

2013

Of Reasonableness, Fairness and the Public Interest: Judicial Review of Copyright Board Decisions in Canada's Copyright Pentalogy

Graham Reynolds

Allard School of Law at the University of British Columbia, reynolds@allard.ubc.ca

Follow this and additional works at: http://commons.allard.ubc.ca/fac_pubs

Citation Details

Graham Reynolds, "Of Reasonableness, Fairness and the Public Interest: Judicial Review of Copyright Board Decisions in Canada's Copyright Pentalogy" in Michael Geist ed, *Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) 1.

This Book Chapter is brought to you for free and open access by the Faculty Scholarship at Allard Research Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Allard Research Commons.



Of Reasonableness, Fairness and the Public Interest: Judicial Review of Copyright Board Decisions in Canada's Copyright Pentalogy

GRAHAM REYNOLDS

Introduction¹

On 12 July 2012, five copyright law decisions were handed down by the Supreme Court of Canada (SCC). These decisions have been referred to (among other names) as the pentalogy (or the copyright pentalogy).² One of the more contentious topics addressed in the pentalogy was judicial review of Copyright Board decisions. Two of the five cases dealt with issues relating to judicial review of such decisions.

In one case—*Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada* [*Rogers*]³—the SCC addressed the standard of review that ought to apply to questions of law decided by the Copyright Board. Rothstein J, who wrote the reasons for judgment, held that the proper standard was one of correctness. In concurring reasons, Abella J argued that the majority's approach did not give sufficient deference to the Copyright Board. Instead, Abella J advocated for the adoption of a reasonableness standard to be applied to questions of law decided by the Copyright Board.

In a second case—*Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* [*Alberta (Education)*]⁴—the SCC

reviewed the Copyright Board's application of fair dealing to a specific set of facts (an issue which, as I will suggest in Part II.B, is ultimately one of statutory interpretation).³ *Alberta (Education)* arose in the context of the Copyright Board's review of a proposed tariff applied for by Access Copyright that would apply to the reproduction of works for use in primary and secondary schools in Canada (outside Quebec).⁴ One issue of disagreement with respect to this tariff was whether short excerpts from textbooks reproduced by teachers and distributed to students (referred to in the decision as Category 4 copies) met the test for fair dealing.

The Copyright Board determined that Category 4 copies did not meet the test for fair dealing.⁵ This decision was appealed to the FCA, which determined that the Copyright Board's reasons with respect to fair dealing were reasonable.⁶ The judgment of the FCA was appealed to the SCC. Abella J, who wrote the reasons for judgment in a 5-4 decision (McLachlin CJ and LeBel, Moldaver and Karakatsanis JJ concurring), determined that the Copyright Board's decision with respect to fair dealing was unreasonable.⁷ Abella J thus allowed the appeal and remitted the matter to the Copyright Board for reconsideration in accordance with her reasons.⁸

Rothstein J, who wrote dissenting reasons in *Alberta (Education)* (Deschamps, Fish and Cromwell JJ concurring), disagreed with Abella J's conclusion that the Copyright Board's decision was unreasonable. In his dissenting reasons, Rothstein J also implied that Abella J, in reaching her conclusion, did not give adequate deference to the judgment of the Copyright Board; or, said differently, that Abella J, in spite of using the language of reasonableness, inadvertently applied a correctness standard instead of a reasonableness standard.⁹

A pentalogy can be defined as "a combination of five mutually connected parts".¹⁰ Are the five copyright decisions handed down by the SCC on 12 July 2012 mutually connected? Is there a coherent narrative with respect to judicial review of Copyright Board decisions in Canada's copyright pentalogy? If so, what is this narrative? Is it a story of inconsistency and inadvertence, where Abella J advocated for deference in one decision¹¹ yet did not give adequate deference in another, as suggested by Rothstein J in his dissenting reasons in *Alberta (Education)*? Or is there another story?

In this chapter, I suggest that the story told in the pentalogy is instead the story of the continuing evolution of the SCC's interpretation of the purpose of the *Copyright Act*, a process that began in *Théberge v Galerie d'Art du Petit Champlain inc.* [*Théberge*]¹² and which is ongoing; of the nature of fair dealing and the fairness analysis; and of the relationship between the Copyright Board and reviewing courts.

I will argue that the purpose of the *Copyright Act*, as interpreted by the SCC, is to contribute to the development of a robust public domain. In order to fulfill this purpose, it is necessary for courts and the Copyright Board to adopt a broad, liberal approach to fair dealing. I will suggest that in its decision in *Alberta (Education)*, the Copyright Board interpreted fair dealing in a narrow manner that—to paraphrase the reasons for judgment of Moldaver JA (as he then was) in *Toronto Police Services Board v (Ontario) Information and Privacy Commissioner [Toronto Police Services Board]*—“[failed] to reflect the purpose and spirit of the [*Copyright Act*] and the generous approach to [fair dealing] contemplated by it.”¹³ As a result, the outcome reached by the Copyright Board fell outside the range of “possible, acceptable outcomes” (this range being defined as the outcomes that flow from the adoption of an interpretation of fair dealing or an approach to fair dealing that is consistent with the purpose of the *Copyright Act*, as interpreted by the SCC).¹⁴ As a matter of law, it can thus be said that it was not open to the Copyright Board to decide the question in the way that it did.

Based on this argument, Abella J did not incorrectly apply a correctness standard in *Alberta (Education)*. Rather, Abella J applied a reasonableness standard of review in a manner consistent with the way in which reasonableness has been applied in *Dunsmuir v New Brunswick [Dunsmuir]*, in numerous SCC decisions handed down post-*Dunsmuir*, and in several Canadian appellate decisions. As well, based on this argument, Abella J's reasons for judgment in *Alberta (Education)* can be seen as consistent with her concurring reasons in *Rogers*.

How, then, to explain Rothstein J's dissenting reasons in *Alberta (Education)*? One point of divergence between the majority and dissent in *Alberta (Education)* relates to the nature of the fairness requirement (the second step in the fair dealing analysis). Rothstein

J's dissenting reasons can be seen as being grounded in an assumption that fairness is an open-ended discretionary concept; one that is capable of multiple interpretations, none of which are preferable over any other. If fairness is open-ended, then there would be little scope for appellate review on a reasonableness standard. If this were the case, almost any decision of the Copyright Board with respect to fairness, provided it is transparent and intelligible, would fall within the range of "possible, acceptable outcomes which are defensible in respect of the facts and law" (as required by *Dunsmuir*).¹⁵

However, one conclusion that we can draw from *Alberta (Education)* is that fairness (in the context of fair dealing) is not as discretionary a concept as it appears to be. *Alberta (Education)* and *Bell* clarify that the purpose of the *Copyright Act* requires a broad, liberal approach to fairness. By implication, then, fairness is not broad and open-ended; rather, it is infused with certain expectations with respect to the way in which it is to be applied (namely, in a large and liberal manner).

This chapter will proceed as follows. In Part I, I will briefly discuss the (recent) history of judicial review of decisions of the Copyright Board. In Part II, I will analyze Abella J's reasons for judgment in *Alberta (Education)* in light of Rothstein J's implied suggestion, in his dissenting reasons, that Abella J applied a correctness standard as opposed to a reasonableness standard. In Part III, I will discuss the implications of *Alberta (Education)* for fair dealing (and specifically the fairness analysis), for future Copyright Board decisions, and for the relationship between the Copyright Board and reviewing courts.

I: Judicial Review of Copyright Board Decisions¹⁶

A. Introduction

In 2008, the SCC handed down its decision in *Dunsmuir*. In this decision, Bastarache J and LeBel J delivered joint reasons for judgment in which they "reassess[ed]" the "approach to be taken in judicial review of decisions of administrative tribunals."¹⁷ Two determinations, made by Bastarache J and LeBel J in their reasons for judgment, are particularly relevant for this chapter. First, they

determined that the existing three standards of review (correctness, patent unreasonableness and reasonableness *simpliciter*) ought to be replaced with two standards—correctness and reasonableness.¹⁸ Second, Bastarache J and LeBel J concluded 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”.¹⁹

One question, following *Dunsmuir*, was the impact that it might have on judicial review of Copyright Board decisions. The Copyright Board is an “independent administrative tribunal”²⁰ consisting of “not more than five members, including a chairman and a vice-chairman, to be appointed by the Governor in Council.”²¹ The chairman of the Copyright Board “must be a judge, either sitting or retired, of a superior, county or district court.”²² Through this requirement, as noted by the FCA in *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn. of Internet Providers [SOCAN v CAIP (FCA)]*, “[t]he Act...ensures that the Board possesses legal expertise.”²³ Qualifications for the other members of the Copyright Board, including the vice-chairman, are not explicitly set out in the *Copyright Act* (its home statute). While there is no right of appeal from Copyright Board decisions, these decisions are subject to judicial review by the FCA.²⁴ Would the SCC’s restatement of judicial review principles in *Dunsmuir* impact the standards of review applied to questions of law, questions of mixed fact and law, and findings of fact made or decided by the Copyright Board?

