

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20180322**

**Docket: A-293-15**

**Citation: 2018 FCA 58**

**CORAM: STRATAS J.A.  
NEAR J.A.  
RENNIE J.A.**

**BETWEEN:**

**THE CANADIAN COPYRIGHT LICENSING AGENCY,  
OPERATING AS ACCESS COPYRIGHT**

**Applicant**

**and**

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA,  
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF  
MANITOBA, THE PROVINCE OF NEW BRUNSWICK, HER  
MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR,  
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF  
NOVA SCOTIA, THE GOVERNMENT OF NUNAVUT, HER  
MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF PRINCE  
EDWARD ISLAND, HER MAJESTY THE QUEEN IN RIGHT OF THE  
PROVINCE OF SASKATCHEWAN, GOVERNMENT OF YUKON  
AND HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE  
OF BRITISH COLUMBIA**

**Respondents**

Heard at Toronto, Ontario, on June 20, 2016.

Judgment delivered at Ottawa, Ontario, on March 22, 2018.

REASONS FOR JUDGMENT BY:

STRATAS J.A.

CONCURRING REASONS BY:

RENNIE J.A.

CONCURRED IN BY:

NEAR J.A.

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**Respondents**

**REASONS FOR JUDGMENT**

**STRATAS J.A.**

[1] The applicant, Access Copyright, applies for judicial review of the decision dated May 22, 2015 of the Copyright Board.

[2] In its decision, the Copyright Board certified royalty rates in two proposed tariffs filed by Access Copyright. Specifically, the royalties are those that the respondent provincial and territorial governments must pay Access Copyright for the reproduction of copyright-protected works in Access Copyright's repertoire in certain years. At issue here are the royalties the respondents must pay in a tariff covering the years 2010-2014.

[3] For the reasons that follow, I would dismiss the application for judicial review with costs.

**A. Overview of the legislative provisions relevant to this application**

[4] Access Copyright is a "collective society": *Copyright Act*, R.S.C. 1985, c. C-42, section 2. Loosely put—and just highlighting those matters relevant to this case—that means that it obtains remuneration for the benefit of those who, through licence agreements, appoint it as their agent and authorize it to act on their behalf for that purpose.

[5] Access Copyright also falls under subsection 70.1(a) of the *Copyright Act*. It "operates... a licensing scheme" that applies "in relation to a repertoire of works of more than one author" and "sets out the classes of uses for which and the royalties and terms and conditions on which it agrees to authorize" such things as reproducing the works.

[6] As a result, sections 70.11 to 70.6 apply to it.

[7] Under section 70.12 of the *Copyright Act*, Access Copyright may propose tariffs to the Board. Objections may be filed.

[8] The Board then adjudicates the fairness and appropriateness of the proposed tariff. In the words of section 70.15 of the Act, the Board “shall certify the tariffs as approved, with such alterations to the royalties and to the terms and conditions related thereto as the Board considers necessary, having regard to any objections to the tariffs.”

[9] Once tariffs are certified, among other things, Access Copyright may, for the period specified in its approved tariff, collect the royalties specified in the tariff and, in default of their payment, recover them in a court of competent jurisdiction: sections 68.2(1) and 70.15(2) of the *Copyright Act*.

**B. What happened here**

[10] Access Copyright proposed tariffs setting out the royalty rates to be paid to Access Copyright concerning the copying of published works in Access Copyright’s repertoire by provincial and territorial governments during the 2005-2009 and 2010-2014 periods. A tariff was proposed for each period.

[11] The first tariff proposed by Access Copyright did not cover the making of digital copies. The second tariff proposed by Access Copyright did authorize the making and distribution of digital copies subject to certain terms. One term required government licensees, when they were

no longer covered by the proposed tariff, to cease to use these digital copies and to delete them from their computer hard drives and other electronic media. This condition is known as the Deletion Provision.

[12] Following a lengthy hearing, the Board certified two tariffs. In the first tariff, the Board certified annual royalty rates payable to Access Copyright of 11.56 cents per full-time equivalent employee for the first period. In the second tariff, it certified the rates at 49.71 cents per full-time equivalent employee for the second period.

[13] Very much at issue in this judicial review is what the Board did with the Deletion Provision.

### **C. Proceedings before the Board**

[14] Access Copyright and the respondents entered into a memorandum of understanding to conduct a joint study of the volume and nature of the copying of published works by provincial and territorial government employees. The parties refer to this as the Volume Study.

[15] The Volume Study was to estimate the annual volume of compensable copying of published works in Access Copyright's repertoire in order to calculate annual royalty rates for the first and second tariffs. The Volume Study was carried out and results were obtained.

[16] Access Copyright chose not to rely on the results in the Volume Study. Instead, it proposed a different methodology. It relied on royalty rates it had previously negotiated with the federal government, the governments of Alberta, Saskatchewan and Ontario, and an agreement between Copibec, a copyright collective based in Quebec, and the government of Quebec. Access Copyright also adduced evidence of standard affiliation agreements with its authors and publisher affiliates. These standard agreements expressly prohibited Access Copyright from licensing digital copying of published works in the absence of the Deletion Provision.

[17] The respondents relied on results from the Volume Study to support their proposed royalty rates. They submitted that the Board should use a tariff methodology, known as the “volume times value” tariff methodology, that it employed in an earlier Board decision concerning a tariff proposed by Access Copyright. Under this methodology, the volume of compensable copying is multiplied by the estimated value of each page of a copied work to obtain a final certified royalty rate.

[18] One of the respondents, British Columbia, objected to the Deletion Provision proposed by Access Copyright in its second tariff. It submitted that requiring destruction of digital copies when a tariff has expired is improper and unreasonable.

[19] After the Board had completed the oral evidence phase of its hearing, the Board issued a notice establishing a timetable for submissions relating to the wording and administrative provisions contained in the proposed tariffs. The notice specifically required Access Copyright to “address the wording and administrative issues already raised by the objectors, and especially

those raised in paragraphs 22 to 33 of Exhibit BC-1.” These paragraphs referred to British Columbia’s objection to the Deletion Provision.

[20] In its submissions, Access Copyright argued that that the parties were invited to address the wording and administrative provisions contained in the proposed tariffs, not issues of substance. Nevertheless, in its view, the Deletion Provision was appropriate and necessary because it was unable to license digital copying without it. It said that the Deletion Provision was a “condition of the grant of rights provided by Access Copyright’s affiliates to Access Copyright”: respondents’ record at p. 322.

[21] The respondents submitted that substantive issues could be addressed as a result of examining the wording and administrative provisions contained in the proposed tariffs. Thus, they addressed the propriety of the Deletion Provision. They submitted that the Deletion Provision should be removed because of the practical impossibility of compliance, Access Copyright had no legal right to control the use of a legally made copy, and the importance of treating digital copies in a technologically neutral manner: respondents’ record at pp. 347-348.

[22] Access Copyright replied, reiterating its position that because the Deletion Provision was a condition of the grant of rights to it by its authors and publisher affiliates, it “does not (and cannot) agree” to its removal from the final certified tariff: respondents’ record at p. 361.

[23] On May 6, 2014, the Board issued an order setting out its preliminary view on the Deletion Provision. The Board stated that the Deletion Provision should not be included in the

second tariff. The Board asked seven questions concerning the Deletion Provision. The fourth asked about the effect that the non-inclusion of the Deletion Provision would have on the compensability of digital copies, including whether digital copying could be covered in the second tariff if the Deletion Provision was not included.

[24] The Board also informed the parties that it would provide them with a list of copying events that it had “preliminarily identified as representing acts of copying that would be compensable under the proposed tariffs” and would ask them to “make calculations that will help to establish the per-[Full Time Employee] royalty”: respondents’ record at p. 402. The parties had previously agreed that the Board should review 291 copying events in order to analyze compensability under the proposed tariffs.

[25] Access Copyright responded to the Board’s questions. On the fourth question, Access Copyright reiterated its earlier submission that the Deletion Provision was a condition of its grant of rights from its authors and publisher affiliates. But it added that it had obtained permission from its Board of Directors to license digital copying without the Deletion Provision and that it would request permission from its affiliates to remove the Deletion Provision from its licences.

[26] The respondents other than British Columbia submitted that although they would prefer that the second tariff cover digital works, if Access Copyright were unable to license digital copying without the Deletion Provision, the copying of digital works should not be considered compensable. British Columbia submitted that if the Deletion Provision were not included,



digital copying would be outside of the scope of Access Copyright's licence and, therefore, digital copying would not be compensable.

[27] The Board permitted the parties to file responses to each other's submissions.

