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## Access Copyright and Fair Dealing Guidelines in Higher Educational Institutions in Canada: A Survey

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### **Abstract**

Information about the acceptance by Canadian higher education institutions (HEI) of the Access Copyright (AC) licence is important for educators, though only a minority of HEI in Canada have opted in to the licence. Furthermore, the copyright “pentology,” the five major decisions of the Supreme Court of Canada (SCC) and its interpretation of fair dealing, are relevant for institutions, faculty, and students. Many Canadian universities and colleges/institutes adopted the Universities Canada (UC) guidelines on fair dealing, while some adopted the six factors as stated by the SCC as their guidelines. In some cases, institutions have not adopted any policy or guidelines for any aspect of copyright. This paper investigates these issues to provide one perspective on the behaviour Canadian HEI exhibit in their adherence to AC and their use of policy and guidelines at their respective institutions.

### **Keywords**

fair dealing, six factors, copyright, higher education, Access Copyright, pentology, guidelines, Canada

## **Introduction**

Beginning with a 2004 Supreme Court of Canada (SCC) decision (*CCH Canadian Ltd. v. Law Society of Upper Canada [CCH]*, 2004), followed by the 2012 “pentology” decisions, five rulings of the SCC, the court provided guidance to educators and others on fair dealing (Geist, 2013). These decisions clarified for users that under fair dealing, restrictive interpretations of the exception must not be made. The *large and liberal interpretation* of fair dealing was further extended for educators with the passing of the *Copyright Modernization Act* in 2012, when “education” was added to the statutory purposes of fair dealing. The SCC recognized the need for balance between the rights of the copyright owner and those of the users by clarifying the limited nature of both owner and users’ rights, while also noting users’ rights and fair dealing were integral to copyright (*SOCAN v. Bell*, 2012). These rulings had a fundamental impact on the interpretation of Canadian copyright: a more open and inclusive approach that balances the rights of users and owners with a large and liberal interpretation of fair dealing.

This paper is an investigation into the acceptance by higher educational institutions (HEI) in Canada outside Quebec of this new interpretation. Specifically, this includes an assessment of the HEI that have chosen to opt in to the Access Copyright licensing scheme, their reference to the Universities Canada (UC) policy statement on fair dealing, and/or reference to the SCCs “six factors.”

## **Background**

Access Copyright (AC) is a Canadian non-profit organization that supports authors and publishers across the country (with the exception of Quebec) by granting copying licenses for a large catalogue print materials. In 2010, AC proposed a significant increase in their pricing structure for HEI, from \$3.38 per full-time equivalent student (FTE) plus \$0.10 per page for course packs (collections of readings) to \$45.00 per FTE for universities and to \$35 per FTE in colleges and institutes (CIs). This “tariff” applied to all HEI in Canada outside of Quebec (Copyright Board of Canada, 2010). Quebec universities and Cégeps (Collèges d'enseignement général et professionnel) hold agreements with a different copyright collective called Copibec. This is a separate issue and is not the focus of this paper.

Universities Canada (UC), formerly the Association of Universities and Colleges Canada (AUCC), represents 96 Canadian HEI. UC responded to renewed faculty and administration interest in copyright and fair dealing generated by this proposed change by creating guidelines. These guidelines were to assist institutions in deciding whether the fair dealing exception to copyright could be used to address concerns regarding the use of copyright-restricted content for research (Association of Universities and Colleges Canada [AUCC], 2010).

In addition to the increased fees, HEI expressed further concerns including the lack of value in the licence. They also felt that AC was exceeding its jurisdiction with its insistence on onerous auditing and reporting requirements, leading to a “culture of surveillance” (Trosow, Armstrong, & Harasym, 2012).

In 2012, AC had also proposed a significant fee increase for the K-12 sector (Copyright Board of Canada, 2012). This, along with AC's aggressive move away from a negotiated licence, caused a reaction among school boards and ministries of education across Canada, and was noted by HEI. The proposed fee increase led to a 2012 Supreme Court of Canada case, and ultimately a significant reduction in the K-12 "tariff" (Access Copyright, 2017; *Alberta (Education) v Access Copyright*, 2012).

This case was one of the five major SCC judgements that occurred on July 12, 2012, termed the "copyright pentalogy" (Geist, 2013), which proved to be a catalyst in the redefinition of Canadian copyright law (Farrow, 2012). Two of these rulings, which resulted from a judicial review of Copyright Board decisions, reinforced the 2004 SCC decision that fair dealing was an integral part of copyright law and outlined a two-step analysis for determining whether a dealing was fair. The first step considered whether the work was used for purposes deemed appropriate under section 29 of the *Copyright Act*. In the case of educators, it had to be determined whether the work fell within the categories of either research or private study. The second step analyzed whether or not the dealing could be deemed "fair" through a review of six factors (Table 1). Depending on the case, any of the six factors could be considered, and there may be additional elements, such as bypassing digital locks or firewalls, that would be relevant. The courts could consider these six factors in determining whether the specific use is fair and must be considered in any claims of copyright infringement (*CCH*, 2004). According to Reynolds, the SCC ruled that the Copyright Board was deemed "unreasonable on the basis that it adopted an approach to fair dealing that was inconsistent with the purpose of copyright, as interpreted by the SCC" (Reynolds, 2013, p.16).

**Table 1***The Second Stage of the Two-Step Analysis for Determining Whether a Dealing is Fair: The Six Factors for Fairness is Used to Guide Fair Dealing Interpretation*

<u>Fairness Factor</u>	<u>Description</u>
The Purpose of the Dealing	The motive for using the work (e.g., is it for commercial or non-commercial purposes). Allowable purposes should not be given a restrictive interpretation that could result in the undue restriction of users' rights.
The Character of the Dealing	Has a single copy or multiple copies been made? It may be relevant to look at industry standards.
The Amount of the Dealing	Both the amount of the dealing and importance of the work allegedly infringed should be considered in assessing fairness. The extent of the copying may differ in accordance to the use.
Alternatives to the Dealing	Was a "non-copyrighted equivalent of the work" available?
The Nature of the Work	If a work is not published, the dealing may be fairer in that its reproduction with acknowledgement could lead to its wider public dissemination, one of the goals of copyright law. If the work is confidential, this may tip the scales towards finding that the dealing was unfair.
Effect of the Dealing on the Work	Will copying the work affect the market of original work? Although the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor, nor the most important that a court must consider in deciding whether the dealing is fair.

*Note.* Adapted from *CCH Canadian Ltd. v. Law Society of Upper Canada*, 1 S.C.R. 339, SCC 13, para. 53, 2004 and *Interpreting Fair Dealing: An Exploration of Distance Instructors' Perceptions of Canadian Copyright Law* by S. Henderson [Master's thesis], Athabasca University, 2016.

The effects of the Copyright pentalogy decisions are discussed in the literature (Geist, 2013; Graham, 2014; Reynolds, 2013; Di Valentino, 2013; Henderson, 2016; Trosow, 2013). The *CCH* ruling confirmed that, even prior to the addition of "education" as a statutory purpose in the *Copyright Modernization Act* (Government of Canada, 2012), the use of materials for educational purposes could be considered as "research" under the fair dealing clause (Geist, 2013).

These rulings strongly restated fair dealing as a right, that copying done by a teacher of reasonable portions of copyright-restricted content was allowed for in-class use, and referred to the restrictive approach of the Copyright Board as "an artificial wedge" and a "skewed characterization" (SCC, 2012, para. 24 & para. 28). The SCC also ruled that the copying of a "class set" of books could be fair as long as it was a reasonable amount, passing the six factor test. (SCC, 2012, para. 28-30).

Subsequent to the 2012 SCC pentalogy decisions, UC drastically revised its fair dealing guidelines in an attempt to provide updated recommendations more in line with the pentalogy rulings (AUCC, 2010; Universities Canada, 2012). The new guidelines also took into account the addition of "education" as a purpose in evaluating fair dealing.

These guidelines were also adopted by the Association of Canadian Community Colleges (ACCC), now called Colleges and Institutes Canada (CIC), representing a total of 127 publicly funded HEI.

However, the UC guideline changes also included restrictions that are arguably not in keeping with the SCC instruction that fair dealing for research must be given a large and liberal interpretation. For example, the guidelines retained the previous AUCC guideline limitation of 10% for copying, which was not in keeping with a large and liberal interpretation. Moreover, they dropped any reference to the SCC six factors, though they were present in earlier versions. DiValentino (2016) is puzzled by this, clarifying that copying is not limited to quantities such as 10%, but, referring to the six factors, is “fact specific and holistic.”

In contrast to UC, the guidelines provided by the Canadian Association of University Teachers (CAUT) rely almost exclusively on the six factors. They refer to the 10% rule as “likely to be fair,” with the proviso that more than 10% can be fair depending on the circumstances. Still, only a few institutions, including Kwantlen University, referenced the CAUT guidelines (Canadian Association of University Teachers [CAUT], 2013).

