence. Moreover, CARL members will be prejudiced by onerous costs and reporting requirements, decreased access to essential material and the resulting harm to research, education and innovation. Faculty, staff and students in the post-secondary community in Canada will be negatively affected if CARL is not permitted to assist this Court and have a voice in this appeal of a decision that, unless reversed, will have a profoundly damaging effect on research, innovation and education in Canada.

29. The role of libraries and universities in the dissemination of knowledge is of immense historic and present importance. Indeed,

> *Libraries and universities predate copyright. The institutional role of libraries and institutions of higher learning in the "promotion of science" and the*

> *"encouragement of learning" was acknowledged before legislators decided to grant authors exclusive rights in their writings*.[16]

30. It must not be overlooked that this case is very much about libraries. Indeed, even the trial decision acknowledged the critical role that libraries play in the access to and dissemination of educational materials:

> *[180] York's libraries (York University Libraries and Osgoode Hall Law Library) play a critical role in the access to and dissemination of educational materials, including hard copy collections (printed monographs and periodicals) as well as electronic collections. Osgoode Hall Law Library is not part of this litigation.*[17]

31. In light of the role the libraries play at the interface of copyright and the dissemination of knowledge, it is perhaps not a coincidence that the landmark 2004 Supreme Court decision in *CCH v. LSUC*,[18] which is probably the most important copyright decision in Canadian law, was also concerned with a library, namely the Great Library of the Law Society of Upper Canada. Access Copyright (or CanCopy, as it was then known) played a leading role in that case.

32. While Access Copyright was not the plaintiff in that action and could not have had standing to sue, it was the driving force and the funder behind that litigation.[19] The publishers who acted as plaintiffs in that case did not seek damages for what they alleged to be an infringement of their copyrights. Instead, they sought a wide injunction, because their strategic goal was to force the Great Library, and potentially other users, to obtain a licence from Access Copyright.

33. Having failed to accomplish that goal, it would now seem that Access Copyright is trying to effectively reverse the *CCH* decision and to cause an even more devastating result to libraries and, indeed, the entire post-secondary sector. Several aspects of the trial decision echo many of the arguments that Access Copyright and its members advanced in the *CCH* case, but

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[16] Ariel Katz, "Copyright, Exhaustion, and the Role of Libraries in the Ecosystem of Knowledge" (2016) 13:1 I/S: J L & Pol'y Infor Soc'y 81 at 84. See CARL MMR Tab 3O.
[17] MMR Tab 3B para 180.
[18] *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339; MMR Tab 3L.
[19] Ariel Katz, "Spectre: Canadian Copyright and the Mandatory Tariff— Part I" (2015) 27 IPJ 151 fn. 70 MMR Tab 3M.

which were ultimately rejected by the Supreme Court. By embracing Access Copyright's novel mandatory tariff theory, the trial decision has handed Access Copyright even greater powers than those that it sought unsuccessfully in the *CCH* litigation.

34. It is also worth noting that the tariff at issue in this case is not limited to universities. The Interim Tariff applies to any "institution", which it defines as "an institution located in Canada (except in the Province of Quebec) that provides post-secondary, continuing, professional, or vocational education or training."[20] Since the Law Society of Upper Canada provides various continuing professional education and training, the Law Society and the Great Library could find themselves compelled to comply with the tariff just as York did.

35. CARL members are directly affected by the outcomes of this case because the unprecedented notion that copyright collectives can impose on libraries and their parent institutions a legal obligation to comply with so called "mandatory tariffs" would seriously jeopardize libraries' ability to pursue their important and well-recognized public mission.

36. Libraries have always had the liberty of choosing the optimal way of complying with their copyright obligations. Obtaining a licence from a copyright collective such as Access Copyright was, and where suitable will continue to be, one of those options. However, until the trial decision libraries and their parent institutions have never been compelled to deal with copyright collectives, and have always had the choice of securing permissions through a variety of other options including obtaining permission directly from rights holders or through intermediaries, and, of course, relying on fair dealing or other statutory exceptions and limitations when appropriate.

37. Universities have clearly recognized the link between libraries and copyright, and have, with the help of their research libraries and staff, put in place a variety of mechanisms that help to ensure copyright compliance at their institutions. As articulated in CARL's Statement on Fair Dealing and Copyright in Universities:

> *The 31-member libraries of the Canadian Association of Research Libraries (CARL) spent $293 million on information resources in 2014-15, demonstrating a clear commitment to accessing print and digital content legally and rewarding content owners accordingly. Universities are actively*

[20] See Interim Tariff. Attached as Exhibit "H".

