

Gowlings Wins Landmark Victory for Law Society of Upper Canada

Copyright decision important for the legal profession and all researchers in Canada

Toronto, Ontario, March 5, 2004 – R. Scott Jolliffe, A. Kelly Gill and Kevin Sartorio of Gowling Lafleur Henderson LLP (Gowlings) secured an important victory yesterday from the Supreme Court of Canada on behalf of the Law Society of Upper Canada. The decision ends an 11-year copyright battle between the Law Society and three legal publishers over the right of lawyers, libraries and researchers to make and deal fairly with copies of works that are needed for research, without being required to pay a licensing fee to any rights holder.

The Court's unanimous decision, written by the Chief Justice, strikes the proper balance in Canada between the rights of copyright owners to exploit their work and the right of the public to use these works for research purposes.

In allowing the Law Society's appeal and ordering that the publishers pay the Law Society's costs of the litigation throughout, the Supreme Court has sent a strong message clarifying a number of very important areas of copyright law.

On the standard of "originality" required in order to receive copyright protection, the Court rejected the proposition that works that are produced merely through labour or "the sweat of the brow" are proper subject matter of copyright. An *original* work under the *Copyright Act* is one that must be the product of an author's "skill and judgment" and not merely hard work. The exercise of skill and judgment must involve some intellectual effort and must not be so trivial that it could be characterized as a purely mechanical exercise.

Chief Justice McLachlin characterized this approach as a "workable, yet fair standard," which was applauded by Law Society counsel, Kelly Gill of Gowlings: "I believe that the Court has taken a very fair approach to a difficult task, defining the proper standard of originality for copyright protection. The Court's approach reflects the purpose and underlying intentions of copyright law."

The Court also granted a declaration to the Law Society that it does not "authorize" copyright infringement by providing coin-operated photocopiers in its Great Library for use by patrons. "This aspect of the case will no doubt be a great relief to many libraries across the country," said Law Society counsel Kevin Sartorio of Gowlings. "Previously, there had been a concern that libraries could be held liable by merely providing their patrons with access to these machines on library premises, but the Court clearly said that is not the case in Canada."

One of the most important aspects of the Court's decision relates to the concept of fair dealing under section 29 of the *Copyright Act*. The Court characterized *fair dealing* as

being a “user’s right.” Put simply, fair dealing for the purpose of research or private study does not infringe copyright. The Chief Justice indicates that the term “research” must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained, and is not limited to non-commercial or private contexts. For example, lawyers carrying on the business of law for profit were held to be conducting research within the meaning of the *Copyright Act*.

The publishers had argued that copying of their works by the Law Society or by lawyers was not fair dealing because they were willing to licence all these activities in exchange for a fee. The Supreme Court rejected this argument. Because fair dealing does not infringe copyright in the first place, the Court stated “the availability of a licence is not relevant to deciding whether [an act of photocopying] has been fair.”

The Court concluded that when the Law Society's Great Library provides photocopying services to its members and the judiciary in accordance with its *Access to the Law Policy* it does not infringe copyright. As such, its services were not enjoined and may continue in their present form without adjustment.

"This decision reinforces the importance of research and clarifies that copying a work for the purpose of research does not infringe copyright," said Scott Jolliffe, Gowlings National Managing Partner. "This decision is important, not only for the legal profession in Ontario, but also for all libraries and persons wishing to engage in research using a copy of some one else’s work."

This landmark decision will have an important impact on both Canadian and international copyright law.

About Gowlings

Since the early 1900s, Gowling Lafleur Henderson LLP (Gowlings) has been recognized as a leader in intellectual property litigation. It is one of Canada's leading diversified business and technology law firms, with more than 100 years of success in employing specialized knowledge and vigorous thought to create practical legal solutions.

Gowlings is at the leading edge in new fields such as technology and intellectual property, providing comprehensive legal solutions, in English and in French, to clients in Canada, the United States and overseas from offices in Montréal, Ottawa, Toronto, Hamilton, Waterloo Region, Calgary, Vancouver and Moscow. The firm also offers specific expertise concerning transactions in the United States, Mexico, Latin America, the Pacific Rim, Western Europe and the Commonwealth of Independent States.

For more information please contact:

Lisa Lupy nec/Adrienne Simic

Media Profile

416-504-8464