



January 26, 2015

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319, 27th Floor
2300 Yonge Street
Toronto, ON M4P 1E4

Re: Toronto Hydro-Electric System Limited 2015-2019 Electricity Rate Application
AMPCO Submissions on the SEC CEA Motion
Board File No. EB-2014-0116

Dear Ms. Walli:

Attached please find AMPCO's submission on the SEC CEA Motion materials in the above proceeding.

Please do not hesitate to contact me if you have any questions or require further information.

Sincerely yours,

A handwritten signature in blue ink, appearing to read 'Adam White', with a long horizontal line extending to the right.

Adam White
President
Association of Major Power Consumers in Ontario

Encl.

Copies to: THESL
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ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, Schedule B to the *Energy Competition Act, 1998*, S.O. 1998, c. 15;

AND IN THE MATTER OF an Application by Toronto Hydro-Electric System Limited for an Order or Orders approving or fixing just and reasonable rates and other service charges for the distribution of electricity as of May 1, 2015;

AND IN THE MATTER OF Rule 27 of the Board's *Rules of Practice and Procedure*.

AMPCO RESPONDING SUBMISSIONS (COPYRIGHT AND CONSTITUTIONAL ISSUES) -- MOTION AND CROSS-MOTION OF THE CANADIAN ELECTRICITY ASSOCIATION

Both the right to privacy and **copyright** are **only exercisable subject to laws of disclosure** which, for example, require publication of copies of the accounts of limited companies, and copies of wills which have been proved, and copies of minutes of certain public authorities.

The laws of procedure relating to litigation also require limitations on the right to privacy and copyright. Every party to an action must disclose all documents in his possession or power relating to the matters in issue in the action, **must allow the other parties to inspect those documents and to take copies of them** and to make use of the documents and the copies and the contents for the purposes of the action in which they are revealed.

Lord Justice Templeman in *Home Office v. Harman*, [1981] Q.B. 534 at 558 (C.A.) [Emphasis added.]

Litigation cannot be conducted successfully unless the parties to the litigation and their attorneys are free to use documents that are part of the litigation....The needs of the courts prevail over the copyright holder's selfish interests..."

Circuit Judge Katzmann, U.S. Court of Appeals (2nd Cir.) in *Unclaimed Property Recovery Service, Inc. v. Kaplan*, Doc. No. 12-4030 (Aug. 20, 2013)

BACKGROUND

1. AMPCO submits this written argument in response to the CEA's quite outrageous submission that *Copyright Act* considerations (and "federal paramountcy" issues supposedly flowing from the *Copyright Act* issues) would prevent the Board from granting the SEC's motion for production of certain benchmarking studies, even if the Board concludes that the benchmarking studies satisfy the relevance test in Rules 26 and 27 of the *OEB Rules*.
2. Copyright does not apply to the disclosure and copying of relevant documents as between parties to litigation, done in accordance with the statutorily authorized rules governing such disclosure and copying. As courts have recognized for decades, the public interest in seeing disputes resolved fairly and on the facts outweighs the purely private economic interests protected by copyright in these circumstances -- which is why it is virtually unheard of for litigants to make allegations of copyright infringement as a result of orders to produce copies of documents pursuant to the rules of practice and procedure of courts and tribunals. Indeed, in this proceeding, before a statutory Board with a public interest mandate, the public interest to disclose weighs even more heavily than in a private dispute between litigants in court.
3. Furthermore, even if copyright considerations were material to the Boards' decision on whether to order production of benchmarking studies), the CEA has failed to prove *any* of the elements of a copyright infringement case: that copyright *exists* in the works, that the CEA *owns* the copyright, and that copyright would be *infringed*.

