The Copyright Pentalogy

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A series of interesting questions was raised in the pentalogy of copyright cases decided by the Supreme Court of Canada (the Court) in July 2012. Are additional royalties payable when a video game is downloaded rather than bought over the counter? Is streaming a communication to the public that requires payment to the copyright holder? When a consumer listens to a preview of a song on iTunes, is Apple on the hook for an extra royalty? How much copying can a teacher do to create course materials for students? And is a movie soundtrack to be treated as a whole or a collection of components?

Amidst all this, the Court found time to introduce an innovation in administrative law doctrine that, regrettably, is likely to cause significant confusion for lower courts. In this chapter, I explain this innovation and outline the reasons to consider it a regrettable one. My primary focus is thus relatively narrow, confined to technical questions of administrative law. However, I adopt a broader lens toward the end of this chapter and suggest that Canadian courts ought to be more willing to accord deference to the decisions of the Copyright Board. I then conclude with some thoughts on the application of the general principles of administrative law in one of the other cases in
the pentalogy. The serious disagreement between the majority and minority judges in that case casts light on an important issue in administrative law: the characterization of administrative decisions.²

**An Innovation**

As is well known, the Court held in *Dunsmuir v New Brunswick*⁸ that there are two standards of review: reasonableness and correctness.⁹ Subsequently, the Court has made clear that there are certain categories of decision to which the two standards apply, as follows: (1) correctness for constitutional questions, resolutions of jurisdictional overlaps, true questions of jurisdiction, and questions of general law of central importance to the legal system, and (2) reasonableness for interpretations of a decision maker’s home statute, issues where law and fact are intertwined, and policy-making decisions.¹⁰

In the *Copyright Cases*, the Court was reviewing decisions of the Copyright Board, the expert tribunal established under the *Copyright Act* (the *Act*)¹¹ to set tariffs for the use of copyrighted material. The jurisdiction to impose tariffs is found in ss. 67 and 68 of the *Act*, while in Part I, the contours of copyright are traced; these were of central importance in the pentalogy.¹² Within the post-*Dunsmuir* framework, the *Act* is clearly the home statute of the Copyright Board, and should be presumptively entitled to deference (i.e. review on a standard of reasonableness rather than correctness).

Instead, the Court introduced an exception to the framework. In *Rogers*,¹³ the Court explained that the appropriate standard of review was correctness, because the Copyright Board shares jurisdiction with the Trial Division of the Federal Court. Here, the Copyright Board had imposed additional tariffs on online music services on the basis that the streaming of music constituted a communication “to the public” under s 3(1)(f) of the *Act*.¹⁴

However, pursuant to s 37 of the *Act*, the Federal Court “has concurrent jurisdiction with provincial courts to hear and determine all proceedings…for the enforcement of a provision of this Act or of the civil remedies provided by this Act.” It is thus possible for an action to be brought to enforce a copyright in the Federal Court, which would require it to determine the boundaries of the copyright
Questions can arise, then, about the interpretation of Part I of the Act, where the contours of copyright are traced, before both the Federal Court and the Copyright Board.

For a majority of the Court, Rothstein J suggested that in these circumstances, according deference to the Copyright Board could lead to inconsistency. If the Federal Court were to answer a question of law in its determination of whether a copyright infringement had occurred, no deference would be owed, and in any appeal to the Federal Court of Appeal and the Supreme Court, the standard of review would be correctness. But if deference were paid to the Copyright Board in interpreting its home statute, the exact same question might be reviewable on a standard of reasonableness by the Federal Court, the Federal Court of Appeal and the Supreme Court.

From this, Rothstein J inferred that Parliament could not have intended deference to be paid to the Copyright Board’s determinations of questions of law arising under the Act:

It would be inconsistent for the court to review a legal question on judicial review of a decision of the Board on a deferential standard and decide exactly the same legal question de novo if it arose in an infringement action in the court at first instance. It would be equally inconsistent if on appeal from a judicial review, the appeal court were to approach a legal question decided by the Board on a deferential standard, but adopt a correctness standard on an appeal from a decision of a court at first instance on the same legal question. Because of the unusual statutory scheme under which the Board and the court may each have to consider the same legal question at first instance, it must be inferred that the legislative intent was not to recognize superior expertise of the Board relative to the court with respect to such legal questions. This concurrent jurisdiction of the Board and the court at first instance
in interpreting the Copyright Act rebuts the presumption of reasonableness review of the Board’s decisions on questions of law under its home statute….18

