File No: 39222

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

YORK UNIVERSITY and THE CANADIAN COPYRIGHT LICENSING AGENCY

Appellants & Respondents

- and -

CANADIAN ASSOCIATION OF RESEARCH LIBRARIES

Proposed Intervener

MOTION RECORD OF THE PROPOSED INTERVENER
CANADIAN ASSOCIATION OF RESERCH LIBRARIES ("CARL")
MOTION FOR LEAVE TO INTERVENE

(Pursuant to Rules 47, 55, 56, 57, and 59 of the *Rules of the Supreme Court of Canada*)

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TAB 1

File No: 39222

IN THE SUPREME COURT OF CANADA

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CANADIAN ASSOCIATION OF RESEARCH LIBRARIES

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NOTICE OF MOTION OF THE PROPOSED INTERVENER

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Ottawa Agent for the Appellant, The Canadian Copyright Licensing Agency ("Access Copyright")

TAKE NOTICE that the Canadian Association of Research Libraries (hereinafter "CARL") (the "Proposed Intervener") hereby applies to a judge of this Court, pursuant to Rules 47, 55, 56, 57 and 59 of the *Rules of the Supreme Court of Canada*, for an order granting the Proposed Intervener leave to intervene in these appeals, which will be heard together, to file a factum of appropriate length and to make oral argument or appropriate length at the hearing of the appeal, and any further or other order as this Court may deem appropriate.

AND FURTHER TAKE NOTICE that the following documentary evidence will be relied upon in support of this motion:

1. The affidavit of Susan Haigh, Executive Director of CARL; and,
2. Such further and other material as counsel may advise and this Court may permit.

AND FURTHER TAKE NOTICE that the motion shall be made on the following grounds:

I. The Appeals

1. By order of this Court dated October 15, 2020, September 4, 2014, both York University (hereinafter "York") and The Canadian Copyright Licensing Agency (hereinafter "Access Copyright") and the Appellants were granted leave to appeal from the judgment of the Federal Court of Appeal (hereinafter "FCA") in *York University v. Copyright Licensing Agency*, 2020 FCA 77 (CanLII), <https://canlii.ca/t/j6lsb> (A-259-17) (the "FCA judgment").

2. These appeals relate to:

    a. In the case of Access Copyright, whether tariffs certified by the Copyright Board are mandatory for users that do not wish or need to be licensed by Access Copyright; and,

    b. In the case or York University, the validity of its Fair Dealing Guidelines.

3. The appeal raises two main distinct but interrelated issues that arise in CARL's view from the issues as framed by the Parties and which CARL hopes to address as an Intervener:

    a. Whether Board-approved licensing schemes can be imposed on unwilling users, for

example when those users prefer to obtain licences elsewhere, or believe that their activities require no licence at all; and,

b. Whether the Courts below should have issued what were, in effect, advisory opinions on the validity of York's Fair Dealing Guidelines and whether these opinions were erroneous in particular respects.

II. The Proposed Intervener Has an Interest in the Issues Arising in These Appeals

4. CARL is the national voice of Canadian research libraries. These include libraries that serve the largest and most research-intensive Canadian universities as well as some non-university libraries. These libraries employ over 1,500 professional librarians, including full-time copyright specialists, who have a crucial role in their institutions in ensuring understanding and compliance with Canadian copyright law and enabling the most efficient possible access to knowledge in the pursuit of research, education and innovation. Most of its member libraries are responsible for copyright administration for their universities. CARL also pursues advocacy and education for the benefit of its members. This includes participation in Parliamentary committee hearings and the preparation of copyright resources for Canadian universities.

5. CARL's member libraries have frontline responsibilities in their research-intensive institutions for some or all of the following activities:

   a. Negotiating and paying licenses ranging from very expensive institutional site-wide licenses from major multinational publishers to individual transactional licenses and permissions for specific works;

   b. Informing and educating administration, faculty, and students about copyright law, practice, and compliance;

   c. Purchasing books, journals, and other essential knowledge assets for research libraries;

   d. Overseeing rights clearance procedures and clearing rights for course syllabi; and,

   e. Participating, with CARL, in national advocacy on copyright and information policy

issues.

6. The Proposed Intervener has demonstrated its interest in copyright law from the standpoint of research libraries in Parliamentary fora and through its extensive activities on behalf of its members, which include the most prominent research based universities and other institutions in Canada.

III. Prejudice to CARL if Not Granted Leave to Intervene

7. If not granted leave to intervene, CARL will be unable to advocate essential and unique arguments that are unlikely to be adequately addressed, if addressed at all, by Access Copyright, York or other likely interveners. This could, in turn, result in harm to CARL's member libraries, and to the institutions and communities that they serve, which are the firmament and leading edge of Canadian research.

8. Copyright has been among the most important issues for the research library community since the 1980's. Since then, the environment has evolved from slow and crude photocopiers to such innovations as text and data mining, Open Education Resources (OERs) and Massive Open Online Courses (MOOCs), in which material in which third party copyright ownership may subsist and may be available to thousands of students at a time around the world. Moreover, the COVID pandemic has seen the rise of online delivery platforms and new ways of sharing essential material because bricks and mortar facilities are not currently operating. This raises new copyright challenges that could be impacted by any unnecessary ruling by this Court on York's Fair Dealing Guidelines, which trace back an entire eventful decade.

9. The ruling of the Federal Court that Copyright Board tariffs are mandatory for universities is a harmful ruling for Canadian research libraries and their users. Fortunately, the FCA convincingly reversed this ruling. Unless this Court upholds the FCA regarding the mandatory tariff issue, CARL member libraries will suffer:

    a. Extreme economic loss of potentially hundreds of millions of dollars in retroactive payments, and future expense in the magnitude of tens of millions per annum, for double payments to a collective;

    b. Loss of access to material that is essential for research, education, learning, and

innovation due to consequential financial hardship;

c. Severe "chill" and uncertainty on campuses about what can be legally used by teachers, researchers and students and the resulting comparative disadvantage; and,

d. Financial constraints that will lead to significant additional costs for students and institutions, raising equity issues and the potential loss of competitive advantage *vis a vis* other countries relative to the Canadian post-secondary sector.

10. Both the Federal Court and the FCA issued what were effectively advisory opinions on York's Fair Dealing Guidelines. These opinions should not have been issued and this Court should declare them to be at most and at best *obiter dicta*, and should indicate in any event that they contain palpable and overriding errors with respect to the issues of safeguards and aggregate copying.

11. The FCA also erred in opining that a key element of this Court's ruling in *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada,* 2012 SCC 36 (CanLII), [2012] 2 SCR 326, <https://canlii.ca/t/fs0vf>, *per* Abella J., was decided "*per incuriam*".

IV. The Proposed Intervener's Submissions will be Useful and Different from those of the Other Parties

12. CARL believes that its position will not be adequately presented or defended by any of the parties to the case or any other likely interveners. In CARL's view, the main errors in the trial judgment 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. These errors were arguably to some extent the result of the strategy adopted by York below. Even at the FCA appeal hearing, York emphasized the fair dealing issue far more than the mandatory tariff issue.

13. While CARL sympathizes with the desire to increase the clarity of what constitutes fair dealing in educational institutions, it believes that courts should not be asked for an advisory opinion on a particular set of guidelines, especially when similar guidelines were used by many other institutions that were not before the Court and the landscape has dramatically

evolved over the last decade.

14. In any event, there are three very clear decisions from this Court since 2004 and a 2012 statutory amendment that state the law on fair dealing. CARL believes that this Court will benefit from its ability to share its different perspective on this issue, which is clearly different than that of either York or Access Copyright.

V. The Submissions that CARL Will Make if Permitted to Intervene

15. CARL would address the following points in response to the issues as framed by the Parties.

16. First, the FCA was correct in ruling that the Federal Court fundamentally erred in 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 judgment holding that an approved tariff is mandatory on users misconstrues the statutory scheme, the intention of Parliament, and contradicts long-established case law, including most notably the recent holding from this Court, as clearly stated by Rothstein, J. in *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57 (CanLII), [2015] 3 SCR 615, <http://canlii.ca/t/gm8b0>;

    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*, and that the trial judgment 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 must now be firmly and finally dealt with, thereby avoiding the need for a costly and unnecessary "Phase II" proceeding and potentially years of considerable further uncertainty and litigation, some of which has already begun.