Katz (2015) considered the restrictive interpretations of fair dealing of the past to be “immature” and had to evolve through the court system. He noted that the fair dealing exception is clear and precise “should we choose to interpret it as mature adults.” There is an abundance of literature regarding the changes to Canadian copyright law and fair dealing exceptions. Geist (2013) published a collection of essays in *The Copyright Pentalogy*, which offers a comprehensive examination of the modifications to the *Copyright Act* and explores how those changes affect processes and procedures in various disciplines. Speaking to issues associated with changes to the *Copyright Act*, several academic scholars and law professionals have created reports or blogs (Chaubal, 2012; Geist, 2012, 2015; Katz, 2015; Knopf, 2014; Contact North, n.d.; Mewhort, 2012) or published articles (Bannerman, 2011; Gervais, 2009; Graham, 2014; Horava, 2008; McGreal, 2004; Nair, n.d.). A common goal of this literature is to demystify the legal and practical aspects of the *Copyright Act* and provide a deeper understanding of the current status of federal laws, which reflect a less restrictive interpretation of fair dealing. Authors have also examined the confusion associated with the comprehension and interpretations of copyright for both law makers and copyright owners/users (Geist, 2012, 2013; Gervais, 2009; Holmes, 1899; Horava, 2008; Kimmons, 2014; Reynolds, 2013; Rife, 2008). There is a master's thesis on how faculty at one Canadian institution interpret fair dealing in their work (Henderson, 2016) as well as an early paper and doctoral dissertation that investigates fair dealing from various standpoints (Di Valentino, 2013, 2016).

Following these court decisions and the decision by many institutions to cease paying the AC “tariff,” AC reduced its FTE “tariff” to \$27.50 as a “model licence,” paid by the University of Toronto, Western University, and others (University of Toronto, 2012). In 2014, the University of Toronto and Western University decided not to renew their licences with AC (Niedobah, 2014). This was followed by other institutions that chose not to renew their licences with AC, but instead decided to rely on their fair dealing rights and licensing directly with publishers (Geist, 2017b). The decision was also

impacted by the increasing availability of quality open educational resources (OER) and the availability of free resources through the internet. Athabasca University, for example, with its growing use of OER, decided there was no need to rely so much on licensed content and continued to license separately with individual publishers for the copyright restricted content that it needed.

In the *Canadian Copyright Licensing Agency v. York University* decision of July 2017, the Federal Court ruled that the interim “tariff” approved by the Copyright Board of Canada was mandatory and provided a restrictive interpretation of the SCCs six factor test (*Canadian Copyright Licensing Agency v. York U.*, 2017). Knopf (2017) and Katz (2017) highlighted serious problems in the York ruling, especially with its interpretation of its interim “tariff” and that the “tariff” itself is mandatory. The ruling is under appeal as it poses problems for York University and the majority of Canadian higher education institutions that have opted out of the “tariff.”

This investigation researched HEI in Canada to determine how many HEI have or have not signed on to the AC licence and how many HEI have adopted either the UC guidelines or the six factor test, as well as how many are accepting a 10% limit on fair dealing.

## **Research Questions**

This research focuses on the following questions:

1. How many and what percent of Canadian public HEI outside Quebec continue to maintain AC licences?
2. How many and what percent of Canadian public HEI outside Quebec refer to the Supreme Court of Canada's six factors in their fair dealing policies?
3. How many and what percent of public HEI outside Quebec refer to the UC fair dealing guidelines?
4. How many and what percent of public HEI outside Quebec refer to the 10% limit for fair dealing?

This investigation will determine if there are significant differences between universities and colleges/institutes, among regions, and in regards to the size of the institution.

## **Methodology**

This research was conducted from December 2016 to June 2017 and began by identifying all existing Canadian HEI. To populate the fair dealing spreadsheet, the names of all (or as many as could be identified) Canadian HEI, their respective sizes (small <10k students; medium 10k to 30k students; large, >30k students), and their location by region/province were identified through use of three sources: Contact

Canada (<http://www.contactcan.com/CCs.html>), Universities in Canada (<http://www.4icu.org/ca/canadian-universities.htm>), and Wikipedia. This information was cross-checked with data available at the UC (<http://www.univcan.ca/universities/member-universities/>) and CIC (<https://www.collegesinstitutes.ca/our-members/member-directory/>) websites. Private HEI in Canada, most of which are not members of UC or CIC, were also initially included in this study. Once this information was compiled, a search of each institution's website was conducted to collect data regarding their status of either opting in or opting out of the AC licence and their current copyright and/or fair dealing policies.

Each institution's website was searched to collect information on whether it had listed its acceptance of the AC licence, had information that it had opted out of the "tariff," or had no information at all. If there was no information on a website, there was no reliable basis to determine that the institution had opted in (or out) to the AC licensing scheme. A further search of each institution's website was then conducted to locate and examine existing intellectual property, copyright and fair dealing policies, and information regarding the 10% guideline for fair dealing. The data was collected using specific search words in Google. For all universities and colleges outside Quebec, the following search words were used: "access copyright" site: (name of HEI) or "copyright" and "fair dealing" site: (name of HEI). For universities and colleges in Quebec the following search words were used: "copibec" site: (name of HEI) or "droits d'auteur" and "utilisation équitable" site: (name of HEI).

Three additional websites were used to confirm the opting in or out of Access Copyright: the Writers' Union of Canada (2017), Ariel Katz Halls of Fame (2012), and Techdirt (2011). These sources were checked against the institutional websites to verify whether the data was valid. Furthermore, this procedure was used to double-check data that was not found using the above-mentioned search words in Google. Data that was not found or was not available was represented by N/A (not available).

Additionally, the Writers Union of Canada (2017) was reviewed as it has an undated web page referring to about 150 AC licensed post-secondary colleges, institutes, and universities, the vast majority of which are small and/or private institutions. It is also clear that many on the list have since opted out of their AC licences, notably most of the larger institutions (e.g., University of Manitoba, University of Ottawa).

In order to ensure the reliability and validity of the data collected, the following procedures were undertaken. First, literature and existing documentation on fair dealing and Access Copyright were studied to ensure a proper understanding of the different policies and guidelines. During this stage, the investigators exchanged information to clarify any misunderstanding or questions and to ensure agreement in terms, aiding their interpretation of the results. Data collection was carried out in the following manner: institutions were classified as UC policy if they had copied the full policy on their site, with minor changes being acceptable. Institutions adhering to the CIC policy were counted as UC policy as the two policies are the same. Universities or colleges were classified as "only six factor test" when they explicitly stated the use of the six factors for fairness and did not include the complete UC policy. Some of the documented institutions listed the six factors and mentioned up to 10% of copy-

protected work in their guidelines. These were classified as “six factor test” for policy and “yes” for 10%. An “outdated” classification was used for the few policies found that were dated earlier than 2012.

Data on Quebec institutions was collected but was not included in the results section of this paper as Copibec, rather than Access Copyright, is the licensing agency. All Quebec HEI, with the exception of Université Laval, have an agreement with Copibec, which is significantly different from the licensing agency acceptance by institutions outside Quebec. Therefore, Quebec HEI policy was classified as being “other” and was left out of the analysis. Significantly, Université Laval has opted out of Copibec and there is an ongoing court challenge in process (Copibec, 2014; Lalonde, 2017; *Société québécoise de gestion collective des droits de reproduction (Copibec) c. Université Laval*, 2017).

Data on private sector HEI in Canada were collected separately. No copyright policy was found for the large multi-campus private colleges, i.e., the Academy of Learning and the CDI College. Colleges that focus on teaching English as a second language (ESL) were not included in this research.

Of 23 colleges and institutes and four universities that did not provide information whether they had opted in or out of the AC licensing scheme, 10 of these institutions were randomly selected and contacted by telephone to confirm that these institutions did not have a membership with AC. During these phone calls, there was some difficulty contacting someone in the institution who were aware of Access Copyright. Call backs were requested and all call backs were re-contacted. However, only five responses were collected from this sample. All respondents confirmed that they were not opting for the AC “tariff.” Although this cannot be considered a reliable sample, it does support the absence of opt-in institutions in this group and the assumption that no information may mean no affiliation with AC. However, this survey cannot be considered fully representative.

Overall, this investigation confirmed the findings of DiValentino (2016), although there are several anomalies to be noted. For example, Kwantlen Polytechnic University adheres to UC policy, and the university has included both Fair Dealing guidelines and CAUT guidelines on their site for reference. In the case of St. Thomas University, no copyright policy was found either during the search or on their site. However, a PDF entitled “New Faculty Teaching Guide” was found on Google, which indicated that the university adheres to the 10% rule. Algoma University is also a good example of an anomaly as its copyright policy and FAQ were outdated.

Another challenge in this study was determining whether or not a particular institution had opted out of the Access Copyright agreement as the AC license agreement had terminated on December 31, 2015. In addition, some of the colleges found in this study are federated colleges of larger universities and not under the umbrella of colleges and institutes (CIs). In many cases, these colleges had no copyright guidelines available on their site, so it was assumed they were complying with the federated university’s copyright guidelines.



## Results and Discussion

**Question 1:** How many and what percent of public Canadian HEI outside Quebec continue to maintain AC licences?

Across Canada (outside Quebec) there are 159 HEI. Of these only 35 (22%) indicated that they opted to licence with AC, while 124 (78%) have not. This represents a minority of HEI that indicate maintaining AC licences. See Figure 1.

