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York University v Access Copyright
Supreme Court of Canada
2021 SCC 32

On October 15, 2020, the Supreme Court of Canada granted both York University and Access Copyright leave to appeal[3] from the decision rendered by the Federal Court of Appeal on April 22, 2020.[4] Oral argument was heard by the Supreme Court on May 21, 2021[5] and, on July 30, 2021, the full Supreme Court of Canada unanimously held that the tariff which Access Copyright was seeking to enforce against York University did not apply to York University. This holding effectively "shut down" Access Copyright's lawsuit against York University and then had a "knock-on" effect when the Supreme Court of Canada then declined to rule on whether a Declaration should be issued (as sought by York University) that any copying conducted within the scope of York University's "Fair Dealing Guidelines for York Faculty and Staff" (issued November 13, 2012) was protected by the fair dealing rights in ss 29, 29.1 and 29.2 of the *Copyright Act*.[6]

The result of the decision of the Supreme Court of Canada in *York University v Access Copyright* is that there is now recent guidance from the Supreme Court of Canada on certain questions involving copyright,[7] although there is not complete closure.

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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.
[3] Supreme Court case no. 39222.
[4] *York University v Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32 (hereinafter referred to as *York University v Access Copyright*).
[5] This hearing was the last in which Justice Abella participated before her retirement from the Supreme Court: her retirement speech can be accessed at https://www.scc-csc.ca/judges-juges/webcast-webdiffusion-farewell-aurevoir-rosalie-silberman-abella-eng.aspx
[6] Justice Abella wrote "[t]he fairness of copying under York's Guidelines was only a live issue between the parties if the tariff was enforceable against York." (see *York University v Access Copyright*, 2021 SCC 32, para 79). Justice Abella described the Declaration sought by York University at para 15.
[7] It is important to note that this decision from the Supreme Court of Canada is only relevant to copyright matters arising in Canada that are governed by Canadian law. Where materials are made available in Canada pursuant to licence agreements that make the law of another jurisdiction (for example, the United States) relevant to interpretation of the contract, fair dealing under Canada's *Copyright Act* will not be relevant to a dispute. See, for example, the note that currently appears on the website of the Law Society of Ontario:

> Copyright and Licence Restrictions on Use
> Use of these eResources is governed by Canadian copyright law and the terms and conditions of the licence agreements between the Law Society of Ontario and resource providers. Each user is responsible for complying with these terms and conditions, including any restrictions on printing, emailing, and downloading licenced content [emphasis in original]. (https://lso.ca/great-library/eresources)

What was the background to this case before the Supreme Court of Canada?

The litigation leading to Supreme Court of Canada's decision in *York University v Access Copyright* was very lengthy and very complex. Its genesis lay in the fact that, on December 23, 2010, the Copyright Board of Canada granted Access Copyright an interim tariff for post-secondary institutions.[8] Access Copyright launched its lawsuit against York University in the Federal Court on April 3, 2013, seeking to force York University to adhere to the terms of the interim tariff. York University then not only entered a defence against Access Copyright's claims but also made its own counterclaim for a declaration of fair dealing.

On July 30, 2014, Prothonotary Aalto, at York University's instigation, ordered "bifurcation" of the impending trial into two phases.[9] He included in Phase I York's counterclaim that it was entitled to a Declaration that "any reproductions made that fall within the guidelines set out in York's 'Fair Dealing Guidelines for York Faculty and Staff … constitute fair dealing".[10] It is only appeals[11] in the course of "Phase I" that reached the Supreme Court of Canada in 2021![12]

Justice Phelan rendered judgment on Phase I on July 12, 2017 and noted that it would only be in the future Phase II of the trial (the "damages" phase) that York University would be expected to raise the issue of fair dealing.[13] York University appealed Justice Phelan's decision on Phase I to the Federal Court of Appeal, both with respect to his decision that York was subject to the interim tariff and with respect to his dismissal of York's counterclaim for a declaration of fair dealing.[14] The Federal Court of Appeal rendered its decision April 22, 2020.[15] The Federal Court

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[8] Reprographic Reproduction 2011-2013, Interim Statement of Royalties to be Collected by Access Copyright (Post-Secondary Educational Institutions) (2011), 92 C.P.R. (4th) 434.

