SCC FILE NUMBER: **39222**

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

YORK UNIVERSITY

APPELLANT
(RESPONDENT)

AND

THE CANADIAN COPYRIGHT LICENSING AGENCY ("ACCESSS COPYRIGHT")

RESPONDENT
(APPELLANT)

AND BETWEEN:

THE CANADIAN COPYRIGHT LICENSING AGENCY ("ACCESSS COPYRIGHT")

APPELLANT
(RESPONDENT)

AND

YORK UNIVERSITY

RESPONDENT
(APPELLANT)

(style of cause continued on next page)

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I - OVERVIEW OF POSITION AND STATEMENT OF FACTS

The Role of the Canadian Association of Law Libraries ("CALL")

1. The Canadian copyright regime is fundamentally a statutory regime that balances the rights of creators to benefit from their works and the rights of all people to freely disseminate knowledge and share ideas. The Copyright Act creates a protection for creators (copyright) balanced by statutorily defined limits or exceptions, including fair dealing, as well as exceptions for specific types of users such as libraries, educational institutions, and archives (collectively, user rights). This appeal requires the Court to consider and examine its fair dealing jurisprudence.

The Court Should Retain the Existing Flexible, Multifactorial Fair Dealing Text

2. CALL submits that the Court should resist the temptation to modify or clarify the existing fair dealing test in response to the factual context of this case. The test for fair dealing articulated and twice applied by this Court is a flexible multifactorial test that allows libraries (and other institutions) to tailor access and appropriate copying policies that consider all relevant circumstances. CALL—as an association of law libraries—is concerned that any such modification may have unintended consequences for persons seeking to access, understand, and discuss the law and so may have unintended effects on the ability of people to access justice.

PART II - STATEMENT OF ISSUES AND POSITION

3. CALL intervenes with respect to the issue of whether the York Guidelines satisfy fair dealing. CALL takes no position on whether copying under the York Guidelines constitutes fair dealing but submits that in deciding this case the Court should take care not to modify the accepted flexible, multifactorial approach to fairness determinations established in the existing case law.

PART III - STATEMENT OF ARGUMENT

Fair and Reasonable Public Access to Legal Materials Furthers Access to Justice

4. CALL has highlighted that copyright has the potential to unduly limit access to the law. For example, CALL has raised jurisprudential concerns around imposing restrictions on access to primary legal sources through Crown copyright. Here the concern is that modifying the fair dealing test could undermine the ability of persons who are not well-financed to properly access and use the full body of materials potentially available to fully understand and discuss the law and participate in legal proceedings.

5. Law libraries are living repositories for collections of materials that have a unique place in Canadian society—that is, they hold vast amounts of primary sources of law as well as academic commentary on the law that is needed to understand, discuss and ultimately participate in Canada's legal system. Built on precedent and authority, our legal system demands that parties follow previous cases and contextualize them within relevant academic and professional comment. The courts demand that these sources be addressed not in broad, abstract terms but with specific reference to the entirety of the document and the specific language at issue.

6. For legal professionals, academics, and the general public to fully understand and use legal knowledge it is crucial they be able to access, copy, and share substantial portions of primary sources of law, reported cases (together with headnotes), and legal academic and professional commentary. The very reason that many compilations of such documents are brought into existence and disseminated widely is to enable the public and legal community to know the law and to use these materials to participate in legal processes.

7. One of the most significant barriers impeding access to justice in Canada is cost. As Binnie J noted, "protracted litigation has become the sport of kings in the sense that only kings or equivalent can afford it[1]." The decision of this Court in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*[2] also recognizes that imposing court fees can act as a significant obstacle to furthering access to justice. Similarly, without appropriately balancing creator and user rights, the cost of accessing and sharing the materials needed to research, understand, and argue legal proceedings can significantly impede effective participation in the legal process.

The Existing Fair Dealing Test Allows the Courts to Strike an Appropriate Balance

8. Fair dealing is a statutory exception to copyright set out in s. 29 of the Copyright Act and related sections. Section 29 provides an exception that is described very generally: "[f]air dealing for the purpose of research, private study, education, parody or satire does not infringe copyright." Sections 29.1 to 29.9 address some specific situations which are protected from being treated as

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[1] *Kerr v. Danier Leather Inc.*, 2007 SCC 44, [2007] 3 SCR 331 at para. 63.
[2] *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 SCR 31.

infringing a creator's copyright. A review of these specific situations shows carefully balanced measures that create room for certain types of user rights while at the same time maintaining meaningful rights that allow creators to benefit from the fruits of their labour.