> *engaged in outreach to their faculty, staff, and students, educating them on their rights and responsibilities under the Copyright Act and ensuring that uses of material under copyright fall well within the provisions of the law. Where educational uses are more substantive and therefore fall outside of fair dealing, the content is either purchased to be added to licensed collections, or rights clearances are obtained and royalties are paid for these uses. Trained, knowledgeable library staff support these activities.*[21]

38. If the trial decision is upheld with respect to its ruling that Copyright Board tariffs are "mandatory" for users, the consequences for academic libraries, their parent institutions and the public interest would be devastating. In the case of a university, for example, the "mandatory tariff" theory would entail that, despite all efforts and expenditure to comply with its copyright obligations without dealing with a monopolistic copyright collective, such as Access Copyright (e.g. by obtaining licences directly from publishers or other market-based intermediaries, relying on "open access" licensing models, and implementing internal fair dealing policies), a single unauthorized reproduction of one work from a copyright collective's repertoire could nonetheless trigger retroactive and prospective liability of millions dollars. In monetary terms alone, the conclusion that tariffs are mandatory could potentially result in a cost to Canadian universities of more than $44,000,000 per annum in tariff payments[22], with potential retroactive application of several years amounting potentially to hundreds of millions of dollars.

39. This liability would compound the millions of dollars that the university already pays for acquisitions, subscriptions, and access to licensed digital databases. It might exceed, by orders of magnitude, any monetary award that the university, even if held liable for infringement, could otherwise be reasonably expected to pay. It is noteworthy that in 2012

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[21] "CARL Statement on Fair Dealing and Copyright," September 6, 2016, http://www.carl-abrc.ca/wp-content/uploads/docs/CARL_Statement_on_Fair_Dealing_2016_EN.pdf See attached Exhibit "I".

[22] Based upon estimated enrolment of 1.7 million students (https://www.univcan.ca/universities/facts-and-stats/) and the final tariff currently sought by Access Copyright of $26 per FTE per annum in a nearly 8-year-old but still undecided Copyright Board hearing. https://www.univcan.ca/universities/facts-and-stats/ See attached Exhibit "J".

Parliament decided to cap statutory damages for "non-commercial" infringement at $5,000 for all previous infringing activity.[23]

40. Moreover, if tariffs become mandatory for users, to stave off the magnitude of such liability, users would be compelled to participate in tariff proceedings before the Copyright Board. The financial and administrative costs of participating in such proceedings would be unsustainable, as illustrated by the fact that the Association of Universities and Colleges Canada ("AUCC", now known as Universities Canada) withdrew in 2012 from the current and still unresolved hearing that has been ongoing since 2010 after reportedly spending nearly two million dollars.[24]

41. Access Copyright does not provide greater access to copyrighted content. It does not provide content, but only seeks to impose additional fees to the use of the content that libraries have often already acquired in other ways, or for which no permission is needed because the copying constitutes fair dealing. Needless to say, the more an institution pays for the use of its existing content or for participating in unnecessary Copyright Board proceedings, the less resources it has for acquiring additional content to support research.

42. But what is at stake is much more than money. In the immediate aftermath of the trial decision, we saw institutions purge all manner of important online information in an exercise of apparently unwarranted but still unsurprising risk avoidance, based upon premature and even incorrect reactions to the York decision.[25] Still, such reaction can be expected in the future if this decision is not reversed because the very possibility that the "mandatory tariff" theory will be upheld has created enormous concern and understandable risk aversion.

43. Moreover, the Interim Tariff and Access Copyright's Proposed Tariff include various terms and conditions, including those with respect to record keeping, reporting, attribution,

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[23] *Copyright Act*, s 38.1(1)(b), IF p 18. MMR Tab 3A.
[24] Howard Knopf, *FAQ re the Access Copyright #ACdeal: 36 Q&As re Persistent Predictions of Peril as the June 30th "Deadline" Approaches*, June 25, 2012, blog http://excesscopyright.blogspot.ca/2012/06/faq-re-acdeal-q-re-pusillanimous.html See attached Exhibit "K".
[25] Howard Knopf, *Copyright Consternation & Confusion on Canadian Campuses as York Cogitates its Appeal,* August 30, 2017, blog http://excesscopyright.blogspot.ca/2017/08/copyright-consternation-confusion-on.html . See attached Exhibit "L".

surveying and auditing and other administrative requirements that go to the core of how libraries carry on their mission. The trial decision implies that the Copyright Board could, at the behest of a copyright collective, promulgate a compulsory scheme for the regulation of libraries. CARL will submit that Parliament could never have intended to give the Copyright Board and collectives such powers, and that even if it did, such regulation of educational institutions and libraries might well fall outside the permissible scope of Federal legislation.[26]

44. Furthermore, competitive and vibrant markets for works in digital form are thriving and growing, to the benefit of authors, publishers, readers, students, scholars and Canadians as a whole. The growth of such products and services has made Access Copyright's licensing schemes less appealing to educational institutions and has been one of the main reason for many institutions' decision not to renew their Access Copyright licences. Instead of finding ways to make its services offerings more attractive, Access Copyright has instead sought to force users into a mandatory payment mechanism through litigation.