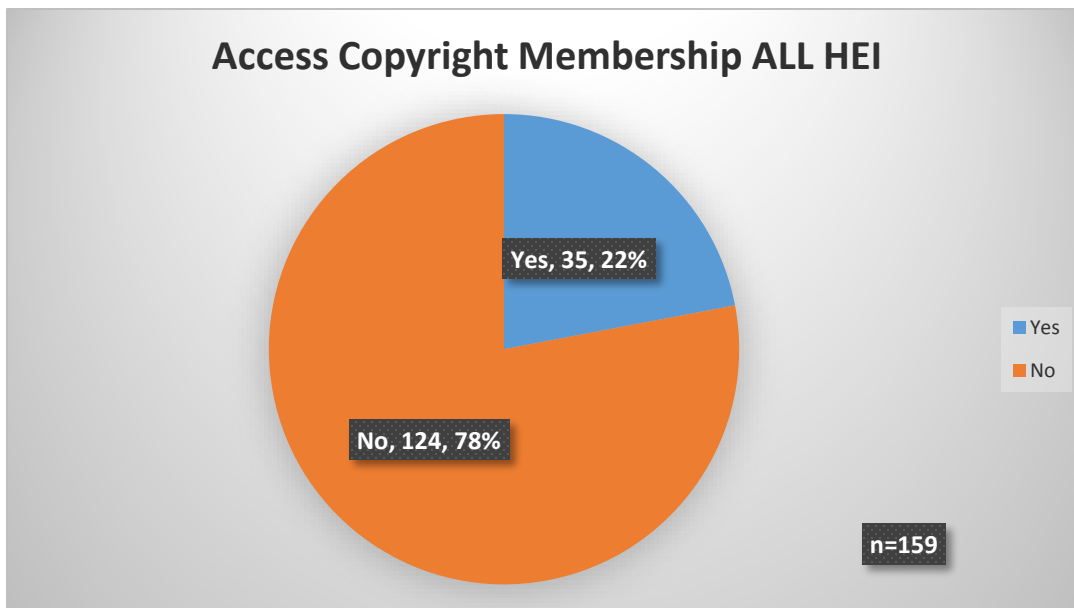


Figure 1. Access Copyright licensee of all Higher Education institutions.

In examining the case of CIs (n=84), 17 (20%) public CIs indicated they opted in to the AC “tariff,” and 44 (53%) have not. However, many CIs, 23 (27%), have no information on their status. The random telephone survey to ascertain AC membership status found that many CIs do not have a designated copyright officer or librarian, which may explain why they do not list their status information. Not all CIs have the resources to fully manage their copyright needs and as a result, may not fully understand AC licensing. According to the information on CI websites, only 20% have confirmed opt-in to AC “tariff” status. This percentage is similar to the information available on university websites, (n=75), where only 18 (24%) indicate opting in to AC. See Figure 2 and 3.

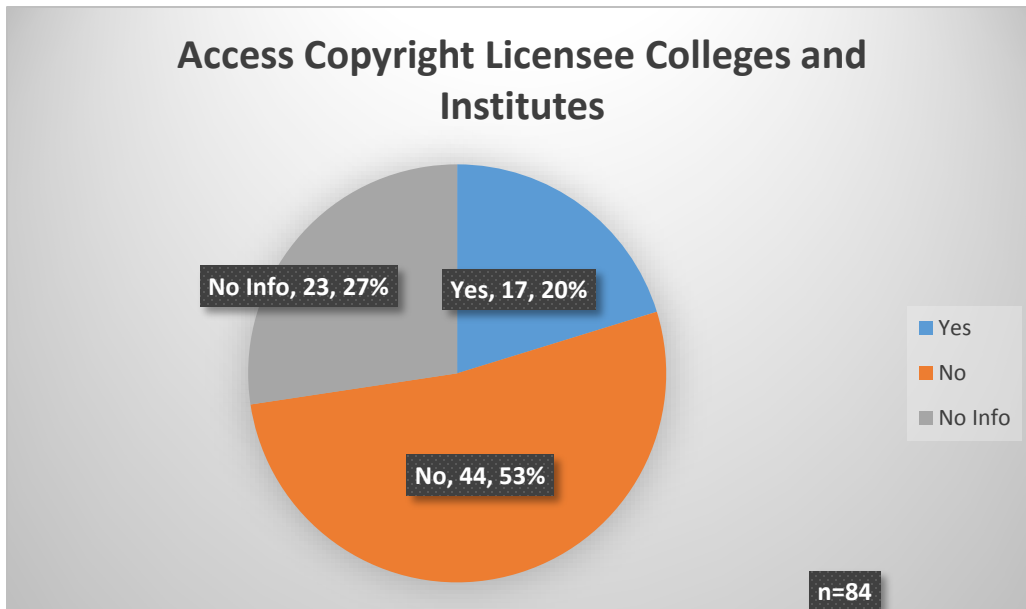


Figure 2. Access copyright licensee college and institutes.

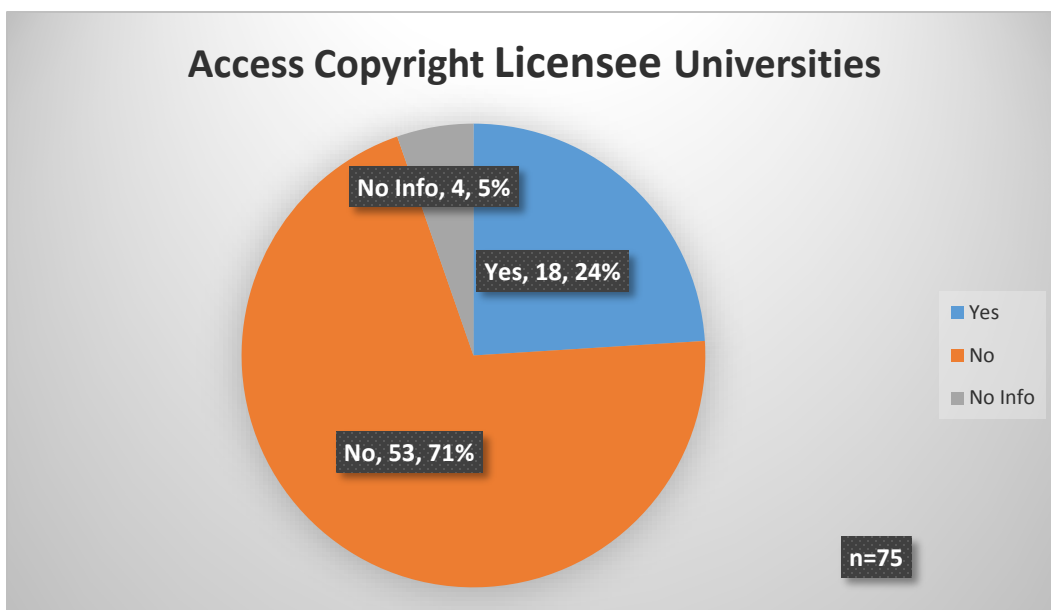


Figure 3. Access copyright licensee universities.

The similar ratio of AC opt-ins to non-opt-ins among both universities and CI (only a minority of each have indicated that they have opted in to the “tariff”) seems to point to a similar understanding of the relative benefits of accepting the AC “tariff.” However, 23 CIs (27%) have no information and do not confirm their status with AC, whereas only a few smaller university colleges do not supply information on this. See the Appendix B and C for a complete list of Canadian HEI Access Copyright membership by institution type, size, province, and region.

### Size of Institution

However, there is a significant difference depending on the size of the institution (large =>30k students; medium 10k to 30k students; small <10k students). Of the large universities (n=14), none opted in to the AC “tariff.” Similarly, of the medium-sized universities (n=19), only two (Wilfrid Laurier University and Thompson Rivers University) opted in. For the smaller universities (n=42) the results are evenly divided with 16 (38%) indicating that they opted in to AC and 22 (52%) not. Four smaller university colleges had no information. See Figure 4.

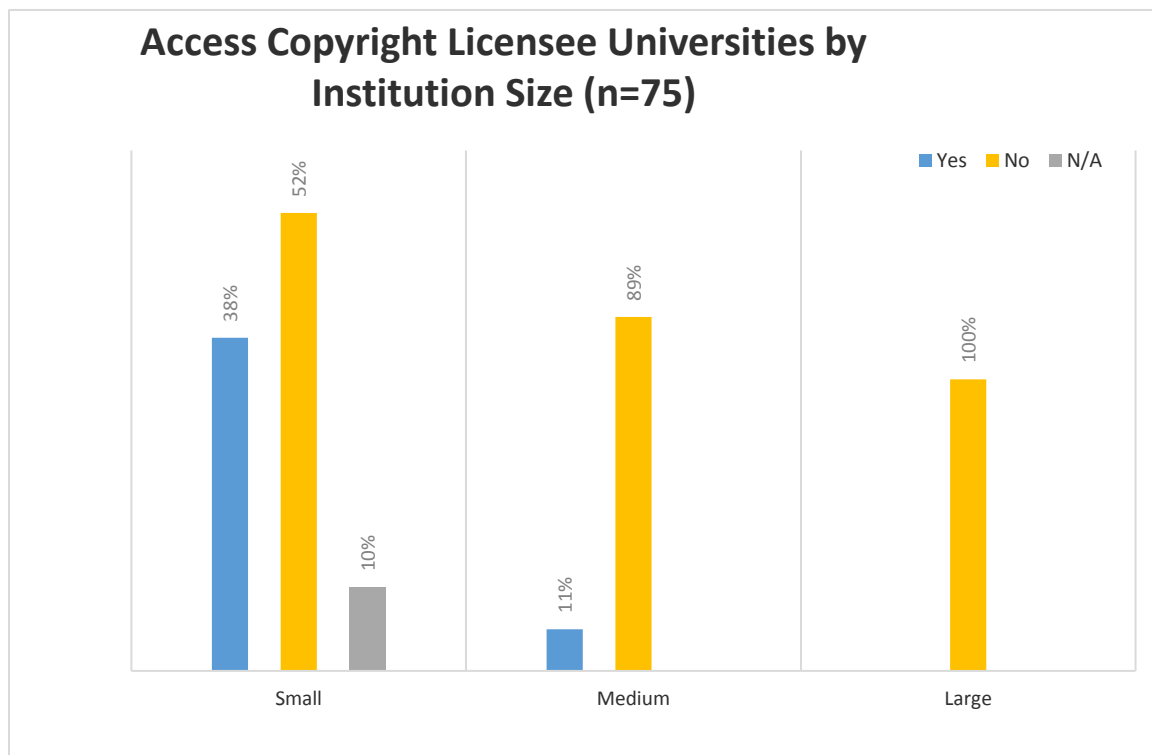


Figure 4. Access Copyright licensee by size of university.