B. Standard of Review to Be Applied to Questions of Law Decided by the Copyright Board

At the time *Dunsmuir* was decided, the leading case addressing the standard of review on questions of law decided by the Copyright Board was the SCC decision in *SOCAN v CAIP*.²⁵ Binnie J, who delivered the reasons for judgment in *SOCAN v CAIP* (McLachlin CJ and Iacobucci, Major, Bastarache, Binnie, Arbour, Deschamps and Fish JJ concurring²⁶) concluded that the standard of review to be applied to questions of law addressed by the Copyright Board is correctness.²⁷

This determination was a departure from previous decisions in which questions of law decided by the Copyright Board had been reviewed on a standard of “patent unreasonableness.”²⁸ This standard had been applied by courts largely on the basis that courts perceived the Copyright Board to be, as noted by Létourneau JA in *Canadian Assn. of Broadcasters v Society of Composers, Authors and Music Publishers of Canada*, “in a better position than...Court[s] to strike a proper balance between the interests of copyright owners and users.”²⁹

The first court to address the issue of the standard of review on questions of law decided by the Copyright Board post-*Dunsmuir* was the FCA in *Shaw Cablesystems G.P. v Society of Composers, Authors and Music Publishers of Canada*.³⁰ Citing *Dunsmuir*, the FCA held that “[t]he Board is a specialist tribunal which deals extensively with copyright matters. The Act is its home statute. It is therefore entitled to deference with respect to its interpretation of that Act.”³¹

The FCA’s judgment in *Shaw* was appealed to the SCC, where it was heard as *Rogers* (one of the cases in the copyright pentalogy).³² As noted above, the reasons for judgment in *Rogers* were written by Rothstein J.³³ Echoing the judgment of Evans JA in *SOCAN v CAIP*, Rothstein J concluded that largely on the basis of “the unusual statutory scheme under which the Board and the court may each have to consider the same legal question at first instance,”³⁴ and due to concerns for consistency,³⁵ the standard of review on questions of law decided by the Copyright Board should be correctness.³⁶

In her concurring reasons in *Rogers* (to which no other judge signed on), Abella J critiqued Rothstein J’s reasons for judgment, arguing strongly that courts ought to take a more deferential approach to decisions of the Copyright Board. She did so in two main ways: first, by advocating for a reasonableness standard of review to be applied to questions of law decided by the Copyright Board,³⁷ and second, by offering a much more fulsome view of the role and mandate of the Copyright Board than that suggested by Rothstein J in *Rogers*.³⁸

With respect to the question of the standard of review that ought to be applied to questions of law decided by the Copyright Board, Abella J stated that “since *Dunsmuir*...this Court has unwaveringly held that institutionally expert and specialized tribunals are entitled to a presumption of deference when interpreting their home statute.”³⁹

In support of this statement, Abella J cited the SCC’s decision in *Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association [ATA]*, which Abella J stated stands for the proposition that “deference on judicial review is presumed *any time* a tribunal interprets its home statute.”⁴⁰ Abella J characterized the approach adopted by the majority in *Rogers*—which she summarized as “[a]pplying a correctness standard of review on the sole basis that a court might interpret the same statute”⁴¹—as an “anomalous jurisprudential relapse,”⁴² the consequences of which are to “effectively [drain] expert tribunals of the deference and respect they are owed.”⁴³

In dismissing the majority’s concern about inconsistent results that might flow from the adoption of a reasonableness standard of review when judicially reviewing Copyright Board decisions, Abella J characterized the Copyright Board as a body with “particular familiarity and expertise with the provisions of the *Copyright Act*.”⁴⁴ She stated:

The *Act* may sometimes be home to other judicial actors as part of their varied adjudicative functions, but their occasional occupancy should not deprive the Board of the deference it is entitled to as the permanent resident whose only task is to interpret and apply the *Act*.⁴⁵

This statement implicitly rejects Binnie J’s characterization of the *Copyright Act*, in *SOCAN v CAIP*, as an “act of general application which usually is dealt with before courts rather than tribunals.”⁴⁶ Binnie J’s characterization was accepted by Rothstein J in his reasons for judgment in *Rogers*.⁴⁷

In addition to disagreeing on the question of which standard of review ought to apply to questions of law decided by the Copyright Board, Abella J and Rothstein J, in their respective reasons in *Rogers*, also presented very different views of the role and mandate of the Copyright Board. In his reasons, Rothstein J affirmed Binnie J’s statement in *SOCAN v CAIP* that “the core of the Board’s mandate is ‘the working out of the details of an appropriate royalty tariff.’”⁴⁸

Objecting to the characterization of the Copyright Board as a mere rate-setter, Abella J instead provided a much more expansive view of the role of the Copyright Board. She stated:

The Board has specialized expertise in interpreting the provisions of the *Copyright Act*. ... The Board does not simply “wor[k] out...the details of an appropriate royalty tariff”, despite what is suggested in [*SOCAN v CAIP*], at para. 49. It sets policies that collectively determine the rights of copyright owners and users, and plays an important role in achieving the proper balance between those actors.⁴⁹

In advocating for a reasonableness standard of review for questions of law that are decided by the Copyright Board, and in offering a broad interpretation of the Copyright Board and its mandate (as opposed to the interpretation of the board’s mandate as set out by the majority), Abella J provided, in her concurring reasons in *Rogers*, a robust defence of a deferential approach to decisions of the Copyright Board.

C. Standard of Review to Be Applied to Findings of Fact and Questions of Mixed Fact and Law Made or Decided by the Copyright Board

In *Dunsmuir*, Deschamps J (Charron and Rothstein JJ concurring) wrote that in the context of administrative review, deference is owed by reviewing courts both with respect to findings of fact and questions of mixed fact and law made or decided by administrative bodies (implying a reasonableness standard of review).⁵⁰ The first court, post-*Dunsmuir*, to address the issue of the proper standard to be applied to findings of fact made by the Copyright Board was the FCA in *Alberta (Education)* (FCA).⁵¹ In this decision, the FCA confirmed that the standard of review to be applied when reviewing findings of fact made by the Copyright Board was reasonableness.⁵² This conclusion was upheld by Abella J in *Alberta (Education)*.⁵³ In *Canadian Recording Industry Association v Society of Composers, Authors and Music Publishers of Canada*, the FCA confirmed that questions of mixed fact and law decided by the Copyright Board are also reviewed on a reasonableness standard.⁵⁴

II: The Reasonableness Standard Applied: Analyzing Abella J’s Reasons in *Alberta (Education)*

A. Introduction

In this Part, I will focus on Abella J’s application of the reasonableness standard in her reasons in *Alberta (Education)*. As noted above, while Abella J (who wrote the majority decision) and Rothstein J (who wrote dissenting reasons) agreed that the question of whether photocopies made by teachers for their students qualified as fair dealing ought to be reviewed on a reasonableness standard,⁵⁵ they disagreed both on how this standard ought to be applied and on the ultimate conclusion (namely, whether the Copyright Board’s decision with respect to fair dealing was unreasonable).

Prior to the pentalogy, the leading SCC case to address fair dealing was *CCH*.⁵⁶ *CCH* dealt with copyright infringement actions brought by legal publishers CCH Canadian Ltd., Thomson Canada Ltd. and Canada Law Book Ltd. against the Law Society of Upper Canada (LSUC). The publishers alleged, among other claims, that the LSUC—which, “[s]ince 1845... has maintained and operated the Great Library at Osgoode Hall in Toronto, a reference and research library with one of the largest collections of legal materials in Canada”⁵⁷—had infringed copyright by “providing [a] custom photocopy service in which single copies of the publishers’ works are reproduced and sent to patrons upon their request [and by]... maintaining self-service photocopiers and copies of the publishers’ works in the Great Library for use by its patrons”.⁵⁸

In the course of her decision (in which she found that the LSUC had not infringed copyright), McLachlin CJ, writing for the Court, made several statements with respect to the nature and scope of fair dealing. Specifically, McLachlin CJ noted that fair dealing is an “integral part of the *Copyright Act*”;⁵⁹ that it is a “user’s right”;⁶⁰ and that “[i]n order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively”.⁶¹

Fair dealing is the broadest defence to copyright infringement available under the *Copyright Act*.⁶² Under fair dealing, individuals have, in certain circumstances, the “right” to use a substantial amount of copyright-protected expression without the authorization of the

copyright owner.⁶³ The fair dealing analysis proceeds in two steps. First, it must be established that the dealing was done for one of eight purposes, namely research, private study, education, parody, satire, criticism, review and news reporting.⁶⁴ Dealings done for the purpose of criticism, review or news reporting, in order to be considered fair, must also satisfy certain attribution requirements.⁶⁵ Second, it must be established that the dealing was “fair.”⁶⁶

With respect to the second part of the fair dealing analysis, McLachlin CJ, in *CCH*, noted that “[t]he Copyright Act does not define what will be fair; whether something is fair is a question of fact and depends on the facts of each case”.⁶⁷ In support of this statement, she cited the judgment of Lord Denning M.R. in *Hubbard v Vosper* [*Hubbard*] in which he noted that “[i]t is impossible to define what is ‘fair dealing’. It must be a question of degree...after all is said in done, it must be a matter of impression.”⁶⁸

In the attempt to provide some guidance to future decision makers with respect to the fairness analysis, McLachlin CJ set out a list of factors outlined originally by Linden JA that, in the view of the SCC, “provides a useful analytical framework to govern determinations of fairness in future cases”.⁶⁹ Specifically, based on *CCH*, factors that may be considered are the purpose of the dealing, the character of the dealing, the amount of the dealing, alternatives to the dealing, the nature of the work, and the effect of the dealing on the work.⁷⁰

As described earlier, in *Alberta (Education)*, in the context of reviewing the tariff proposed by Access Copyright, the Copyright Board determined that short excerpts from textbooks reproduced by teachers and distributed to students did not meet the test for fair dealing. This determination was reviewed first by the FCA (which held that it was reasonable) and subsequently by the SCC. In her decision, Abella J concluded that “the Board’s finding of unfairness was based on...a misapplication of the *CCH* factors.”⁷¹ As a result, Abella J held that “its outcome was rendered unreasonable.”⁷² Consequently, Abella J allowed the appeal and remitted the matter to the Copyright Board for reconsideration based on her reasons.⁷³

Rothstein J, in his dissenting reasons, disagreed with Abella J, stating that “[i]n my view, the Board made no reviewable error in principle in construing the *CCH* factors and, with one relatively minor

exception, its factual analysis, application of the CCH factors to the facts and its conclusions were not unreasonable.”⁷⁴ Rothstein J also objected to what he viewed as the approach taken by Abella J in her reasons for judgment, implying that Abella J did not give adequate deference to the Copyright Board with respect to its analysis of the fairness (or CCH) factors. As Rothstein J stated: “The application of these factors to the facts of each case by the Copyright Board should be treated with deference on judicial review. A principled deferential review requires that courts be cautious not to inadvertently slip into a more intrusive, correctness review.”⁷⁵

Rothstein J’s contention that Abella J did not give adequate deference to the Copyright Board in her decision in *Alberta (Education)* merits further analysis, particularly given Abella J’s concurring reasons in *Rogers* in which Abella J called for greater deference to be given to decisions of the Copyright Board. What can explain this outcome?