45. If tariffs such as the one in question become mandatory, the incentive to develop more efficient and competitive business models for copyright clearance would be seriously diminished, because users would be forced to deal with a monopolistic collective. Therefore, unless overturned by this Court, this novel "mandatory tariff" theory will create severe anti-competitive effects on those markets without any redeeming value for Canadians.

b. This Appeal Raises Legal Issues of Utmost Public Interest

46. This appeal raises legal issues of utmost public interest. The decision of the Federal Court has been widely criticized and is extremely controversial. As noted earlier, CARL believes that the Court below made three serious errors: (1) it erred in its holding on the mandatory tariff issue; (b) it erred when it decided to make findings on copyright infringement and the validity of York's fair dealing policy where the issue of copyright infringement was not and could not have been properly before it; and (c) its rulings on the fair dealing issue, which need not have been made, are inconsistent with all three of the fair dealing decisions of the

[26] Ariel Katz, "Spectre: Canadian Copyright and the Mandatory Tariff - Part II" (2015) 28:1 IPJ 39 at 92. MMR Tab 3N.

Supreme Court of Canada since 2004 and with the 2012 addition by Parliament of the word "education" to the purposes set forth in s 29 of the Act.[27]

47. In its submissions, CARL will demonstrate the impact of these errors on the delicate balance between the rights of copyright owners and those of users in general, and their particular harmful effect on libraries, their patrons, on scholars, students, and research in Canada. CARL will show why, unless reversed, the error of the trial decision will seriously undermine this balance, the cornerstone of Canadian copyright jurisprudence, and render users' rights effectively meaningless.

48. The potential harm to the post-secondary educational sector in Canada of the trial decision in terms of its capacity to foster research and innovation is clearly a matter of great public interest and will affect every element of the public at large.

49. The outcome of this case will not be limited to the parties involved. When Access Copyright filed its lawsuit against York, it issued a media release emphasizing that the lawsuit is only one element in a broader strategy aimed at forcing all institutions who decided not to obtain licences from Access Copyright to do so.[28] Moreover, Access Copyright itself acknowledged the wide-ranging and important public interest aspect of this decision in a press release dated July 12, 2017 — the day of the decision — when its President and CEO stated that:

> *"The Court* ***struck the right balance between the public good that is education and the need to reward creators to ensure that this public good continues to be well supported by quality Canadian content. Up until today, the state of the law regarding fair dealing left creators and the institutions that copyright protected works in a state of uncertainty."*** *said Roanie Levy, CEO & President of Access Copyright. "This decision will help the parties understand what can be done and paves the way to re-establish stability and royalties to creators."*[29] (emphasis added)

50. Although CARL disagrees with Access Copyright that the Court below struck the right balance, it shares its view about the public importance of the resolution of this case.

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[27] MMR Tab 3A.
[28] http://web.archive.org/web/20130529154558/http://www.accesscopyright.ca/media/35670/2013-04-08_ac_statement.pdf See attached Exhibit "M".
[29] See attached Exhibit "N".

c. No Other Reasonable or Efficient Means to Submit the Question to the Court

51. CARL believes that there is no other reasonable or efficient means to submit the question of whether tariffs are mandatory to the Court. The question of whether s 68.2 (1) indeed empowers collectives to impose compliance with an approved tariff on a user can only be decided by "a Court of competent jurisdiction" in an action to recover the royalties pursuant to that section. This case is such an action. This issue was indeed decided by the Court below, and is currently before this Honourable Court.

52. CARL notes that the Court below could have disposed of this case by accepting York's narrow technical argument that the *interim* tariff is not an *approved* tariff without deciding whether a *final* approved tariff would be mandatory or not. This would have been, at best, a very small and temporary victory and would have not prevented the inevitable ensuing litigation concerning whether final approved tariffs are mandatory. However, in rejecting York's argument and holding that the interim tariff is an approved tariff, the Court below proceeded to decide that an approved tariff is mandatory. Accordingly, CARL believes that the option of settling this case on the narrow issue of the *interim* tariff is no longer an option. Access Copyright's case was predicated on the notion that an approved tariff is mandatory, and the Court below accepted its position. Unless reversed, the trial decision on this issue will become settled law in Canada.