17. Second, CARL will submit that the Federal Court need not have dealt with the issue of

infringement and fair dealing, notwithstanding that York chose to pursue the issue of the validity of its Fair Dealing Guidelines as a counterclaim:

a. CARL will submit that the FCA judgment was correct in ruling that "the validity of York's Guidelines as a defence to Access Copyright's action does not arise because the tariff is not mandatory and Access Copyright cannot maintain a copyright infringement action" (FCA judgment para. 206); and,

b. CARL will submit that the FCA's comments on fair dealing were at most and at best *obiter dicta* in addition to being seriously incorrect, in particular with respect to the need for monitoring, supervision and safeguards, as well as the issue of aggregate copying.

18. The FCA erred in opining that a key element of this Court's landmark ruling in *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada,* 2012 SCC 36 (CanLII), [2012] 2 SCR 326, <https://canlii.ca/t/fs0vf>, *per* Abella J., was decided "*per incuriam*".

19. The proposed intervention will not cause delay or prejudice to the parties. CARL will not seek costs, and asks that they not be liable for costs to any other party should leave be granted.

20. CARL will seek leave to file an intervener factum of appropriate length. to make oral submissions of appropriate duration, and not be liable for or eligible to receive any costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of March, 2021.

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TAB 2

File No: 39222

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

YORK UNIVERSITY and THE CANADIAN COPYRIGHT LICENSING AGENCY

Appellants & Respondents

- and -

CANADIAN ASSOCIATION OF RESEARCH LIBRARIES

Proposed Intervener

AFFIDAVIT OF SUSAN HAIGH

in support of MOTION FOR LEAVE TO INTERVENE

by CANADIAN ASSOCIATION OF RESEARCH LIBRARIES

(Pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*)

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Contents

Introduction

1. I, Susan Haigh, of the City of Ottawa, Ontario, MAKE OATH AND SAY as follows.

2. This affidavit is in support of a motion to intervene by the Canadian Association of Research Libraries ("CARL") in the pending appeals to be heard by this Court from the unanimous decision of the Federal Court of Appeal per Pelletier J.A., dated April 22, 2020 in *York University v. The Canadian Copyright Licensing Agency (Access Copyright),* 2020 FCA 77 (CanLII), <http://canlii.ca/t/j6lsb> (hereinafter the "FCA judgment"). The FCA judgment was the result of an appeal in turn from the 2017 Federal Court ("Federal Court judgment") of Phelan J. in *Canadian Copyright Licensing Agency v. York University,* 2017 FC 669 (CanLII), [2018] 2 FCR 43, <http://canlii.ca/t/h4s07> (the "trial judgment"). Canadian Copyright Licensing Agency is hereinafter referred to as "Access Copyright" and Yark University is hereinafter referred to as "York".

The Proposed Intervener

3. CARL is the national voice of Canadian research libraries. These include libraries that serve the largest and most research-intensive Canadian universities as well as some non-university libraries. [1] These libraries employ over 1,500 professional librarians, including full-time copyright specialists, who have a crucial role in their institutions in ensuring understanding and compliance with Canadian copyright law and enabling the most efficient possible access to knowledge in the pursuit of research, education and innovation. Most of our member libraries are responsible for copyright administration for their universities. CARL also pursues advocacy and education for the benefit of its members. This includes participation in Parliamentary committee hearings [2] and the preparation of copyright resources for Canadian universities.[3]

4. I have been Executive Director of CARL since 2014. Previously, I held several leadership positions at Library and Archives Canada, with a particular focus on the preservation and

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[1] See list of CARL member institutions: https://www.carl-abrc.ca/about-carl/members/
[2] E.g. https://www.carl-abrc.ca/influencing-policy/copyright/2018-review-of-the-copyright-act/
[3] For examples, see https://www.carl-abrc.ca/influencing-policy/copyright/
and https://www.carl-abrc.ca/publications-and-documents/

access of Canada's digital documentary heritage. I have a Bachelor of Arts in English from the University of Victoria and a Master of Library and Information Science from Western University. 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 and other information about the proceedings at the Copyright Board, in the Federal Court, and in the Federal Court of Appeal by CARL's counsel.

5. CARL's member libraries have frontline responsibilities in their research-intensive institutions for some or all of the following activities:

    a. Negotiating and paying licenses ranging from very expensive institutional site-wide licenses from major multinational publishers to individual transactional licenses and permissions for specific works;

    b. Informing and educating administration, faculty, and students about copyright law, practice, and compliance;

    c. Purchasing books, journals, and other essential knowledge assets for research libraries;

    d. Overseeing rights clearance procedures and clearing rights for course syllabi; and,

    e. Participating, with CARL, in national advocacy on copyright and information policy issues.

6. CARL, in tum, is responsible for both learning from and leading its membership and advocating on all issues of importance in all necessary fora.

CARL'S Interest in These Proceedings

7. CARL's role, mandate, and responsibility require it to be an effective advocate for balanced copyright legislation and its correct interpretation by Canadian courts. Given the history of this litigation and the proceedings at the Copyright Board, where the Association of Universities and Colleges Canada ("AUCC", now known as Universities Canada)

controversially withdrew its opposition to the tariff in question,[4] CARL believes that essential arguments may not be adequately presented to this Court unless CARL is granted leave to intervene.

8. If given leave to intervene, CARL would advocate the following positions:

   a. "Tariffs" certified by the Copyright Board are mandatory for collectives such as Access Copyright insofar as they set rates, terms and conditions that must be incorporated in licenses offered by the collective to any willing institution to which the tariff applies. However, such licenses are optional for users if the institution is not willing to agree to such a license because it chooses to comply with Canadian copyright law in other ways, such as direct licensing with publishers, transactional licenses as needed for specific use cases, and reliance upon the fair dealing provisions and other exceptions in Canada's *Copyright Act.* This is not only sound policy and consistent with the legislation as amended from time to time. It is also the only possible conclusion from a long line of cases dating back to 1894 in the UK courts, 1943 in this Court, and culminating in a recent explicit ruling of this Court in *CBC v. SODRAC*[5] just over five years ago.

   b. As for fair dealing, this Court need not and should not adjudicate the legitimacy of York's specific fair dealing guidelines at issue:

      1. The counterclaim in which York sought their judicial validation was unnecessary, and the Federal Court should not have considered it and issued what was effectively an advisory opinion. The Federal Court proceeding was not an infringement action and the actual copyright owners were not before the Court. In any event, the guidelines in question were always considered controversial and are now outdated in view of COVID and numerous other digital developments. This Court should clearly indicate that the comments

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[4] Howard Knopf, *AUCC Abruptly Exits from Post-Secondary Copyright Board Case - What's next for Canadian Universities and Colleges?,* Blogpost April 25, 2012. https://excesscopyright.blogspot.com/2012/04/aucc-abruptly-exits-from-post-secondary.html

[5] *Canadian Broadcasting Corp. v. SODRAC 2003 Inc. ,* 2015 SCC 57 (CanLII), [2015] 3 SCR 615, <http://canlii.ca/t/gm8b0> (hereinafter *CBC v. SODRAC)* at paras. 112-113.

and findings of the FCA below on the guidelines were, at most and at best, *obiter dicta,* and are indeed legally wrong insofar as they deal with aggregate copying and compliance safeguards.

11. It does not seem logical or equitable that a use that would be fair dealing in a small class of 20 students at small university would be infringing if used in an identical context in one or more large classes comprising several hundred students or more at a large university simply because the aggregate number of copies is greater. As to safeguards, it is also illogical that the librarians in the *CCH v. LSUC* [6] case were not required to monitor and supervise the one-at-a-time use of photocopiers or of the fax copies sent to out of town lawyers but are now apparently required to do so for the activities of tens of thousands of students and faculty on campus and online.

9. The role of libraries is central in this case. Indeed, the trial judgment 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.*[7]

10. In light of the role the libraries play at the interface of copyright and the dissemination of knowledge, [8] it is important to recall that the landmark 2004 decision of this Court in *CCH v. LSUC ,*[9] widely regarded as "the most important fair dealing decision" in Canadian law,[10] also concerned a library, namely the Great Library of the Law Society of Upper Canada. That decision established that the Great Library was entitled to rely upon its Access Policy which

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[6] *CCH Canadian Ltd. v. Law Society of Upper Canada,* 2004 SCC 13 (CanLII), [2004] 1 SCR 339, <https://canlii.ca/t/1glp0> (hereinafter *"CCH v. LSUC")*

[7] Trial judgment, para. 180.

