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The decision of the Federal Court of Appeal in *York University v Access Copyright*[3]

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

(1) The part of the **Federal Court of Appeal decision** regarding **"Fair Dealing"** is **relevant** to **ALL libraries in Canada**.[4]

(2) Interest in the part of the **Federal Court of Appeal decision** about the effect and enforceability of the **"Interim Tariff" will vary** amongst types of libraries and also according to their situations. It may help you to gauge your interest in this part of the judgment to examine the following list of factors:

1. If your library is **in Quebec**, the "Tariff" part of this decision will not directly affect you. Access Copyright does not represent authors' and publishers' rights in Quebec: Quebec libraries and other institutions deal with COPIBEC.[5]
2. **Elsewhere in Canada**, your interest in this decision may be affected by the following factors:
    a. Libraries located in other Post-Secondary Education Institutions will be **most** interested (as post-secondary educational institutions, like York University, where tariffs are in place with Access Copyright).[6]
    b. Libraries in the elementary and secondary school sector[7] AND in provincial and territorial government institutions[8] will also be **very** interested as they are also experiencing dealing with Access Copyright through tariffs.
    c. Other libraries, such as public libraries, for instance, may be **less keenly interested** in this part of the decision because their institutions are

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

[2] This is a historic position at OLA to which I was appointed after the retirement of Bernie Katz (Guelph University) – although called to the Ontario Bar, I do not currently practice law. Research assistance provided by Western Law graduate student Matthew Robertazzi.

[3] 2020 FCA 77 (unanimous decision written by Justice Pelletier, joined by Justices De Montigny & Woods on appeal from the decision in *Access Copyright v York University* 2017 Federal Court 669 (Justice Phelan)

[4] As was the case, until now, for the part of Justice Phelan's 2017 decision discussing the applicability and effect of "Fair Dealing" under Canada's *Copyright Act* .

[5] Quebec Reproduction Rights Collective Administration Society (http://www.copibec.ca)

[6] See Access Copyright Post Secondary Educational Institution Tariff, 2018-2020 https://cb-cda.gc.ca/tariffs-tarifs/proposed-proposes/2017/reprography2018-2019.pdf and see Access Copyright Post-Secondary Educational Institution Tariff, 2021-2023 https://cb-cda.gc.ca/tariffs-tarifs/proposed-proposes/2019/ACCESS-07112019.pdf

[7] See Access Copyright Elementary and Secondary Schools https://cb-cda.gc.ca/tariffs-tarifs/proposed-proposes/2019/ACCESS-01062019.pdf

[8] See Access Copyright Provincial and Territorial Governments Tariff 2019-2020 https://cb-cda.gc.ca/tariffs-tarifs/proposed-proposes/2018/ACCESS-26052018.pdf and see Access Copyright Provincial and Territorial Governments Tariff, 2021-2025 https://cb-cda.gc.ca/tariffs-tarifs/proposed-proposes/2019/ACCESS-07112019-2.pdf

> neither currently involved in any tariff proceedings before the Copyright Board nor subject to any tariff.[9]

II. Will there be an appeal from this judgment?

(a) Leave to appeal is required from the Supreme Court of Canada if either party wants to appeal this matter to the Supreme Court

There is no automatic right of appeal from this judgment of the FCA to the Supreme Court of Canada: instead, if either of the parties (York University or Access Copyright) wish to appeal to the Supreme Court, they will have to apply to the Court for "leave to appeal." This judgment was handed down on April 22, 2020. A party seeking leave must file an application for leave to appeal with the Registrar of the Supreme Court (and serve other parties) within 60 days of the date of the judgment appealed from.[10] On the leave application, the Supreme Court Justice hearing the leave application will decide for the Court whether

> any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it.[11]

If there is such a question involved, then the appeal itself would then proceed to the Supreme Court in due course.

If neither party applies for leave or if leave is not granted by the Supreme Court, this judgment of the FCA will be final and the law on the matter unless and until another case comes through the courts and, when asked for leave in that case, the Supreme Court grants leave.

(b) Why would York University appeal?

