

# Memorandum

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2012 10 10

**CONSORTIUM/2012/02**

To: Deputy Ministers, CMEC Copyright Consortium

Re: Teleconference to discuss the implications of revised copyright legislation and the Supreme Court decision on tariffs for copying in schools  
Tuesday, October 16, 2012, at 2:00 p.m. EDT

## **RESPONSE REQUESTED BY OCTOBER 12, 2012**

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The deputy minister responsible for the Copyright Consortium would like to convene a teleconference of all deputy ministers of the Copyright Consortium on Tuesday, October 16, from 2:00 to 3:00 p.m. EDT.

The purpose of the teleconference is to discuss the steering committee's recommendations with regard to the educational uses of copyright protected works that are permitted under fair dealing following two significant events in June and July of 2012:

- the adoption by Parliament of the *Copyright Modernization Act*; and
- the landmark Supreme Court of Canada decision on the meaning of fair dealing in an education setting.

As a result of these two events, many educational uses of copyright protected works no longer require permission or payment of copyright royalties. Further to advice provided by legal counsel and the tariff proceedings subcommittee, the steering committee has therefore developed a set of recommendations on how member jurisdictions can take full advantage of this new copyright landscape. Given that member jurisdictions and the school boards of Ontario have been required to pay royalties to Access Copyright for each calendar year, it is urgent that the deputy ministers of the Copyright Consortium discuss these recommendations in a manner that will allow them to benefit from these changes starting in 2013. A briefing note outlining the issues for deputy ministers of the consortium to consider is attached as Appendix I as well as Attachment I, The Fair Dealing Guidelines.

Please indicate on the attached response form your availability to participate in the teleconference, and return the completed form to the Secretariat by October 12, 2012.

Please note the following dial in instructions:

To access the teleconference in English:

- dial S15 or, if you are in Toronto, S15
- enter the pass code S15 followed by the # key.

To access the teleconference in French:

- dial S15 or, if you are in Toronto S15
- enter the pass code S15 followed by the # key.

Thank you for your cooperation.

ORIGINAL SIGNED BY

Andrew Parkin  
Director General

Enc.

cc Advisors  
Quebec



# Memorandum

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2012 10 10

**CONSORTIUM/2012/02**

To: Lise Boissonneault

Tel.: 416 962 8100, ext. 273

Fax: 416 962 2800

E mail: l.boissonneault@cmec.ca

Re: Teleconference to discuss the implications of revised copyright legislation and the Supreme Court decision on tariffs for copying in schools  
Tuesday, October 16, 2012, at 2:00 p.m. EDT

**RESPONSE REQUESTED BY OCTOBER 12, 2012**

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Deputy Minister

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Jurisdiction

☐ I will participate in the **October 16** teleconference of the deputy ministers of the Copyright Consortium.

☐ I am unable to participate in the **October 16** teleconference of the deputy ministers of the Copyright Consortium but will be represented by the following official:

Name:

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Title:

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E mail:

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Date

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Signature

If you have difficulty filling out this form electronically, please print it and return it by fax.

If replying by e-mail, please name your response file with the name of your jurisdiction.

## Issues

1. Should member jurisdictions and school boards in Ontario continue to pay the existing Access Copyright tariff?
2. Should member jurisdictions and school boards in Ontario implement the recommended Fair Dealing Guidelines?

## Introduction

- Two recent events have changed the scope of educational fair dealing with respect to copyright in Canada:
  - On June 29, 2012, Parliament passed the *Copyright Modernization Act*. This act adds "education" as a new purpose in the fair dealing provision.
  - On July 12, 2012, the Supreme Court of Canada issued a landmark decision interpreting what fair dealing means in an educational setting: *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* (the "Education Fair Dealing Case").
- As a consequence of these two events, many educational uses of copyright protected works no longer require payment of copyright royalties.
- This briefing note sets out the recommendations accepted by the CMEC Copyright Consortium Steering Committee, on the advice of the Tariff Proceedings Sub Committee and legal counsel.

## Introducing Fair Dealing Guidelines

- The recommended Fair Dealing Guidelines (Attachment I) set out what, on the advice of legal counsel, a "short excerpt" means in an educational setting.
- The Fair Dealing Guidelines also set out safeguards for copyright owners that will help teachers deal fairly with copyright protected works.