53. Indeed, in the course of preparing this motion for leave to intervene, CARL has just become aware of a new Federal Court Action T-326-18 launched on February 16, 2018 by ministries of education of ten Canadian provinces and territories (excluding British Columbia, Ontario and Quebec) and each of the school boards in Ontario to recover almost $25.5 million in excess payments to Access Copyright. A critical issue in that litigation will be whether Copyright Board tariffs are mandatory.[30] The province of British Columbia has also launched a similar action on the same day, namely A-329-18. The uncertainty that is manifest in this new litigation and other foreseeable litigation to follow would have been obviated had the issue of mandatory tariffs been fully and forcefully confronted at trial and correctly resolved by the trial judge. This Court now can and should correct this fundamental error concerning

[30] See Statement of Claim attached Exhibit "O" and, in particular, paragraphs (a), 23, 31, and 33. Note that only the first of the detailed calculations for the individual plaintiffs is included.

the threshold issue in time to save needless future litigation both in the instant case, these new cases, and others that doubtless will follow to enforce tariffs in the post-secondary sector involving potentially hundreds of millions of dollars.

54. CARL also believes that this appeal provides the best opportunity to determine whether the Court could and should have adjudicated the issues of infringement and fair dealing. This case began nearly five years ago and the trial decision pertains only to Phase I, while Phase II has not yet begun. If this Court accepts CARL's position that the issues of infringement and fair dealing were not properly before the Court below, this would not only save considerable time and resources in the present litigation but will also avoid wasting such resources in future proceedings.

d. CARL's Position Will Not Otherwise Be Adequately Defended

55. CARL believes that its position will not be adequately presented or defended by any of the parties to the case or any other known or likely interveners. In CARL's view, the main errors in the trial decision were in its ruling that the interim tariff is mandatory and that final approved tariffs are also mandatory, and in the Court's willingness to adjudicate the issues of infringement and fair dealing.

56. Access Copyright's arguments at trial were predicated upon the proposition that approved tariffs are mandatory as are interim tariffs and there is no reason to expect that Access Copyright would argue otherwise on appeal.

57. While York challenges this holding on appeal, in CARL's opinion, its argument is incomplete, ambiguous, and clearly secondary to York's concern with fair dealing. As documented below, it is clear that York repeatedly asserted before the Federal Court that it was not necessary to address the issue of whether final approved tariffs are mandatory. York's attempt now to deal with the "mandatory tariff" issue notably contrasts with its position at trial.

58. Moreover, York's Notice of Appeal and its Statement of Issues in its Memorandum both focus explicitly on whether the interim tariff is mandatory and not whether approved tariffs

are mandatory.[31] Even if York had succeeded on its narrow argument about the interim tariff or should do so in this Court on such a narrow basis, it would ring hollow for the university community because the final approved tariff from the Copyright Board, would still be mandatory. Even now, the York Memorandum states,

a. in its overview at para. 7(b) that the judge erred in **"determining that the 'interim tariff' is an 'approved tariff'** within the meaning of s. 68.2(1) of the Act, and that it is enforceable against anyone who has not agreed to be bound by it"; and,

b. as a main issue in para. 26(b) only that: "Did the trial **judge err in concluding that the Interim Tariff was mandatory**, not voluntary, and enforceable against York?" (emphasis added) and does not refer in Part III of its Memorandum to "approved tariffs".[32] (emphasis added)

59. Thus, it is still not clear that York will fully, forcefully and adequately address the overall threshold issue of whether tariffs approved by the Copyright Board are mandatory or merely whether the interim tariff is not mandatory. Moreover, York's submissions on the mandatory tariff issue comprise only about five of the 30 pages in the York Memorandum.

60. In any event, given its position at trial, CARL is not confident that York will adequately address the mandatory tariff issue in particular in its oral argument, if indeed it addresses the issue at all.

61. CARL agrees with the analysis of Prof. Ariel Katz, one of Canada's leading copyright scholars, as to how York failed to fully address the mandatory tariff issue and why it may have failed to do so. This is set forth in his detailed blog post published on July 27, 2017 shortly after the decision from the Federal Court. A copy of his blog is attached as Exhibit "Q" to this affidavit.[33]

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[31] See York's Notice of Appeal, para. 1(b) Exhibit "P"
[32] See excerpt of York Memorandum of February 2, 2018 paras. 7(b) and 26(b) Exhibit "A" in attached Exhibit "A".
[33] Ariel Katz, "Access Copyright v. York University: An Anatomy of a Predictable But Avoidable Loss", University of Toronto Faculty of Law Blog, July 27, 2017, at https://www.law.utoronto.ca/blog/faculty/access-copyright-v-york-university-anatomy-predictable-avoidable-loss. See attached Exhibit "Q".