York could seek leave to appeal the decision of the FCA in respect of its **counterclaim** – in respect of which the FCA (at para 4) upheld Justice Phelan's dismissal of York's counterclaim for a declaration that all copying which fell within the terms of its Fair Dealing Guidelines constituted fair dealing pursuant to ss 29, 29.1 or 29.2 of the *Copyright Act*, RSC 1985, c. C-42. York was criticized by the FCA for not adducing evidence in support of its counterclaim other than the text of its Guidelines.[12] It is

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[9] See http://www.cb-cda.gc.ca/tariffs-tarifs/index-e.html.
[10] *Supreme Court Act*, RSC 1985, c S-26, s 58(1)(a).
[11] Supra, s 40(1).
[12] For instance, at para 236, the FCA accepts Access Copyright's point on appeal that "York did not lead any evidence from users, ie, students, as to their dealings with copied material or why the copying permitted by the Guidelines was fair from the students' perspective." At para 249 the FCA acknowledges a further point by Access Copyright "that York's submission that copies were not kept by students is not supported by the evidence which showed that students were not precluded from downloading, copying and sharing permanent copies of works provided to them by York professors." At para 280 the FCA again notes "York has not led any evidence as to students' use of the copied works so as to show it is fair."

possible, however, though very rare, to get special permission from the Supreme Court of Canada to introduce new evidence.[13]

(c) Why would Access Copyright appeal?

Access Copyright could seek leave to appeal the decision of the FCA allowing York's appeal of Justice Phelan's decision in the **main action** and dismissing Access Copyright's claim based on the Interim Tariff**,** under the *Copyright Act* Part VII: the FCA decided, contrary to Justice Phelan's earlier decision, that "a tariff approved by the Copyright Board… is not "mandatory" in the sense that it is enforceable against anyone whose use of the protected works is an infringement of the copyright owner's exclusive rights" (para 4).

III. The Federal Court of Appeal disapproves of York University's Fair Dealing Guidelines:

This new 312 paragraph decision of the **Federal Court of Appeal** (which replaces Justice Phelan's 2017 decision in *Access Copyright v York University*[14] as the current law in Canada) has two aspects:[15]

(1) "**Fair Dealing**" and
(2) the "**Interim Tariff**" for Post-Secondary Educational Institutions 2011-2013, requested by Access Copyright: Copyright Board ordered end of 2010.[16]

It must be noted at the outset, with respect to the "fair dealing" aspect of the FCA judgment, that, at the end of the day, the FCA's decision on the 2nd matter to be discussed here (the question of the Interim Tariff) becomes the more important part of the judgment in terms of deciding this dispute between Access Copyright and York University. Ultimately, on the matter of fair dealing, the FCA decides "the validity of York's Guidelines as a defence to Access Copyright's action does not arise because the tariff [on which the entire lawsuit is based] is not mandatory." (para 206), This means the outcome of the appeal did not, in the end, depend upon the FCA's discussion and decision about "fair dealing" (paras 207-312). Since this part of the judgment is not the reason for the ultimate disposition of this dispute between Access Copyright and York, it will be thought of as *obiter*:[17] However, although it is not the most authoritative part of this appeal judgment, the FCA is very clear about its view of York University's Fair Dealing Guidelines and the role, or lack thereof, they can play in establishing a "fair dealing" defence – and this,in turn, can be a very important guide for libraries and their institutions in assessing the future value of their own existing Fair Dealing Guidelines.

In this lawsuit, York argued its Guidelines, by themselves, established the defence of fair dealing. As the FCA noted, "York did not lead any evidence from users, i.e. students, as

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[13] Supra, note 10, s 62(3). See, as an example of a case in which such evidence was permitted, on 7 July 2009, in *Globe and Mail v. Canada (Attorney General)*, see Supreme Court file no. 33114.
[14] Supra, footnote 3.
[15] Just as the 2017 decision of Justice Phelan had two aspects.
[16] See http://www.cb-cda.gc.ca/tariffs-tarifs/proposed-proposes/2010/interim_tariff.pdf.
[17] "Obiter" is shorter for "obiter dictum" – defined in *Davidner v Schuster*, [1936] 1 DLR 560 at 569 by the Saskatchewan Court of Appeal as "A statement made or decision reached in a court opinion that is not essential for disposition of the case."

to their dealings with copied material or why the copying permitted by the Guidelines was fair from the students' perspective." (para 236)

Justice Phelan in the Court below had not accepted this claim for fair dealing and the FCA, here, also found York's Guidelines did not establish a fair dealing defence for York – and, indeed, the FCA specifically found that York's adoption of its Guidelines was "indicative of unfairness." (see para 240, quoted further below).