[8] Victoria Owen, *Who Safeguards the Public Interest in Copyright in Canada, Journal, Copyright Society of the US.A.,* March 26, 2013, http://journal.csusa.org/arc hive/v59-04-CPY405.pdf

[9] *CCH v. LSUC, supra* note 6

[10] Emily Hudson, *Drafting Copyright Exceptions ,* 2020 Cambridge University Press, p. 243. (hereinafter "Emily Hudson"). See excerpt in attached Exhibit "A".:

itself "provides reasonable safeguards that the materials are being used for the purpose of research and private study"[11] and that "Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law."[12]

11. Access Copyright (or CanCopy, as it was then known) played a major role in that case by funding it[13] and acting as an intervener. Despite its loss in that case, it has been trying ever since to license research institutions and to impose unrealistic active safeguard duties on librarians.

12. CARL's members are directly affected by the outcome of this case because the incorrect holding of the Federal Court that copyright collectives can impose on libraries and their parent institutions a legally "mandatory tariff' would, if upheld, seriously jeopardize research libraries' ability to pursue their important and well-recognized public interest mission of legally providing the most efficient access to the most possible works.

13. 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:

> *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 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,*

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[11] *CCH v. LSUC, supra* note 6 at paras. 61, 66.
[12] *CCH v. LSUC, supra* note 6 at para. Para. 38.
[13] Ariel Katz: *Spectre: Canadian Copyright and the Mandatory Tariff-* Part I *27(2) IPJ 151 (2015)* Available on SSRN: https://papers.ssrn.com/so l3/papers.cfm?absrtact_id=2544721; Note 70.

knowledgeable library staff support these activities. [14]

14. Some more specific recent examples of annual acquisition expenditures from a large, medium, and smaller university are as follows: [15]

University of Toronto	90,000 students	$28,000,000 p.a.
University of British Columbia	65,000 students	$16,000,000 p.a.
University of Guelph	30,000 students	$8,000,000 p.a.

Prejudice to CARL if Not Granted Leave to Intervene

15. If not granted leave to intervene, CARL will be unable to advocate essential and unique arguments that are unlikely to be adequately addressed, if addressed at all, by Access Copyright, York or other likely interveners. This could, in tum, result in harm to CARL's member libraries, and to the institutions and communities that they serve, which are the firmament and leading edge of Canadian research.

16. Copyright has been among the most important issues for the research library community since the 1980s. Since then, the environment has evolved from slow and crude photocopiers to such innovations as text and data mining, Open Education Resources (OERs) and Massive Open Online Courses (MOOCs), in which material in which third party copyright ownership may subsist may be available to thousands of students at a time around the world. Moreover, the COVID pandemic has seen the rise of online delivery platforms and new ways of sharing essential material because bricks and mortar facilities are not currently operating. This raises new copyright challenges that could be impacted by any unnecessary ruling by this Court on York's fair dealing guidelines, which trace back an entire eventful decade.

17. The ruling of the Federal Court that Copyright Board tariffs are mandatory for universities is a harmful ruling for Canadian research libraries and their users. Fortunately, the FCA convincingly reversed this ruling. Unless this Court upholds the FCA regarding the

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[14] "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

[15] Based upon letters of support from 2020 filed in Volume II of York's Application for Leave to Appeal.

mandatory tariff issue, CARL member libraries will suffer:

a. Extreme economic loss of potentially hundreds of millions of dollars in retroactive payments, and future expense in the magnitude of tens of millions per annum, for double payments to a collective;

b. Loss of access to material that is essential for research, education, learning and innovation, due to consequential financial hardship;

c. Severe "chill" and uncertainty on campuses about what can be legally used by teachers, researchers and students and the resulting comparative disadvantage; and,

d. Financial constraints that will lead to significant additional costs for students and institutions, raising equity issues and the potential loss of competitive advantage *vis a vis* other countries relative to the Canadian post-secondary sector.

What Does the "Mandatory Tariff' Issue Entail?

18. A simple analogy illustrates why these tariffs are not mandatory for users. Years ago, Canadian passenger rail traffic was highly regulated with detailed "tariffs" setting the price, terms, and conditions applicable to the railways and their customers. Thus, a passenger wishing to take the train from Ottawa to Toronto knew exactly what the ticket would cost, and the railway could not charge more or refuse passage to a passenger willing to pay the tariff rate. However, no traveler was forced to take the train from Ottawa to Toronto. They were free to fly, take the bus, drive a car, ride a bicycle or use any other chosen means that might be more or less expensive and more or less convenient. In this present litigation, Access Copyright is attempting to force the entire post-secondary sector to take up licenses that they may neither want nor need. There are alternative and more efficient ways to comply with Canadian copyright law, and there is no justification for double payment or unnecessary payment for the use of material that is already licensed or permitted by fair dealing or other users' rights provided in the *Copyright Act.*

19. This Court decided just over five years ago, based upon the intervention by Prof. Ariel Katz and the McGill Centre for Intellectual Property Policy led by Prof. David Lametti (as he then was), who were both represented by CARL's counsel in this proceeding, that tariffs fixed by

the Copyright Board are not mandatorily binding on users:

> *(112) I* ***conclude that the statutory licensing scheme does not contemplate that licences fixed by the Board pursuant to s. 70.2 should have a mandatory binding effect against users.*** *However, this case does not require this Court to decide whether the same is true of collective organizations.* ***It may be that the statutory scheme's focus on regulating the actions of collective organizations, and the case law's focus on ensuring that such organizations do not devolve into "instruments of oppression and extortion"*** *(Vigneux v. Canadian Performing Right Society Ltd., [1943} S.C.R. 348, at p. 356, per Duff J, quoting Hanfstaengl v. Empire Palace, [1894] 3 Ch. 109, at p. 128) would justify finding that the Board does have the power to bind collective organizations to a licence based on the user's preferred model - transactional or blanket - on terms that the Boardfindsfair in view of that model. However, this issue was not argued in this case.*
>
> *(113) I* ***find that licences fLXed by the Board do not have mandatory binding force over a user; the Board has the statutory authority to fLX the terms of licences pursuant to s. 70.2, but a user retains the ability to decide whether to become a licensee and operate pursuant to that licence, or to decline:.*** [16]
> Per Rothstein, J.
> (emphasis and underline added)

20. However, it seems that many players in the copyright community - particularly Access Copyright - chose not to recognize the impact and clarity of this decision. Even York stopped short at the trial level in this case of urging that CBC v. SODRAC was binding and that final tariffs are not mandatory. As documented by Prof. Ariel Katz with references to written submissions and transcripts: [17]

> *... York's counsel concluded its submission on the question of the mandatory tariff and said: "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 tarifft are generally enforceable or whether approved tariff is mandatory or voluntary."* (footnote omitted)

21. We note that even the Copyright Board itself has now evolved in its analysis to the point of taking no position on whether tariffs are mandatory. In its reasons finally certifying the tariff in question in this case after nine years, in 2019, the Board stated:

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[16] *CBC v. SODRAC, supra* note 5

[17] Prof. Ariel Katz, *Access Copyright v. York University: An Anatomy of a Predictable But Avoidable Loss,* blogpost July 26, 2017: https://arielkatz.org/archives/3762

> *[357} The Tariffs are silent on whether compliance with a tariff is mandatory for users who do not seek to benefit from the licence offered thereby. We are aware that related issues have been raised in recent judicial proceedings[148] and it is not necessary for us to opine on the issue at this point.*
> *FN 148: Canadian Broadcasting Corp v SODRAC 2003 Inc., 2015 SCC 57; York,* [trial judgment] *supra note 4.*[18]

22. It follows inevitably from Access Copyright's position on mandatory tariffs[19] that, if a university is responsible for the making of even one single inadvertently infringing copy of one work in its limited repertoire, such a university would be liable for payment of the Copyright Board's FTE (full time equivalent) tariff set finally and retroactively by the Copyright for the period of 2011-2014 and with retroactive application:

- $24.80 per FTE[20] for universities.
- $9.54 per FTE for all other educational institutions, such as colleges.[21]

23. This rate would apply to ALL the students in a university or college for the entire term of the tariff. Thus, for a university with 50,000 FTE students, that single copy could cost $1,240,000 for each year - i.e. the entire period - of the tariff as certified by the Copyright Board- in other words $3,720,000 for the three years 2011-2014.

24. This would be in addition to the potentially tens of millions per annum that such a university would be paying anyway for site licenses and the acquisition of digital and print books, journals, and resources. This would also be in addition to what students would be paying for their own textbooks and course packs purchased through copy shops licensed by Access Copyright.