Rothstein J’s argument can be pared down to this point: Parliament could not have intended to allow divergent approaches to the interpretation of copyright. Therefore, it must be inferred that the appropriate standard of review is correctness. Interpreting copyright must remain a matter for the courts, consistent with the intention of Parliament.19

**Legislative Intent**

In a strong set of concurring reasons, Abella J confessed that it was not “obvious to [her] why shared jurisdiction should be seen to displace Parliament’s attributed intention that a tribunal’s specialized expertise entitles it to be reviewed with restraint.”20 On this view, Parliament vested broad authority in the Copyright Board as an expert forum for the resolution of complex questions about the scope of copyright and its protections; resolutions in which interested parties could participate.21

One could suggest various reasons for the shared jurisdiction between the Federal Court and Copyright Board. Concerns may have been felt about whether fully ousting Federal Court jurisdiction over copyright was consistent with s 96 of the Constitution Act, 1867. Or it may have been thought prudent to incentivize central enforcement of copyrights in the Federal Court rather than allowing divergent approaches in the provinces.22

But in the end, all such speculation is beside the point, for in reality there is no “ghost in the machine”.23 Courts do not attempt to divine legislative intent in a literal sense.24 Rather, in following the “polar star” of legislative intent,25 it is necessary for courts to pay heed to the language, context and subject matter of statutory provisions and their purposes and consequences.26 In Rogers, however, Rothstein J’s inference as to legislative intent was dubious. If there was a legislative intent that issues arising under the Act should be within the purview of the courts, an appeal could have been provided for. Traditionally, this is the sort of indicator that Canadian courts have looked for.27
Indeed, the courts have “usually viewed the lack of a right of appeal in the Copyright Act as a factor favouring deference to the Board.”

Inserting such a clause would have been straightforward: Parliament could simply have provided that there would be an appeal to the Federal Court from the Copyright Board on any question of law concerning the interpretation of the Act. The failure to do so is a strong indicator that Parliament intended the Copyright Board, not the courts, to be the primary decision maker in copyright matters, subject to deferential review. Should deference to the Copyright Board prove unappealing as a matter of general policy, it would be open to Parliament to amend the Act to introduce an appeal clause.

**A Strange Reading of Dunsmuir**

In *Dunsmuir*, the Court was clear that its goal was to simplify and clarify the general principles of judicial review, to find “solutions that provide real guidance.” One would think that *Dunsmuir* would be best interpreted with these overarching purposes in mind. However, the majority decision in *Rogers* provides another example from the 2011–2012 term of the Court departing from the spirit of *Dunsmuir*. It cannot be said that developing an exception to what has gradually become a settled judicial review framework assists in clarifying and simplifying the law. A strange reading of *Dunsmuir* was thus necessary.

In justifying his conclusion that a standard of review of correctness ought to apply to the Copyright Board’s determinations of the contours of copyright, Rothstein J relied on the fact that shared jurisdiction meant the Copyright Board was no longer operating in a discrete and specialized administrative regime. As a result,

This is consistent with *Dunsmuir*, which directed that “[a] discrete and special administrative regime in which the decision maker has special expertise” was a “facto[...] that will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied” (para. 55). Because of the jurisdiction at first instance that it shares with the courts, the Board cannot be said to operate in such a “discrete…administrative regime.”
This language comes directly from *Dunsmuir*. But in *Dunsmuir*, discreteness was only one factor that could lead to a finding that a reasonableness standard ought to be applied. Here is the full paragraph from which Rothstein J extracted the factor:

> A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:

— A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.

— A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).

— The nature of the question of law. A question of law that is of “central importance to the legal system… and outside the…specialized area of expertise” of the administrative decision maker will always attract a correctness standard. On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.\(^{32}\)

To pluck one factor from one paragraph in a decision that aimed to *simplify* and *clarify* judicial review is a strange way of justifying the new shared jurisdiction exception. The exception is, as Abella J pointed out, “not even hinted at in *Dunsmuir*.\(^{32}\)

The potential for confusion is obvious. The new exception can only *complicate* judicial review. Rothstein J seemed to suggest that the exception will apply only to intellectual property regimes\(^{34}\) and Abella J predicted a change in the trademarks field.\(^{35}\) But whatever the Court says about the scope of the new shared jurisdiction exception, it will inevitably have ramifications in the lower courts. For the logic of the Court’s approach extends far beyond the territory of intellectual property and into other domains regulated by the general principles of administrative law.