62. CARL agrees with Prof. Katz's conclusions that York indeed failed to "fully and forcefully" address the mandatory tariff issue and that this was really the only proper question before the Court in this case and that the rest of the issues need not have been dealt with. He states that:

> *"Two weeks ago, Justice Phelan of the Federal Court handed Access Copyright a huge victory in its lawsuit against York University.[1] I have followed the case closely and read the parties' submissions and* ***I have been constantly concerned that York risked snatching defeat from the jaws of victory.*** *Unfortunately, this is what happened. The good news is that many of the Court's fundamental findings rest on very loose foundations, that I am confident that York's loss is only temporary, and that if York appeals the decision and handles the appeal appropriately, most, if not all, of the Court's major findings will be reversed.* ***One way or another, and possibly with interveners assisting the Court, one hopes that all essential arguments will be made on appeal. Therefore, this post provides an anatomy of York's predictable yet totally avoidable loss****.*
>
> *In a nutshell, York has chosen to ignore the most important question in this case, namely whether tariffs approved by the Copyright Board become mandatory on users. The answer to this question carries long-term strategic implications for Access Copyright and for all educational institutions in Canada. Access Copyright understood the importance of this question and argued its case accordingly. York, on the other hand, has chosen to limit its submissions to the narrow question of whether an interim tariff could be mandatory, and refrained from addressing the general question of whether approved tariffs (i.e., final tariffs) were mandatory on users. York has also been eager, it seems, to turn this case into a case about fair dealing, which need not have happened."*
>
> *…*
>
> *Lacking standing to sue to protect and enforce the copyrights of its members, Access Copyright couldn't and didn't sue York for copyright infringement. Rather, Access Copyright brought these proceedings to compel York to pay royalties pursuant to an Interim Tariff first issued by the Copyright Board of Canada on December 23, 2010.[3]*
>
> *Therefore, the central question wasn't whether York infringed any copyright of any of Access Copyright's members, but whether York has been legally obliged to pay the royalties specified in the Interim Tariff—in other words, whether the Interim Tariff was legally binding (i.e. "mandatory") on York. Not only was this the central question, it should have been the only question before the Court. And since Access Copyright could not sue for copyright infringement, there was no need for York to defend itself against such allegations, and no need to file a counterclaim seeking a declaration that all of the reproductions made under its Fair Dealing Guidelines constituted fair dealing (and hence*

> *were non-infringing).[4] Arguably, the case could have been decided more quickly, and potentially at a tiny fraction of the cost, if the Court and the parties had focused on the single legal question of whether tariffs are mandatory on users, or at least had attempted to answer this preliminary question first, before dealing with the more factually and legally complicated issue of fair dealing. In fact, during a case management hearing on March 26, 2014 (which I attended as an observer), Prothonotary Aalto suggested bifurcating the case in order to answer this legal question first. Access Copyright seemed willing to do that, but York, for reasons that I never understood, was not.*
>
> *Importantly, as I shall show below, York never made any attempt to respond to Access Copyright's submission on this question or moved to resolve the case earlier by way of attack on Access Copyright's pleading, motion for summary judgment, ruling on a question of law, etc. Any of those could have ended the case much earlier, without the need to deal with the far more complex, time-consuming, expensive and, as it turned out, fatally risky, question of fair dealing.*
>
> (footnotes omitted and emphasis added)

63. Prof. Katz also indicates in his blog that:

> *York's counsel only suggested that the decision was "instructive", and that "the decision [in CBC v. SODRAC] in terms of general principles are equally applicable here".* (footnotes omitted)

64. I have confirmed the accuracy of Prof. Katz's quotes and characterizations of York's arguments with respect to the mandatory tariff issue and York's characterization of the *CBC v. SODRAC* case by examining the records from the Court provided to me by counsel.

65. Prof. Katz elaborates in considerable detail in his blog on his main conclusions noted above. If CARL is permitted to intervene, it will assist the Court by explaining in simplified but careful analysis why it is essential that this Court address all aspects of why tariffs are not mandatory, which was not adequately addressed in the Federal Court by York and is still not adequately addressed in the York Memorandum dated February 2, 2018.