COPYRIGHT CONCERNS DO NOT ARISE WHEN DOCUMENTS ARE DISCLOSED AND COPIED FOR LITIGATION IN ACCORDANCE WITH APPLICABLE RULES OF PRACTICE AND PROCEDURE

In Litigation, Copyright Rights Give Way to the Public Interest in Resolving Disputes Fairly

4. The CEA's principal submission is that if the Board were to grant SEC's motion, this would result in a violation of CEA's copyright under the *Copyright Act*. (CEA's submission that such an order would in addition be unconstitutional by virtue of the doctrine of federal paramountcy depends entirely upon its underlying submissions that copyright exists in the reports, is owned by the CEA, and would be infringed in the first place -- all of which the CEA has failed to prove, and all of which AMPCO denies.)
5. CEA's assertion of copyright infringement because of disclosure and copying in the course of litigation is remarkable. It is virtually unheard of for litigants to make allegations of copyright infringement as a result of orders to produce copies of documents pursuant to the rules of practice and procedure of courts and tribunals. That is because it has long been understood that, on public policy grounds, copyright law simply does not apply to such disclosure and copying.

6. The issue was addressed in the 1981 English Court of Appeal decision in *Home Office v. Harman*, which was a case about a lawyer who disclosed to a journalist documents produced to the lawyer on discovery in litigation. Lord Justice Templeman of the English Court of Appeal observed that while the owner of a document may presumptively keep it private, and the owner of copyright in the contents (who may well be a different person) may prevent re-publication of the contents, these rights are subordinate to laws that require disclosure, such as laws that require public companies to publish their accounts and public authorities to publish their meeting minutes.
7. Similarly, “[t]he laws of procedure relating to litigation also require limitations on the right to privacy and copyright. Every party to an action must disclose all documents in his possession or power relating to the matters in issue in the action, must allow the other parties to inspect those documents and to take copies of them and to make use of the documents and the copies and the contents for the purposes of the action in which they are revealed.”
8. Professor David Vaver, one of the leading copyright scholars in the world, cited this case in his text *Intellectual Property Law*¹ as support for his statement that material produced on discovery in litigation may be copied for the purposes of the litigation (but not for sale).
9. The United States Court of Appeals for the Second Circuit (covering New York, Vermont and Connecticut) recently had to deal with an attempt by a party’s former lawyer to use copyright to try to frustrate the litigation process. In *Unclaimed Property Recovery Service v. Kaplan*,² a party’s former lawyer tried to assert his copyright in a pleading in order to prevent the lawyer who replaced him from re-filing a copy of the pleading.
10. The Court described the question as “an issue of first impression”. The fact that copyright in a pleading was an “issue of first impression” in 2013 speaks to the fact that parties so rarely raise copyright issues related to the disclosure and production of litigation documents -- precisely because it is so clear, and has long been clear, that copyright cannot be used as a strategic tool to frustrate the rules of civil litigation and the fair resolution of disputes in the public interest.
11. The U.S. Second Circuit (Circuit Judge Katzmann, now Chief Judge Katzmann) rejected the former lawyer’s attempt to invoke his copyright in his pleading to prevent its re-filing by the new lawyer. The Court observed that “[l]itigation cannot be conducted successfully unless the parties to the litigation and their attorneys are free to use documents that are part of the litigation. The parties rely on such documents as a means of establishing the nature of the dispute and the facts and legal arguments that have been put forward by each party. This is true at both the trial and the appellate levels.”

¹ 2nd Edition, Irwin Law, 2011, at p.221

² Docket No. 12-4030, August 20, 2013, available at: <http://www.gpo.gov/fdsys/pkg/USCOURTS-ca2-12-04030/pdf/USCOURTS-ca2-12-04030-0.pdf>

12. In comments that are reminiscent of Lord Justice Templeman's comments about copyright giving way to the greater public interest, Circuit Judge Katzmann added that "[a] court's ability to perform its function depends on the ability of the parties (and their attorneys) to put before it copies of all the documents in contention and to serve one another with copies of such documents." Needless to say, the same applies to a regulatory tribunal, subject to the reality that the public interest deserves even greater weight in these circumstances.
13. In short, for reasons of public policy -- the fair and fact-based resolution of disputes in public courts and tribunals -- which are as applicable in Canada as in the U.K. and the U.S., copyright simply cannot be invoked in the manner in which the CEA seeks to invoke it to frustrate the operation of the duly enacted rules of litigation.
14. CEA's remarkable copyright submission, if accepted, leads to the conclusion that every provincial superior court's rules of civil procedure that require persons to disclose copies of their relevant documents are unconstitutional violations of federal copyright law and are violations of federal paramountcy because the provincial civil rules committees are (as the CEA states³ this Board is) "constitutionally inferior provincial tribunals". CEA's submission is clearly wrong.