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[18] *Access Copyright - Tariffs for Post-Secondary Educational Institutions,* 2011-2017 - Copyright Board, December 6, 2019
https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/453965/1/document.do

[19] As reinforced by an early statement from the Copyright Board that "An institution does not require such a licence if the institution does not use the repertoire... " Access Copyright - Interim Tariff for Post-Secondary Educational Institution, 2011-2013 [Revised] 2011-04-07
https://decisions.cb-cda.gc.ca/cb-cda/certified-homologues/en/item/367520/index.do

[20] FTE is the acronym for "full time equivalent student".

[21] *Access Copyright - Tariffs for Post-Secondary Educational Institutions, 2011-2017* See Copyright Board Fact Sheet https://decisions.cb-cda.gc.ca/cb-cda/r/en/item/453964/index.do
Full tariff: https://cb-cda.gc.ca/sites/default/files/inline-files/2009-06-11-1.pdf

25. We do not deny that there could be an isolated example of inadvertent copyright infringement during an academic year by a post-secondary institution of a work that might actually be in Access Copyright's limited repertoire, giving rise to small amount of actual damages. But that is no reason to impose a tariff of millions of dollars on an unwilling institution for a single inadvertently infringing copy of a single work. Copyright infringement proceedings and even class actions are available to actual copyright owners when appropriate.

26. In any event, Access Copyright is neither an actual copyright owner nor an exclusive licensee and therefore has no standing to sue for copyright infringement. It would be absurd to allow Access Copyright to do indirectly through tariff enforcement with no litigation safeguards what it cannot do directly through normal copyright infringement litigation.

27. Access Copyright disingenuously and incorrectly suggests in its factum[22] that this "single copy fallacy", as they call it, is an *"in terrorem"* argument and a collateral attack on the Copyright Board's decision. However, that is the basis of Access Copyright's business model of attempting to impose its tariff on educational institutions at all levels. Indeed, the actual *"in terrorem"* aspect is precisely that the "single copy" threat, as upheld by the Federal Court and rejected by the FCA, is apparently very real and that institutional risk aversion will lead to educational institutions signing unnecessary, unwanted and very expensive licenses simply to avoid litigation. The legitimacy of this model is the key issue now before this Court.

28. If the learned trial Judge in the Federal Court was correct that Copyright Board tariffs are mandatory, the result would be a cost to Canadian universities of more than $27,000,000 per annum in tariff payments for the period of201 l-2014 alone with retroactive application. [23] The impact potentially amounts to hundreds of millions of dollars in past liability and much more in terms of future liability for forced double payments or worse for unnecessary and unwanted licenses that should be optional for users.

29. Pelletier J.A. in the FCAjudgment cited and closely followed a crucial paper by Prof. Ariel

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[22] Access Copyright Factum, paras. 113-122.

[23] Based upon estimated enrolment of approximately 1.4 million students, of which approximately 1,090,000 were full FTE in 2019 https://www.univcan.ca/universities/facts-and-stats/ and final certified tariff rates. *Supra* note 21.

Katz that was included in a prepublication version in the factum submitted to this Court in *CBC v. SODRAC.* This was Prof. Katz's *Spectre I* paper.[24] It is expected to play a key role in this Court's consideration of the "mandatory tariff' issue.

30. Prof. Katz' subsequent *Spectre II* paper[25] is also expected to play a key role in this appeal and will be relied upon by CARL, if CARL is permitted to intervene. This was the second article in a series of two. As described in the abstract of the *Spectre II* paper:

> *The previous article showed that the "mandatory tariff" theory cannot, as a matter of statutory interpretation and in light of the case law, withstand scrutiny. This article shows that construing the Act in accordance with the "mandatory tariff" theory gives rise to numerous practical challenges, conceptual puzzles, procedural nightmares, and constitutional headaches, each of which should weigh the scales against it. In contrast, the "voluntary licence" theory avoids all these quandaries, and, in addition to being consistent with earlier case law, appears clear, simple, and coherent.*[26]

CARL's Main Intervener Points If Permitted to Intervene

31. CARL would address the following points in response to the issues as framed by the Parties.

32. First, the FCA was correct in ruling that the Federal Court fundamentally erred in 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 judgment holding that an approved tariff is mandatory on users misconstrues the statutory scheme, the intention of Parliament, and contradicts long-established case law, including most notably the recent holding from this Court, as clearly stated by Rothstein, J. in *CBC v. SODRAC* in 2015.[27];

    b. CARL will argue that this holding from *CBC v. SODRAC,* which itselfreaffirmed earlier case law, is controlling, that it is not limited to proceedings under section 70.2

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[24] *Supra* note 13
[25] Ariel Katz: *Spectre: Canadian Copyright and the Mandatory Tariff- Part* II28(1) IPJ 39 (2015) Available on SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract id=2636464
[26] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2636464
[27] *Supra,* note 5

of the *Copyright Act,* and that the trial judgment 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 must now be firmly and finally dealt with, thereby avoiding the need for a costly and unnecessary "Phase II" proceeding and potentially years of considerable further uncertainty and litigation, some of which has already begun.[28]

33. Second, CARL will submit that the Federal Court need not have dealt with the issue of infringement and fair dealing, notwithstanding that York chose to pursue the issue of the validity of its fair dealing guidelines as a counterclaim:

a. CARL will submit that the FCA's comments on fair dealing were at most *obiter dicta* in addition to being seriously incorrect, in particular with respect to the need for monitoring, supervision and safeguards, as well as the issue of aggregate copying; and,

b. CARL will submit that the FCA judgment was correct in ruling that "the validity of York's Guidelines as a defence to Access Copyright's action does not arise because the tariff is not mandatory and Access Copyright cannot maintain a copyright infringement action".[29]

CARL's Earlier Attempt to Intervene

34. It is important that this Honourable Court be aware that CARL was denied leave to intervene in the FCA. CARL's overwhelming concern in attempting to intervene in the FCA was that the question of whether final approved tariffs and not simply interim tariffs are mandatory had been avoided at the trial by York University and was not clearly going to be fully and forcefully addressed even in the appeal. Webb J.A. ruled, in our respectful view clearly incorrectly, that:

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[28] Access Copyright, 2018 Annual Report, Notes 7 & 16, https://www.accesscopyright.ca/media/1583/ac ar19.pdf

[29] FCA judgment para 206

> *[13] By* ***acknowledging that York only addresses the interim tariff issue in its notice of appeal, CARL is acknowledging that this is the only issue that will be before this Court. Any arguments that CARL would wish to make in relation to any final approved tariff are outside the issues that are before this Court*** *and do not justify granting CARL leave to intervene.*[30] (emphasis added)

35. CARL asked for reconsideration of that ruling, but that request was denied in an unreported ruling. Nonetheless, the precise issue as framed by CARL that Webb J.A. ruled was not open for consideration or as the basis for an intervention , namely whether final approved tariffs are mandatory, fortunately ended up being the main issue that was dealt with in the FCA in 206 paragraphs of its 312-paragraph ruling that closely followed the arguments that CARL had proposed to make in the FCA.

36. The denial of intervener status to CARL by Webb J.A. in the FCA and the subsequent embrace by the FCAjudgment of the precise arguments that Webb J.A. ruled were "outside the issues that are before this Court" make it even more important and appropriate that CARL be granted leave to present those arguments to this Court by way of intervention.

CARL's Position Will be Useful and Different

37. CARL believes that its position will not be adequately presented or defended by any of the parties to the case or any other likely interveners. In CARL's view, the main errors in the trial judgment 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. These errors were arguably to some extent the result of the strategy adopted by York below.[31] Even at the FCA appeal hearing, which I attended, York emphasized the fair dealing issue far more than the mandatory tariff issue.

38. While CARL sympathizes with the desire to increase the clarity of what constitutes fair dealing in educational institutions, it believes that courts should not be asked for an advisory opinion on a particular set of guidelines, especially when similar guidelines were used by many other institutions that were not before the Court and the landscape has dramatically

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[30] *York University v. Canadian Copyright Licensing Agency (Access Copyright),* 2018 FCA 81 (CanLII), <http://canlii.ca/t/hxt7t>

[31] See Katz, *supra,* note 17 and Emily Hudson, *supra* note 10 p. 302. Excerpt in Exhibit "A".

evolved over the last decade.

39. In any event, there are three very clear decisions from this Court since 2004[32] and a 2012 statutory amendment[33] that state the law on fair dealing. CARL believes that this Court will benefit from its ability to share its different perspective on this issue, which is clearly different than that of either York or Access Copyright.

Conclusion

40. 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.

41. 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. CARL will not seek and asks not to be liable for any costs in this proceeding. CARL hopes to be permitted to file a factum of appropriate length and be permitted an appropriate time for oral argument.