9. Given the relatively general nature of s. 29, the courts have had to elaborate a test for determining what constitutes fair dealing in any context. The first question the court must ask is whether the dealing is for an allowable purpose as described in s. 29.[3] In making this assessment the court must not adopt a restrictive interpretation of allowable purposes as this could result in unduly restricting the rights of users.[4] After determining this question the court then must consider whether the use, even if allowable, is fair.

10. In *CCH Canadian Ltd. v. Law Society of Upper Canada*[5] the court articulated a flexible, multifactorial test for fairness requiring the court to consider: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work. This Court has elaborated on how this analysis is to be applied in cases such as *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*[6] (which considered the copying and sharing of text excerpts in an educational setting) and *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*[7] (which considered fair dealing in the context of music streaming).

11. Two things are clear from a review of both the cases and the statutory amendments: (1) the history of copyright is the history of the law trying to keep up with progress of technology constantly making new ways to copy, disseminate and even create works[8]; and (2) the response to

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[3] *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339 [*CCH*] at para. 50.
[4] *CCH* at para. 54.
[5] *CCH* at para. 53.
[6] *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 SCR 345.
[7] *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 SCR 326 [*SOCAN v. Bell*].
[8] See for example the 2012 addition of s. 29.21, for copyright in non-commercial user-generated content.

this technological race must be carefully measured and balanced to ensure continued fairness to both creators and users, and to maintain the dual goals of creation and dissemination.[9]

12. When the *Statute of Anne*[10] first established copyright protection for works, copying was a process limited by the limited access to printing presses. Since then we have seen a progression of cases and legislative reforms addressing emerging forms of media as well as increasingly democratized publishing—as photocopying machines, video-tape machines, and other digital mechanisms have become widely available and accessible to ordinary people.

13. Surprisingly, what did not clearly emerge in the courts below is the degree to which modern libraries and educational institutions have moved from a world of physical materials to a world of digital materials. Case law, legislation, academic commentary and professional articles are at least as likely now to be accessed through digital means and similarly disseminated through means such as emails, dropboxes or links to databases. This evolution in the field of copyright carries with it a hidden further evolution as access to online and digital material is likely governed by licensing arrangements which bring their own challenges depending on the nature of the technology being used.[11] This is part of the reason libraries and academic institutions are opting out of Access Copyright's license – their rights and obligations are now defined and governed by private arrangements with digital rights holders.[12]

14. Absent Parliament amending the legislation, the existing test for fair dealing gives a tool that is broad and flexible enough to allow the court to address this evolving landscape without resort to blunt or arbitrary tests. The existing test looks at the particular context and considers what is being used, who is using it, why it is being used, and the effect of its use on a case by case basis.

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[9] *CCH* at para. 10; *SOCAN v. Bell* at para. 21.

[10] *An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned* [*Statute of Anne*] 1709 (UK), 8 Anne, c. 21, 9 Statutes of the Realm 256 (1708-1713). Book of Authority [Tab 1].

[11] See for example the issues raised concerning licensing fees for incidental copies and the policy of trying to maintain technological neutrality considered in *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 SCR 615.

[12] Pascale Chapdelaine, "Fair Dealing for the Purpose of Education: *York University v The Canadian Copyright Licensing Agency*" (9 Apr 2021) CanLII Connects online: <https://www.canliiconnects.org/en/commentaries/73793> at pp. 4–5.

It does not put the court in the position of needing to legislate a bright-line test that Parliament has not enacted but instead confines the court to its more institutionally appropriate role: elucidating the law on a case-by-case basis with the benefit of a full record.

The Existing Test Furthers the Goal of Ensuring Practical Access to Legal Source Material

15. The existing fair dealing test furthers access to legal source materials and the larger societal good of furthering understanding of, and discussion about, the law to enable active participation in legal processes. It can further access to justice. This can be illustrated by considering the allowable purpose question and a few of the six factors set out in the fairness test. For example:

a. An *allowable purpose* is one that is envisioned in s. 29 and can include "'[r]esearch for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums... Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the *Copyright Act*.'"[13] Reproducing legal works is an integral part of the legal research process, and, as such, is an allowable purpose, whether carried out by library staff or by the ultimate user.[14]

b. In looking at the *purpose of the dealing*, the existing case law requires that this be considered from the point of view of the user and views some uses as being more or less fair than others. Users of legal source material easily fall within the allowable uses of "research" or "private study." Notably, the existing test allows the court to look deeper and consider that the purpose of the research may be to understand the law or to assist a lay litigant make submissions to the court. Both of these motivations should be seen as more fair and this would weigh in favour of the fairness of the use under the existing test.

c. In looking at the *character of dealing*, the existing test would allow the court to take into account the fact that copies were being made by a person as research for use in court as weighing favorably in the process of determining the fairness of the dealing considering the public interest in having the court fully and accurately informed about relevant legal sources by the parties (given the adversarial nature of our legal system).