[9] Protonotary Aalto granted York University's motion for bifurcation on July 30, 2014 (Federal Court file #T-578-13). This process is described in the judgment of the Supreme Court of Canada in *York University v Access Copyright*, 2021 SCC 32, at para 16.

[10] *York University, et al v Canadian Copyright Licensing Agency (Access Copyright"),* 2020 FCA 77

[11] *Canadian Copyright Licensing Agency* [Access Copyright] *v York University*, 2017 FC 669 (Phelan, J) and *York University, et al v Canadian Copyright Licensing Agency ("Access Copyright"),* 2020 FCA 77 (Pelletier, JA, writing also for DeMontigny and Woods, JJA)

[12] See again *York University v Access Copyright,* 2021 SCC 32, para 16.

[13] *Canadian Copyright Licensing Agency v. York University*, 2017 FC 669, at paras 219, 220. In making his decision on Phase I, Justice Phelan found in favour of Access Copyright, finding the interim tariff Access Copyright had obtained from the Copyright Board was enforceable against York University and dismissing York University's counterclaim for a declaration of fair dealing (For further information about Justice Phelan's decision focused on the perspective of libraries, see Margaret Ann Wilkinson, "[An Overview] *Access Copyright v York University,* Federal Court, Justice Phelan, 2017 FC 669" (July 19, 2017, 6 pp) at https://accessola.com/wp-content/uploads/2020/08/2017-Access-Copyright-v-York-U.pdf)

[14] Notice of appeal filed September 22, 2017.

[15] Pelletier, J, for the Federal Court of Appeal (*York University, et al v Canadian Copyright Licensing Agency ("Access Copyright"),* 2020 FCA 77), in addition to making other dispositions, at para 4 "dismiss[ed] York's counterclaim on the basis that its Guidelines do not ensure that copying which comes within their terms is fair dealing" and also found York University's dealings with copyright material did not constitute fair dealing (para 310). On the other hand, however, the Federal Court of Appeal also found that Access Copyright could not sue York University on the basis of its interim tariff ordered by the

of Appeal implicitly recognized "opt out" institutions as legitimate when it found the relevant tariffs issued by the Copyright Board were not binding on all institutions that could potentially be covered by them: "a tariff approved by the Copyright Board… is not "mandatory" in the sense that it is enforceable against anyone who use of the protected works is an infringement of the copyright owner's exclusive rights."[16] In light of this finding, the Federal Court of Appeal noted that "the validity of York's Guidelines as a defence to Access Copyright's action does not arise because the tariff is not mandatory."[17] Nonetheless, in *obiter*,[18] the Federal Court of Appeal went on to consider fair dealing, finding York University's behaviour unfair in respect of five of the six fair dealing factors that had been established by the Supreme Court of Canada in 2004 in *CCH v Law Society of Upper Canada*[19] and also disapproving of York University's Fair Dealing Guidelines.[20]

The judgment of the Federal Court of Appeal was multi-faceted[21] and both York University and Access Copyright sought and received leave to appeal from it to the Supreme Court of Canada.[22]

In the end, on appeal, the Supreme Court of Canada unanimously[23] agreed (in the result) with the Federal Court of Appeal, finding Access Copyright's tariff not enforceable against York University and not granting the Declaration respecting York's Guidelines that York requested. The Supreme Court of Canada, however, criticized[24] both the fair dealing analysis undertaken by Justice Phelan in the Federal Court and the fair dealing analysis upon which the three justices of the Federal Court of Appeal had been unanimous.[25]

Copyright Board and, as a result, "the validity of York's Guidelines as a defence to Access Copyright's action [did] not arise because the tariff is not mandatory and Access Copyright cannot maintain a copyright infringement action." (para 206).