Copyright Act is NOT a "Complete Code" when it Comes to Defences, Exceptions and Users' Rights

15. The CEA's argument depends heavily upon an incorrect assertion that the *Copyright Act* is a "complete code" of defences and exceptions to copyright infringement (see, for example, paragraph 43 of the CEA's written argument). The CEA's assertion is wrong.
16. The *Copyright Act* is certainly a "complete code" of copyright *rights and remedies*, in the sense that persons asserting copyright must be able to point to something specific in the *Copyright Act* that grants the right and gives the remedy. The *Copyright Act* says so explicitly: section 89 provides that "[n]o person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament, but nothing in this section shall be construed as abrogating any right or jurisdiction in respect of a breach of trust or confidence." However, the *Copyright Act* is **not** a "complete code" of defences, exceptions and users' rights, as the CEA's own materials make very clear.
17. An excellent example is found in the CEA's written argument, at paragraph 56, in which the CEA sets out the six-part "fair dealing" test stated by the Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada*.⁴ This six-part test is *entirely* judge-made law. The *Copyright Act* itself simply mentions "fair dealing" for the purpose of research, private study, etc. as a defence and sets

³ CEA written argument, para. 64.

⁴ 2004 SCC 13.

out *no* criteria to define what a “dealing” is, or what makes it “fair” or not. These principles are entirely judge-made.

18. Similarly, Professor Vaver points out that while “[c]opyright is protected solely under the *Copyright Act*”, several exemptions to copyright constitute “common law rights and immunities”, to which he devotes an entire section, the very first section under “Part J -- Users’ Rights: Free Use”:

- Copying material under certain federal legislation is allowed, while “other legislation requiring or allowing copying may also implicitly exempt copying from infringement....[M]aterial on public registries and material produced on discovery in litigation may be copied for the purposes of the litigation, but not for sale.” (pages 220-221).
- “A property owner has a common law right to repair, modify, or destroy his property as he wishes, but the exercise of the right may be affected by copyright or moral rights. Some repairs are outside copyright altogether...” (pages 219-220).
- “At common law, copyright may be overridden for public interest reasons. So, for example, the need to promote the administration of justice may justify copying a judge’s reasons for judgment, or material for one’s lawyer to file in anticipation of litigation. But that need will not justify the prosecution in withholding relevant documents from a defendant...or a party in objecting to the production of transcripts of evidence or other material generated for judicial proceedings to other parties.” (page 218).
- “Whistleblowers are sometimes excused from infringing copyright when they copy private documents and hand them over to a newspaper for publication.” (page 219).

19. The CEA’s materials provide another excellent example of the *Copyright Act* not constituting a complete code of copyright law. At paragraph 59 of its written argument, the CEA invokes and relies upon the 2013 decision of the Federal Court of Appeal in *Manitoba v. Access Copyright*.⁵ This decision established that the *Copyright Act* **implicitly** binds the federal and provincial Crowns -- even though the *Copyright Act* lacks the explicit statement that is required by law⁶ to be present in an Act if the Act is to bind the Crown. Clearly and obviously, the *Copyright Act* is not a complete code, except in the limited sense that copyright *rights and remedies* must be found in the Act.

20. When it comes to intellectual property statutes, it is always dangerous and wrong to assume that all of copyright law is found in the *Copyright Act*, or that all of patent law is found in the *Patent Act*, merely because of statements that the Act is a “complete code” or the law is “wholly statutory”. As

⁵ 2013 FCA 91.

⁶ By legislation such as the federal *Interpretation Act*, s. 17, and the Ontario *Legislation Act*, s. 71.

the Supreme Court of Canada reminded us in 2008, in the context of patent law, while “the law of patents is wholly statutory...judge-made doctrine has over the years done much to clarify the abstract generalities of the statutes and to secure uniformity in their application.”⁷

21. The *Copyright Act* is not a complete code when it comes to users' rights, defences and exceptions, and it is well established that disclosing and copying documents in accordance with the rules governing litigation is permitted.