[28] Access Copyright stated that it had proposed a reasonable compromise in its submission "that recognizes there is no need to require the deletion of digital copies where there is no further infringing use": respondents' record at p. 436.

[29] The respondents other than British Columbia saw Access Copyright as attempting to retroactively build its repertoire of rights. It argued that the Board should not certify a tariff based on rights that do not yet exist. They also noted that Access Copyright had not filed any evidence of permission to license digital copying with the Deletion Provision and it was too late to introduce any new evidence.

[30] The Board then issued an order dealing with its analysis of the 291 copying events identified in the Volume Study. It found on a preliminary basis that 26 out of the 291 events were compensable. This list of 26 excluded all digital copying events. The Board asked the parties to make some calculations on this basis. It did not invite any further submissions.

[31] Access Copyright filed a letter offering those calculations. It also filed a separate letter challenging the Board's preliminary conclusions concerning the 26 events. Access Copyright

also informed the Board that a majority of its publisher affiliates had agreed to waive the Deletion Provision with retroactive effect to the start date of the second tariff.

[32] The respondents wrote to object to Access Copyright's extra submissions.

[33] The Board upheld the objection. Access Copyright's further submissions were not requested by the Board, they came almost two years after final oral arguments had been made, and the submissions were speculative in nature: respondents' record at p. 468.

[34] On May 22, 2015, the Board reached its final decision. It adopted the respondents' preferred methodology, the "volume times value" approach. In applying this methodology, the Board excluded from the total number of compensable copying events all digital copying events identified in the Volume Study because the Board had decided not to include the Deletion Provision in the second tariff. Five copying events that exceeded a maximum 10% copying limit imposed by the tariff were also excluded.

[35] In this application for judicial review, the Deletion Provision is a central focus. The parties characterize quite differently what the Board did. Issues relating to procedural fairness, the Board's evaluation of substantial copying and its application of fair dealing are also in issue.

[36] The parties' characterizations of what the Board did concerning the Deletion Provision are worth canvassing as they affect the standard of review analysis.

[37] Access Copyright submits that it put forward certain terms and conditions to the Board. In its decision, the Board altered one: it removed the Deletion Provision: see paras. 151-159 of its reasons. As a result, an entire class of use—permission to the respondents to make digital copies—was removed from the tariff. The Board decided that the removal of the Deletion Provision deprived Access Copyright of any and all authority to licence digital uses: see paras. 161-167 of its reasons.

[38] This, Access Copyright says, the Board could not do. It submits that the Board had no authority under the *Copyright Act* to vary the terms and conditions on digital uses that Access Copyright agreed to authorize. Nor did it have authority to remove a term of digital use and thereafter to remove the entire class of digital use from the tariff on the basis of that improperly removed condition. It characterizes this as an issue that goes to the Board's jurisdiction.

[39] Access Copyright submits that this removal was not necessarily tied to the Board's rate-setting function. Instead, the Board was to value the rights of use—here, rights including the Deletion Provision—as presented by Access Copyright. In doing what it did, Access Copyright says that the Board failed to value the rights as presented by Access Copyright (*i.e.*, including the Deletion Provision). The Board did not have the power to remove the Deletion Provision.

[40] As a result of this error, Access Copyright says that the Board failed to exercise its power to determine the value of the licensed right that was subject to the Deletion Provision.

[41] Access Copyright also submits that none of the respondents pleaded or advocated for the removal of the Deletion Provision until the Board first raised this issue roughly a year and a half after the hearing began. In its view, there was procedural unfairness that vitiates the Board's decision.

[42] The respondents characterize what the Board did with the Deletion Provision differently. They say that the Board did not decide to remove the Deletion Provision. Instead, the Board decided not to include it in its tariff. In so doing, it exercised its discretion under section 70.15 of the Act to set tariffs. In *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2010 FCA 139, 403 N.R. 309 (“SOCAN (2010)”), this Court upheld the jurisdiction of the Board to exclude classes of uses from a tariff. This is what the Board did here. In no way did the Board vary the terms and conditions on digital uses that Access Copyright agreed to authorize.

## **D. Analysis**

### **(1) Reviewing the substance of the Board's decision**

#### **(a) The proper standard of review**

[43] For the moment, for argument's sake, I shall adopt Access Copyright's characterization of what the Board did concerning the Deletion Provision. Even on Access Copyright's

characterization of what the Board did, some of its submissions on the standard of review cannot be accepted.

[44] Access Copyright submits that the standard of review of what the Board did concerning the Deletion Provision is correctness because this is a jurisdictional matter: the Board “exceeded its jurisdiction” in making its decision. It submits that the Board had no jurisdiction to alter the terms and conditions relating to the classes of uses that the collective society sets out and agrees to authorize.

[45] Put another way, Access Copyright says that the Board can consider and, if appropriate, change the proposed royalties and the terms and conditions proposed to be associated to those royalties, but cannot go further and change the terms and conditions of Access Copyright’s arrangements with copyright holders.

[46] Even on Access Copyright’s characterization of what the Board did, the standard is reasonableness, not correctness. I reject the submission that we have before us a jurisdictional issue warranting correctness review.

[47] What the Board had before it—and what is before us now—is the *Copyright Act*. It sets out what the Board may do. The question of what the Board may do, then, is a question of statutory interpretation.

[48] Thus, in deciding what it could and could not do, the Board had to expressly or implicitly take a view of what the *Copyright Act* says on that issue. In other words, we are dealing with the Board's express or implicit view—its interpretation—of its home statute.

[49] Three recent Supreme Court majority decisions affirm that the standard of review on this is reasonableness: *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293; *Quebec (Attorney General) v. Gu  rin*, 2017 SCC 42, , 412 D.L.R. (4th) 103; *Quebec (Commission des normes, de l'  quit  , de la sant   et de la s  curit   du travail) v. Caron*, 2018 SCC 3.

[50] These cases stand for the proposition that reasonableness is the presumed standard of review for an administrative decision-maker's interpretation of legislative provisions with which it is familiar or that it frequently uses. Here, the Copyright Board is interpreting the *Copyright Act*, legislation with which it is familiar and that it frequently uses.

[51] These Supreme Court cases are hardly new. They confirm an earlier and unwavering line of majority Supreme Court jurisprudence on this point. Although there are literally tens of Supreme Court cases that have employed the presumption of reasonableness in the case of interpretations of regulatory provisions by administrative decision-makers, I shall mention only the two most important, foundational ones.

[52] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court held (at para. 54) that "[d]eference will usually result where a tribunal is interpreting its own

statute or statutes closely connected to its function, with which it will have particular familiarity.”

[53] In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 34, the majority of the Supreme Court held that “unless the situation is exceptional...the interpretation by the tribunal of ‘its own statute or statutes closely connected to its function, with which it will have particular familiarity’ should be presumed to be a question of statutory interpretation subject to deference on judicial review.”

[54] I wish to address more directly Access Copyright’s submission that where “jurisdiction” is involved the standard of review is correctness. When one looks at the jurisprudence, we see that this sort of submission arises in two ways.

– I –

[55] The first way is that this was a fundamental issue relating to the limits of the Board’s power. The Board, so-to-speak, had to decide whether it was inside or outside the fences set up for it by Parliament. This was a “jurisdictional issue” that the Board had to get right before it entered into its assessment of Access Copyright’s proposed tariff.

[56] We receive this sort of submission quite often. We write cases rejecting it over and over again based on the Supreme Court’s standard of review jurisprudence: see, e.g., *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332 at paras. 39-46;

*Globalive Wireless Management Corp. v. Public Mobile Inc.*, 2011 FCA 194, [2011] 3 F.C.R. 344 at paras. 28-29.

[57] For the moment, let's define a so-called "jurisdictional question" as one requiring an assessment as to whether the administrator has done something that its legislation does not permit it to do. But to answer this question, we must interpret the legislation to define the limits of what the administrator can do. Thus, a "jurisdictional question" is really a question of legislative interpretation, one calling for reasonableness review on the basis of all of the above authorities.

[58] Put another way, the issue whether an administrative tribunal is inside or outside the "jurisdictional" fences set up by Parliament is really an issue of where those fences are—in other words, an interpretation of what the legislation says about what the administrative decision-maker can or cannot do.

