SCC Court File No: 39222

IN THE SUPREME COURT OF CANADA
[On Appeal from the Federal Court of Appeal]

B E T W E E N:

YORK UNIVERSITY

APPELLANT
(Appellant)

- and -

CANADIAN COPYRIGHT LICENSING AGENCY ("ACCESS COPYRIGHT")

RESPONDENT
(Respondent)

(Style of Cause continued on inside cover page)

FACTUM OF THE INTERVENER, SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC

Pursuant to Rule 42 of the Rules of the Supreme Court of Canada

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(Continuation of style of cause)

- and -

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PART I - OVERVIEW

1. This Court is presented with competing interpretations of fair dealing for educational purposes. The Federal Court of Appeal below[1] opted for an interpretation of the purpose of the dealing predicated on financial transactions, which are merely instrumental activities in pursuit of the university's intrinsically valuable role as a post-secondary educator. In adopting this approach, the courts below stripped the dealing in question of its grounding in the university's statutory objects, its place in copyright's innovation and authorship cycle, its wider social value and, ultimately, its constitutional value as an embodiment of freedom of expression.
2. CIPPIC argues for an alternative approach that is consistent with *Charter* values and avoids the harms inherent to the approach adopted in the courts below. This approach:
    a. recognizes that copyright is right to exclude, not simply be paid;
    b. identifies the relevant perspective as that of the ultimate user;
    c. recognizes universities' unique role as cradles of authorship and innovation; and
    d. appreciates educational institutions role in society where truth is contested; and
    e. appreciates that intermediaries and commercial actors are aspects of marketplaces that facilitate the socially beneficial exercise of both owners' and users' rights.

PART II – POSITION ON APPELLANT'S QUESTION

3. **Substantive Error:** Did the courts below err by failing to apply the fairness factors from the student's perspective in light of the educational purpose of the dealings? CIPPIC argues for a purpose interpretation of fair dealing from the perspective of the ultimate beneficiary of the dealing at issue. CIPPIC takes no position on the ultimate issue before the Court.
4. **Procedural Error:** Did the courts below err by focusing on compliance and safeguards akin to an action for copyright infringement? CIPPIC makes no submissions on approach of the Federal Court of Appeal to the Appellant's use of Guidelines.

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[1] *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, 2018 FCA 58 [*York v Access Copyright*].

PART III – STATEMENT OF ARGUMENT

A Fair Dealing: An Exercise in Statutory Construction

5. Interpretation of the meaning and scope of the fair dealing provisions of the *Copyright Act*[2] are a matter of statutory construction. In keeping with the modern approach to statutory constructions, the words of section 29 of the Act should be interpreted "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[3]
6. The *Interpretation Act* requires that every statute "be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."[4] Statutes are considered to be "always speaking" and are to be applied "to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning."[5]

1. Purpose of Copyright Law

7. This Court's decisions in *Théberge v. Galeries d'art du Petit Champlain*[6] and *Law Society of Upper Canada v. CCH Canadian Limited*[7] placed copyright law on a rational foundation. The decision in *Théberge* identified the purpose of copyright law as: "a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator."[8]
8. Parliament in dividing rights between authors and users should be seen as identifying the purpose of the *Copyright Act* as a balancing of statutory entitlements amongst equally significant stakeholders. The majority in *Théberge* went on to observe that "it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them."[9]

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[2] *Copyright Act*, RSC 1985, c C-42 [*Copyright Act*].
[3] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 22, citing Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87.
[4] *Interpretation Act*, RSC 1985, c I-21, s. 12 [*Interpretation Act*].
[5] *Interpretation Act*, s. 10.
[6] *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336 [*Théberge*].
[7] *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339 [*CCH*].
[8] *Théberge* at para 30.
[9] *Théberge* at para 31.

