



SUPREME COURT OF CANADA

CITATION: Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright), 2012 SCC 37

DATE: 20120712
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BETWEEN:

Province of Alberta as represented by the Minister of Education, et al.

Appellants

and

Canadian Copyright Licensing Agency Operating as “Access Copyright”

Respondent

- and -

Canadian Publishers’ Council, Association of Canadian Publishers, Canadian Educational Resources Council, Canadian Association of University Teachers, Canadian Federation of Students, Association of Universities and Colleges of Canada, Association of Canadian Community Colleges, CMRRA-SODRAC Inc., Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Canadian Authors Association, Canadian Freelance Union, Canadian Society of Children’s Authors, Illustrators and Performers, League of Canadian Poets, Literary Translators’ Association of Canada, Playwrights Guild of Canada, Professional Writers Association of Canada, Writers’ Union of Canada and Centre for Innovation Law and Policy of the Faculty of Law University of Toronto

Interveners

CORAM: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 38)

Abella J. (McLachlin C.J. and LeBel, Moldaver and Karakatsanis JJ. concurring)

DISSENTING REASONS:
(paras. 39 to 60)

Rothstein J. (Deschamps, Fish and Cromwell JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

Province of Alberta as represented by the Minister of Education, Province of British Columbia as represented by the Minister of Education, Province of Manitoba as represented by the Minister of Education, Citizenship and Youth, Province of New Brunswick as represented by the Minister of Education, Province of Newfoundland and Labrador as represented by the Minister of Education, Northwest Territories as represented by the Minister of Education, Culture and Employment, Province of Nova Scotia as represented by the Minister of Education, Territory of Nunavut as represented by the Minister of Education, Province of Ontario as represented by the Minister of Education, Province of Prince Edward Island as represented by the Minister of Education, Province of Saskatchewan as represented by the Minister of Education, Yukon Territory as represented by the Minister of Education, Airy and Sabine District School Area Board, Algoma District School Board, Algonquin and Lakeshore Catholic District School Board, Asquith-Garvey District School Area Board, Atikokan Roman Catholic Separate School Board, Avon Maitland District School Board, Bloorview MacMillan School Authority, Bluewater District School Board, Brant Haldimand Norfolk Catholic District School Board, Bruce-Grey Catholic District School Board, Campbell Children's School Authority, Caramat District School Area Board, Catholic District School Board of Eastern Ontario, Collins District School Area Board, Connell and Ponsford District School Area Board, Conseil des écoles catholiques du Centre-Est de l'Ontario, Conseil des écoles publiques de l'Est de l'Ontario, Conseil des écoles séparées catholiques de Dubreuilville, Conseil des écoles séparées catholiques de Foleyet, Conseil scolaire de district catholique Centre-Sud, Conseil scolaire de district catholique de l'Est Ontarien, Conseil scolaire de district catholique des Aurores Boréales, Conseil scolaire de district catholique des Grandes Rivières, Conseil scolaire de district catholique du Nouvel-Ontario, Conseil scolaire de district catholique Franco-Nord, Conseil scolaire de district des écoles catholiques du Sud-Ouest, Conseil scolaire de district du Centre Sud-Ouest, Conseil scolaire de district du Grand Nord de l'Ontario, Conseil scolaire de district du Nord-Est de l'Ontario, District School Board of Niagara, District School Board Ontario North East, Dufferin-Peel Catholic District School Board, Durham Catholic District School Board, Durham District School Board, Foleyet District School Area Board, Gogama District School Area Board, Gogama Roman Catholic Separate School Board, Grand Erie District School Board, Greater Essex County District School Board, Halton Catholic District School Board, Halton District School Board, Hamilton-Wentworth Catholic District School Board, Hamilton-Wentworth District School Board, Hastings & Prince Edward District School Board, Hornepayne Roman Catholic Separate School Board, Huron Perth Catholic District School Board, Huron-Superior Catholic District School Board, James Bay Lowlands Secondary School Board, Kawartha Pine Ridge District School Board, Keewatin-Patricia District School Board,

Kenora Catholic District School Board, Lakehead District School Board, Lambton Kent District School Board, Limestone District School Board, Missarenda District School Area Board, Moose Factory Island District School Area Board, Moosonee District School Area Board, Moosonee Roman Catholic Separate School Board, Murchison and Lyell District School Area Board, Nakina District School Area Board, Near North District School Board, Niagara Catholic District School Board, Niagara Peninsula Children’s Centre School Authority, Nipissing-Parry Sound Catholic District School Board, Northeastern Catholic District School Board, Northern District School Area Board, Northwest Catholic District School Board, Ottawa Children’s Treatment Centre School Authority, Ottawa Catholic District School Board, Ottawa-Carleton District School Board, Parry Sound Roman Catholic Separate School Board, Peel District School Board, Peterborough Victoria Northumberland and Clarington Catholic District School Board, Rainbow District School Board, Rainy River District School Board, Red Lake Area Combined Roman Catholic Separate School Board, Renfrew County Catholic District School Board, Renfrew County District School Board, Simcoe County District School Board, Simcoe Muskoka Catholic District School Board, St. Clair Catholic District School Board, Sudbury Catholic District School Board, Superior North Catholic District School Board, Superior-Greenstone District School Board, Thames Valley District School Board, Thunder Bay Catholic District School Board, Toronto Catholic District School Board, Toronto District School Board, Trillium Lakelands District School Board, Upper Canada District School Board, Upper Grand District School Board, Upsala District School Area Board, Waterloo Catholic District School Board, Waterloo Region District School Board, Wellington Catholic District School Board, Windsor-Essex Catholic District School Board, York Catholic District School Board and York Region District School Board

Appellants

v.

