Court's Liberal Approach to "Criticism" Fair Dealing in Favour of Use of Copyrighted News Material in Political Ads

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It is not often that we are lucky enough in Canada to get judicial pronouncements on the law of Fair Dealing for the purposes of "criticism" or "review" (*Copyright Act*, 1985 RCS c C-42, section 29.1 (the "Act")). When we do, copyright and TV/film errors and omissions ("E&O") lawyers become giddy because these don't come around very often. The recent decision of the Federal Court of Canada (per Justice Phelan) in *Canadian Broadcasting Corporation v. Conservative Party of Canada*, 2021 FC 425 (*CBC v CPC*) provided an interpretation of "fair dealing" for the purpose of criticism that is certain to have a wide ranging impact on how users (including political parties) engage with others' copyrighted works. The decision found that incorporating seconds-long clips from others' work into political attack ads, while amounting to the taking of a "substantial part" of that work, can nevertheless qualify as a "fair dealing" with respect to that work for the purpose of criticism.

Of importance, in *CBC v CPC*, the Court held that to avail oneself of fair dealing for the purpose of criticism, the "criticism" need not be restricted to criticism of the copied work itself. Instead, the "idea set out in the work and the social or moral implications of those ideas" are also fair game. Such broad interpretation may well invigorate this fair dealing category, and embolden users to test the limits of how "critical" a criticism could be to be "fair". It is interesting to contrast this decision with Justice Phelan's prior ruling in *United Airlines, Inc. v. Cooperstock*, 2017 FC 616 ("Cooperstock"). In that case, the defendant operated a website that permitted users to submit complains about an airline provider. The defendant claimed the website was fair dealing for the purpose of "parody". In that context, the Court found no fair dealing. Justice Phelan noted that "parody" required an "intent for humour" rather than an "intent to embarrass and punish … if extended too far, what may be designed in jest for parody may simply become defamatory". By contrast, the outcome in *CBC v CPC* expands the "criticism" category to encompass use of works in attack ads. Such ads, by their nature, are designed to "embarrass and punish" the subject. It suggests that where a user's dealing may not comfortably sit within the meaning of "parody" or "satire", the user may be better off arguing the dealing is for the purpose of "criticism".

Such expanded interpretation of "criticism" may also be of particular importance to documentary filmmakers. In combination with the Ontario Court's 2020 decision in *Wiseau Studio, LLC v Harper*, 2020 ONSC 2504—which suggested an expanded approach to the "news reporting" fair dealing category in the context of documentary filmmaking—these two decisions indicate that documentary filmmakers may now have more confidence when incorporating excerpts of third party copyrighted works into their films without permission from the copyright holder.

Background

The case centred on federal election campaign attack ads and tweets produced by the Conservative Party of Canada ("CPC") that incorporated copyrighted works owned by the Canadian Broadcasting Corporation ("CBC"), Canada's national broadcaster, without CBC's express consent.

The CPC ad, entitled "Look at what we've done", sought to criticize Prime Minister Justin Trudeau and the Liberal Party of Canada. It included short excerpts from CBC's news reports "At Issue", "Point of View", "The National" (CBC's leading national English evening television program), and from the "Power Panel" segment of "Power and Politics", as well as from

an hour-long Town Hall with the Prime Minister produced and broadcast by CBC (the "Ad"). Most segments were 10 minutes or longer. The excerpts taken were less than ten seconds each (discussed further below). The CPC also posted four short (less than a minute long) excerpts from CBC's two-hour broadcast of the English-language federal leadership debates on Twitter ("Tweets") (collectively, the "Clips"). The CPC's tweets were re-tweeted hundreds of times.

CBC sought an injunction to stop the CPC from disseminating the Clips, and a declaration as to CBC's rights in the Clips. The CPC claimed that the use of the Clips did not amount to copyright infringement as they were protected by Fair Dealing.

In reaching its decision, the Court focused on two issues: (1) whether CPC took a substantial part of CBC's Works to incorporate into the Ad and Tweets; and (2) whether CPC's actions constitute "fair dealing".

Of note, CPC stopped circulating the Ad and took down the Tweets after CBC commenced litigation. CPC argued that this rendered CBC's request for an injunction moot. However, the Court declined. Justice Phelan noted the importance of the issue to conduct in future elections (including a possibly upcoming 2021 election), and that neither CPC nor CBC had conceded their position. As the dispute was likely to occur again—and could also determine political parties' behaviour in future elections—it was appropriate or the Court to resolve the issue.

The Ad, Tweet, and Clips

The Ad was 1 minute, 46 seconds in length. It included five Works: the "Coyote Clip" (a 4-second clip from a 5:12 minute "At Issue" segment); the "Town Hall Clip" (an 8-second clip from a 102 minute CBC town hall with the Prime Minister); the "Tasker Clip" (a 5-second clip from an 8:12 minute "Power and Politics" program); the "Murphy Clip" (a 7-second clip from a 3:30 minute segment); and the "Singh Clip" (a 5-second clip from a 9:10 minute CBC News Network segment).

