

Federal Court



Cour fédérale

Date: 20240531

Docket: T-1862-15

Citation: 2024 FC 829

Ottawa, Ontario, May 31, 2024

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

**1395804 ONTARIO LTD, operating as
BLACKLOCK'S REPORTER**

**Plaintiff/
Respondent on Motion**

and

ATTORNEY GENERAL OF CANADA

**Defendant/
Moving Party**

and

**SAMUELSON-GLUSHKO CANADIAN
INTERNET POLICY & PUBLIC INTEREST
CLINIC**

**Intervener/
Respondent on Motion**

JUDGMENT AND REASONS

[1] The Attorney General of Canada [AGC], the Defendant in the action launched by 1395804 Ontario Ltd, operating as Blacklock's Reporter [hereinafter "Blacklock's Reporter" or "BR" or "Plaintiff/Respondent on Motion"], is the Moving Party seeking a summary judgment against the Plaintiff.

[2] This matter turns on a subscription to Blacklock's Reporter, which is a subscription-based news corporation based out of Ottawa. An officer at Parks Canada purchased a \$148 subscription to Blacklock's Reporter, using a Parks Canada Agency credit card and address. Blacklock's Reporter launched against the Defendant, acting on behalf of Parks Canada, an action alleging that officers at Parks Canada used the subscription in a way that is contrary to the *Copyright Act*, (RSC 1985, c C-42) [the *Act*] by obtaining, reading and distributing news articles without proper authorization.

[3] However, as I will explain, the matter in dispute reached the Court in a rather tortuous way. While Blacklock's Reporter discontinued its action, the Defendant raced to the Court in order to counterclaim against the Plaintiff. The Attorney General also brought a summary judgment motion pursuant to Rule 213 of the Rules of the Federal Courts (SOR/98-106). That constitutes the matter which is before the Court. As a result, Blacklock's Reporter is now the "Plaintiff/Respondent on Motion", while the Attorney General, acting on behalf of the original Defendant, is now the "Defendant/Moving Party".

I. How did we get here?

[4] Blacklock's Reporter chose to discontinue its action against Parks Canada on July 6, 2020. Nevertheless, the Defendant sought to keep some of the matters that would have been included in the discontinued action alive by serving an amended Statement of Defence and Counterclaim on Sunday, July 5, 2020. It was filed with the Court on July 7. However, Blacklock's Reporter argued that its discontinuance of its action resulted in the motion for summary judgment being without object.

[5] I pause to give some more background to these proceedings. A number of actions against federal departments and Crown corporations have been launched by BR. They all allege copyright infringement, but the facts in each such action were found to be different by Case Management Judge Tabib, in her Order of March 3, 2016 (T-1862-15). She found that the news articles were different and often involved different authors as well as different acts of infringement, including the copying and transmission to others within the entity. There are also similarities between the cases: the theory of the case for the Plaintiff in each case appears to be similar. The Defendants were all claiming to be operating on the basis of fair dealing (*Copyright Act*, s 29) in that the subscriptions purchased were used to share within the organization articles to conduct research, media monitoring, verification of accuracy or consideration of whether a response was required.

[6] Associate Judge Tabib determined that the pending actions were to be stayed, in spite of BR's resistance, until after one of those actions, involving the Department of Finance

(T-1391-14), was finally concluded. The Case Management Judge held the faint hope that case T-1391-14 would lead to “a very high likelihood that it will lead to a significant narrowing of the issues” (Order of March 3, 2016, p 6/7). Associate Judge Tabib alluded to the possible application of the principles of issue estoppel in a number of future cases.

[7] Blacklock’s Reporter challenged the ruling. In a Judgment dated June 27, 2016 (2016 FC 719), Gascon J found that the appeals had to be dismissed, with costs amounting to \$10,500 to be paid by BR (Order of August 16, 2016). Gascon J indicated in his Judgment of June 2016 that BR complained that Associate Judge Tabib speculated on the question of the application of the doctrine of issue estoppel, a matter that was argued before this Court in this case. He disposed of the issue as follows: “This statement clearly indicated that *issue estoppel* could help streamline cases where the AGC is a Defendant, but it did not suggest or imply that this doctrine could apply to the other Defendants” (para 63).

[8] The Department of Finance case, the so-called “test case”, was decided on November 10, 2016. It did resolve little concerning the other pending cases. The next one in the queue was the one involving Parks Canada. The matter of filing an amended Statement of Defence and Counterclaim by the AGC in the Parks Canada case was challenged by Blacklock’s Reporter. By an Order dated April 29, 2021, Case Management Judge Molgat found that the Statement of Defence and Counterclaim should be allowed to proceed, following written submissions made by the parties.

[9] We learn from the Order that the summary judgment motion made by the AGC was the sticking point. The AGC's contention was that the motion would help resolve related actions. The genesis of what became the amended notice of motion for summary judgment after the events of July 2020 is found in the AGC's motion for summary judgment. The AGC sought the dismissal of the parts of the Plaintiff's claim that relate to the contention that there was a breach in this case of technological protection measures (TPMs, as per section 41 et al of the *Copyright Act*). The AGC was also asking for an order confirming that the use of articles obtained through a subscription constitutes "fair dealing" in the circumstances of the case: there was therefore no violation of the *Act*, says the AGC. That is because "fair use" is an exception to the TPM provisions. The obtaining of a subscription gives access to a password that can be shared in pursuit of the "fair use".

[10] It is reported in the Order of April 29, 2021, that, leading up to the kerfuffle in early July 2020, Blacklock's Reporter gave instructions to counsel "to proceed to the case management conference without a timetable for the summary judgment motion in Parks Canada (T-1862-15)" (Order of April 29, 2021, p 4/14). It appears that there were discussions between the parties to consider such motion.

[11] There were no further developments until April 2020. Blacklock's Reporter requested a case management conference advising that "Blacklock's is inclined to forego the summary judgment motion in Parks Canada (T-1862-15) and have Health Canada (T-117-17) proceed" (Order of April 29, 2021, p 4/14). The AGC submitted a detailed timetable for his motion for summary judgment in this case. That led to a CMC on July 3, 2020, where the Case Management

Judge advised that an Order establishing a timetable for the motion for summary judgment would be issued. It is then that Blacklock's Reporter, through its counsel, announced that it would discontinue its action against Parks Canada.

[12] Following the incidents of early July 2020, the issue became whether the motion for summary judgment should proceed. That takes us to the Order of April 2021. Case Management Judge Molgat had to adjudicate whether the counterclaim was still alive in spite of the discontinuance of the "main action". Associate Judge Molgat found that the amended motion record of August 27, 2020 (an amended Statement of Defence and Counterclaim had come on the heels of the events of July 3 to 6, 2020) was alive and well. Recognizing that a discontinuance ends the proceedings (*Olumide v Canada*, 2016 FCA 287), that result would be attained only if the discontinuance is filed prior to the counterclaim. The counterclaim had been served on Blacklock's Reporter on Sunday, July 5, prior to the discontinuance of July 6; at any rate, the "Counterclaim was served and was submitted for filing, with proof of service, prior to service of the Discontinuance by the Plaintiff, and they were properly entered and filed by the Registry in the same sequence" (Order of April 29, 2021, p 9/14).

[13] The Case Management Judge then proceeded to dispense with compliance with Rule 172 and grant leave *nunc pro tunc*. Associate Judge Molgat wrote at p 12/14:

Apart from the prospect of now facing a counterclaim and the motion for summary judgment filed, the Plaintiff has not demonstrated that it will suffer prejudice or injustice if leave to file the Counterclaim is granted or dispensed with. In all the circumstances, I conclude that it is in the interest of justice and in the spirit of Rule 3 and the simplified rules to do so. The requirement to obtain leave to file the Counterclaim will therefore be dispensed with.

...

Given the potential for the motion to dispose of most if not all of the Related Actions, I am satisfied that allowing the motion to proceed is the option that best achieves the interest of justice and the just, most expeditious and least expensive determination of the issues.

[14] Blacklock's Reporter appealed the Order of the Case Management Judge. Madam Justice McDonald heard the appeal and dismissed it on August 25, 2021 (2021 FC 872).

[15] McDonald J found that the fact that the Amended Statement of Defence and Counterclaim was filed prior to the notice of discontinuance allowed for the motion for summary judgment to proceed. My colleague wrote: "If the discontinuance was filed before the Counterclaim was filed, the action would have been concluded and the summary judgment motion could not proceed. Whereas, if the Counterclaim was filed first, the Discontinuance would not apply to the claims advanced in the Counterclaim" (para 5). In the result, there is discontinuance of Blacklock's Reporter's action, but the AGC's motion remains alive and was heard by the Court. However, the nature and quality of the evidence to be adduced was not known at the time. Whether a decision on the motion for summary judgment would help streamline the process concerning the other lawsuits was not a certainty, but rather a hope.

[16] As already alluded to, there are a number of related actions launched by Blacklock's Reporter against various federal government departments and agencies. Indeed the first such action, involving the Department of Finance and alleging a violation of the *Act* by obtaining, reading and distributing articles without authorization, was dismissed in November 2016. The other related actions are held in abeyance. The matters to be addressed in this case may have an

impact in the other Court cases still pending. At least, that is the contention of the AGC. The motion seeks declarations concerning three distinct matters:

1. The Terms and Conditions relative to the subscription to gain access to a website in order to have available articles. The subscription is offered and sold by the Plaintiff.
2. The use made of articles accessed by Parks Canada, said by the Defendant to constitute “fair dealing” in accordance with s 29 of the *Copyright Act* RSC 1985, c C-42.
3. Do the activities conducted by Parks Canada, i.e. the sharing of a password required to access articles from the Plaintiff’s website, constitute circumvention of technological protection measures taken by the Plaintiff?

II. The parties

[17] The Respondent on the motion, an Ontario numbered company operating as Blacklock’s Reporter, is an online news corporation based in Ottawa. It makes available articles on a subscription basis via its website. BR covers politics, legislation, parliamentary committees, the federal bureaucracy as well as the courts. It has court cases pending concerning various departments and agencies. The first such court action was with respect to civil servants in the Department of Finance. It appears that this first test case did not resolve much as a second case, involving officers at Parks Canada, was litigated until a discontinuance intervened. Nevertheless, the Crown kept some matters alive in the hope of getting some declarations that could then be used in other litigation between Blacklock’s Reporter and various defendants.

[18] This case involves the Parks Canada Agency which is established pursuant to the *Parks Canada Agency Act* (SC 1998, c 31). The Agency is made a body corporate, under the responsibility of the Minister of the Environment, “that may exercise powers and perform duties and functions only as an agent of Her Majesty in right of Canada” (s 3). The long preamble to the *Act* speaks of the purpose of the Agency to be to ensure “that Canada’s national parks, national historic sites and related heritage areas are protected and presented for this and future generations and in order to further the achievement of the national interest as it relates to those parks, sites and heritage areas and related programs”. The Agency has the power to enter into contracts, to acquire property, sell, loan, exchange or dispose of any personal property or moveables acquired, or deal in the intellectual property controlled or administered by it (s 8). Legal proceedings may be brought or taken by or against the Agency in the name of the Agency (s 18).

[19] Following this Court’s decision on the ability of the AGC to counterclaim in spite of the discontinuance of the underlying action, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic [CIPPIC] sought to intervene in this matter, pursuant to Rule 109 of the *Federal Courts Rules*. The Case Management Judge’s Order of January 21, 2022 notes the opposition to the intervention by Blacklock’s Reporter while the AGC supported it. The Court granted leave to intervene.