Clever counsel will undoubtedly argue before provincial and federal courts that the existence of a private right of action negates
the deference owed to interpretations of a home statute. After all, in an action, a provincial superior court or the Trial Division of the Federal Court will be called upon to answer any questions of law arising, potentially the same questions addressed by the relevant administrative body in its regulatory functions.

There are some obvious examples. As with the Copyright Act, the Competition Act creates a private right of action. Section 36(1) provides as follows:

Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI, or

(b) the failure of any person to comply with an order of the Tribunal or another court under this Act, may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

Section 36(3) makes the Federal Court a “court of competent jurisdiction” for the hearing of such actions. Meanwhile, s 7(1) (a) of the Competition Act makes clear that its “administration and enforcement” falls within the purview of the Commissioner of Competition.

Although the Court has previously held that deference is owed to the bodies administering the Competition Act, this conclusion sits very uneasily with the shared jurisdiction exception developed in Rogers. A private right of action and an administrative body co-exist; jurisdiction is thus shared between courts and regulators. Rogers teaches that, in such situations, no deference is owed to administrative interpretations of law. The existence of conflicting decisions is unnecessary, because the mere potential for inconsistency is the trigger for the new shared jurisdiction exception.
Securities legislation in the provinces may also fall within the shared jurisdiction exception. While the Ontario Securities Commission is “responsible for the administration” of the Securities Act, and is owed deference, Parts XXIII and XXIII.1 create civil remedies actionable in the Superior Court of Justice. Clearly, interpreting the provisions of the Securities Act is central both to the work of the Ontario Securities Commission and to that of the Superior Court. Jurisdiction is shared. Following Rogers, any questions of law that could arise before the Ontario Securities Commission or the Superior Court would be subject to review on a standard of correctness.

Beyond these two examples, counsel for the applicant in future judicial review cases will doubtless closely parse the statute book in order to identify areas of shared jurisdiction.

Creative counsel might even argue that public law duties that can ground actions against public bodies in negligence also create shared jurisdiction. In determining whether an action lies against a public body in negligence, a provincial superior court must of necessity trace the contours of the public body’s duties; in order to accomplish this task, the body’s home statute will have to be interpreted. On the logic exhibited in Rogers, the mere potential for shared jurisdiction is what matters. Could it not be said, then, that the possibility of actions against a public body in negligence would require review on a standard of correctness? To so argue would be to stretch the Rogers logic very far indeed. If, in principle, the availability of actions in negligence would always justify a standard of review of correctness, deference could be completely gutted. This cannot be what Rothstein J intended. But the very availability of the argument is evidence that the approach taken in Rogers will complicate rather than simplify and clarify the general principles of judicial review.

**Embracing Pluralism: Multiple Interpretations**

One can appreciate Rothstein J’s concern with the potential for conflicting interpretations. Certainly, anomalous outcomes may result from the shared jurisdiction of the Federal Court and the Copyright Board.
However, as Abella J responded, deference has always been “based on the idea that multiple valid interpretations of a statutory provision were inevitable, and ought not to be disturbed unless the tribunal’s decision was not rationally supported.” From the earliest days of the Court’s deferential approach, this has been a key idea.

The philosopher Chaim Perelman put the point eloquently:

In fact, we admit that two reasonable and honest men can disagree on a determined question and thus judge differently. The situation is even considered so normal, both in legislative assemblies and in tribunals that have several judges, that decisions made unanimously are esteemed exceptional; and it is normal, moreover, to provide for procedures permitting the reaching of a decision even when opposing opinions persist.

Admitting divergent outcomes is the sine qua non of deference. Quailing at the prospect contrasts starkly with the Court’s comfort with determining whether a particular result “falls within a range of possible outcomes.”

Even allowing that the potential for the sorts of divergent result identified by Rothstein J requires a solution, it is not clear that reserving questions of law to the courts is the appropriate one. Other solutions are available.