The larger and medium sized universities are almost unanimous in their decision not to opt in to the AC “tariff,” while almost half of the smaller universities have chosen to do so. It seems that the smaller institutions are behaving in a more cautious and risk averse manner and, because of their size, also may not have staff knowledgeable in copyright matters. This difference could also be explained by the much larger “tariff” fees charged to the big institutions, and therefore they are more motivated to not to opt in. Moreover, the larger institutions may have access to additional legal advice that counsels them and minimizes the risk exposure.

For large CIs, (n=14), four (29%) have opted in to AC membership. For the medium sized CIs (n=24), five (20%) have opted in to AC. For the smaller CIs (n=45), eight (18%) have opted in to AC. See Figure 5.

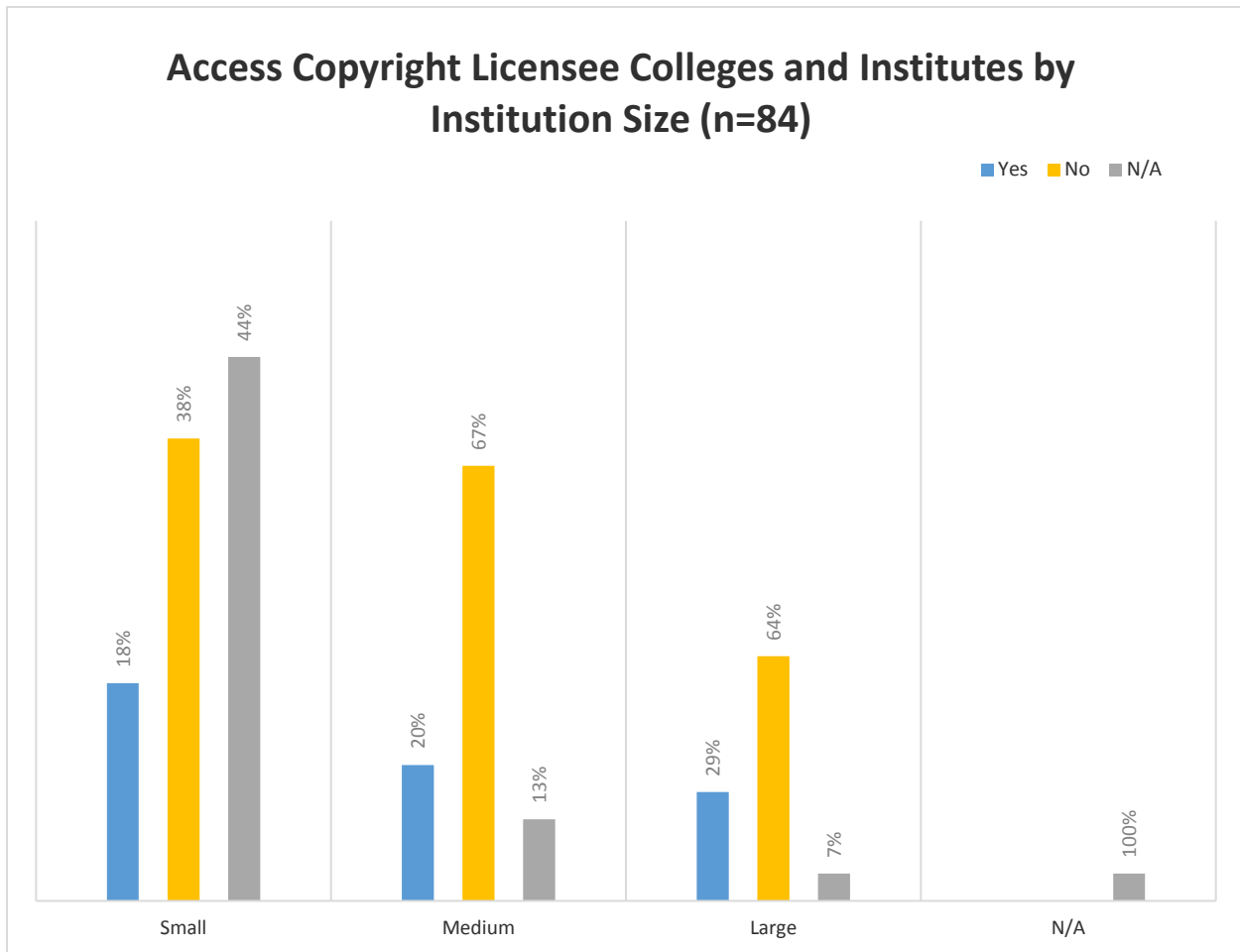


Figure 5. Access Copyright licensee by college and institute size.

CIs have a different profile; they seem to be much more risk averse. Unlike the universities, a large minority (15) of CIs have opted in to the AC “tariff.” On the other hand, many of the smaller CIs show no information on their status and only a third have opted in.

### Regions

Colleges and institutes show a similar trend with a minority of institutions indicating an opt-in to AC. CIs in the Western/Northern region (n=45), only 10 (22%) are AC opt-ins. In Ontario, (n=29) the story is similar, with only 6 (20%) of CI opting in to AC. In the Atlantic region, CIs (n=10), only 1 (10%) opted in to AC. See Figure 6.

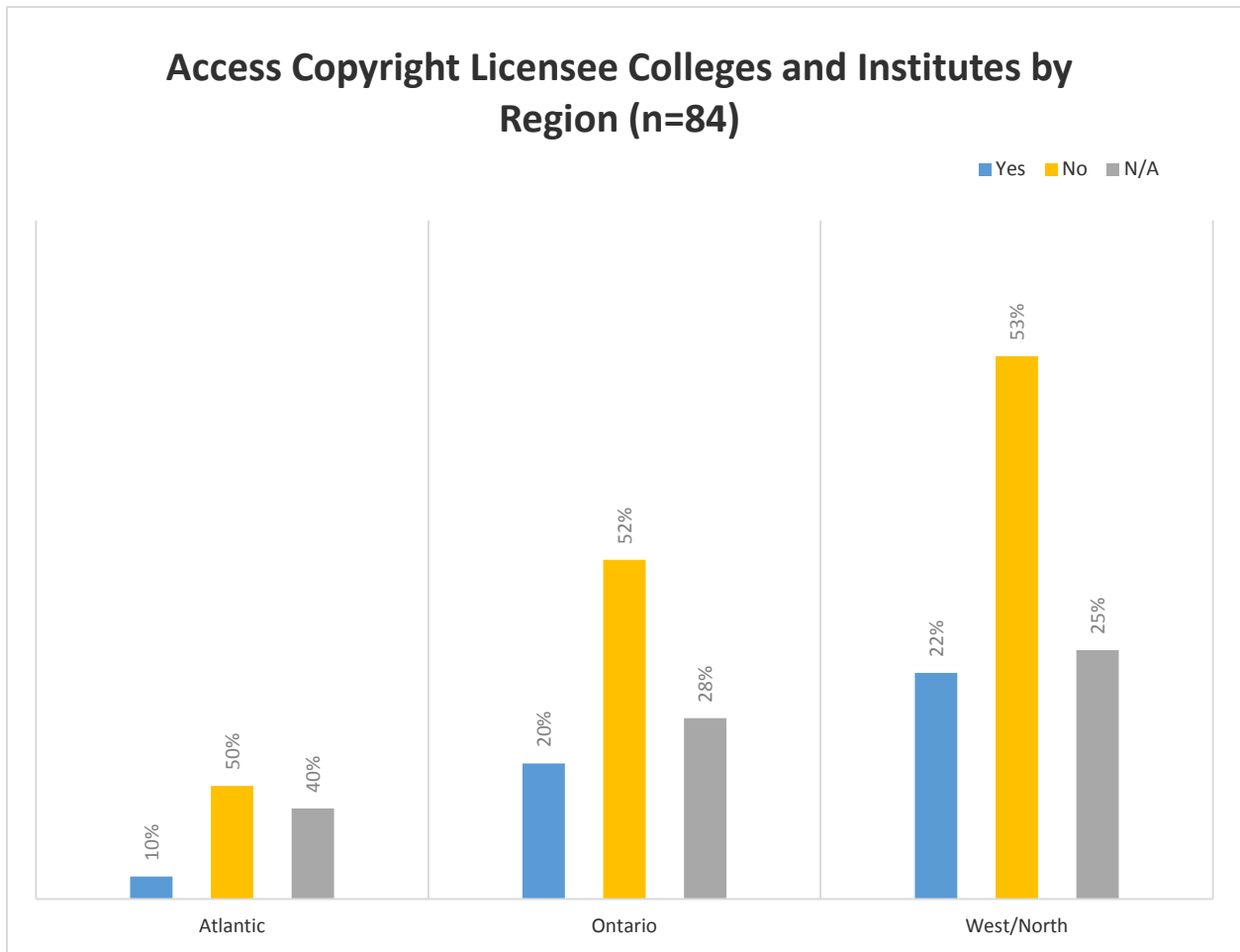


Figure 6. Access Copyright licensee of colleges and institutes by region.

Universities across Canada also show a minority of AC members, with only six (20%) in the Western/Northern region (n=30) indicating an opt-in to AC. Ontario (n=29) is similar with only six (20%) institutions opting in to AC. The Atlantic region (n=16) universities indicate a total of six (38%) of universities continue to opt in to AC. See Figure 7.