As noted above, one explanation—alluded to by Rothstein J, in his dissenting reasons in *Alberta (Education)*, is that Abella J, in her reasons for judgment in *Alberta (Education)*, “inadvertently [slipped] into a more intrusive, correctness review.”⁷⁶ Based on this explanation, Abella J did not give adequate deference to the decision of the Copyright Board; rather, she simply substituted her judgment for that of the Copyright Board. This explanation, however, implies an inconsistency between Abella J’s decision in *Alberta (Education)* and her concurring reasons in *Rogers*—that Abella J advocated for deference to be given to determinations of the Copyright Board in one case, yet failed to give deference in another. Such an inconsistency—particularly given that *Rogers* and *Alberta (Education)* were heard by the SCC on back-to-back days, and the judgments delivered on the same day—would be surprising.

I suggest that there is another explanation. Specifically, in this Part, I suggest that the Copyright Board, in applying fair dealing to a specific set of facts, adopted an approach to fair dealing that was inconsistent with the purpose of the *Copyright Act*, as interpreted by the SCC. In so doing, it reached an outcome that fell outside of the range of possible, acceptable outcomes. As a result, Abella J’s decision to allow the appeal did not reflect a lack of deference to the decision of the Copyright Board.

In the next section of this Part, I will describe the application of the reasonableness standard, post-*Dunsmuir*, in the context of statutory interpretation. While the question of “whether something is fair is a question of fact”, as noted by McLachlin CJ in *CCH*,⁷⁷ the question of how to interpret and apply fair dealing is ultimately a question of statutory interpretation. The interpretation or approach adopted by a court or the Copyright Board to fair dealing is (or ought to be) informed by their view of the purpose of the legislation as a whole. Thus interpreted, fair dealing is applied to the facts of the case, making the question dealt with in *Alberta (Education)* a question of mixed fact and law, reviewable on a reasonableness standard.⁷⁸ In numerous judgments, as will be described below, reviewing courts have found decisions of administrative bodies to be unreasonable on the basis that the administrative body adopted an interpretation of the statutory provisions in question that was inconsistent with the purpose of the legislation, as interpreted by the reviewing court.

B. The Application of the Reasonableness Standard in the Context of Statutory Interpretation

In *Dunsmuir*, the SCC describes reasonableness as a

[D]eferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range

of possible, acceptable outcomes which are defensible in respect of the facts and law.⁷⁹

In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)* [NLNU],⁸⁰ Abella J (writing for the Court) clarified the approach taken by reviewing courts in determining whether a decision of an administrative decision maker is unreasonable.⁸¹ Rather than requiring the reviewing court to engage in “two discrete analyses—one for the reasons and a separate one for the result”, Abella J described the reasonableness analysis as a “more organic exercise—the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes.”⁸²

As noted in *Catalyst Paper Corp. v North Cowichan (District)* (following *Dunsmuir*), “reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors.”⁸³ In the context of cases in which the issue being reviewed involves the tribunal’s interpretation of a specific statutory provision, many reviewing courts engage in a process of statutory interpretation in order to determine whether the “decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.”⁸⁴ Abella J, who delivered the judgment of the Court in *Celgene Corp. v Canada (Attorney General)* [*Celgene*], described “statutory interpretation [as] involv[ing] a consideration of the ordinary meaning of the words used and the statutory context in which they are found.... The words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute.”⁸⁵

Reviewing courts engage in the process of statutory interpretation, at least theoretically, not to determine whether they would agree with the outcome reached by the tribunal (this would be an inappropriate application of the correctness standard in the context of a reasonableness analysis), but to determine the range of possible outcomes (thus allowing the reviewing court to determine whether the tribunal’s decision fell within the range of possible, acceptable outcomes, even if it is not the outcome that the reviewing court itself would have adopted).⁸⁶

This is not to say, however, that some courts engaged in this process of statutory interpretation do not “inadvertently slip into a more intrusive, correctness review”.⁸⁷ This concern was noted by Binnie J in *ATA*.⁸⁸ Binnie J pointed to two cases—*Dunsmuir*⁸⁹ and *Canada (Canadian Human Rights Commission) v Canada (Attorney General)* [*CHRC*]⁹⁰—in which he argued that “the intensity of scrutiny” applied by the reviewing courts was “not far removed from a correctness analysis”.⁹¹ Similarly, Gus Van Harten, Gerald Heckman and David J. Mullan have noted that

[o]ccasionally, there are cases, usually involving issues of legal interpretation, where a court applies the reasonableness standard in a way that appears to show little if any deference to the decision-maker. In such cases, it is pertinent to ask whether the court carried through on its commitment to defer or whether, instead, the court engaged in correctness review ‘in disguise.’⁹²

In addition to questioning whether some reviewing courts might use this process to engage in “correctness review ‘in disguise’”,⁹³ it can also be asked, more broadly, how the range of possible outcomes should be determined. In the context of a case involving statutory interpretation, should the court’s determination of statutory purposes trump that of the administrative tribunal? This approach sits uneasily with the idea of “deference as respect” articulated by David Dyzenhaus and adopted by the SCC in *Dunsmuir*.⁹⁴ Rather, it seems to perpetuate a policy of judicial supremacy over the actions of administrative tribunals.⁹⁵

The resolution of this question is beyond the scope of this chapter to address. Instead, this chapter will merely note that the approach to the reasonableness analysis described above, in which the reviewing court determines whether the outcome reached by the tribunal falls within the range of possible, acceptable outcomes after having engaged in the process of statutory interpretation in order to ascertain the range of outcomes, has been adopted in numerous SCC and Canadian appellate decisions since *Dunsmuir*.

In many of these cases, reviewing courts have found decisions of administrative tribunals to be unreasonable, at least in part on

the basis that the tribunal's approach to or interpretation of specific statutory provisions was inconsistent with the purpose of the statute, as interpreted by the reviewing court. In *Dunsmuir*, for instance, Bastarache and LeBel JJ critiqued the "reasoning process of the adjudicator", suggesting that it was "deeply flawed" in that "[i]t relied on and led to a construction of the statute that fell outside of the range of admissible statutory interpretations".⁹⁶

A similar approach was adopted in *CHRC*.⁹⁷ After having engaged in an interpretive process to determine the range of possible outcomes, LeBel and Cromwell JJ (McLachlin CJ and Deschamps, Abella, Charron and Rothstein JJ concurring), stated that

[i]n our view, the text, context and purpose of the legislation clearly show that there is no authority in the Tribunal to award legal costs and that there is no other reasonable interpretation of the relevant provisions. Faced with a difficult point of statutory interpretation and conflicting judicial authority, the Tribunal adopted a dictionary meaning of "expenses" and articulated what it considered to be a beneficial policy outcome rather than engage in an interpretive process taking account of the text, context and purpose of the provisions in issue. In our respectful view, this led the Tribunal to adopt an unreasonable interpretation of the provisions.⁹⁸

In *Halifax (Regional Municipality) v Canada (Public Works and Government Services)* [*HRM*]⁹⁹ (Cromwell J, writing for the Court), the Minister of Public Works and Government Services' determination that "roughly 40 acres of the Halifax Citadel National Historic Site of Canada has only nominal value for the purposes of municipal taxation"¹⁰⁰ was held to be unreasonable on the basis that it was "inconsistent with the Act's purpose".¹⁰¹ As the Minister had adopted an approach that would "[defeat] Parliament's purpose", the outcome reached as a result of this approach was determined to fall outside the range of possible, acceptable outcomes.¹⁰²

This type of approach to the reasonableness analysis has also been adopted in several decisions of appellate courts. For instance, in *Toronto Police Services Board*, Moldaver JA (as he then was) (Sharpe

and Blair JJA concurring) restored the order of the Adjudicator and set aside the order of the Divisional Court (which had found the Adjudicator’s interpretation of s 2(1)(b) of the *Municipal Freedom of Information and Protection of Privacy Act* to be unreasonable) on the basis that “[t]he Divisional Court [gave] s 2(1)(b) a narrow construction—one which...[failed] to reflect the purpose and spirit of the Act and the generous approach to access [to information] contemplated by it”.¹⁰³

Celgene is an example of a decision in which the SCC determined that the tribunal’s decision fell within the range of possible, acceptable outcomes (and was thus reasonable) largely on the basis that the tribunal’s decision was consistent with the purpose of the statutory provisions, as interpreted by the reviewing court.¹⁰⁴ In *Celgene*, Abella J framed the question to be decided as whether the interpretation adopted by the Patent Medicine Prices Review Board (Board) of ss. 80(1)(b), 83(1) and 85 of the *Patent Act* was “justified.”¹⁰⁵ In order to determine the answer to this question, Abella J relied on general principles of statutory interpretation, noting that the Board adopted an interpretation of these provisions that was “guided by the consumer protection goals of its mandate”¹⁰⁶ and stating that “[t]he Board’s interpretive choice is supported by the legislative history”.¹⁰⁷ Abella J determined that in adopting an interpretation of ss. 80(1)(b), 83(1) and 85 of the *Patent Act* that was consistent with the Board’s consumer protection purpose, the Board had reached an outcome that fell within the range of possible, acceptable outcomes.

As this section has demonstrated, in a number of cases, reviewing courts have found tribunal decisions to be either reasonable or unreasonable on the basis that the tribunal had adopted an approach to or an interpretation of statutory provisions that was either consistent with or inconsistent with the purpose of the legislation, as interpreted by the reviewing court. In the next section, I will argue that consistent with the decisions described above, Abella J, in *Alberta (Education)*, determined that the Copyright Board’s decision was unreasonable on the basis that it adopted an approach to fair dealing that was inconsistent with the purpose of copyright, as interpreted by the SCC.