[59] This Court has repeatedly concurred with this idea. It has held that "jurisdictional questions" defined in that way are really questions of legislative interpretation on which reasonableness is presumed to be the standard of review. They are not "true questions of jurisdiction" as that phrase is understood in *Dunsmuir*. See *Public Service Alliance of Canada v. Canadian Federal Pilots Assn.*, 2009 FCA 223, [2010] 3 F.C.R. 219; *C.B. Powell Limited v. Canada (Border Services Agency)*, 2011 FCA 137, 418 N.R. 33 at paras. 20-22; *Globalive Wireless*, above at para. 34; *Canada (Attorney General) v. Professional Institute of the Public Service of Canada*, 2011 FCA 20, 414 N.R. 256; *Wheatland County v. Shaw Cablesystems*



*Limited*, 2009 FCA 291, 394 N.R. 323 at paras. 38-41; *Canada (Attorney General) v. Public Service Alliance of Canada*, 2011 FCA 257, 343 D.L.R. (4th) 156; *Canada (Attorney General) v. Access Information Agency Inc.*, 2018 FCA 18 at paras. 16-20.

[60] These authorities bind us and preclude us from accepting Access Copyright's submission that we are dealing with an issue of "jurisdiction." And for good reason. The courts have been down the road of correctness for so-called jurisdictional questions and have seen its flaws.

[61] Long ago, courts interfered with decisions of administrative decision-makers by labelling their rulings on "preliminary" or "entry" matters as going to their "jurisdiction": see, e.g., *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756, 18 D.L.R. (3d) 1. In effect, certain questions that, as discussed above, were really questions of legislative interpretation, were given the "preliminary" or "entry" label, as opposed to others. Criteria for what is "preliminary" or "entry" was never articulated, nor could it be: what is "preliminary" or "entry" is purely arbitrary and in the eye of the beholder. Nevertheless, by labelling certain matters as "preliminary" or "entry" questions, and calling them "jurisdictional," courts freely substituted their view of the matter for that of the administrative decision-maker, even in the face of privative clauses—in effect, correctness review. It did not take much creativity or effort for judges to characterize something as "jurisdictional" and impose their views over those of the administrative decision-maker.

[62] Over thirty years ago, seeing the evident flaws with this approach, the Supreme Court began to discard it. In *C.U.P.E. v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227, 97 D.L.R. (3d)

417, Dickson J. (as he then was), writing for a unanimous Supreme Court, declared (at p. 233), “[t]he courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.”

[63] The movement away from the old jurisdictional approach was pretty much complete as a result of the Supreme Court’s decision in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, 35 Admin. L.R. 153. From that time forward until *Dunsmuir* in 2008, the Supreme Court reviewed the substance of administrative decision-making on the basis of a “pragmatic and functional test.” The test required the Court to determine the standard of review by applying four factors and then assessing the acceptability and defensibility of the administrative decision without regard to the outmoded ground of “jurisdictional error.”

[64] In *Dunsmuir*, the Supreme Court recast the approach reviewing courts should follow when assessing the substance of administrative decisions. But it did not go back to the old approach of “jurisdictional error.” Quite the contrary: it disparaged it. It called it “a highly formalistic, artificial ‘jurisdiction’ test that could easily be manipulated”: *Dunsmuir* at para. 43.

[65] In *Dunsmuir* at para. 35, the Supreme Court commented upon Dickson J’s warning in *C.U.P.E.*:

Prior to *CUPE*, judicial review followed the “preliminary question doctrine”, which inquired into whether a tribunal had erred in determining the scope of its jurisdiction. By simply branding an issue as “jurisdictional”, courts could replace a decision of the tribunal with one they preferred, often at the expense of a legislative intention that the matter lie in the hands of the administrative tribunal. *CUPE* marked a significant turning point in the approach of courts to judicial

review, most notably in Dickson J.'s warning that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233). Dickson J.'s policy of judicial respect for administrative decision making marked the beginning of the modern era of Canadian administrative law.

[66] These words are wise. And on this, the Supreme Court does not stand alone.

[67] In a recent case, the majority of the Supreme Court of the United States decried the "jurisdictional error" approach, noting that virtually any decision can be said to raise a "jurisdictional" issue warranting overly intrusive correctness review: *City of Arlington v. F.C.C.*, 133 S. Ct. 1863 (2013). The only possible limit would be to somehow distinguish certain questions of legislative interpretation—so called "entry questions" or "preliminary questions"—from questions of legislative interpretation, an evanescent distinction discoverable not on principle but rather on the whim or idiosyncratic musings of a reviewing judge. This offends the rule of law which supplies the primary basis for judicial interference with administrative decision-making: the outcome of cases cannot depend on the whim of the judge. The majority of the Supreme Court of the United States put it this way (at p. 1871): this sort of exercise places the judge in the position of a "haruspex, sifting the entrails of vast statutory schemes to divine whether a particular agency interpretation qualifies as 'jurisdictional'," a task that is "not the product of reasoned decision-making."

[68] After the wise words of *Dunsmuir*, cited above, the Supreme Court has repeatedly sounded the warning of Dickson J. (as he then was) not to "brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so": *Canada (Citizenship and*

*Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 45; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160 at para. 36; *Alberta Teachers' Association* at para. 33; *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3 at para. 126.

[69] Most importantly, in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364, the Supreme Court overruled *Bell*, above, and its idea that there are certain preliminary questions or entry questions of jurisdiction that an administrative decision-maker must get right.

[70] Quite simply, the use of the label “jurisdiction” to justify judicial interference with administrative decisions is no longer appropriate and was rightly discarded long ago. Through experience with the concept over some decades, it has seen to be unprincipled and doctrinally unsound.

[71] Recently, though, instability and uncertainty has bedeviled the Supreme Court’s standard of review jurisprudence. This has encouraged parties to raise matters long ago thought rejected.

[72] The old, discredited idea of labelling certain questions as “jurisdictional” and engaging in correctness review of them recently welled up again: *Guérin*, above. There, at the behest of the parties before it, the Supreme Court considered whether “jurisdiction” gives rise to correctness review: *Guérin*. Faced with Access Copyright’s submissions that the standard of review is correctness for jurisdictional questions and given the instability and uncertainty in the jurisprudence, this Court awaited the Supreme Court’s decision in *Guérin*.

[73] In *Guérin*, the Supreme Court did not give effect to the idea of correctness for so-called jurisdictional questions, questions that, as I have explained, are really just issues of statutory interpretation. But this was by only a bare majority.

[74] The majority of the Court in *Guérin* continued to apply the presumption of reasonableness to what, in its view, involved an administrator's interpretation of the governing statute. The majority rejected the idea that some statutory interpretation issues are "jurisdictional" in nature inviting correctness review.

[75] Following the majority's approach in *Guérin*, in my view administrative decision-makers are still kept within what some might call "jurisdictional fences." The majority's approach still respects what some call "jurisdiction." There comes a point where an administrative decision-maker adopts a view of its statutory powers and the statutory scope of its authority that is neither acceptable nor defensible. When that happens, reviewing courts acting under the reasonableness standard will quash the administrative decision, thereby keeping the administrative decision-maker within its authority.

[76] Recently, forty articles, many of which were authored by leading members of the academy in the area of administrative law, were posted at the blog sites *Administrative Law Matters* and *Double Aspect* as part of a commemoration of the tenth anniversary of *Dunsmuir*. Of note is that not a single one advocated a return to the old, discredited approach of "jurisdiction."

[77] For the foregoing reasons I conclude that even on Access Copyright’s characterization of the matter before us, the standard of review is reasonableness, not correctness.

– II –

[78] The second way that “jurisdictional” arguments of the sort that Access Copyright asserts in this case are commonly made is by reference to a portion of the Supreme Court’s seminal case of *Dunsmuir*. At para. 59 of *Dunsmuir*, the Supreme Court held that correctness is the standard of review for “true questions of jurisdiction.”

[79] Regrettably, the Supreme Court has never defined what a “true question of jurisdiction” is.

[80] The best that can be done is to examine para. 59 of *Dunsmuir* more closely. In that paragraph, the only case the Supreme Court cites to define a true question of jurisdiction is *United Taxi Drivers’ Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485. *United Taxi* concerned whether the City of Calgary was authorized under municipal acts to enact bylaws limiting the number of taxi plate licences. In other words, it was considering an issue of *vires* relating to subordinate legislation. This is not what we are dealing with in the case at bar.

[81] And at the same time, also in *Dunsmuir*, the Supreme Court warns us that in deciding what a “true question of jurisdiction” is, we must remember that this category “will be narrow”

and, referring to *C.U.P.E.*, above, it has told us that we must not brand as jurisdictional issues that are doubtfully so. In providing for correctness review for true questions of jurisdiction, the Supreme Court did not mean to throw us back to the old “jurisdictional” approach.

[82] Also of significance is that three times after *Dunsmuir*, the Supreme Court has queried whether the “true question of jurisdiction” category of correctness review exists: *Alberta Teachers’ Association*, above at para. 34; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 at paras. 25-33; *Edmonton East* at para. 26. This makes sense as, for reasons explained above, issues of jurisdiction are actually issues of legislative interpretation. And, also as explained above, the standard of review for decisions by administrative decision-makers concerning the interpretation of legislative provisions is presumed to be reasonableness.