42. I have read the Memorandum of Argument in support of this Leave to Intervene application and can confirm that it contains an accurate reflection of the proposed submissions that CARL will make, should this Court grant CARL leave to intervene.

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

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[32] *CCH Canadian Ltd.* v. *Law Society of Upper Canada, 2004* SCC 13 (CanLII), [2004] 1 SCR 339, <https://canlii.ca/t/1 glp0>; *Society of Composers, Authors and Music Publishers of Canada* v. *Bell Canada,* 2012 SCC 36 (CanLII), [2012] 2 SCR 326, <https://canlii.c a/t/fs0vf; *Alberta (Education)* v. *Canadian Copyright Licensing Agency (Access Copyright),* 2012 SCC 37 (CanLII), [2012] 2 SCR 345, <https://canlii.ca/t/fs0v5>

[33] "Fair dealing for the purpose ofresearch, private study, education, parody or satire does not infringe copyright." R.S., 1985, c. C-42, s. 29; 2012, c. 20, s. 21 https://laws-lois.justice.gc.ca/eng/acts/c-42/page-8.html#docCont

Sworn before me at the City of Ottawa,)
in the Province of Ontario,)
this 5th day of March, 2021.)
)
)

A Commissioner for taking oaths, etc.

Susan Haigh

Howard Knopf

This is **Exhibit "A"**
in support of the Affidavit of Susan Haigh sworn before me in the City of Ottawa, Province of Ontario, this 5th day of March, 2021

Commissioner of Oaths

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Drafting Copyright Exceptions

From the Law in Books to the Law in Action

Emily Hudson

King's College London

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For Nicholas John Hudson

Orator; Publisher; Spycatcher
1933–2018

in particular when compared with use of a work that was confidential.

(6) *The effect of the dealing on the work.* The Supreme Court did not attempt a detailed analysis of this factor, noting only that it included consideration of any competition with the market for the original work and that although 'an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair'.[63] As noted in Chapter 5, there are challenges in determining what considerations should be relevant to any market-focused factor, including the operation of normative and empirical considerations.

Applying these factors, the Supreme Court held that the Law Society's activities were fair, as assessed by the Access to the Law Policy. For instance, the Policy placed limits on when requests would be filled, based on the user's purpose and the amount of material requested. It stated that only single copies would be provided . The nature of the copied items - legal materials - also supported fair dealing. Further, the Supreme Court concluded that there were not any *reasonable* alternatives to the dealing, noting that it would not be realistic to expect researchers to perform all their research onsite. Nor was it relevant to this factor that a licence could be obtained from the copyright owners: '[i]f a copyright owner were allowed to licence people to use its work and then point to a person 's decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner's monopoly over the use of his or her work in a manner that would not be consistent with the *Copyright Act's* balance between owner's rights and user's interests .' [64] Finally, the publishers did not introduce any evidence that the market for their works was impacted by the Great Library's photocopying service.

III The Response from Lawyers

A Later Cases

By the time of the Canadian fieldwork, a number of cases had cited or applied *CCH,* in particular its dicta on originality and infringement by authorisation.[65] However, two cases stood out as being of particular

[63] Ibid., para. 59, citing *Pro SiebenMediaAGv. Carlwn UK Television Ltd* [1999) FSR 610.
[64] Ibid., para. 70.
[65] See, e.g., *BMG Canada Inc* v. *John Doe* [2004) 3 FCR 241; *Society of Composers, Authors and Music Publishers of Canada* v. *Canadian Association of Internet Providers* [2004] 2 SCR 427; *Robertson* v. *Thomson Corporation* [2006) 2 SCR 363; *Canadian Wireless Telecommunications Association* v. *Society of Composers, Authors and Music Publishers of Canada* [2008] 3 FCR 539.

relevance to the empirical work as they analysed elements of the Supreme Court's decision that are relevant to exceptions. The first was the decision of Bastarache J in *Euro-Excellence Inc* v. *Kraft Canada Inc,* in relation to the philosophy of copyright.[66] The second was the Copyright Board's *Tariff No. 22A* decision in relation to fair dealing.[67] The facts of *Euro-Excellence* and *Tariff No. 22A* were both removed from *CCH,* demonstrating the decision's potential to influence outcomes in a variety of cases. Furthermore, the reasons delivered by Bastarache J in *Euro-Excellence* evidenced a clear intention to adopt a robust if not extended approach to the reasoning in *CCH.*[68] These cases, in the way they treated *CCH,* seemed to confirm its status as the most important fair dealing decision to have been handed down by a Canadian court.

1 Euro-Excellence After *CCH* it was common for courts to refer to the 'dual purposes' of and 'balance' in copyright law.[69] However, one judgment was particularly significant because of its depth of analysis regarding the philosophy of copyright: the decision of Bastarache J in *Euro-Excellence.* This case related to the parallel importation into Canada, by Euro, of Cote d'Or and Toblerone chocolate bars. Kraft had contractual arrangements with the European makers, under which it was the exclusive distributor of each product. In an attempt to stop Euro's activity, the European makers registered as artistic works various logos associated with the chocolate bars, and then executed an exclusive licence in favour of Kraft in relation to use of those works in Canada. Kraft sought to use its rights under this licence to bring proceedings for secondary infringement against Euro,[70] on the basis that Euro had contravened section 27(2)(e) of the Copyright Act:

It is an infringement of copyright for any person to ... import into Canada for the purpose of doing anything referred to in paragraphs (a) to (c) [namely, sale and other commercial dealings] ... a copy of a work ... that the

[66] [2007] 3 SCR 20.
[61] *Statement of Royalties to be Collected by SOCAN for the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works,* Tariff No 22A (Internet - Online Music Services) 1996-2006, Copyright Board of Canada, 18 October 2007.
[68] See, e.g., Hughes, n. 11 above, 58-60.
[69] See, e.g., *Society of Composers, Authors and Music Publishers of Canada* v. *Canadian Association of Internet Providers,* n. 65 above, 448-449; *Robertson* v. *Thomson Corporation,* n. 65 above, para. 69 (Abella D-
[70] Kraft was the Canadian owner of 'Cote d'Or' and 'Toblerone' trade marks but it did not rely on those rights in the proceedings.

In considering this question, it is worth noting a few matters about the litigation and Phelan J's jud gment. The claim brought by Access did not include a challenge to York's Fair Dealing Guidelines. Instead, fair dealing was in issue because of a counter-claim by York which sought declarations that copies made pursuant to its Guidelines fell within fair dealing. This strategy has been criticised on the basis that York should have focused on denying the proposition that tariffs approved by the Board are mandatory, or at least split the issues so that fair dealing was considered only if York lost on this point.[182] It also meant that Phelan J was asked to consider York's copying practices generally, rather than any specific acts of alleged infringement.[183]

The substantive elements of York's Guidelines applied to 'Short Excerpts',[184] and permitted staff to make a single copy of a Short Excerpt for each student enrolled in a class or course, such copies being able to be distributed as handouts, made as part of a course pack or hosted on a password-protected learning management system. The Guidelines stated that the extract 'in each case must contain no more of the work than is required in order to achieve the fair dealing purpose', these purposes matching those in the Copyright Act. The Guidelines noted that 'other sources of permission' would be required for copies falling outside its parameters and provided contact details of York's Copyright Office.

Implementation of the Guidelines occurred on 22 December 2010.[185] At that point York had a blanket licence with Access (this licence expiring on 31 December 2010), and for the first half of 2011, York operated

[182] See especially A. Katz, 'Access Copyright v. York University: An Anatomy of a Predictable But Avoidable Loss', *Ariel Katz* (26 July 2017), https://arielkatz.org/ access-copyright-v-york-university-anatomy-predictable-avoidable-loss/. Part of Katz's argument was that approval of a tariff by the Board serves only to render that tariff 'mandatory on the collective', i.e., that the collective 'cannot legally withhold a licence or refuse to issue one' to a user who wishes to operate under the approved scheme': e.g., A. Katz, 'Spectre: Canadian Copyright and the Mandatory Tariff - Part I' (2015) 27 *Intellectual Property Journal* 151; A. Katz, 'Spectre: Canadian Copyright and the Mandatory Tariff - Part II' (2015) 28 *Intellect.ual Properry Journal* 39. York instead argued that an *interim* tariff was not mandatory as it was not an 'approved tariff', or that this tariff was not binding as it was not published in the *Canada Gazette: Access Copyright* v. *York,* n. 8 above at para. 189.

