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Access Copyright v York University, Federal Court, Justice Phelan 2017 FC 669

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I. Is my library affected by this decision of Canada's Federal Court?

The decision has two aspects: (1) it focuses on the law surrounding "Fair Dealing" and (2) it focuses on the law governing the "Interim Tariff" for Post-Secondary Educational Institutions 2011-2013 ordered by the Copyright Board at the end of 2010 at the request of Access Copyright (see http://www.cb-cda.gc.ca/tariffs-tarifs/proposed-proposes/2010/interim_tariff.pdf).

The part of this decision that discusses the applicability and effect of **"Fair Dealing"** under Canada's *Copyright Act* can relate directly to **ALL** libraries in Canada.

The part of the decision discussing the effect and enforceability of the **"Interim Tariff"** will **not** be directly or indirectly applicable in the context of **any library which is not part of an institution to which a Copyright Board tariff or current tariff application applies:**

- *This part of the decision is not currently relevant to libraries in Quebec*;
- Elsewhere in Canada, this part of the decision is likely to be
  - ***most interesting*** *to libraries located in Post-Secondary Educational Institutions* and
  - **also interesting** to libraries in Elementary and Secondary Schools and in Provincial and Territorial Government institutions See http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/reprographic-reprographie-e.html.
  - Public libraries in Ontario, for instance, may be **less keenly interested** in this part of the decision because their institutions are not currently involved in any tariff proceedings before the Copyright Board or subject to any tariff. (See http://www.cb-cda.gc.ca/tariffs-tarifs/index-e.html)

[1] This document is provided for information only and does not constitute legal advice.

II. Will there be an appeal from this judgment?

Justice Phelan decided this case *against* York University, in *favour* of Access Copyright. York University may decide to appeal. The decision would be appealed to the Federal Court of Appeal. Since this judgment has been released in July, it appears York may take up to 30 days after the end of this August to decide whether to accept the decision or file a notice of appeal (see Federal Courts Act, RSC 1985, c. F-7, s 27; http://cas-cdc-www02.cas-satj.gc.ca/portal/page/portal/fca-caf_eng/legislation_eng/appealsFC-appelsCF_eng)

III. About the Lawsuit Itself:

Access Copyright, the copyright collective that represents published literary rights holders' rights everywhere in Canada except in Quebec, brought a lawsuit against York University several years ago. Judge Phelan's reasons for judgment following the trial of the action in the Federal Court are dated Wednesday, July 12, 2017 (see http://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/232727/index.do).

The lawsuit was procedurally complex, with Access Copyright initiating the lawsuit but with York University not only defending itself against Access Copyright's claim but also itself turning the tables and requesting relief from the Court in a counterclaim.

Access Copyright sought to have the Federal Court force York University to adhere to and comply with the terms of an Interim Tariff issued by the Copyright Board on December 13, 2010 (see http://www.cb-cda.gc.ca/tariffs-tarifs/proposed-proposes/2010/interim_tariff.pdf; note that there were a number of proceedings before the Board in connection with this tariff and the original tariff was later varied). This tariff was intended by the Copyright Board to apply to the reproduction of literary works across all Canadian colleges and universities (except those in Quebec) – including York University -- from September 1, 2011 to December 31, 2013. Access Copyright wanted the Court to order York University to pay to it amounts set out in the tariff. In particular, Access Copyright was upset that "some instructors went to a non-[Access Copyright]licensed print shop, Keele Copy Centre, for which no sanctions were imposed by the York administration" to get coursepacks produced for their students [see paragraph 48].

York University not only decided to defend itself against Access Copyright's claim but also asked the Court to declare that the "Fair Dealing Guidelines" it published in December 2010 and revised in 2012 covered all reproductions made prior to April 8, 2013 (that is, a period longer than the period that Access Copyright was suing York University over) – and that these reproductions were allowable under the *Copyright Act* as "fair dealing" and did not require York University to have had permissions from the copyright holders.

In terms that have become common recently in Canada's library world, York University identified itself as an "opt out" institution (a term recognized by Justice Phelan in his judgment, see paragraph 50] and, in its reaction to the copyright lawsuit brought against it by the copyright collective Access Copyright, was essentially asking the Court to sanction the concept of "opting out" of a tariff process brought to the Copyright Board of Canada by a copyright collective. York University had sent a notice to Access Copyright that it was opting out as of August 31, 2011 [see paragraph 171]. York University's "Fair Dealing Guidelines" were modeled on those developed by the then

Association of Universities and Colleges of Canada (AUCC) [see paragraphs 173 & 175-178[2]], now known as Universities Canada.