9. In *CCH*, a unanimous Court approached its task in interpreting the fair dealing provisions with this division of entitlements in mind. The Court stated that fair dealing is more than an "exception" to copyright infringement. As a user's right, fair dealing is "properly understood as an integral part of the *Copyright Act*" and "must not be interpreted restrictively."[10]

10. The Court went on in *CCH* to describe the importance of fair dealing to the scheme of copyright law as a whole as follows:

> Any act falling within the fair dealing exception will not be an infringement of copyright. he fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver, *supra*, has explained, at p. 171: "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation."[11]

11. In assessing whether the Great Library, the defendant in CCH, would have to establish that no use of content provided by the Great Library infringed copyright, the Court concluded that it did not, but could "rely on its general practice to establish fair dealing":

> The language is general. "Dealing" connotes not individual acts, but a practice or system. This comports with the purpose of the fair dealing exception, which is to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works. Persons or institutions relying on the s. 29 fair dealing exception need only prove that their own dealings with copyrighted works were for the purpose of research or private study and were fair. [12]

12. The fair dealing provisions of the Act should be interpreted in a "large and liberal" manner that achieves Parliament's objectives in granting user rights. Purposive interpretation of fair dealing regards the enumerated purposes of the fair dealing provisions of the *Copyright Act* as advancing public policy objectives that are important in a free and democratic society. The values underlying these public policy objectives reflect wider societal and constitutional values. Narrow readings of the fair dealing provisions that do not take fair dealing's public policy objectives into account will reduce fair dealing to a mere exception to copyright owners' rights, a loophole – an approach this Court has expressly rejected.

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[10] *CCH*, para 48.
[11] *CCH*, para 48, citing David Vaver, *Copyright Law*, (Toronto: Irwin Law, 2000) at 171.
[12] *CCH* at para 63.

2. *Charter* Values

13. An exercise in statutory interpretation may have recourse to *Charter* values to assist in resolving ambiguity in meaning. In its exercise of statutory interpretation, the Court only views ambiguities as "real" when the provision is reasonably capable of more than one meaning.[13] Ambiguity is not decided on the fact that several courts have differing conclusions on the interpretation of a given provision – there must genuinely be two (or more) plausible readings, "each equally in accordance with the accordance with the intentions of the statutes".[14] In such circumstances, the Court may have recourse to *Charter* values in construing statutory meaning: a statute must be construed with the presumption that Parliament intended to act legislation in conformity with the *Charter*,[15] and where faced with competing interpretations of a statutory provision, the Court must consider the possible interpretations of a provision and adopt the one that embodies the *Charter* values.[16]

14. Copyright law balances rights in expression. Indeed, it is a cornerstone of copyright that it vests only in expression, and not facts or ideas.[17] Expression is also the domain of section 2(b) of the *Charter of Rights and Freedoms*, which guarantees freedom of expression. The Supremacy Clause dictates that the constitutional guarantee of freedom of expression "is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."[18] The law of copyright ought, then, to be interpreted in a manner consistent with the values that underlie freedom of expression, and this Court should have recourse to .

15. This Court has identified three purposes that lie at the core of freedom of expression:

    (1) **The pursuit of truth:** "[S]eeking and attaining the truth is an inherently good activity."

    (2) **Democratic Participation:** "[P]articipation in social and political decision-making is to be fostered and encouraged."

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[13] *Bell ExpressVu Ltd Partnership v Rex*, 2002 SCC 42 at para 29.
[14] *CanadianOxy Chemicals Ltd v Canada (Attorney General)*, [1999] 1 SCR 743 at para 14, 171 DLR (4th) 733.
[15] *Canada (A.G.) v. Mossop*, [1993] 1 S.C.R. 554 at 581.
[16] *R v Lucas*, [1998] 1 SCR 439 at para 66, 157 DLR (4th) 423.
[17] See, *e.g.*, Moreau v. St. Vincent, 1950 CanLII 248 (FC).
[18] *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.)*, 1982, c.11, s. 2(b) and s. 52(1).

(3) **Individual self-fulfillment and human flourishing:** "[T]he diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed."[19]

16. The Court must resolve competing interpretation of the meaning of the Act's fair dealing provisions in a manner that embodies these *Charter* values. Interpretations of fair dealing that neglect *Charter* values have the effect of impairing those values. Fair dealing must benefit from the the presumption that Parliament intended to enact a fair dealing provision that conforms with the *Charter*.
17. While Canadian courts have yet to consider Charter values in exercises of statutory interpretation of provisions of the *Copyright Act*,[20] courts in other jurisdictions have engaged with the intersection of freedom of expression and copyright.[21]
18. Academic authors have long observed the troubling failure of Canadian courts to analyze potential conflicts between the values underlying freedom of expression and copyright law.[22] Professor Vaver suggests that the Supreme Court of Canada's approach to user rights embodies a vision of rights inspired by the *Charter*:

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[19] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 976.