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## Basis of the copying limits in the Fair Dealing Guidelines

- The recommended Fair Dealing Guidelines are based on, and take into account, multiple sources:
  - the 2004 Supreme Court of Canada decision in the *CCH Case*;
  - the 2012 Supreme Court of Canada decision in the *Education Fair Dealing Case*;
  - the changes made in 2012 to the copyright law by the *Copyright Modernization Act*;
  - legislative, judicial, and scholarly interpretations of the meaning of the term "short excerpts" in other countries; and
  - quantitative guidelines for fair dealing (and its equivalent) in other countries.

## **Safeguards for copyright owners**

- The Fair Dealing Guidelines contain important safeguards for copyright owners. See sections 5, 6, and 7 of the guidelines.
- In 2004, the Supreme Court of Canada held that adopting institutional guidelines on fair dealing that provide reasonable safeguards to copyright owners is an important element in establishing that a dealing is "fair."

## **Claiming the benefits of fair dealing**

- It is important that Consortium jurisdictions and school boards implement these guidelines to enable them to claim the full benefit of fair dealing.
- Communicating and copying copyright protected works that legally constitute fair dealing do not require permission or payment of copyright royalties.

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- The risk of copyright infringement increases in proportion to the degree to which the dealing exceeds the guidelines set out in the Fair Dealing Guidelines.

## **Background on Access Copyright's tariff**

- Access Copyright is a copyright collective organization that represents authors and publishers in Canada (except Quebec).
- Currently, ministries and departments of education and school boards in Ontario pay approximately \$20 million each year to Access Copyright for the right to make copies of copyright protected published print materials, pursuant to a tariff certified by the Copyright Board of Canada.
- The passage of the *Copyright Modernization Act* and the decision of the Supreme Court of Canada, taken together, result in a copyright law that no longer requires permission or payment for the majority of the uses authorized by the current Access Copyright tariff because the majority of these uses no longer require permission or payment under fair dealing.

- Fair dealing does not mean that a teacher can make unlimited use of any copyright protected work without permission or payment. Rather, fair dealing permits the use of "short excerpts" for educational purposes. "Short excerpts" are described in the Guidelines.
- For example, the current Access Copyright tariff authorizes copying of up to 10% of a published work, a chapter, or an article from a published work. These are "short excerpts," and copying or communicating them is now permitted under fair dealing without payment of royalties to Access Copyright.
- There is therefore little value in continuing to operate under the Access Copyright tariff beyond December 31, 2012, the end of the current tariff period.

## Conclusions

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- The Fair Dealing Guidelines should be implemented before December 31, 2012, to enable member jurisdictions and school boards in Ontario to move from the Access Copyright tariff system to a reliance on fair dealing to meet their copying and communication needs as of January 1, 2013.

## Recommendations

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Pages 9 through 10 redacted for the following reasons:

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**Deputy Ministers of the Copyright Consortium**  
**Teleconference**  
**October 16, 2012**  
**2:00 p.m.**

**Draft Summary of Decisions**

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**Participants:** Shannon Delbridge, Chair, and Carole Olsen (Nova Scotia); Caroline Ponsford (British Columbia); Tim Wiles, Rafaella Garofalo (Alberta); Cheryl Senecal, Brenda Maximuik (Saskatchewan); Aileen Najduch, Marjorie Poor, Darcy Rollins (Manitoba); Lise Bellefleur (New Brunswick); Steve Webster (Prince Edward Island); Darrin Pike, Charlotte Strong (Newfoundland and Labrador); Valerie Royle (Yukon); Andrew Parkin, Ruby Chow, Daniel Buteau (CMEC Secretariat); Wanda Noel (legal counsel)

**1. Overview of issues to be discussed**

The Chair welcomed participants to the teleconference. She highlighted the significant gains made by the Copyright Consortium as a result of the revisions to the federal copyright legislation and the Supreme Court decision on fair dealing. She stated that the consortium had gone significantly beyond the initial advocacy for an Internet amendment, particularly with the addition of education as an allowable fair dealing purpose.

The Chair brought the recommendations from the Copyright Consortium Steering Committee to the attention of participants and stressed how they take full advantage of the new copyright landscape. Most notably, she highlighted how they allow for assessing the value of Access Copyright tariffs with a view to revisiting their continued payment. She also stressed the importance of approving and widely distributing the new *Fair Dealing Guidelines* for a process that may lead member jurisdictions and Ontario school boards to opt out of Access Copyright tariffs as of 2013.