The FCA found:

> "It was incumbent on [York University] to justify the Guidelines themselves so as to allow the Court to declare the reproductions that fall within the Guidelines are fair dealing. It has **not** done so." (para 310, emphasis added)

The FCA noted, at para 212[18], that Justice Phelan, in the Court below, had identified two users: "the university 'which is assembling, copying and distributing the material as the publisher, and the student who is the end user of the material.'" The FCA takes issue with this finding. The FCA first re-establishes that the Supreme Court in 2004 in *CCH v Law Society* focused on the Law Society's general practice (para 225) and then goes on to specifically disagree with the interpretation of the focus of the *CCH v Law Society* judgment that a differently composed Supreme Court gave later in the 2012 *SOCAN v Bell* pentalogy case, which the FCA referred to as "SOCAN."[19] The FCA noted that, in *SOCAN*, the Supreme Court described the earlier *CCH v Law Society* judgment as focusing "not on the library's perspective, but on that of the ultimate users, the lawyers, whose purpose was legal research." (para 225) The FCA then states that "the [Supreme] Court's analysis [in *CCH v Law Society*] focused on the General [sic] *Library's* policy and practice" (para 255,[20] emphasis added) and characterizes the Supreme Court's *SOCAN* "characterization of this element of the analysis in CCH [as] *per incuriam*"[21] (para 227). The FCA goes on to note "the relevant perspective [in SOCAN] was the user's… In CCH it was the institution, in SOCAN, it was the individual viewer." (para 232) The FCA goes on to hold that "[i]n the case of an institutional claim of fair dealing based on general practice, it is the institution's perspective that matters… the Supreme Court's application

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[18] In turn quoting from Justice Phelan's reasons, para 264, cited above in footnote 3.

[19] Of the nine Supreme Court justices who unanimously decided *CCH v Law Society*, five had left the Court by the time it unanimously decided the 2012 case the FCA refers to as "*SOCAN*": Justice Arbour had been replaced by Justice Abella (who wrote for the Court), Justice Major by Justice Rothstein, Justice Bastarache by Justice Cromwell, Justice Iacobucci by Justice Moldaver and Justice Binnie by Justice Karakatsanis: only the Chief Justice and Justices LeBel, Deschamps and Fish remained. See Figures 1 and 2 in Margaret Ann Wilkinson, "The Context of the Supreme Court's Copyright Cases," in Michael Geist (ed), *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law*, 71 at 79 and 82 (where the 2012 decision is abbreviated as "Bell" (not "SOCAN")), online: https://ruor.uottawa.ca/handle/10393/24103.

[20] The FCA clearly intended this reference to be to the *Great* Library.

[21] Decisions "held to have been given **per incuriam** are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong." *Morelle Ltd v Wakeling*, [1955] 1 All ER 708 at 718 [1955] 2 QB 379 (United Kingdom). The FCA, in identifying as *per incuriam* some reasoning of this 2012 Supreme Court decision, is taking the position that its reasoning need not be followed by a lower court (such as the FCA in this case).

of the fairness factors to the Great Library's copying focussed on the latter's practices and procedures and not those of its patrons." (para 238).

The FCA distinguishes *Alberta Education*, another of the 2012 Supreme Court pentalogy cases, by noting that "[u]nlike *CCH* [or the present *York v Access Copyright* case], *Alberta Education* is not a guideline case"(para 232) – but the FCA also highlights the analysis by the Supreme Court in *Alberta Education* for the proposition that "a finding that a copier is hiding behind the ultimate user's purpose in order to dissemble [its] own separate purpose is relevant to the fairness analysis" (para 230). The FCA finds that

> "As the copier, it was incumbent on York to ensure that its Guidelines were implemented according to their intent, since the integrity of the Guidelines and York's practice are at the heart of its claim of fair dealing. [Justice Phelan]'s finding [of fact] that the safeguards were virtually absent undermines York's claim to fair dealing, or, to put it another way, tends to show unfairness." (para 239[22])

Thus the FCA found that York University had not taken steps to ensure that its Guidelines were being implemented according to their intent by those individuals to whom the Guidelines were directed (the ones actually making the copies).

