



Education Law eBulletin

A newsletter for educators

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SHIBLEY RIGHTON LLP
Barristers & Solicitors
www.shibleyrighton.com

Toronto Office:
250 University Avenue
Suite 700
Toronto, ON M5H 3E5
Tel.: (416) 214-5200
Toll free: 1-877-214-5200

Windsor Office:
2510 Ouellette Avenue
Suite 301
Windsor, ON N8X 1L4
Tel.: (519) 969-9844
Toll free: 1-866-422-7988

Education and Public Law Group

John P. Bell
john.bell@shibleyrighton.com

Brian P. Nolan
brian.nolan@shibleyrighton.com

Sheila M. MacKinnon
sheila.mackinnon@shibleyrighton.com

J. Paul R. Howard
paul.howard@shibleyrighton.com

Thomas McRae
thomas.mcrae@shibleyrighton.com

Gaynor J. Roger
gaynor.roger@shibleyrighton.com

John De Vellis
john.devellis@shibleyrighton.com

Bryce Chandler
bryce.chander@shibleyrighton.com

Megan Marrie
megan.marrie@shibleyrighton.com

Supreme Court of Canada rules on "Fair Dealing" Under the Copyright Act

The Supreme Court of Canada's July 12 ruling in *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 seems to have provided some temporary relief to school boards regarding the use of photocopied materials by teachers. In this case, the Supreme Court upended a decision by the Copyright Board with the Court ruling that certain materials copied by elementary and secondary school teachers for use by their students was "fair dealing" pursuant to the *Copyright Act*. However, as will be explored below, the relief provided by this decision is not absolute. Moreover, the Court referred the matter back to the Copyright Board which could still decide to levy a tariff on those materials.

This issue arose in 2004 when Access Copyright, an association representing authors and publishers of printed literary and artistic works, to renew royalty agreements it had with each province (excluding Quebec). At that time, Access Copyright filed a proposed tariff with the Copyright Board regarding the reproduction of its works for use in elementary and secondary schools. Ultimately, the Copyright Board held that copies of textbooks made by elementary and secondary school teachers did not constitute "fair dealing" pursuant to the *Copyright Act*; therefore, the copies made by teachers were subject to royalties. The Alberta Minister of Education applied for judicial review of the Copyright Board's decision. The Federal Court of Appeal upheld the Copyright Board's conclusion that the copies were not fair dealing. This was subsequently appealed to the Supreme Court of Canada.

In a 5-4 majority, the Supreme Court of Canada overturned the Copyright Board's decision, finding that photocopies made by elementary and secondary school teachers, where the copied materials are short excerpts of books, should not be subject to additional tariffs. At the heart of the issue before the Court was the Copyright Board's analysis regarding the "fair dealing" of copyrighted works. Ultimately, the Court held that the Copyright Board had made several errors in concluding that the photocopying done by elementary and secondary school teachers was not fair dealing.

First, the Court recognized that the Copyright Board had decided that the predominant purpose of the photocopying by teachers was instruction, not research or private study by students, and did not therefore constitute a protected activity. However, the Court reviewed a number of previous decisions that considered the interpretation of "fair dealing" under the *Act* and held that the Copyright Board's approach created an "artificial wedge" between the unified purposes of instruction and research and private study. In this case, the copier's intent – to provide excerpts to students for the students' use in research and private study – was integral to the fair dealing analysis. The Court held that any analysis that attempted to distinguish between purpose of instruction and the purpose of research or study was illusory; that is, that there was no separate purpose (i.e. the use of copies for commercial purposes) intended by teachers in this case who made the copies for the sole purpose of facilitating their students' studies.

Second, the Court took issue with the Copyright Board's decision that the "amount of the dealing" by teachers was unfair. Initially, the Copyright Board found that teachers only copied short excerpts of each textbook. Despite this, the Copyright Board held that the practice of copying textbooks was unfair after reviewing the total number of pages that teachers copied. However, The Supreme Court of Canada stated that the proper method of determining fair dealing is to examine the proportion of the copied excerpt in comparison to the entire work. The Court held that the Copyright Board's

decision regarding the proportionality, or amount of the dealing, was flawed on the basis that the Board's conclusion, based on total quantity of pages copied, was contrary to its findings that teachers only copied short excerpts of each textbook.

Third, in considering whether there were reasonable alternatives to photocopying textbooks, the Supreme Court of Canada disagreed with the Copyright Board's conclusion that buying books for every student was a realistic alternative, especially considering that teachers were copying short excerpts of textbooks to be used only for instructional purposes. Finally, in reviewing the effect of the photocopying on the commercial sales of textbooks, the Court held that there was no evidence of any link between photocopying short excerpts and a decline in textbook sales.

As a result of the errors made in drawing its conclusions, the matter was remitted back to the Copyright Board to determine whether a tariff was appropriate in these circumstances.

In our view, the Supreme Court of Canada's decision not only provides clear direction regarding "fair dealing," it also provides interesting commentary regarding the learning process itself. In its decision, the Court specifically criticized the Copyright Board's finding that teacher instruction was not associated with students' research or private study. The Court held that this drove an artificial wedge into the "unified purposes" of instruction and study that are inherent in the learning process. Indeed, the Court held that the "teacher/copier ... shares a symbiotic purpose with the student/user who is engaging in research or private study," thus demonstrating a holistic approach to education and the learning process.

Given that the Court remitted the matter back to the Copyright Board for further consideration, we will now need to wait to see whether the Board will still attempt to apply a tariff in these circumstances. In the meantime however, the Supreme Court of Canada's decision suggests that "fair dealing" allows teachers to copy short excerpts from textbooks as long as the copying is completed for the purpose of student instruction. In any event, we would suggest that at least one comment made by the dissenting minority remains salient: it is unlikely that multiple "short excerpts" from the same textbook would be considered fair if the total proportion of the all the copied excerpts, when viewed as a whole, amounts to a substantial copy of the entire work in question.

Recent Decisions:

The Alberta Court of Queen's Bench upheld the decision of a Board of Arbitration in which a temporary teacher's contract of employment was found to contravene the provisions of the School Act. *Edmonton School District No. 7 v. Alberta Teachers' Assn.*, 2012 ABQB 386.

The Ontario Court of Appeal upheld the Divisional Court's ruling that the Labour Board could not ignore the express terms of the collective agreement dealing with grievance and arbitration, and that the Board did not have the jurisdiction to extend timelines regarding a grievance that had not been properly filed by the union. *Greater Essex County District School Board v. United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552*, 2102 ONCA 482.

The Nova Scotia Supreme Court held that a teacher at a private school was entitled to payment of the remainder of her contract following her wrongful termination. *Ruparell v. Halifax Ladies College (c.o.b. Armbrae Academy)*, 2012 NSSC 211.

The Nova Scotia Supreme Court denied parents a stay pending the judicial review hearing of a school board's decision to close a school because there was no irreparable harm and the balance of convenience did not favour the applicants. *Delorey v. Strait Regional School Board*, 2012 NSSC 227.