**2. Questions from jurisdictions and discussion**

Participants sought clarification on whether or not the *Fair Dealing Guidelines* could be adopted as jurisdictional policy. The Chair confirmed that such a use of the guidelines was strongly encouraged.

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### **3. Recommendations**

The Chair proposed that the four recommendations from the Copyright Consortium Steering Committee be approved by the deputy ministers of the Copyright Consortium. All recommendations were approved unanimously.

The CMEC Secretariat confirmed receipt of the Ontario Deputy Minister of Education's approval by e mail.

### **4. Other business**

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Participants agreed that it would be very useful to receive the *Fair Dealing Guidelines* in a format that would facilitate the widest possible distribution.

The CMEC Secretariat underscored the strong leadership provided by Nova Scotia with regard to copyright issues.



# Memorandum

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2013 11 27

CONSORTIA/2013/05

To: Deputy ministers of the CMEC Copyright Consortium

Re: Approval to intervene in York University's litigation with Access Copyright

## RESPONSE REQUESTED BY DECEMBER 11, 2013

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Following a teleconference held on November 22, 2013, the CMEC Copyright Consortium Steering Committee would like recommend that the CMEC Copyright Consortium apply for leave to intervene in the existing lawsuit brought by Access Copyright against York University in the Federal Court of Canada. Attached is additional information and a draft budget prepared by the Copyright Consortium Steering Committee and the Secretariat that would allow the consortium to proceed (APPENDIX I).

Although CMEC is not a party to the proceeding in *Access Copyright v. York University*, it is possible for CMEC to ask the Federal Court for permission to intervene in the proceeding. CMEC is well positioned to bring the united voice of K–12 education to this legal proceeding, supporting York University's arguments and defending CMEC's own *Fair Dealing Guidelines* in the process. Intervening at this point, in this case, is much less costly than having to fight a future, prolonged court case to defend the *Fair Dealing Guidelines* with a K–12 teacher, school, school board, or education ministry/department as the defendant. This presents an opportunity to "nip in the bud" Access Copyright's argument against the education sector's interpretation of "short excerpts" and the legitimacy of the established *Fair Dealing Guidelines*.

Please indicate your response by filling out and returning the attached response form by **December 11, 2013**.

Thank you for your cooperation.

ORIGINAL SIGNED BY

Andrew Parkin  
Director General

Enc.

cc Quebec



95 St. Clair Avenue West, Suite 1106, Toronto, Canada M4V 1N6  
Tel.: 416.962.8100  
Fax: 416.962.2800  
Web: www.cmec.ca

# Response Form

2013 11 27

CONSORTIA/2013/05

To: Lise Boissonneault

Tel.: 416 962 8100, ext. 273

Fax: 416 962 2800

E mail: l.boissonneault@cmec.ca

Re: Approval to intervene in York University's litigation with Access Copyright

**RESPONSE REQUESTED BY DECEMBER 11, 2013**

Deputy Minister

Jurisdiction

- ☐ I approve the CMEC Copyright Consortium's filing of an application for leave to intervene in the existing lawsuit brought by Access Copyright against York University in the Federal Court of Canada, and I approve the budgets for step 1 (2013 14) and step 2 (2014 15).
- ☐ I do not approve of this intervention.

Name and title: \_\_\_\_\_

Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_

Date

Signature

If you have difficulty filling out this form electronically, please print it and return it by fax.  
If replying by e-mail, please name your response file with the name of your jurisdiction.

# Briefing note

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CONSORTIA/2013/05  
APPENDIX I

## Deputy ministers' approval to intervene in York University's litigation with Access Copyright November 25, 2013

### Issue

It is the unanimous recommendation of the CMEC Copyright Consortium Steering Committee that the CMEC Copyright Consortium apply for leave to intervene in the existing lawsuit brought by Access Copyright against York University in the Federal Court of Canada.

