Sana Halwani
416-865-3733
shalwani@litigate.com

August 5, 2021

An Ode to Usersâ€™ Rights

In the last case heard before her retirement from the Supreme Court of Canada, and writing for a unanimous Court, Justice Rosalie Abella affirmed the Federal Court of Appeal's ruling that tariffs set by the Copyright Board are not mandatory (*York University v Access Copyright*). Justice Abella also rejected the FCA's narrow approach to fair dealing and reiterated the nature of fair dealing as a user's right, to be approached in the educational context from a student's perspective and not exclusively from the institutional perspective.

This decision is a major victory for educational institutions and users of academic content, who now have greater flexibility to obtain their rights to copyrighted works through varied means, rather than being obliged to pay tariffs to collective societies.

Sana Halwani, Paul-Erik Veel, and Jacqueline Chan of Lenczner Slaght were privileged to represent the interveners, Authors Alliance and Professor Ariel Katz, in this appeal. Authors Alliance is a non-profit organization representing the interests of authors who want to serve the public good by sharing their creations broadly. Professor Katz is a copyright scholar and the author of key articles relied on by the Court in this decision.

In our submissions on their behalf, we emphasized that authors were not a monolith and that Access Copyright did not represent the interests of all authors. On the interim tariff, we agreed with the FCA that the tariff was not enforceable against York. On fair dealing, we parted ways with York and Access Copyright, and argued that the question of whether York's guidelines were fair should not have been dealt with outside of an infringement action, and the Court agreed with us on this point. We submitted that the FCA decision undermined the robustness of the fair dealing doctrine and that this was the result of fair dealing being determined in the abstract, without being anchored in any analysis of any specific instance of alleged infringement.

BACKGROUND

Access Copyright is a collective society that licences and administers reproduction rights in published literary works through the collection of royalties, including from educational institutions such as York. Access Copyright is not an assignee or an exclusive licensee of the copyrights held by its members,

meaning that it does not have the right to sue for copyright infringement. Access Copyright's affiliates remain free to licence their rights to users directly or through intermediaries other than Access Copyright.

York, like many universities, makes learning materials available to students for educational purposes through copies of published works, some of which fall within Access Copyright's repertoire, that are available in the form of print course packs and digital learning management systems.

The procedural history of this case is complex and started in 2011. In January 2011, York began to pay Access Copyright an interim tariff under subsection 68.2(1) of the *Copyright Act* that had been approved by the Copyright Board. In July 2011, York informed Access Copyright that it would not continue as a licensee and claimed that its copying activities involving Access Copyright's repertoire constituted fair dealing and, in any event, the interim tariff was not enforceable against it. York relied on its own fair dealing guidelines, which specified that short excerpts could be copied for educational and research purposes.

When York stopped paying the interim tariff, Access Copyright brought a proceeding before the Federal Court to enforce the tariff (*Canadian Copyright Licensing Agency v York University*). As a collective society and not the copyright owner, Access Copyright did not have standing to sue York for copyright infringement. Therefore, the central question before the FC was whether the interim tariff was mandatory or legally binding on York. York counterclaimed for a declaration that any reproductions that complied with its guidelines constituted fair dealing under section 29 of the *Copyright Act.* The FC found that the interim tariff was enforceable against York and neither its guidelines nor its actual practices constituted fair dealing.

The Federal Court of Appeal overturned the lower court's finding that Access Copyright's tariff was mandatory but upheld its declaration that York's guidelines *did not constitute* fair dealing (*York University v Canadian Copyright Licensing Agency*). The FCA found that the Board approved tariffs were not mandatory – but voluntary – for users. If a user chooses not to be licensed under a tariff, the remedy is an infringement action by the relevant copyright owners (not by Access Copyright). As for fair dealing, the FCA concluded that York could not establish that all copying within its guidelines was fair and refused to issue the declaration sought by York.

Access Copyright appealed on the tariff issue and York appealed on the fair dealing issue.