Canadian Copyright Licensing Agency Operating as “Access Copyright”

Respondent

and

Canadian Publishers’ Council, Association of Canadian Publishers, Canadian Educational Resources Council, Canadian Association of University Teachers,

Canadian Federation of Students, Association of Universities and Colleges of Canada, Association of Canadian Community Colleges, CMRRA-SODRAC Inc., Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Canadian Authors Association, Canadian Freelance Union, Canadian Society of Children’s Authors, Illustrators and Performers, League of Canadian Poets, Literary Translators’ Association of Canada, Playwrights Guild of Canada, Professional Writers Association of Canada, Writers’ Union of Canada and Centre for Innovation Law and Policy of the Faculty of Law University of Toronto

Intervenors

Indexed as: Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)

2012 SCC 37

File No.: 33888.

2011: December 7; 2012: July 12.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Intellectual property — Copyright — Infringement — Exception — Fair dealing — Teachers making photocopies of excerpts of textbooks and other copyrighted works to distribute to students as part of class instruction — Collective society seeking to collect royalties for photocopies of excerpts — Whether elementary and secondary schools can claim the benefit of “fair dealing” exception for copies of

works made at the teachers' initiative with instructions to students that they read the material — Copyright Act, R.S.C. 1985, c. C-42, s. 29.

Administrative law — Judicial review — Standard of review — Copyright Board deeming that photocopies of excerpts of textbooks and other copyrighted works did not constitute fair dealing — Whether decision reviewable on standard of reasonableness or correctness — Whether Board made reviewable error.

Access Copyright represents authors and publishers of printed literary and artistic works. It filed a proposed tariff with the Copyright Board with respect to the reproduction of its repertoire for use in elementary and secondary schools in all the provinces and territories other than Quebec. The Copyright Board concluded that copies made at the teachers' initiative with instructions to students that they read the material were made for the allowable purpose of "research or private study" under s. 29 of the *Copyright Act*. They did not, however, constitute fair dealing and were therefore subject to a royalty. On judicial review, the Federal Court of Appeal upheld the Copyright Board's conclusion that the copies were not fair dealing.

Held (Deschamps, Fish, Rothstein and Cromwell JJ. dissenting): The appeal should be allowed and the matter remitted to the Board for reconsideration.

Per McLachlin C.J. and LeBel, **Abella**, Moldaver and Karakatsanis JJ.: Fair dealing allows users to engage in activities that might otherwise amount to copyright infringement. The test for fair dealing was articulated in *CCH Canadian*

Ltd. v. Law Society of Upper Canada as involving two steps. The first is to determine whether the dealing is for the allowable purpose of “research or private study” under s. 29, “criticism or review” under s. 29.1, or “news reporting” under s. 29.2 of the *Copyright Act*. The second step assesses whether the dealing is “fair”.

There is no dispute that the first step of the test set out in *CCH* was met and that the dealing — photocopying — was for the allowable purpose of research or private study. The dispute in this case centres on the second step of the test, namely, whether the copies were “fair” according to the factors set out in *CCH*: the purpose, character, and amount of the dealing; the existence of any alternatives to the dealing; the nature of the work; and the effect of the dealing on the work.

The Board concluded that the predominant purpose was that of the teacher as the copier. This meant that the purpose was instruction, not research or private study. When considering the first stage of *CCH* — whether the dealing is for an allowable purpose — the relevant perspective is that of the user. This does not mean, however, that the copier’s purpose is irrelevant at the second stage. The copier’s purpose will be relevant to the fairness analysis if the copier hides behind the shield of the user’s allowable purpose in order to engage in a separate purpose — such as a commercial one — that can make the dealing unfair. There is no separate purpose on the part of the teachers in this case. They have no ulterior or commercial motive when providing copies to students. They are there to facilitate the students’ research and private study and to enable the students to have the material they need

for the purpose of studying. The teacher/copier shares a symbiotic purpose with the student/user who is engaging in research or private study. The Copyright Board's approach drives an artificial wedge into these unified purposes of instruction and research/private study by drawing a distinction between copies made by the teacher at the request of a student and copies made by the teacher without a prior request from a student. The word "private" in "private study" should not be understood as requiring users to view copyrighted works in isolation.

The Copyright Board's approach to the "amount of the dealing" factor was also flawed. Having found that teachers only copied short excerpts of each textbook, the Board was required to determine whether the proportion of each of the short excerpts in relation to the whole work was fair. This factor is not a quantitative assessment based on aggregate use, but an examination of the proportion between the excerpted copy and the entire work.

With respect to the "alternatives to the dealing" factor, contrary to the Copyright Board's conclusion, buying books for every student is not a realistic alternative to teachers copying short excerpts to supplement student textbooks. Purchasing a greater number of original textbooks to distribute to students is unreasonable in light of the Board's finding that teachers only photocopy short excerpts to complement existing textbooks.

As for the "effect of the dealing on the work" factor, there was no evidence of a link between photocopying short excerpts and a decline in textbook

sales. There were several factors, in fact, other than photocopying, that were more likely to have contributed to any such decline. Moreover, the Board's finding that the teachers' copying was limited to short excerpts of complementary texts, makes it difficult to see how the teachers' copying competes with the market for textbooks.

The Copyright Board's decision as to whether the photocopies amount to fair dealing is to be reviewed on a reasonableness standard. Because its finding of unfairness was based on a misapplication of the *CCH* factors, its outcome was unreasonable.