IV. On the Matter of Fair Dealing:

In terms of York University's assertions that its copying during period of the Interim Tariff and after was all within the bounds of "fair dealing" and therefore nothing is owing Access Copyright, despite the existence of the Interim Tariff, **Justice Phelan has decided York University's copying did not all fall under the "fair dealing" exception** to the rights of the copyright holders.

Justice Phelan has decided that York University did not meet the full test of factors required to make the case for the fair dealing users' right (from the Supreme Court's 2004 decision in *CCH v Law Society of Upper Canada*[3]; see

The only factor Justice Phelan finds that York University satisfied is the first:

1. ***"purpose of the dealing"*** – Justice Phelan says, of York's copying, that "York's dealing with copyrighted material … falls within … education, research and private study … the photocopying was done for allowable educational purposes." (paragraphs 16 & 256, 267).

   But, in terms of the "goal of the dealing," which has become the Copyright Board's way of referring to the "*purpose of the dealing*" in the context of the remaining factors (see paragraphs 264-266 & 268), Justice Phelan stated that "the question is the fairness of the goal of allowing students to access required course materials for education" (paragraph 270) He found that "York created the Guidelines and operated under them primarily to obtain for free that which they had previously paid for" (paragraph 272). In the end, he found "the goal of the dealing is mixed and is a factor to be considered [but] is not a strong factor in the fairness analysis" (paragraph 275).

In terms of the other the factors, however, Justice Phelan found that York University had failed to satisfy it burden of proof on more of those factors for which it had the burden of proof (i.e. #2 and #3) than it had satisfied (#4)[4]:

2. ***"character of the dealing"***-- Justice Phelan found "wide-ranging, large volume copying tends toward unfairness" (see paragraphs 18 & 276-289) and that "the copying at issue [in the 2004 *CCH v LSUC* case] was that of a single copy of a reported decision, case summary, statute,

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[2] All paragraph references in this note are to paragraphs in Justice Phelan's reasons, found at http://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/232727/index.do

[3] While Justice Phelan focuses on the 2004 decision of the Supreme Court about "fair dealing" (*CCH v LSUC*, see https://scc-csc.lexum.com/scc-csc/scccsc/en/item/2125/index.do?r=AAAAAQATQ2FuYWRhIEV2aWRlbmNlIEFjdAE), he also refers to the later 2012 decisions of the Supreme Court that focus on fair dealing -- more extensively to *Alberta (Education) v Access Copyright*, 2012 SCC 37 (see, at least, paragraphs 176, 253, 277, 288, 290, 323-324, 344) but also to *SOCAN v Bell Canada*, 2012 SCC 36 (see paragraph 253).

regulation, or limited selection of text from a treatise…not the mass copying of portions of books, texts, articles, entire artistic work, or portions of collections, nor was it the multiple copying of those materials into coursepacks or digital formats." (paragraph 261)

York was unsuccessful in its argument that it had licenses and permissions from others (not represented by Access Copyright) that reduced the amount of copyright it was doing related to the Access Copyright Interim Tariff -- because York could not produce clear, complete evidence about those other relationships (see paragraph 287).

3. ***"amount of the dealing"***—Justice Phelan found that York had not established fairness, either quantitatively (see paragraphs 291-295) or qualitatively (see paragraphs 296 -317): "the Guidelines set … fixed and arbitrary limits on copying (thresholds) without addressing what makes these limits fair … There is no explanation why 10% or a single article or any other limitation [in the Guidelines] is fair." (paragraphs 20-22; see also paragraphs 295 & 306)

York was unsuccessful "almost completely both quantitatively and qualitatively. In the context of this case, this is a critical factor which establishes that there is nothing fair about the amount of the dealing" (paragraph 318).

4. ***"alternatives to the dealing"*** -- Justice Phelan found that York University had failed to establish that there were no alternatives to its dealing – that "the justification of cheaper access cannot be a determinative factor" (paragraph 24; see also paragraphs 319-331) but, nonetheless, found that "with the mix of factors and the weighing thereof, **this factor favours York** but not as strongly as it has argued" (paragraph 331, emphasis added).
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Justice Phelan found that the situation in the *Alberta (Education)* case, where the Supreme Court found fairness, was entirely different from York's situation because in that case the materials involved were in addition to textbooks in the classroom: "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, and it is quite another for York to produce coursepacks and materials for distribution through LMSs [learning management systems], which stand in place of course textbooks, through copying on a massive scale." (paragraph 324) Nonetheless, Justice Phelan did consider that teaching without textbooks at the university level could be achieved fairly, he found "York has not actively engaged in the consideration of alternatives [to the textbook] which exist or are in development. [paragraph 329] There are alternatives – these include using custom book services, purchasing individual chapters or articles from the publisher, or purchasing more of the necessary books and articles. There is just no reasonable free alternative to copying." (paragraph 330, emphasis in the original)

5. *"**nature of the work**"*

   This factor, discussed only at paragraphs 332-338, was found to be non-determinative but, nonetheless, "tends toward the negative end of the fairness spectrum" (paragraph 338) and thus **would add (some, non-determinative) weight against York's position**.