[183] Cf. *Cambridge Universiry Press* v. *Patron,* 769 F 3d 1232, 1259 (ll th circuit, 2014) (the District Court was correct to assess the fair use status of each alleged act of infringement, as to focus instead on copying practices generally would leave 'no principled method' to analysing fair use).

[184] Defined to mean the greater of: (1) 10 per cent or less of a work; or (2) no more than one chapter from a book, a single article from a periodical, an entire entry from an encyclopaedia or similar reference work, or an entire artistic work, poem or musical score from a work containing other artistic works, poems or musical scores: ibid., Guidelines summarised at para. 3 and reproduced in full at Schedule A.

[185] Ibid. at para. 173.

under the interim tariff. On 4 July 2011, York notified Access that it had decided to opt out of the tariff effective 31 August 2011.[186] From that point, and similar to other universities that had adopted this course, York relied on other strategies to manage copyright, including licensing. Significantly, a number of evidentiary difficulties arose in the Federal Court in relation to the level of copying at York and the coverage of licences, and the evidence of Access's witnesses tended to be preferred.[187]

Although Phelan J cited dicta from cases such as *CCH* and *Alberta* v. *Access Copyright,* he saw the facts as very different from those cases. For instance, he stated that '[t]here is an objectivity in *CCH* which is absent in York's case',[188] and drew contrasts between the practices of York and the library in *CCH,* including in the number of copies made,[189] the amount taken from copied works,[190] and the level of supervision and monitoring of copying, especially for resources uploaded to virtual learning environments.[191] In relation to *Alberta* v. *Access Copyright,* he said that there was 'no parallel' to the 'limited copying of excerpts' in that case, the York Guidelines permitting 'significant copying' and forming part of a 'mass and massive enterprise' for the distribution of material to students:[192] it 'is one thing for a teacher to have the school librarian run off some copies of a book or article in order to supplement school texts' but 'quite another for York to produce coursepacks and materials for distribution through [learning management systems] which stand in place of course textbooks, through copying on a massive scale'.[193]

Importantly, Phelan J not only suggested that York's practices lacked proper intellectualisation and oversight but questioned the motivations behind those practices. For example, he emphasised on a number of occasions what he saw as the self-interest behind York's actions, as illustrated by his comment that it was 'evident that York created the Guidelines and operated under them primarily to obtain for free that which they had previously paid for' .[194] Similarly, Phelan J stated that there were alternatives to making fair dealing copies (e.g., production of custom books, or purchasing more articles or books from publishers) but that there was 'just no reasonable free alternative to copying' .[195] This conception of York's goal as being oriented towards its financial bottom line not only weakened arguments in relation to the first fairness factor (the purpose of the dealing) but seemed to set the tone for Phelan J's

[186] Ibid. at paras. 168-172. [187] Ibid. at paras. 83-143. [188] Ibid. at para. 260.
[189] Ibid. at paras. 276-289 (character of the dealing), 339-355 (effect of the dealing).
[190] Ibid. at paras. 290-318. [191] Ibid. at paras. 58-62, 266, 314.
[192] Ibid. at para. 344. [193] Ibid. at para. 324. [194] Ibid. at para. 272.
[195] Ibid. at para. 330. Emphasis in original.

TAB 3

File No: 39222

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

YORK UNIVERSITY and THE CANADIAN COPYRIGHT LICENSING AGENCY

Appellants & Respondents

- and -

CANADIAN ASSOCIATION OF RESEARCH LIBRARIES

Proposed Intervener

MEMORANDUM OF ARGUMENT OF THE PROPOSED INTERVENER

CANADIAN ASSOCIATION OF RESERCH LIBRARIES ("CARL")

MOTION FOR LEAVE TO INTERVENE

(Pursuant to Rules 47, 55, 56, 57, and 59 of the *Rules of the Supreme Court of Canada*)

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I. MAIN FACTS AND ISSUES IN APPEALS & OVERVIEW OF APPLICANT'S POSITION

1. These appeals are from a unanimous decision of the Federal Court of Appeal, *per* Pelletier J.A., dated April 22, 2020 in *York University v. The Canadian Copyright Licensing Agency (Access Copyright)*, 2020 FCA 77 (CanLII), <http://canlii.ca/t/j6lsb> (hereinafter the "FCA judgment").[1] The FCA judgment was the result of an appeal in turn from the 2017 Federal Court ("Federal Court judgment") of Phelan J. in *Canadian Copyright Licensing Agency v. York University*, 2017 FC 669 (CanLII), [2018] 2 FCR 43, <http://canlii.ca/t/h4s07> (the "trial judgment"). Canadian Copyright Licensing Agency is hereinafter referred to as "Access Copyright" and York University is hereinafter referred to as "York". Both York and Access Copyright sought and on October 15, 2020 were granted leave to appeal the FCA judgment. Both appeals are being heard together.

2. York framed the issues in its Leave to Appeal Application as follows:

> *1. The proposed appeal raises the following issues of public importance that ought to be decided by this Court:*
> *(a) When determining whether copying in the educational context constitutes "fair dealing" (and thus not infringement) under ss. 29, 29.1 and 29.2 of the Copyright Act, R.S.C., 1985, c. C-42, should the analysis be conducted from the perspective of the ultimate users (students), or from the perspective of the educational institution they attend?*
> *(b) When determining whether copying in the educational context constitutes "fair dealing" under ss. 29, 29.1 and 29.2 of the Copyright Act, the analysis should refrain from conflating factors.*
> *(c) For institutional fair dealing guidelines to be "fair" for the purposes of ss. 29, 29 .1 and 29 .2 of the Copyright Act, is there an obligation for an educational institution to implement safeguards to ensure compliance with the guidelines themselves?*[2]

3. Access Copyright framed its requested relief as follows:

> *17. Access Copyright therefore seeks leave to appeal so the Court may address the following question for the benefit of all copyright collectives and copyright owners affected by the decision of the Federal Court of Appeal:*
> *(1) Is a tariff approved by the Copyright Board enforceable by a collective society under subsection 68.2(1) of the Copyright Act only if the user to whom the tariff*

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[1] *York University v. The Canadian Copyright Licensing Agency (Access Copyright)*, 2020 FCA 77 (CanLII), <http://canlii.ca/t/j6lsb> (hereinafter "FCA judgement").
[2] York, Leave to Appeal Application, V. I, Notice of Application, p.1.

pertains agrees to be bound by its terms and conditions?[3]

4. The proposed Intervener Canadian Association of Research Libraries (hereinafter "CARL") represents research libraries that, in turn, serve Canada's leading research universities and other research institutions. CARL has a mandate and responsibility to assist this Court in the determination of the issues in this case and in seeking an outcome that will not have a negative operational and financial impact on its member libraries and the institutions that they serve.[4] CARL seeks leave to intervene in order to make the following two main submissions, which are further explained below:

    a. The FCA decision was correct in holding that:

    > *[204] As a result, I conclude that a final tariff would not be enforceable against York because tariffs do not bind non-licensees. If a final tariff would not be binding, the conclusion can hardly be different for an interim tariff.*
    > *[205] Acts of infringement do not turn infringers into licensees so as to make them liable for the payment of royalties. Infringers are subject to an action for infringement and liability for damages but only at the instance of the copyright owner, its assignee or exclusive licensee. In the course of the hearing before this Court, Access Copyright candidly admitted that, given its agreement with its members, it cannot sue York for infringement in the event that some or all of the copies made by York are infringing copies. However, Access Copyright claims the right to enforce the tariff against non-licensee infringers; yet if the tariff is not mandatory then there can be no right to enforce it.*
    > *[206] As a result, the validity of York's Guidelines as a defence to Access Copyright's action does not arise because the tariff is not mandatory and Access Copyright cannot maintain a copyright infringement action. Therefore, I would allow York's appeal from the judgment of the Federal Court with costs, set aside the Federal Court's judgment, and dismiss Access Copyright's action with costs.*[5]

    b. The FCA need not and should not have issued what is effectively an advisory opinion on the validity of York's Fair Dealing Guidelines. CARL hopes that this Court will declare that the FCA's judgement on these Guidelines was at most and at best *obiter dicta* and, in any event, was wrong with respect to the issues of safeguards and aggregate copying. The FCA also erred with respect to its comment that a key

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[3] York, Leave to Appeal Application, V. I, Notice of Application, p. 5.
[4] Affidavit of Susan Haigh, paras. 15-17.
[5] *York University v. The Canadian Copyright Licensing Agency (Access Copyright)*, 2020 FCA 77 (CanLII), <http://canlii.ca/t/j6lsb> paras. 204-206

element of this Court's decision in *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada,* 2012 SCC 36 (CanLII), [2012] 2 SCR 326, <https://canlii.ca/t/fs0vf>, *per* Abella J., was decided "*per incuriam*".[6]

5. These proceedings began by way of an action by Access Copyright against York University to enforce the "Interim Tariff" issued by the Copyright Board on December 23, 2010.[7] York defended the action and counterclaimed "seeking a declaration that any reproductions made fell within the Fair Dealing Guidelines it issued and therefore constitute the exception for "fair dealing" under s. 29 of the *Copyright Act*, RSC 1985, c C-42. The declaration sought covers all reproductions of all copyright-protected works made prior to April 8, 2013 and thereafter, regardless of whether such works are part of Access Copyright's repertoire."[8]

II. STATEMENT OF QUESTIONS IN ISSUE

6. Should CARL be granted leave to intervene in these appeals and, if so, on what terms?

III. ARGUMENT

7. This Court may exercise wide discretion in deciding whether or not to allow an intervention. Normally, applicants for leave to intervene are required to establish: (a) that they have an interest in the appeal; and (b) that they will be able to make submissions that are useful and different from those of the other parties to the appeal.[9] CARL satisfies these requirements.