Per Deschamps, Fish, **Rothstein** and Cromwell JJ. (dissenting): Whether a dealing is fair is a question of fact. The *CCH* factors help assess whether a dealing is fair but they are not statutory requirements. The Copyright Board's application of these factors to the facts of a case should be treated with deference and a reasonableness standard should be applied on judicial review. In this case, the Board made no reviewable error in principle.

It was neither artificial nor unreasonable to conclude that the photocopies mainly serve the teacher's purpose of teaching and that this was the relevant and predominant purpose of the dealing. The Board did not draw an artificial distinction between copies made at the request of a student and at the teacher's own initiative. The Board did not err by equating "instruction" with "non-private study". The word "private" in s. 29 of the *Copyright Act* cannot be stripped of meaning. A copy made on a teacher's own initiative may be for private study if, for example, the material is

tailored to the particular learning needs or interests of a single or small number of students but “private study” cannot include large quantities of copies made as part of an organized program of instruction.

It is important not to look to the same aspect of the dealing under more than one *CCH* factor. The Board’s analysis of the amount of the dealing remained focused on the overall proportion of the copied pages of a work in relation to the entire work over a period of time. Its analysis of the character of the dealing focused on the fact that multiple copies of the same excerpt are made, at any one time, to be disseminated to a whole class. There is no basis to disturb the Board’s assessments of these factors.

The Board’s analysis of alternatives to the dealing was not unreasonable. Furthermore, in a case where numerous short excerpts of the work are taken, the fact that there are no non-copyrighted alternatives will not automatically render a dealing fair. The Board’s conclusion that the dealing competes with the original work to an extent that makes the dealing unfair is unsupported by evidence and unreasonable. However, no one *CCH* factor is determinative and the Board considered the purpose of the dealing and the amount of the dealing to be the most important factors, therefore this error is not sufficient to render the Board’s decision unreasonable. The Board’s decision was intelligible, transparent and justifiable and cannot be said to fall outside of a reasonable range of outcomes.

Cases Cited

By Abella J.

Referred to: *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, rev'g 2002 FCA 187, [2002] 4 F.C. 213; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36; *Sillitoe v. McGraw-Hill Book Company (U.K.) Ltd.*, [1983] F.S.R. 545; *University of London Press, Ltd. v. University Tutorial Press, Ltd.*, [1916] 2 Ch. 601; *Copyright Licensing Ltd. v. University of Auckland*, [2002] 3 N.Z.L.R. 76; *Hubbard v. Vosper*, [1972] 1 All E.R. 1023.

By Rothstein J. (dissenting)

CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13, [2004] 1 S.C.R. 339, rev'g 2002 FCA 187, [2002] 4 F.C. 213; *Hubbard v. Vosper*, [1972] 1 All E.R. 1023; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

Statutes and Regulations Cited

Copyright Act, R.S.C. 1985, c. C-42, ss. 29, 29.1, 29.2, 29.4, 70.13(2).

Copyright, Designs and Patents Act 1988 (U.K.), 1988, c. 48, s. 178 “private study”.

Authors Cited

D’Agostino, Giuseppina. “Healing Fair Dealing? A Comparative Copyright Analysis of Canada’s Fair Dealing to U.K. Fair Dealing and U.S. Fair Use” (2008), 53 *McGill L.J.* 309.

APPEAL from a judgment of the Federal Court of Appeal (Blais C.J. and Noël and Trudel JJ.A.), 2010 FCA 198, [2011] 3 F.C.R. 223, 405 N.R. 354, 85 C.P.R. (4th) 349, [2010] F.C.J. No. 952 (QL), 2010 CarswellNat 2481, reversing in part a decision of the Copyright Board, www.cb-cda.gc.ca/decisions/2009/Access-Copyright-2005-2009-Schools.pdf, [2009] C.B.D. No. 6 (QL). Appeal allowed, Deschamps, Fish, Rothstein and Cromwell JJ. dissenting.

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Written submissions only by David Fewer and Jeremy de Beer, for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

Written submissions only by Marian Hebb, Warren Sheffer and Brendan van Niejenhuis, for the interveners the Canadian Authors Association, the Canadian Freelance Union, the Canadian Society of Children's Authors, Illustrators and Performers, the League of Canadian Poets, the Literary Translators' Association of Canada, the Playwrights Guild of Canada, the Professional Writers Association of Canada and the Writers' Union of Canada.

Written submissions only by Howard P. Knopf and Ariel Katz, for the intervener the Centre for Innovation Law and Policy of the Faculty of Law University of Toronto.

The judgment of McLachlin C.J. and LeBel, Abella, Moldaver and Karakatsanis JJ. was delivered by

ABELLA J. —

[1] Many authors create textbooks and other literary works to sell to primary and secondary level educational institutions across Canada. Photocopying short excerpts of these works is a common practice in Canadian schools, and is often used as an important administrative and teaching tool by teachers. The issue in this appeal is whether photocopies made by teachers to distribute to students as part of class instruction can qualify as fair dealing under the *Copyright Act*, R.S.C. 1985, c. C-42.

Background

[2] Access Copyright represents authors and publishers of literary and artistic works in printed materials which are subject to copying. It administers the reproduction of published materials by issuing licences and collecting and distributing royalties to affiliated copyright owners. When Access Copyright does not reach a licensing or royalty agreement with users who photocopy published works in its repertoire, it can apply to the Copyright Board to certify a royalty in the form of a tariff.

[3] At elementary and secondary schools across Canada, teachers often make photocopies of portions of textbooks or other published works which are part of Access Copyright's repertoire. Between 1991 and 1997, Access Copyright reached royalty agreements with each of the provinces and territories (other than Quebec) with respect to the reproduction of its repertoire for use in these schools. In 1999, all the provincial parties and the Ontario School Boards (the "Coalition") signed a five-year agreement, providing for royalty increases based on a per student calculation, not on the number of pages copied.