C. The Application of the Reasonableness Standard in *Alberta (Education)*

a. The Continuing Evolution of the Purpose of the *Copyright Act*, as Interpreted by the SCC

i. *The Author-centric Approach to Copyright*

In *Bell*, Abella J, writing for the Court, referenced the “author-centric” view of copyright in her reasons for judgment.¹⁰⁸ She described this view of copyright as “focus[ing] on the exclusive right of authors and copyright owners to control how their works were used in the marketplace,”¹⁰⁹ and cited *Bishop v Stevens* as an example of an SCC case in which this approach to copyright was employed.¹¹⁰ Abella J’s description of the author-centric approach to copyright can be seen as implying that the purpose of the *Copyright Act*, under this approach, is to reward and protect authors and copyright owners.¹¹¹ As well, based on this statement, it can be suggested that under the author-centric approach to copyright, owners’ rights are to be interpreted broadly, while exceptions to copyright infringement are to be interpreted narrowly. Interpreting the *Copyright Act* in such a manner would be consistent with the focus of the *Copyright Act* being on authors and copyright owners (and not on users or the broader public interest, for instance). Citing Carys Craig, Abella J noted that under the author-centric approach to copyright, “any benefit the public might derive from the copyright system [is] only a fortunate by-product of private entitlement.”¹¹² Based on this statement, it can be suggested that the author-centric approach privileges private interests over broad consideration of the public interest.

In *Bell*, Abella J described the author-centric approach to copyright as the “former framework” and the “earlier” view of copyright.¹¹³ This choice of diction is significant. It implies that this view of copyright was, at one time, the dominant conception of copyright in Canada. It also implies that this is no longer the case. What, then, is the current governing approach to copyright in Canada?

ii. *The Instrumental–Public Interest Approach*

Beginning in *Théberge* and most recently affirmed in the pentalogy,¹¹⁴ the SCC has interpreted the *Copyright Act* as supporting

a conceptualization of copyright as a mechanism (or instrument) employed to achieve a specific outcome. I refer to this approach to copyright as the instrumental–public interest approach. Under this approach to copyright, the purpose of the *Copyright Act* is to advance the public interest by contributing to the development of a “robustly cultured and intellectual public domain.”¹¹⁵

Copyright contributes to the development of the public domain by providing an economic incentive for the creation and dissemination of works of the arts and intellect.¹¹⁶ This economic incentive spurs the creation and dissemination of works that would otherwise not have been created or disseminated. Once created and made public, these works become available for certain types of unauthorized uses (thus facilitating future creation and contributing to a vibrant public domain). In order to ensure that the economic incentive of copyright functions properly (and that individuals continue to invest in the creation and dissemination of expression), copyright owners must receive a “just” or “fair reward.”¹¹⁷ Ensuring a fair reward for copyright owners is thus consistent with and advances the public interest in a vibrant public domain. As such, it is an integral part of the instrumental–public interest approach to copyright.

Interpreting the rights of copyright owners too broadly, however, could negatively impact and run counter to the public interest. To quote McLachlin CJ, the “public domain...flourish[es]” when “others are able to produce new works by building on the ideas and information contained in the works of others.”¹¹⁸ It becomes impoverished if copyright owners are able to restrict, to too great a degree, the ideas, information and expression contained within their works.

Ensuring that information and expression is disseminated is crucial in maintaining a vibrant public domain. Works that are not disseminated (or that are not disseminated broadly) cannot be accessed or used by others. As noted by Binnie J in *Théberge*, “[e]xcessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization.”¹¹⁹

Recognizing that overcompensating copyright owners risks harming the public interest in a vibrant public domain, the SCC has taken several steps to limit the rights of copyright owners. First, it has emphasized that the rights of copyright owners are of a “limited nature”.¹²⁰ As noted by Binnie J in *Théberge*, “[i]n crassly economic terms it would be as inefficient to overcompensate artists and authors ... as it would be self-defeating to undercompensate them”.¹²¹ Second, the SCC has also reframed exceptions, limitations and defences to copyright infringement as “users’ rights”.¹²² Users’ rights help to mediate “[e]xcessive control by holders of copyrights” and, as a result, to protect the public domain.¹²³ In so doing, users’ rights play an “essential” role in “furthering the public interest objectives of the *Copyright Act*”.¹²⁴ Fair dealing, the broadest users’ right set out in the *Copyright Act*, contributes to the development of a vibrant public domain by giving individuals the right to reproduce, build upon and disseminate works of the arts and intellect in various ways.

Under the instrumental–public interest approach, fair dealing and other user rights are seen as an “integral part of the *Copyright Act*”.¹²⁵ As such, they “must not be interpreted restrictively”.¹²⁶ The role played by the fairness analysis (the second step in the fair dealing analysis) is particularly important in “balanc[ing] between protection and access”¹²⁷ and in advancing the public interest in a vibrant public domain. Abella J has described the fairness analysis as the part of the test in which the “analytical heavy-hitting is done in determining whether the dealing was fair”.¹²⁸ It is thus crucial, under the instrumental–public interest approach to copyright, that the fairness analysis not be interpreted restrictively.¹²⁹ Under this approach to copyright, both fair dealing (broadly) and the fairness analysis (specifically) must be given large, liberal interpretations.

b. Abella J’s Decision in *Alberta (Education)* Focuses on the Approach to Fair Dealing Adopted by the Copyright Board

In his dissenting reasons, Rothstein J suggested that Abella J “seize[d] upon a few arguable statements or intermediate findings to conclude that the overall decision is unreasonable”.¹³⁰ I suggest that

this is not the case. Although Abella J does not explicitly ground her decision in the text of *Dunsmuir* or other, more recent SCC decisions in the area of administrative law, I suggest that Abella J—in a manner consistent with the way in which *Dunsmuir* has been interpreted by numerous SCC and Court of Appeal decisions, as described above—found the decision of the Copyright Board to be unreasonable on the basis that it adopted an approach to fair dealing that was inconsistent with the purpose of the *Copyright Act*, as interpreted by the SCC. By virtue of its adoption of such an approach, the outcome reached by the Copyright Board fell outside the range of “possible, acceptable outcomes which are defensible in respect of the facts and law”.¹³¹

The contention that Abella J’s reasons for judgment focused on the overall approach to fair dealing taken by the Copyright Board and not to a few isolated statements or findings is supported by reference to Abella J’s reasons for judgment. On numerous occasions throughout her reasons for judgment, Abella J indicated that she took issue either with how the Copyright Board “approached” a fairness factor, or the “approach” taken by the Copyright Board in the context of its fair dealing analysis. For instance, Abella J stated that “[i]n my view, the key problem is in the way the Board *approached* the ‘purpose of the dealing’ factor”;¹³² she distinguished several authorities from the United Kingdom on the basis that “courts in the U.K. have tended to take a more restrictive *approach* to determining the ‘purpose’ of the dealing than does *CCH*”;¹³³ she critiqued “[t]he Board’s *approach*” for “driv[ing] an artificial wedge” into what she states are the “unified purposes” of “teacher/copier and student/user”;¹³⁴ she stated that “[t]he Board’s skewed characterization of the teachers’ role...also led to a problematic *approach* to the ‘amount of the dealing’ factor”;¹³⁵ noting that this was a “flawed *approach*”;¹³⁶ she stated that she “[had] difficulty with how the Board *approached* the ‘alternatives to the dealing’ factor”;¹³⁷ noting that “the Board’s *approach*” led to a “demonstrably unrealistic outcome”;¹³⁸ and stated that “[t]he final problematic application of a fairness factor by the Board was its *approach* to the ‘effect of the dealing on the work’”.¹³⁹ In the penultimate paragraph in her decision, Abella J connected the Board’s approach to the outcome that it reached, stating that “[b]ecause the Board’s finding of unfairness was based on what was, in

my respectful view, a misapplication of the *CCH* factors, its outcome was rendered unreasonable”.¹⁴⁰

I will proceed by discussing the approach to copyright adopted by the Copyright Board in *Alberta (Education)*. I will demonstrate that the Copyright Board, in its decision, adopted an interpretation of fair dealing that was inconsistent with the purpose of the *Copyright Act*, as interpreted by the SCC. In so doing, it arrived at an outcome that was outside of the range of possible, acceptable outcomes.

c. The Approach to Fair Dealing Adopted by the Copyright Board in *Alberta (Education)* was Inconsistent with the Purpose of the *Copyright Act*, as Interpreted by the SCC

Although acknowledging that *CCH* is the “unavoidable starting point of any analysis of fair dealing”,¹⁴¹ the Copyright Board, through the course of its decision, interpreted and applied both *CCH* and fair dealing more generally in a narrow, restrictive manner. Such an approach is inconsistent with the purpose of the *Copyright Act*, as interpreted by the SCC, namely to contribute to the development of a strong, robust public domain.¹⁴² This purpose, as outlined above, requires a large, liberal interpretation to be given to user’s rights such as fair dealing.

The approach adopted by the Copyright Board, on the other hand, is more consistent with the author-centric approach, under which the purpose of the *Copyright Act* is to reward and protect authors and copyright owners. The Copyright Board adopted such an approach in order to have its analysis “conform with”¹⁴³ article 9(2) of the Berne Convention¹⁴⁴ and article 13 of the TRIPS Agreement¹⁴⁵ and to reach the only result that it believed was consistent with these two treaty provisions—a result it viewed as “self-evident”—namely, “that copies made on a teacher’s initiative for his or her students either conflict with the normal exploitation of the work or unreasonably prejudice the legitimate interests of the rights holders” and as a result ought not to satisfy fair dealing.¹⁴⁶

The Copyright Board’s decision to interpret fair dealing in a manner consistent with the Berne Convention and TRIPS Agreement—done on the basis of its view that “the Supreme Court has been placing

significant emphasis on treaties that Canada has not yet ratified; it seems even more crucial to account for those that have been”¹⁴⁷—is not in itself necessarily unreasonable.¹⁴⁸ However, both article 9(2) of the Berne Convention and article 13 of the TRIPS Agreement can be seen as presenting a view of limitations and exceptions to copyright infringement that is inconsistent with the purpose of the *Copyright Act*, as interpreted by the SCC. Both article 9(2) of the Berne Convention and article 13 of the TRIPS Agreement portray limitations and exceptions to copyright infringement as carve-outs from the copyright owner’s exclusive rights, as opposed to integral elements of the copyright scheme that must not be interpreted restrictively. In interpreting *CCH* through the lens of these two articles, the Copyright Board adopted an approach to copyright that was more reflective of now-rejected interpretations of the purpose of the *Copyright Act*—namely, to reward and protect authors and copyright owners—than contemporary interpretations of its purpose, as interpreted by the SCC.