66. Prof. Katz has noted, and I have confirmed by examining the transcripts, that learned trial Judge during the course of the hearing did address the question of the significance of a "final decision or an approved tariff" during the final arguments. CARL is concerned that York

failed to adequately address and argue the issue and may have indeed effectively conceded the main point in issue. For example, as shown in the transcript of the oral arguments:

> *THE COURT: In a final decision or in an approved tariff there is specific statutory grant of authority to impose it in, which you say since an interim tariff isn't mentioned there isn't the specific statutory granted?*
>
> *MR. COTTER: Precisely.*
>
> *So in my submission an interim tariff is not an approved tariff, and that resolves the issue. And as a result, it's not necessary to dive into this bigger question as to whether tariffs are generally enforceable or whether approved tariff is mandatory or voluntary. If, however, you decide you want to get into that issue the issue is addressed by Professor Katz in this article. And this article was written before CBC and Sodrac was decided by the Supreme Court. So it's quite a lengthy article, and it goes through the different theories. And Professor Katz articulates why he says the mandatory theory is incorrect, and the voluntary is correct. And what I would propose to do is --*
>
> *THE COURT: Does he say that in, is it specifically focused on interim tariffs.*
>
> *MR. COTTER: No, it doesn't deal -- it's dealing with the broader picture as to whether tariffs are mandatory or voluntary.*
>
> *THE COURT: And it's his thesis that they're not mandatory?*
>
> *MR. COTTER: Correct. They're voluntary.*
>
> *THE COURT: Because he says there isn't sufficient statutory grant?*
>
> *MR. COTTER: Correct….* [34]

67. I have reviewed the transcripts of the final oral arguments and the final written submissions to the learned trial Judge in this case. While there are repeated references to the *CBC v. SODRAC* case as being "instructive", these submissions stop far short of indicating that the ruling of the Supreme Court is binding and applicable in this instance. CARL will explain why the ruling in *CBC v. SODRAC* is controlling, and why the trial decision attempt to distinguish it has no basis.

[34] Transcript of Closing Oral Hearing June 22, 2016: pp 69-70P. See attached Exhibit "R".

68. Moreover, while there was a brief discussion of one of Prof. Katz's articles during the final oral arguments, York did not refer to his important law review articles, published in 2015,[35] on the issue of mandatory tariffs in the final written submission filed July 29, 2017. Presumably, those articles were not before the learned trial Judge, and in any event, they are not referred to in the trial decision. These articles, which are essential for an understanding of the "mandatory tariff" issue, are included with the written memorandum of fact and law, in support of this motion. CARL would also note that a pre-published earlier version of these articles was before the Supreme Court in the *CBC v. SODRAC* case as part of the intervener factum co-authored by Prof. Katz, and which was clearly influential in the outcome of that case.[36]

69. Moreover, York, in its closing oral arguments, chose to minimize the importance of the mandatory tariff issue:

> *Mr. Cotter: ...**There is this great big issue out there as to whether tariffs generally are voluntary or mandatory, and in my submission that's not the issue yet before you. There is no approved or final tariff. What we're dealing with is an interim tariff.***
>
> *THE COURT: You mean if I decide that it's not an approved tariff all of this goes away?*
>
> *MR. COTTER: Yes.*
>
> *MR. COTTER: On the main action.*
>
> *THE COURT: **I thought you were holding out the ultimate carrot.***
>
> *MR. COTTER: **Just a piece of the carrot.***
>
> ***It's a baby carrot**.* [37]

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[35] Ariel Katz, "Spectre: Canadian Copyright and the Mandatory Tariff— Part I" (2015) 27 IPJ 151; Ariel Katz, "Spectre: Canadian Copyright and the Mandatory Tariff — Part II" (2015) 28 IPJ 39. Included with authorities in CARL's written representations. MMR Tabs "M" and "N" respectively.

[36] Factum of The Interveners Centre For Intellectual Property Policy and Ariel Katz dated March 2, 2015 in *CBC v. SODRAC.* See attached Exhibit "S", paras 7, 12,14,16, 18, 19.

[37] Transcript of Closing Oral Hearing June 22, 2016: Pp 64-65. See Transcript excerpt in attached Exhibit "R".