[4] When the time came to renew the royalty agreement in 2004, Access Copyright wanted the royalties revised to reflect the volume and content of what was being copied. The parties were unable to reach an agreement, based largely on the fact that they could not agree on how a "volume study" was to be conducted. Access Copyright therefore filed a proposed tariff with the Copyright Board in accordance with s. 70.13(2) of the *Copyright Act*.

[5] During the course of the proceedings before the Board, the parties eventually agreed to the terms of a volume study. It was carried out between February 2005 and March 2006. In accordance with the agreed-upon terms, information was recorded by observers on stickers posted next to each photocopier, including who made the copy, who would be using the copy, and the purpose of the copy.

[6] Based on information collected from the stickers, each incident of photocopying was divided into one of four categories. The first three dealt with copies made by teachers either for themselves or at the request of a student. All parties agreed that copies falling under these categories — about 1.7 million pages — constituted fair dealing.

[7] The fourth category (Category 4) dealt with copies of works made at the teachers' initiative with instructions to students that they read the material. Teachers would photocopy short excerpts from textbooks and distribute those copies to students as a complement to the main textbook the students used.

[8] At a hearing before the Board, Access Copyright argued that the Category 4 copies did not meet the test for fair dealing identified by McLachlin C.J. in *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339. The Coalition countered with the argument that the approximately 16.9 million pages in Category 4 should be excluded from any tariff because the copies constituted fair dealing under ss. 29 or 29.1 of the *Copyright Act*.

[9] Based on the evidence from the stickers used in the volume study, the Board concluded that the Category 4 copies were made for the allowable purpose of “research or private study” under s. 29 of the *Act*, but found, applying the *CCH* fairness factors, that the Category 4 copies did not constitute fair dealing and were therefore subject to a royalty. The Board also rejected the Coalition's argument that

the Category 4 copies fell within the exception for educational institutions under s. 29.4 of the *Act* ([2009] C.B.D. No 6 (QL)).

[10] On judicial review, the Federal Court of Appeal remitted the s. 29.4 issue back to the Board, stating that the Board failed to address an aspect of the “educational institutions” test. But the court found the Board’s conclusion that the Category 4 copies were not fair dealing to be reasonable (2010 FCA 198, [2011] 3 F.C.R. 223).

[11] The Coalition appealed only the fair dealing issue to this Court, maintaining that the Board’s conclusion was not in accordance with the *CCH* test and was therefore unreasonable. I agree and would therefore remit the matter to the Board for reconsideration in accordance with these reasons.

Analysis

[12] As discussed in the companion appeal *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36 (*SOCAN v. Bell*) the concept of fair dealing allows users to engage in some activities that might otherwise amount to copyright infringement. The test for fair dealing was articulated in *CCH* as involving two steps. The first is to determine whether the dealing is for the allowable purpose of “research or private study” under s. 29, “criticism or review” under s. 29.1, or “news reporting” under s. 29.2 of the *Copyright Act*. The second step of *CCH* assesses whether the dealing is “fair”. The onus is on the person invoking “fair

dealing” to satisfy all aspects of the test. To assist in determining whether the dealing is “fair”, this Court set out a number of fairness factors: the purpose, character, and amount of the dealing; the existence of any alternatives to the dealing; the nature of the work; and the effect of the dealing on the work.

[13] The Board accepted that where the photocopier stickers indicated that the copying was for an allowable purpose — “research” or “private study” — no further inquiry under the first step of the *CCH* test was required. The Board also found that where the sticker indicated that the purpose of the copy was “criticism or review”, the purpose was also to be treated as “research or private study”.

[14] Before this Court, there was generally no dispute that the first step in *CCH* was met and that the dealing — photocopying — was for the allowable purpose of research or private study. The dispute essentially centred on the second step of the test: whether the Category 4 copies were “fair” in accordance with the *CCH* factors. I have concerns over how the Board applied several of those factors.

[15] In my view, the key problem is in the way the Board approached the “purpose of the dealing” factor. The Board concluded that since the Category 4 copies were not made as a result of a student request, they were no longer for the purpose of research or private study at the second stage. This was based on its observation that in *CCH*, the Great Library was making copies at the request of lawyers. Because there was no such request for Category 4 copies, the Board concluded that the *predominant* purpose was that of the teacher, namely, “instruction”

or “non-private study”. The Board therefore found that this factor tended to make the Category 4 copies unfair. The Federal Court of Appeal, agreeing with the Board, stated that the real purpose or motive behind the copies was instruction, not private study.

[16] Access Copyright argued that the purpose of the dealing should be seen, as it was by the Board and the Federal Court of Appeal, from the copier’s, or teacher’s perspective. It relied particularly on three key Commonwealth cases which found the copier’s purpose in reproducing the work to be determinative. In *Sillitoe v. McGraw-Hill Book Company (U.K.) Ltd.*, [1983] F.S.R. 545 (Ch. D.), an importer and seller of “study notes” which reproduced a substantial part of a literary work, argued that the notes were intended as a supplementary aid for students engaging in research and private study. The court held that the seller was unable to invoke the fair dealing exception since it was not *itself* engaged in private study or research, but was merely facilitating this activity for others (p. 558).