EVEN IF COPYRIGHT LAW APPLIED TO DISCLOSURE AND COPYING OF DOCUMENTS FOR LITIGATION, CEA HAS FAILED TO PROVE ANY OF THE ELEMENTS OF A COPYRIGHT INFRINGEMENT CASE

22. The CEA asserts that copyright infringement would result if the Board made the order sought by the SEC. AMPCO denies, as set out above, that copyright is at all germane to the issue. However, even if it were, the CEA, as the party asserting copyright, had the burden to prove the elements of a copyright case: that copyright subsists in the works, that the CEA is the owner or assignee of copyright, and that copyright would be infringed. The CEA, as explained below, has utterly failed to meet its burden with respect to all of these elements. It is worth mentioning that the only evidence in support of the CEA's copyright arguments is the affidavit of Francis Bradley, which does not even mention copyright. The CEA makes three important assertions in its written argument which are completely unsupported by any evidence: that the CEA Property is made up of “original works, developed with skill and knowledge” of the CEA and its members (paragraph 47 of the CEA's written argument), that the CEA is the “assignee” of the IP in the CEA Survey Reports (paragraph 48 of the CEA's written argument) and that the CEA is the “copyright owner” of 7 of the 8 reports at issue (paragraph 2 of the CEA's written argument).

No Evidence and No Explanation as to Whether Copyright Exists

23. Under section 5 of the *Copyright Act*, copyright subsists in every original literary work if the author of the work (i.e., the human being who created it) was a citizen, subject or ordinary resident of a Berne Convention or World Trade Organization country.
24. The key requirement here is “originality,” which obviously includes the requirement that the work itself must not have been copied from another work. However, it means much more than that. As Chief Justice McLachlin explained (speaking for the Court) in *CCH Canadian v. Law Society*, at para. 16:

⁷ *Apotex Inc. v. Sanofi-Synthelabo Canada Inc.*, 2008 SCC 61, para. 12 (Rothstein J.), quoting from Lord Walker in *Synthon B.V. v. SmithKline Beecham plc*, [2006] 1 All E.R. 685 (H.L.).

What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce "another" work would be too trivial to merit copyright protection as an "original" work.

25. The mere fact that the creation of a work involved "industriousness" or "sweat of the brow" is not sufficient to make a work "original" under Canadian copyright law.⁸
26. Again, the only evidence in support of the CEA's copyright arguments is the affidavit of Francis Bradley, and there is simply nothing in the Bradley affidavit that speaks to the *CCH Canadian* criteria for originality. The Board cannot simply assume that the reports in issue satisfy the originality criterion in the *Copyright Act*, yet the CEA has failed to adduce *any* evidence that would tend to prove that the (unidentified) authors of the reports used their knowledge, developed aptitude or practised ability in producing the works, or used their capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the reports. There is simply no evidence that the production of the reports involved anything more than industriousness -- which is not enough to make a work "original" and thus copyrightable. There is not even evidence that industriousness was required.
27. For example, at paragraph 19 of the Bradley Affidavit, the affiant testifies that the annual service continuity reports on distribution system performance are "versions" of a report prepared by the CEA for nearly three decades. There is no evidence that the work that goes into preparing a new "version" of a report that the CEA has been preparing for three decades involves anything more than non-copyrightable data collation or sweat of the brow.
28. As an additional example, at paragraph 20 of the Bradley Affidavit, the affiant testifies that the CEA, in order to produce the CEA Benchmarking Reports, "collects confidential CEA Data from participating members. It then analyzes this data using the CEA Data Models, which is comprised of CEA intellectual property, including methodology, data sets, modelling and analytical metrics that have been developed and are owned by the CEA as part of its commercial endeavour." There is no evidence as to how this results in originality and thus copyright for the resulting report.

⁸ *CCH Canadian*, para. 15.