[20] What prompted the Court to grant leave was Blacklock’s Reporter’s contention that access to its online articles was performed through the circumvention of its TPM, that being contrary to s 41.1(1)(a) of the *Act*. Indeed, does fair dealing constitute an exception to the TPM

provisions, assuming that the required password can be a technological protection measure as the notion is defined. Here is how Associate Judge Molgat justified the intervention:

CONSIDERING that the issues raised involve the rights of owners of copyright on one hand and the rights of users on the other, and that the interplay between the Act's anti-circumvention provisions and an affirmative defence of fair dealing with potentially broad implications for users' rights appears not to have been the subject of previous decisions, the Court is satisfied that CIPPIC has a genuine interest in the matter;

CONSIDERING CIPPIC's public interest mandate, institutional expertise and experience, the Court is of the view that CIPPIC has much insight into the area of copyright law and policy, including the reach of the anti-circumvention provisions in the Act, and the scope of fair dealing, as it has demonstrated in a number of interventions before this Court, the Federal court of Appeal and the Supreme Court of Canada.

The CIPPIC abided perfectly by the terms of the Order granting it leave. Its intervention was of great assistance to the Court.

III. The original test case

[21] Many Court cases were held in abeyance while an initial Court case was before the Federal Court (Order of Case Management Judge Tabib, March 3, 2016). That case involved the Department of Finance, represented as it should by the Attorney General of Canada. It is *1395804 Ontario Ltd (Blacklock's Reporter) v Canada (Attorney General)*, 2016 FC 1255, [2017] 2 FCR 256 [*Department of Finance*]. As we shall see, the AGC relies significantly on the findings made by Mr. Justice Robert Barnes. The matter was not appealed by Blacklock's Reporter (the awarding of the costs in favour of the Defendant (2016 FC 1400) was appealed and the appeal was dismissed from the Bench (2017 FCA 185).

[22] In that first case, Blacklock's Reporter alleged that Department of Finance officials violated its copyright by obtaining, reading and distributing the Plaintiff's articles without authorization. The AGC argued, successfully, that the use made constituted fair dealing in accordance with s 29 of the *Act*.

[23] Our Court found that BR was using a "paywall" in order to protect its news copy. The paywall is referred to as the requirement to pay a subscription which allows for the use of a password to gain access to articles located on a website. There is no description or explanation as to what constitutes a password from a technical standpoint. In fact, there is no indication that access to a password was used by Finance officials.

[24] There is a description of how a subscription can be acquired through an online application. Single subscriptions, without the need to acknowledge and accept any terms of use, are available. The Court notes that the application "refers to the purchase of custom bulk rates for institutional subscribers who would like to distribute or share Blacklock's content in-house" (para 5). Furthermore, the Court acknowledges that at the bottom of the application form, there is a "reference to "Terms and Conditions" but these are not particularized and would only be seen by a subscriber following a search of Blacklock's website" (para 5). As we shall see later, that corresponds to the evidence available in the instant case.

[25] The facts in the Finance case differ somewhat from those in this case, as the articles which were made the subject of BR's action in infringement were acquired by someone outside of the Department of Finance. Nevertheless, the articles were made available within Finance.

[26] BR's managing editor, Mr. Tom Korski, was writing an article which he titled "\$30,000,000 Sugar Tax is averted". As part of his process, Mr. Korski interviewed the President of the Sugar Institute; he also sought to get information about tariff changes from an official at the Department of Finance. In spite of comments made by the Finance official, the article improperly attributed "did not comment" from the Department.

[27] Following a chain reaction, Mr. Korski sent the President of the Sugar Institute an e-mail comprising a digest of his article, which prompted the President to acquire a subscription to access the said article. The President then pasted the article in an e-mail sent to a Finance official in the International Trade Policy Division. The President wrote to the Finance official that she was not pleased with the "spin" put on the conversation she had with BR's managing editor.

[28] Two days later, a second article was posted online. Once again, an unfavourable light was cast on the Department of Finance in an article whose title was "It didn't make any sense". The President, using the password, accessed the article and sent the second article to the same Finance official. As in this case, the President of the Sugar Institute testified being unaware of the Terms and Conditions: the President never thought she could be infringing BR's copyright by sending the articles to the Finance official.

[29] Within Finance, the articles were shared between officials with a direct interest with a view to possible corrections. In the end, none were made. Blacklock's Reporter sued, seeking \$17,209.10 in damages.

[30] Our Court found that the Defendant, the AGC on behalf of the Department of Finance, was entitled to the protection afforded by s 29 of the *Act*: its use of the articles constituted fair dealing for the purpose of research, private study, education, parody or satire. Fair dealing does not infringe copyright. In the view of Barnes J, “the fair dealing protection so obviously applicable to the acknowledged facts of this case that the litigation should have never been commenced let alone carried to trial” (Supplemental Judgment and Reasons as to costs, 2016 FC 1400, at para 18).

[31] Indeed, in the appeal concerning costs, the Court of Appeal noted “(t)he Federal Court considered the issues before it – here, primarily the issue of fair dealing – to be well-settled in the jurisprudence and, thus, neither novel nor of public significance” (para 5).

[32] I turn to the analysis conducted in the “test case” involving the Department of Finance. Having reviewed the facts of the case, our Court acknowledged that the copyrighted material had been used by the Department without payment and without consent. Accordingly, it was for the AGC to establish that the use made was covered by s 29, the fair dealing provision which reads as follows:

<p>Research, private study, etc.</p> <p>29 Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.</p>	<p>Étude privée, recherche, etc.</p> <p>29 L’utilisation équitable d’une oeuvre ou de tout autre objet du droit d’auteur aux fins d’étude privée, de recherche, d’éducation, de parodie ou de satire ne constitue pas une violation du droit d’auteur.</p>
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The reach of s 29 is broad and fair dealing is not an exception to a right conferred on copyright holders by law. It is inherent to the scheme, thereby striking a balance between owners and users.

In this oft-quoted passage, Professor Vaver summarized the state of the law in his *Intellectual Property Law: Copyright, Patents, Trade-marks* (Toronto: Irwin Law 2nd ed, 2011):

The *Copyright Act* lets users carry on a wide range of activities without needing to worry about copyright. What the Act specifically permits is not an infringement. Whoever does a permitted act is not just taking advantage of a limitation, exception, exemption, defence, “loop-hole,” or gracious indulgence extended by a copyright owner. He is exercising a right inherent in the balance the *Copyright Act* strikes between owners and users. Both owner and user rights must receive the fair and balanced reading that befits remedial legislation. User rights need to be as liberally interpreted as owner rights are, lest copyrights become “instruments of oppression and extortion” and unduly interfere with people’s rights to deal as they wish with their own tangible property. [Footnotes omitted]

(p 215)

[33] The leading authority on what constitutes fair dealing continues to be *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339 [*CCH*]. The case concerned the reproduction by the Law Society of reported cases, statute, regulation or limited selection of text from a treatise at the Great Library at Osgoode Hall operated by the Law Society. In a unanimous decision authored by Chief Justice McLachlin, the Supreme Court ruled that the reproduction constitutes “research” in accordance with s 29. For our purposes, it will suffice to refer to only a few findings made by the Supreme Court and considered fully by Barnes J.

[34] At paragraph 48 of *CCH*, the Supreme Court establishes the fundamental principles and underpinnings of the law:

- fair dealing is an integral part of the scheme; it is not a defence;

- “in order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively”.

[35] Evidently, pursuant to s 29, there must be a dealing which falls within one of the purposes identified in the section. It must also be fair. In the case at bar, as well as in *CCH*, the dealing was said to be for research. At paragraph 51 of *CCH*, the Court writes:

51 The fair dealing exception under s. 29 is open to those who can show that their dealings with a copyrighted work were for the purpose of research or private study. “Research” must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained. I agree with the Court of Appeal that research is not limited to non-commercial or private contexts. The Court of Appeal correctly noted, at para. 128, that “[r]esearch for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums is nonetheless research.” Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the *Copyright Act*.

[36] It is without difficulty that our Court found that the use made of the BR’s articles was for the purpose of research: “There is no question that the circulation of this news copy within the Department was done for a proper research” (para 33). In so doing, our Court considered and applied the other leading case concerned with s 29, the unanimous decision in *Society of Composers, Authors and Music Publishers v Bell Canada*, 2012 SCC 36, [2012] 2 SCR 326 [*SOCAN*]. In *SOCAN*, the Court confirmed and reaffirmed at paragraph 11 that “(i)n order to maintain the proper balance between these interests [the balance between protection and access], the fair dealing provision “must not be interpreted restrictively”: *CCH*, at para 48.” The *SOCAN* Court found that allowing previews of musical works by consumers before making a purchase did constitute research and, therefore, s 29 could apply if that dealing for the purpose of research was fair.

[37] The *SOCAN* Court endorsed and applied the six fairness factors for guidance developed in *CCH*: “the purpose, character, and amount of the dealing; the existence of any alternatives to the dealing; the nature of the work; and the effect of the dealing on the work” (para 14). The *SOCAN* Court reviewed the six factors and concluded that the dealing (for the purpose of research) was fair.

[38] Barnes J conducted his own review of fairness factors. I reproduce most of paragraph 36 of his Judgment in view of the importance the findings will have on the outcome of the case:

[36] In finding the scope of use of the articles to be fair I have considered the following factors, all of which favour the Defendant’s position:

- (a) The articles were legally and appropriately obtained by [XXX] who was a paid subscriber to Blacklock’s. Blacklock’s website was not hacked or accessed by illicit means. In the result, the articles were no longer behind Blacklock’s paywall when the Department obtained them.
- (b) [XXX] sent the articles to [Departmental officials] for a legitimate business reason (i.e., to protect her business reputation and to manage her working relationship with the Department);
- (c) The Department received the articles unsolicited and used them (i.e., read them) for a legitimate business purpose (i.e., to consider whether the stories required a response or correction);
- (d) The articles were circulated among only six Department officials all of whom had a reason to see them;
- (e) No commercial advantage was sought or obtained by the Department’s use of the articles nor were they republished in any form;
- (f) The two articles represented only a small fraction of the protected news copy on Blacklock’s website and

one of them was shortly-after publically exposed on Blacklock's website;

- (g) The articles contained information obtained from the Department in response to Mr. Korski's queries. As a source, the Department had a direct and immediate interest in their content. Indeed, a finding of copyright infringement against a news source for the simple act of reading the resulting copy is likely to have a chilling effect on the ability of the press to gather information. Such a result cannot be in the public interest;
- (h) [Departmental officials] had a reasonable basis for their concern that the articles misrepresented some of the information they had conveyed to Mr. Korski and that a correction might be warranted. The involvement of their colleagues in a possible follow-up was, in the circumstances, reasonable;
- (i) Neither [XXX] nor the Department were aware of, or agreed to, Blacklock's Terms and Conditions. In any event and as noted below, those provisions did not unambiguously prohibit the circulation of Blacklock's copy for personal or non-commercial purposes. If [XXX], as a subscriber, had the right to use and distribute the articles for a non-commercial purpose, those who received the articles lawfully could reasonably expect to enjoy the same privilege;
- (j) What occurred here was no more than the simple act of reading by persons with an immediate interest in the material. The act of reading, by itself, is an exercise that will almost always constitute fair dealing even when it is carried out solely for personal enlightenment or entertainment; and
- (k) While the public interest is served by the vigilance of the press, copyright should not be a device that serves to protect the press from accountability for its errors and omissions. The Department had a legitimate interest in reading the articles with a view to holding Blacklock's to account for its questionable reporting.