[17] The court in *Sillitoe* relied on *University of London Press, Ltd. v. University Tutorial Press, Ltd.*, [1916] 2 Ch. 601, where a publisher issued a publication reproducing old exams and sold it to students who were preparing for their own exams. The publisher argued that the publication amounted to fair dealing “for the purposes of private study” by university students preparing for exams. The court held that the company could not bring itself within the fair dealing exception, rejecting the argument that the purpose of the publication was “private study”:

It could not be contended that the mere republication of a copyright work was a “fair dealing” because it was intended for purposes of private study; nor, if an author produced a book of questions for the use of students, could another person with impunity republish the book with the answers to the questions. Neither case would, in my judgment, come within the description of “fair dealing.” [p. 613]

[18] In the New Zealand case *Copyright Licensing Ltd. v. University of Auckland*, [2002] 3 N.Z.L.R. 76 (H.C.), several universities provided copies of copyrighted works to students as part of course packs, and charged the students for these materials through various school fees. The universities argued that the copying constituted fair dealing for the purposes of research or private study. The court held that the “purpose” must be that of the person “doing the copying” (paras. 43 and 52). Since the copiers — the universities — were not themselves dealing with the work for the purposes of research or private study, the copying did not amount to fair dealing.

[19] With respect, I do not find these authorities particularly helpful. Firstly, courts in the U.K. have tended to take a more restrictive approach to determining the “purpose” of the dealing than does *CCH*. Based on s. 178 of the *Copyright, Designs and Patents Act 1988* (U.K.), 1988, c. 48, for example, which defines “private study” to exclude “a commercial purpose”, courts in the U.K. have asserted that both research and private study must be for a non-commercial purpose: see G. D’Agostino, “Healing Fair Dealing? A Comparative Copyright Analysis of Canada’s Fair Dealing to U.K. Fair Dealing and U.S. Fair Use” (2008), 53 *McGill L.J.* 309, at p. 339. This expressly contradicts the statement in *CCH* that the allowable purposes must be given

a “large and liberal interpretation”, and that “research” is not limited to non-commercial or private contexts (para. 51).

[20] More importantly, as noted by Linden J.A. of the Federal Court of Appeal in *CCH*, 2002 FCA 187, [2002] 4 F.C. 213, at para. 132 (reversed on other grounds), these “course pack” cases involved copiers with demonstrably ulterior — i.e. commercial — motives. They invoked the allowable purposes of “research” or “private study”, in effect, in order to appropriate their customers’ or students’ purposes as their own and escape liability for copyright infringement.

[21] These cases, then, to the extent that they are germane, do not stand for the proposition that “research” and “private study” are inconsistent with instructional purposes, but for the principle that copiers cannot camouflage their own distinct purpose by purporting to conflate it with the research or study purposes of the ultimate user.

[22] As noted in the companion appeal *SOCAN v. Bell*, fair dealing is a “user’s right”, and the relevant perspective when considering whether the dealing is for an allowable purpose under the first stage of *CCH* is that of the user (*CCH*, at paras. 48 and 64). This does not mean, however, that the copier’s purpose is irrelevant at the fairness stage. If, as in the “course pack” cases, the copier hides behind the shield of the user’s allowable purpose in order to engage in a separate purpose that tends to make the dealing unfair, that separate purpose will also be relevant to the fairness analysis.

[23] In the case before us, however, there is no such separate purpose on the part of the teacher. Teachers have no ulterior motive when providing copies to students. Nor can teachers be characterized as having the completely separate purpose of “instruction”; they are there to facilitate the students’ research and private study. It seems to me to be axiomatic that most students lack the expertise to find or request the materials required for their own research and private study, and rely on the guidance of their teachers. They study what they are told to study, and the teacher’s purpose in providing copies is to enable the students to have the material they need for the purpose of studying. The teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study. Instruction and research/private study are, in the school context, tautological.

[24] The Board’s approach, on the other hand, drives an artificial wedge into these unified purposes by drawing a distinction between copies made by the teacher at the request of a student (Categories 1-3), and copies made by the teacher without a prior request from a student (Category 4). Nowhere in *CCH* did the Court suggest that the lawyer had to “request” the photocopies of legal works from the Great Library before those copies could be said to be for the purpose of “research”. On the contrary, what the Court found was that the copies of legal works were “necessary conditions of research and thus part of the research process”:

The reproduction of legal works is for the purpose of research in that it is an *essential element of the legal research process*. . . . Put simply, [the Great Library’s] custom photocopy service helps to ensure that legal professionals in Ontario can access the materials necessary to conduct the

research required to carry on the practice of law. [Emphasis added; para. 64.]

[25] Similarly, photocopies made by a teacher and provided to primary and secondary school students are an essential element in the research and private study undertaken by those students. The fact that some copies were provided on request and others were not, did not change the significance of those copies for students engaged in research and private study.

[26] Nor, with respect, do I accept the statement made by the Board and endorsed by the Federal Court of Appeal, relying on *University of London Press*, that the photocopies made by teachers were made for an unfair purpose — “*non-private study*” — since they were used by students as a group in class, and not “privately”. As discussed above, the holding was simply that the publisher could not hide behind the students’ research or private study purposes to disguise a separate unfair purpose — in that case, a commercial one. The court did *not* hold that students in a classroom setting could never be said to be engaged in “*private study*”.

[27] With respect, the word “private” in “private study” should not be understood as requiring users to view copyrighted works in splendid isolation. Studying and learning are essentially personal endeavours, whether they are engaged in with others or in solitude. By focusing on the geography of classroom instruction rather than on the *concept* of studying, the Board again artificially separated the teachers’ instruction from the students’ studying.