“Methodologies”, “modelling” and “analytical metrics” are not the subject of copyright since copyright protects expression only, not ideas, schemes or systems, no matter how hard it was or how long it took to produce or develop the concept.⁹

No Evidence and No Explanation as to Whether and How the CEA is the Owner of Copyright

29. The most serious concern in all of this arises with respect to another crucial element of a copyright case, namely that the claimant must prove that it is the *owner* of the copyright, or is a person *deriving a right, title or interest by assignment or grant in writing from the owner*.¹⁰
30. There are bare assertions in the CEA’s written argument that the CEA is the “copyright owner”. There is no evidence in support of these assertions. Instead, there is evidence that leads to serious doubt as to how the CEA could be the owner of copyright in the reports.
31. There is evidence that CEA owns the “reports”, but that is not evidence that CEA owns the *copyright in the reports*. This distinction is fundamental to copyright law. I may buy a copy of the latest Harry Potter book and thereby become the owner of the book -- giving me the right to give the book away, or destroy it, or highlight it. I am *not*, however, the owner of *copyright* in the book (J.K. Rowling or more likely her publisher is), so I cannot photocopy the book and distribute the photocopies.
32. Lord Justice Templeman pointed out this fundamental distinction --- the distinction between owning the thing and owning the copyright in the thing -- at the beginning of his judgment in *Home Office v. Harman*:
- A person who owns a document may keep that document and its contents secret and private. A person who owns the copyright in the contents of a document may prevent the re-publication of those contents. **The owner of the document and the owner of the copyright are not necessarily the same person.** Both the right to privacy and copyright are only exercisable subject to laws of disclosure which, for example, require publication of copies of the accounts of limited companies, and copies of wills which have been proved, and copies of minutes of certain public authorities.
[Emphasis added.]
33. Evidence that the CEA owns “the reports” is therefore no evidence that the CEA owns the copyright in the reports. There is no evidence that the CEA owns the copyright in the reports, although the CEA makes that assertion in its written argument.

⁹ Vaver, p. 59.

¹⁰ *Copyright Act*, s. 34 and 41.23.

34. Under the *Copyright Act*, the first owner of copyright in a work is the work's author, i.e., the human being who created it. However, where the author was an employee who created the work in the course of his or her employment, the employer is the first owner of copyright in the work, unless there is an agreement to the contrary. Ownership of the copyright may be transferred by *written assignment*.¹¹
35. Notably, freelancers, even paid freelancers, are therefore the owners of copyright in the commissioned works they author, absent an agreement to the contrary, because freelancers are not employees of the persons commissioning the works.¹²
36. The reports in issue here are identified at paragraph 3 of the Bradley affidavit as follows:
- (a) 2014 National Attitudes Report (Innovative Research Group Inc.);
 - (b) 2013 Public Attitudes Research Report (IPSOS Reid);
 - (c) 2012 Public Attitudes Research Report (IPSOS Reid);
 - (a)[sic] 2011 Public Attitudes Research Report (IPSOS Reid);
 - (b)[sic] 2014 Multi-Client Budget Benchmark Report (Information Technology) (the "Gartner Report");
 - (c)[sic] 2013 Service Continuity Data on Distribution System Performances in Electrical Utilities (CEA);
 - (d)[sic] 2012 Annual Service Continuity Report on Distribution System Performance in Electrical Utilities (CEA); and
 - (e)[sic] 2011 Service Continuity Data on Distribution System Performance in Electrical Utilities (CEA).
37. In relation to the Innovative Research Group, IPSOS Reid and Gartner Reports, there is no evidence as to who the authors of those reports were. If the authors of, say, the Innovative Research Group report were employees of Innovative Research Group who authored the report in the course of their employment, then Innovative Research Group was the first owner of copyright (unless there was an agreement between the authors and Innovative Research Group to the contrary -- there is no evidence that speaks to this -- in which case the authors were the first owners of copyright). There is no evidence and no explanation as to how the CEA could have become the owner of copyright in

¹¹ *Copyright Act*, s. 13.

¹² Vaver, p. 125.

those reports. In particular, there is no evidence of a written assignment of copyright, as required by the *Copyright Act*.