[39] Before concluding the review of the law and findings made by our Court in the Department of Finance “test case”, a reference to some further observations and findings is apposite. The relevance of a paywall and of terms and conditions to applying the fair dealing provision is recognized. However, the copyright’s owner must not only establish some prohibition, but it must be shown that the person involved was aware of the limitations. “All that is required is an acknowledgement at the time of acquiring access that the terms in question were read and accepted.” (para 38). That was not done and the subscriber had no reason to think a violation of the *Act* would occur by sharing articles of special and direct interest with people affected by them. Indeed, the Terms and Conditions were found by our Court to be ambiguous which results in the drafter of the conditions to be bound to the most favourable interpretation to the user of the copy:

[42] I do not accept that [the subscriber] or the Department should be taken to be aware of Blacklock’s web-based terms of use. But even if they had been aware they would have been no further ahead. Blacklock’s Terms and Conditions contain a material ambiguity concerning downstream distribution. On the one hand they seemingly prohibit distribution by subscribers but, on the other, they permit it for personal, or non-commercial uses:
[Footnote omitted]

The use made of the articles was found to be for a non-commercial purpose.

[40] In the result, our Court dismissed the action. The AGC urges this Court, in spite of the discontinuance of the underlying court action, to issue a declaration of rights to the effect that there is room for rectification of the Terms and Conditions, that not only is there no breach of copyright on the basis of the facts in the underlying action, but also there is no infringement of technological protection measures [TPM], in the form of a password that was required to gain access to articles on Blacklock’s Reporter’s website.

IV. The facts in this case

A. *Notice of Motion*

[41] The Fresh as Amended Notice of Motion sets the framework to be used by the AGC to get the declarations sought. The AGC asserts:

- a) the Terms and Conditions of the subscription were ambiguous and unenforceable; at any rate they should be interpreted in favour of Parks Canada. No adequate notice was given. The Terms and Conditions of the subscription allowed the distribution of articles within Parks Canada without infringing on the copyright or circumventing the alleged TPM;
- b) the use made of the articles constitutes fair dealing;
- c) Parks Canada acquired an institutional subscription, thus allowing the further distribution of the articles, as an officer of Blacklock's Reporter represented to Parks Canada that the subscription was for the benefit of Parks Canada;
- d) sharing the password as part of fair dealing does not constitute a circumvention of the TPM. There was no intention to circumvent in gaining access in these circumstances. At any rate, the public servants were permitted to share the password, under the Terms and Conditions, to access the articles from the website: thus there was no circumvention of the TPM.

B. *The evidence*

[42] It should be stressed at the outset that it is largely unknown what specific evidence was before our Court in the case involving public servants from the Department of Finance. Some of it was mentioned by Barnes J, but it is less than clear, as we shall see, whether the issues with respect to the copyright infringement, and the existence of fair dealing, can be readily disposed of on the basis of the doctrines of issue estoppel and *res judicata* where the actual evidence is not sufficiently spelled out. That is not to say that the findings made are of no assistance. They are. The question is rather whether the test for issue estoppel is met (*Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, [2001] 2 SCR 460 [*Danyluk*]), including the exercise of discretion by the Court.

[43] The Moving Party, the AGC, forcefully suggested that BR's *modus operandi* is akin to "copyright trolling", which is described as copyright holders using the threat of litigation to generate revenue. BR is accused of publishing inaccurate, deceptive or inflammatory articles. Then, "teasers" are sent to federal entities to entice a purchase of a subscription. The terms and conditions are ambiguous and are buried in the webpage. The AGC contends that after a few months, BR files access to information requests to assess the amount of sharing of articles. I indicated during the hearing of the case that without the evidence of a pattern repeating itself – evidence that was not present in the case – I was not inclined to consider any further an allegation of "copyright trolling", perhaps with a view to implying an abuse of copyright. Having considered again the evidence before the Court, I continue to disregard such assertions.

[44] Media relations is undoubtedly a role that is played at Parks Canada. The media coverage is monitored; if there are media pieces that contain erroneous or misleading information, a decision must be made on whether or not a response or correction is warranted. As related by one of three Parks Canada employees who testified by affidavit in this case, Mr. Frédéric Baril, that may well require that the content of media pieces be shared with experts and other employees within the organization. To put it simply, Mr. Baril's evidence, which remained uncontradicted, is that media monitoring is part and parcel of the activities of federal entities, which includes Parks Canada.

[45] Mr. Baril, who was the manager of the unit with Parks Canada that gained access to some articles from BR through a subscription (le Directeur des Services ministériels et médiatiques), testified more specifically that Parks Canada's interest in media reporting is with a view to correcting erroneous or misleading information: he provided examples of such occurrences involving Blacklock's Reporter's articles. Moreover, Mr. Baril stated that the only articles from BR, which were accessed by Parks Canada and shared within the organization, were articles related to the Agency's mandate and activities. There were fifteen. He said that, typically, managers and senior employees would receive e-mails from BR referring to contents that were either deceitful or misleading, or alarmist. They required consultations within Parks Canada to formulate an appropriate response as a governmental organization. In a word, Parks Canada's interest in articles published by BR was limited to those involving the Agency and the sharing of them, and only them, was limited to the personnel that might contribute to a response or further communication, if needed (see, for instance, Exhibit C to Frédéric Baril's Affidavit, Moving Party's Record, p 127 et al).

[46] The sharing of articles could also happen, according to Mr. Baril, with central agencies when the mandate or responsibilities of other governmental entities are engaged. The limited and occasional sharing would help ensure a coordinated response or position on behalf of the government.

[47] The second Parks Canada official who testified (affidavit and cross-examination on her affidavit) was Ms. Genevieve Patenaude. She was the official who purchased the subscription which allowed Parks Canada to have the password to gain access to the articles of interest to it.

[48] Ms. Patenaude, a media relations officer at Parks Canada, was instructed to purchase a subscription to Blacklock's Reporter for the benefit of the entity she worked for, the Parks Canada Agency. That was on September 18, 2013.

[49] Ms. Patenaude testified at length on how she proceeded to acquire a subscription. She testified that between January 2013 and December 2015, media relations officials received numerous requests from BR for information. Having experience with the purchase of subscriptions for Parks Canada, she went to the Blacklock's Reporter website to acquire a subscription.

[50] Ms. Patenaude stated in her affidavit, and never moved from her position on cross-examination, that the Blacklock's Reporter webpage she accessed indicated only one type of subscription which was made available. According to her affidavit (Moving Party's Motion Record, p 1156 and following), she accessed a webpage which had the same information as that

found at her Exhibit A. Exhibit A contains the home page for the Blacklock's Reporter website and a page with the title "Membership Levels" for those who wish to subscribe. That was actually a page retrieved by using the Wayback Machine, a device used frequently in litigation which archives historical information on the web. Ms. Patenaude said that was the page she saw in September 2013. As a matter of fact there is no indication on that page of more than one membership level, although the title "Membership Levels" appears on the page. On the same line where the level Blacklock's Reporter appears, there is a link in light blue font entitled "I want Blacklock's Reporter". Ms. Patenaude clicked on that link.

[51] As part of Exhibit A, there is at the bottom of the home page the words "Terms and Conditions" in relatively small font: the words were inconspicuous although visible. When the purchase was made, the witness testified that she was unaware of their existence: it was in black font: indeed it was not identified as a link as oftentimes such a link is in light blue. Not only was the link not obvious, but there was no indication that there was a connection with institutional subscriptions. As I read Ms. Patenaude's testimony, she was not aware of terms and conditions and these were not brought to the attention of the person who is interested in purchasing a subscription. She says that "I was not asked to acknowledge them, which is unlike what most vendors require. I also understood that a purchase of a "Blacklock's Reporter" subscription, the only subscription available on the webpage, was an institutional subscription" (Genevieve Patenaude's Affidavit, para 8).

[52] Ms. Patenaude proceeded to fill out the form called "Membership Checkout" with information relating to Parks Canada and the Agency's credit card number; she identified the

purchase as a Parks Canada purchase. The form that was filled out by Ms. Patenaude was not in evidence. Instead, the available form was retrieved from the Wayback Machine. It is striking that the form produced in Exhibit A, which contains the membership levels item, is dated December 2013. The price associated with the only level, “Blacklock’s Reporter”, is \$157. However, the Membership Checkout form reproduced at Exhibit C of Ms. Patenaude’s affidavit indicates the price of membership to be \$314, twice the amount posted in December 2013. That may well suggest that the Checkout form came later than December 2013.

[53] The version found in Exhibit C includes words Ms. Patenaude asserts were not on the form she filled out. They are: “For institutional subscribers who would like to share or distribute content in-house, please contact manager Holly Doan for custom bulk rates at _____”. Ms. Patenaude remained adamant on cross-examination that the words must have been added some time after she completed the purchase on September 18, 2013.

[54] Shortly after the purchase was completed, BR sent an e-mail to Parks Canada (that was the e-mail address put on the Membership Checkout form) confirming the subscription purchase. The e-mail (Exhibit O to the affidavit of Frédéric Baril) announces that the membership account is now active. It reads as follows:

Thank you for your membership to Blacklock's Reporter. Your membership account is now active.

Below are details about your membership account and a receipt for your initial membership invoice.

Account: [REDACTED]

Membership Level: [REDACTED]

Membership Fee: The price for membership is \$148.00. For institutional subscribers who would like to share or distribute content in-house, please contact manager [REDACTED] for custom bulk rates at [REDACTED]

(emphasis added)

[55] Ms. Patenaude testified concerning the words that I underlined. Here is what she declared at paragraph 12 of her affidavit:

12. The email contained new information, namely that “institutional subscribers who would like to share or distribute content in-house” should contact a manager at Blacklock’s for custom bulk rates. The information was provided after I made the purchase and after it had been accepted by Blacklock’s. In any event, I understood the word “bulk subscriptions” to mean that if Parks Canada wanted to share the articles widely, beyond the Parks Canada organization, it was required to contact a manager at Blacklock’s. I understood “institutional subscription” to mean a subscription available to Parks Canada as a whole, which is not dissimilar to what if [*sic*] offered by other media outlets in the marketplace.

[56] The witness also testified concerning the Terms and Conditions. She stated that she did not see them at the time of purchase and they were not brought to her attention. The contentious paragraphs from the Terms and Conditions are reproduced here:

You acknowledge and agree one subscription is allotted per subscriber. Distribution of articles, photographs, images, writings or other content of any kind by a single subscriber by paper, electronic file, disc, intranet or any and all methods is not permissible. For purchase of bulk subscriptions, see “Contact”.

Reproduction, duplication, or distribution of Blacklock's Reporter and/or all or any part of its content for anything other than your personal, non-commercial use is a violation not only of these Terms and Conditions but also of copyright laws unless you have written permission from Blacklock's Reporter. The content on Blacklock's Reporter is made available to you for non-commercial, personal, or educational purposes only ...