[16] *York University, et al v Canadian Copyright Licensing Agency ("Access Copyright"),* 2020 FCA 77, para 4.

[17] *York University, et al v Canadian Copyright Licensing Agency ("Access Copyright"),* 2020 FCA 77, para 206.

[18] Short for "obiter dictum," defined in *Davidner v Schuster*, [1936] 1 DLR 560 at 569 (Sask CA), as "A statement made or decision reached in a court opinion that is not essential for the disposition of the case."

[19] See Margaret Ann Wilkinson, "The Decision of the Federal Court of Appeal in *York University v Access Copyright*" (May 13, 2020, 9 pp), pp 5-6, at https://accessola.com/wp-content/uploads/2020/08/2020-05-York-v-Access-FCA-OLA-Comment-FINAL.pdf

[20] See, inter alia, *York University, et al v Canadian Copyright Licensing Agency ("Access Copyright"),* 2020 FCA 77, para 240.

[21] For further information about this decision of the Federal Court of Appeal focused on the perspective of libraries, see Margaret Ann Wilkinson, "The Decision of the Federal Court of Appeal in *York University v Access Copyright*" (May 13, 2020, 9 pp) at https://accessola.com/wp-content/uploads/2020/08/2020-05-York-v-Access-FCA-OLA-Comment-FINAL.pdf

[22] October 15, 2020, Supreme Court of Canada file no 39222.

[23] Justice Abella wrote for herself, Chief Justice Wagner, and Justices Moldaver, Karatkatsanis, Côté, Brown, Rowe, Martin and Kasirer.

[24] *York University v Access Copyright,* 2021 SCC 32, para 19.

[25] *York University, et al v Canadian Copyright Licensing Agency ("Access Copyright"),* 2020 FCA 77.

Why did the Supreme Court find Access Copyright's tariff unenforceable in this lawsuit?

In its judgment, written by Justice Abella, the Supreme Court of Canada stated that the *Copyright Act* "does not make tariffs approved by the Copyright Board pursuant to s 70.15 [the section that applies to tariffs sought by Access Copyright] mandatory against users who choose not to be licensed on the approved terms."[26] This has two direct consequences, one of general application and one with specific application to the litigation between Access Copyright and York University:

(1) generally, this finding by the Supreme Court of Canada legitimizes the position taken by a goodly number of institutions in Canada that they are permitted to "opt out" of being governed by tariffs which a copyright collective has sought and received from the Copyright Board under s 70.15 of the *Copyright Act*; and
(2) specifically, this finding knocks out the basis of Access Copyright's lawsuit against York and so "Phase 2" of the lawsuit will now never take place: to take future legal action against York University, Access Copyright will have to explore possibilities such as starting a fresh lawsuit suing York University for infringement pursuant to s 34(1) of the *Copyright Act*.[27]

The Supreme Court of Canada noted, in *York University v Access Copyright*, that the earliest sets of copyrights to be regulated through a tariff-setting process were those administered by performing rights societies in Canada on behalf of performers.[28]It should be noted that the tariff at issue in *York University v Access Copyright* was one issued under a later regime created in the *Copyright Act* through 1988 and 1997 amendments (termed the "general regime" by the Supreme Court of Canada).[29] It was "Access Copyright's core argument… that… the 1988 and 1997 amendments expanding collective administration [of copyright] were meant to protect copyright owners and that Parliament intended to make approved tariffs binding in furtherance of this purpose."[30]The unanimous Supreme Court rejected that interpretation, saying the *Copyright Act* "does not make tariffs approved by the Copyright Board pursuant to s 70.15 mandatory against users who choose not to be licensed on the approved terms."[31]