38. Nevertheless, the CEA states baldly in its written argument (para. 48) that it is the “assignee” of the CEA Survey Reports.
39. The Bradley Affidavit does state at para. 18 that the CEA’s contracts with Innovation Research Group Inc. and IPSOS Reid provide for the CEA being the sole owner of the CEA Survey Reports. However, as stated above, owning the reports is not the same thing as owning copyright in the reports. Because the CEA’s evidence in support of its copyright arguments is so flimsy, and gives absolutely no detail as to the terms of the CEA’s contracts with Innovation Research Group and IPSOS Reid, there is no evidence of any written assignment of copyright which could have permitted CEA to step into the shoes of Innovation Research Group or IPSOS Reid as the owner of *copyright* in the reports.
40. As for items (c), (d) and (e) (the Service Continuity reports designated “CEA” in paragraph 3 of the Bradley Affidavit), the evidence is similarly insufficient to explain and prove how the CEA could have come to own the copyright in the reports. According to the Bradley Affidavit (para. 19), the CEA Benchmarking Reports were designed with “the substantial involvement of the CEA and consultation with CEA members.” To the extent that this “consultation” (the nature of which Mr. Bradley does not explain) involved drafting text involving the exercise of skill and judgment, copyright would be owned by the relevant CEA member, or perhaps by the employee who drafted the text. There is no evidence and no explanation as to how the CEA could have become the owner of copyright.
41. As for the 2011, 2012 and 2013 service continuity reports, there is again evidence that the “reports are owned by the CEA” (para. 21 of the Bradley Affidavit), but there is a lack of evidence that the CEA owns the copyright in the reports, and what evidence there is casts doubts on whether this could be the case.
42. The closest the CEA has provided to evidence on this point is that the CEA’s employees are the authors of the “CEA Data Models” and that the “CEA Data Models were used extensively” to prepare the CEA Benchmarking Reports. There is no evidence as to how the CEA Data Models were used, and by whom, to “prepare the CEA Benchmarking Reports”. There is no evidence that this use required skill and judgment so as to satisfy the originality requirement, and there is no evidence as to who did this -- in particular, no evidence that the authors were CEA employees acting in the course of their employment and not party to any agreement that they would retain copyright in their works.

No Infringement -- Any Copying Would be Fair Dealing for Research or Private Study or Both

43. Assuming copyright has any relevance to the production of relevant documents in litigation (which is denied), and assuming that copyright subsists in the reports and that the CEA owns copyright (both of which are denied), the CEA has failed to demonstrate that copyright infringement would result from an order by the Board as sought by the SEC as against THEC.
44. Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.¹³
45. If the Board were to grant the SEC's motion on the basis that the reports whose production is sought are relevant, any reproduction of the reports would constitute fair dealing for the purpose of research, or private study, or both.
46. The Supreme Court of Canada clarified in *CCH Canadian v. Law Society of Upper Canada* that "research" must be given a large and liberal interpretation, and is not limited to non-commercial or private contexts. Research for the purpose of advising clients, giving opinions, arguing cases, or preparing briefs and factums, even for remunerative work for paying clients, is still research. Lawyers carrying on the business of law for profit are conducting research within the meaning of section 29 of the *Copyright Act*.¹⁴
47. Similarly, the Supreme Court of Canada recently observed in *Alberta v. Access Copyright*¹⁵ that the "private" aspect of "private study" does not require users to "view copyrighted works in splendid isolation." Studying documents and learning from them are essentially personal endeavours, whether they are engaged in with others or in solitude, and there appears to be no requirement that "private study" can only exist in the context of earning a degree or a diploma. If the SEC's motion is granted, any copying of CEA copyrighted works would constitute dealing for the permitted purposes of research, or private study, or both.
48. Whether the dealing is "fair" is, as the CEA observes, assessed in view of the six-part test stated in *CCH Canadian*:
- *Purpose of the dealing*: Just as in the *CCH* case itself, which dealt with lawyers' use of copied cases for the purpose of assisting clients including paying clients, any dealing here would be for the purpose of research (or, alternatively, private study) in order to assess and evaluate legal positions and arguments. Just as in *CCH*, this dealing would be fair.