The Tweets consisted of 4 individual tweets that reproduced three different clips and an excerpt from the October 7, 2019 Canadian federal leadership debate. The debate was produced by the Canadian Debate Production Partnership ("CDPP"), a non-partisan group of broadcasters chaired by the CBC. The content of the Tweets are outlined at para 15 of the decision:

1. The "First Tweet" included a 42-second clip of Andrew Scheer (CPC Leader) speaking at the Leaders' Debate.
2. The "Second Tweet" included a 21-second clip of Mr. Scheer and Jagmeet Singh (NDP Leader) speaking at the Debate.
3. The "Third Tweet" included the same clip as the Second Tweet, but with a different French caption.
4. The "Fourth Tweet" included a 14-second clip of Mr. Scheer and Mr. Trudeau speaking at the debate.

Taking of a Substantial Part of CBC's Works

The Court easily found the Works at issue were protected by copyright as "cinematographic works". The key issue was whether short clips from much longer works constituted a taking of a "substantial part" of that work. The CPC argued that no substantial part of any of the Works was taken, because on average only 0.5% of the underlying work was used in the Ad and Tweets. They noted 0.5% fell well below the 32% of a copyrighted work found to not be a "substantial part" in *Warman v Fournier*, 2012 FC 803. The CPC also argued that the nature of the works taken consisted of "editorial or administrative contributions", and thus did not meet the originality requirement for copyright protection.

Justice Phelan rejected both these arguments. He referred to the Supreme Court's decision in *Cinar Corporation v Robinson*, 2013 SCC 73 ("Cinar") for guidance, and noted the Supreme Court required a "qualitative and holistic" approach to analyzing whether a "substantial part" is taken. The Court listed five factors used to assess whether a "substantial part" of the original work was taken:

1. The quality and quantity of the material taken, including the importance of the parts taken to the plaintiff's work and the extent of originality of the parts taken;
2. The extent to which the impugned use adversely affects the plaintiff's activities and diminishes the value of the plaintiff's copyright;
3. Whether the material taken is the proper subject-matter of copyright;
4. The purpose for which the material is taken, including whether the defendant intentionally appropriated the plaintiff's work to save time and effort; and
5. Whether the material is used in the same or similar fashion as the plaintiff's.

(Of note, this five-factor test appears in the 1995 Federal Court decision in *U & R Tax Services Ltd.* v. *H&R Block Canada*

Inc. (1995), 62 C.P. R. (3d) 257 (Fed. T.D) at para 35. It does not appear in Supreme Court's decision in *Cinar* as noted in paragraph 44 of the *CBC v CPC* decision).

The Court considered each of these five factors and determined that "substantial parts" were taken. On the first factor (quality and quantity), the Court found the CPC "took all the skill and judgment used to create the original" (para 48). Justice Phelan noted that "artistic design, production services (lighting, camera work, audio, etc.) and journalistic decisions (i.e., the flow of discussions and the election and posing of questions)" (para 50) all constituted the skill and judgment of "CBC and it's employees". Moreover, the Court found CPC's taking involved "selectivity and manipulation" (para 53) as they were used to convey their message to voters that people should not vote for the Liberal Party federal candidates. This showed the portions of the Work taken were qualitatively important. On the second factor (adverse effects), the Court held that "absent something more than intangible and speculative concerns, the CBC's brand would seem to be strong enough to counter any suggestion of involvement in partisan politics" (para 54). On the third factor, the Works were confirmed to be the proper subject matter for copyright protection. On the fourth factor (purpose of the use), Justice Phelan referred to the Ontario Court's decision in *Wiseau Studio, LLC v Harper*, 2020 ONSC 2504 and affirmed "the substantial part analysis includes the importance of the materials, adverse impacts, proper copyright subject matter as well as the reason for copying" (para 57). Here, the Court found the evidence established the appropriation was to "create a political ad that was designed to show Mr. Trudeau in an unfavourable light and consequently seek support (votes, money or both) from viewers" (para 58). The purpose of the taking was not just to "save time and effort" but also "the impactful nature of clips showing an opponent saying and doing things that hold them up to potential ridicule and criticism" (para 60). Of note, Justice Phelan emphasized that the Court's role on this fourth factor was to "establish the true purpose behind the taking of the copyright", which inquiry was "also a factor to consider under "fair dealing"" (para 61). This was the same approach adopted in *United Airlines*. On the fifth factor (if the material is used in a similar fashion), the Court found that although there was no similar use in this case, this factor was of minor importance in the weighing exercise.

Fair Dealing

Having found a "substantial part" of the CBC's Works was taken, the Court moved on to find the dealings by CPC were nevertheless excused as they qualified as a "criticism", and were, on the balance "fair". The Court approached the analysis using the two-step test outlined by the Supreme Court of Canada in *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 ("CCH"): (1) whether the dealing feel into one of the Act's enumerated fair dealing categories (e.g., was for an allowable purpose); and (2) if so, whether, on the balance, the dealing was "fair" having regard to six factors set out by the Court in *CCH*.