[20] Canadian courts have considered the constitutionality of the *Copyright Act* (see, *e.g.*, *Compagnie Générale des Établissements Michelin – Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, [1997] 2 FC 306 (FCTD), but not engaged a Charter values analysis as an exercise of statutory interpretation.

[21] See, e.g., See *Golan v Holder* (2012), 132 S Ct 873; *Ashdown v Telegraph Group Ltd* (2001), [2002] EWCA Civ 1142; *Laugh It Off Promotions CC v South African Breweries International (Finance)BVt/a Sabmark International*, [2005] ZACC 7.

[22] See, *e.g.*, Carys J Craig, "Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright" (2006) 56 Univ of Toronto LJ 75; Alex Colangelo and Alana Maurushat, "Exploring the Limits of Computer Code as a Protected Form of Expression: A Suggested Approach to Encryption, Computer Viruses, and Technological Protection Measures" (2006) 51 McGill LJ 47; Ian Kerr, Alana Maurushat and Christian Tacit, "Technical Protection Measures: Tilting at Copyright"s Windmill" (2003) 34 Ottawa L Rev 6; Ian Kerr and Jane Bailey, "The Implications of Digital Rights Management for Privacy and Freedom of Expression" (2004) 2 J of Info, Comm & Ethics in Soc 87; Graham Reynolds, "A Step in the Wrong Direction: The Impact of the Legislative Protection of Technological Protection Measures on Fair Dealing and Freedom of Expression" (2006) 5 CJLT 179; Graham Reynolds, "Necessarily Critical? The Adoption of a Parody Defence to Copyright Infringement in Canada" (2010) 33 Man LJ 241; Graham Reynolds, "The Limits of Statutory Interpretation: Towards Explicit Engagement, by the Supreme Court of Canada, with the Charter Right to Freedom of Expression in the Context of Copyright" (2016) 41:2 Queen's LJ 455; Graham J. Reynolds, "Reconsidering Copyright's Constitutionality" (2016) 53:3 Osgoode Hall L.J. 898-947; Teresa Scassa, "Intellectual Property on the Cyber-Picket Line: A Comment on British Columbia Automobile Assn v Office and Professional Employees" International Union, Local 378" (2002) 39 Alta L Rev 934; Teresa Scassa, "Trademarks Worth a Thousand Words: Freedom of Expression and the Use of the Trademarks of Others" (2012) 53 Les

> The rhetoric of rights fits well with the Supreme Court of Canada's view that copyright law is about balance: for to balance rights is to balance similar entities, while balancing a right against an exception is either nonsensical or starts off with a linguistic bias against the exception. It is probably no coincidence that the Court's new perspective on copyright law came after two decades of decisions on the freedom of expression guarantee under the Canadian Charter of Rights and Freedoms of 1982. For copyright law is par excellence an area that deals with the sensitive area of expression of not just authors but everyone - and expression is, as the Supreme Court of Canada has emphasized in its post-*Charter* cases, a "vital concept" to be restricted only "in the clearest of circumstances." On this theory, cultural access would be treated as the rule, and copyright restriction as the exception.[23]

3. Consistency with International Agreements

19. It may be suggested that a large a liberal construction of fair dealing is inconsistent with Canada's obligations under international treaties and trade agreements. Canada is a party to the *Berne Convention*,[24] the international treaty that sets minimum standards of protection for member states. The *Berne Convention* also sets standards for limitations and exceptions, namely the so-called "three-step test".[25] Canada is also party to numerous trade agreements that incorporate the *Berne Convention* by reference.
20. CIPPIC submits that there is no conflict between the fair dealing defense and the so-called "three-step test" of the *Berne Convention*.[26] The test is facilitative, not restrictive.
21. Statutory construction permits recourse to international treaties to assist in the resolution of ambiguity in purposive construction of statutes. CIPPIC submits that such recourse supports a broad, purposive approach to fair dealing.
22. The World Intellectual Property Organization, the United Nations agency charged with administering intellectual property treaties, describes international law's approach to limitations and exceptions as follows:

> Limitations and exceptions to copyright and related rights vary from country to country due to particular social, economic and historical conditions. International treaties acknowledge this diversity by providing general conditions for the application of exceptions and limitations and leaving to national legislators to decide if a particular exception or limitation is to be applied and, if it is the case, to determine its exact scope.[27]

Cahiers de droit 887; David Vaver, "Intellectual Property: The State of the Art" (2000) 116 LQR 621; andDavid Vaver, "Copyright Defences as User Rights" (2013) 60 J Copyright Soc"y USA 661.
[23] Vaver, "Copyright Defences as User Rights", at 669-70.
[24] *The Berne Convention for the protection of literary and artistic works:1886 – 1896*, as amended [*Berne*].
[25] *Berne*, Article 9(2).
[26] *Berne*, Article 9(2).
[27] World Intellectual Property Organization, "Limitations and Exceptions".