### Background

- As anticipated, the *Fair Dealing Guidelines* being used in K–12 schools since January 1, 2013, are under attack.
- On April 8, 2013, Access Copyright filed a lawsuit against York University in the Federal Court of Canada. The lawsuit alleges that York University has infringed copyright by copying copyright protected works in certain course packs made at the request of named faculty members working at the university.
- This copying is defined as fair pursuant to the *York University Fair Dealing Policy*. Access Copyright asserts that this copying is not fair dealing.
- York University seeks a court ruling that the fair dealing policy for York faculty and staff (the *York University Fair Dealing Policy*) is consistent with the *Copyright Act*, and that the alleged infringing acts complained of by Access Copyright consequently constitute fair dealing.
- The copying limits set out in the *York University Fair Dealing Policy* are the same as those currently being applied by K–12 schools.

### CMEC's interest in the outcome

- K–12 schools in Canada, with the exception of Quebec, have implemented *Fair Dealing Guidelines* that are virtually identical to the fair dealing policy at issue in the litigation between Access Copyright and York University.
- Most importantly, York University and K–12 schools use the same definition of “short excerpt,” which is the critical definition that determines the amount of copying allowable under all of these policies or guidelines.

- In 2012, the Supreme Court of Canada ruled in *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* that “short excerpts” copied for students do not infringe copyright because copying “short excerpts” for education purposes is permitted under fair dealing. The court, however, did not define what a “short excerpt” is.
- Following the Supreme Court decision, an agreed interpretation of “short excerpts” was developed for use by all levels of the education system, from Kindergarten to postgraduate studies. At the time of writing (late 2013), it is accurate to state that Canadian educational institutions (outside of Quebec) are all relying on the same definition of “short excerpt.”
- The York University proceeding before the Federal Court will therefore be the first judicial application, and legal review, of the concept of “short excerpts” as articulated by the Supreme Court in its 2012 decision in the *Alberta* case. In these circumstances, there is a great deal at stake in this litigation for all educational institutions.
- The CMEC Copyright Consortium therefore has a significant interest in ensuring that the *York University Fair Dealing Policy* is vigorously defended, that the Federal Court understands what is at stake for the entire education community, and that it is aware that its eventual decision will affect not only York University, but every other Canadian educational institution (outside of Quebec) as well.

### **Intervening at the Federal Court of Canada**

- CMEC is not a party to the proceeding in *Access Copyright v. York University*.
- Nonetheless, it is possible for CMEC to ask the Federal Court for permission to intervene in the proceeding.
- Intervening, if allowed by the court, would permit CMEC to submit evidence and present legal arguments to the court, essentially giving K–12 schools the right to participate in the judicial proceeding between Access Copyright and York University.

### **Intervention requirements**

To intervene in a proceeding, the party applying to intervene must show that:

1. the applicant has an interest in the outcome;
  2. the rights of the applicant will be seriously affected by the litigation; and
  3. the applicant, as intervener, will bring a unique and different perspective to the proceedings, distinct from that of the existing litigants.
- It should not be difficult for CMEC to meet these requirements.
  - The fair dealing rights of over four million teachers and students in K–12 schools are clearly at stake in any review of the legitimacy of the *York University Fair Dealing Policy*. This covers requirement 1.

- Millions of dollars in potential royalty payments are also in issue. This covers requirement 2.
- CMEC would bring the K–12 education perspective to the Federal Court — something that York University is unable to do. The fact that so many educational institutions speak with a united voice through CMEC on copyright issues would send a powerful message to the Federal Court. York University cannot send that message, but CMEC can. This covers requirement 3.
- A successful intervener becomes a participant in the proceeding, with such rights as are granted by the court. Typically, an intervener would obtain the right to make legal arguments (to file a written factum), the right to give a limited oral presentation at the trial, and the right to adduce any evidence that the court allows.

### Why CMEC should intervene

- The stakes are considerable for K–12 education in the outcome of *Access Copyright v. York University*. The gains to education from the hard fought victory at the Supreme Court of Canada could be significantly curtailed, and arguably even partially reversed, if Access Copyright won the case on the basis that the *York University Fair Dealing Policy* is unfair.
- The cost to benefit ratio is very low. The cost of intervening in this proceeding would be relatively insignificant compared to the millions of dollars that ministries and school boards currently do not have to pay to Access Copyright each year by relying, at least in part, on fair dealing and the Supreme Court’s 2012 decision. These millions of dollars may be at stake in this proceeding.
- Intervening at this point, in this case, is much less costly than having to fight a future, prolonged court case to defend the *Fair Dealing Guidelines* with a K–12 teacher, school, school board, or education ministry/department as the defendant. This presents an opportunity to “nip in the bud” Access Copyright’s argument against the education sector’s interpretation of “short excerpts” and the legitimacy of the established *Fair Dealing Guidelines*.
- CMEC is well positioned to bring the united voice of K–12 education to this legal proceeding, supporting York University’s arguments and defending CMEC’s own *Fair Dealing Guidelines* in the process.