On establishing the final factor, the one for which Access Copyright bore the burden of providing evidence that it is negatively affected (see paragraph 252), Access Copyright was successful in demonstrating that York's policy and practices did have an effect on the market for the copyright holders' works, though this factor #6 was recognized by Justice Phelan as being not the most important factor to a court considering fair dealing (paragraph 340):

6. *"**effect of the dealing on the market**"* -- Justice Phelan found that it was sufficient that Access Copyright had proven "that the market for the works (and physical copying thereof) has decreased because of the [York University] Guidelines, along with other factors" (paragraph 26; see also paragraphs 339-355).

   In this respect, Justice Phelan recognized that "much of Access's evidence of impacts on the market was general in nature, [but held that] it establishes tht the likelihood of impacts from York's own Guidelines will be similar. This is sensible given the massive amounts of copying at issue, the history of payments to Access prior to York opting out of the Interim Tariff, and the size of York as the second largest university in Ontario" (paragraph 352)

V. On the Role of York's Guidelines:

As Justice Phelan noted, at paragraph 255 (citing to *CCH v LSUC*, paragraph 63), "the fairness assessment looks at the text of the policies, the rationale for the policies, and the practical or real dealing by the users of the owners' works. Both the Guidelines themselves and the practices under the Guidelines must be fair."

Justice Phelan decided that "**York's own Fair Dealing Guidelines are not fair in either their terms or their application.**" (paragraph 14).

Justice Phelan compared the "Guidelines" from the Law Society of Upper Canada's Great Library that Chief Justice McLachlin quoted in full in the *CCH v LSUC* judgment and found that the York University Guidelines (modeled on the AUCC guidelines) differed from the Great Library policies in very important ways:

- "One important distinction is that the copying done at the Great Library was for others, not for the Library itself. In York's situation, the copying and the Guidelines serve York's interests and

the interests of its faculty and students. There is an objectivity in CCH which is absent in York's case." (paragraph 260)

- "the manner in which the Access Law Policy was implemented and practiced [at the Law Society, in CCH v LSUC] was markedly different from the York Guidelines. These differences included:
  - Copying at a single location under the supervision and control of research librarians in the Great Library constrasted with no effective supervision, control, or other method of "gatekeeping" at York;
  - A policy strictly applied and enforced by librarians [at the Law Society] versus virtually no enforcement of the Guidelines by anyone in authority at York;
  - Single copies made versus multiple copies;
  - A large amount of *ad hoc* or situational copying for users at the Great Library contrasted with the mass systemic and systematic copying at York; and,
  - An absence of negative impacts on publishers in *CCH* as contrasted with the negative impacts on creators and publishers caused or at least significantly contributed to by York." (paragraph 262)

VI. On the Matter of Tariffs:

Justice Phelan has decided that York University had no option to "opt out" of the Interim Tariff ordered by the Copyright Board – and was bound by its terms from September 1, 2011 to December 31, 2013 (see paragraphs 7-13 of his judgment).

Justice Phelan found that York University professors who copied material subject to the Tariff "triggered obligations [for York] under the Interim Tariff" (paragraph 241), that the actions of those professors "were so closely connected to the professors' authorized employment activities as to render York vicariously responsible" (paragraph 243].

There are two ways that this ruling about the legal position of an Interim Tariff issued by the Copyright Board might be addressed in future. First, if Justice Phelan's decision in *Access Copyright v York University* is appealed by York University, the Federal Court of Appeal may rule differently on the question of the legal position of an Interim Tariff. Second, whatever the courts decide on this question, Parliament can change its legislation: there is a mandatory 5-year statutory review of the *Copyright Act* set to begin this fall.[5]

[5] The Standing Committee on Banking, Trade and Commerce has indicated (November 2016) the review should include review of the Board ("Copyright Board: A Rationale for Urgent Review" (https://sencanada.ca/content/sen/committee/421/BANC/Reports/FINALVERSIONCopyright_e.pdf). Library organizations such as the Canadian Federation of Library Associations (CFLA) can take a position on the matter (see Margaret Ann Wilkinson, "A Copyright Board for Canada at 150," June 26, 2017, *Policy Options*, http://policyoptions/irpp.org/magazines/june-2017/copyright-board-canada-150/ and Victoria Owen, "Libraries and the (Copyright) Balancing Act," June 14, 2017, *Policy Options*, http://policyoptions/irpp.org/magazines/june-2017/libraries-and-the-copyright-balancing-act/)