



Ontario Catholic School
Trustees' Association

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July 2, 2019

MEMORANDUM

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

FROM: Nick Milanetti, Executive Director

SUBJECT: Refund Litigation & Access Copyright Update

On May 29, 2019, the Federal Court issued an Order with respect to document discovery in the Refund Litigation case regarding Access Copyright regarding overpaid royalties. The Order is attached to this memo as an Appendix.

Background:

The Jurisdictions (including school boards in Ontario) and Access Copyright could not agree on two issues: first, the number of ministries, school boards and schools required to swear affidavits of documents; and second, the scope of records that should be produced. With no agreement in sight, the Jurisdictions brought a Motion asking the Federal Court to resolve this impasse. This Motion was argued before the Federal Court on May 28, 2019 and the Court's decision was rendered during the hearing.

The Legal Order:

Although legal counsel was successful in persuading the Court to remove some of the most onerous requests for records made by Access Copyright, it remains that ministries, school boards and schools have been ordered by the Court to provide a considerable volume of records.

School boards and schools that are randomly selected to participate in the discovery process will have assistance from the Council of Ministers of Education Tariff Proceedings Sub-Committee. Information Documents for ministries, school boards and schools will be provided, that will describe in detail what needs to be done, what documents need to be provided to Access Copyright and suggest ways to go about gathering the records that the Court has ordered be provided.

School Board and School:

The Court has ordered “full” discovery of 65 school boards across participating Jurisdictions. These 65 boards will be randomly selected from a sample consisting of large and small boards that is stratified based on location and FTE counts. “Full” discovery involves searching for and providing the extensive records listed in sections 3 and 4 of the Court’s Order. If a record requested by Access Copyright does not exist, then nothing can be provided.

In addition, 300 school boards have been ordered to participate in “limited” discovery. “Limited” discovery involves searching for and providing the records (if they exist) listed in section 6 of the Court’s Order.

Lastly, the Court has ordered 8 schools in each of the 65 school boards being fully discovered, to produce the records described in sections 3 and 4 of the Court’s Order. If a record requested by Access Copyright does not exist, then nothing can be provided. It does not appear that “targeted discovery” boards will have to have schools identified for discovery, but that needs to be clarified.

Timelines for Selection of School Boards and Schools:

The Order requires the parties to provide a schedule for the selection of school boards and schools by June 4, 2019. CMEC’s survey expert, Dr. Paul Whitehead, has produced a list of affected Catholic school boards and schools. From the list of all schools, eight schools in each of the 65 boards will be randomly selected. The sample of schools will be stratified by enrolment, location and the grade level taught in the school. Details on the selection will be provided in the coming days.

As the selection process unfolded, some of the smaller boards did not have 8 schools and so, some larger boards will now have more schools, so as to reach the required number of schools Canada-wide. OCSTA will notify those boards directly if they are selected as the schools that are chosen.

The Court Order directs the parties to provide a joint submission on the dates when affidavits and documents must be delivered to Access Copyright by June 11, 2019. The deadlines for final submission of Document Discovery are:

Ministries Deadline:	October 18, 2019
School Board Deadline:	December 31, 2019
School Deadline:	February 28, 2020

The communication documents developed by a CMEC to aid selected boards with this, will give an earlier date by about 3 weeks. This allows the CMEC legal team to review the submitted documents for relevance and for privacy, prior to delivering the full package to Access Copyright.

The school board deadline is the same for Full Discovery boards and for Limited Discovery boards.

Affected Catholic School Boards:

The following boards have been selected for “full” discovery:

Toronto Catholic District School Board
Dufferin-Peel Catholic District School Board
Halton Catholic District School Board
Ottawa Catholic School Board
Windsor-Essex Catholic District School Board
Peterborough Victoria Northumberland & Clarington Catholic District School Board
Algonquin & Lakeshore Catholic District School Board
Catholic District School Board of Eastern Ontario
Brant Haldimand Norfolk Catholic District School Board
St. Clair Catholic District School Board
London District Catholic School Board

Next Steps:

CMEC is in the process of hiring a project coordinator to communicate directly with the selected ministries, school boards and schools, and to manage the collection of the documents. Once this person has been identified, this information will be shared.

CMEC is also working on the development of supporting documentation for all selected ministries, school boards and schools. These documents will outline in detail, the types of documents being sought with suggestions for gathering the court-ordered records. As well, there will be detailed instructions on how to submit records to the Project Coordinator mentioned above.

Further updates will be sent to OCSTA boards as required.

If you have any questions, please contact me at nmilanetti@ocsta.on.ca or Stephen Andrews at sandrews@ocsta.on.ca.

Attachment

Federal Court



Cour fédérale

Date: 20190529

Docket: T-326-18

Ottawa, Ontario, May 29, 2019

PRESENT: Case Management Judge Mandy Ayles

BETWEEN:

**THE PROVINCE OF ALBERTA AND ALL
ENTITIES NAMED IN SCHEDULE "A"**

Plaintiffs

and

**THE CANADIAN COPYRIGHT LICENSING
AGENCY (C.O.B. AS ACCESS COPYRIGHT)**

Defendant

ORDER

UPON MOTION by the Plaintiffs, heard at a special sitting on May 28, 2019, for relief, as set out in the Notice of Motion, related to the specific representative group of Plaintiffs, as well as the nature of documents to be produced, for the purpose of complying with the Court's Order dated January 2, 2019, which ordered that documentary production shall proceed by way of a representative set of productions from an agreed upon number of Plaintiff schools, school boards and Ministries of Education;

CONSIDERING that the parties were unable to reach an agreement as to the number of Plaintiff schools, school boards and Ministries of Education, nor the nature of all documents to be produced by those entities;