### Timelines

- If an application for leave to appeal is to be filed, it should be filed as soon as possible.
- All the required court documents (the pleadings) were filed by Access Copyright and York University with the Federal Court by October 18, 2013.
- Applications to intervene typically follow shortly after the pleadings are complete.
- The earlier an application to intervene is made, the greater the likelihood that it will be granted by the court.

- It is not possible to accurately predict a timeline for this trial. A typical proceeding may take somewhere between six months to two years to come to trial.
- While the application to intervene should be made now, the York University case is unlikely to proceed to a hearing until mid to late 2014. A decision sometime in 2015 is probably a reasonable estimate of the time required for the court to issue its judgment.

## **Budget**

Budget estimates for applying for leave to intervene at the Federal Court are best based on the assumption that this would be a two step process. While seeking leave to intervene necessitates initial expenses, securing the funds necessary to participate in a hearing at the Federal Court would be necessary should the application to intervene be granted by the court.

### *Step 1: Applying for leave to intervene at the Federal Court*

The work to be done to prepare an application for leave to intervene includes preparing the leave application, supporting evidence and affidavit(s), replying to York University and Access Copyright's responses to the CMEC intervention application, and consulting with York University's legal counsel to coordinate efforts to defend the *York University Fair Dealing Policy*. Although difficult to predict, the estimated cost for doing the work required for step 1 would be approximately S14

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### *Step 2: The hearing at the Federal Court*

If leave to intervene is granted by the Federal Court, the next step would be to prepare for, and participate in, an oral hearing before the court. This involves preparing a factum, oral arguments, attending the hearing before the Federal Court to present CMEC's evidence and oral arguments, and responding to other possible interveners. Although it is not certain that there will be other interveners, there likely will be. Given that the issues to be considered by the court could have significant financial consequences for the Canadian publishing industry, it is prudent to assume that other interveners may wish to take part in the process as well. Preparing responses to three other interveners is taken into account in this draft budget. The estimated cost for the work involved in step 2 would be in the range of S14 Jurisdictions would only be invoiced if leave to intervene was granted.

S14

## **Recommendations**

That deputy ministers approve:

1. the CMEC Copyright Consortium's filing of an application for leave to intervene at the Federal Court of Canada as soon as possible; and
2. a total estimated budget of S14

A breakdown of jurisdictional contributions follows.

S14

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February 11, 2014

Rob Wood  
Deputy Minister  
Ministry of Education  
P.O. Box 9179, Stn Prov Govt  
Victoria, British Columbia  
V8W 9H8

Dear Mr. Wood,

Further to Memorandum CONSORTIA/2013/05, through which the deputy ministers of the CMEC Copyright Consortium approved the intervention in the lawsuit brought by Access Copyright against York University in the Federal Court of Canada and through which they approved the budgets for step 1 (2013–14) and step 2 (2014–15), you will find attached an invoice for your jurisdiction's share of the S14 total contribution for Phase I of the intervention.

Thank you for your continuing support.

Yours truly,

Andrew Parkin  
Director General

Enc.

cc Caroline Ponsford  
Director, Accountability & Business Intelligence  
Open Government & Community Partnerships Division  
and member of the Copyright Consortium Steering Committee

**cmecc**

Council of  
Ministers  
of Education,  
Canada

Conseil des  
ministres  
de l'Éducation  
(Canada)

95 St. Clair Avenue West, Suite 1106, Toronto, Canada M4V 1N6  
Tel.: 416.962.8100  
Fax: 416.962.2800  
Web: www.cmecc.ca

# Invoice / Facture

**Invoice number/Numéro de facture: 2881**

**Date: February 11, 2014**

To/À :

Mr. Rob Wood  
Deputy Minister  
Ministry of Education  
P.O. Box 9179, Stn Prov Govt  
Victoria, British Columbia  
V8W 9H8

Description	Amount/Montant
As per Memorandum CONSORTIA/2013/05, intervention in York University's litigation with Access Copyright.	
Phase 1 – British Columbia's contribution	
	S14
<b>TOTAL</b>	