¹³ *Copyright Act*, s. 29.

¹⁴ *CCH Canadian v. Law Society of Upper Canada*, para. 51.

¹⁵ 2012 SCC 37.

- *Character of the dealing*: The SEC does not seek production of copies of the reports in order to sell them for profit, or distribute them to the public. A small number of copies would be used for the purposes of the litigation. This dealing would be fair.
- *Amount of the dealing*: For the purpose of research or private study, it may be essential to copy an entire work, as the Supreme Court observed in *CCH*.¹⁶ Furthermore, when an order is made to produce a document because the tribunal is satisfied that the document is relevant, normally the entire document is produced, subject only and exceptionally to redactions to preserve a statutory or common-law privilege. No such privilege is asserted by the CEA. This dealing would be fair.
- *Alternatives to the dealing*: If the Board grants the SEC's motion on the basis that the documents sought are relevant, there is no alternative to the dealing. The very documents themselves will have been held to be relevant. This dealing would be fair.
- *Nature of the work*: The Supreme Court's comments at paragraph 58 of *CCH* that the scales may be tipped in favour of unfair dealing if the work is confidential, must be taken in context. That comment began with a statement that "if a work was unpublished, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider dissemination of the work -- one of the goals of copyright law." In other words, the Supreme Court was contemplating a situation in which an unpublished work became published.¹⁷ As this would not occur here, the scales would not be tipped towards unfair dealing.
- *Effect of the dealing on the work*: As the CEA does not sell the full reports or make them available to the public (on the evidence, it only sells sanitized versions to the public via the CEA website), there would be no effect on the work. The dealing would be fair. The CEA's submission on this point addresses what it says would be the effect of disclosing "the CEA Property", but this is not germane -- this prong of the *CCH* test focuses on the effect of the dealing *on the work*, not the alleged effect of disclosure or copying on the CEA.

49. The CEA's submission¹⁸ that "fair dealing" is not available to the provincial Crown or to the Board, on the basis that the *Copyright Act* supposedly deals with government rights exhaustively, is irrelevant and also wrong in law.

¹⁶ At para. 56.

¹⁷ In the context of the *Copyright Act*, "publication" of a work means making copies of it available to the public: *Copyright Act*, s. 2.2(1)(a)(i). It does not include merely showing the work or a copy of it to someone, or even to more than one person.

¹⁸ CEA written argument, para. 55.

50. It is irrelevant because if the SEC succeeds on its motion, the Board will make an order for production of documents to the SEC, and the SEC will be the entity engaging in a “dealing” with the works. The Board itself may never “deal” with the works.
51. The CEA’s submission is wrong in law because it is obvious that the *Copyright Act* does not deal exhaustively with government rights. The *Manitoba v. Access Copyright* Federal Court of Appeal decision, cited and relied upon by the CEA, establishes that the *Copyright Act* binds the federal and provincial Crowns even though it *fails* to say so explicitly. Clearly, the *Copyright Act* does not deal exhaustively with government rights.
52. Fair dealing is “an integral part of the scheme of copyright law,” is “always available” and is a “user’s right”.¹⁹ There is no principled reason why the Crown would be unable to avail itself of fair dealing.

CONCLUDING COMMENTS

53. The CEA has devoted a substantial portion of its written argument to addressing the test for production from non-parties. These principles are not germane as the SEC’s motion seeks production only of those CEA benchmarking studies which THESL has in its possession. The SEC’s motion is for production from a party.
54. Finally, the CEA ascribes some significance to the fact that the *Ontario Energy Board Act* and the *Statutory Powers Procedure Act* are silent with respect to the *Copyright Act*. That is true; indeed, the *Courts of Justice Act*, the *Rules of Civil Procedure*, and the superior court rules of all of the provinces are also silent with respect to the *Copyright Act*. AMPCO respectfully submits that this is because, as stated at the outset, copyright considerations simply do not apply to the disclosure and copying of relevant documents between parties to litigation pursuant to the applicable rules of procedure.
55. AMPCO respectfully requests that the CEA’s copyright arguments be rejected.

¹⁹ *CCH*, paras. 48, 49.