IV. The Federal Court of Appeal finds York's behaviour in respect of Five of the Six Fair Dealing Factors to be Unfair:

In his judgment rendered in the Federal Court in 2017, Justice Phelan found, with respect to York's defence of Fair Dealing, that York's behaviour was unfair with respect to all but the first (purpose of the dealing) and fourth (alternatives to the dealing) of the six fair dealing factors (purpose of the dealing).[23] The FCA has not only confirmed Justice Phelan's findings of unfairness for each of factors 2,3,5 and 6 but has also found that the evidence related to the first factor (the purpose of the dealing) indicates unfairness (para 241). Thus, ultimately, the Federal Court of Appeal (FCA) has found that five of the six factors for fair dealing set out by the Supreme Court in the 2004 *CCH v Law Society* case was not satisfied by York in this case – and therefore York could not avail itself of the defence of fair dealing.

Factor 1 – *purpose of the dealing* – **unfair**

- The FCA noted that Justice Phelan had erred in his analysis of this factor "but not for the reasons York identified [in its appeal]… [he] fell into palpable and overriding error in importing 'education' as an allowable purpose" [of the dealing] into [his] analysis of the "goal" of the dealing. [His] conclusions with respect to York's purpose in adopting its Guidelines are unequivocal and are a clear indication of unfairness." (para 241)
- "[Justice Phelan] used exceptionally strong language in describing York's purpose… 'to obtain for free that which [it] had previously paid for' and 'to keep enrolment up by keeping student costs down and to use whatever savings there may be in other parts of the university's operation.'" (quoting in his reasons, at para 240, from Justice Phelan's reasons at paras. 272-73)

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[22] The finding of fact by Justice Phelan referred to here by the FCA can be found at para 266 of Justice Phelan's 2017 judgment, cited above in footnote 3.

[23] See p 3 of Margaret Ann Wilkinson, *Access Copyright v York University*, 6pp. (July 19, 2017): a synopsis of that earlier decision, focused on Canadian libraries, posted by the Ontario Library Association at https://www.accessola.org/web/Documents/Programs/Copyright/OLA - Access Copyright v York U.pdf.

Factor 2 – *character of the dealing* – **unfair (critical of the Guidelines)**

- The FCA noted that York's Guidelines "imposed no limitations on what students might do with the copies they were provided, which is not surprising in that the Guidelines were addressed to York's professors and staff" but, the Court continues, "the Guidelines do not enjoin professors to remind the students of any limitations on their use of the copies provided to them. (para 250).
  - The FCA accepted Justice Phelan's conclusion that the evidence about this factor tended to show York's dealings were not fair (at para 258) but also noted that "York's Guidelines did not attempt to forestall downstream copying and redistribution by students." (para 256)

Factor 3 – *amount of the dealing* – **unfair**

- The FCA reiterated that this factor deals with "the proportion of a protected work which is copied and not the amount of the copying in the aggregate" (para 259).
- While the FCA thought that Justice Phelan had "muddied the waters by introducing references to quantitative elements in [his] analysis" (para 259), it nonetheless concluded that "York has not shown that the Federal Court erred in any material way in coming to its conclusion [at para 318 of Justice Phelan's reasons] that there was 'nothing fair about the amount of [York's] dealing'." (para 283)

Factor 4 – *alternatives to the dealing* – **fair – but given less weight than Justice Phelan gave it**

- The FCA did not feel that this factor as strongly supported Access Copyright's position as did Justice Phelan (see para 292) but still took the position that it "would not interfere with [Justice Phelan]'s conclusion that this factor favours York though … its effect is mitigated." (see again para 292)

Factor 5 – *effect of the dealing* – **unfair**

- The FCA concluded, on this factor (at para 306):

> "The facts of this case are significantly different that those considered by the Supreme Court in the Trilogy[24]. The copying pursuant to the Guidelines is vastly more significant that it was in any of those cases. It involves significantly larger portions of the original works and allows for entire works to be copied simply on the basis of the publication format. [Justice Phelan] considered the evidence submitted by the parties and concluded that the effect of the dealing pointed to unfairness. None of York's submissions are sufficient to show that [Justice Phelan] fell into palpable and overriding error on a question of fact or mixed fact and law."