The witness testified that the paragraphs are the same as those considered by Barnes J in the *Department of Finance* case. Barnes J, at paragraphs 42-43 of his Judgment, found that those same paragraphs from the Terms and Conditions were ambiguous about the downstream distribution because they permit distribution for personal or non-commercial use. The interpretation of the clause must be the one most favourable to the user as it is the drafter who created the ambiguity. As the distribution in the *Department of Finance* case was for a non-commercial purpose, it must be seen as being permitted.

[57] Finally, Ms. Patenaude testified that the sharing of articles was very limited within Parks Canada. It was to allow access to articles for work related to Parks Canada's mandate. There was never any intention to avoid or by-pass any paywall: it was simply to validly access the content. She uses her affidavit to introduce into evidence an exchange of e-mails between another communications officer at Parks Canada and one of BR's owners where BR acknowledges that Parks Canada had a subscription. The exchange is found at Exhibit J to Frédéric Baril's affidavit, which is faithfully reproduced:



Re: Parks Canada Gets Attaboy
to: andrew.campbell@pc.gc.ca

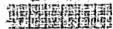
02/07/2014 11:37 AM

History: This message has been forwarded.

Dear Mr Campbell,

No inducement to purchase is required as Parks Canada is already a subscriber. The emails are an advisory when your organization is cited or quoted. Blacklock's is not a blog. Communications between public officials and news organizations are not covered by the Act. Wrong on all counts.

Regards,



Publisher

Blacklock's Reporter




On Jul 2, 2014, at 9:31 AM, andrew.campbell@pc.gc.ca wrote:

s.19(1)

Holly,

This constitutes illegal spam. There is no unsubscribe and you are certainly marketing to me to purchase your blog.

Andrew Campbell

From: 
Sent: 02/07/2014 09:11 AM AST
Subject: Parks Canada Gets Attaboy

[58] I now turn to the evidence offered on behalf of Blacklock's Reporter. It consists for all intents and purposes in the affidavit of Mr. Tom Korski, together with a number of exhibits and the cross-examination on his affidavit. He is the managing editor of Blacklock's Reporter, as well as a director and officer of the corporate entity.

[59] Mr. Korski described the BR operation as consisting of articles made accessible on the Blacklock's Reporter's website once a subscription has been purchased. That is what has been referred to, as I understand it, as the "paywall". Most of the articles on the website can be accessed solely if a subscription has been purchased, although a small number may be accessible without it.

[60] The witness described how someone could purchase a subscription directly from the website. Although the website then used on September 18, 2013, could not be retrieved, Mr. Korski relied on the Wayback Machine, which he describes as “an internet archiver which permits the recall of earlier websites” (Mr. Korski’s affidavit, para 10), to refer to BR websites which were in existence around the time Parks Canada purchased its subscription.

[61] There is no dispute as to how Parks Canada, or any potential subscriber, could purchase a subscription. There was a tab on the website page which simply indicates “Subscribe now”. Once clicking on the tab, the subscriber is taken to a page called “Membership Levels”. On that page there is only one membership level. The subscriber must then click on “I want Blacklock’s Reporter”, which is a link to another page: Membership Checkout. There is a controversy in this case concerning the content of the Membership Checkout page. Mr. Korski contends that the following words were on the page since July 2013. I reproduce again the sentence for convenience: “For institutional subscribers who would like to share or distribute content in-house, please contact manager Holly Doan for custom bulk rates at _____”. There is no direct evidence as to what the web page in use on September 18, 2013 consisted of other than the testimony of Ms. Patenaude, who purchased the subscription on behalf of Parks Canada. She is adamant that the words were not present on the Membership Checkout page in use on September 18: she said that she would remember such presence and she was not shaken on cross-examination. Mr. Korski for his part relies on two e-mails. One from himself to someone presented as an IT consultant, instructing that some additions be made to what Mr. Korski referred to as the “website payment page”. The exchange of e-mails is appended as Exhibit F to Mr. Korski’s affidavit. I reproduce the exchange as found in the Exhibit:

----- Forwarded message -----

From: "Thibaut Revenaz" <thibaut@glebemedia.ca>
Date: Jul 4, 2013 2:40 PM
Subject: Re: Blackie's Before I Forget
To: "TOM KORSKI" <korski1949@rogers.com>
Cc:

Hi Tom,

I've made the changes.

Cheers,

Thibaut

On Sat, Jun 29, 2013 at 9:07 AM, TOM KORSKI <korski1949@rogers.com> wrote:

Hi Thibaut: forgive my note on a Saturday. I have been meaning to send this and just had a moment now. I'd like to change some scripting on the website payment page. I didn't see the appropriate page to change the text, and hesitate to blunder around the dashboard in the manner of a bull in a china shop. The text follows. It differentiates between personal and bulk subscriptions, gives Holly's contact info for institutional subscribers and updates the HST status of BC. Thanks a lot for making these changes, and have a great weekend.

Regards

Tom

You have selected the ***Blacklock's Reporter*** membership level.

Blacklock's never stores credit card information. We never renew a subscription without your OK. All payments are securely encrypted via Stripe.com, the foremost payment processor used by Canadian business today.

The price for a personal membership is **\$148.00**. For institutional subscribers who would like to share or distribute content in-house, please contact manager Holly Doan for custom bulk rates at [613-422-6823](tel:613-422-6823), holly@blacklocks.ca.

Customers in Canada will be charged all applicable taxes (Newfoundland & Labrador, Nova Scotia, New Brunswick and Ontario billing addresses will be charged HST, all other provinces and territories will be charged GST.) Membership expires after 1 year.

[62] As I noted during the hearing, there are obvious issues with Exhibit F. First and foremost is the fact that the sender of the e-mail bearing the date of July 4, 2013, never testified. This is pure hearsay. If one were to rely on the principled way of admitting hearsay evidence, BR would

have had to establish necessity and reliability. That was not shown on this record. There was no explanation for the words “Forwarded message” at the top of the Exhibit. The subject of the e-mail (Re: Blackie’s Before I Forget) is unexplained. There is no way of knowing to what the sender was referring to when he says “I’ve made the changes”. Indeed, this exhibit is no more than a rather crude “cut and paste”. As I inquired at the hearing, it is quite evident that Mr. Korski’s e-mail contains on its face two different fonts, one for the message to Thibaut and the font for the message to be added to the Membership Checkout page.

[63] In the circumstances, the Court would have to prefer the testimony of Ms. Patenaude. Be that as it may, there is probably not much in the end that rides on resolving the controversy. That is because the issues of what did Ms. Patenaude know, and when did she know it, are in the end relevant to the extent of whether Parks Canada operated within the confines of s 29 of the *Act*, the fair dealing provision. On the evidence before the Court, there is no doubt that Ms. Patenaude was acting in good faith and that she sought to acquire the only membership available.

[64] Mr. Korski’s affidavit continues to note that an automatically generated message followed shortly after Ms. Patenaude purchased the subscription. It also refers to an e-mail the following day which merely welcomes the new subscriber. In both cases, the e-mail message is sent to “pc.media@pc.gc.ca”, the e-mail address for Parks Canada Media.

[65] The affidavit goes on to argue that the Terms and Conditions are clear and unambiguous as Mr. Korski claims that they were drawn to the attention of Parks Canada.

[66] A few paragraphs of the affidavit are dedicated to the technological protection measures Mr. Korski claims are used by BR. Once again, the paragraphs are more argumentative than informative. The affidavit states that the protection consists of a password that is required to gain access to articles. There is no information concerning what constitutes a password or the system used by BR. In fact, on cross-examination, Mr. Korski readily acknowledged that “I actually don’t know how the IT works” (question 63) and “I have never bought a password Mr. Gay” (question 67). There is no evidence on this record of how the IT works or, for that matter, what was the actual password used by Parks Canada. One would have thought that it is relevant to whether or not there may have been circumvention of a technological protection measure where the means to gain access are only through the use of a password.

[67] Finally, Mr. Korski testified concerning the use made by BR of the *Access to Information Act*, RSC 1985, c A-1, to “monitor” the use made of the subscriptions. The affidavit contends that some fifteen articles, all relating to Parks Canada business, were shared with individuals within the organization.

V. Supplementary submissions

[68] The Court raised after hearing the parties for three days whether the use of the summary judgment was the appropriate mechanism to seek and obtain wide ranging declarations in view of the discontinuance of the original action and the evidentiary record before the Court. Furthermore, the issue of the use of *issue estoppel*, as proposed by the Moving Party, the AGC, was also raised by the Court as requiring further submissions (Direction of June 12, 2023).

[69] Additional submissions were submitted by the AGC on June 30, 2023, and Blacklock's Reporter on July 21, 2023.

[70] The AGC argued that summary judgment is available despite the discontinuance of the main action. The counterclaim is a separate action which allows for a motion for summary judgment. In the case at bar, the conditions for summary judgment are met because the issues raised are capable of resolution as permitting a fair and just adjudication. Indeed, there is no genuine issue for trial in that there is sufficient evidence to adjudicate the dispute. Specifically it is argued that issues relating to terms and conditions, fair dealing and circumvention of technological protection measures can be decided on this record, as the parties have put their best foot forward. On that last issue, the AGC suggests that not only is the Court equipped to consider his main contention, that is that the use of a password does not equate with circumvention, but also that a password, as such, is not a technological protection measure. As we shall see, the Court declines to address that issue because there is no need to deal with it since the password was in fact used. Additionally, there is in this case a complete lack of evidence as to what constitutes a password, and in particular what constitutes the password used in this case.

[71] Summary judgment, says the AGC, is expeditious and cost effective. It seems, however, that this constitutes an attempt to use, as much as possible, declarations to be made in this case in a number of other cases involving the Crown and Blacklock's Reporter. There may be some issues that can translate into declarations to be useful in other litigation, but, as we shall see, the issues to be resolved are also a function of the facts proven in this case which may or may not be present in other cases. In fact, the Court is limited by the record available.

[72] The AGC asserts that the test for being granted declaratory relief is met. He uses the judgment in *Ewert v Canada*, 2018 SCC 30, [2018] 2 SCR 165, at para 81:

[81] A declaration is a narrow remedy but one that is available without a cause of action and whether or not any consequential relief is available: *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 143; P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at p. 37; L. Sarna, *The Law of Declaratory Judgments* (4th ed. 2016), at p. 88; see also *Federal Courts Rules*, SOR/98-106, r. 64. A court may, in its discretion, grant a declaration where it has jurisdiction to hear the issue, where the dispute before the court is real and not theoretical, where the party raising the issue has a genuine interest in its resolution, and where the respondent has an interest in opposing the declaration sought: see *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99, at para. 11; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 46; *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at pp. 830-33.

(my emphasis)

[73] Finally, it is contended that the Crown is indivisible, such that the doctrine of *issue estoppel* may be available in appropriate cases. I note that whether or not findings in this case may be used in future cases is to be decided in future cases if they satisfy the *Danyluk* test.

[74] As expected, Blacklock's Reporter takes a different view. It asserts that summary judgment is to be restricted to questions of law and contract interpretation. There should not be declarations where there is no practical effect. BR cites the case of *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 SCR 99, at para 11. However, I note that the Supreme Court rather refers to "practical utility", not "practical effect as between the parties". On the basis that it claims that no practical effect as between the parties, BR considers the matter moot.

[75] Given that the case management judge has allowed the motion for summary judgment to proceed, and in view of that decision having been confirmed on appeal, BR states that these decisions are not binding on this Court. There are no authorities offered in support of such bold proposition. BR accuses the AGC of ignoring the discontinuance in this case. With all due respect, it will be the Plaintiff who ignores that the issue was front and centre before the case management judge and the Federal Court Justice on appeal. They both ruled that the matter should proceed.