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## Begley, Rhianna MTIC:EX

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**From:** MacFarlane, Paige EDUC:EX  
**Sent:** March-21-13 4:12 PM  
**To:** Elliott, Nigel G EDUC:EX  
**Cc:** Gorman, James EDUC:EX; Campbell, Carolyn ABR:EX; Ponsford, Caroline EDUC:EX  
**Subject:** copyright  
**Attachments:** 20130319133050.pdf

**Follow Up Flag:** FOI Request  
**Flag Status:** Flagged

Hi Nigel following up on our brief conversation yesterday here's the nutshell version of where we're at with this.  
Bottom line a joint response is being developed by CMEC soon as we get it we'll provide it to your office for review.

Please let me know if you need more information or if you have any questions - thanks

### Background:

- This is an ongoing, complex issue related to last year's Supreme Court decision and the enactment of federal legislation, Bill C-11.
- The Council of Ministers of Education Canada (CMEC) has been taking a common approach to copyright-related issues through the CMEC Copyright Consortium.
- A letter writing campaign was anticipated, and we expect activity in opposition to the enactment of Bill C-11 to continue.
- CERC sent a letter dated October 14 2012 to ministers - a common response was drafted by the CMEC Copyright Consortium.
- Ministry staff took part in a December 3 2012 teleconference with Gerry McIntyre, CERC and Nancy Gerrish, McGraw Hill. Staff listened to the publisher's concerns, spoke about guidelines that were to be released in January and referred the individuals to the Chair of the Copyright Consortium if they wished to discuss matters further.
- Ministry staff distributed hard copies of the guidelines document [Copyright Matters!](#) to school districts (for each teacher) in February 2013.
- Communication to superintendents has taken place in relation to the guidelines. ERAC (Educational Resources Acquisition Consortium) staff have also been involved in communicating the copyright changes to school district staff.

### Next steps:

- **The Chair of the Copyright Consortium will provide a common response to the March 11, 2013 letter. Draft wording is being prepared and will be provided for review as soon as possible.**

Thanks

**Paige MacFarlane**

Assistant Deputy Minister | Open Government and Community Partnerships | Ministry of Education

“Civilization is a race between education and catastrophe.” - HG Wells

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**From:** Elliott, Nigel G EDUC:EX  
**Sent:** Wednesday, March 20, 2013 10:48 AM  
**To:** MacFarlane, Paige EDUC:EX  
**Cc:** Dickinson, Carolyn EDUC:EX; Hamilton, Gail S EDUC:EX  
**Subject:** Canadian Educational Resources Council

Hi Paige,

As discussed here is the letter from the Canadian Educational Resources Council. You'll see that in the final paragraph the Council indicates that they are considering legal action, and would like our Ministry to contact them within ten days.

Thanks,

Nigel

***Nigel G. Elliott***

Executive Assistant to the Hon. Don McRae  
Minister of Education  
Office: 250-356-7760

**WITHOUT PREJUDICE**

March 11, 2013

MINISTER OF EDUCATION		
<b>RECEIVED</b>		
<input type="checkbox"/> M.O. #	<b>166460</b>	<input type="checkbox"/> FYI
<b>MAR 19 2013</b>		
<input type="checkbox"/> DRAFT REPLY	<input type="checkbox"/> FILE	<input type="checkbox"/> MA
<input type="checkbox"/> OTHER	<input type="checkbox"/> AC	<input type="checkbox"/> DM

Hon. Don McRae  
Minister of Education  
Box 9179 STN Prov Govt  
Victoria, BC V8W 9H8

Dear Minister McRae,

We wrote you on October 14, 2012 to express our concerns about educators' public statements regarding the Supreme Court's decision in the Access Copyright case and to seek an opportunity for dialogue in pursuit of a fair and sustainable basis for adjusting to the new copyright environment.

As both publishers and educators are aware, the Supreme Court's 5-4 decision in Access Copyright did not deal with copying at large. As the Ministers of Education emphasized in their written materials before the Supreme Court, the dispute involved a limited and spontaneous course of copying "short excerpts". On average, this activity resulted in the copying of "four and a half pages per student per year" or 7% of copies made in K-12 schools. At the outset of her oral presentation, counsel for the Ministers of Education explained that a short excerpt involved a teacher copying a "few pages" from another text to confront a specific problem encountered by a student. She told the Supreme Court that "the few pages I've asked you to imagine copying as a teacher are the short excerpts that are in dispute here".