Factor 6 – *nature of the work* – **unfair – but not a heavily weighted factor by the FCA or by Justice Phelan**

- The FCA took "note of Justice Phelan's conclusion" (para 308) that this factor tended against a finding of fair dealing (see para 307) and that York, in its written submissions on appeal, did not challenge Justice Phelan's position (para 338),

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[24] The FCA defines "the Trilogy," in para 209, as (1) CCH [*CCH Canadian Ltd, v Law Society of Upper Canada*, 2004 SCC 13, [2004] 1SCR 339], (2) *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36, [2012] 2 SCR 326 [SOCAN], and (3) *Alberta Education [Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright*), 2012 SCC 37, [2012] 2 SCR 345.

V. How does the FCA decision suggest guidelines can be better created to support a defence based on Fair Dealing?

- Taking the lesson from the FCA's words in para 256 (quoted above, on p 6, in connection with Factor 2), guidelines would be better if they *did* "forestall downstream copying and redistribution by students."
- "Guidelines which called for the destruction of copied works at the conclusion of a class and prohibited the retention and redistribution of copies works [might be] indices of fair dealing. The difficulty is that instructions of this kind do not appear in the York Guidelines." (para 258, speaking of Fairness Factor 1 – the character of the dealing)
- The FCA pointed to a "significant difference between York's copying and the copying in *Alberta Education*.[25] York's copying is systematic while the copying in *Alberta Education* was *ad hoc*." (para 290)
- The FCA noted the York Guidelines were addressed to professors and staff (see, eg, para 250) – it is possible to create Guidelines that take other perspectives.[26]

VI. Given the FCA Decision, what will the role of Tariffs be in the life of libraries going forward?

There appear to be two key lessons in the tariff portion of the FCA's judgment:

1. **The FCA has recognized "opt-out" institutions as legitimate**; **and**
2. **Opt-out institutions should review and, in most cases, completely re-draft their Fair Dealing Guidelines.**

Writing some years ago, this author took the position that once Access Copyright stopped offering negotiated blanket licenses to individual post-secondary institutions and government licenses over a decade ago, the remaining decisions open to these institutions became limited to either

> "(1) keeping their activities within users' rights bounds and not acquiring licences for more uses [from] Access Copyright, or
> (2) … passively accepting the tariff proposed by Access Copyright (or accepting it as imposed by the Board after others have opposed it and the Board has ruled), or
> (3) … actively opposing the tariff as proposed and participating in the processes of the Board."[27]

The first choice is the choice that York University took -- and numbers of other post-secondary institutions (as well as other non-post-secondary entities across Canada) have made the same "opt-out" choice. The FCA has now confirmed that this is a legitimate choice. However, there is a caveat in this decision on the recognition of "opt-out" institutions: while the FCA has confirmed that option #1 does legally exist, the FCA

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[25] *Alberta (Education)*, supra.

[26] See, for example, Margaret Ann Wilkinson, Joan Dalton and Victoria Owens, "Collective Rights Management of Copyright in Canada,"(2011) Law Presentations.38. Available at https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1037&context=lawpres

[27] See Margaret Ann Wilkinson, "Copyright, Collectives and Contracts: New Math for Educational Institutions and Libraries," in Michael Geist (ed), *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 503 at 538-539, online: https://www.irwinlaw.com/sites/default/files/attached/CCDA 17 Wilkinson.pdf.

has also now held that simply creating Guidelines does not guarantee that an institution's activities will be found to lie within users' rights bounds. Specifically, the Guidelines derived from the model created by the Association of Universities and Colleges of Canada (AUCC), now Universities Canada (as the FCA specifically described in para 12), will not, for the reasons set out in the fair dealing portion of this judgment, provide an institution with a fair dealing defence.[28]

Because of these holdings by the FCA, if Access Copyright were now simply to sue York for infringement under s 27 of the *Copyright Act* (rather than continuing on with this legal action under Part VII of the *Copyright Act* which governs collectives and tariffs),[29] York would face the same challenges with respect to defending its Guidelines as have occurred here (at least until that lawsuit – or this one -- reaches the Supreme Court) since, in this decision, the FCA establishes unequivocally that, to remain within the bounds of users' rights, the Guidelines created must be closer to those created by the Law Society of Upper Canada than were those York University created.