The Copyright Board’s adoption of a narrow, restrictive interpretation of fair dealing is evident in several ways that will be described in more detail below. First, several statements from *CCH* that point to the continuing evolution in the SCC’s interpretation of the purpose of the *Copyright Act* were absent from the Copyright Board’s decision in *Alberta (Education)*; second, the Copyright Board reframed one of the central conclusions reached in *CCH* in a manner that is more reflective of now-rejected interpretations of the purpose of the *Copyright Act* than contemporary interpretations of its purpose, as interpreted by the SCC; third, the Copyright Board repeatedly adopted a narrow interpretation of the scope of *CCH*; and fourth, the Copyright Board made certain assumptions when evaluating the fairness factors set out in *CCH* that led it to conclude that the factors tended to unfairness. Taken together, these elements of the Copyright Board’s decision suggest that the approach to fair dealing adopted by the Copyright Board was inconsistent with the purpose of the *Copyright Act*, as interpreted by the SCC.

As noted above, the Copyright Board began its fair dealing analysis by stating that “*CCH* now is the unavoidable starting point of any analysis of the notion of fair dealing”.¹⁴⁹ It then set out what it viewed

as the “substance of the propositions resulting from that decision”.¹⁵⁰
 The Copyright Board summarized *CCH*’s main principles as follows:

76 First, all exceptions provided in the Act are now users’ rights. They must be given a liberal interpretation, according to the purposes of copyright in general, including maintaining a balance between the rights of copyright holders and the interests of users, and the exception in particular.

77 Second, the fair dealing exception applies only to certain allowable purposes: private study, research, criticism, review, and news reporting. Dealings for other purposes are not covered by the exception, even if they would otherwise be fair.

78 Third, dealings for an allowable purpose are not ipso facto fair. The fairness of the dealing is assessed separately, according to an open list of factors including the purpose, character and amount of the dealing, available alternatives, the nature of the work and the effect of the dealing on the work.

79 Fourth, since all of the conditions for application of the exception must be satisfied, the exception will not apply as long as any one condition is not met.

80 Fifth, a practice or a system may constitute a “dealing” just as well as an individual act. The exception can benefit a practice or system if it is established either that all of the individual dealings are research-based and fair, or that the practice or the system itself is research-based and fair.

81 Sixth, the notion of fair dealing is a legal concept that must be interpreted according to the framework laid down in *CCH*. [...] ¹⁵¹

Certain important elements of *CCH* are absent from this summary. While the mere fact that “[r]easons may not include all the arguments, statutory provisions, jurisprudence or other details the

reviewing judge would have preferred...does not impugn the validity of either the reasons or the result under a reasonableness analysis”, as noted by Abella J in *NLNU*,¹⁵² the manner in which the Copyright Board summarized *CCH* reveals inconsistencies, with respect to the scope of defences to copyright infringement, between the approach adopted by the Copyright Board and the purpose of the *Copyright Act*, as interpreted by the SCC. Three elements of *CCH*, in particular, are absent from the Copyright Board’s summary.

First, in *CCH*, fair dealing is referred to as an “integral part of the *Copyright Act*”¹⁵³ and an “integral part of the scheme of copyright law.”¹⁵⁴ Reference to fair dealing as being “integral” to the *Copyright Act* is absent from the Copyright Board’s decision. This absence can perhaps be attributed to the Copyright Board’s view that the *Copyright Act* ought to be interpreted in a manner consistent with the Berne Convention and the TRIPS Agreement. Conceiving of fair dealing as an “integral” part of the *Copyright Act* can be seen as inconsistent with the adoption of a view of fair dealing that is “confine[d]” to “certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder”, as articulated in article 13 of the TRIPS Agreement.¹⁵⁵

Second, in *CCH*, McLachlin CJ referenced Binnie J’s statement in *Théberge* that one must not only “recogniz[e] the creator’s rights but...giv[e] due weight to their limited nature.”¹⁵⁶ Reference to the “limited nature” of creator’s rights is absent from the Copyright Board’s decision. Instead, the Copyright Board noted that its approach “helps to ‘maintain the proper balance between the rights of a copyright owner and users’ interests’ and avoid restricting them unduly (since both copyright owners’ interests and users’ rights can be unduly restricted)”.¹⁵⁷ The idea that the Copyright Board should guard against interpreting the *Copyright Act* in a manner that would unduly restrict the rights of copyright owners (perhaps through a large and liberal approach to users’ rights) echoes the language used in article 9(2) of the Berne Convention and article 13 of the TRIPS Agreement, and is more consistent with the author-centric approach to copyright than with the purpose of the *Copyright Act*, as interpreted by the SCC. To refer to the interests of copyright owners as being “limited”—as was done in *CCH*—could be seen as being inconsistent with the language

used in article 9(2) of the Berne Convention and article 13 of the TRIPS Agreement, which focuses on the need for states to ensure that exceptions or limitations to exclusive rights are not interpreted in an overbroad manner.

Third, in *CCH*, in the context of discussing the originality standard, McLachlin CJ stated that creating “safeguard[s] against the author being overcompensated for his or her work...helps ensure that there is room for the public domain to flourish as others are able to produce new works by building on the ideas and information contained in the works of others.”¹⁵⁸ No reference to this statement, or to the idea of the public domain more generally, is made in the Copyright Board’s decision in *Alberta (Education)*. Although the Copyright Board was not required to include reference to this statement (or the concept of the public domain, more broadly) in its reasons, its absence again suggests an inconsistency between the approach adopted by the Copyright Board and the purpose of the *Copyright Act*, as interpreted by the SCC.

In addition to selectively quoting from and reframing elements of *CCH*, the Copyright Board, through the course of its decision in *Alberta (Education)*, also repeatedly interpreted *CCH* in a restrictive manner. It did so in several ways. First, while noting that the “notion of research must be interpreted broadly,”¹⁵⁹ a comment that draws directly from the statement by the SCC in *CCH* that “[r]esearch’ must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained,”¹⁶⁰ the Copyright Board then stated that “it appears that *CCH* did not challenge previous interpretations of the notion of private study.”¹⁶¹ In making this statement, the Copyright Board thus chose not to interpret *CCH* as authority for the proposition that a “large and liberal interpretation” ought to be applied to all fair dealing purposes (and not simply the purpose at issue in *CCH* itself).¹⁶² As well as serving as a restrictive interpretation of *CCH*, this statement is also inconsistent with the language used by the SCC in *CCH*. Three paragraphs after stating that “research’ must be given a large and liberal interpretation,” the SCC broadens the scope of this statement, noting that “the allowable purposes under the *Copyright Act*, namely research, private study, criticism, review or news reporting...should not be given a restrictive interpretation or

this could result in the undue restriction of users' rights".¹⁶³

Second, the Copyright Board, in the course of its decision, relied on judgments in which a restrictive approach to fair dealing was adopted. For instance, in support of its view that the purpose of the dealing should be analyzed from the perspective of the teacher or copier rather than from the perspective of the ultimate user, the Copyright Board relied heavily on three decisions, two of which were from the United Kingdom. As noted by Abella J, however, "courts in the U.K. have tended to take a more restrictive approach to determining the 'purpose' of the dealing than does *CCH*".¹⁶⁴ Thus, relying on these decisions can itself be seen as inconsistent with the purpose of the *Copyright Act*, as interpreted by the SCC (which mandates the adoption of a large and liberal interpretation to fair dealing).

A third example of the Copyright Board's application of a restrictive interpretation of *CCH* is found in the way in which it distinguished between the role of the teacher in a school and that of staff at the Great Library. Describing these two roles as "scarcely comparable", the Copyright Board noted that¹⁶⁵

[T]he teacher-student relationship is not the same as that between the Great Library and lawyers. The Great Library is simply an extension of a lawyer's will. A teacher does not merely act on behalf of a student, given that, to a large extent, it is the teacher who instructs the student what to do with the material copied.¹⁶⁶

In constructing the comparison between teachers and staff at the Great Library in such a manner, the Copyright Board narrowed the ambit of *CCH* to situations in which an intermediary acts as an extension of the will of the user. In so doing, the Copyright Board was able to avoid overtly challenging the determination in *CCH* while concluding that, in this instance, fair dealing was not made out.

The characterization of teachers adopted by the Copyright Board (as performing a role very different from staff at the Great Library) was not the only characterization that could have been adopted. Instead of being seen as having roles that are "scarcely comparable", teachers and the staff at the Great Library could instead have been seen as playing similar roles, in that both attempt to increase access to

works of the arts and intellect. This appears to be the approach taken by Abella J, who noted that “[t]he teacher...facilitates wider access to [the] limited number of [purchased originals] by making copies available to all students who need them”.¹⁶⁷ This approach is consistent with the purpose of the *Copyright Act*, as interpreted by the SCC.