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[13] *CCH* at para. 51.
[14] *CCH* at para. 64.

d. Similarly, the *nature of the work* would weigh in favour of the user in the context of copying and disseminating most legal source material. Much legal source material is brought into existence to be widely disseminated for public and institutional use. At the furthest extreme, primary source materials such as legislation, regulations and judgments are meant to be broadly read, understood and complied with (indeed, it is CALL's position that most of these works are of such a character that copyright does not subsist in them). But even legal source materials that have been modified to include creative contributions, such as headnotes, are intended to be read and used in a similar fashion.

16. While these are illustrations of how the current approach to fair dealing can further the goal of ensuring appropriate access to legal source materials, they also demonstrate the value of a flexible, multifactorial approach to balancing creator and user rights in the context of potentially larger societal values. Whereas CALL does not take a position on the fairness of the York Guidelines, the existence of well-considered guidelines that reflect the multifactorial test and its case-specific and flexible nature, as are used in law libraries to aid researchers and library staff, weighs in favour of findings of fairness.[15]

Concerns About the Application of the *CCH* Test in this Case

17. Both the lower courts applied the multifactorial test described in *CCH* but did so in a way that raises two significant concerns that will undermine the flexible nature of that test. First, they put very substantial weight on the number of copies made and circulated. Second, they considered the size of the forgone licensing fees in assessing the effect of the dealing.

18. Undue emphasis on quantitative measures creates a real risk that the test will lose its flexible nature and diminish the non-quantifiable aspects of the multifactorial test. This jeopardizes the delicate balance of creator interests and user rights, and of creation and dissemination of works. This is not to say that well-crafted fair dealing guidelines that reflect the multifactorial test and its case-specific and flexible nature cannot incorporate numerical guidelines to assist law library staff and individual researchers who are not experts in copyright law but a numerical approach should not be incorporated into the legal test.

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[15] *CCH* at paras. 64, 66, 67, 68, 71.

19. The decision to look at the licensing fees in previous years as a measure of fairness is more dramatically misguided. If a dealing is fair then the copyright holder is not entitled to insist on a license. Indeed, "[t]he availability of a licence is not relevant to deciding whether a dealing has been fair."[16] If in fact the dealing is fair, the license fee paid in past years is a windfall to the copyright holder for having had the benefit of unnecessary license fees.

20. While CALL does not take a position on whether the lower courts put such inappropriate weight on any of these factors as to constitute a palpable and overriding error, it does submit that the Court should give some direction clarifying both issues. In particular the Court should make it clear that, consistent with *CCH*, the legislated fair dealing user right should not be reduced to a page counting exercise or calculation of allegedly forgone licensing fees.

Concerns about Judicial Reform of the Fair Dealing Test

The Danger of Unintended Jurisprudential Consequences

21. As illustrated above in the context of legal source materials and law libraries, the fair dealing provisions of the Copyright Act extend to a broad range of materials, actors, and purposes. While actors may guide their own fair dealing case-by-case assessments in practice with the aid of well-considered guidelines that reflect the *CCH* multifactorial test, the court is not well positioned to articulate numerical guidelines that would affect other actors dealing with different materials for different purposes. For example, while it may seem attractive to say that it would not be fair dealing to copy 30% of a work, how would this apply to case materials or academic materials for use in court where it likely necessary to copy 100% of the document?[17] Fundamentally, the teaching of earlier jurisprudence that a flexible test can be applied in a fact specific context is as wise now as it was then.

The Danger of Undermining or Effectively Altering Existing Licensing or Contractual Arrangements

22. This concern is specifically directed at the realities of modern means of accessing, publishing and sharing legal and academic materials – namely through digital collections and online tools. These materials are governed not only by the *Copyright Act* but also by licensing

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[16] *CCH* at paras. 64.
[17] *CCH* at para. 56.

arrangements negotiated (or in some cases, effectively imposed) by copyright holders. These licensing arrangements are not negotiated in isolation from the copyright regime; instead, the parties agree to arrangements knowing their statutory rights and those they may hold under the licensing arrangements. A judicially imposed shift in the underlying statutory regime therefore has the potential to not only shift the rights of users and creators under copyright law but also to shift the rights and benefits enjoyed by licensees and licensors. The court simply does not have the record before it to assess or understand the effects a change in the law might have.