A. The Proposed Intervener Has an Interest in the Issues Arising in these Appeals

8. CARL is the national voice of Canadian research libraries. These include libraries that serve the largest and most research-intensive Canadian universities as well as some non-university libraries. These libraries employ over 1,500 professional librarians, including full-time

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[6] *York University v. The Canadian Copyright Licensing Agency (Access Copyright)*, 2020 FCA 77 (CanLII), <http://canlii.ca/t/j6lsb> paras. 222-227

[7] *Access Copyright - Interim Tariff for Post-Secondary Educational Institution,* 2011-2013 https://decisions.cb-cda.gc.ca/cb-cda/certified-homologues/en/item/367522/index.do?q=access+copyright

[8] Trial judgement, para. 2. *Canadian Copyright Licensing Agency v. York University,* 2017 FC 669 (CanLII), [2018] 2 FCR 43, <http://canlii.ca/t/h4s07>

[9] *Rules of the Supreme Court of Canada*, SOR/2002-156, s 55; *R. v. Finta*, 1993 CanLII 132 (SCC), [1993] 1 SCR 1138, <https://canlii.ca/t/1fs3t>

copyright specialists, who have a crucial role in their institutions in ensuring understanding and compliance with Canadian copyright law and enabling the most efficient possible access to knowledge in the pursuit of research, education and innovation. Most of CARL's member libraries are responsible for copyright administration for their universities. CARL also pursues advocacy and education for the benefit of its members, including participation in Parliamentary committee hearings and preparation of copyright resources for Canadian universities.[10] CARL's member libraries have frontline responsibilities in their research-intensive institutions.[11]

9. CARL's members are directly affected by the outcome of this case because the incorrect holding of the Federal Court that copyright collectives can impose on libraries and their parent institutions a legally "mandatory tariff" would, if upheld, seriously jeopardize research libraries' ability to pursue their important and well-recognized public interest mission of legally providing the most efficient access to the most possible works.[12]

10. If the FCA judgment regarding the mandatory tariff issue is not upheld, the institutions that CARL's member libraries serve could be liable for tens of millions of dollars a year both retroactively and in the future for unwanted and unnecessary tariff costs that would result in double payment for rights that are already licensed in other ways or for uses that require no permission or payment due to the fair dealing and other exceptions provided by the *Copyright Act.*[13] This Court has already recognized the problems associated with "double dipping" and disapproved of collective societies' attempts to add duplicative layers of royalties and fees in three of its decisions from 2012.[14]

11. Moreover, CARL's member libraries and the professional librarians who are employed by

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[10] Affidavit of Susan Haigh, para. 3.
[11] Affidavit of Susan Haigh, para. 5.
[12] Affidavit of Susan Haigh, para. 12.
[13] Affidavit of Susan Haigh, paras. 24, 27, 28 et passim.
[14] *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada, 2012* SCC 34 (CanLII), [2012] 2 SCR 231, <https://canlii.ca/t/fs0v7> paras 1, 11; *Re:Sound v. Motion Picture Theatre Associations of Canada,* 2012 SCC 38 (CanLII), [2012] 2 SCR 376, <https://canlii.ca/t/fs0vc> at para 14; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada,* 2012 SCC 36 (CanLII), [2012] 2 SCR 326, <https://canlii.ca/t/fs0vf>at para 48.

them may have to engage in unrealistic monitoring and supervision of the activities of tens of thousands and students and faculty in a manner that was expressly rejected by the Court in the photocopier and fax era in *CCH v. LSUC*[15] and would be even more illogical in today's online milieu.[16]

B. Prejudice To CARL if Not Granted Leave To Intervene

12. If not granted leave to intervene, CARL will be unable to advocate essential and unique arguments that are unlikely to be adequately addressed, if addressed at all, by Access Copyright, York or other likely interveners.[17] This could, in turn, result in harm to CARL's member libraries, and to the institutions and communities that they serve, which are the firmament and leading edge of Canadian research.[18]

13. CARL suffered prejudice when its application for leave to intervene was wrongly, in its view, denied in the FCA by Webb J.A. who also denied CARL's request for reconsideration. CARL was pleased that that the denial of intervener status to CARL by Webb J.A. in the FCA was followed by subsequent embrace by the FCA judgment of the precise arguments that Webb J.A. ruled were "outside the issues that are before this Court". CARL submits that this makes it even more important and appropriate that CARL be granted leave to present those arguments to this Court by way of intervention.[19]

C. The Submissions of CARL will be Useful and Different from those of Other Parties

14. With respect to the mandatory tariff issue and Access Copyright's appeal, CARL will take a more vigorous approach than York, in view of York's earlier strategic decision at trial to focus on the interim tariff and not to confront the issue of whether final approved tariffs are mandatory until the appeal, and even then with less priority than its quest for validation of its Fair Dealing Guidelines.[20]

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[15] *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 (CanLII), [2004] 1 SCR 339, <https://canlii.ca/t/1glp0> (hereinafter "*CCH v. LSUC*")
[16] Affidavit of Susan Haigh, para. 8.b.ii.
[17] Affidavit of Susan Haigh, paras. 15, 37.
[18] Affidavit of Susan Haigh, paras. 12, 15.
[19] Affidavit of Susan Haigh, paras. 34-36
[20] Affidavit of Susan Haigh, para. 37.

15. With respect to the issue of the Fair Dealing Guidelines, CARL – unlike York – will urge this Court to declare that the lower courts should not have heard the counterclaim for what amounted to an advisory opinion, especially in view of the fact that no actual copyright owners were before the Court, many other Canadian institutions with similar guidelines were not before the Court, and The Fair Dealing Guidelines were always controversial and are now very outdated for many reasons, including COVID.[21] Thus, this Court should declare that all of the comments below on the Fair Dealing Guidelines were at most and at best *obiter dicta* and should be disregarded. That said, if this Court is inclined to address the Fair Dealing Guidelines substantively to any extent, this Court should rule that the findings below on safeguards and on aggregate copying,[22] as well as the "*per incuriam*" comment, were clearly incorrect.

D. The Nature of the Proposed Legal Argument

i. The Mandatory Tariff Issue

16. Regarding the mandatory tariff issue, CARL will submit that:
    a. The FCA judgment is correct and compelling;
    b. The decision of this Court from just over five years ago in *CBC v. SODRAC,*[23] based upon the intervention of Prof. Ariel Katz and the institute led by Prof. David Lametti, as he then was, is clearly applicable and binding in the current case; and,
    c. In addition to the binding application of *CBC v. SODRAC,* the trial judgment in this case is contrary to jurisprudence from the UK dating back to 1894 and of this Court dating back to 1943.[24]

17. CARL will rely upon the influential *Spectre I* paper of Prof. Ariel Katz[25], which was before this Court in the *CBC v. SODRAC* case in prepublication form and which was cited and

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[21] Affidavit of Susan Haigh, para. 8.
[22] Affidavit of Susan Haigh, para. 33.
[23] *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57 (CanLII), [2015] 3 SCR 615, <http://canlii.ca/t/gm8b0> (hereinafter *"CBC v. SODRAC"*) at paras. 112-113
[24] Affidavit of Susan Haigh, para. 8 and Katz Spectre I & Spectre II.
[25] Ariel Katz: *Spectre: Canadian Copyright and the Mandatory Tariff* - Part I *27(2) IPJ 151 (2015)* Available on SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2544721

clearly very influential in the unanimous FCA judgment below written by Pelletier, J.