[83] I do not mean to suggest that this avenue for correctness review is permanently foreclosed. It still remains a feature of *Dunsmuir* and the Supreme Court has not removed it from the law. There may be a day when the Supreme Court defines “true questions of jurisdiction” in a clearer way and starts to resort to this avenue of correctness review. But that day has not yet come: the Supreme Court has not resorted to it in the ten years since *Dunsmuir* was decided.

[84] Therefore, I conclude that even if I were to accept Access Copyright’s characterization of what the Board did concerning the Deletion Provision, the standard of review on this point would be reasonableness. But I do not accept Access Copyright’s characterization. I turn to that now.

**(b) The proper characterization of what the Board did concerning the Deletion Provision**

[85] The first step in considering an application for judicial review is to interpret and properly characterize what the administrative decision-maker has done that is impugned in the judicial review proceedings—*i.e.*, identify and characterize the decision under review. Once the relevant decision has been identified and characterized, the reviewing court can determine whether or not the decision is reasonable. See *Canada (Attorney General) v. Boogaard*, 2015 FCA 150, 474 N.R. 121 at para. 36.

[86] In my view, the respondents have properly characterized the decision under review. The Board did not decide to remove the Deletion Provision. Instead, the Board decided not to include it in its tariff. This is an entirely different thing, one that it is able to do as part of its exercise of discretion under 70.15 of the Act when setting tariffs.

[87] To some extent, the characterization issue before us has been settled by our earlier jurisprudence. We are bound by that jurisprudence: *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149. In *SOCAN* (2010), this Court upheld the jurisdiction of the Board to exclude classes of uses from a tariff. This is what the Board did here. In no way did the Board vary the terms and conditions on digital uses that Access Copyright agreed to authorize.

[88] We must now assess whether the Board's decision not to include the matters related to the Deletion Provision in the tariff was reasonable.



(c) **The meaning of reasonableness**

[89] The Supreme Court has told us that reasonableness is a “range of acceptable and defensible outcomes” or a “margin of appreciation”: *Dunsmuir* at para. 47; *McLean*, at para. 38.

[90] Repeatedly, the Supreme Court has suggested that reasonableness “takes its colour from the context” and “must be assessed in the context of the particular type of decision-making involved and all relevant factors”: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 at para. 18; *Khosa*, above at para. 59; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770 at paras. 22 and 73; *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80 at para. 57; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458 at para. 74; *Halifax*, above at para. 44; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 at para. 54. In other words, certain circumstances, considerations and factors in particular cases influence how we go about assessing the acceptability and defensibility of administrative decisions.

[91] Looking at this from the perspective of reviewing courts, if the circumstances, considerations and factors differ from case to case, how reviewing courts go about measuring acceptability and defensibility will differ from case to case; in other words, reasonableness will “take its colour from the context” of the case. Looking at this from the perspective of administrative decision-makers, as a practical matter some decision-makers in some contexts

seem to be given more leeway or a broader “margin of appreciation” than other decision-makers in other contexts.

[92] For this reason, sometimes we see some administrative decision-makers afforded a very broad range or margin of appreciation and others less so: compare, for example, cases like *John Doe v. Ontario (Finance)*, 2014 SCC 36, [2014] 2 S.C.R. 3 with *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616. Although the Supreme Court sometimes tells us that reasonableness is a single standard of deference, there is no doubt that under the reasonableness standard, all other things being equal, the deference it gives to administrative decisions rooted in socio-economic policy is greater than the deference it gives to administrative decisions grappling with legal matters, like, for instance, where the text of the legislation is fairly clear and the administrator has not offered any specialized or policy-based insight into the matter.

[93] In many cases, this Court has followed these trends in the Supreme Court’s jurisprudence and has identified a number of factors that might affect the “colour” of reasonableness review or, put another way, the intensity of review: see, e.g., *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006; *Canada (Attorney General) v. Abraham*, 2012 FCA 266, 440 N.R. 201 at paras. 37-50, *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75, 444 N.R. 120 at paras. 13-14 (the “Aboriginal Children” case); *Boogaard*, above; *Re:Sound v. Canadian Association of Broadcasters*, 2017 FCA 138, 148 C.P.R. (4th) 91 (“*Re:Sound* (2017)”). The Court of Appeal for Ontario has done this as well:

*Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436, 237 O.A.C. 71 at para. 22.

[94] Several matters of context have been identified in the jurisprudence and a few examples will suffice to illustrate.

[95] Statutes and the case law of courts can constrain what is considered to be acceptable and defensible or within the margin of the appreciation of the administrative decision-maker. Take, for example, a taxation officer who must consider whether relief should be given within the strictures of the tax law on the books. The decisions of that tax official are subject to reasonableness review, but the only decisions that fall within the range of the acceptable and the defensible are those that respect the limits imposed by the tax law on the books. See, *e.g.*, *Abraham*, above.

[96] Suppose a human rights tribunal imposes a requirement for an anti-discrimination claim. But the anti-discrimination law as pronounced by the Supreme Court under the *Charter* says that there is no such requirement. Absent an acceptable explanation by the tribunal for what it did, its decision is at odds with directly applicable Supreme Court authority that cannot be distinguished and so it cannot be acceptable and defensible. See, *e.g.*, *Aboriginal Children*, above.

[97] Sometimes statutes give administrative decision-makers the power to award remedies for misconduct. Some require that the administrative decision-maker consider certain factors when awarding a remedy. This is, in effect, a statutory recipe that the decision-maker must follow in

order to make an acceptable and defensible remedial decision or a remedial decision that will be considered to be within its margin of appreciation. If the decision-maker does not follow the recipe, its decision will be unreasonable. See, e.g., *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203.

[98] These examples show that statutory wording or case law can affect reasonableness review. An administrator that makes a decision contrary to statutory wording or case law and does not satisfactorily explain it will fail reasonableness review.

[99] In this case, this is key. Access Copyright says, for example, that the Board failed to obey statutory limits in its ruling on the Deletion Provision. It also submits that the Board failed to follow binding case law and, as a result, wrongly assessed “substantial part” under section 3 of the *Copyright Act* and the issue of fair dealing.

[100] But for the constraining effects of statutory wording and binding case law, the Board has a wide margin of appreciation in determining what royalty rates are appropriate and what tariffs should be certified. Such matters are infused with broad matters of policy, typically of the sort within the ken of the Board, and, thus, they are accorded considerable deference: *Bell Canada v. Canada (Attorney General)*, 2017 FCA 249; *Boogaard*, above; *Re:Sound* (2017), above.

[101] In *Re:Sound* (2017), above, this Court confirmed that the Board has considerable leeway in deciding what tariffs to certify. The following discussion from that case is apposite to the matter before us, *mutatis mutandis* (at paras. 48-51):

Another part of the “context” here that affects the “colour” of reasonableness is the nature of the Board’s decision in setting equitable remuneration. It is one suffused by considerations of expertise about this regulated sector, regulatory experience, policy appreciation, subjective weighings and assessments and factual appreciation. It is a matter that is more suited to evaluation by the executive branch. It is less suited to the judicial branch because of the limited legal content in the decision.

The case law shows that these considerations affect the reviewing court’s application of the reasonableness standard. A decision-maker that has been given a broad policy mandate has a broad range of options it can legitimately choose from: *Farwaha*, above at para. 91. Where the decision is suffused with subjective judgment calls, policy considerations and regulatory experience or is a matter uniquely within the ken of the executive, the margin of appreciation will be broader: *Gitxaala Nation v. Canada*, 2016 FCA 187 at para. 149, citing *Paradis Honey Ltd. v. Canada*, 2015 FCA 89, 382 D.L.R. (4th) 720, at para. 136. Courts are “poorly positioned” to opine on policy issues with “public interest components” and “economic aspects” and so “by legislative design the selection of a policy choice from among a range of options lies with the [administrative decision-maker] empowered and mandated to make that selection”: *FortisAlberta Inc. v. Alberta (Utilities Commission)*, 2015 ABCA 295, 389 D.L.R. (4th) 1 at paras. 171-172; to similar effect, see *Rotherham v. Metropolitan Borough Council v. Secretary of State for Business Innovation and Skills*, 2015 UKSC 6 at para. 78 (policy based decisions of this type are “particularly difficult for a court to evaluate and therefore to criticise, and therefore to condemn”).