…. (emphasis added)

70. There was further discussion of Katz's paper:

> *THE COURT: Does he explain why Parliament would go to all of the effort to create a tariff regime that wasn't enforceable?*
>
> *MR. COTTER: He does. And he does that over the page at 19 under the heading, "Licences and Licensing Schemes." And here he draws an important distinction between certain sets of rights under the Copyright Act. And that includes s. 3 rights on the one hand, and the remedy as he articulates it, or the right, is a right to exclude. And he explains this in the paragraph about halfway down, it starts: "Those copyrights are distinct..." So he draws a distinction between rights like s. 3 rights and the remuneration right in s. 19 and 81. Because the Act is clear for those rights you have a right to be paid. And for copyright it's a right to exclude others. So to really put his theory at a high level, copyright is the right to exclude others. And if somebody uses your work without your permission your right is to sue them for infringement. The result of that may be damages in a monetary payment, but your right is the right to sue for infringement. And you have to view, according to Professor Katz, the licensing scheme with that perspective in mind. So that a copyright is a right to exclude; and, therefore, you have to look at licences in that light.*
>
> *THE COURT: But licences are a grant of permission and an obligation to be paid.*
>
> *MR. COTTER: Correct.*
>
> *THE COURT: So in a sense it's a little like a standing offer. If you want to comply, you want to use this, send us a cheque and we won't bother you. Whereas the other rights, copyrights is: Don't you make a copy of my work or I'll sue you.*
>
> *MR. COTTER: Essentially, that's correct.*
>
> *THE COURT: Okay.*
>
> *MR. COTTER: **So I don't propose to take you through any more of that article. As I said at the outset, in my submission, that's an issue that doesn't need to be decided in this case. If the question of whether an interim tariff is an approved tariff is decided as per York's submissions which is, no, it's not, then it's clearly not enforceable then that's the end of the discussion**.*

> *That's it for the first issue*.[38] (emphasis added)

71. CARL's concern about the mandatory tariff issue is that it should have been and must now be fully and forcefully addressed. While CARL is pleased to see that York's memorandum attempts finally to respond to the issue of the mandatory tariff, CARL believes that the argument is inadequate to address CARL's concerns.

72. CARL also believes that it is important for this Honourable Court to determine whether the issues of fair dealing generally and York's guidelines in particular were necessarily and properly put in issue. CARL believes that this case and future cases could be simplified by addressing the threshold issue of whether it was necessary or even proper for the Court to adjudicate with respect to York's fair dealing guidelines.

73. In his blog about this case, Prof. Ariel Katz comments as follows:

> *Most of the coverage of the Court's decision in the media and the blogosphere focused on the Court's finding with respect to fair dealing (i.e. that York's Fair Dealing Guidelines are not "fair" in their terms or application), see e.g., here, here, and here. However, the first important point to note about this decision is that, although it looks like a decision about copyright infringement, this action was not a copyright infringement case. In Canada, only "the owner of any copyright, or any person or persons deriving any right, title or interest by assignment or grant in writing from the owner" may initiate legal proceedings to protect and enforce the copyright they own, and only those persons are entitled to the remedies provided by the Copyright Act.[2] Access Copyright neither owns the copyright in any of the works in its repertoire, nor does it hold any other property interest in those works. Therefore, it has no standing to sue for copyright infringement. Even if York had infringed any copyright, it is only answerable to the owner of the copyright, but not to Access Copyright. I hope in a separate post to discuss the implication of this point, and how overlooking it might have led to Court to admit and rely on irrelevant or possibly inadmissible evidence, which, in turn, contributed to some of the most problematic aspects of the Court's ruling on fair dealing.*
>
> (footnote omitted)

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[38] Transcript of Closing Oral Hearing June 22, 2016 pp 71-73 Document #238 of Appeal Book. See Transcript excerpt in attached Exhibit "R".

74. Access Copyright cannot be expected to direct the Court's attention to this point, York has not done that, and Universities Canada does not propose to address it. CARL, alone, proposes to address this issue.

75. While CARL sympathizes with the desire to increase the clarity of what constitutes fair dealing, its members' daily experiences in the trenches of copyright practice lead it to believe that submitting any set of guidelines to a Court's approval or disapproval in the present case is not the most constructive or even proper way to accomplish that. Courts should not be asked for advisory opinions on a particular set of guidelines, especially when similar guidelines are used by many other institutions that were not before the Court. In any event, there are three very clear decisions from the SCC since 2004 and a 2012 amendment to the law that state the law on fair dealing. CARL believes that this Court will benefit from its ability to share its different perspective on this matter.

e. The Interests of Justice Will Be Better Served by Allowing CARL's Intervention

76. CARL believes that the interests of justice will be better served by allowing its intervention in this matter as neither of the parties and none of the other foreseeable potential interveners will approach this case from the standpoint of research libraries and professional librarians – who operate at the front line of copyright matters in research institutions.