A fourth instance of the Copyright Board adopting a narrow, restrictive interpretation of *CCH* is found in the way in which the Copyright Board interpreted *CCH* as indicating that in order for a photocopy made by one party (A) for another party (B) to qualify for the purpose of research, B must request the copy (thus imposing a procedural requirement not dictated by the SCC in *CCH*). Abella J pointed out that

Nowhere in *CCH* did the Court suggest that the lawyer had to ‘request’ the photocopies of legal works from the Great Library before those copies could be said to be for the purpose of ‘research.’ On the contrary, what the Court found was that the copies of legal works were ‘necessary conditions of research and thus part of the research process’... Similarly, photocopies made by a teacher and provided to primary and secondary school students are an essential element in the research and private study undertaken by those students.¹⁶⁸

The final way in which the Copyright Board interpreted and applied fair dealing in a manner inconsistent with the purpose of the *Copyright Act*, as interpreted by the SCC, is demonstrated in the assumptions made by the Copyright Board when evaluating the fairness factors; assumptions that led it to conclude that the factors tended to unfairness and that, as a result, the dealing was not fair. For instance, when evaluating the alternatives to the dealing factor, the Copyright Board determined that it tended to unfairness on the basis that there was an alternative to the dealing—namely, that educational institutions could “[b]uy the originals to distribute to students or to place in the library for consultation.”¹⁶⁹ The assumption made by the Copyright Board in the context of reaching this conclusion was that schools could afford to purchase multiple copies of original texts to distribute to students. The Copyright Board stated that “[t]he fact

that the establishment has limited means does not seem to bar the recognition of this point.”¹⁷⁰ This is a curious statement, given that in the previous sentence, the Copyright Board notes that this option (namely, purchasing the book) is, “from a practical standpoint...not open to the student.”¹⁷¹

On the basis of this assumption, the Copyright Board was able to conclude that the alternatives to the dealing factor tended to unfairness (a conclusion that contributed to the Copyright Board’s ultimate conclusion that the dealing at issue was unfair). Abella J was highly critical of the Copyright Board’s suggestion that schools could “buy the original texts to distribute to each student,” describing this suggestion as “a demonstrably unrealistic outcome.”¹⁷²

With respect to two other factors to be considered in the fair dealing analysis, namely the amount of the dealing and the effect of the dealing on the work, the Copyright Board made assumptions, in the apparent absence of evidence, that led it to conclude that the factors tended to unfairness. In CCH, the SCC had noted that in assessing the amount of the dealing, “[b]oth the amount of the dealing and importance of the work allegedly infringed should be considered.”¹⁷³ In applying this factor to the facts of CCH, the SCC noted that “[a]lthough the dealings might not be fair if a specific patron of the Great Library submitted numerous requests for multiple reported judicial decisions from the same reported series over a short period of time, there is no evidence that this has occurred.”¹⁷⁴ In the absence of evidence, the SCC did not accept this finding (and as a result, concluded that this factor tended to fairness).

The Copyright Board, however, adopted a different approach in *Alberta (Education)*. Although noting that “it seems that teachers generally limit themselves to reproducing relatively short excerpts from a work to complement the main textbook” (a result which should cause this factor to tend to fairness), the Copyright Board then stated that “[on] the other hand, in our view, it is more than likely that class sets will be subject to ‘numerous requests for...the same...series,’ which would tend to make the amount of the dealing unfair on the whole.”¹⁷⁵ It is unclear on what evidentiary basis (if any) the Copyright Board reached this conclusion.¹⁷⁶ Reaching this

conclusion in the absence of evidence would be inconsistent with the SCC's decision in *CCH*, and with the purpose of the *Copyright Act*, as interpreted by the SCC. One way to ensure that copyright owners' rights are not interpreted in an overbroad manner is to insist on evidence demonstrating the amount of the work that was used by the party relying on fair dealing, and, in the absence of such evidence, to decline to find that this factor tends to unfairness.

When analyzing the factor that addresses the effect of the dealing on the work, the Copyright Board also made assumptions, in the apparent absence of evidence, that led it to conclude that the dealing was unfair. As noted by the SCC in *CCH*, the effect of the dealing factor looks at whether the “reproduced work is likely to compete with the market of the original work”.¹⁷⁷ If so, “this may suggest that the dealing is not fair”.¹⁷⁸ Applying this factor to the facts of *CCH*, on the basis that “no evidence was tendered to show...that the publishers' markets had been negatively affected by the Law Society's custom photocopying service”,¹⁷⁹ the SCC refused to find that “the market for the publishers' works had decreased as a result of [the copies in question] having been made”.¹⁸⁰

The Copyright Board, however, in its decision in *Alberta (Education)*, accepted the “uncontradicted evidence from textbook publishers...that textbook sales have shrunk by more than 30 per cent in 20 years”, noted that “[s]everal factors contributed to this decline, including the adoption of semester teaching, decrease in registrations, longer lifespan of textbooks, use of the Internet and other electronic tools, resource-based learning and use of class sets”,¹⁸¹ and, despite the fact that they were “not able to determine precisely to what extent each factor [described above] contributed to this decline”,¹⁸² concluded that “the impact of photocopies...is sufficiently important to compete with the original to an extent that makes the dealing unfair”.¹⁸³ To paraphrase the SCC judgment in *CCH*, although “no evidence was tendered to show that the market for the publishers' works had decreased *as a result* of these copies having been made”,¹⁸⁴ the Copyright Board still “conclude[d] that photocopies made on a teacher's initiative for his or her students have an unfair effect on the works in Access Copyright's repertoire.”¹⁸⁵

Referring to the lack of evidence on this point as an “evidentiary

vacuum”;¹⁸⁶ Abella J criticized the Copyright Board’s conclusion that the photocopies had a sufficiently detrimental impact on the original to make this factor tend to unfairness, pointing out that “other than the bald fact of a decline in sales over 20 years, there is no evidence from Access Copyright demonstrating any link between photocopying short excerpts and the decline in textbook sales”.¹⁸⁷

In reaching its conclusion in the absence of such evidence, the Copyright Board adopted an approach to fair dealing that is inconsistent with the purpose of the *Copyright Act*, as interpreted by the SCC. This purpose requires a large and liberal interpretation to be given to users’ rights, and for courts and the Copyright Board to ensure that the rights of copyright owners are not overprotected. One way through which these outcomes can be achieved is to insist—before concluding that the factor addressing the effect of the dealing on the work tends to unfairness—on evidence either linking the dealing with negative economic consequences for the work or works in question, or establishing that the dealing resulted in negative economic consequences.

In the above analysis, I have suggested that the approach to copyright adopted by the Copyright Board is inconsistent with the purpose of the *Copyright Act*, as interpreted by the SCC. Although the Copyright Board framed its decision within the language of *CCH* (in which the SCC continued the process of articulating the modern understanding of the purpose of the *Copyright Act* as promoting an instrumental–public interest approach to copyright), its decision was shaped by its view that the outcome must “conform with” article 9(2) of the Berne Convention and article 13 of the TRIPS Agreement.¹⁸⁸ These two articles emphasize the ability of the copyright owner to control and to profit from the use of his or her works. While they contemplate (and accept) that there may be some limitations and exceptions to owners’ exclusive rights, these exceptions are limited.

Such an approach, as described above, is inconsistent with the purpose of the *Copyright Act*, as interpreted by the SCC, through which both copyright and user’s rights work in concert to advance the public interest by contributing to the development of a vibrant public domain, and in which users’ rights are given a large and liberal interpretation. Instead, the approach adopted by the Copyright Board

is more consistent with the author-centric approach to copyright, an approach that was explicitly rejected by the SCC in the pentalogy. Under this approach, exceptions and limitations to copyright infringement are narrowly interpreted in order to maximize the rewards given to (and protection offered to) authors and copyright owners.

As a result of its adoption of an approach to fair dealing that is inconsistent with the purpose of the *Copyright Act*, as interpreted by the SCC, the Copyright Board reached an outcome that fell outside of the range of possible, acceptable outcomes (as defined by the SCC). While some commentators question whether reviewing courts should have the final say on determining the range of possible, acceptable outcomes, such an approach, as outlined above, is consistent with SCC and appellate jurisprudence both in *Dunsmuir* and post-*Dunsmuir*. Thus, the conclusion reached by Abella J—that the Copyright Board’s decision is unreasonable—can be seen as defensible under the approach to the reasonableness analysis adopted in authorities such as *Dunsmuir*, *CHRC*, *Celgene*, *HRM*, and *Toronto Police Services Board*.¹⁸⁹

III: Significance of *Alberta (Education)*

What, then, is the significance of *Alberta (Education)*? What does this decision portend for fair dealing, for the future of the Copyright Board, and for Canadian copyright law more generally? With respect to fair dealing, *Alberta (Education)* suggests that fair dealing is no longer merely “a matter of impression”.¹⁹⁰ Rather, it is rooted in and shaped by the purpose of the *Copyright Act*, as interpreted by the SCC—namely, to contribute to the development of a robust public domain. This purpose requires a broad interpretation to be given to fair dealing.

One question that flows from this conclusion involves the nature of the fairness analysis. Rothstein J’s dissenting reasons in *Alberta (Education)* can be seen as being grounded in an assumption that “fairness” is a discretionary concept, one that is open-ended and capable of multiple interpretations. In Rothstein J’s view, the Copyright Board ought to be given wide latitude to apply the fairness factors to the facts of a specific dispute as it sees fit.¹⁹¹ Such an approach is

suggested in cases like *Hubbard*, cited with approval in *CCH* as well as other Canadian copyright decisions.¹⁹² If Rothstein J is correct, and if fairness is an open-ended, discretionary concept, then there would be little scope for appellate review when applying the reasonableness standard.

However, one conclusion that we can draw from *Alberta (Education)* is that fairness (and fair dealing more generally) is not as discretionary a concept as it appears to be (and as previous decisions, including *CCH*, have suggested it to be). From *CCH*, we know that the fair dealing categories are to be applied in a large and liberal manner.¹⁹³ Abella J's reasons in *Alberta (Education)*, read alongside *Bell*, suggest that courts and the Copyright Board must also apply fairness in a large and liberal manner.

In *Bell*, Abella J affirmed the importance of fairness both to fair dealing and to the purpose of the *Copyright Act*. As stated by Abella J, the fairness analysis is the part of the fair dealing test in which the “analytical heavy-hitting is done in determining whether the dealing was fair.”¹⁹⁴ It is the core of fair dealing. As such, it plays a particularly important role in “balanc[ing] between protection and access.”¹⁹⁵ Consequently, it must not be interpreted restrictively. Abella J's reasons for judgment in *Alberta (Education)*, in which she adopted a large and liberal approach to fairness, can thus be seen as the logical extension of—and an application of—her reasons in *Bell*.