A decision about the quantum of “equitable remuneration,” such as the one in this case, is not a simple one, arrived at by processing information objectively and logically against fixed, legal criteria. Rather, it is a complex, multifaceted decision involving sensitive weighings of information, impressions and indications using criteria that may shift and be weighed differently from time to time depending upon changing and evolving circumstances. Accordingly, the Board’s decision on such an issue is entitled to considerable leeway. See, e.g., *Canada (Attorney General) v. Boogaard*, 2015 FCA 150; 474 N.R. 121 at para. 52.

Previous decisions of this Court recognize the foregoing and acknowledge that the Board is entitled to considerable leeway in decisions concerning the quantum of “equitable remuneration.” According to this Court, Parliament gave the Board “a very wide royalty certification discretion”: *Neighbouring Rights Collective of Canada v. Society of Composers, Authors and Music Publishers of Canada*, 2004 FCA 302, [2004] 1 F.C.R. 303.

**(d) Assessing the reasonableness of the Board's decision**

[102] Access Copyright raises three bases upon which the Board's decision is unreasonable. It submits that the Board's decision became unreasonable by virtue of its treatment of the Deletion Provision, the Board's assessment of "substantial part" under section 3 of the *Copyright Act*, and its evaluation of fair dealing.

[103] I shall consider each of these in turn.

**(i) The Deletion Provision**

[104] In this case, the provision governing what the Board did is section 70.15 of the *Copyright Act*. There are two aspects to the Board's decision: its implicit interpretation of section 70.15 of the Act and its application of the section to the facts of this case.

[105] As we shall see, section 70.15 contains limiting language on what the Board can do when approving the tariffs. And, further, there are cases that confirm the limiting language and act as a constraint on what the Board can do under section 70.15: *Almon Equipment*, *Aboriginal Children* and *Abraham*, discussed above.

[106] Under section 70.15 of the Act, the Board "shall certify the tariffs as approved, with such alterations to the royalties and to the terms and conditions related thereto as the Board considers necessary, having regard to any objections to the tariffs."

[107] For the purposes of this case, key are the following words in section 70.15: “such alterations to the royalties and to the terms and conditions related thereto.” “Related thereto” refers to “the royalties.” Thus, the terms and conditions that can be altered are those related to the royalties and not other terms and conditions.

[108] This Court has previously read section 70.15 in the same way:

The Board's statutory mandate requires it to set the rates of remuneration payable to the collective societies that represent various copyright holders, and to determine what terms and conditions, if any, should be attached to the royalties.

*(Neighbouring Rights Collective of Canada v. Society of Composers, Authors and Music Publishers of Canada, 2003 FCA 302, [2004] 1 F.C. 303 at para. 42.)*

[109] I agree with the respondent that if the Board purported to alter other terms and conditions, its decision could be attacked. But, as explained above, I do not characterize what the Board is doing in this case in that way.

[110] *CTV Television Network Ltd. v. Canada (Copyright Board)* (1993), 99 D.L.R. (4th) 216, 149 N.R. 363 (C.A.) supports this. In saying that “the Board possesses the incidental powers which are necessary and inexorably linked to the exercise of its function,” it said that the function was “fixing the rates which the performing rights societies can charge”: *CTV* at p. 221 D.L.R. *Society of Composers, Authors & Music Publishers of Canada v. Canada (Copyright Board)* (1993), 47 C.P.R. (3d) 297, 61 F.T.R. 141 supports this too. It held that the role of the

Board, “as established by statute, has been described as one to fix rates and the terms, in the public interest, for royalties to be assessed”: at p. 316 C.P.R.

[111] Although it arises long ago and under the sections of the Act pertaining to fees for the licenses issued by performing rights societies, the decision of the Exchequer Court of Canada in *Composers, Authors and Publishers Association of Canada, Limited v. Sandholm Holdings et al.*, [1955] Ex. C.R. 244, 24 C.P.R. 58 is instructive. The Board is described as only a fee-setting body that can regulate the fees set by performing rights societies, not one that can delve into the underlying arrangements entered into by the performing rights societies (at pp. 75-76 C.P.R.):

Moreover, I am of the opinion that it was not the purpose of the legislation to which I have referred to give the Copyright Appeal Board power to determine the terms and conditions of the licences issued by a performing rights society to persons wishing to perform its copyright musical works. What Parliament was concerned with was to take away from such societies their right to fix the fees, charges or royalties for the issue of their licences and vest the fee fixing function exclusively in the Copyright Appeal Board. This radical change was a drastic interference with the contractual rights of the performing rights societies. But the Act should not be construed as making any greater interference with such rights than was necessary to accomplish its purposes. Thus, as I see it, the rights of the performing rights societies, apart from their right to fix their fees, have not been taken away. They are still free, subject to the Act, to fix the terms of their licences and stipulate the conditions to which they are subject.

It follows from what I have said that the Copyright Appeal Board, apart from its function of fixing the fees for the licenses issued by performing rights societies and its powers incidental to the performance of such functions, does not have power to determine the terms of such licenses or the conditions to which they are subject. Thus, it is for the performing rights society, subject to the Act, to determine the terms of its licenses and stipulate the conditions to which they are subject and for the Copyright Appeal Board to fix the amount of the fees, charges and royalties which it may sue for and collect in respect of issue of the license in the terms and subject to the conditions determined by it [the license]. It is, of course, within the power of the Copyright Appeal Board to do whatever may be necessary to the discharge of its statutory function.



Thus, I am the view that it would not have been competent for the Board to insert the [license] provision referred to if it had not been inserted by the plaintiff [performing rights society] but that is quite a different thing from saying that it could not approve a statement of fees with such a provision contained in it.

[112] After this 1951 decision, Parliament has amended the Act establishing the Board as we know it today. But in my view the fundamental principle described in *Composers, Authors and Publishers Association of Canada* has not changed: the Board exists to discharge an economic mandate by fixing rates and its powers are tied to that function.

[113] Under section 70.12, a collective society such as Access Copyright, and not the Board, has the power to set the terms and conditions upon which the society agrees to license the use of works in its repertoire. But the Board still has the discretion under section 70.15 regarding what matters should form part of a tariff and what matters should not. This is shown by this Court's decision in *SOCAN* (2010), above.

[114] In *SOCAN* (2010), the Board refused to certify a class of uses from the tariff it certified. The proposed tariff, known as SOCAN Tariff 22, concerned several different types of uses made of musical works in SOCAN's repertoire on the Internet. As part of the tariff it proposed, SOCAN included a use known as "Other Sites." This class of use concerned Internet sites where the subject-matter did not principally concern music, such as Facebook. The Board excluded this class of uses from the tariff it certified.

[115] This Court upheld the Board’s decision not to certify a tariff for uses identified by SOCAN under the category of “Other Sites,” noting that the Board had provided “abundant, elaborate and cogent reasons for this exclusion” (at para. 19).

[116] This Court dismissed SOCAN’s argument that the Board was “duty-bound” under the Act to certify and fix a royalty rate for a proposal put before it (at para. 29):

Even if I assume, as contended by SOCAN, that the “Other Sites” Item must be seen as a tariff of its own and, therefore, that the Board refused to certify that tariff, I would conclude for the reasons already stated that the Board was justified in refusing to certify it. Surely, it was not the intention of Parliament that the Board certify an unapproved and unapprovable tariff.

[117] Was the Board’s decision not to certify a component of a tariff in this case unreasonable? In my view, no. It was well within its proper discretion to rule as it did. In this regard, I agree with the following explanation and analysis supplied by the respondents other than British Columbia in their memorandum (at paras. 56-59):

In the decision under review, the Board refused to certify the component of the [Access Copyright’s] Second Tariff related to digital copying because it concluded that the [Access Copyright] could not, as a matter of law, “grant a licence for the making of digital copies without the presence of the Deletion Provision...”. The Board accordingly found that “the making of digital copies is not an act that will be permitted under the Tariff” and that digital copies were, accordingly, not compensable for the purpose of establishing the royalty rate payable to [Access Copyright] [Board decision at para.167].

In its decision, the Copyright Board explained very clearly why it decided not to include the Deletion Provision in the Second Tariff. These reasons included the fact that the Consortium and British Columbia would not likely be able to comply with the provision in any meaningful way, it would have the “undesirable effect” of “creating an obligation to delete digital copies” made under the tariff after the

tariff's expiration, and it could eventually deprive a licensee of the right to use or possess a lawfully made digital copy of a protected work after termination of the licence even though such use or possession would not constitute an act of copyright infringement under the Act [Board decision at paras. 156-158].