Notwithstanding our letter of October, and without dialogue or consultation with us, your Ministry appears to have reached a conclusion that threatens educational publishing and elevates risk for all stakeholders in the market. We have been informed that your Ministry will no longer be paying royalties under the Access Copyright K-12 tariff on behalf of school boards across the province, and instead those boards will be making unremunerated copies in accordance with the "fair dealing guidelines" set out in the Copyright Matters manual issued by the Council of Ministers for Education. That manual is authored by the same counsel who delivered arguments for the Ministers of Education before the Supreme Court, but it defines a "short excerpt" in dramatically different fashion.

Under the “up to 10%” formula described at page 3 of the Copyright Matters manual, a “short excerpt” could range far beyond a “few pages” copied in reaction to a specific difficulty to a systematic practice, putting educational publishing in peril. As one of many possible examples, under that formula, Copyright Matters appears to authorize the copying of more than 85 pages of a typical 850 page senior Science textbook. Copyright Matters does not require that the copy be made spontaneously in response to a student need, but authorizes copies to be incorporated as part of a course pack issued to numerous students or as part of a digital course-management system.

Copyright Matters imposes no brakes on such acts of copying. In fact, it authorizes repeated acts of copying from a single textbook unless it is an individual teacher’s intent to copy “substantially the entire work”. It deliberately undermines the educational market by authorizing the pooling of works on course-management systems and the replacement of purchased textbooks by copied course packs. None of these activities was adjudged “fair” by the Supreme Court.

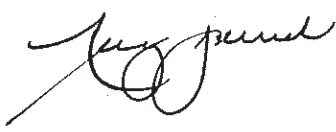
As we warned in October, adopting fair dealing guidelines that result in systematically unfair copying practices could place the Ministers of Education as well as individual school boards at risk for directly or indirectly infringing the rights of publishers and authors. The economic harm to publishers and authors is made clear by the gap between historical royalties paid to Access Copyright and those paid under the new zero payment approach unilaterally imposed by Ministers of Education across Canada. Our pursuit of a dialogue with the CMEC Copyright Consortium Subcommittee (through the Chair of that Committee) has been flatly rejected. This is unacceptable for the reasons we have stated above.

Educational publishers accept that the Supreme Court’s decision in Access Copyright has clarified fair dealing in Canada. We are willing to work reasonably and collaboratively to find a way forward that pays heed to the needs of educators and publishers and does not involve expensive and risky litigation. In other jurisdictions, there are negotiated precedents between educators and publishers that assist in understanding which kinds of copying practices in schools are more likely to be fair, and which are not. These precedents are embodied in the diagram attached at Schedule “A”, which we provide for discussion purposes only. For greater certainty, the considerations raised in Schedule “A” are not intended to bind our members if educators and publishers fail to reach a mutually acceptable solution respecting copying activities in schools. However, a review of Schedule “A” will provide an independent basis for concluding that Copyright Matters is drastically out of line with “fair” practices negotiated elsewhere.

We understand that the Ministry intends to distribute copies of Copyright Matters to teachers and administrators throughout your province’s school system. We believe that such an action would authorize the systematic infringement of our members’ copyrights and risk massive liability for the Ministry as well as for individual boards. We urge you to meet with us in advance of any such distribution to discuss ways of avoiding such a drastic turn of events.

Unless the Ministry is prepared to engage with us in meaningful efforts to address the aforementioned issues (either individually or collectively through CMEC), it forces us – along with other rights holders – to seek relief via the legal processes available to us for enforcing our rights in all affected works. We hope that this will not be the case and ask that you reach out within the next 10 days to set up a meeting with our representative publishers and their counsel.