First, Rothstein J could have placed faith in the paramountcy-type analysis employed in *British Columbia Telephone Co. v Shaw Cable Systems (B.C.) Ltd.* There, contradictory decisions were reached by administrative bodies: compliance with one would have been defiance of the other. The Court resolved the conflict by reference to legislative intent. It essentially asked, based on the statutory provisions in question, which tribunal the legislature would have intended to have the last word in a situation of conflict. Here, the telecommunication regulator’s decision, “being an expression of the broad policy-making role accorded to it by Parliament, should take precedence over the decision of the labour arbitration board to the extent of the inconsistency.” In the Rogers scenario, the Court could simply have kicked the problem down the road. If and when contradictory decisions were issued, a reviewing court could determine which ought to prevail.
Second, the Court could simply have trusted in the ability of the Federal Court and Copyright Board to work out any problems between themselves. To put it starkly, the Federal Court would need a very good reason to depart from a decision of the Copyright Board and *vice versa*. Discretion would be the better part of valour. Moreover, if the Federal Court departed without adequate justification from a decision of the Copyright Board, the Federal Court of Appeal could, if necessary, correct it. If the Copyright Board departed without adequate justification from a decision of the Federal Court, its decision would be unreasonable.\(^48\)

These two alternative solutions might excite opposition, but they would surely have been preferable to the development of an exception to the *Dunsmuir* framework, which is likely to complicate the law of judicial review.\(^49\) Moreover, the shared jurisdiction exception requires an interventionist standard of review where deference would otherwise be appropriate. Deference will be undermined by the new exception, and the legislative purpose of creating specialized administrative bodies will be subverted. Indeed, given the potential that the new shared jurisdiction exception has to undermine the framework of deference, I hope that future courts will use these alternative approaches to deal with inconsistency if and when it arises, thereby confining the *Rogers* exception to the intellectual property field.

**Deference to the Copyright Board**

Taking a step back and viewing the *Rogers* decision more broadly, the refusal to accord deference to the Copyright Board is most unfortunate. There is certainly a “long history” of judicial, rather than administrative, interpretation of the scope of copyright.\(^50\) Pedigree, however, is no reason to ignore principle, especially given that the *Copyright Cases* represented the Court’s first major post-*Dunsmuir* foray into intellectual property law.

As Abella J explained, the Copyright Board is undoubtedly an expert body, to which decision-making authority had been delegated, and therefore deference was appropriate:

> The Board has highly specialized knowledge about the media technologies used to create and disseminate
copyrighted works, such as the Internet, digital radio, satellite communications, as well as related economic issues…. This specialized knowledge is precisely the kind of institutional expertise that Dunsmuir concluded was entitled to deference.31

One might suggest that the Copyright Board's expertise lies solely in the area of rate setting, not in defining the scope of copyright. This seems too narrow an approach. One would be wise to recall Abella J’s previous admonition: “If every provision of a tribunal’s enabling legislation were treated as if it had jurisdictional consequences that permitted a court to substitute its own view of the correct interpretation, a tribunal’s role would be effectively reduced to fact-finding.”32 No distinction between rate setting and law interpreting is made in the Act; again, providing an appeal, in order to segment these two questions, would not have been difficult. Indeed, the fact that the Chair of the Copyright Board must be a judge33 casts doubt on the plausibility of a segmentation of legal and economic questions.34 While the other members need not have legal training, their regular exposure to the relevant legal principles and, crucially, their regular application of these principles in concrete contexts allows them to accrue significant expertise. Accordingly, the Copyright Board should not be treated as solely a technocratic body to be trusted only with complex economic questions and not broader questions of law and policy.

More generally, the Copyright Board is the body that is best positioned to identify and develop the underlying principles of the Act. It deals with tariff applications and various issues pertaining to the contours of copyright on a regular basis. All interested parties can participate before the Copyright Board and submit their respective points of view in a deliberative forum.35 By contrast, the Court is only an occasional actor on the copyright stage. A similar justification for deference was advanced by Dickson J (as he then was) in his seminal set of reasons in Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corporation:

The rationale for protection of a labour board’s decisions within jurisdiction is straightforward and
compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.\textsuperscript{56}

For example, while there is doubtless much to be said for the Court’s recognition in the Copyright Cases of a principle of “technological neutrality”,\textsuperscript{57} there is much more to be said for leaving the identification, development and application of such principles to the Copyright Board. Once the Court has spoken on a question of law, the principles it announces are set in stone. If, say, major technological advances unforeseen by the Court render the principle of technological neutrality inappropriate, it will ultimately require an appeal to the Court to resolve the situation. Take, for example, Canadian judges’ treatment of fair dealing before the Court’s decision in \textit{CCH Canadian Ltd. v Law Society of Upper Canada};\textsuperscript{58} “For a long time, the Canadian approach to fair dealing was one of single-minded reliance upon specific rules, together with a distinct unwillingness to consider the purpose of fair dealing within the larger policy aims of copyright law.”\textsuperscript{59} It may be true that the Court’s decision in \textit{CCH} revitalized fair dealing,\textsuperscript{60} but had the development of fair dealing been entrusted to the Copyright Board, a long period of stagnation might have been avoided.