Significant Changes to Fair Dealing Represent Policy Choices Better Left to Parliament

23. As illustrated by this case, the fair dealing test strikes a balance between creators and users of works that can have wide societal effects. A narrowing of the test to favour the rights of creators has the inevitable effect of diminishing the rights of users and potentially creating liabilities or detriments for the public or other institutions. Similarly, changing the balance to favour users will inevitably disadvantage creators and potentially have knock-on effects on the general public (for example, if creative industries favoured other countries over Canada because of a less favourable copyright regime). As such, decisions about the scope and operation of fair dealing on the whole are major policy choices that involve reconciling polycentric interests and not merely the interests of the litigants before the court.

24. It should be highlighted that there really are a wide variety of policy choices that can be made. For example, in Ireland the Dáil Éireann has chosen to limit the right of parties to contract out of fair dealing rights.[18] Elsewhere, other narrower or broader approaches modify, limit or override attempts to contract out of or modify user rights.[19] As a general rule it is not the role of the courts to make such policy choices, especially where there is already a well-established approach.

25. It should also be kept in mind that Parliament has well-established processes for reviewing the *Copyright Act*. Section 92 requires that a committee of the Senate, House of Commons, or

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[18] *Copyright and Related Rights Act* (I), 2000, s. 2(10).
[19] International Federation of Library Associations, "Protecting Exceptions Against Contract Override: A Review of Provisions for Libraries" (2019), online (pdf): <https://www.ifla.org/files/assets/hq/topics/exceptions-limitations/documents/contract_override_article.pdf>.

both, be established to review the legislation. This process includes hearing from a wide range of witnesses from different sectors, including representatives of creators, users, the academic sector and libraries (CALL participated in the last such review). This process results in a report which is then considered by the government and Parliament and can (and does) lead to statutory reform. The last such review was carried out in 2019 and resulted in a major report from the House of Commons Standing Committee on Industry, Science and Technology.[20] This report considered a number of possible changes to fair dealing. The courts are simply not equipped to conduct a similar, inclusive process.

Significant Changes to Fair Dealing Are Potentially Highly Technical in Nature

26. A review of the fair dealing provisions of the Copyright Act, as well as the recent case law, reveals that many fair dealing cases are highly technical in nature and raise difficult issues of definition and response. For example, the provisions related to s. 29 have had to address such varied matters as making back-ups of digital materials, making single copies for personal viewing, and making copies for tests at educational institutions. It is noteworthy that these various explications are carefully balanced and well-defined, often placing limits on and describing how they apply in the context of different media. Generalist courts simply do not have the expertise or overarching perspective to develop such well-tempered limitations to creator or user rights.

27. This comment applies to not only the technical aspects of the media but also the inter-relations between the parts of the *Copyright Act*. Apart from fair dealing, the legislative regime provides protections to educational institutions (s. 29.4); libraries, archives and museums (s. 30.1-30.4); and persons with perceptual difficulties (s. 32). Any adjustments to the fair dealing doctrine must be considered in the context of these provisions – both to understand how these provisions may affect the issue at hand as well as to understand how any decision of the court may affect these provisions. Again, this is not a task well suited for the courts, in either expertise or process.

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[20] House of Commons, *Statutory Review of the Copyright Act, Report of the Standing Committee on Industry, Science and Technology* (June 2019) 42nd Parl, 1st Sess (Chair: Dan Ruimy) online (pdf): <https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf>.

Conclusion

28. CALL asks that regardless of the disposition of these appeals, the court ensure that the current flexible, multifactorial approach to determining the fairness of an appropriate use be affirmed and not modified.

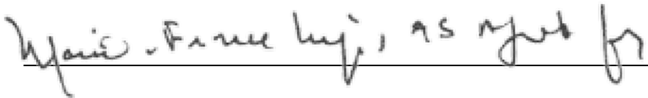
PART IV - COSTS

29. Further to the Order granting intervention CALL asks that that no further order for costs either be made for or against it.

PART V - ORDER SOUGHT

30. CALL takes no position with respect to the orders that should be granted in the appeal.

All of this is respectfully submitted this 23rd of April, 2021.



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PART VI – TABLE OF AUTHORITIES

Description	**Para Reference**
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International Federation of Library Association, "Protecting Exceptions Against Contract Override: A Review of Provisions for Libraries" (2019), online (pdf): <https://www.ifla.org/files/assets/hq/topics/exceptions-limitations/documents/contract_override_article.pdf>	24
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An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned [*Statute of Anne*] 1709 (UK), 8 Anne, c 21, 9 Statutes of the Realm 256 (1708-1713)	12
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