[76] Blacklock's Reporter concedes nevertheless that summary judgment is available in whole or in part. For instance, the Court may entertain granting summary judgment on issues "where there would be a collateral consequence of the outcome of a decision" (factum, para 17). As such, the only issues to be considered are questions of law or concerning the interpretation of contracts as they may impact the related actions launched by BR.

[77] BR challenges the AGC's assertion that the indivisibility of the Crown applies to Parks Canada. It reads the statute creating Parks Canada as suggesting that it is distinct from the Crown. Parks Canada, as a body corporate created pursuant to s 3 of the *Parks Canada Agency Act*, SC 1998, c 31, is not a department of government. It has the power to enter into contracts, acquire property, sue or be sued. That, says Blacklock's Reporter, does not correspond at all with a department such as the Department of Finance. Parks Canada has a measure of independence.

[78] The issue of indivisibility of the Crown was raised in the context of applying the doctrine of *issue estoppel* in this case and other cases involving Blacklock's Reporter. One of the

conditions for *issue estoppel* to be successfully invoked is that the parties to the judicial decision or their privies are the same in the proceedings in which estoppel is raised. If the parties are not the same, there will be no estoppel. Moreover, Blacklock's Reporter argues that the facts in the *Department of Finance* case are not nearly identical to the facts in the case at bar, as argued by the AGC. The same question, another pre-condition to estoppel according to *Danyluk* (that the same question has been decided), was not decided in the *Department of Finance* case where the facts are significantly different, BR says. There was no purchase of a subscription by the Department of Finance, and accordingly they never went through the checkout process, nor did they receive a follow-up e-mail; the sharing of articles did not involve the use of a specific password; in fact, there was no password in the possession of Finance officials. At any rate, even if the three pre-conditions were met, which include the same person and the same question, BR urges the Court to exercise its discretion, which undoubtedly exists, to decline to apply the doctrine of *issue estoppel* in this case.

[79] In view of the supplementary submissions made by the parties, some things have been clarified. First, the Court must address the issues on the basis of the evidence before the Court and not be tempted to decide more than is appropriate. For instance, the AGC was suggesting that the Court issue a declaration on the ability for a password to constitute a technological protection measure. The case before the Court is actually that the password obtained through a subscription was used to gain access to material for the purpose of conducting activities said to be covered by s 29 of the *Act*. The password was used, it was not hacked. Moreover, there is no evidence whatsoever about the password in this case, or passwords in general. The Court was urged by BR and the intervener to refrain from entering that field without any expert evidence.

[80] The AGC wants the Court to issue a declaration concerning three questions in order to dispose of, or truncate, matters in other lawsuits launched against some other entities. The Court, in my view, must show prudence: the tail should not be wagging the dog. The Court, in its recognized discretion, should consider the matters raised on their own merit. If they can be used in the future, as was the case with the Judgment involving the Department of Finance, so be it. But the Court should resist the temptation to seek to be helpful. It should limit itself to the facts as proven to decide the issues on the basis available.

[81] A case in point is the use that can be made of the doctrine of *issue estoppel*. The Court raised at the end of the hearing the question of the indivisibility of the Crown. The point of the matter was whether Parks Canada, a body corporate with the ability to enter into contracts with a department or agency of the Government of Canada (among others), as well as any other government, person or organization, can be equated with departments with a view to satisfying one of the three pre-conditions for *issue estoppel*. The specificity of Parks Canada Agency was not addressed. Furthermore, as pointed out by BR, while the AGC suggested that the fact situation in the *Department of Finance* case was nearly identical to that in the case at hand, so that the second *Danyluk* condition can be satisfied, that may not be so. There are some similarities, but the facts may prevent the use of the doctrine.

[82] Conversely, Blacklock's Reporter's attempt at challenging this Court's judgment granting leave for the motion for summary judgment to proceed because of its discontinuance of the main action cannot be entertained. This Court has twice concluded that the motion could proceed in spite of the discontinuance of the main action. Collateral attacks cannot be entertained.

[83] All in all, this suggests that the Court should address the issues within the confines of the evidence presented. It will not seek to go beyond the four corners of the case. If declarations are to be issued, they must be with respect to the case effectively before the Court. There should not be an attempt to resolve cases that are not before the Court on facts that are unknown. This case is not to become a reference at large concerning questions the Moving Party would wish decided in the hope that declarations “will have immediate legal and practical utility and settle questions that have been the subject of proceedings between parties spanning six to nine years” (AGC’s factum, para 23). If that is the result achieved with declarations that are deemed possible on the basis of the record before the Court, that will benefit other cases. That may yet be possible although the facts in the other cases are not known, let alone proven. There exist inherent limits to what can be achieved with a summary judgment in the context of the adversarial system of adjudication where the evidentiary record is as limited as it is here.

VI. Analysis

[84] There are three questions the AGC wishes for the Court to specifically opine on and issue declarations. They are:

- There was no binding agreement between the parties, or there was a unilateral mistake on the part of Parks Canada, thus opening the door to rectification;
- Parks Canada did not infringe Blacklock’s Reporter’s copyright; and
- No circumvention of Technological Protection Measures occurred in this case.

I shall address the issues in turn.

A. *Rectification*

[85] Parks Canada contends that it did not consent to the purchase of a subscription for a single user. As we saw, the officer who purchased the subscription on behalf of the Parks Canada Agency, Ms. Patenaude, never read the Terms and Conditions, gave electronically Parks Canada's coordinates to BR and paid for the subscription using a credit card of Parks Canada. Ms. Patenaude testified that being taken from Blacklock's Reporter's home page (which has a link to "Subscribe Now") to a page called "Membership Levels", she purchased the only level available. Again, there is a link to "Subscribe Now". She was taken to another page called "Membership Checkout". That is where the information about the subscriber, including the e-mail address of Parks Canada, is registered.

[86] The form used on September 18, 2013, is not available and was not produced. That much is clear. There was a controversy as to what was the content of the Membership Checkout form seen and used. Blacklock's Reporter argued that some words on the form should have attracted Ms. Patenaude's attention to the sentence already referred to twice at paragraphs 53 and 61. Ms. Patenaude was adamant that those words were not on the form she filled out electronically. She would have remembered them. Blacklock's Reporter cross-examined the affiant extensively, without success.

[87] In an attempt to counter her testimony, BR offered Exhibit F to the affidavit of Tom Korski (reproduced at para 61). It is one page where appears an e-mail message from Mr. Korski with the date of June 29, 2013, and a response five days later. Clearly, the one page is the result

of a cut and paste exercise. In his e-mail Mr. Korski gives an explanation for the text that follows, which he would want his IT consultant to insert in the “website payment page”. He writes that “I didn’t see the appropriate page to change the text”. The actual text to be inserted is obviously in a different font than the font of the e-mail itself. We are not enlightened by the response of the consultant some five days later. The e-mail says very little, if anything. The response bears as a subject “Re: Blackie’s Before I Forget”. The text is minimal and the configuration of the responding e-mail are reproduced for ease of reference:

Hi Tom,

I've made the changes.

Cheers,

Thibaut

The author of the e-mail did not testify.

[88] As stated before, I have concluded that, on a balance of probabilities, the testimony of Ms. Patenaude has to be preferred. She faced cross-examination and her testimony resisted the test. On the other side, the evidence is hearsay and, indeed, there is no way of knowing what the consultant could be referring to: what changes? That constitutes the evidence before the Court. Accordingly, I conclude that the checkout form on the day the purchase of a subscription was completed did not have the words made the subject of contestation.

[89] Shortly after the subscription's purchase was completed, an e-mail to the address pc.media@pc.gc.ca was automatically generated. It welcomes the new subscriber and announces that "Your membership account is now active". It also provides billing information in the following form:

Below are details about your membership account and a receipt for your initial membership invoice.

Account: [REDACTED]

Membership Level: [REDACTED]

Membership Fee: The price for membership is \$148.00. For institutional subscribers who would like to share or distribute content in-house, please contact manager [REDACTED] for custom bulk rates [REDACTED]

[90] Ms. Patenaude testified that, with the transaction completed, she quickly concluded that the billing instruction did not apply to her because she was not concerned with "custom bulk rates". The subscription was purchased for the purpose of validating articles published by BR where Parks Canada was the subject of the articles. I accept her evidence. Common sense and human experience lead to that conclusion. The witness was instructed to purchase a subscription by her bosses in the media area of Parks Canada. As Frédéric Baril testified, media monitoring is key. He confirmed that the use made of the subscription was exclusively for the purpose of considering articles published about the Agency. In the period between January 2013 and September 2013, e-mails sent by BR to managers and other employees of BR referred to information that typically was misleading and alarmist concerning the Agency and its activities. The e-mails asked for an official reaction. The very nature of these e-mails called for some sharing of information with colleagues in order to formulate an adequate response. Mr. Baril's testimony was not challenged. I accept Mr. Baril's evidence. It provides the context in which Ms.

Patenaude made the purchase and the purpose of the purchase, the whole being corroborated by the use made of the access to the BR website granted through the subscription.

[91] However, that does not make the case for the remedy sought by the AGC. The contention is that the terms of the agreement between BR and Ms. Patenaude, on behalf of Parks Canada, “were buried deep in the Blacklock’s webpage, barely perceivable to the naked eye and were never pointed out to the purchaser. In these circumstances, there was no consent by Parks Canada and there is no binding contract” (Moving Party’s memorandum of fact and law, para 43). I cannot accept that contention. For starters, the mention of the terms and conditions was not buried deep in the webpage. The words were in my estimation plainly visible although inconspicuous. What is true is that Ms. Patenaude did not see them or did not pay attention to them but, as I pointed out during the hearing, Ms. Patenaude had purchased subscriptions before. She was not a neophyte. Terms and conditions were not a novelty. Could BR have made the matter clearer by requiring a purchaser to click on an “I accept” button? Most probably. But that does not justify suggesting that Blacklock’s Reporter fostered ambiguities, as argued by the AGC, or never making it clear what type of subscription was being purchased. There was one level of membership and that did not deviate. That is the evidence before the Court and, in my view, it is insufficient to infer some nefarious purpose on the part of Blacklock’s Reporter.

[92] Had Ms. Patenaude been curious enough, she would have clicked on the button “Terms and Conditions” and, right upfront, she would have read the paragraphs already reproduced in these Reasons for Judgment (para 56). Although it is reasonable to believe the reference to “Terms and Conditions” could have been clearer including by requiring a subscription purchaser

to acknowledge having read them and agreed to them, that does not lead to a conclusion that BR misrepresented the subscription that was being purchased. Misrepresentation implies a measure of intent to deceive. The reference to the terms and conditions on the form was inconspicuous. But the Court cannot infer on this record an intent to deceive. Ms. Patenaude is to be considered as a rather experienced and somewhat sophisticated participant. Indeed, she remembered quite vividly that the checkout form did not have the words which would have caught her attention. It seems to me that we are faced with instructions that are less than clear which led to an honest mistake on the part of the subscriber.