[28] The Board's skewed characterization of the teachers' role as being independent and differently motivated from that of the student users, also led to a problematic approach to the "amount of the dealing" factor. In considering this factor, the Board accepted that teachers generally limit themselves to reproducing relatively short excerpts of each textbook. Having found that the teachers only copied "short excerpts", the Board was required to determine whether the proportion of each of the short excerpts in relation to the whole work was fair. Instead, it then cited a passage from *CCH*, at para. 68, that said "if a specific patron . . . submitted numerous requests for multiple reported judicial decisions from the same reported series over a short period of time", the dealing might not be fair. Relying on this quote, the Board concluded that a teacher was analogous to a specific patron, and that the repeated copying of the same "class set" of books — that is, a set shared by more than one class or by many students in the same class — tended to make the dealing unfair.

[29] This, with respect, was a flawed approach. First, unlike the single patron in *CCH*, teachers do not make multiple copies of the class set for their own use, they make them for the use of the *students*. Moreover, as discussed in the companion case *SOCAN v. Bell*, the "amount" factor is not a quantitative assessment based on aggregate use, it is an examination of the proportion between the excerpted copy and the entire work, not the overall quantity of what is disseminated. The quantification of the total number of pages copied, as the Court noted in *CCH*, is considered under a different factor: the "character of the dealing".

[30] The Board had, in fact, already considered the quantification of the dissemination when it assessed the character of the dealing, finding that multiple copies of the texts were distributed to entire classes. In reapplying this same quantitative concern when assessing the “amount of the dealing”, it conflated the two factors, which had the effect of erasing proportionality from the fairness analysis.

[31] I also have difficulty with how the Board approached the “alternatives to the dealing” factor. A dealing may be found to be less fair if there is a non-copyrighted equivalent of the work that could have been used, or if the dealing was not reasonably necessary to achieve the ultimate purpose (*CCH*, at para. 57). The Board found that, while students were not expected to use only works in the public domain, the educational institutions had an alternative to photocopying textbooks: they could simply buy the original texts to distribute to each student or to place in the library for consultation.

[32] In my view, buying books for each student is not a realistic alternative to teachers copying short excerpts to supplement student textbooks. First, the schools have already purchased originals that are kept in the class or library, from which the teachers make copies. The teacher merely facilitates wider access to this limited number of texts by making copies available to all students who need them. In addition, purchasing a greater number of original textbooks to distribute to students is unreasonable in light of the Board’s finding that teachers only photocopy short excerpts to complement existing textbooks. Under the Board’s approach, schools

would be required to buy sufficient copies for every student of every text, magazine and newspaper in Access Copyright's repertoire that is relied on by a teacher. This is a demonstrably unrealistic outcome. Copying short excerpts, as a result, is reasonably necessary to achieve the ultimate purpose of the students' research and private study.

[33] The final problematic application of a fairness factor by the Board was its approach to the "effect of the dealing on the work", which assesses whether the dealing adversely affects or competes with the original work. Access Copyright pointed out that textbook sales had shrunk over 30 percent in 20 years. However, as noted by the Coalition, there was no evidence that this decline was linked to photocopying done by teachers. Moreover, it noted that there were several other factors that were likely to have contributed to the decline in sales, such as the adoption of semester teaching, a decrease in registrations, the longer lifespan of textbooks, increased use of the Internet and other electronic tools, and more resource-based learning.

[34] Despite this evidentiary vacuum, the Board nonetheless concluded that the impact of photocopies, though impossible to quantify, was "sufficiently important" to compete with the original texts to an extent that made the dealing unfair. The Board supported its conclusion with the finding that the schools copy "more than a quarter of a billion textbook pages each year", even though this total

number included the pages for which the schools *already* pay a tariff. The Category 4 copies in dispute account for under 7% of those pages.

[35] In *CCH*, the Court concluded that since no evidence had been tendered by the publishers of legal works to show that the market for the works had decreased *as a result* of the copies made by the Great Library, the detrimental impact had not been demonstrated. Similarly, other than the bald fact of a decline in sales over 20 years, there is no evidence from Access Copyright demonstrating any link between photocopying short excerpts and the decline in textbook sales.

[36] In addition, it is difficult to see how the teachers' copying competes with the market for textbooks, given the Board's finding that the teachers' copying was limited to short excerpts of complementary texts. If such photocopying did not take place, it is more likely that students would simply go without the supplementary information, or be forced to consult the single copy already owned by the school.

[37] This Court in *CCH* stated that whether something is "fair" is a question of fact and "a matter of impression" (para. 52, citing *Hubbard v. Vosper*, [1972] 1 All E.R. 1023 (C.A.), at p. 1027). As a result, the Board's decision as to whether the photocopies amount to fair dealing is to be reviewed, as it was by the Federal Court of Appeal, on a reasonableness standard. Because the Board's finding of unfairness was based on what was, in my respectful view, a misapplication of the *CCH* factors, its outcome was rendered unreasonable.

[38] I would therefore allow the appeal with costs and remit the matter to the Board for reconsideration based on these reasons.

The reasons of Deschamps, Fish, Rothstein and Cromwell JJ. were delivered by

ROTHSTEIN J. —

I. Introduction

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

[40] The application of these factors to the facts of each case by the Copyright Board should be treated with deference on judicial review. A principled deferential review requires that courts be cautious not to inadvertently slip into a more intrusive, correctness review.

[41] Justice Abella finds that the Copyright Board misapplied several of the *CCH* factors and that its conclusion is, as a result, unreasonable. I respectfully disagree. In my view, the Board made no reviewable error in principle in construing the *CCH* factors and, with one relatively minor exception, its factual analysis, application of the *CCH* factors to the facts and its conclusions were not unreasonable. I would therefore dismiss the appeal.