If legal principles were developed by the Copyright Board in the first place, subject to deferential review, the principles could be modified or even jettisoned as conditions demanded it.\textsuperscript{61} Allowing the Court to review interpretations of the Copyright Board on a standard of correctness has the unfortunate potential to ossify the law. Far better to allow the various parties affected by the Copyright Board’s determinations to fight for their preferred interpretations in the forum provided for by Parliament. Instead, the Court seems to see itself as perched on the apex of the judicial hierarchy, reluctant to cede its position to an expert body that is better placed to answer polycentric
copyright questions and receive input from interested parties. Yet the Court does not, in short, have the copyright on wisdom in this field.

**Deference in Application: The Problem of Characterization**

For all of Abella J’s ornate words about deference in Rogers, one could be forgiven for questioning just how deferential she was to the Copyright Board in the Alberta (Education) case. Two general points emerge from a consideration of the sharp disagreement between the majority and dissenting reasons. First, when it comes to deference to administrative decision makers, judicial acts matter as much as words. Second, the characterization of administrative decisions by reviewing courts plays an important role in determining whether the decisions will ultimately be upheld.

In Alberta (Education), the issue was whether photocopies made by teachers in order to distribute them to students as part of classroom instruction could qualify as fair dealing. On foot of a dispute between Access Copyright and its provincial and territorial partners about the extent of copying being done pursuant to their agreements, a quantitative study was conducted. The particular issue that emerged and wended its way to the Court was whether copies made on the initiative of teachers with a subsequent instruction to students to read the materials constituted fair dealing.

The Copyright Board concluded that the copying was for an allowable purpose, but that, on application of the “fairness factors” laid out previously by the Court in CCH, the copying had been done in an unfair manner. The argument before the Court was entirely about the application of the fairness factors. There was no general question of legal interpretation. Accordingly, the parties agreed that the appropriate standard of review was reasonableness. I should sound a note of caution before describing the decision: the justices agreed among themselves neither about the way to conduct a deferential review nor about the way to characterize the impugned decision.

Abella J, writing for a five-member majority, noted four problems with the Copyright Board’s approach. First—indeed, the “key problem”—the Copyright Board had misapplied the “purpose of the dealing factor”. According to Abella J, the Copyright Board’s error
was to look at the copying solely from the perspective of the teacher. Rather, the appropriate perspective to adopt was that of the “user”.

As a result, the Copyright Board drove an “artificial wedge” between the initiative of the teacher and the initiative of the student. It also “artificially” separated study in the classroom among one’s peers from study on one’s own.

Second, the Copyright Board’s approach to the “amount of the dealing” factor was “flawed”. Abella J took the view that the Copyright Board had been wrong to say that repeated copying of a particular set of materials tended to make the dealing unfair. Contrary to the view expressed by the Copyright Board, the “amount” factor requires an assessment of proportionality between the copied excerpt and the work as a whole. It is the “character” factor that speaks to overall quantification of the copying. The Copyright Board had inappropriately “conflated the two factors.”

Third, in its discussion of “alternatives to the dealing”, the Copyright Board had suggested that the schools could buy more hard copies of the textbooks being copied. Abella J flatly rejected this suggestion: “buying books for each student is not a realistic alternative to teachers copying short excerpts to supplement student textbooks.”

Fourth, the Copyright Board had concluded, in its application of the “effect of the dealing on the work” factor, that the copying had caused a decline in sales of hard copies of the textbooks in question. However, there was simply “no evidence” to suggest a causal link between the copying and the decline in sales, an observation shared by Rothstein J in dissent.

Abella J concluded that as a result of the Copyright Board’s “misapplication of the CCH factors”, its decision was unreasonable.