[93] The theory of the case of the Moving Party has been from the beginning that the actions of BR are “akin to “copyright trolling”” (Moving Party’s memorandum of fact and law, para 1). On this record, this is a contention this Court is not able to accept. As said, and repeated, by the Supreme Court of Canada, “evidence must always be sufficiently clear, convincing and cogent” (*F.H. v McDougall*, 2008 SCC 53, [2008] 3 SCR 41, para 46; *Canada (Attorney General) v Fairmont Hotels Inc*, 2016 SCC 56, [2016] 2 SCR 720, para 36 [*Fairmont Hotels*]). The *Fairmont Hotels* Court went on to acknowledge that where rectification is sought, evidence exhibiting a high degree of clarity, persuasiveness and cogency is typically required (para 36). The evidence on this record is not clear, convincing and cogent. It is one thing to recognize ambiguities generating honest mistakes. It is quite another to conclude, as urged by the Moving Party, that BR fostered ambiguities.

[94] The Court is equally unable to follow the Moving Party’s contention that BR ought to have known of the mistake which, in turn, disallows resistance to a suit for rectification. In order

to have the declaration sought, the Moving Party must establish the evidence which will be sufficient. In my view, this record does not support that theory of the case.

[95] The *Fairmont Hotels* Court found that “(r)ectification is limited to cases where the agreement between the parties was not correctly recorded in the instrument that became the final expression of their agreement” (para 3). That demonstration has not been made. As a result, the declaration sought for the rectification “by striking down those parts of the Terms and Conditions that do not conform with Parks Canada’s understanding of what it was purchasing, namely that an institutional subscription was purchased allowing for the sharing of articles and password” (Moving Party’s memorandum of fact and law, para 95) is not allowed.

B. *Fair Dealing*

[96] In my view, Parks Canada did not infringe Blacklock’s Reporter’s copyright. This conclusion is largely based on the findings made in the *Department of Finance* case, as the facts in both cases lead to the same conclusion.

[97] There is in this case clear evidence that Parks Canada acquired the subscription that was made available in order to gain access to articles produced by Blacklock’s Reporter. It used it exclusively for a purpose consonant with the fair dealing provision of the *Act*, in line with the use made of BR’s articles in the Blacklock’s Reporter Judgment rendered by my former colleague, Barnes J (*Department of Finance*).

[98] I have already explained at some length the findings made in that earlier case, as well as referring to the leading case law that applies to s 29 of the *Act* (see in particular this Judgment's paragraphs 32 to 37). There is evidently no need to reprise that which has already been covered.

[99] It bears repeating, nevertheless, that as stated by the Supreme Court in *CCH*, the fair dealing in a case like ours requires that the dealing is for the purpose of research, and that it be fair (para 50). In the case involving the Department of Finance, Barnes J concluded that the very same type of activities in that case as in the case at hand constituted dealing for the purpose of research, one of the purposes recognized by section 29 to constitute a dealing. Indeed the Supreme Court considered that ““Research” must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained” (para 51). There is no reason to depart from the conclusion reached in the *Department of Finance* case (para 33) where Barnes J concluded that the same kind of activities as those proven in the case at bar constituted a proper research purpose.

[100] The *Copyright Act* does not define what will be fair; but the Supreme Court supplied a list of factors which provide “a useful analytical framework to govern determinations of fairness in future cases” (*CCH*, para 53). I have reproduced at paragraph 38 herein the findings of our Court in the *Department of Finance* case. They encompass the factors identified by the Supreme Court to determine fairness: purpose of the dealing; character of the dealing (multiple copies distributed); amount of dealing (including the importance of the work), alternatives to dealing; nature of the work (published or confidential); effect of the dealing on the work. The Supreme Court stressed that the identified factors may be more or less important, to the point of being

close to irrelevant in some contexts. Conversely other factors may be relevant in some different contexts.

[101] The comparison of the eleven factors considered in the *Department of Finance* case and the case at bar convinces this Court that the dealing in this case is fair:

- a) BR's website was not hacked or accessed by illicit means. A subscription was purchased;
- b) the subscription was used for a legitimate business reason, that is to identify articles targeting Parks Canada to seek to protect its reputation and to correct mistakes, errors or misrepresentations in the public interest;
- c) the use made by Parks Canada was limited to its valid business purpose;
- d) the circulation of the articles was limited to persons who needed to know for business reasons linked to the Agency's core mandate;
- e) there was no commercial advantage either sought or obtained by Parks Canada;
- f) a small number of articles (15) was shared among a small number of relevant officials for the specific business reasons linked to the Agency's mandate;
- g) as established in the uncontradicted testimony of Mr. Frédéric Baril, there was a reasonable basis for concern between January 2013 and September 2013 about articles which contained citations seen as misleading and alarmist which called for the sharing with appropriate officials;
- h) as in the *Department of Finance* case, the Terms and Conditions were not ignored. They were not known. Justice Barnes noted: "In any event, and as noted below, those provisions did not unambiguously prohibit the circulation of Blacklock's copy

for personal or non-commercial purposes” (para 36). I agree with my former colleague. I will come back to the issue about the Terms and Conditions;

- i) this constitutes the simple act of reading by officials with an immediate interest in the articles for business related reasons. There is no evidence that this was in the nature of a frolic in territory protected by copyright. This is the very purpose of the balance that includes fair dealing;
- j) there is a significant public interest in reading articles with a view to protecting the public, and the press, against errors and omissions.

[102] Much debate between the parties centred on the Checkout form, the e-mail of September 18, 2013, which confirmed that a subscription had been purchased and the account was immediately active, and the Terms and Conditions. All three seek to limit the distribution of articles. But they use different formulations, and none of them is unambiguous.

[103] As seen earlier, Ms. Patenaude testified that the words (see paras 53 and 61 of these Reasons for Judgment) were not on the Checkout form she filled out on September 18, 2013. On balance, her testimony must be preferred. There is no need to consider the language further.

[104] It is accepted that the Terms and Conditions are the same in the case at bar as in the *Department of Finance* case. The Court in the latter case took issue with the fact that something as simple as an acknowledgement that the terms and conditions have been read and accepted was not present. Barnes J wrote at paragraph 37 that “the owner of copyright must establish that the terms of use actually prohibit the access or distribution in question and that the person involved

was aware of the limitations”. That was a failure of BR in the *Department of Finance* case as well as in the case at bar. There was no reason to think that sharing a very limited number of articles to a limited number of officials solely interested in the content for business reasons having to do with the Agency’s mandate and reputation could constitute somehow a violation of the *Act*. I appreciate that the intent to violate is not a constituent element of a breach, but the actions guided by fair dealing, which are for a purpose clearly recognized by copyright law, are protected from liability. Once again, fair dealing is an integral part of the *Act*: it is not merely a defence.

[105] But there is more. Barnes J found that the Terms and Conditions contain a material ambiguity in that distribution is seemingly prohibited while distribution is said to be a violation of the *Act* “for anything other than your personal, non-commercial use” (Terms and Conditions, 5th para). Barnes J read the two terms, “personal” and “non-commercial”, disjunctively. I agree. Personal and non-commercial are two very different concepts. As a matter of fact the very next sentence from the Terms and Conditions speaks of the content being made available “for non-commercial, personal, or educational purposes only”. Surely the three nouns refer to distinct notions or concepts. The Supreme Court seems to have had the same understanding of the difference between the two when the Chief Justice wrote for a unanimous Court in *CCH* that “I agree with the Court of Appeal that research is not limited to non-commercial or private contexts” (para 51).

[106] The invoice sent to Ms. Patenaude shortly after sending the filled out Checkout form and concluding the agreement between the parties referred to “institutional subscribers who would

like to show or distribute content in-house, please contact manager _____ for custom bulk rates ...”. Again, none of the terms used is defined. For instance, there is only one type of subscriber: what is an “institutional subscriber” other than a subscriber who happens to be an institution of some sort? What is a “bulk subscription”? What constitutes “distribution” or share? And how about “custom bulk rates”? Indeed, Ms. Patenaude testified that when she saw these words shortly after the contract was completed and the account was indicated as being active, she believed this did not apply to the subscription just purchased and, in particular, the words “custom bulk rates” had no application (cross-examination of Genevieve Patenaude, questions 103-107-108-109-116). That is reasonable. The drafter of the Terms and Conditions and the invoice of September 18, 2013, is bound by the interpretation most favourable to the user. That finding by Barnes J applies equally in this case.

[107] These instruments did not dissipate the confusion. The lack of definition of what constitutes “distribution”, “bulk subscription” in the Terms and Conditions and “bulk rates” in the invoice makes it impossible to know what the limitations may be, especially in the context of the limited use made of the password and the access to articles for a purpose recognized as fair dealing. The very notion of “bulk”, whether it be “bulk subscription” or “custom bulk rates” suggests a large quantity, some magnitude which obviously does not correspond to what might be required to satisfy the requirements for fair dealing. Large scale distribution for a purpose other than the kind of legitimate reasons encountered in this case runs the risk of not qualifying under s 29. As aptly remarked by Barnes J, “subscribers and downstream users are subject to the obligations imposed on them by the Act. But at the same time they enjoy the considerable protection afforded to them under the statutory fair dealing provisions” (para 44).

[108] Nothing in these Reasons for Judgment should be taken as condoning practices which contravene the *Copyright Act* in the guise of monitoring at large the media. The *CCH* Court expressly observed that “whether some thing is fair is a question of fact and depends on the facts of each case” (para 52). It is rather that the activities conducted by Parks Canada after obtaining, in a licit fashion, articles directly related to its mandate and its operations constitute, as in the *Department of Finance* case, fair use. Different facts may generate different outcomes.

C. *Technological Protection Measures*

[109] The Plaintiff in this case argued that it was Parliament’s intent to prevent the use of copyrighted works from infringing activities if they sought to circumvent technological protection measures. This results from a chapter introduced in Part IV of the *Copyright Act* (Remedies) in 2012.

[110] The Moving Party, the AGC, seeks a third declaration. The subscription, he says, allowed for the sharing of articles and, accordingly, there is no breach of any technological protection measure [TPM]. In any event, the sharing of a password, which appears to have taken place to some extent in this case, does not constitute circumvention of the TPM. Moreover, the fair dealing provisions of the *Act* are such that there was no circumvention under the *Copyright Act*.

[111] As I pointed out at the hearing of this matter, the issue raised clearly lacks any evidence of a technical nature. There is no evidence of the extent of the use of the password associated with the subscription purchased on September 18, 2013. There is no evidence either of what a “password” is and what it was in this case: thus, there was no expert evidence led by either party

on what, in this case, constitutes the TPM. The *Act* requires that the TPM be “effective” (in French, “efficacement”). The absence of evidence may well be significant if the facts of this case require an understanding of what a “password” is. What appears clear, however, is that there was no “hacking”, whatever that may mean from a technical standpoint. In the context of this case, it is taken as meaning that the password was not discovered by force, whether that be by trial and error or otherwise. In other cases, courts have declined to address issues concerning TPM without a solid evidentiary base (*Wiseau Studio LLC et al v Harper*, 2020 ONSC 2504, 174 CPR (4th) 262; *Allarco Entertainment 2008 Inc v Staples Canada ULC*, 2021 ABQB 340). It follows that this Court must also be circumspect in addressing what appears to be a novel issue, especially in view of the Plaintiff having chosen to discontinue its action.

[112] Before going any further, I reproduce the provisions that most prominently apply. I begin with the prohibition against circumvention.