The Dealing was for the allowable purpose of criticism

The CPC argued its dealings qualified as criticism, review, satire, and education—all allowable purposes under the *Act*. However, the Court found only criticism at play. Although there was some element of satire in the Works, they were "less "Monty Python" and more "Sports 40 Best Bloopers"" (para 74).

In keeping with the Supreme Court of Canada's pronouncement in *CCH*, the Court gave a "large and liberal interpretation" to the meaning of the "criticism" allowable purpose. It rejected CBC's position (one set out in a 2001 decision of the British Columbia Supreme Court (2001 BCSC 156), and long followed by many filmmakers and copyright/E&O lawyers in Canada), that to qualify as a "criticism", the criticism must pertain to the work at issue. Instead, Justice Phelan cited a 1972 English case and a 2003 decision of the British Columbia Supreme Court and held that "Canadian jurisprudence has established that it is not merely the text or composition of a work that may be the object of criticism but also the idea set out in the work and the social or moral implications of those ideas" (para 79). For the Court, "criticism" included criticism of the ideas and actions challenged by the dealing. It should not be limited to only challenging the form or content of the expression. Here, it was enough that the criticism was directed at the Prime Minister— the subject of the Works— and not of the CBC Works themselves, to qualify as criticism for the purpose of Fair Dealing.

In addition to qualifying as a "criticism", the CPC's dealing also met the technical requirements of this fair dealing category under the Act that the source and name of the author/performer/marker/broadcaster also be identified. Justice Phelan cautioned against taking a "microscopic" approach to these technical requirements. The purpose of these technical requirements would be "met if the source is identified or identifiable to a reasonably informed watcher" (para 85). The appearance of the CBC's logo in some clips, and an "easily recognized core program site" and "TV personality" in others was sufficient to meet the source requirements of the Act (of note, whether these facts also satisfied the "name"

requirement was not squarely considered by the Court).

Having found CPC's use of the CBC works qualified as a "criticism", the Court next considered the second part of the test: the fairness analysis.

The Dealing was Fair

The Court concluded the CPC's dealing was also "fair". In doing so, the Court considered the six "fair dealing" factors — (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) the existence of any alternatives; (5) the nature of the work; and (6) the effect of the dealing on the work — and found nearly all favoured a finding of fairness.

On the first factor (purpose of the dealing), the Court found the "ultimate purpose" of the dealing was to "mount a political campaign to secure votes to form a government". This was a "legitimate political purpose" that pointed to fairness (para 90).

With respect to the second factor (character of the dealing), "fairness" was not found. The Ad was broadcast, and the Tweets were communicated via the Internet; the dissemination of the CBC works was broad; and more than a single copy was made. While the Court cautioned that digital dealings may need to be treated differently than dealings involving physical copies (given the principles of technological neutrality being developed by the Supreme Court), the speed and extent of dissemination in this case (more than 2 million views of the Ad in six days) weighed against fairness.

On the third factor (amount taken), the Court found that the average Clip was anywhere from 0.5% to 3% of the overall Work, which was small. While the Court made note that the use of the CBC works "was neither excessive nor trivial" (para 97), the overall finding was that the amount of the use was fair. This is an important contrast given the Court's finding that the same clips constituted a "substantial part" of the underlying Work. It suggests that different considerations apply with respect to what constitutes a "substantial part" versus what "amounts" of a work can be taken and still quality as "fair", and that ultimately the use of a "substantial part" can still be deemed fair notwithstanding the different considerations.

On the fourth factor (alternatives), the real issue was whether possible alternatives—such as watching the entire Works, or discussions/interviews on the topic— "were as reasonably effective" as using direct statements or actions of the targeted politicians (para 101). While finding it "difficult to see a reasonable alternative" for some of the Clips, the Court held the factor neutral, at best.

On the fifth factor (nature of the work), that the Works were designed for public broadcast, mandated for wide distribution, and already published, all favoured fairness.

On the last factor (effect on the work), the Court found CBC's argument that partisan use of its Works could damage its journalistic integrity and reputation for neutrality unfounded in the evidence. While the Court noted such concerns were reasonable and could be borne out in other circumstances, it was not the case here.

Weighing the six fairness factors, the Court held CPC's dealing was fair.

Conclusion

This decision as it stands, provides users (and filmmakers) with arguments to rely on the fair dealing category of criticism when incorporating others' work into their own without permission, where the underlying work itself is not squarely criticized. In combination with *Wiseau*, it suggests that courts may now be more willing to find a dealing is fair where there is some public interest element to the incorporating work/dealing—at least with respect to documentary filmmaking or advertisements.

Stay tuned for further development and whether this decision is appealed.