To take up my first general point about Alberta (Education)—deference—the overview of Abella J’s reasoning, with its reliance on artificial wedges, inappropriate conflation and unrealistic alternatives, required an intrusive review of the Copyright Board’s decision. While the philosophy Abella J described in Rogers is laudable, it is difficult to square her philosophy with her application of it in Alberta (Education). Unsurprisingly, Abella J’s approach provoked a sharp dissent from four of her colleagues, for whom Rothstein J wrote. As he warned, courts should be “cautious not to inadvertently slip into a
more intrusive, correctness review.” In particular, the substitution of judgment by the Court on whether the purchase of extra books was an “alternative to the dealing” was problematic: there was no doubt that these were “relevant facts” which the Copyright Board could consider; for the Court to take a diametrically opposed view was simply not appropriate. Moreover, the factors identified in CCH were outlined as an aid to interpretation of the Act. As Abella J noted in Rogers, interpretation of its home statute is precisely the area in which the Copyright Board has greater expertise than a reviewing court. For a judicial decision that aimed to establish guidelines for the Copyright Board to undermine deference is most unfortunate.

In addition, Abella J’s careful slicing of the Copyright Board’s decision into various components cuts against her own previous advice not to “segment” administrative decisions. Rothstein J’s criticism is vivid and persuasive:

I do not think it is open on a deferential review, where a tribunal’s decision is multifactored and complex, to seize upon a few arguable statements or intermediate findings to conclude that the overall decision is unreasonable. This is especially the case where the issues are fact-based, as in the case of a fair dealing analysis.

Administrative decisions should be viewed in the round, not dismantled into distinct components. The sum of the parts is what should count, not the parts themselves. For example, Rothstein J agreed that there was insufficient evidence to justify the Copyright Board’s conclusion on the “effect of the dealing on the work” factor. Nevertheless, “an unreasonable observation under this one factor” was insufficient to render the whole of the Copyright Board’s assessment unreasonable. A properly deferential approach, such as that followed by Rothstein J, would not lead a reviewing court to strike down a complex administrative decision on the basis of an isolated unreasonable finding.

To lead into my second general point about Alberta (Education)—characterization—I should say a brief word in defence of Abella J. It is true, although Abella J did not make reference to the concept, that a failure to follow judicially developed jurisprudence can cause
an administrative decision maker to take an unreasonable decision. However, this sort of failure does not automatically require a decision to be struck down as unreasonable by a reviewing court: attention must be paid to whether the decision nonetheless has the characteristics of “justification, transparency and intelligibility” and falls within a range of possible, acceptable outcomes. In any event, without having regard to this possibility, Abella J clearly took the view that the decision was fatally flawed.

Rothstein J disagreed: he found that the Copyright Board’s decision was reasonable. Indeed, although he agreed with Abella J that the Copyright Board’s decision was, in part, unsupported by evidence, he did not agree that the Copyright Board had misapplied CCH. What is interesting, therefore, is why he disagreed.

It seems that the disagreement arose because Abella J and Rothstein J adopted diametrically opposed characterizations of CCH and of the Copyright Board’s application of the CCH factors. In respect of CCH, recall that Abella J held that in the course of its “purpose of the dealing” analysis, the Copyright Board had inserted an “artificial wedge” between the purpose of the teacher and the purpose of the student. Rothstein J flatly disagreed: “the distinction drawn by the Board remains consistent with and reasonable in light of CCH”. Indeed, in Rothstein J’s view, the purpose of the teacher could not reasonably have been ignored by the Copyright Board. Abella J and Rothstein J, then, took very different views of the meaning of CCH, views that indelibly coloured their performance of the task of judicial review.

In respect of the Copyright Board’s application of the CCH factors, a similar difference can be perceived. Recall Abella J’s criticism of the Copyright Board for having “conflated” the “amount” and “character of the dealing” factors. Rothstein J, however, saw no reason to rebuke the Copyright Board. He held that the Copyright Board had quite properly “remained focused” on the question of proportion throughout its analysis. Rothstein J’s characterization of the Copyright Board’s decision was that the Copyright Board was concerned about teachers returning to copy further excerpts from the same works they had copied from previously.

There was no confusion at all between the two factors, on
Rothstein J’s reading of the Copyright Board’s decision. Two completely different views of the Copyright Board’s decision were taken: Abella J concluded that the Copyright Board was confused; Rothstein J concluded that the Copyright Board was perfectly clear.