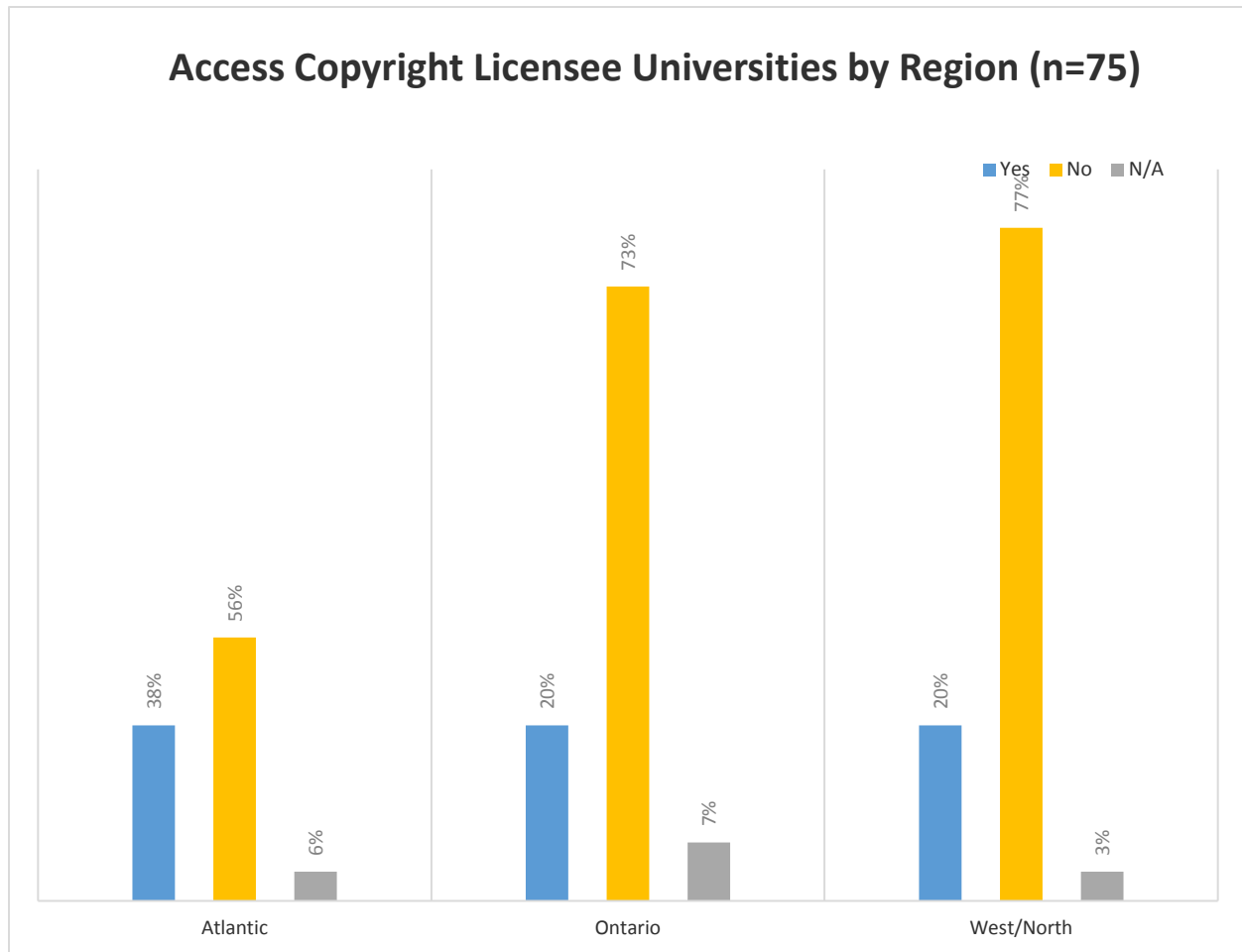


Figure 7. Access Copyright licensee for universities by region.

Adherence to the AC “tariff” shows the Western region opting in less than the other regions, and Ontario opting in less than the Atlantic region. The University of British Columbia and Athabasca University, both in the west, were among the first universities to opt out of AC. This may be attributed to the fact that the western universities are active in supporting open educational resource (OER) initiatives such as the Memorandum of Understanding supporting OER (Memorandum of Understanding, 2014). As well, Manitoba has also initiated a program supporting open textbooks. When institutions replace commercial content with OER, they prefer to not pay AC for content that they are no longer using. BCcampus was the first in Canada to support OER at the provincial level, collaborating with many HEI in the province to create a repository. The Alberta OER initiative supported OER initiatives in several HEI in the province. With the creation of eCampus Ontario in 2016, Ontario has started a major OER initiative, while there are no such initiatives in the Atlantic region.

**Question 2:** How many and what percent of public HEI outside Quebec refer to the SCCs six factor test?

The SCC has proposed the six factor test for evaluating whether or not an act is fair dealing; few institutions make reference to this. As displayed in Figure 8, only 23 (31%)

universities and six (7%) CIs refer to it on their websites. Regionally, the spread across the country is similar. Overall, only 18% of institutions refer to the six factor test, with the remaining 82% not referring to the test (see Figure 9). For a complete list of universities and CIs who use the six factor test and their AC licensing affiliation, see Appendix C.

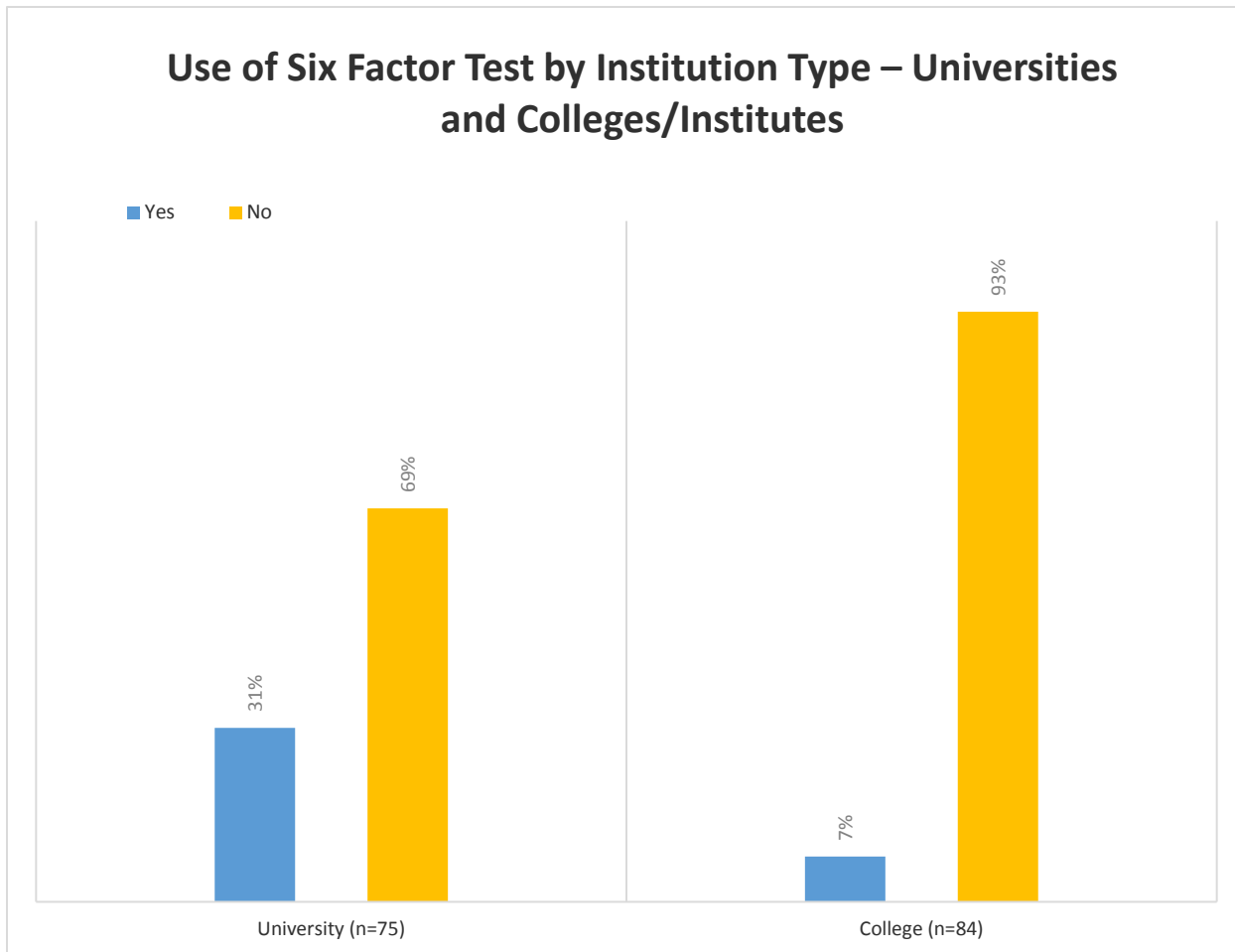


Figure 8. Use of the six factor test by institution type (universities versus colleges/institutes).