The Copyright Board failed to apply a large and liberal approach when evaluating fairness. Instead, it adopted a narrow, restrictive interpretation of fairness (and fair dealing more generally). In so doing, the Copyright Board adopted an interpretation of fair dealing that was inconsistent with the purpose of the *Copyright Act*, as interpreted by the SCC. This led it to arrive at an outcome that fell outside of the range of possible, acceptable outcomes.

If, following *Bell* and *Alberta (Education)*, fairness is now considered to be rooted in and shaped by the purpose of the *Copyright Act*, as opposed to being an open-ended, discretionary concept, might the fairness analysis itself have to be modified to reflect this shift? Is the list of factors outlined in *CCH* still a “useful analytical framework to govern determinations of fairness”, as McLachlin CJ referred to it?¹⁹⁶ Should this “structured approach” be reformed to

take into account the importance of fairness to fair dealing and to the purpose of the *Copyright Act*, as articulated by Abella J in *Bell*? If so, how might the fairness analysis be reformed? Should some factors dominate or have greater weight than others? Are some factors now irrelevant? Or, instead of modifying the “structured approach”, ought it be abandoned entirely in favour of a new approach to determining fairness (such as a proportionality analysis)? It remains to be seen how these questions, which are beyond the scope of this chapter to address, will play out in future jurisprudence.¹⁹⁷

With respect to the future of the Copyright Board and its impact on copyright policy, *Alberta (Education)* is authority for the principle that reviewing courts can challenge decisions of the Copyright Board on the basis that the Copyright Board applied the *Copyright Act* in a manner that was inconsistent with the purpose of copyright, as interpreted by the SCC. Post-*Alberta (Education)*, failure to apply the *Copyright Act* in a manner consistent with the purpose of copyright—as interpreted by the SCC in cases such as *Théberge*, *CCH*, *Bell*, and *Alberta (Education)*—can lead to the Copyright Board’s decision being overturned by reviewing courts.

This is not to say, however, that Abella J is dismissive of the ability of the Copyright Board to play a positive role in the development of Canadian copyright law. Based on her concurring reasons in *Rogers*, it appears that Abella J sees the Copyright Board as playing an important role in this process. Respectful of the Copyright Board’s expertise, Abella J would be prepared to defer to its judgments, even with respect to questions of law.

Nevertheless, in *Alberta (Education)*, Abella J emphasized that in interpreting and applying the *Copyright Act*, the Copyright Board must do so in a manner that is consistent with the purpose of the *Copyright Act*, as interpreted by the SCC. This approach—sitting uneasily with the idea of “deference as respect”¹⁹⁸—is consistent with what Sheila Wildeman refers to as an “[attitude] of judicial supremacy” through which reviewing courts “[set] strict limits of legality within which administrative reasoning is closely hedged”.¹⁹⁹

Seen through this lens, Abella J’s reasons in *Alberta (Education)* are consistent with her concurring reasons in *Rogers*. In *Rogers*, Abella J advocated for a deferential approach to be taken to decisions made

by the Copyright Board while maintaining, in *Alberta (Education)*, that it is the role of the Court to set the limits of legality within which the Copyright Board may reason, and while setting those limits more narrowly than Rothstein J thinks is acceptable (based on his dissenting reasons in *Alberta (Education)*).

The end result is that post-*Alberta (Education)*, the Copyright Board is significantly constrained in its ability to shape Canadian copyright law. Abella J's reasons for judgment in *Alberta (Education)* clarify that the Copyright Board does not have unlimited discretion under fairness (and fair dealing more broadly) to implement policy goals or promote values that are inconsistent with the purpose of the *Copyright Act*, as interpreted by the SCC.

It can be argued that Canadian copyright law and policy may suffer as a result of this outcome. If the Copyright Board does have “specialized expertise”, and if it does “[play] an important role in achieving the proper balance between [owners and users]”,²⁰⁰ then it could perhaps have offered interpretations of the purpose of the *Copyright Act* different from those set out by the SCC, contributing to the “wider constitutional project...of public justification...shared among the legislative, judicial, and executive/administrative branches.”²⁰¹ Wildeman refers to this “model of constitutional ordering” as “constitutional pluralism, wherein all three branches of government participate in working out the significance of the legal norms governing the exercise of state power.”²⁰² The ability of the Copyright Board to contribute to this project, in the context of the *Copyright Act*, is limited by *Alberta (Education)*.

Alberta (Education), however, will not necessarily lead to the marginalization of the Copyright Board, an institution described by Canadian academics as playing “a crucial but underappreciated role in shaping Canadian copyright policy”²⁰³ and a “pivotal role in balancing the seesaw of interests in Canada’s copyright playground.”²⁰⁴ Instead, *Alberta (Education)* can serve as the starting point for a new era in the history of the Copyright Board and in the development of Canadian copyright policy. If the Copyright Board responds to the SCC’s decision in *Alberta (Education)* by wholeheartedly embracing the purpose of the *Copyright Act*, as interpreted by the SCC, it can become what Abella J envisions based on her judgments in *Rogers*

and *Alberta (Education)*—a body that truly plays an important role in contributing to Canadian copyright policy by advancing the public interest in matters of copyright: that fairly rewards copyright owners; increases and facilitates access to works; and ultimately contributes to the development of a vibrant public domain. If the Copyright Board does not seize this opportunity, however, and continues to apply an approach to copyright that is inconsistent with the purpose of the *Copyright Act* as interpreted by the SCC, then Abella J’s reasons for judgment in *Alberta (Education)* provide reviewing courts with the framework through which they can—defensibly and in a manner consistent with prior jurisprudence—overturn the decisions of the Copyright Board on the basis that they are unreasonable.

The story of the pentalogy with respect to judicial review of Copyright Board decisions is thus not a story about inconsistency and the inadvertent application of an incorrect standard of review. It is instead a story about the continuing evolution of the SCC’s interpretation of the purpose of the *Copyright Act*—from rewarding and protecting authors and copyright owners, to contributing to the development of a robust public domain—a process that originated in *Théberge*, was advanced in *CCH*, and was articulated most recently in the pentalogy; of the fairness analysis and its shift from a discretionary, open-ended concept to one that is rooted in and shaped by the purpose of the *Copyright Act*; and of the tension between the SCC and the Copyright Board with respect to the proper interpretation of the purpose of the *Copyright Act*.

It is a story that points to two possible futures: one of continued tension between the SCC and the Copyright Board, and one in which both institutions work together toward a common purpose. Ultimately, it is up to the Copyright Board to write the epilogue to the story of the Canadian copyright pentalogy; to determine—based on whether it chooses to interpret the *Copyright Act* in a manner consistent with the purpose of the *Copyright Act*, as interpreted by the SCC—the future it wishes for itself.²⁰⁵



¹ I am grateful to Michael Geist, Diana Ginn, Meghan Murtha, Justine Pila, Sheila Wildeman and an anonymous reviewer for their valuable comments on an earlier draft of this chapter. Any errors or omissions are my responsibility alone.

² *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 SCR 231 <<http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9994/index.do>> [ESA]; *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283 <<http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9995/index.do>> [Rogers]; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36, [2012] 2 SCR 326 <<http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9996/index.do>> [Bell]; *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 SCR 345 <<http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9997/index.do>> [Alberta (Education)]; *Re:Sound v Motion Picture Theatre Associations of Canada*, 2012 SCC 38, [2012] 2 SCR 376 <<http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9999/index.do>> [Re:Sound]. Numerous individuals have referred to this set of five cases as the pentalogy, including Howard Knopf, Ariel Katz, and Michael Geist.

³ *Alberta (Education)*, *supra* note 2. Fair dealing is the broadest defence to copyright infringement set out in the *Copyright Act*, RSC 1985, c C-42 [*Copyright Act*] <<http://laws.justice.gc.ca/en/C-42/>>. Prior to the copyright pentalogy being handed down, the leading Canadian SCC decision to address fair dealing was *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339 <<http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/2125/index.do>> [CCH]. I will describe fair dealing in greater detail in Part II.A of this chapter.

⁴ *Statement of royalties to be collected by Access Copyright for the reprographic reproduction, in Canada, of works in its repertoire*, [2009] CBD No 6 at para 1 <<http://www.cb-cda.gc.ca/decisions/2009/Access-Copyright-2005-2009-Schools.pdf>> [Alberta (Education) (CB)].

⁵ *Ibid* at para 118.

⁶ *Alberta (Minister of Education) v Canadian Copyright Licensing Agency (c.o.b. Access Copyright)*, 2010 FCA 198 <<http://decisions.fca-caf.gc.ca/en/2010/2010fca198/2010fca198.html>> [Alberta (Education) (FCA)].

⁷ *Alberta (Education)*, *supra* note 2 at para 37.

⁸ *Ibid* at para 38.

⁹ *Ibid* at para 40.

¹⁰ *The Oxford English Dictionary*, 3d ed, *sub verbo* “pentalogy”.

¹¹ *Rogers*, *supra* note 2.

¹² *Théberge v Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 SCR 336 <<http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/1973/index.do>> [Théberge].

¹³ *Toronto Police Services Board v (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20 at para 49 <<http://www.ontariocourts.ca/decisions/2009/january/2009ONCA0020.pdf>> [Toronto Police Services Board].

¹⁴ *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47 <<http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/2408/index.do>> [*Dunsmuir*].

¹⁵ *Ibid.*

¹⁶ A comprehensive history of judicial review of Copyright Board decisions (and Copyright Appeal Board decisions) is beyond the scope of this chapter to address. For a detailed history, see YA Hynna, “Evolution of Judicial Review of Decisions of the Copyright Board” in Ysolde Gendreau, ed, *Institutions Administratives du Droit d’Auteur/Copyright Administrative Institutions* (Cowansville, QC: Les Éditions Yvon Blais Inc., 2002).