Yours sincerely,

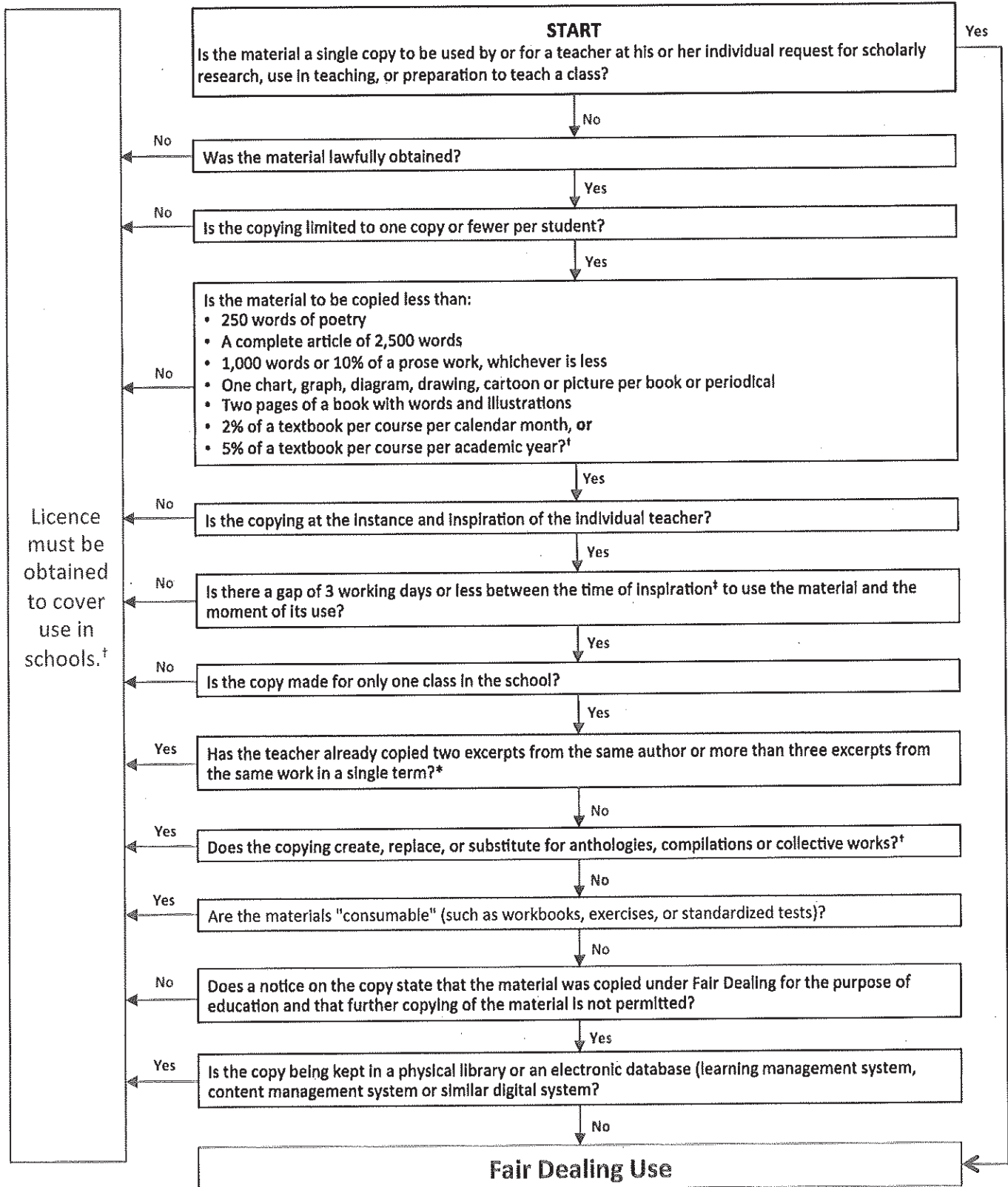
A handwritten signature in black ink, appearing to read "Nancy Gerrish". The signature is fluid and cursive, with a long horizontal stroke extending to the left.

Nancy Gerrish, Chair  
Canadian Educational Resources Council (CERC)

A handwritten signature in black ink, appearing to read "Gerry McIntyre". The signature is bold and cursive, with a large, stylized "G" and "M".

Gerry McIntyre, Executive Director  
Canadian Educational Resources Council (CERC)

**Schedule A**  
*For Discussion Purposes Only – In Furtherance of Settlement*  
**Fair Dealing Guidelines for K-12 Setting**  
(drawn from negotiated guidelines in USA and Hong Kong)



<sup>‡</sup> Use of the Material was not and could not have been planned or foreseen ahead of time.

<sup>†</sup> Access Copyright tariffs and licenses permit limited copying, typically up to 10% of a work; more extensive copying requires a licence from the publisher.

<sup>\*</sup> This limitation does not apply to newspapers, news magazines or current news sections of other periodicals.