At its core, then, the disagreement between Abella J and Rothstein J was not necessarily one about the proper way for a reviewing court to be deferential toward an administrative decision maker. Rather, it was about the nature of *CCH* and the Copyright Board’s decision. It is fair to conclude that her skepticism about the quality of the impugned decision led Abella J to apply an intrusive standard of reasonableness.

There is an important lesson here for administrative lawyers: the comparatively neglected question of characterization is an important one. Ultimately, its characterization by a reviewing court will determine to an important extent whether an administrative decision will survive judicial review. In circumstances of good faith disagreement between judges about how to characterize administrative decisions, it seems logical that the more deferential course would be to adopt the characterization that casts the decision in the most favourable light available. Similarly, if two reasonable readings of a judicial precedent are available, a reviewing court should not substitute its preferred reading for a reasonable one chosen by an administrative decision maker. Accordingly, the obligation to defer is not necessarily exhausted by the application of a standard of review of reasonableness. Even Abella J, so elegant in her defence of deferential review in *Rogers*, proved less than deferential in *Alberta (Education)*, because of the manner in which she characterized the Copyright Board’s decision.

**Conclusion**

It remains to be seen how the shared jurisdiction exception will play out in the lower courts. It is almost certain that applicants will attempt to extend Rothstein J’s logic beyond the parameters of intellectual property. If they succeed in doing so, deference will be undermined. It is hoped that the innovation will be limited to intellectual property law. Enough harm has been done to the autonomy of the Copyright Board. It would be most unfortunate if other administrative bodies were
to suffer collateral damage as a result of the unnecessary development of the new shared jurisdiction exception. Finally, however, as a consideration of Alberta (Education) reveals, simply applying a deferential approach may not be enough. Adopting an appropriately deferential mindset may require in addition a deferential approach to the characterization of administrative decisions.

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1 Thanks, with the usual disclaimer, to Michael Geist, Mark Rubenstein, Bob Tarantino and an anonymous reviewer for comments on an earlier draft. I also benefited from a discussion of the Copyright Cases with lawyers at Fraser Milner Casgrain LLP, kindly facilitated by Tim Banks.


7 I should note that I am using the term “characterization” not to describe the process of determining whether a decision is discretionary or interpretive, or factual or legal (see below, text accompanying n 9). Rather, I am using it to describe the process of determining what the decision maker actually said or did.


Rogers, supra note 3. On standard of review, Rogers is the leading decision of the five. In both Bell, supra note 4, and Re:Sound, supra note 6, the court seemed satisfied that the Copyright Board was correct in its determinations. In ESA, supra note 2, the minority followed Rogers, treating it as conclusive as to the applicable standard of review, even though chronologically speaking it was decided subsequently. Confusingly, the majority reasons in ESA, written by Abella and Moldaver JJ, did not discuss the applicable standard of review at all. They appeared to apply a standard of correctness: see paras 10, 27, 28, 31, 32 and 39. Given the presence of Abella J in the majority, this makes sense only if Rogers is taken as determinative of the standard of review. In any event, Rogers is the only one of the cases in which there is discussion of the standard of review. The remaining case, Alberta (Education), supra note 5, involved purely an application of the standard of reasonableness to a determination of the Copyright Board. I discuss it below, text accompanying nn 63-87.

Copyright Act, supra note 11, s 3(1)(f).


Rogers, supra note 3 at para 14.


Rogers, supra note 3 at paras 14-15.

Ibid at para 64.

Ibid at para 63.


Pursuant to s 37 of the Copyright Act, the jurisdiction of the Federal Court is concurrent with that of the superior courts. But there are very strong incentives to bring an action in the Federal Court: “The Federal Court is often preferred because its judges are more experienced in [intellectual property] litigation, the case can often be more quickly heard and appealed, and the Federal Court’s orders are enforceable Canada-wide”. David Vaver, Intellectual Property Law, 2d ed (Toronto: Irwin Law, 2011) at 608.

Even the use of legislative history aims to elucidate the meaning of words used in legislation, not to peer into the individual minds of lawmakers. See Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985) at 42.