Having decided not to include the Deletion Provision in the Second Tariff, and having explained its reasons for so deciding, the Board then had to respond to the [Access Copyright's] own evidence that it did not have the legal right to grant a licence for the making of digital copies without this term. In other words, the presence of the Deletion Provision was a condition of the grant of rights that [Access Copyright] had received from its underlying rights holders in respect of digital copying.

As was the case on the facts described in [*SOCAN (2010)*], in reaching its decision, the Board did not conclude that [Access Copyright] would never be able to support a tariff claim in respect of digital copying. Instead, the Board simply stated that it could not certify a tariff in relation to digital copying based on the evidence that was before it in this proceeding. Because this evidence demonstrated that [Access Copyright] could not license digital copying in the absence of the Deletion Provision, by refusing to include the Deletion Provision as a "term and condition" of the Second Tariff, the Board properly concluded that [Access Copyright] did not hold the necessary rights to license digital copying for the purposes of this tariff hearing. Moreover, in explaining why it could not certify a tariff for digital copying, the Board went on to express its hope that "these issues will be given a broader airing the next time the Board considers a tariff filed by [Access Copyright] [Board's decision at para. 170].

[118] Therefore, I find that the Board's decision in this respect was reasonable.

**(ii) The reasonableness of the Board's assessment of "substantial part" under section 3 of the *Copyright Act***

[119] Subsection 3(1) of the *Copyright Act* defines copyright as the sole right to reproduce, perform in public and publish, if unpublished, a copyright-protected work or any "substantial part" thereof in any material form whatever.

[120] The *Copyright Act* does not define “substantial part.” But the Supreme Court has stated that “analysis of the qualitative aspect [of the portion reproduced] is an essential element of the analysis under s. 3(1)”: *Théberge v. Galerie d’Art du Petit Champlain*, 2002 SCC 34, [2002] 2 S.C.R. 336 at paras. 142-144.

[121] And in *Cinar Corporation v. Robinson*, 2013 SCC 73, [2013] 3 S.C.R. 1168 at paras. 25-28, the Supreme Court held that to determine what is a “substantial part,” one must look in part at the originality of the work that warrants the protection of the *Copyright Act*. In its words (at para. 26), “[a]s a general proposition, a substantial part of a work is a part of the work that represents a substantial portion of the author’s skill and judgment expressed therein.”

[122] Access Copyright submits that while the Board charged itself correctly on the law, it did not follow the law: see paras. 203-209 of the Board’s decision.

[123] It submits that the Board erred in two ways:

- The Board held that it could not engage in a qualitative analysis of the copied works because there was no evidence: at para. 204. But Access Copyright says that there was evidence: application record at p. 525; supplementary application record of Access Copyright at p. 1226.
- The Board adopted a bright-line, solely quantitative rule to inform its assessment of substantiality: at paras. 204-205. It held that all copying events that represented

the reproduction of less than 2.5% of the work were not a “substantial part” of the work. In effect, says Access Copyright, the Board found that in every instance, 2.5% of a work was not protected by copyright. This disregarded the legal requirement upon the Board to assess on a qualitative basis whether a substantial part of the work was copied.

[124] I consider that *Robinson* is distinguishable. It concerned an action for copyright infringement. There, the copying was non-literal: the source material was not directly and literally duplicated. Rather it was transformed into a new work that possessed similarities and differences from the original work. The task was to compare the original work and the new work to determine which parts of the new work were substantially similar to the original and whether similar portions of the original work qualified for copyright protection. The focus was on a specific work and the factors to be considered are specific to the specific work and the holder of rights over the work.

[125] Here, the copying at issue was entirely direct and literal, consisting primarily of the photocopying of excerpts from journals, newspapers and books. The Board was engaged in the exercise of setting a tariff based on legal decisions as to what is usually done in an entire industry that is targeted by a tariff, with evidence provided by a survey of user behaviour. In this case, the Board had to establish a royalty rate to be applied to uses of Access Copyright’s repertoire by employees of provincial and territorial governments. The Board had to determine on the evidence before it how many copies of a substantial part of a work and how many copies of an insubstantial part of a work are typically made in a typical year by provincial or territorial

government employees. Its methodology was to examine the results of a study, the Volume Study discussed earlier in these reasons, over two weeks. The Board extrapolated the results of the Volume Study to generate estimates for every year covered by the proposed tariffs.

[126] In *Robinson*, the court had to compare the disputed works in order to ascertain which elements were protected by copyright and which portions of the original author's skill and judgment were copied, all with a view to determining whether a substantial part of the original had been copied. This, of course, is primarily a qualitative analysis. This differs from what the Board in this case had to do. The Board began from the position that original underlying works had been copied. Thus, there was no need to engage in the sort of qualitative comparison of each copy to the original work undertaken in *Robinson*. Instead, the Board proceeded from the basis that for this particular item and for the purposes of this particular tariff, the best method of determining substantiality was by reference to the quantitative amount of the work copied.

[127] Access Copyright specifically attacks the Board's "bright-line" rule that one to two copied pages of a published work that did not exceed 2.5% of the overall work constituted "reasonable approximations in establishing non-substantiality": Board's decision at para. 204. Here, however, it is not clear how the Board could have proceeded in a different way. It did not have qualitative evidence before it about the levels of skill and judgment used to create the portions of the original works that were copied by government employees. And even if that evidence were available, it is hard to see how the Board could have analyzed every one of the potentially compensable copying events identified in the Volume Study.

[128] There is much to be said for the Board's adoption of a bright-line rule. It provides guidance to government employees concerning what copying is permitted because it is insubstantial. The respondents other than British Columbia suggest the following (at para. 107 of their memorandum) and I agree:

In the absence of the bright line rule adopted by the Board, individual government employees would obviously reach widely varying conclusions as to what is, and is not, a substantial part of a published work. One employee, for example, could consider 1% of a work to be substantial while another could set that threshold at 5%. To avoid such different, and likely conflicting, interpretations as to what the term "substantial" means, [we submit] that the bright line rule established by the Board is entirely reasonable.

[129] Under the reasonableness standard, the Board is permitted a significant margin of appreciation in determining the method by which the tariff should be set. Based on the foregoing, I am not persuaded that the Board proceeded in an unacceptable or indefensible way.

**(iii) The reasonableness of the Board's assessment of fair dealing**

[130] In their submissions concerning the royalty rates that Access Copyright should receive, the respondents claimed fair dealing.

[131] Access Copyright submits that the Board erred in its consideration of fair dealing in a number of ways:

- The Board explicitly refused to consider the issue of who bore the burden of adducing evidence on the respondents' claim of fair dealing: see the Board's reasons at para. 222. The Board found that there was insufficient information or evidence or that the parties' positions on the issue were evenly balanced: see the Board's reasons at paras. 278, 318-319, 321, 338, 392. Had the Board properly applied the burden, the respondents should have lost on this issue. In effect, the Board obligated Access Copyright to disprove the respondents' claims of fair dealing.
- In assessing the fairness of the dealings, the Board failed to consider the dealings as a whole, considering the impression left by all of the factors and facts assessed together. Instead, it considered each fairness factor in isolation from every other factor: see, *e.g.*, paras. 297-298, 300-301, 309-314 of the Board's reasons.
- In assessing the fairness of the dealings, the Board was to consider "both the amount of the dealing and importance of the work allegedly infringed": *CCH v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 at para. 56. The Board looked only to the quantity copied and not the qualitative importance of the works that were copied: at para. 325. In fact, at para. 320, the Board stated "it was not readily apparent...to what extent the qualitative aspect of the amount of the dealing is even to be considered in assessing the 'amount of dealing' factor": at para. 320. Here, the Board was to consider whether the amount taken was an important part of the work. If



the evidence was missing, the respondents should suffer for that because of the burden of proof.

- In assessing the “character of the dealing” factor, the Board must “examine how the works were dealt with” and the total number of pages copied that are claimed to be fair: *CCH*, above at para. 55; *Alberta v. Canadian Copyright Licensing Agency*, 2012 SCC 37, [2012] 2 S.C.R. 345. The Board ignored this.

[132] Access Copyright’s submissions concerning the burden of proof are misconceived. Had this been a copyright infringement proceeding, the burden of proof might be significant. However, this is a tariff-setting matter, an exercise in economic valuation relating to multiple copyright uses, not a legal inquiry into whether a specific act of copyright infringement has occurred in relation to an identifiable copyright-protected work. A proceeding before the Board to establish a tariff is simply not the same as a copyright infringement case.

[133] The Board itself recognized this, noting (at para. 215) that:

Copyright Board tariffs are certified on a prospective basis, taking into account future use. A tariff cannot reasonably, or even feasibly, be treated as a claim of copyright infringement. Access Copyright cannot prove future infringement, nor can the Objectors defend against a speculative claim.