23. The TRIPS Agreement,[28] to which Canada is a party, incorporates the obligations of Canada and the United States under *Berne*. American copyright law's broad, purposive approach to general copyright exceptions akin to fair dealing, "fair use", was tested before a trade arbitration panel. The panel's decision acknowledged the compatibility of fair use with governing trade law.[29] This signals that the fair dealing analysis set out in *CCH* would also comply with the three-step test and falls within the scope of discretion granted to member states when implementing international obligations under *Berne*.
24. The first element of the three-step test under the TRIPS Agreement, that limitations or exceptions be confined to certain special uses, is predicated on providing both copyright holders and users with a sufficient degree of legal certainty. Canadian fair dealing provisions fulfill this obligation by providing an exhaustive list of permissible uses.
25. The TRIPS Agreement provides that the protection and enforcement of intellectual property should contribute to the "mutual advantage of producers and users" "in a manner conducive to social and economic welfare, and to a balance of rights and obligations". It further mandates that "measures and procedures to enforce intellectual property rights" should "not themselves become barriers to legitimate trade" and that appropriate measures "may be needed to prevent the abuse of intellectual property rights by right holders".[30]
26. International conventions and trade agreement provide ample scope for the approach to fair dealing urged on this Court in these submissions.

B Application of Purposive Construction of Fair Dealing

27. The enumerated purposes of the fair dealing provisions of the *Copyright Act* advance public policy objectives that are important in a free and democratic society. The values underlying these public policy objectives are not limited to the narrow motives of specific defendants, but embrace wider societal and constitutional values. Narrow readings of the fair dealing provisions that do not take fair dealing's public policy

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[28] *TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C*, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [*TRIPS Agreement*].

[29] *United States – Section 110(5) of the U.S. Copyright Act (2000), WTO Doc WT/DS160/R (Panel Report)*, para 6.108.

[30] *TRIPS Agreement*, Preamble and Articles 7 and 8.

objectives into account will reduce fair dealing to a mere exception to copyright owners' rights, a loophole – an approach this Court has expressly rejected.[31]

28. Fair dealing for the purposes of education, interpreted in a "large and liberal" manner that befits "remedial legislation" and animated by *Charter* values underlying freedom of expression, suggests an approach to the analysis of the purpose of the dealing that adopts the following points:
    a. recognition of the implications that copyright is an exclusive right;
    b. the relevant perspective *must* be that of the ultimate user;
    c. universities occupy a unique place as a cradle of authorship and innovation;
    d. educational institutions play a crucial role in society when even truth is contested; and
    e. appreciates that intermediaries and commercial actors are necessary elements of marketplaces that facilitate the socially beneficial exercise of both owners' and users' rights.
29. **Copyright is an exclusive right.** Copyright is an exclusive right, not a remunerative right.[32] That is, the Act grants copyright owners the right to "say no", to deny users the right to engage in any of the acts enumerated in the statute, including the right to copy works for educational purposes unless. Copyright is not simply the right to get paid. The right to exclude access is difficult to square with *Charter* values, and is a troubling right to exercise against educational interests.
30. **The relevant perspective is that of the ultimate user.** In assessing the fairness of dealing, courts will consider the purpose of the dealing. This Court has stated that "courts should attempt to make an objective assessment of the user/defendant's real purpose or motive in using the copyrighted work."[33] Prior to doing so, the Court must identify the proper perspective from which to glean this purpose. The Federal Court of Appeal below stated that in a "guideline case", it is the institutional perspective that is material,[34] and found York's purpose to be economic in nature.[35] With respect, this mischaracterizes both this Court's analysis in *CCH* and the role of universities in Canada.

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[31] *CCH* at para 48.
[32] *Copyright Act*, s. 3(1).
[33] *CCH* para. 54.
[34] *York v Access Copyright*, para 220.
[35] *York v Access Copyright*, para 238.