In *Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2 at para 24, [2012] 1 SCR 5, the Court recognized a third standard of review applicable to policy decisions of municipalities, on the basis that this standard was recognized in the pre-*Dunsuir* jurisprudence, <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/7987/index.do>. It is difficult to square the court’s logic, however, with the reduction in *Dunsuir* of the available standards of review from three to two. See Paul Daly, “*Dunsuir’s Flaws Exposed: Recent Decisions on Standard of Review*” SSRN (2012) 58 McGill LJ 1 (forthcoming) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2111353>.

Rogers, *supra* note 3 at para 15 [emphasis in the original].

*Dunsuir, supra* note 8 at para 55 [internal citation omitted].

Rogers, *supra* note 3 at para 63.

*Ibid* at para 19.

*Ibid* at para 70.


See e.g. Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission), 2001 SCC 37, [2001] 2 SCR 132.


Rogers, supra note 3 at para 69.


The phrase first originated in the Court's constitutional jurisprudence, in the particular context of the division of powers. See Multiple Access Ltd. v McCutcheon, [1982] 2 SCR 161 at 191.

Shaw, supra note 45 at para 79, McLachlin J.

Shaw, supra note 45 at para 79, McLachlin J.

The Québec Court of Appeal has provided a recent reminder that although administrative bodies are not bound by stare decisis, they must nonetheless respect the principle of coherent decision-making by justifying departures from prior decisions: Syndicat de l'enseignement de la région de Laval c. Commission scolaire de Laval, 2012 QCCA 827 at para 60.

Another means of resolving the instant case would have been to hold simply that the standard of review had already been satisfactorily determined, as envisaged by the Court in Dunsmuir, supra note 8 at para 62. A majority of the Court had applied a standard of correctness to the Copyright Board's determination of a legal question in Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers, 2004 SCC 45 at paras 48-50, [2004] 2 SCR 427, Binnie J. As I explain below, text accompanying nn 47-54, I do not agree that a standard of correctness is appropriate. It would, nonetheless, have been preferable to go down this route rather than the hazardous road taken in Rogers.

Society of Composers, Authors and Music Publishers of Canada v Canadian...

51 Rogers, supra note 3 at para 66 [internal citation omitted].


53 Copyright Act, supra note 11, s 3.

54 Ibid, s 66(3).

55 The Copyright Act does not erect high barriers to participation (see e.g. ss 67.1(5) and 68(1)) and Article A.2 of the Copyright Board’s model directive on participation is generous in its scope: “Anyone may comment in writing on any aspect of the proceedings. As a general rule, comments received later than the date by which participants must present or file oral or written arguments, will not be considered. In due course, the Board will forward these comments to participants” <http://www.cb-cda.gc.ca/about-apropos/directive-e.html>. See generally Henry Richardson, Democratic Autonomy: Public Reasoning about the Ends of Policy (Oxford: Oxford University Press, 2002).


57 See e.g. ESA, supra note 2 at paras 8-10.


60 In a draft essay, Ariel Katz has suggested that the decision “breathed new life” into fair dealing. See “The Rebirth of Fair Dealing” <http://www.law.nyu.edu/ecm_dlv2/groups/public/@nyu_law_website__global/documents/documents/ecm_pro_073711.pdf>.


62 See e.g. Society, supra note 50 at para 75.

63 Alberta (Education), supra note 5 at para 1.

64 Ibid at para 7.

65 CCH, supra note 58 at para 53. The following factors were there said to provide an “analytical framework to govern determinations of fairness in future cases”: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work.
Alberta (Education), supra note 5 at para 15.

Ibid at para 22.

Ibid at para 24.

Ibid at para 27.

Ibid at para 29.

Ibid at para 30.

Ibid at para 32.

Ibid at para 33.

Ibid at para 57.

Ibid at para 37.

Ibid at para 40.

Ibid at para 56, Rothstein J, dissenting.

Ibid at para 39, Rothstein J, dissenting: “While useful for the purposes of the fair dealing analysis, the factors are not statutory requirements”.

See above, text accompanying nn 52-54. It does not necessarily contradict her advice. The two issues are distinct. In Via Rail, supra note 52, Abella J was faced by an attempt to extricate a legal question from a decision. Here, Abella J extricated several factual questions from a decision. Despite the absence of an outright contradiction, the contrast is nonetheless telling.

Alberta (Education), supra note 5 at para 59.

Ibid at para 58.


Alberta (Education), supra note 5 at para 24.

Ibid at para 44.

Ibid at para 30.

Ibid at para 51.