II. Fair Dealing

A. *Purpose of the Dealing*

(1) Whose Purpose Is Relevant

[42] In my respectful opinion, it was not unreasonable for the Board to have considered that the teacher's purpose was relevant and *predominant on the facts in this case*. At para. 98 of its reasons ([2009] C.B.D. No. 6 (QL)), the Board stated:

Conversely, with respect to copies of excerpts made on the teacher's initiative for his or her students or at the student's request with instructions to read them, we consider that the teacher's stated purpose must predominate. Most of the time, this real or predominant purpose is

instruction or “non-private” study. We attribute a certain degree of importance to the fact that the teacher’s role is scarcely comparable to that of staff at the Great Library, the subject of *CCH*. That staff makes copies at the clients’ request. A teacher, in deciding what to copy and for whom, just as when directing students’ conduct, is doing his or her job, which is to instruct students. According to this criterion, the dealing therefore tends to be unfair.

[43] In my view, even if the selecting of passages and photocopying them carried out by teachers for their students were to be seen as an integral part of the students’ private study, the teacher also has a purpose. It is to utilize the photocopied excerpts in the process of instructing and educating the students, the essence of the job of teaching. This purpose cannot be ignored and was not by the Board. The teacher’s role in selecting and photocopying excerpts of works is significantly different from the role of the Great Library staff in *CCH*, which was completely passive. The Board noted this difference at para. 98 of its reasons and concluded that, *on the facts*, the teacher’s purpose predominated in these circumstances. There is nothing unreasonable in this *factual* conclusion.

[44] Nor do I think that the Board’s approach draws an artificial distinction between copies made by the teacher at the request of a student and those made at the teacher’s own initiative. In my opinion, the distinction drawn by the Board remains consistent with and reasonable in light of *CCH*. It was quite clear in *CCH* that the photocopies made by the staff of the Great Library were made at the request of the lawyers. That is, without that request from the lawyers, there would have been no photocopies. Considering, as the Board did, that the fact that the initiative for a copy came from a teacher was an indicator that the photocopy would mainly serve the

teacher's purpose of teaching is not artificial or unreasonable. This is a realistic assessment of the facts and circumstances of classroom teaching.

[45] At para. 88 of its reasons, the Board explained that since the dealing in issue was for more than one purpose, it would look, under the first step of *CCH*, at whether any one of the purposes was an allowable purpose for fair dealing under the Act; if so, it would proceed to assess the *predominant* purpose of the dealing in the analysis of whether the dealing is fair. The parties agreed that this appeal should be decided solely on the assessment of the Board's analysis of fairness under the second step of *CCH*. In these circumstances, there is no basis for the suggestion that the finding by the Board under the "purpose of the dealing" factor — that the copies were made predominantly for the teacher's purpose of instruction — contradicts its finding under the first step of the analysis — that Category 4 copies were made for an allowable purpose.

(2) The Meaning of "Private Study"

[46] I do not think that the Board and the Federal Court of Appeal erred in equating "instruction" with "*non-private study*", and that this tended to make the purpose of the dealing unfair (Board, at para. 98; 2010 FCA 198, [2011] 3 F.C.R. 223, at paras. 37-38).

[47] While I agree with Justice Abella that "[s]tudying and learning are essentially personal endeavours" (para. 27), in the sense that each individual applies

his or her own mind to the acquisition of knowledge, studying may occur in different settings. The *Copyright Act* itself requires that to be fair dealing, use of a copyrighted work must be for “private study”, which indicates that the Act foresees private and non-private study (s. 29). This point was made in *CCH* by the majority of the Federal Court of Appeal at paras. 128-29. Parliament does not speak in vain (*Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 110). Words used by the legislator should be construed to give them *some* meaning. The section cannot be interpreted to strip the word “private” in “private study” of *any* meaning.

[48] The Board relied on prior jurisprudence on this point (para. 90). The Federal Court of Appeal upheld the Board’s conclusion as reasonable because

“[p]rivate study” presumably means just that: study by oneself. . . . A large and liberal interpretation means that the provisions are given a generous scope. It does not mean that the text of a statute should be given a meaning it cannot ordinarily bear. When students study material with their class as a whole, they engage not in “private” study but perhaps just “study”. [para. 38]

[49] I agree with the distinction made by the Federal Court of Appeal. When included in the *Copyright Act*, the expression “private study” arguably refers to the situation of a scholar or student dealing with a work for his individual study. This does not mean that the scholar or student may not collaborate with others. I would hesitate to endorse the Board’s apparent view at para. 90 of its reasons, that a copy made at the request of a teacher can *never* be for the purpose of private study. In my

view, a copy made on a teacher's own initiative would indeed be for private study if, for example, the material is tailored to the particular learning needs or interests of a single or small number of students. However, "private study" cannot have been intended to cover situations where tens, hundreds or thousands of copies are made in a school, school district or across a province as part of an organized program of instruction. The Board's conclusion at para. 98 that, in the case of Category 4 copies, "[m]ost of the time, [the] real or predominant purpose is instruction or 'non-private' study" is reasonable on the facts of this case.

B. Amount of the Dealing and Character of the Dealing

[50] I agree with my colleague that as a matter of analytical coherence, the "amount of the dealing" factor is concerned with "the proportion between the excerpted copy and the entire work, not the overall quantity of what is disseminated" (para. 29). The number of copies and the extent of the dissemination are properly considered under the "character of the dealing" factor (*CCH*, at para. 55). I also agree that it is important to avoid double counting in assessing the fairness of a dealing by looking to the same aspect of the dealing under more than one factor.

