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February 6, 2017

TO: Chairpersons and Directors of Education
- All Catholic District School Boards

FROM: Patrick Daly, President

SUBJECT: Decision of the Federal Court of Appeal Access Copyright's Judicial Review Application

Background Information:

As you will recall from previous memorandums, the Copyright Board of Canada ("Board") heard a tariff proposal from Access Copyright in May, 2014. The Board ruling of this proposal was delivered on February 19, 2016 setting tariff rates for the years 2013-15.

On April 28, 2016, the deputy ministers of the Council of Ministers of Education Canada Copyright Consortium ("Consortium") decided to continue not to pay the Access Copyright proposed tariff, to prohibit the copying of consumables, and to undertake an education and monitoring program to provide evidence of compliance with the *Fair Dealings Guidelines* in the Kindergarten to grade 12 education systems outside of Quebec.

Access Copyright then applied for a judicial review of the Board's decision in the Federal Court of Appeal claiming that the Board made several errors of law in its February 19, 2016 decision.

Decision of the Federal Court of Appeal:

On January 27, 2017, the Federal Court of Appeal issued its decision on Access Copyright's judicial review application. It found that the Copyright Board of Canada did not make any of the errors of law Access Copyright claimed, save one limited exception. The attached memorandum from the Consortium to the Deputy Ministers of education across Canada provides further details on the legal decision and the next steps in the legal process.

We will continue to monitor the legal proceedings and provide additional material when it becomes available.

If you have any questions, please contact Steve Andrews, Director of Legislative and Political Affairs at sandrews@ocsta.on.ca.

Attachment



cmecc

Council of
Ministers
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Conseil des
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Memorandum

CONSORTIUM/2017/03

2017 02 03

To: Deputy ministers of the CMEC Copyright Consortium

Re: Decision of the Federal Court of Appeal in the matter of Access Copyright's judicial review application, January 27, 2017

The purpose of this memo is to inform deputy ministers of the CMEC Copyright Consortium of the recent decision of the Federal Court of Appeal.

Access Copyright proposed a tariff of \$15.00 per student for the years 2010–12 and \$9.50 per student for the years 2013–15. The Copyright Board of Canada (the “Board”) heard this tariff proposal in May 2014.

The Board's ruling of February 19, 2016, set the tariff rate at \$2.46 for 2010–12 and \$2.41 for the period 2013–15. The rate reflected the Board's finding that, while over 98 per cent of copying in schools was fair pursuant to the fair dealing provisions of the *Copyright Act*, consumables were being copied, which required payment of copyright royalties. The rates are based on the copying of consumables, which the Board concluded was not covered by fair dealing.

On April 28, 2016, deputy ministers of the CMEC Copyright Consortium (the “Consortium”) held a teleconference and decided to continue not to pay the Access Copyright tariff, to prohibit the copying of consumables, and to undertake an education and monitoring program to provide evidence on compliance with the *Fair Dealing Guidelines* in the K–12 education systems outside of Quebec. This decision continues to save Consortium jurisdictions and Ontario school boards millions of dollars annually.

Access Copyright applied for judicial review of the Board's decision in the Federal Court of Appeal. This application claimed that the Board had made several errors of law in its decision setting the *Access Copyright Elementary and Secondary School Tariff, 2010–2015*.

On January 27, 2017, the Federal Court of Appeal issued its decision on Access Copyright's judicial review application (“the Decision”). It found that the Board did not make any of the errors of law that Access Copyright claimed it did. The CMEC Consortium was consequently victorious on all of its arguments, with one limited exception described below.

The most significant element of the Decision is that the Federal Court of Appeal has, by deciding that the Board did not make any other errors of law, largely confirmed the interpretation of fair dealing described in the Consortium's *Fair Dealing Guidelines*. The Federal Court of Appeal is the second-highest court in Canada. Only the Supreme Court of Canada is higher. The precedent set by the Federal Court of Appeal's decision is a binding precedent that must be followed by lower courts. This Decision is therefore an important victory that provides strong legal support for the Consortium's decision to stop paying Access Copyright's tariff and to rely on fair dealing instead.

The one area in which the Federal Court of Appeal did find an error on the part of the Board was a failure to consider some coding evidence that had been submitted by Access Copyright. The Board had received some evidence on this particular coding matter, but failed to acknowledge this evidence in its decision. This was an error on the Board's part. As a result, the Federal Court of Appeal has sent this coding issue back to the Board for reconsideration. This means that the Board will need to consider this coding evidence and issue a separate decision on its impact, if any, on the tariff rate.

There is a good possibility that Access Copyright will seek leave to appeal the Decision to the Supreme Court of Canada; it has nothing to lose by seeking leave to appeal, as it has already lost on all of the legal issues it appealed to the Federal Court of Appeal. According to section 58(1)(a) of the *Supreme Court of Canada Act*, an application for leave to appeal must be served and filed within 60 days of the date that a judgment is pronounced. If Access Copyright decides to seek leave to appeal to the Supreme Court of Canada, it must do so no later than Tuesday, March 28, 2017.

A detailed analysis of the Federal Court of Appeal's decision is being prepared by legal counsel and will be shared with the Copyright Consortium Committee in due course.

Thank you for your attention to this matter.

ORIGINAL SIGNED BY

Chantal C. Beaulieu
Executive Director

cc: Members of the Copyright Consortium Committee
Advisors



Communiqué

FOR IMMEDIATE RELEASE

CMEC COPYRIGHT CONSORTIUM PLEASSED WITH FEDERAL COURT OF APPEAL DECISION

TORONTO, February 6, 2017 – The Copyright Consortium of the Council of Ministers of Education, Canada (CMEC), is pleased with the Federal Court of Appeal's January 27, 2017, decision in the judicial review of the Copyright Board of Canada's decision setting the 2010–15 Access Copyright tariff for elementary and secondary schools outside of Quebec for the copying of print materials such as books, magazines, and newspapers. In its decision, the court upheld substantially all of the legal arguments the consortium made before the Copyright Board.

The consortium is composed of the ministers of education of all provinces and territories, with the exception of Quebec.

Access Copyright's judicial review application claimed the Copyright Board had made several errors of law when it set the Access Copyright Elementary and Secondary School Tariff, 2010–2015. In its findings, the Federal Court of Appeal decided that the Copyright Board did not, with one limited exception, make any of the errors of law claimed by Access Copyright.

Most importantly, the Federal Court of Appeal upheld the Copyright Board's significant finding that a vast majority of the copying in schools is fair, pursuant to the fair-dealing provisions of the *Copyright Act*.

The Honourable Karen Casey, Minister of Education and Early Childhood Development for Nova Scotia and Chair of the CMEC Copyright Consortium, said, "Ministries of education and school boards take the importance of copyright compliance in our schools very seriously. So, it is reassuring to receive the Federal Court of Appeal decision, which legitimizes the copyright practices of our teachers and school staff."

Members of the consortium will be assessing the full implications of the Federal Court of Appeal's decision in the coming weeks.

Details of the CMEC Copyright Consortium's position on copyright can be found at <http://cmec.ca/139/Programs-and-Initiatives/Copyright/Overview/index.html>.

About CMEC

Founded in 1967, CMEC is the collective voice of Canada's ministers of education. It provides leadership in education at the pan-Canadian and international levels and contributes to the exercise of the exclusive jurisdiction of provinces and territories over education. For more information, visit us at www.cmec.ca.

- 30 -

Information

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