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[26] *York University v Access Copyright,* 2021 SCC 32, para 75.
[27] The Supreme Court recognizes that future internal changes between Access Copyright and its members would permit Access Copyright to maintain infringement actions in the future: see para 74 of the judgment. See also Catherine Lovrics, "Access Copyright calls for legislation to ensure 'functional marketplace for educational publishing,' *Canadian Lawyer* (12 August 2021) where, near the end of the article, Lovrics notes "theoretically, we could see class actions for copyright infringement, because that structure would facilitate advancing infringement claims on behalf of members for which there's a repertoire."
[28] *York University v Access Copyright*, 2021 SCC 32, paras 55, 63
[29] See *York University v Access Copyright,* 2021 SCC 32, para 56.
[30] *York University v Access Copyright*, 2021 SCC 32, para 57.
[31] *York University v Access Copyright*, 2021 SCC 32, para 75. In para 75 the portion quoted refers specifically to s 68.2(1) and not the whole *Copyright Act*… but the sense is the same in this context as the Supreme Court had explained, at para 29, Access Copyright's argument "that s 68.2(1), incorporated by reference in s 70.15(2), mean[t] that any person who makes an otherwise unauthorized use of a work captured by an approved tariff is liable to be sued for royalties, regardless of whether the user agrees to be bound by a license on the approved terms…the "mandatory tariff" theory." It is this theory that the

Why did the Supreme Court of Canada decline to rule on York University's request for a declaration that York's Guidelines were fair?

The entire Supreme Court of Canada in *York University v Access Copyright* agreed that "[a] proper balance [in copyright] ensures that creators' rights are recognized, but authorial control is not privileged over the public interest."[32] Nonetheless, the Supreme Court of Canada found "consideration of [York's] Guidelines in this case inappropriate."[33] It warned that "the issue of fair dealing … can only be determined in a factual context."[34] (It will be recalled that the Supreme Court of Canada, in this appeal, was hearing only argument related to "Phase I" of the action that was launched by Access Copyright on April 8, 2013.[35])

The Supreme Court of Canada distinguished the situation before it in the present appeal in *York University v Access Copyright* from the situation before it in 2004 when it decided *CCH Canadian Ltd v Law Society of Upper Canada*[36](in 2004 the Supreme Court of Canada did deal directly with fair dealing and unanimously approved the "guidelines" that the Law Society had created and entered into evidence in that case[37]):

> It is true that in *CCH*, the Court granted a declaration to the Law Society that it "does not infringe copyright when a single copy of a reported decision, case summary, statute, regulation or limited selection of text from a treatise is made by the Great Library in accordance with its Access Policy" (para 76). But it did so in the context of a live infringement action brought by proper parties, and where the Law Society relied on its "practices and policies" to show that its dealings were fair.[38]

The Supreme Court of Canada in *York University v Access Copyright* drew on an earlier, non-copyright Supreme Court of Canada case to make the point that declaratory relief from the courts

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Supreme Court specifically rejects at para 75. It should also be noted that, at para 76, the Supreme Court of Canada specifically noted that

> [i]t is of course open to Parliament to amend the Copyright Act if and when it sees fit to make collective infringement actions more readily available. But under the existing relevant legislation in this appeal, an approved tariff is not binding against a user who does not accept a licence.

[32] *York University v Access Copyright,* 2021 SCC 32, para 94.

[33] *York University v Access Copyright,* 2021 SCC 32, para 83. This is because the Supreme Court had established earlier in that same paragraph in the judgment that the interim tariff under which Access Copyright was suing York "is not mandatory and is therefore unenforceable against York." This, in turn, as the paragraph notes, meant that there was "no live dispute between the parties…The undesirable consequences of assessing fair dealing guidelines in the absence of a genuine dispute between proper parties is that the analysis is inevitably anchored in aggregate findings and general assumptions without a connection to specific instances of works being copied."

[34] *York University v Access Copyright,* 2021 SCC 32, para 88.