SCC DECISION

Writing for a unanimous court, Justice Abella dismissed both appeals. She agreed with the FCA that tariffs are voluntary not mandatory, and therefore that the interim tariff was not enforceable against York. She declined to entertain York's request for a declaration but she also did not endorse the fair dealing analysis conducted by the lower courts.

In finding that the interim tariff in section 68.2(1) of the *Copyright Act* was unenforceable against York, the Court found that Access Copyright did not have the power to enforce royalty payments set out in a Board approved tariff (pursuant to section 70.15) against a user who had opted out of a licence on the approved terms. In other words, the Court held that a collective society, such as Access Copyright, could not force a licence upon an unwilling user. Although the Court was sympathetic to the difficulty faced by Access Copyright because of its inability to initiate infringement actions as a non-exclusive licensee, it ultimately held that this was a consequence arising from Access Copyright's freely chosen contractual arrangements with its members.

The Court also canvased the text, legislative context, and the purpose and supporting jurisprudence of section 68.2(1) and found that there was no language in the *Copyright Act* that created a requirement to pay approved royalties to a collective society operating a licensing scheme.

Justice Abella explained that the combined effect of a collective society collecting royalties under section 68.2(1) in exchange for protection from copyright infringement under section 70.17, created a dichotomy between users who chose to be licensed under the terms of a Board approved tariff, and those who chose not to be. A person who has paid or offered to pay the royalties under section 70.17 becomes a licensee and may be liable for defaulted payments under section 68.2(1). On the other hand, a person who has not paid or offered to pay is not licensed and may only be liable for infringement. Therefore, section 68.2(1) ensures that collective societies, such as Access Copyright have a remedy for defaulted payments from voluntary licensees. This interpretation of sections 68.2(1) and 70.17 is consistent with the Court's position in *Canadian Broadcasting Corp. v SODRAC 2003 Inc.*

Justice Abella did not mince words in rejecting Access Copyright's interpretation of its tariffs as mandatory:

> Access Copyright's interpretation of s. 68.2(1) is not only unsupported by the purpose of the Board's price-setting role, it is, respectfully, also in direct conflict with that

> purpose. Instead of operating as a part of a scheme designed to control collective societies' potentially unfair market power, Access Copyright's interpretation would turn tariffs into a plainly anti competitive tool, boosting collective societies' power to the detriment of users.

As for fair dealing, the Court refused to assess York's fair dealing guidelines in the absence of a genuine dispute between proper parties. Given that this was not an action for infringement because Access Copyright did not have standing to bring such an action, York was not in a position to seek such a declaration. Therefore, the Court held that it would be inappropriate to anchor the analysis of fair dealing in aggregate findings and general assumptions without a connection to specific instances of works being copied.

Nevertheless, the Court roundly rejected the reasoning of the FC and FCA on the issue of fair dealing. In particular, Justice Abella noted that the lower courts had erred in approaching the analysis exclusively from an institutional perspective, rather than the perspective of students who use the materials: "[b]y anchoring the analysis in the institutional nature of the copying and York's purported commercial purpose, the nature of fair dealing as a user's right was overlooked and the fairness assessment was over before it began." Instead, the proper 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*.

IMPLICATIONS

This decision represents a long-awaited victory for educational institutions, affording them choice in the management of their copyright obligations, and freeing them from the "Sword of Damacles" that mandatory tariffs represented. It has also alleviated the potentially unfair market power of collective societies, such as Access Copyright, and may encourage the dissemination of a greater diversity of works and a proliferation of different business models.

On the fair dealing issue, even without a determination of whether York's guidelines were fair, the Court's rebuttal of the FC and FCA's approach to fair dealing has restored the balance between creators and users struck by the Court in *CCH Canadian Ltd v Law Society of Upper Canada* and *SOCAN v Bell Canada*. Critically, the Court emphasized that the perspective of students – not just the institutions they attend – must be considered in the fair dealing analysis, thereby re-affirming the nature of fair dealing as a robust user's right and

not an exception to be narrowly construed.