[51] However, in my opinion, the Board's analysis under the "amount of the dealing" factor remained focused on the proportion of the photocopied excerpt to the entire work. In its factual assessment of the "amount of the dealing" factor, the Board found "that class sets will be subject to 'numerous requests for [. . .] the same [. . .] series'" (para. 104, citing *CCH*, at para. 68). I do not read the Board's reliance on

this finding as indicating that it improperly considered the overall number of copies of the same excerpt distributed to a whole class.

[52] As I understand the Board's reasons, while teachers usually made short excerpts at any one time, this was offset by the fact that the teachers would return to copy other excerpts from the same books — the ones contained in class sets — thereby making the *overall proportion* of the copied pages unfair in relation to the entire work *over a period of time*. The Board found:

With respect to the copies made on the teacher's initiative for his or her students, there are factors weighing on each side. . . . [I]t seems that teachers generally limit themselves to reproducing relatively short excerpts from a work to complement the main textbook. On the other hand, in our view, it is more than likely that class sets will be subject to "numerous requests for [. . .] the same [. . .] series", which would tend to make the amount of the dealing unfair on the whole. [Emphasis added.]

The Board's conclusion is consistent with the *CCH* direction that "the [amount of the] dealings might not be fair if a specific patron . . . submitted numerous requests for multiple reported judicial decisions from the same reported series over a short period of time" (*CCH*, at para. 68). In this context, it was not unreasonable for the Board to compare a teacher with a specific patron of the Great Library, given its earlier conclusion that the teacher's purpose must predominate.

[53] Under the "character of the dealing" factor, the Board focused its analysis on the fact that multiple copies of the *same* excerpt are made, at any one time, to be *disseminated to the whole class* (Board, at para. 100). Accordingly, on my reading of

the Board's reasons, there was no double counting; the Board's conclusions of unfairness under the "character of the dealing" and the "amount of the dealing" factors were arrived at independently, taking into consideration different aspects of the dealing.

[54] On the whole, unless it is shown that the Board's conclusion of fact that the books from the "class sets will be subject to 'numerous requests. . .'" was unreasonable — and I would observe that the appellants specifically state in their factum that "the Board's findings of fact are not in dispute" (para. 50) — I would not disturb the Board's assessment under the "amount of the dealing" and "character of the dealing" factors.

C. Alternatives to the Dealing

[55] According to my colleague's analysis, at para. 32, the Board also unreasonably assessed whether there were any alternatives to the dealing, because "buying books for each student is not a realistic alternative to teachers copying short excerpts to supplement student textbooks". I agree that buying books to distribute to all students does not seem like a realistic option if we are speaking of photocopies of short excerpts only, used to supplement the main textbooks already in possession of the students.

[56] However, on the premise that the same class sets of books will be subject to numerous requests for short excerpts, as found by the Board at para. 104 of its

reasons, it was not unreasonable for the Board to consider, at para. 107, that from a practical standpoint, the schools had the option of buying more books to distribute to students or to place in the library or in class sets instead of photocopying the books. While buying books may not be a non-copyrighted alternative such as those envisaged in *CCH*, these were relevant facts for the Board to consider in a case where it found systematic copying from the same books. In addition, the Board considered the schools' resources and found that in this case, "[t]he fact that the establishment has limited means does not seem to bar the recognition of this point" (para. 107). In a case where numerous short excerpts of the work are taken, the fact that there are no non-copyrighted alternatives to the dealing does not automatically render the dealing fair. Therefore, I am not persuaded that the Board's analysis under the "alternatives to the dealing" factor was unreasonable.

D. Effect of the Dealing on the Work

[57] I agree with Justice Abella that the Board's conclusion that the photocopying of Category 4 copies "compete[s] with the original to an extent that makes the dealing unfair" (Board, at para. 111) seems unsupported by evidence. Even accepting that it was reasonable for the Board to conclude, based on the evidence of declining book sales, that photocopying had a negative impact on the work, it appears from para. 111 of its reasons that the Board came to this conclusion by referring to the *total* amount of photocopying across Canada — 250 million pages, the bulk of which is already paid for through the tariff — and not the 16.9 million

Category 4 copies. Determining the effect of the Category 4 dealing on the work required relating *those* photocopies to the work and determining whether the effect of those copies was sufficiently important to “compete with the market of the original work” (*CCH*, at para. 59). I would be inclined to find this conclusion unreasonable.

[58] However, I do not think that an unreasonable observation under this one factor is sufficient to render the Board’s overall assessment unreasonable. As noted in *CCH*, no one factor is determinative (paras. 59-60) and the assessment of fairness remains fact specific. In the appellants’ own submission, the Board in this case considered the “purpose of the dealing” and the “amount of the dealing” factors to be the most important (*A.F.*, at para. 45). In light of my conclusion that the Board’s assessment under those and other factors was reasonable, I would not find the entire decision unreasonable because of this one finding.

III. Conclusion

[59] Tribunal decisions can certainly be found to be unreasonable (see e.g. *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471). However, I do not think it is open on a deferential review, where a tribunal’s decision is multifaceted and complex, to seize upon a few arguable statements or intermediate findings to conclude that the overall decision is unreasonable. This is especially the case where the issues are fact-based, as in the case of a fair dealing analysis.

[60] This Court has stated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, that reviewing courts are to look for “justification, transparency and intelligibility within the decision-making process” of the tribunal and with “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (para. 47). In my respectful view, the Board’s detailed and extensive analysis and decision in this case were intelligible, transparent and justifiable. Its conclusion cannot be said to fall outside of a reasonable range of outcomes. For these reasons, I would dismiss the appeal with costs.

Appeal allowed with costs, DESCHAMPS, FISH, ROTHSTEIN and CROMWELL JJ. dissenting.

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