[35] See text above at footnotes 9-11. Federal Court file #T-578-13: Protonotary Aalto granted York University's motion for bifurcation on July 30, 2014 (see again also *York University v Access Copyright,* 2021 SCC 32 para 16). It was only in the trial Phase II that the issue of fair dealing was to be dealt with.

[36] *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13.

[37] See further on this below in the section on "What lessons from *CCH Canadian Ltd v Law Society of Upper Canada* (2004) have been brought to our attention by the Supreme Court of Canada in *York University v Access Copyright* in 2021?"

[38] *York University v Access Copyright,* 2021 SCC 32, para 63.

should only be given where a question is "real" and will have "practical utility".[39] In the *York University v Access Copyright* judgment Justice Abella's reasons (adopted by the entire Supreme Court of Canada) had already demonstrated that the tariff was unenforceable against York University (see paragraphs 30-75) and therefore any order involving York's Guidelines would be redundant since it had been demonstrated that Access Copyright could not succeed in the current lawsuit against York University and therefore any decision made by the Supreme Court of Canada involving the declaratory relief York University sought would have no practical utility.

What does* York University v Access Copyright *tell us about Fair Dealing?

While the Supreme Court of Canada in *York University v Access Copyright* did not decide the question of fair dealing raised before it in the litigation between Access Copyright and York University, it did, in its decision, provide guidance on the matter by indicating that its decision

> should not be construed as endorsing the reasoning of the Federal Court and Federal Court of Appeal [in the judgments of Justice Phelan and the Federal Court of Appeal that led to the appeal before the Supreme Court] on the fair dealing issue. There are some significant jurisprudential problems with those aspects of their judgments...[40]

The Supreme Court of Canada then devoted seventeen paragraphs of its judgment to comments concerning interpretation of fair dealing[41]-- but these paragraphs are very clearly *obiter* as the Court concludes by saying[42]

> [a]t the end of the day, the question in a case involving a university's fair dealing practices is whether those practices actualize the students' right to receive course material for educational purposes in a fair manner, consistent with the underlying balance between users' rights and creators' rights in the [Copyright] Act. Since we are not deciding the merits of the fair dealing appeal brought by York, there is no reason to answer the question in this case.

What lessons from *CCH Canadian Ltd v Law Society of Upper Canada* (2004) have been brought to our attention again by the Supreme Court of Canada in *York University v Access Copyright* in 2021?

The 2004 decision in *CCH Canadian Ltd v Law Society of Upper Canada*,[43] is the quintessential "library case" in Canadian copyright jurisprudence: it was based on the activities of the Great Library at Osgoode Hall operated by the then Law Society of Upper Canada.[44]

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[39] *York University v Access Copyright,* 2021 SCC 32, para 82, drawing upon *Daniels v Canada (Indian Affairs and Northern Development)* [2016] 1 SCR 99 at para 11.
[40] *York University v Access Copyright,* 2021 SCC 32, para 87.
[41] *York University v Access Copyright)*, 2021 SCC 32, paras 89-106.
[42] *York University v Access Copyright,* 2021 SCC 32, para 106.
[43] *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13
[44] *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13, paras 65-73. The litigation began in 1993. The definition of "fair dealing" in the *Copyright Act* then was narrower than it is currently (education, parody and satire were not included) but this difference is not material to the principles annunciated by the Supreme Court then or now that are under discussion herein. The Law Society of Upper Canada is now known as the Law Society of Ontario.