Prohibition

41.1 (1) No person shall

(a) circumvent a technological protection measure within the meaning of paragraph (a) of the definition *technological protection measure* in section 41;

(b) offer services to the public or provide services if

(i) the services are offered or provided primarily for the purposes of circumventing a technological protection

Interdiction

41.1 (1) Nul ne peut :

a) contourner une mesure technique de protection au sens de l’alinéa a) de la définition de ce terme à l’article 41;

b) offrir au public ou fournir des services si, selon le cas :

(i) les services ont pour principal objet de contourner une mesure technique de protection,

measure,

(ii) the uses or purposes of those services are not commercially significant other than when they are offered or provided for the purposes of circumventing a technological protection measure, or

(iii) the person markets those services as being for the purposes of circumventing a technological protection measure or acts in concert with another person in order to market those services as being for those purposes; or

(c) manufacture, import, distribute, offer for sale or rental or provide — including by selling or renting — any technology, device or component if

(i) the technology, device or component is designed or produced primarily for the purposes of circumventing a technological protection measure,

(ii) the uses or purposes of the technology, device or component are not commercially significant other than when it is used for the purposes of circumventing a

(ii) les services n'ont aucune application ou utilité importante du point de vue commercial si ce n'est le contournement d'une mesure technique de protection,

(iii) il présente — lui-même ou de concert avec une autre personne — les services comme ayant pour objet le contournement d'une mesure technique de protection;

c) fabriquer, importer, fournir, notamment par vente ou location, offrir en vente ou en location ou mettre en circulation toute technologie ou tout dispositif ou composant si, selon le cas :

(i) la technologie ou le dispositif ou composant a été conçu ou produit principalement en vue de contourner une mesure technique de protection,

(ii) la technologie ou le dispositif ou composant n'a aucune application ou utilité importante du point de vue commercial si ce n'est le contournement d'une

technological protection measure, or

(iii) the person markets the technology, device or component as being for the purposes of circumventing a technological protection measure or acts in concert with another person in order to market the technology, device or component as being for those purposes.

mesure technique de protection,

(iii) il présente au public — lui-même ou de concert avec une autre personne — la technologie ou le dispositif ou composant comme ayant pour objet le contournement d'une mesure technique de protection.

Circumvention of technological protection measure

(2) The owner of the copyright in a work, a performer's performance fixed in a sound recording or a sound recording in respect of which paragraph (1)(a) has been contravened is, subject to this Act and any regulations made under section 41.21, entitled to all remedies — by way of injunction, damages, accounts, delivery up and otherwise — that are or may be conferred by law for the infringement of copyright against the person who contravened that paragraph.

Contournement de la mesure technique de protection

(2) Sous réserve des autres dispositions de la présente loi et des règlements pris en vertu de l'article 41.21, le titulaire du droit d'auteur sur une oeuvre, une prestation fixée au moyen d'un enregistrement sonore ou un enregistrement sonore est admis, en cas de contravention de l'alinéa (1)a relativement à l'oeuvre, à la prestation ou à l'enregistrement, à exercer contre le contrevenant tous les recours — en vue notamment d'une injonction, de dommages-intérêts, d'une reddition de compte ou d'une remise — que la loi prévoit ou peut prévoir pour la violation d'un droit d'auteur.

(my emphasis)

The chapter on TPM runs for some fourteen sections, including a number of exceptions to the prohibition against circumventing TPM:

- Section 41.11: Law enforcement and national security / Enquêtes;
- Section 41.12: Interoperability of computer programs / Interopérabilité;
- Section 41.13: Encryption research / Chiffrement;
- Section 41.14: Personal information / Renseignements personnels;
- Section 41.15: Security / Sécurité;
- Section 41.16: Persons with perceptual disabilities / Personnes ayant une déficience perceptuelle;
- Section 41.17: Broadcasting undertaking / Entreprises de radiodiffusion;
- Section 41.18: Radio apparatus / Appareil radio;
- Section 41.19: Reduction of damages / Annulation ou réduction de dommages-intérêts;
- Section 41.2: Injunction only remedy / Cas où le seul recours est l'injonction;
- Section 41.21: Regulations / Règlements;
- Section 41.22: Prohibition – rights management information / Interdiction : information sur le régime des droits.

[113] It goes without saying that the definition of what Parliament considers a “technological protection measure” and what constitutes the prohibited circumvention are critical to understanding the prohibition:

Definitions

41 The following definitions apply in this section and in sections 41.1 to 41.21.

circumvent means,

- (a) in respect of a technological protection measure within the meaning of paragraph (a) of the definition *technological protection*

Définitions

41 Les définitions qui suivent s'appliquent au présent article et aux articles 41.1 à 41.21.

contourner

- a) S'agissant de la mesure technique de protection au sens de l'alinéa a) de la définition de ce terme, éviter, supprimer, désactiver ou entraver la

measure, to descramble a scrambled work or decrypt an encrypted work or to otherwise avoid, bypass, remove, deactivate or impair the technological protection measure, unless it is done with the authority of the copyright owner; and

(b) in respect of a technological protection measure within the meaning of paragraph (b) of the definition *technological protection measure*, to avoid, bypass, remove, deactivate or impair the technological protection measure.
(*contourner*)

technological protection measure means any effective technology, device or component that, in the ordinary course of its operation,

(a) controls access to a work, to a performer's performance fixed in a sound recording or to a sound recording and whose use is authorized by the copyright owner; or

(b) restricts the doing — with respect to a work, to a performer's performance fixed in a sound recording or to a sound recording — of any act referred to in section 3, 15 or 18 and any act for which remuneration is payable under section 19.

mesure — notamment décoder ou déchiffrer l'oeuvre protégée par la mesure — sans l'autorisation du titulaire du droit d'auteur;

b) s'agissant de la mesure technique de protection au sens de l'alinéa b) de la définition de ce terme, éviter, supprimer, désactiver ou entraver la mesure. (*contourner*)

mesure technique de protection Toute technologie ou tout dispositif ou composant qui, dans le cadre normal de son fonctionnement :

a) soit contrôle efficacement l'accès à une oeuvre, à une prestation fixée au moyen d'un enregistrement sonore ou à un enregistrement sonore et est autorisé par le titulaire du droit d'auteur;

b) soit restreint efficacement l'accomplissement, à l'égard d'une oeuvre, d'une prestation fixée au moyen d'un enregistrement sonore ou d'un enregistrement sonore, d'un acte visé aux articles 3, 15 ou 18 ou pour

(*mesure technique de protection*)

lequel l'article 19 prévoit le versement d'une rémunération.
(*technological protection measure*)

[114] The TPM must be a technology, device or component that must be effective in controlling access to the work or restricting the doing of some act. The notion of effective applies to technology, device or component. Whether the TPM is alleged to be a technology, a device or a component, each must be “effective”; the qualifier does not apply only to the technology. If there were to be any ambiguity in the English version, the uncertainty is removed in the French version. Already in 1891, the equal authenticity of both versions of legislation was recognized (*The Canadian Pacific Railway Co v Robinson*, [1891] 19 SCR 292). The principle has translated into seeking to reconcile the two versions of legislation. The modern leading case on the interpretation of bilingual legislation remains *R v Daoust*, [2004] 1 SCR 217, where the Court says:

28 We must determine whether there is an ambiguity, that is, whether one or both versions of the statute are “reasonably capable of more than one meaning”: *Bell ExpressVu, supra*, at para. 29. If there is an ambiguity in one version but not the other, the two versions must be reconciled, that is, we must look for the meaning that is common to both versions: *Côté, supra*, at p. 327. The common meaning is the version that is plain and not ambiguous: *Côté, supra*, at p. 327; see *Goodyear Tire and Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610, at p. 614; *Kwiatkowsky v. Minister of Employment and Immigration*, [1982] 2 S.C.R. 856, at p. 863.

The Court went on to find that if both versions are ambiguous, the common meaning will normally be the narrower version. The unambiguous version will usually carry the day. We must also determine if the common meaning is consistent with Parliament’s intent. It seems to me that

there is no doubt that Parliament intended that the effectiveness of the measure must apply to the technology, device or component, and not only for the technology to be effective but not the device or the component. The French version makes it clear that the common meaning must prevail as it also conforms with Parliament's intent (*Schreiber v Canada (Attorney General)*, [2002] 3 SCR 269, at para 56). That is because the structure of the French version of the definition of "technological protection measure" is different. The English structure may leave the impression that only the technology must be effective as the qualifier "effective" may be associated with technology only. Not so in the French version. The equivalent of "effective" ("efficacement") is found in paragraphs (a) and (b) of the definition and it is made clear that it is the controlling of the access to a work or the restricting of the use with respect to a work that must be "effective" ("efficacement"), whether the measure is technology, device or component.

[115] Similarly, in both versions the common meaning of "effective" and "efficacement" implies some certainty about producing the desired effect. According to the Canadian Oxford Dictionary (Oxford University Press Canada 2001), the first meaning of "effective" is "having a definite or desired effect"; its second is "impressively powerful in effect". A third meaning is presented as being "actual, existing in fact rather than officially or theoretically". "Efficace", on the other hand, is defined in *Le Petit Robert de la langue française* as "qui produit l'effet qu'en attend".

[116] Blacklock's Reporter takes the view that a password fits squarely within the meaning of a TPM because, it says, it is an effective technology to control access. Fair dealing is not

applicable in the context of circumvention because allowing it would be disregarding clear parliamentary direction. I cannot share that point of view.

[117] In this case, the Court granted leave to the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic [CIPPIC] to intervene in this matter, being supported by the AGC (Order of Case Management Judge Molgat, January 21, 2022). The Court wrote at page 4 of 7:

CONSIDERING CIPPIC’s public interest mandate, institutional expertise and experience, the Court is of the view that CIPPIC has much insight into the area of copyright law and policy, including the reach of the anti-circumvention provisions in the Act, and the scope of fair dealing, as it has demonstrated in a number of interventions before this Court, the Federal Court of Appeal and the Supreme Court of Canada.

CIPPIC duly limited itself to arguing that sections 41 and 41.1 of the *Act* do not restrict fair dealing and that employing a validly obtained password to access content does not satisfy the requirements of the definition of “circumvent”.

[118] The Court has carefully reviewed the submissions of counsel for BR, the AGC and CIPPIC, and has listened again to the recording of the hearing of this case. As a matter of fact, I was somewhat dubious that the procedural vehicle of a motion for summary judgment, for an outcome constituted of declarations, was completely appropriate on a record comprised of limited affidavits when one of the important issues being debated was what constitutes a technological protection measure, without any expert evidence as to what constitutes a password.

[119] As a result, the issue must be circumscribed to the limited evidence brought forward by the parties. Hence, it has been established to the Court’s satisfaction that Parks Canada purchased

the only type of subscription made available by Blacklock's Reporter. That subscription gave Parks Canada access to a password which was used to gain access to some articles published by BR which concerned Parks Canada's mandate and operations. The evidence does not establish if the sharing required to conduct the research undertaken by Parks Canada in its monitoring of articles was done by sharing the password, sharing copies of articles through e-mails or in paper format. There appears, however, to be common ground that there was some sharing of the password. The Court is satisfied that the use made of the articles accessed through the validly obtained password constituted, on the facts in this record, fair dealing according to section 29 of the *Act*. Fundamentally, Parks Canada did not circumvent what is presented as an effective TPM. It used the password licitly obtained for the purpose for which it was created: gaining access to articles located on a website. Once the articles were obtained, they were used in a manner consistent with recognized fair dealing.