[134] I note that since 2004 the Supreme Court has considered fair dealing in three decisions raising different contexts: *CCH* (in a law library); *Alberta* (in a classroom); *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2

S.C.R. 326 (online sale of music). None of these decisions conducted a fair dealing assessment using the burden of proof approach Access Copyright alleges the Board should have followed.

[135] In analyzing each of the potential compensable copying events identified in the Volume Study, the Board did not need to decide whether each particular event was infringing. Instead, it had to assess whether each of the copying events involved compensable copying as part of the calculation of the overall volume of copying for the purposes of setting royalty rates in the proposed tariffs.

[136] In *CCH* (at para. 52) and *Alberta* (at para. 37), the Supreme Court emphasized that fair dealing is a “matter of impression”. I do not agree with Access Copyright’s submission that the Board did not have regard to the overall “impression”. In this case, the Board formed an overall impression of the dealing involved after reviewing a large number of copying events in considerable detail.

[137] I also reject Access Copyright’s submission that the Board erred in considering the six different *CCH* “fairness” factors in isolation from each other. The Board conducted its analysis in a manner similar to that followed by the Supreme Court in *CCH*, *Alberta* and *Bell*. To some extent the factors must be considered in isolation in order to prevent conflation and double counting. The Board explained in great detail which dealings were fair and which were not and given the deference to which the Board is entitled under reasonableness review, I am not persuaded that there are grounds to interfere.

[138] Access Copyright submits that *CCH* requires the Board to consider whether the amount taken was an important part of the work. The Board examined the Supreme Court's decisions in *CCH*, *Alberta* and *Bell* and noted that the Supreme Court discussed the amount of the dealing purely in relation to the quantity of copyright-protected works that have been copied. It noted (at para. 320) that it is "not readily apparent...to what extent the qualitative aspect of the amount of the dealing" is to be considered as part of any fair dealing assessment. It explained (at para. 321) the Supreme Court's approach on the basis that in *Alberta* and *Bell* "those cases considered numerous dealings with a multitude of works and there was no evidence of the qualitative aspects of the portions that were dealt with." In other words, in the absence of any qualitative evidence relating to the "importance" of a particular work, the Board had no choice but to assess the amount of the dealing on a strictly quantitative basis. Again, given the deference to be accorded to the Board on decisions such as this, I am not persuaded that the Board's decision should be interfered with on this basis.

[139] I add that the Volume Study, negotiated carefully by the parties, was the only source of information available to the Board about the amount of the dealing. That study did not include the measurement of any qualitative aspects of government copying behaviour. Access Copyright's involvement in the design of the Volume Study makes it difficult for it now to complain that the Board did not take into account the qualitative factor of the "importance" of the works copied.

[140] Access Copyright attacks the Board's finding that the aggregate number of copies was not relevant when it assessed the "character of the dealing" factor. It says that *CCH* and *Alberta* both require the Board to consider the aggregate number of copies when assessing this factor.

[141] However, in its analysis the Board did consider the aggregate number of copies. It merely said (at para. 287) that, on the facts of the proceeding before it, when assessing the fairness of one particular dealing under this factor, it cannot consider the "aggregate number of copies disseminated of all works" copied by all government employees. It decided that the aggregate copying of all government employees only becomes relevant under this factor when assessing fairness based on a person's or institution's policy or practice.

[142] The evidence consisted of large numbers of copying events of employees doing different jobs in offices across Canada. The Board concluded that for the purposes of a tariff proceeding, the aggregate dealings of all licensees are not a valid measure of individual dealings because one instance of dealing does not describe the overall character of the dealings being assessed. The Board put it this way (at paras. 289-291):

Even where, on average, dissemination may be wide, it does not follow that all of the individual dealings should automatically be considered to have a wide dissemination.

...

Moreover, this approach would mean that dealings that are individually fair could become unfair once they are all done, even by different persons, simply by reason of their total quantity.

[143] I am not persuaded that the Board's decision should be interfered with on this basis.

[144] Overall, on issues of fair dealing and whether the events in the Volume Study were non-compensable for the purposes of the tariff-setting calculations, it must be recalled that the Supreme Court has emphasized that “[w]hether something is fair is a question of fact and depends on the facts of each case”: *CCH* at para. 52.

[145] As well, “[t]he application of these factors to the facts of each case by the [Board] should be treated with deference on judicial review”: *Alberta* at para. 40. Questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues attract the deferential reasonableness standard: *Dunsmuir* at paras. 47, 51 and 53. Only pure questions of law that courts as well as the Board might handle enjoy correctness review: *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283. This aspect of the Board's decision is factual in nature, suffused as it is by appreciation of the record before it, not a determination of a pure issue of law.

[146] In my view, in its assessment of fair dealing the Board faithfully applied the teachings of the Supreme Court to the particular evidence in this particular case, assigning weight to the evidence before it as it is entitled to do. It reached a conclusion that was acceptable and defensible.

[147] Overall, for the foregoing reasons, the Board's certification of the tariffs was founded upon an acceptable and defensible reading of the applicable law and the evidence before it. Its decision was reasonable.

**(2) Procedural fairness**

[148] Did the Board breach any obligations of procedural fairness?

[149] Access Copyright raises several procedural fairness concerns. Its concerns relate broadly to decisions made by the Board concerning the receipt of submissions and new evidence.

[150] Relevant to the analysis is the level of procedural fairness an administrative decision-maker must afford. This is determined by the factors set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193.

[151] The standard of review for procedural decisions made by administrators or decisions made by administrators that have procedural impact is currently unsettled in this Court: see the four differing positions that a unanimous panel of this Court summarized in *Bergeron v. Canada (Attorney General)*, 2015 FCA 160, 474 N.R. 366 at paras. 67-71, a decision that postdates the latest Supreme Court decision on point, *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502. The fact that many of us disagree on this point cannot be disputed: that is evident in our jurisprudence. But whether we need to resolve the disagreement now is another question.

[152] Fortunately, we need not resolve it here. As will be seen, none of the procedural fairness concerns raised by Access Copyright have any legal merit. Thus, it is not necessary to determine the standard of review or to define with precision the exact level of procedural fairness that the Board must afford to parties before it.

[153] Access Copyright notes that the Board excluded five copying events and the weighted annualized volume of exposures represented by those events from the compensable category of copying events because the amount of copying by employees exceeded the copying limits prescribed in the proposed tariff: see reasons at para. 175 and Table 2, “Outside Scope of Tariff”, applicant’s record at p. 170. It complains that neither the Board nor the respondents ever raised this issue at this time. It says that the first time that Access Copyright knew about the issue was in the Board’s decision.

[154] As a result, Access Copyright submits that it was denied a right to make submissions and offer evidence on this issue. It says that had it been afforded that opportunity, it would have provided the Board with evidence and submissions as to why all or a large part of this volume of copying should be included in the method the Board adopted to calculate the royalty rate.

[155] I disagree.

[156] For the purposes of this analysis, I note the summary of the proceedings at paras. 14-33, above. That summary shows that Access Copyright had ample opportunity to make submissions on all issues, including issues relating to the Deletion Provision.

[157] Information relating to the volume and overall page length of each separate work captured in the Volume Study was available to all parties and Access Copyright could have commented at any of several times submissions were entertained as to how copying events which exceeded the 10% copying limit should have been treated in the Board's analysis. Access Copyright had an opportunity to comment on this, and that is all that the obligations of procedural fairness require.

[158] I am also not convinced that a specific invitation should have been extended to the parties to make submissions concerning the five events. The five events were known and could have been addressed by the parties if they wished. The genre of the works copied in the five events, the number of pages in the work, and the number of pages copied were provided to the parties as part of the data generated in the Volume Study. It then followed as a direct application of the tariff by the Board that the events were non-compensable and the Board explains itself at paras. 173-176. I also note that the Board is entitled to insist that its decisions be timely and efficient and if it were to invite specific submissions on every conceivable point of dispute its proceedings would be impermissibly bogged down. Access Copyright has not persuaded me that the manner in which the Board proceeded in this respect in this case was unfair.

[159] Access Copyright also challenges the procedural fairness of the Board's decision not to include the Deletion Provision in the second tariff.

[160] The Board's decision not to include the Deletion Provision in the second tariff resulting in the non-compensability of digital copying flowed from Access Copyright's own evidence and



legal submissions. Access Copyright's own standard affiliation agreements that it filed with the Board in conjunction with its Statement of Case dated May 4, 2012 established that it did not have the legal ability to license digital copying with the Deletion Provision. Access Copyright was aware from the beginning of the proceeding that the Deletion Provision has been challenged by British Columbia in its Statement of Objections dated July 6, 2009. It was raised in British Columbia's Statement of Case, a witness called by British Columbia provided evidence opposing the Deletion Provision and the respondents made detailed submissions on it in the course of post-hearing submissions on the tariff provisions.