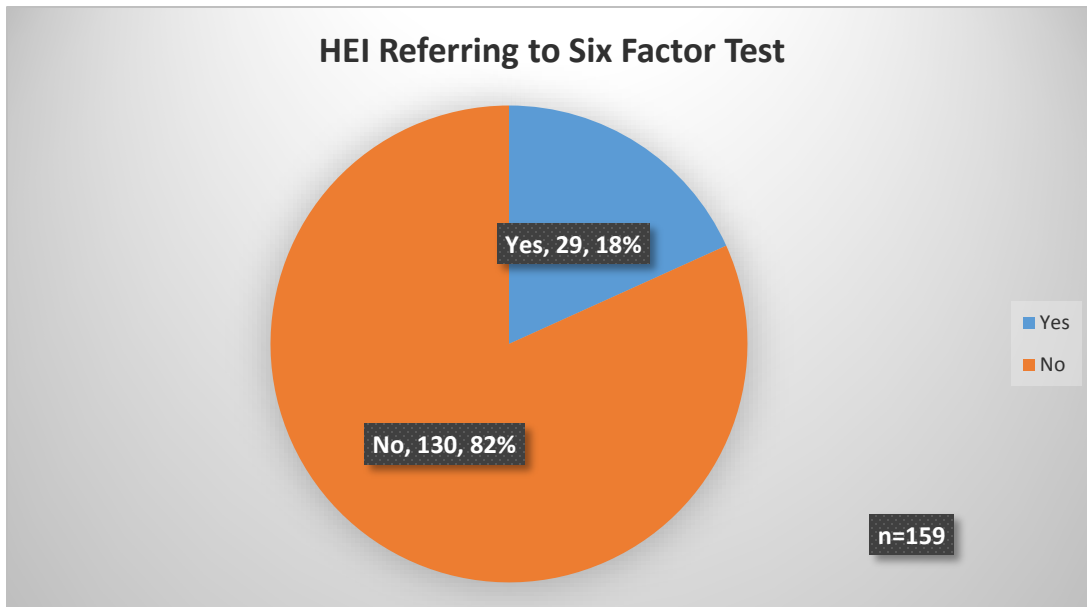


Figure 9. HEI referring to the second stage “six factor test” of the two-step analysis.

Interestingly, while it is to be expected that the 24 (83%) of HEI that refer to the six factor test have not opted in to the AC “tariff”, still five (17%) of the institutions that refer to the six factor test have also opted in to AC licences (see Figure 10).

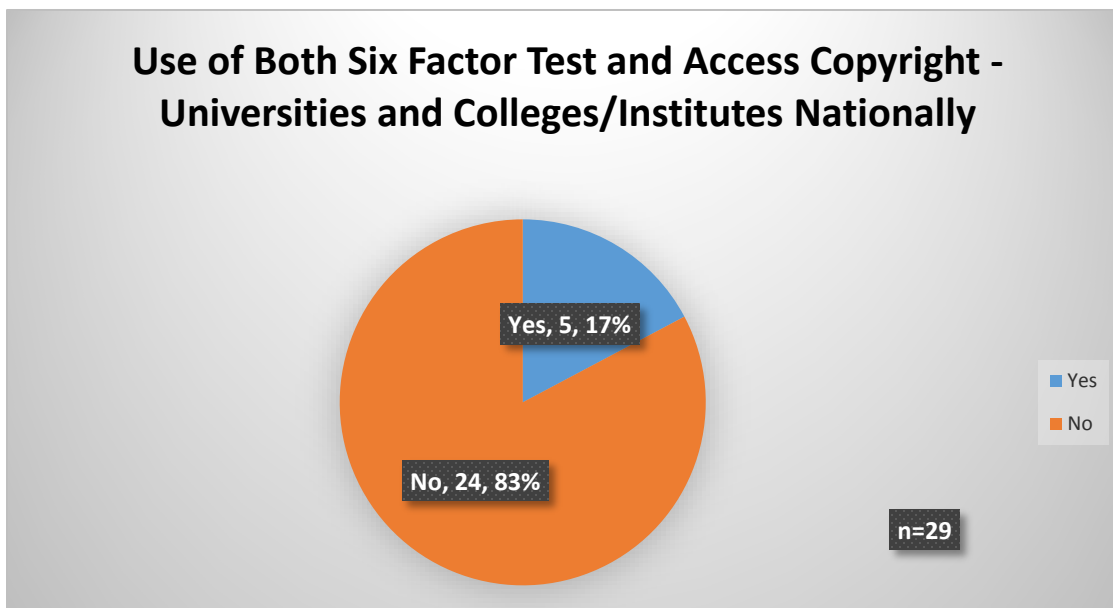


Figure 10. Use of the six factor test and Access Copyright licensee.

Of these institutions, a review of the universities who use the six factor test shows there are eight small, six medium, and six large universities have opted out of AC, while there are three small universities who have opted in to AC. Colleges and Institutes who use the six factor test show that one large, two medium, and one small institution opted out of AC, while one medium and one large had opted in to AC.



**Question 3.** How many and what percent of public HEI outside Quebec refer to the UC guidelines?

As can be observed in Figure 11, the UC guidelines are being followed by a slight majority of HEI (53%); nearly half of HEI are either ignoring or choosing not to recommend the UC guidelines.

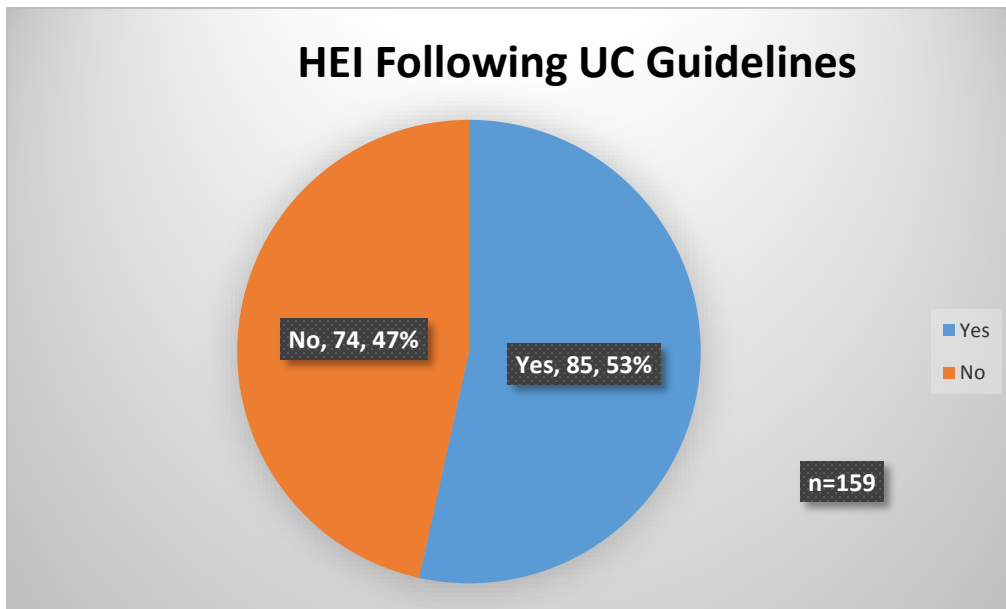


Figure 11. Public HEI following Universities Canada guidelines.

**Question 4.** How many and what percent of public HEI outside Quebec refer to the UC 10% limit for fair dealing?

The 53% of HEI that post the UC guidelines also post the 10% rule, which is contained within them. Other HEI that do not post the guidelines also refer to the 10% guideline for fair dealing (Figure 12).

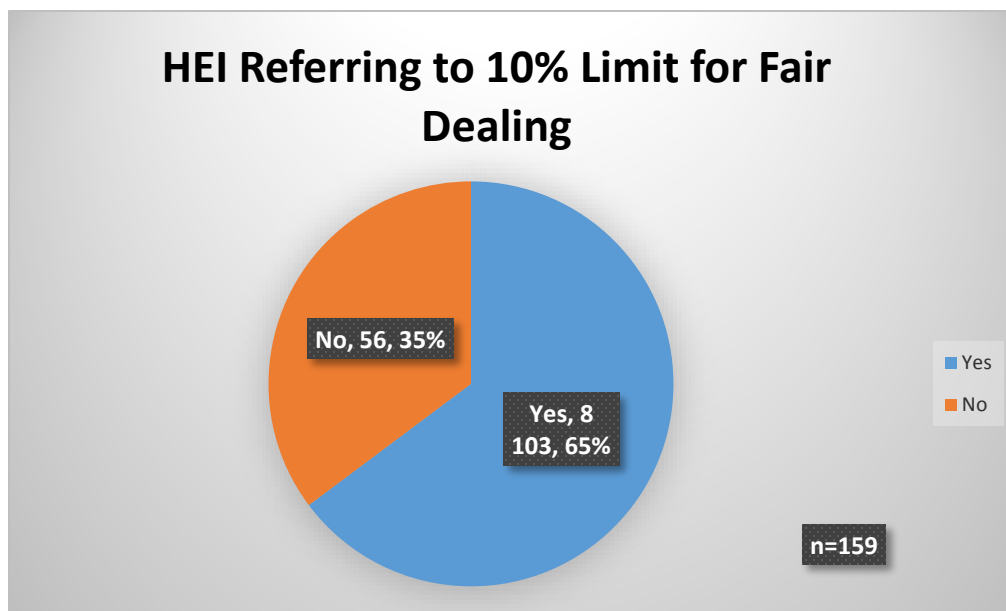


Figure 12. Universities and colleges referring to the 10% guidelines for fair dealing.

Use of the 10% guideline is similar between universities and CIs and there are no significant differences among regions or when comparing the size of institutions.

### ***Private Institutions***

There were 67 private universities investigated in this study. The vast majority, 56 (84%), had no information on copyright or fair dealing. Eighteen (27%) were members of AC and only three identified membership to another affiliate agency (Copibec). Nine private institutions refer to the six factor test, and of those, six also are members of AC. Additionally, six private institutions refer to the 10% guidelines.