[120] In fairness, BR was essentially reacting to the arguments put forth by CIPPIC. It remains, however, that its counter arguments were suffused with various concepts that were not defined or do not find support in our law. Thus, repeatedly BR referred to a "paywall" being circumvented. The paywall is equated with a TPM that is circumvented because the paywall is meant to "prevent access without an authorized username and a password" (Blacklock's Reporter's response to CIPPIC memorandum of fact and law, para 31; see also para 42). First, "paywall" is not defined. Second, it would appear doubtful that a paywall is strictly speaking a TPM, as stated at paragraph 31. That conflates the means and the end. Rather the TPM used is the means to the end, which may be a so-called "paywall" or something else. It is the technology, device or component created that results in a paywall. In other words, the TPM exists for a purpose, but it

is only the means to satisfy a purpose that may be a paywall. It is the means that is not to be circumvented whether that be technology, device or component. Barnes J in the *Department of Finance* case said that “(t)he suggestion that Blacklock’s business model cannot survive in the face of the minor and discrete use that took place here is essentially an admission that the market places little value on Blacklock’s work-product ... It also goes without saying that whatever business model Blacklock’s employs it is always subject to the fair dealing rights of third parties” (para 45). I certainly share that view. A paywall may be the result of some technology, device or component, but it is not the technology, device or component. The paywall is not the TPM. It protects against unauthorized intrusions and is part of a business model. That protection is not jeopardized by Parks Canada purchasing a subscription for the purpose of research constituting fair dealing. In the case at bar, there is no circumvention of a TPM simply because the password was not circumvented: it was properly obtained and used for a legitimate purpose.

[121] BR argued that Parliament’s intention was to empower owners to protect the works with any technological tool at their disposal (para 32). That cannot be accurate because that would not account for the requirement that the technology, device or component be effective. What constitutes effective technology, device or component in this case is not addressed. More importantly, clear language would be expected to displace altogether the fair dealing protection.

[122] On a number of occasions, BR speaks of fair dealing as being a defence against infringement (para 21, for instance). Fair dealing has been found by authorities binding on this Court to be an integral part of a scheme, not a mere exception to the scheme or a defence to an infringement. It must be accounted for in considering the TPM provisions.

[123] The Court has accordingly considered the matter on the basis of the record as it is, i.e. on the basis that the access to the articles was valid because it was done through the use made of a validly acquired password. BR asserts at paragraph 23 of its response to the CIPPIC memorandum of fact and law that “a copyright owner has the right to control access to its work, and should not be deprived of asserting infringement if its work was unlawfully accessed. Likewise, a user should not be able to benefit from illicit activity”. The difficulty with such a statement is not that it may not be true: it may. It is rather that it must be shown that the activity was illicit.

[124] The AGC contends that, given that the use of the password was in the context of fair dealing, with a password legally obtained, there cannot be liability under subsection 41.1(1) of the *Act*. At any rate, circumvention was never established.

[125] CIPPIC’s submissions were more fulsome. Fundamentally, it argues that the TPM provisions do not apply to restrain fair dealing; using a validly obtained password to access content is not circumvention. I agree. I would add nonetheless that how the password was obtained is significant as this may prevent a user from invoking the fair dealing provisions of the *Act*. Obtaining content by descrambling a signal or decrypting a communication may render invoking fair dealing very difficult to establish successfully. It is telling in my view that s 41.11(1) of the *Act* provides for an explicit exception for law enforcement and national security against liability for circumvention. But this is not the case before this Court. Our case is much more straightforward in my estimation and it is limited to a very narrow scenario.

[126] As pointed out earlier, the *Act* provides for a careful balance between the rights of owners of the works who must receive a just reward, especially because of the access now possible for copyrighted content in the digital world, and the use that must be possible to make in the public interest (*CCH*, para 23). This is integral to the needed balance between owners and users. That balance has been part of our law for two decades and Parliament was fully aware of its existence. Fair dealing was not a blank cheque before the amendments of 2012 brought about the TPM provisions, and there is no indication that the balance was to be upended in one direction or the other. That would be the effect of the interpretation suggested by BR.

[127] Not only would the upending of the balance require some clear signal from Parliament, which we cannot find in the text, context, structure or even history, but the text of the prohibition against circumvention points in the opposite direction. Section 41.1 establishes a prohibition against circumvention. Subsection (2) provides specifically that the owner of the copyright in a work is entitled to all remedies conferred by law for the infringement of copyright. However, the law is careful to stress that the entitlement to remedies is “subject to this Act and any regulations made under section 41.21”. The ability to claim a remedy for circumvention is limited by the words of the Statute because, as I read it, the scheme of the *Act* continues to prevail.

[128] For our purposes, it suffices to note, as we are invited to do so by CIPPIC, that paragraph 49 of *CCH* establishes the principle that “as an integral part of the scheme of copyright law, the s 29 fair dealing exception is always available”. The Supreme Court goes on to use as an example a library that can always use s 29; if unable to satisfy the requirements, it could turn on the library exemption of s 30.2. Specific exemptions for TPM do not, on that

reasoning, displace the fundamental pillar of copyright law that is fair dealing. If there is fair dealing, there is no infringement. Actually, the structure of the *Act* itself places the TPM provision in the part of the *Act* interested in the remedies for infringement (s 41.1(2)).

[129] Blacklock's Reporter asserted that "the aforementioned tabulated conditions illustrate Parliament's clear overall reluctance to reward any user who fails to properly acquire or access a work" (Blacklock's Reporter's response to CIPPIC's memorandum of fact and law, para 13). The same argument is found at paragraph 9. The argument cannot hold if the access was licit: here, the password was acquired regularly. The fair dealing right is meant to be robust. One of the purposes of the fair dealing right is to bring balance to copyright law and avoids allowing a monopoly over the use of the works (*CCH*, para 70). If such an important balance were to be altered as suggested by BR, Parliament would have been explicit.

[130] What is the purpose then of the TPM provision? The proverbial "elephant in the room" question was in my view completely answered by CIPPIC at paragraph 42 of its submissions, which I reproduce here:

42. The TPM Provisions' purpose was to better enable digital copyright owners to enforce copyright in the online environment. They provide an additional remedial arrow in the copyright owner's quiver where an infringement occurs in a digital context "to better address the challenges and opportunities of the Internet". They were not intended to **effectively enlarge** copyright protection for digital works by allowing owners to employ TPMs to defeat fair dealing, an inherently non-infringing activity. [footnotes omitted]

Fair dealing precludes liability under the *Act*. Other sources of liability may be created, including by contract. If the goal of the TPM provisions was to allow copyright owners the ability to

unilaterally not only to alter the balance, but to change it completely in the face of the state of copyright law, the expectation can only be that Parliament would have said so. It did not.

[131] In view of the conclusion that I have reached on the issue of whether fair dealing and TPM were meant to co-exist in some harmony so long as the dealing is fair, which includes obviously how access to the work has been accomplished and the use of the content that followed, the balance between owners of copyrights and potential users of the works remains preserved. The ability of copyright owners to protect against the distribution of their works, which is made so much more broad scale in the digital world, is now a reality. But that cannot be if the cost is to negative fair dealing. Accordingly I see no need to consider the issue of the constitutionality of a TPM regime that would be divorced from Parliament's jurisdiction over copyrights (*Constitution Act, 1867*, s 91(23)).

[132] There remains the issue of whether a "password" is a technological protection measure, which requires that the technology, device or component be effective to control access to the work. The definition of "circumvent" requires that the person in breach of the prohibition must descramble or decrypt or to otherwise avoid, bypass, remove, deactivate or impair the technological protection measure in order to gain access. It stands to reason that the starting point has to be what is the technology, device or component at issue in this case before seeking to address whether it is effective or not. There is not a paucity of evidence: there is instead a complete absence on the record before the Court.

[133] There is no need to consider any further the circumvention of the password because, in this case, there is no evidence of descrambling, decrypting or to otherwise avoid, bypass, remove, deactivate or impair the TPM since the password was acquired and used for the purpose for which it was created, i.e. gain access to articles. Only CIPPIC submitted dictionary definitions of the various actions constituting circumvention of access. That, in my view, could not justify offering a declaration of what constitutes circumvention given the list of actions found in the definition of the term. It will suffice to conclude that the very use of the password, which arguably could constitute a TPM, can hardly be the circumvention of itself when used as it was meant to be used.

VII. Conclusion

[134] Given that there is no liability involved in these proceedings as the original action has been discontinued, the Moving Party, the AGC, seeks declarations in his motion for summary judgment. In his prayer for relief, the AGC asks specifically for a declaration:

- a) that there be rectification by the Court, striking down those parts of the Terms and Conditions that do not conform with Parks Canada's understanding that it was purchasing an institutional subscription allowing the sharing of articles and passwords;
- b) that Parks Canada was entitled to share articles for institutional use. To the extent that the subscription was an individual subscription, the articles and their circulation were subject to fair dealing and, accordingly, there is no breach of copyright;

- c) that, to the extent that the subscription was not an institutional subscription, the sharing of a password is not a circumvention of the technology protection measures of the *Copyright Act*;
- d) that, at any rate, if there was a breach of the TPM provisions, they were inconsequential to the extent they are subject to fair dealing. No damages are accordingly payable.

[135] For the reasons developed in the preceding paragraphs, and, fundamentally, in view of the record available to the Court, the Court is not disposed to grant rectification in this case.

[136] Nonetheless, the AGC, on behalf of Parks Canada, is entitled to the declaration that, having purchased the only type of subscription offered which allowed the acquisition of a password needed to access articles produced by Blacklock's Reporter, Parks Canada's use of the password in the circumstances of this case constitutes fair dealing under section 29 of the *Copyright Act*.

[137] On the issue of the alleged contravention of the TPM provisions of the *Copyright Act*, the AGC is entitled to the limited declaration that the licit acquisition and use of a password, if it is otherwise a technological protection measure, does not constitute the circumvention of the technological protection measures of the *Copyright Act*. The evidentiary record in this case does not permit the Court to consider if a password constitutes an effective technology, device or component. At any rate, such finding is not needed here in view of the facts.

[138] The Order granting the intervention of the Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic [CIPPIC] provided specifically that the “CIPPIC shall not seek or be made subject to any Order for costs”. As to the AGC and 1395804 Ontario Ltd, operating as Blacklock’s Reporter, in view of the divided success on the motion for summary judgment, there shall be no Order for costs.

JUDGMENT in T-1862-15

THIS COURT'S JUDGMENT is the following:

1. It is hereby declared that, having purchased the only type of subscription available, which was allowing the acquisition of the password needed to access articles produced by Blacklock's Reporter, Parks Canada's use of the password in the circumstances of this case constitutes fair dealing under section 29 of the *Copyright Act*.
2. It is hereby declared that the licit acquisition and use of a password, if it is otherwise a technological protection measure, does not constitute the circumvention of the technological protection measures of the *Copyright Act*.
3. There is no order as to costs.

"Yvan Roy"
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1862-15

STYLE OF CAUSE: 1395804 ONTARIO LTD, operating as BLACKLOCK'S
REPORTER v ATTORNEY GENERAL OF CANADA
AND SAMUELSON-GLUSHKO CANADIAN
INTERNET POLICY & PUBLIC INTEREST CLINIC

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: JUNE 7-9, 2023

JUDGMENT AND REASONS: ROY J.

DATED: MAY 31, 2024

APPEARANCES:

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