It is clear in the Supreme Court of Canada's judgment in *York University v Access Copyright*, decided seventeen years after *CCH Canadian Ltd v Law Society of Upper Canada*,[45] that the unanimous full Supreme Court of Canada in 2021 has wholeheartedly endorsed the framework for analyzing fair dealing that it set up in 2004 in *CCH Canadian Ltd v Law Society of Upper Canada*.[46]

In *CCH v Law Society of Upper Canada* the Supreme Court of Canada held that the following factors are important in determining whether use of a work in copyright falls within "fair dealing":[47]

- The ***purpose*** *of the* ***dealing***[48]
- *The* ***character*** *of the* ***dealing***[49]
- *The* ***amount*** *of the* ***dealing***[50]
- ***Alternatives*** *to the* ***dealing***[51]
- *The* ***nature*** *of the* ***work***[52]
- *The* ***effect*** *of the* ***dealing***[53]

All six factors have now been specifically re-affirmed by the Supreme Court of Canada in *York University v Access Copyright*.[54]

Since 2004, with respect to the third factor, "the amount of the dealing," the Supreme Court of Canada in the 2021 *York University v Access Copyright* has reaffirmed the approach it took in its 2012 decision in *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*: "[s]ince fair dealing is a 'user's' right, the 'amount of the dealing' factor should be assessed based on the individual use, not the amount of the dealing in the aggregate."[55] With respect to the same factor, in this 2021 *York University v Access Copyright* (quoting itself in the same 2012

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[45] *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13
[46] See *York University v Access Copyright,* 2021 SCC 32, para 96: "The … judicial framework for fair dealing was set out in CCH [*CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13]". This endorsement was made even though composition of the Supreme Court of Canada *York University v Access Copyright*, 2021 SCC was completely differently than the Supreme Court of Canada which decided *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13, seventeen years ago: in 2004 then Chief Justice McLachlin wrote for herself and Justices Iaccobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish; in 2021, Justice Abella wrote for Chief Justice Wagner and Justices Moldaver, Côté, Karatkatsanis, Brown, Rowe, Martin and Kasirer. After Justice Abella's retirement from the Supreme Court of Canada on June 30, 2021, Justice Mahmoud Jamal was appointed on July 1, 2021.
[47] *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13, para 61 (in part).
[48] Does the dealing fall within any of the categories of research, private study, education, parody, satire, criticism, review or news reporting?
[49] What was done to the work? Was it used repetitively?
[50] How much of the work was copied and was it a substantial part of the work in qualitative terms?
[51] Were there commercial alternatives available to the personal claiming fair dealing?
[52] Is there a strong public interest in access to the information?
[53] Does the use made by the person claiming fair dealing compete with the market for the work? To what extent was the copyright owner impacted by the use?
[54] *York University v Access Copyright,* 2021 SCC 32, para 96.
[55] *York University v Access Copyright,* 2021 SCC 32, para 104. citing to *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, [2012] 2 SCR 326, para 41.

decision in *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*), the Supreme Court has also noted that " 'large scale organized dealings' are not 'inherently unfair'."[56]

One key lesson that one can take from the Supreme Court of Canada's refusal to rule on York's Guidelines in *York University v Access Copyright*[57] is that **the only set of fair dealing guidelines that have ever been approved by the Supreme Court of Canada remain those quoted in full by the Supreme Court in *CCH Canadian Ltd. v Law Society of Upper Canada* (within paragraph 61): the policy in place at the Law Society's Great Library**[58]:

> In 1996, the Law Society implemented an "Access to the Law Policy" ("Access Policy") which governs the Great Library's custom photocopy service and sets limits on the types of requests that will be honoured:
>
> Access to the Law Policy
>
> The Law Society of Upper Canada, with the assistance of the resources of the Great Library, supports the administration of justice and the rule of law in the Province of Ontario. The Great Library's comprehensive catalogue of primary and secondary legal sources, in print and electronic media, is open to lawyers, articling students, the judiciary and other authorized researchers. Single copies of library materials, required for the purposes of research, review, private study and criticism, as well as use in court, tribunal and government proceedings, may be provided to users of the Great Library.
>
> This service supports users of the Great Library who require access to legal materials while respecting the copyright of the publishers of such materials, in keeping with the fair dealing provisions in Section 27 of the Canadian Copyright Act.
>
> Guidelines to Access
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> 1. The Access to the Law service provides single copies for specific purposes, identified in advance to library staff.
>
> 2. The specific purposes are research, review, private study and criticism, as well as use in court, tribunal and government proceedings. Any doubt concerning the legitimacy of the request for these purposes will be referred to the Reference Librarian.