### ***Limitations***

This study is limited by its design of focusing on websites for information. This reliance on institutional websites for accurate information, supplemented by phone calls to random institutions, may be problematic. It is assumed that institutions that accepted the AC "tariff" noted this on their website. That said, there may be some institutions that did note this, and some institutions may have accepted the "tariff" since the research was conducted. Furthermore, inferences regarding the motivations of the different institutions cannot be verified, including their level of risk aversion or simple conformity with others. Another limitation is that the study took place in 2017. As a result, the results may capture a specific moment in time, as HEI views and policies towards copyright are subject to change. The data were checked and revised in September of 2018 to include changes that had occurred since the data was first gathered, and are reflected in the results. As institutional policy in this area continues to evolve, so too will the data on this policy. While data acquired through these methods is useful, further research must acknowledge the limitations and timeliness of the information.

## **Summary and Suggestions for Future Research**

The majority of Canadian higher education institutions have responded to the Supreme Court of Canada's rulings on fair dealing. With this fair dealing jurisprudence, combined with the increased availability of open educational resources and direct licensing arrangements with publishers, many HEI decided they do not need Access Copyright licences (*Canadian Broadcasting Corp v. SODRAC*, 2015). Instead, they chose to rely on Universities Canada's guidelines rather than accept a more open interpretation of fair dealing using the SCC's six factors, or the more liberal Canadian Association of University Teachers' guidelines. This story gained wider importance following the July 2017 Federal Court decision with more restrictive interpretations on fair dealing and an interim mandatory "tariff" for York University. (*CCLA v. York U.*, 2017). An appeal of this decision is in process and, along with the Copibec class action suit against Laval University, will have a profound effect on HEI in Canada.

As of September 2018, five additional universities from the original sample indicated they opted out of the AC licence. None have decided to join. At the college and institute level, a further 19 institutions from the original sample opted out of the AC licence, two have opted in, and four now show no information either way (three formerly opted in; 1 opted out). There has been a small increase in the number of institutions (five universities, two colleges) that now refer to the SCCs six factor test (See Appendix C). By the time this article is published, there is potential that more institutions will have opted out of AC memberships and updated their policy practices.

The significance of this research is to provide a view regarding the attitudes and behaviors of HEIs across Canada (excluding Quebec) in the evolving copyright climate. Fair dealing has always been a part of Canadian copyright law, but it was only in 2012 when the pentalogy decisions in the SCC challenged the restrictive behaviours institutions were self-imposing. From this point, some institutions chose to break free from AC licensing and use fair dealing and open resources to their advantage. However, as this research demonstrates, there is an inconsistency as to why not all institutions adhere to the large and liberal interpretation of fair dealing as interpreted by the SCC. Why the interpretations are different (even conflicting) and what the restrictive interpretation of the fair dealing exception by the Federal Court means for HEI going forward is not clear. However, this research suggests that a national consensus could be agreed on in order to take advantage of the large and liberal interpretation of fair dealing as interpreted by the SCC. This consensus could benefit all HEIs and encourage ongoing use of the fair dealing and the six factor test, resulting in more consistent practices across the country.

This quantitative investigation was based on an examination of the public information available on institutional websites. As noted above, the data supports the view that the majority of HEI in Canada chose not to opt in to AC licensing. However, only a few HEI based their interpretations of fair dealing on the SCC six factor test, with the majority including references to the UC guidelines and the 10% of a work interpretation. A follow-up qualitative study, with interviews or focus groups could shed light on the reasoning behind these decisions and the implications to opt in or opt out of the AC licensing

agreement, to adopt or not the UC model licence, or to make reference to the six factor test and the 10% rule. A comparative case study of the perspectives and experiences of the copyright decision makers would also provide more information on motivations and biases. The lack of a reliable sample of HEI that had no information on their websites on copyright of fair dealing represents a flaw in this research. This could be remediated with a reliable sample to test the limited but suggestive data supplied in this investigation. There is also a need for a cost-benefit analysis comparing AC opt-in with opt-out that tests for financial savings and administrative time reduction in HEI.

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### ***Appendix A: Canadian HEI Adherence to the Six Factor Test Listed by East to West Region***

<u>University</u>	<u>Type</u>	<u>Size</u>	<u>Province</u>	<u>Region</u>	<u>AC membership status</u>	<u>Adherence to six factor test</u>
University of New Brunswick	University	Small	New Brunswick	Atlantic	No	Six factor test
University of Prince Edward Island	University	Small	PEI	Atlantic	No	Six factor test
University of King's College	University	Small	Nova Scotia	Atlantic	Yes	Six factor test
The University of Western Ontario	University	Large	Ontario	ON	No	Six factor test
University of Toronto	University	Large	Ontario	ON	No	Six factor test
Queen's University	University	Medium	Ontario	ON	No	Six factor test
Nipissing University	University	Small	Ontario	ON	No	Six factor test
Laurentian University	University	Small	Ontario	ON	Yes	Six factor test
Lakehead University	University	Small	Ontario	ON	No	Six factor test
Trent University	University	Small	Ontario	ON	No	Six factor test
University of St. Michael's College	University	Small	Ontario	ON	No	Six factor test; Part of UofT
University of Trinity College	University	Small	Ontario	ON	No	Six factor test; Part of UofT
George Brown College	College	Large	Ontario	ON	No	Six factor test
La Cité Collégiale	College	Small	Ontario	ON	No	Six factor test



<u>University</u>	<u>Type</u>	<u>Size</u>	<u>Province</u>	<u>Region</u>	<u>AC membership status</u>	<u>Adherence to six factor test</u>
Victoria University	University	Large	Ontario	ON	No	Six factor test; Part of UofT
Athabasca University	University	Large	Alberta	West & North	No	Six factor test
Simon Fraser University	University	Large	BC	West & North	No	Six factor test
University of Manitoba	University	Large	Manitoba	West & North	No	Six factor test
Grant MacEwan University	University	Medium	Alberta	West & North	No	Six factor test
Mount Royal University	University	Medium	Alberta	West & North	No	Six factor test
SAIT Polytechnic	University	Medium	Alberta	West & North	No	Six factor test
University of Saskatchewan	University	Medium	Saskatchewan	West & North	No	Six factor test
University of Victoria	University	Medium	BC	West & North	No	Six factor test
University of Northern British Columbia	University	Small	BC	West & North	No	Six factor test
Université de Saint-Boniface	University	Small	Manitoba	West & North	Yes	Six factor test
British Columbia Institute of Technology	College	Large	BC	West & North	Yes	Six factor test
Langara College	College	Medium	BC	West & North	No	Six factor test
Saskatchewan Polytechnic	College	Medium	Saskatchewan	West & North	No	Six factor test
Okanagan College	College	Medium	BC	West & North	Yes	Six factor test

Note. Large =>30k students; Medium 10k to 30k students; Small <10k students

## ***Appendix B: Canadian Universities Listed by Their Affiliation to the Access Copyright License***

<u>Institution</u>	<u>Type</u>	<u>Size</u>	<u>Province</u>	<u>Region</u>	<u>AC membership status</u>
Cape Breton University	University	Small	Nova Scotia	Atlantic	N/A
Campion College at the University of Regina	University	Small	Saskatchewan	West & North	N/A
Brescia University College	University	Small	Ontario	ON	N/A
Huron University College	University	Small	Ontario	ON	N/A
Acadia University	University	Small	Nova Scotia	Atlantic	No
Concordia University of Edmonton	University	Small	Alberta	West & North	No
University of New Brunswick	University	Small	New Brunswick	Atlantic	No
University of Prince Edward Island	University	Small	PEI	Atlantic	No
The University of Western Ontario	University	Large	Ontario	ON	No
University of Toronto	University	Large	Ontario	ON	No
Queen's University	University	Medium	Ontario	ON	No
Nipissing University	University	Small	Ontario	ON	No
Lakehead University	University	Small	Ontario	ON	No

<u>Institution</u>	<u>Type</u>	<u>Size</u>	<u>Province</u>	<u>Region</u>	<u>AC membership status</u>
Trent University	University	Small	Ontario	ON	No
Athabasca University	University	Large	Alberta	West & North	No
Simon Fraser University	University	Large	BC	West & North	No
University of Manitoba	University	Large	Manitoba	West & North	No
Grant MacEwan University	University	Medium	Alberta	West & North	No
Mount Royal University	University	Medium	Alberta	West & North	No
SAIT Polytechnic	University	Medium	Alberta	West & North	No
University of Saskatchewan	University	Medium	Saskatchewan	West & North	No
University of Victoria	University	Medium	BC	West & North	No
University of Northern British Columbia	University	Small	BC	West & North	No
University of St. Michael's College	University	Small	Ontario	ON	No
University of Trinity College	University	Small	Ontario	ON	No
Victoria University	University	Large	Ontario	ON	No
Memorial University	University	Large	Newfoundland	Atlantic	No
Dalhousie University	University	Medium	Nova Scotia	Atlantic	No
Mount Allison University	University	Small	New Brunswick	Atlantic	No

<u>Institution</u>	<u>Type</u>	<u>Size</u>	<u>Province</u>	<u>Region</u>	<u>AC membership status</u>
Mount Saint Vincent University	University	Small	Nova Scotia	Atlantic	No
Nova Scotia College of Art & Design (NSCAD University)	University	Small	Nova Scotia	Atlantic	No
Ryerson University	University	Large	Ontario	ON	No
University of Ottawa	University	Large	Ontario	ON	No
University of Waterloo	University	Large	Ontario	ON	No
York University	University	Large	Ontario	ON	No
Brock University	University	Medium	Ontario	ON	No
Carleton University	University	Medium	Ontario	ON	No
McMaster University	University	Medium	Ontario	ON	No
University of Guelph	University	Medium	Ontario	ON	No
University of Windsor	University	Medium	Ontario	ON	No
University of Ontario Institute of Technology	University	Medium	Ontario	ON	No
Northern Alberta Institute of Technology	University	Large	Alberta	West & North	No
The University of British Columbia	University	Large	BC	West & North	No