18. Moreover, CARL will also rely upon Prof. Katz's *Spectre II* follow up paper, the abstract of which states:

> *The previous article showed that the "mandatory tariff" theory cannot, as a matter of statutory interpretation and in light of the case law, withstand scrutiny. This article shows that construing the Act in accordance with the "mandatory tariff" theory gives rise to numerous practical challenges, conceptual puzzles, procedural nightmares, and constitutional headaches, each of which should weigh the scales against it. In contrast, the "voluntary licence" theory avoids all these quandaries, and, in addition to being consistent with earlier case law, appears clear, simple, and coherent.*[26]

ii. The Fair Dealing Guidelines Issue

19. CARL will argue that the counterclaim seeking the validity of York's Fair Dealing Guidelines should not have been heard in the trial proceeding and, as indicated by Pelletier J.A. in the FCA judgement:

> *[206] As a result, the validity of York's Guidelines as a defence to Access Copyright's action does not arise because the tariff is not mandatory and Access Copyright cannot maintain a copyright infringement action. Therefore, I would allow York's appeal from the judgment of the Federal Court with costs, set aside the Federal Court's judgment, and dismiss Access Copyright's action with costs.*[27]

20. Presumably, Pelletier J.A. went on to opine in some detail on the reasons below regarding the Fair Dealing Guidelines in view of the possibility that this Court might overrule him on the mandatory tariff issue. However, neither the Trial Judgement nor the FCA judgement should have included what was clearly an advisory opinion with wide implications for institutions other than York that were not before the Court. This court issues advisory opinions only in references by the Governor in Council.[28] Nor can York's counterclaim be justified as a declaration of non-infringement, since the essential parties for such a declaration – i.e. the

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[26] Ariel Katz: *Spectre: Canadian Copyright and the Mandatory Tariff - Part II* 28(1) IPJ 39 (2015) Available on SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2636464

[27] *York University v. The Canadian Copyright Licensing Agency (Access Copyright)*, 2020 FCA 77 (CanLII), <http://canlii.ca/t/j6lsb>, para. 206.

[28] *R. v. Marshall,* 1999 CanLII 666 (SCC), [1999] 3 SCR 533 <https://canlii.ca/t/1fqkn> para. 31.

actual copyright owners in question – were not even parties.[29] Such a declaration was not sought. It is clear and conceded that only actual copyright owners, or exclusive licensees if the copyright owner is joined or assignees, can sue for copyright infringement.

21. Indeed, the FCA judgment correctly states that:

> *[205] Acts of infringement do not turn infringers into licensees so as to make them liable for the payment of royalties. Infringers are subject to an action for infringement and liability for damages but only at the instance of the copyright owner, its assignee or exclusive licensee. In the course of the hearing before this Court, Access Copyright candidly admitted that, given its agreement with its members, it cannot sue York for infringement in the event that some or all of the copies made by York are infringing copies. However, Access Copyright claims the right to enforce the tariff against non-licensee infringers; yet if the tariff is not mandatory then there can be no right to enforce it.*
> *[206] As a result, the validity of York's Guidelines as a defence to Access Copyright's action does not arise because the tariff is not mandatory and Access Copyright cannot maintain a copyright infringement action. Therefore, I would allow York's appeal from the judgment of the Federal Court with costs, set aside the Federal Court's judgment, and dismiss Access Copyright's action with costs*.[30]

22. Access Copyright has no standing to sue for copyright infringement and no copyright owners or exclusive licensees were parties in this case. In any event, there are three very clear decisions from this Court since 2004[31] and a 2012 statutory amendment that clearly set forth the law on fair dealing in Canada.[32] The applications of these decisions to the York Fair Dealing Guidelines in an abstract fashion without the actual copyright owners before the Court was not only inappropriate because it was an abstract advisory opinion but also contained palpable and overriding errors with respect to the issues of safeguards and aggregate copying.

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[29] *Research in Motion Limited v. Atari Inc*., 2007 CanLII 33987 (ON SC), <https://canlii.ca/t/1slnp>
[30] *York University v. The Canadian Copyright Licensing Agency (Access Copyright)*, 2020 FCA 77 (CanLII), <http://canlii.ca/t/j6lsb> paras. 205-206. Supra note 1.
[31] *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 (CanLII), [2004] 1 SCR 339, <https://canlii.ca/t/1glp0>; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36 (CanLII), [2012] 2 SCR 326, <https://canlii.ca/t/fs0vf>; *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright),* 2012 SCC 37 (CanLII), [2012] 2 SCR 345, <https://canlii.ca/t/fs0v5>
[32] "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; 2012, c. 20, s. 21 https://laws-lois.justice.gc.ca/eng/acts/c-42/page-8.html#docCont

23. In particular, with respect to aggregate copying, it is illogical and inequitable that a use that would be fair dealing in a small class of 20 students at small university would be infringing if used in an identical context in one or more large classes comprising several hundred students or more at a large university simply because the aggregate number of copies is greater.[33] This Court has already clearly addressed the issue of aggregate copying in 2012 and concluded, *per* Abella J., that:

> *[43] Further, given the ease and magnitude with which digital works are disseminated over the Internet, focusing on the "aggregate" amount of the dealing in cases involving digital works could well lead to disproportionate findings of unfairness when compared with non-digital works. If, as SOCAN urges, large-scale organized dealings are inherently unfair, most of what online service providers do with musical works would be treated as copyright infringement. This, it seems to me, potentially undermines the goal of technological neutrality, which seeks to have the Copyright Act applied in a way that operates consistently, regardless of the form of media involved, or its technological sophistication: Robertson v. Thomson Corp., 2006 SCC 43 (CanLII), [2006] 2 S.C.R. 363, at para. 49.* [34]

24. As to safeguards, it also illogical and inequitable that the librarians in the Great Library of the Law Society of Upper Canada, which had clearly posted its Access Policy were not required to monitor and supervise the one-at-a-time use of photocopiers or of the fax copies sent to out of town lawyers but are now apparently required to do so for the activities of tens of thousands of students and faculty on campus and online. The landmark decision of this Court in *CCH v. LSUC*[35] in the context of self-serve photocopiers and fax machines would seem to apply *a fortiori* in today's online milieu. The Great Library was able to rely upon it Access Policy and the presumption that "a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright. Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law".[36] It may be noted that this Court's judgment in *CCH v. LSUC*, written by retired CJC McLachlin, is widely regarded as "the most important fair dealing

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[33] Affidavit of Susan Haigh, para. 8.b.ii.

[34] *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36 (CanLII), [2012] 2 SCR 326, <https://canlii.ca/t/fs0vf> para 43. See also paras. 41-42.

[35] *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13, [2004] "CCH v. LSUC" 1 SCR 339

[36] *CCH v. LSUC* para. 38.

decision" in Canadian law.[37] Access Copyright (or CanCopy, as it was then known) played a major role in that case by funding it[38] and acting as an intervener.

IV. SUBMISSIONS ON COSTS

25. The Proposed Interveners do not seek any costs and submit that no costs should be awarded against them.

V. ORDER SOUGHT

26. CARL seeks an Order:

a. Granting leave to intervene in these appeals pursuant to Rule 55 of the Rules of the Supreme Court;

b. Allowing it to file a factum of appropriate length and permitting it to make oral submissions of appropriate length at the hearing of these appeals; and,

c. Holding it not liable to pay or to be eligible to receive any costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8th day of March, 2021

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[37] Emily Hudson, *Drafting Copyright Exceptions*, 2020 Cambridge University Press, p. 243. See excerpt in Exhibit "A" of Susan Haigh Affidavit.
[38] Ariel Katz: *Spectre: Canadian Copyright and the Mandatory Tariff* - Part I *27(2) IPJ 151 (2015)* Available on SSRN*:* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2544721; Note 70.

VI. TABLE OF AUTHORITIES

Cases

Other Authorities

Statutes

Regulations

VII. KEY STATUTORY PROVISIONS

Copyright Act R.S.C. 1985 c. C-42 as amended:

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. 2

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

Section 68,2(1) at the material time:

68.2 (1) Without prejudice to any other remedies available to it, a collective society may, for the period specified in its approved tariff, collect the royalties specified in the tariff and, in default of their payment, recover them in a court of competent jurisdiction.

68.2 (1) La société de gestion peut, pour la période mentionnée au tarif homologué, percevoir les redevances qui y figurent et, indépendamment de tout autre recours, le cas échéant, en poursuivre le recouvrement en justice.