77. CARL has waited until it could examine York's Rule 346 Memorandum, which was filed on February 2, 2018, and has filed this motion for leave to intervene as soon as possible thereafter. With respect, CARL believes that York's Memorandum:

    a. Does not fully and forcefully address the paramount and threshold issue of whether approved tariffs are mandatory. It does not address and seek to correct all the errors that the trial judge made on this point and it fails to cite essential relevant and controlling case law and other authorities, which CARL is ready to bring to this Court's attention;

    b. Does not address whether or not York's fair dealing guidelines should have been before the Court;

    c. Does not argue that the trial decision regarding fair dealing should, at most, even to the extent it may not be erroneous, be treated as *obiter dicta*;

    d. Omits considerable important jurisprudence, learned authority and legislative history that would be of great assistance to this Court; and,

e. Fails to address the definition and interpretation of the word "tariff" and its legal significance.

78. Neither of the parties provided the Federal Court with all the essential jurisprudence and authority required to adequately address such issues as the mandatory tariff issue or whether Access Copyright had standing to pursue this litigation as it did. The York Memorandum still fails to do so and Access Copyright's memorandum cannot be expected to do so.

79. York University was presumably acting in this litigation in accordance with instructions from its management. We are unaware of any attempt by York or its counsel to consult with the Canadian library community at large and many of our concerns, as outlined below, were not reflected in York's position in this litigation. York did not have any duty to consult with the library community or with other educational institutions, and as a litigant it has the prerogative of handling its case as it sees fit. However, the legal determinations of the Court below, if upheld by this Court, will impact not only York's administration, its students, researchers, faculty, and librarians, but also those of other educational institutions and the public at large. Therefore, it is crucial that this Court hear the perspectives of other stakeholders, such as those represented by CARL.

80. CARL has also had the opportunity to examine the leave to intervene material filed by Universities Canada on February 2, 2018. It is clear that its proposed intervention will deal with different points in different ways and with a different perspective than CARL.

f. Can the Court Hear and Decide This Appeal Without CARL?

81. CARL believes that neither party in this appeal will provide this Court with all of the necessary arguments, jurisprudence and authorities that the Court will need. They failed to do so in the Federal Court, particularly with respect to the application of the SCC's landmark ruling in *CBC v. SODRAC* concerning so-called mandatory tariffs, and also with respect to Access Copyright's standing to conduct what was effectively a massive infringement action with a record of more than 75,000 pages[39] and whether there was any need or proper jurisdiction for the Court to rule on York's fair dealing guidelines. CARL will acquaint this Honourable Court with the larger implications associated with the Federal Court's ruling,

[39] See letter of John Cotter dated December 4, 2018 in attached Exhibit "T".

namely how it will undo constructive developments in the Supreme Court of Canada and Parliament since 2004 concerning fair dealing and the 2012 addition of the word "education" to the s. 29 "fair dealing" provision of the *Copyright Act*.

82. CARL will address this issue from the unique perspective of libraries and their long established institutional role in the advancement of learning.

VI. Conclusion

83. CARL seeks leave to intervene in this case, above all, because this Honourable Court would benefit from having all necessary perspectives, arguments and jurisprudence before it on this appeal. CARL's position is that the main issue concerning the "mandatory tariff" was not adequately dealt with below. CARL is concerned that this issue will not be adequately dealt with in this Honourable Court without CARL's intervention.

84. CARL has made this application at the earliest possible opportunity, while still taking the time to review all the issues with great care and study the necessary documents from the Appeal Book as filed in electronic form on December 6, 2017 and waiting to examine the York Memorandum.

85. CARL will not introduce any new evidence or any new issues. All of the issues discussed in this affidavit were before the Court at trial and are addressed, albeit very differently, in the York Memorandum.

86. CARL's proposed intervention will not prejudice any of the parties in this Appeal and will not delay or adversely affect these proceedings in any respect. CARL will take the record as it finds it and will not supplement the record. CARL will seek to avoid unnecessary duplication of submissions, and will abide by any schedule set by the Court.

87. CARL asks this Honourable Court for leave to intervene in this appeal by filing a memorandum of up to 30 pages and to present oral argument of up to 30 minutes. CARL is mindful that this exceeds the normal limits for interveners in this Honourable Court but respectfully suggests that this would be justified in the circumstances, due to the importance of the issues and arguments to research libraries and the many necessary references to

jurisprudence and other authorities that were not provided to the Court below and are unlikely to be provided by the parties or other interveners.

88. I affirm this affidavit in support of the motion by CARL for leave to intervene, and for no other or improper purpose.

Affirmed before me at the City of Toronto,)
in the Province of Ontario,)
this 6th day of March, 2018.)
)
) _____
_____) **VICTORIA OWEN**
A Commissioner for taking oaths, etc.