Access Copyright's purpose in bringing this lawsuit against York University in the first place was to force York to adhere to and comply with the terms of an Interim Tariff it had succeeded in getting the Copyright Board to issue on December 13, 2010.[30] It wants the courts to order York University to pay it the amounts set out in that Tariff. Justice Phelan decided that York University had no option to "opt out" of that Interim Tariff[31] and held York liable to Access Copyright. Now having appealed Justice Phelan's decision, including his decision on this point, York University has been successful in its appeal to the FCA on this point.

The FCA, in this part of its judgment, provides, in 144 paragraphs, a comprehensive review of the entire history of the collective administration of copyright in Canada (paras 50-194).[32]

In writing about the question of whether Access Copyright's tariff should be binding on every post-secondary educational institution that could be bound by it, the FCA noted that

> The assumption underlying Access Copyright's argument… is that effective enforcement requires mandatory tariffs. With respect, this is not self evident. The advantage of collective societies is that they allow rights holders to pool their resources to enable them to economically enforce their rights. This advantage exists even in the absence of mandatory tariffs. (para 203)

The FCA has found that Access Copyright has no cause of action under Part VII of the *Copyright Act* (the part of the statute under which it had brought the suit in the first place) because York University was never subject to that 2010 Interim Tariff:

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[28] For material that may be helpful to constructing alternative forms of Fair Dealing Guidelines, see again Wilkinson,Dalton & Owens, "Collective Rights Management of Copyright in Canada," supra, note 26.
[29] As will be discussed in the next section (VII), while technically possible for Access Canada to start a fresh action against York, under the infringement section of the *Copyright Act*, s 27, this is unlikely to happen for reasons internal to Access Copyright.
[30] http://www.cb-cda.gc.ca/tariffs-tarifs/proposed-proposes/2010/interim_tariff.pdf.
[31] *Access Copyright v York University* 2017 Federal Court 669, (Phelan, J) paras 7-13.
[32] For a less comprehensive but shorter description of much of the same history, see Margaret Ann Wilkinson, "Copyright, Collectives and Contracts," supra, note 27, at 505-522.

> "In light of the statutory language, and its legislative history, Access Copyright's argument that the remedy provided for in subsection 68.2(1) [of the *Copyright Act*] allows it to collect royalties from non-licensees i.e. infringers cannot be sustained." (para 170)

At para 206 the FCA continues "the tariff is not mandatory and Access Copyright cannot maintain [this] copyright infringement action" (meaning, by "[this] copyright infringement action, the action in which this appeal have been brought: an action under Part VII of the *Copyright Act* governing collectives).

VII. Instead of seeking leave to appeal to the Supreme Court (see Part II above) – or if the leave application fails, is there anything else York University or Access Copyright can do?

Both parties can decide not to take any further action in the courts at this time.

- York would still appear to be wise to change its Fair Dealing policy to avoid future problems (see paras 311-312 of the FCA judgment).

Access Copyright:

- Since this current proceeding was brought under Part VII of the *Copyright Act*, suing York under another provision of the *Copyright Act* (Part III, s 27), for infringement, would technically be open to Access Copyright… but, paragraphs 205-206 of the FCA judgment indicate that, for reasons internal to Access Copyright, Access Copyright is not in a position to sue York University for infringement under s 27:

> "Access Copyright candidly admitted that, **given its agreement with its members** [ie, authors and publishers], it cannot sue York for infringement in the event that some or all of the copies made by York are infringing copies."[33] (emphasis added)

from **York**'s perspective:

- If Access Copyright *did* sue York for this same infringement, though in a different lawsuit brought under s 27 of the *Copyright Act* (notwithstanding its agreement with its members – or should that agreement change), York has been told by the FCA, in this judgment, that it cannot rely on the defence of fair dealing based on the evidence of its Fair Dealing Guidelines– and another court, hearing the new lawsuit brought under different provisions of the *Copyright Act* than this one was, because of the reasoning of the FCA in this decision, would also not accept a fair dealing defence from York based upon the same Fair Dealing Guidelines… so York would appear to need to gather evidence other than its Guidelines in order to establish a fair dealing defence.

[33] It would appear that, unless the current agreement between Access Copyright and its members referenced at paras 205-206 of the FCA judgment changes at some point in the future, Access Copyright may not be bringing lawsuits under s.27 of the *Copyright Act*.