CONSIDERING the motion materials filed by the parties and the submissions made by the parties at the hearing of the motion;

CONSIDERING the Court's reasons for decision given at the hearing of the motion;

THIS COURT ORDERS that, for the purpose of representative documentary discovery of the Plaintiffs as ordered by Order dated January 2, 2019:

1. The following entities shall, on behalf of the Plaintiffs, deliver affidavits of documents:
 - a. Each Ministry of Education from all Provinces and Territories, excluding Quebec and British Columbia, and in relation to Ontario, the school boards shall make inquiries of the Ministry for relevant documents;
 - b. 65 school boards (excluding Quebec and British Columbia), randomly selected with sufficient representation of smaller and larger school boards (in proportions equivalent to their share of FTEs) and to be distributed across Canada in a manner proportional to FTE counts while ensuring a minimum of three school boards per Province and three for the three Territories in aggregate; and

- c. Eight schools randomly selected from each of the 65 school boards, with sufficient representation of smaller and larger schools as well as elementary and secondary schools [collectively, the Representative Plaintiffs].
2. The selection of school boards and schools shall be a joint exercise undertaken by the parties and their experts. The parties shall, by no later than June 4, 2019, provide the Court with a jointly-proposed deadline for the selection of the representative school boards and schools.
 3. The affidavits of documents to be delivered in accordance with paragraph 1 of this Order shall contain the following records, for the period 2013 to the present, in the power, possession or control of the Representative Plaintiffs that are relevant to the implementation, administration and enforcement of fair dealing, to the extent such records exist:
 - a. Each fair dealing guideline implemented by each province, district, school board and school, including:
 - i. Implementation memoranda;
 - ii. Correspondence;
 - iii. Training materials and logs;
 - iv. Teacher and administrator certifications;
 - v. Guidelines for agents or external providers;

- vi. Documents relating to the monitoring of compliance with fair dealing guidelines, including by CMEC;
 - vii. Feedback from users within the school system;
 - viii. Incident reports or disciplinary records relating to non-compliance or failure to train, including any records of any violation or suspected or claimed violations of any fair dealing guidelines, and excluding any student incident reports or student disciplinary records. The names of any students may be redacted from the records; and
- b. Such other relevant documentation relating to the implementation, administration and enforcement of fair dealing guidelines, including of Ministry or Department of Education Copyright Officers.
4. The affidavits of documents to be delivered in accordance with paragraph 1 of this Order shall also contain the following records, for the period 2013 to the present, in the power, possession or control of the Representative Plaintiffs that are relevant to the copying activities of the Representative Plaintiffs, to the extent such records exist:
- a. Physical copies of works, including both “master copies” of works intended to be used for teaching as well as resulting copies of works disseminated to students;

- b. Lesson plans, course syllabi, course outlines, source materials, curriculums and similar records associated with the teaching of subjects in the Plaintiffs' schools (i.e. teach course binders);
- c. All internal and external records pertaining to choice of educational materials, maintenance of class sets, and use of workbooks;
- d. All internal and external records pertaining to the Defendant or its tariffs;
- e. All internal and external records pertaining to the schools, school boards and provinces electing to "no longer operate" under the Defendant's K-12 tariff;
- f. Archives from electronic learning management systems;
- g. Budgets for each school for the 2013-2018 years (in the form that they currently exist), including for:
 - i. Purchasing all products and services including materials used for educational instruction;
 - ii. Copying expenses (i.e. paper, ink, copying equipment, etc.); and
 - iii. Acquiring new physical works (i.e. for textbooks, novels, etc.);
- h. Amounts spent by each school on purchasing or licensing materials for educational instruction, broken down by type, including on each textbook and consumable, as they relate to the works at issue in the Counterclaim;

- i. Publisher licence agreements;
 - j. Amounts spent on licenses of materials used for educational instruction by work licensed;
 - k. Records from copying shops or internal copying services relating to any copying of the works at issue in the Counterclaim;
 - l. Records of any savings of each school board resulting from copying of the works at issue in the Counterclaim; and
 - m. All FTE numbers on a per class basis, for all schools and school boards between 2013 and 2018.
5. The following entities shall, on behalf of the Plaintiffs, deliver a limited affidavit of documents:
 - a. 300 school boards (excluding Quebec and British Columbia).
6. The limited affidavits of documents to be delivered in accordance with paragraph 5 of this Order shall contain the following records, for the period 2013 to the present, in the power, possession or control of each school board, to the extent such records exist:
 - a. Copyright management and enforcement guidelines, including all guidelines, instructions and training materials issued by the school board to teachers and principals;

- b. Any copying audits, audit committee reports or studies with regard to compliance;
 - c. All copying budget numbers; and
 - d. All FTE numbers.
7. The Defendant shall be entitled to identify a maximum of ten additional school boards for targeted discovery, which school boards shall produce an affidavit of documents containing the same categories of documents as set out in paragraphs 3 and 4 hereof. The Defendant shall advise the Plaintiffs of any targeted discovery request within seven days of the deadline for selection of the representative school boards and schools.
8. The parties shall, by no later than June 11, 2019, provide the Court with a jointly-proposed timetable, or individually-proposed timetables, for service of the Plaintiffs' affidavits of documents and schedule one productions.
9. The Defendant is entitled to its costs of the motion, payable in any event of the cause. The parties shall meet and confer to attempt to reach an agreement on quantum, failing which the Defendant shall serve and file written cost submissions not exceeding three pages by June 11, 2019 and the Plaintiffs shall serve and file responding written cost submissions not exceeding three pages by June 17, 2019.

"Mandy Ayles"

Case Management Judge