[56] *York University v Access Copyright,* 2021 SCC 32, para 105, quoting *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, [2012] 2 SCR 326, at para 43. The Supreme Court in *York University v Access Copyright*, 2021 SCC 32, goes on to say at para 105 "the character of the dealing factor must be carefully applied in the university context, where dealings conducted by larger universities on behalf of their students could lead to findings of unfairness when compared to smaller universities. This would be discordant with the nature of fair dealing as a user's right."

[57] *York University v Access Copyright,* 2021 SCC 32, para 87.

[58] *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13, para 61.

> 3. The individual must identify him/herself and the purpose at the time of making the request. A request form will be completed by library staff, based on information provided by the requesting party.
>
> 4. As to the amount of copying, discretion must be used. No copies will be made for any purpose other than that specifically set out on the request form. Ordinarily, requests for a copy of one case, one article or one statutory reference will be satisfied as a matter of routine. Requests for substantial copying from secondary sources (e.g. in excess of 5% of the volume or more than two citations from one volume) will be referred to the Reference Librarian and may ultimately be refused.
>
> 5. This service is provided on a not for profit basis. The fee charged for this service is intended to cover the costs of the Law Society.
>
> When the Access Policy was introduced, the Law Society specified that it reflected the policy that the Great Library had been following in the past; it did not change the Law Society's approach to its custom photocopy service.

Then Chief Justice McLachlin, for the unanimous Supreme Court of Canada, in 2004, said of Law Society of Upper Canada's policy (quoted above) that:[59]

> …The Access Policy places appropriate limits on the type of copying that the Law Society will do. It states that not all requests will be honoured. If a request does not appear to be for the purpose of research, criticism, review or private study, the copy will not be made. If a question arises as to whether the stated purpose is legitimate, the Reference Librarian will review the matter. The Access Policy limits the amount of work that will be copied, and the Reference Librarian reviews requests that exceed what might typically be considered reasonable and has the right to refuse to fulfill a request. On these facts, I conclude that the Law Society's dealings with the publishers' works satisfy the fair dealing defence and that the Law Society does not infringe copyright.

There is nothing in the judgment of the Supreme Court of Canada in *York University v Access Copyright* in 2023 that derogates from the Supreme Court of Canada's approval of the policy of the Great Library that it considered in 2004. Therefore, it appears that a policy based closely on that of the Great Library would tend to support a defence of fair dealing in the future.[60]

The Supreme Court of Canada in *York University v Access Copyright* noted that the trial judge and Court of Appeal deciding the case in the courts below should have taken into account both the institutional perspective of the university and "the perspective of the students who use the materials" when considering fair dealing.[61] The policy of the Great Library of the Law Society of Upper Canada (now the Law Society of Ontario), quoted above, expressly refers to the needs of "lawyers, articling students, the judiciary and other authorized researchers" and "supports users of the Great Library who require access to legal materials" (see the text quoted above). The

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[59] *CCH Canadian Ltd. v Law Society of Upper Canada* 2004 SCC 13, para 73.

[60] The Law Society of Ontario's current form for its document delivery service may be found at https://lso.ca/great-library/document-delivery-request-form.

[61] *York University v Access Copyright,* 2021 SCC 32, para 98.

policy would thus appear to embrace both the institutional perspective of the Law Society of Upper Canada and the perspective of the users of the library (who included both members of the Law Society (lawyers and articling students) of Upper Canada and “other authorized researchers”). When looking at fair dealing both from institutional perspectives and users’ perspectives, it would appear guidelines based upon those of the Law Society of Upper Canada, reproduced in the 2004 judgment of the Supreme Court of Canada in *CCH v Law Society of Upper Canada*, should continue to find favour with Canadian courts.