<u>Institution</u>	<u>Type</u>	<u>Size</u>	<u>Province</u>	<u>Region</u>	<u>AC membership status</u>
University of Alberta	University	Large	Alberta	West & North	No
Kwantlen Polytechnic University	University	Medium	BC	West & North	No
University of Calgary	University	Medium	Alberta	West & North	No
University of Regina	University	Medium	Saskatchewan	West & North	No
Capilano University	University	Medium	BC	West & North	No
First Nations University of Canada	University	Small	Saskatchewan	West & North	No
Royal Roads University	University	Small	BC	West & North	No
The University of Winnipeg	University	Small	Manitoba	West & North	No
University College of the North	University	Small	Manitoba	West & North	No
University of Lethbridge	University	Small	Alberta	West & North	No
University of The Fraser Valley	University	Small	BC	West & North	No
Dalhousie Agricultural Campus of Dalhousie University	University	Small	New Brunswick	Atlantic	No
King's University College	University	Small	Ontario	ON	No
St. Jerome's University	University	Small	Ontario	ON	No

<u>Institution</u>	<u>Type</u>	<u>Size</u>	<u>Province</u>	<u>Region</u>	<u>AC membership status</u>
St. Thomas University	University	Small	New Brunswick	Atlantic	Yes
University of Sudbury	University	Small	Ontario	ON	Yes
Université de Moncton	University	Small	New Brunswick	Atlantic	Yes
Royal Military College of Canada	University	Small	Ontario	ON	Yes
Algoma University	University	Small	Ontario	ON	Yes
OCAD University	University	Small	Ontario	ON	Yes
University of King's College	University	Small	Nova Scotia	Atlantic	Yes
Laurentian University	University	Small	Ontario	ON	Yes
Université de Saint-Boniface	University	Small	Manitoba	West & North	Yes
Saint Francis Xavier University	University	Small	Nova Scotia	Atlantic	Yes
Saint Mary's University	University	Small	Nova Scotia	Atlantic	Yes
Université Sainte-Anne	University	Small	Nova Scotia	Atlantic	Yes
Wilfrid Laurier University	University	Medium	Ontario	ON	Yes
Thompson Rivers University	University	Medium	BC	West & North	Yes
Brandon University	University	Small	Manitoba	West & North	Yes

<u>Institution</u>	<u>Type</u>	<u>Size</u>	<u>Province</u>	<u>Region</u>	<u>AC membership status</u>
Emily Carr University of Art and Design	University	Small	BC	West & North	Yes
Vancouver Island University	University	Small	BC	West & North	Yes
École technique et professionnelle, Université de Saint-Boniface	University	Small	Manitoba	West & North	Yes

*Note.* Large =>30k students; Medium 10k to 30k students; Small <10k students

**Appendix C: Canadian Colleges and Institutes Listed by Their Affiliation to the Access Copyright License**

<u>Institution</u>	<u>Type</u>	<u>Size</u>	<u>Province</u>	<u>Region</u>	<u>AC membership status</u>
Collège Acadie Î. - P. - É.	College	Small	PEI	Atlantic	N/A
Maritime College of Forest Technology	College	Small	New Brunswick	Atlantic	N/A
New Brunswick Bible Institute	College	Small	New Brunswick	Atlantic	N/A
Nunavut Arctic College	College	Small	Nunavut	North	N/A
Northern Francophone College (Collège nordique francophone)	College	Small	Northwest Territories	North	N/A
Fleming College	College	Medium	Ontario	ON	N/A
Collège Boréal	College	Small	Ontario	ON	N/A
Sault College	College	Small	Ontario	ON	N/A
Southeast Regional College	College	Medium	Saskatchewan	West & North	N/A
Parkland College (Saskatchewan)	College	N/A	Saskatchewan	West & North	N/A
Carlton Trail Regional College	College	Small	Saskatchewan	West & North	N/A
Coquitlam College	College	Small	BC	West & North	N/A
Northern Lakes College	College	Small	Alberta	West & North	N/A



<u>Institution</u>	<u>Type</u>	<u>Size</u>	<u>Province</u>	<u>Region</u>	<u>AC membership status</u>
Northlands College	College	Small	Saskatchewan	West & North	N/A
Saskatchewan Indian Institute of Technologies	College	Small	Saskatchewan	West & North	N/A
Vancouver College of Art and Design	College	Small	BC	West & North	N/A
Georgian College	College	Large	Ontario	ON	N/A
St. Lawrence College	College	Medium	Ontario	ON	N/A
Collège de l'île	College	Small	PEI	Atlantic	N/A
First Nations Technical Institute	College	Small	Ontario	ON	N/A
Kenjgewin Teg Educational Institute (KTEI)	College	Small	Ontario	ON	N/A
Michener Institute of Education at UHN	College	Small	Ontario	ON	N/A
North West College	College	Small	Saskatchewan	West & North	N/A
Conestoga College	College	Large	Ontario	ON	No
Loyalist College	College	Small	Ontario	ON	No
Douglas College	College	Medium	BC	West & North	No
Great Plains College	College	Small	Saskatchewan	West & North	No
Cambrian College	College	Medium	Ontario	ON	No
Canadore College	College	Small	Ontario	ON	No

<u>Institution</u>	<u>Type</u>	<u>Size</u>	<u>Province</u>	<u>Region</u>	<u>AC membership status</u>
NorQuest College	College	Medium	Alberta	West & North	No
Keyano College	College	Small	Alberta	West & North	No
Lakeland College	College	Small	Alberta	West & North	No
Alberta College of Art and Design	College	Small	Alberta	West & North	No
Assiniboine Community College	College	Small	Manitoba	West & North	No
Confederation College	College	Medium	Ontario	ON	No
George Brown College	College	Large	Ontario	ON	No
Langara College	College	Medium	BC	West & North	No
Saskatchewan Polytechnic	College	Medium	Saskatchewan	West & North	No
La Cité Collégiale	College	Small	Ontario	ON	No
Portage College	College	Small	Alberta	West & North	No
Nova Scotia Community College	College	Medium	Nova Scotia	Atlantic	No
New Brunswick Community College	College	Medium	New Brunswick	Atlantic	No
Holland College	College	Small	PEI	Atlantic	No
Yukon College	College	Small	Yukon	North	No
Centennial College	College	Large	Ontario	ON	No

<u>Institution</u>	<u>Type</u>	<u>Size</u>	<u>Province</u>	<u>Region</u>	<u>AC membership status</u>
Fanshawe College	College	Large	Ontario	ON	No
Seneca College	College	Large	Ontario	ON	No
Sheridan College	College	Large	Ontario	ON	No
Humber College	College	Medium	Ontario	ON	No
Lambton College	College	Medium	Ontario	ON	No
Niagara College	College	Medium	Ontario	ON	No
Ontario Agricultural College	College	Small	Ontario	ON	No
Bow Valley College	College	Large	Alberta	West & North	No
North Island College	College	Large	BC	West & North	No
Camosun College	College	Medium	BC	West & North	No
Justice Institute of British Columbia	College	Medium	BC	West & North	No
Vancouver Community College	College	Medium	BC	West & North	No
Selkirk College	College	Medium	BC	West & North	No
Grande Prairie Regional College	College	Small	Alberta	West & North	No
Lethbridge College	College	Small	Alberta	West & North	No
Medicine Hat College	College	Small	Alberta	West & North	No

<u>Institution</u>	<u>Type</u>	<u>Size</u>	<u>Province</u>	<u>Region</u>	<u>AC membership status</u>
Northern Lights College	College	Small	BC	West & North	No
Red Deer College	College	Small	Alberta	West & North	No
Marine Institute	College	Large	Newfoundland	Atlantic	No
Centre for Nursing Studies	College	Small	Newfoundland	Atlantic	No
Manitoba Institute of Trades and Technology	College	Small	Manitoba	West & North	No
Luther College	College	Medium	Saskatchewan	West & North	No
Mohawk College	College	Medium	Ontario	ON	Yes
Nicola Valley Institute of Technology	College	Small	BC	West & North	Yes
Northwest Community College	College	Small	BC	West & North	Yes
Blue Quills First Nations College	College	Small	Alberta	West & North	Yes
Aurora College	College	Small	Northwest Territories	North	Yes
Okanagan College	College	Medium	BC	West & North	Yes
St. Clair College	College	Medium	Ontario	ON	Yes
College of the North Atlantic	College	Medium	Newfoundland	Atlantic	Yes
Algonquin College of Applied Arts and Technology	College	Large	Ontario	ON	Yes

<u>Institution</u>	<u>Type</u>	<u>Size</u>	<u>Province</u>	<u>Region</u>	<u>AC membership status</u>
Durham College	College	Large	Ontario	ON	Yes
Northern College	College	Medium	Ontario	ON	Yes
The Michener Institute of Education at UHN	College	Small	Ontario	ON	Yes
Red River College	College	Large	Manitoba	West & North	Yes
College of New Caledonia	College	Small	BC	West & North	Yes
College of the Rockies	College	Small	BC	West & North	Yes
Olds College	College	Small	Alberta	West & North	Yes
British Columbia Institute of Technology	College	Large	BC	West & North	Yes

*Note.* Large =>30k students; Medium 10k to 30k students; Small <10k students