In *CCH*, the Supreme Court concluded that the Great Library's purposes were fair, but did so only with reference to the requests and purposes of users.[36] In the case of universities, copying such as at the case at bar is similarly for the needs and purposes of users. But for the educational purposes of students, no copying occurs. In the Federal Court, the hearing judge concluded that York's real objective was "to obtain for free that which [it] had previously paid for" and "to keep enrolment up by keeping student costs down and to use whatever savings there may be in other parts of the university's operation".[37] The Court did not consider York's statutory objectives: "the advancement of learning and the dissemination of knowledge" and "the intellectual, spiritual, social, moral and physical development of its members and the betterment of society."[38] However, in reaching this conclusion, the Court imported the purposes of students – the ultimate users – into the motives of the university. The university's economic purposes only make sense as a reflection of the purposes of the ultimate user of educational materials. But even this reflection is a distorted one, stripping students of their purposes in seeking an education at all and counting only students' financial motivations. This approach also strips from the analysis any motivations that resonate with *Charter* values. Accordingly, it should be rejected.

31. **Universities are a cradle of authorship and innovation.** The approach of both courts below to the purpose of the dealing also has the effect of stripping universities of their role as incubators of authors and innovation. By reducing the role of students to commercial actors, and the objectives of York University to economic ones, the courts below neglected the larger benefits to society that universities provide and the resonance of these benefits with *Charter* values and the objects of copyright law itself.
32. **Educational institutions role in the search for truth.** In troubled times in which even truth is politically contested, universities play a crucial role in both ascertaining truth and developing critical comprehension skills among members of society. This role lies at the heart of *Charter* values embodied by universities, and it should be considered in assessing the purposes of the dealings before this Court.

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[36] *CCH* at para 66.
[37] *Canadian Copyright Licensing Agency v. York University*, 2017 FC 669, [2018] 2 F.C.R. 43, para 272-27.
[38] *The York University Act, 1965*, 13-14 Eliz. II, 1965, ss. 4.

33. **The necessity of marketplace mechanisms.** The lower courts' fixation on the financial purposes of York raises the question of the fairness of commercial dealings. In *CCH*, this Court stated that "research done for commercial purposes ***may*** not be as fair as research done for charitable purposes."[39] This does not amount to a presumption against the fairness of a commercial dealing. In *SOCAN v Bell*, this Court found fair the commercial dealings of defendants servicing consumers.[40] This approach is sound. Fair dealing activity cannot be artificially divorced from the economic environments in which it occurs. Canada embraces a market economy, where entrepreneurs and innovators compete in the market to meet the needs of Canadians. Commerce is the vehicle of exchange for these transactions. Just as copyright owners benefit from a functioning marketplace in exploiting their works, so too must users avail themselves of service providers in the marketplace to meet their needs in exercising user rights. Again, this approach is consistent with *Charter* values. Freedom of expression relies upon both a notional marketplace of ideas, and a functional marketplace for the development and dissemination of ideas. The approach to fair dealing adopted by this Court will have implications beyond the narrow setting of post-secondary education. Educational fair dealing is a foundational protection for formal and informal education, and professional and life-long learning. Commercial intermediaries are necessary elements for the socially beneficial exercise fair dealing rights for the purposes of education.

PART IV - COSTS

34. CIPPIC will not seek costs in this matter and asks that costs not be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of April, 2021.

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[39] *CCH* para 54 [emphasis added].
[40] *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326 para 36.

PART VI – TABLE OF AUTHORITIES

Authority		*Reference in Argument*
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	Bell ExpressVu Ltd Partnership v Rex, 2002 SCC 42 at para 29	
	Canada (A.G.) v. Mossop, [1993] 1 S.C.R. 554 at 581	
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	Alex Colangelo and Alana Maurushat, "Exploring the Limits of Computer Code as a Protected Form of Expression: A Suggested Approach to Encryption, Computer Viruses, and Technological Protection Measures" (2006) 51 McGill LJ 47	
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	David Vaver, "Copyright Defences as User Rights" (2013) 60 J Copyright Soc"y USA 661	
Statutory Provisions		
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	Copyright Act, RSC 1985, c C-42, section 29	

	Interpretation Act, R.S.C 1985, c I-21, s. 10, 12.	
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International Agreements		
	The Berne Convention for the protection of literary and artistic works:1886 – 1896, as amended	
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