[161] As well, the Board allowed Access Copyright to make a number of submissions on the question of digital copying and the Deletion Provision and it made those submissions. In particular, its notice of November 26, 2012 and its Order of May 6, 2014 raised the issue of the appropriateness of the Deletion Provision as an administrative provision in Access Copyright's proposed second tariff.

[162] On January 18, 2013, in response to a request for submissions by the Board, Access Copyright submitted that the Deletion Provision was appropriate and necessary. It submitted that the Deletion Provision was a condition of the rights that rights holders provided to Access Copyright.

[163] On April 26, 2013, in response to a request for submissions by the Board, Access Copyright again submitted that the Deletion Provision was a condition of the rights that rights

holders provided to it. Access Copyright stated that it “does not (and cannot) agree” to the removal of the Deletion Provision.

[164] On May 6, 2014, the Board issued an Order that set out its preliminary view that it would not include the Deletion Provision and directed the parties to respond to a number of questions. One of those questions was “the effect that non-inclusion of this condition would have on the compensability of Digital Copies, including whether Access Copyright could issue a licence in relation to the Digital Copies made in the events in the Study.”

[165] In response, on June 6, 2014, Access Copyright repeated its previous position. However, it added that its Board of Directors had authorized licensing without the Deletion Provision and that it was in the process of asking rights holders for authorization to license without the Deletion Provision.

[166] On June 13, 2014, Access Copyright replied to submissions made by others on June 6, 2014. It repeated the submissions it made on June 6, 2014.

[167] On July 21, 2014, the Board made an order setting out its preliminary conclusions on the 26 copying events which it considered compensable. The Board did not request further submissions from the parties nor did it raise the Deletion Provision. Instead, it merely asked the parties to make certain mathematical calculations. Nevertheless, on August 28, 2014, Access Copyright wrote a letter to the Board challenging its preliminary conclusions and offering new

evidence. Later, after receiving submissions, the Board concluded that the letter was inadmissible.

[168] Overall, the Board permitted four separate legal submissions from the parties on the issue of the Deletion Provision. Two were made before the Board had reached a preliminary view that it would not include the Deletion Provision in the final certified tariff, and two more after the Board announced its preliminary view.

[169] In my view, Access Copyright was aware of the issues that were in play before the Board and had ample opportunity to offer submissions on those issues, thereby meeting the requirements of procedural fairness: *Canada (A.G.) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504 at para. 42. Indeed, on one occasion, it considered itself free to make submissions when it was not invited to do so.

[170] Access Copyright also complains that on September 11, 2014, the Board improperly refused to allow it to file new evidence (in its August 28, 2014 letter discussed above) showing that a majority of its publisher affiliates had agreed to waive the requirement that the Deletion Provision be included in the final certified tariff. Access Copyright attempted to submit this evidence to the Board on August 28, 2014. The Board exercised its discretion to refuse to admit the evidence, noting that the question of digital copying “was live from the beginning of the 2010-2014 tariff proceedings” and that Access Copyright sought the waivers at the last possible moment “in an attempt to change the scope of its authority to license digital uses”: respondents’ record at p. 468.

[171] Access Copyright has not persuaded me that this exercise of discretion should be set aside. The Board is master of its own procedure (*Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, 69 D.L.R. (4th) 489), has an interest in the efficient and timely progress of its proceedings, and had clear, permissible grounds for ruling as it did. Even on a standard of review of correctness, I would be loath to interfere. As well, the new evidence was irrelevant because it did not tie the specific digital copies in the Volume Study to the partial retroactive waiver. And applying any late agreement retroactively to the Volume Study, thereby affecting the royalty for the entire tariff period was arguably unreasonable.

[172] Therefore, I conclude that the Board did not breach any obligations of procedural fairness.

**E. Proposed disposition**

[173] For the foregoing reasons, I would dismiss the application for judicial review with costs.

“David Stratas”

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J.A.

**RENNIE J.A. (Concurring Reasons)**

[174] I agree with the disposition of this application as proposed by my colleague Justice Stratas. In so doing, I do not wish to be taken to agree that the existence of jurisdictional questions has been foreclosed as suggested, or that the Supreme Court in *Guérin* rejected the correctness standard for jurisdictional questions. In *Guérin*, the application of the reasonableness standard flowed from the majority's interpretation that the issue was not a true jurisdictional question, not from a rejection of the correctness standard for jurisdictional questions or from a determination that true jurisdictional questions do not exist (*Guérin* at paras. 32–36).

[175] Nor do I agree that the law with respect to the role of reviewing courts in assessing procedural fairness is unsettled. It is, to the contrary, settled, both in the Supreme Court of Canada and in this Court (see *Khela* at paras. 79–80; *Wsá nec School Board v. British Columbia*, 2017 FCA 210 at para. 23; *Maritime Broadcasting* at para. 79, per Webb J.A.).

[176] Some of what has been expressed in paragraphs 54–81 in my colleague's reasons goes beyond what is required to answer the question before us. In consequence, I will make only a few, limited observations.

[177] Returning to the jurisdictional issue, there is no doubt that the Supreme Court abrogated the preliminary question doctrine. This put an end to the “highly formalistic, artificial ‘jurisdiction’ test” and replaced it with the “pragmatic and functional analysis” (*Dunsmuir* at paras. 35–36, 43; *Bibeault* at 1088–1090). Since *Dunsmuir*, the presumption of reasonableness of

a tribunal's interpretation of its home statute, rebuttable in the case of a true question of jurisdiction, has prevailed.

[178] I do not understand from this evolution of the law that jurisdictional questions do not exist, but rather that courts are to refrain from “quickly labell[ing]” a question as a jurisdictional one (*Halifax* at para. 34). Further, although the Supreme Court has recently queried whether truly jurisdictional questions exist, and placed strict criteria on their identification, it has repeatedly confirmed that the presumption of reasonableness can be rebutted by a jurisdictional question (*Alberta Teachers’* at para. 34; *McLean* at para. 25; *Guérin* at para. 32). *Dunsmuir* itself is no less an authority for point. At paragraph 59 the Court noted:

Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. ... [T]rue jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. ...

[179] The Supreme Court has been consistent on this point over the decade since *Dunsmuir* was decided. In *Guérin* at paragraph 32 the Court confirmed the test for a jurisdictional question as set out in *Dunsmuir* at paragraph 59, namely that, such questions must be understood “in the narrow sense of whether or not the tribunal had the authority to make the inquiry”. More recently, in *Caron* at paras. 80–81, two members of the Court identified the refusal of a tribunal to apply the law as raising a jurisdictional question governed by a correctness standard.

[180] In *Dunsmuir*, the Court drew a straight and unbroken line between jurisdictional questions, the rule of law and constitutional responsibility of the courts to ensure that the administrative decision-makers remain within the boundaries of their legislative remit (*Dunsmuir* at paras. 27–31). As the Supreme Court has identified a rationale for the existence of

jurisdictional questions and a test for their identification which some members have recently applied, I am reluctant to conclude that the concept of jurisdictional questions is unprincipled and doctrinally unsound.

[181] These points of divergence are, however, of no consequence. Even on Access Copyright's characterization of the Board's treatment of the Deletion Provision, no jurisdictional question arises in light of established jurisprudence. Nor does the standard of review in respect of procedural fairness, assuming it is a relevant consideration, have any bearing on the outcome. As the reasons of my colleague fully demonstrate, Access Copyright was aware of the issues that were engaged in the proceedings before the Board and had repeated opportunities to respond to the case that was made against it.

“Donald J. Rennie”

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J.A.

“I agree  
D.G. Near J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:**

A-293-15

**JUDICIAL REVIEW OF THE DECISION OF THE COPYRIGHT BOARD DATED  
MAY 22, 2015.**

**STYLE OF CAUSE:**

**THE CANADIAN COPYRIGHT  
LICENSING AGENCY,  
OPERATING AS ACCESS  
COPYRIGHT v. HER MAJESTY  
THE QUEEN IN RIGHT OF THE  
PROVINCE OF ALBERTA *ET AL.***

**PLACE OF HEARING:**

TORONTO, ONTARIO

**DATE OF HEARING:**

JUNE 20, 2016

**REASONS FOR JUDGMENT BY:**

STRATAS J.A.

**CONCURRING REASONS BY:**

RENNIE J.A.

**CONCURRED IN BY:**

NEAR J.A.

**DATED:**

MARCH 22, 2018

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