¹⁷ *Dunsmuir*, *supra* note 14 at para 1.

¹⁸ *Ibid* at para 34.

¹⁹ *Ibid* at para 54. See also the statement of Rothstein J, who delivered the reasons for judgment in *Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 SCR 654 at para 39 <<http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/7979/index.do>> [ATA], that “[w]hen considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness.”

²⁰ *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn. of Internet Providers*, 2002 FCA 166 at para 70 <<http://decisions.fca-caf.gc.ca/en/2002/2002fca166/2002fca166.html>> [*SOCAN v CAIP (FCA)*].

²¹ *Copyright Act*, *supra* note 3, s 66(1). As of 17 December 2012, the members of the Copyright Board are Mr. Justice William J Vancise (Chairman), Mr. Claude Majeau (Vice-Chairman and Chief Executive Officer), and Mr. Nelson J Landry (Member).

²² *Copyright Act*, *supra* note 3, s 66(3).

²³ *SOCAN v CAIP (FCA)*, *supra* note 20 at para 71.

²⁴ Section 28(1) of the *Federal Courts Act*, RSC 1985, c F-7, states that “[t]he Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals: ... (j) the Copyright Board established by the *Copyright Act*.”

²⁵ *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 SCR 427 <<http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/2159/index.do>> [*SOCAN v CAIP*]. *SOCAN v CAIP* was a decision in which the Copyright Board was required to interpret its home statute, the *Copyright Act*.

²⁶ LeBel J wrote reasons in which he disagreed solely with the “appropriate test for determining the location of an Internet communication under the *Copyright Act*” (*ibid* at para 134).

²⁷ *Ibid* at para 50.

²⁸ See, for instance, *Canadian Assn. of Broadcasters v Society of Composers, Authors and Music Publishers of Canada*, [1994] FCJ No 1540 (CA) [CAB 1994]; *Réseaux Premier Choix Inc. v Canadian Cable Television Association*, 1997 FCJ No 1723 (CA), Linden, Strayer and McDonald JJA <http://decisions.fca-caf.gc.ca/fr/1997/a-759-96_6037/a-759-96.html> [*Réseaux*]; and *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Booksellers* (1999) 1 CPR (4th) 80

(FCA) <http://decisions.fca-caf.gc.ca/en/1999/a-130-98_1482/a-130-98.html> [CAB 1999].

²⁹ CAB 1994, *supra* note 28 at para 15.

³⁰ *Shaw Cablesystems G.P. v Society of Composers, Authors and Music Publishers of Canada*, 2010 FCA 220 <<http://decisions.fca-caf.gc.ca/en/2010/2010fca220/2010fca220.html>> [Shaw].

³¹ *Ibid* at para 27. In reaching this conclusion, the FCA echoed earlier judgments such as *AVS Technologies Inc. v Canadian Mechanical Reproduction Rights Agency* (2000), 7 CPR (4th) 68 (FCA) <http://decisions.fca-caf.gc.ca/en/2000/a-19-00_2147/a-19-00.html> [AVS]; CAB 1994, *supra* note 28; *Réseaux*, *supra* note 28; and CAB 1999, *supra* note 28.

³² *Rogers*, *supra* note 2.

³³ In *ibid*, Rothstein J delivered the reasons for judgment, with McLachlin CJC and LeBel, Deschamps, Fish, Rothstein, Cromwell, Moldaver and Karakatsanis JJ concurring. Abella J wrote a separate set of concurring reasons.

³⁴ *Ibid* at para 15.

³⁵ *Ibid* at para 14. In this para, Rothstein J states that “[i]t 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.”

³⁶ As noted above, the same conclusion—albeit through a different line of reasoning—was reached by Binnie J, who delivered the reasons for judgment in *SOCAN v CAIP*, *supra* note 25 at para 15.

³⁷ *Rogers*, *supra* note 2 at paras 59-88.

³⁸ *Ibid* at para 65.

³⁹ *Ibid* at para 60.

⁴⁰ *Ibid* at para 61 [emphasis in original], citing *ATA*, *supra* note 19 at para 34.

⁴¹ *Rogers*, *supra* note 2 at para 60.

⁴² *Ibid* at para 88.

⁴³ *Ibid* at para 60.

⁴⁴ *Ibid* at para 68.

⁴⁵ *Ibid*.

⁴⁶ *SOCAN v CAIP*, *supra* note 25 at para 49.

⁴⁷ *Rogers*, *supra* note 2 at para 10.

⁴⁸ *SOCAN v CAIP*, *supra* note 25 at para 12.

⁴⁹ *Rogers*, *supra* note 2 at para 65.

⁵⁰ *Dunsmuir*, *supra* note 14 at para 166.

⁵¹ *Alberta (Education) (FCA)*, *supra* note 6.

⁵² *Ibid* at para 27.

- ⁵³ *Alberta (Education)*, *supra* note 2 at para 37.
- ⁵⁴ *Canadian Recording Industry Association v Society of Composers, Authors and Music Publishers of Canada*, 2010 FCA 322 at para 12 <<http://decisions.fca-caf.gc.ca/en/2010/2010fca322/2010fca322.html>>.
- ⁵⁵ *Alberta (Education)*, *supra* note 2 at paras 37, 41.
- ⁵⁶ *CCH*, *supra* note 3.
- ⁵⁷ *Ibid* at para 1.
- ⁵⁸ *Ibid* at para 4.
- ⁵⁹ *Ibid* at para 48.
- ⁶⁰ *Ibid*.
- ⁶¹ *Ibid*.
- ⁶² See *Copyright Act*, *supra* note 3 at ss 29-29.2.
- ⁶³ *CCH*, *supra* note 3 at para 48.
- ⁶⁴ *Copyright Act*, *supra* note 3 at ss 29-29.2.
- ⁶⁵ *Ibid*.
- ⁶⁶ *Ibid*.
- ⁶⁷ *CCH*, *supra* note 3 at para 52.
- ⁶⁸ *Hubbard v Vosper* (1971), [1972] 1 All ER 1023 (CA) at 1027 [*Hubbard*], cited in *CCH*, *supra* note 3 at para 52.
- ⁶⁹ *CCH*, *supra* note 3 at para 53.
- ⁷⁰ *Ibid*.
- ⁷¹ *Alberta (Education)*, *supra* note 2 at para 37.
- ⁷² *Ibid*.
- ⁷³ *Ibid* at para 38.
- ⁷⁴ *Ibid* at para 41.
- ⁷⁵ *Ibid* at para 40.
- ⁷⁶ *Ibid*.
- ⁷⁷ *CCH*, *supra* note 3 at para 52.
- ⁷⁸ *Dunsmuir*, *supra* note 14 at para 166.
- ⁷⁹ *Ibid* at para 47.
- ⁸⁰ *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 <<http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/7980/index.do>> [*NLNU*].
- ⁸¹ The main issues addressed by the SCC in *NLNU*, *ibid*, were whether the reasons offered by the arbitrator, in this specific instance, were reasonable and, more broadly, how reviewing courts are to conduct a reasonableness review where the question focuses on the adequacy of reasons.
- ⁸² *Ibid* at para 14.
- ⁸³ *Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2, [2012] 1 SCR 5 at para 18 <<http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/7987/index.do>> [*Catalyst*].

⁸⁴ *Dunsmuir*, *supra* note 14 at para 47.

⁸⁵ *Celgene Corp. v Canada (Attorney General)*, 2011 SCC 1, [2011] 1 SCR 3 at para 21 <<http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/7913/index.do>> [*Celgene*].

⁸⁶ For example, the Alberta Court of Appeal, in *P.A.L. v Alberta (Criminal Injuries Review Board)*, 2012 ABCA 177 <<http://www.albertacourts.ab.ca/jdb/2003-ca/civil/2012/2012abca0177.pdf>>, [*P.A.L.*], stated that “the issue of whether an interpretive outcome is or is not within a range of reasonable outcomes can *only* be determined by engaging in the interpretive process” (para 33).

⁸⁷ *Alberta (Education)*, *supra* note 2 at para 40.

⁸⁸ *ATA*, *supra* note 19.

⁸⁹ *Dunsmuir*, *supra* note 14.

⁹⁰ *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 53 <<http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/7969/index.do>> [*CHRC*].

⁹¹ *ATA*, *supra* note 19 at para 85.

⁹² Gus Van Harten, Gerald Heckman, David J Mullan, *Administrative Law: Cases, Text, and Materials*, 6th ed (Toronto: Emond Montgomery Publications, 2010) at 869.

⁹³ *Ibid.*

⁹⁴ David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy”, in M Taggart, ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279 at 286 (quoted with approval in *Dunsmuir*, *supra* note 14 at para 48).

⁹⁵ For a discussion of this issue, see Sheila Wildeman, “Pas de Deux: Deference and Non-Deference in Action” in CM Flood and L Sossin, eds, *Administrative Law in Context* (Toronto: Emond Montgomery, 2013) 323 [Wildeman]; see also David J Mullan, “*Dunsmuir v New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let’s Try Again!” (2008) 21 Can J Admin L & Prac 117.

⁹⁶ *Dunsmuir*, *supra* note 14 at para 72.

⁹⁷ *CHRC*, *supra* note 90.

⁹⁸ *Ibid* at para 64.

⁹⁹ *Halifax (Regional Municipality) v Canada (Public Works and Government Services)*, 2012 SCC 29, [2012] 2 SCR 108 <<http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9989/index.do>> [*HRM*].

¹⁰⁰ *Ibid* at para 1.

¹⁰¹ *Ibid* at para 5.

¹⁰² *Ibid* at para 47.

¹⁰³ *Toronto Police Services Board*, *supra* note 13 at para 49. For further examples, see also *Ontario (Ministry of Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2011 ONCA 32; *P.A.L.*, *supra* note 86.

¹⁰⁴ *Celgene*, *supra* note 85. Wildeman, *supra* note 95 at 370 refers to *Celgene* as a case that is “arguably exemplary of the potential for reconciliation of concerns for deference and for supervision of legality in reasonableness review”, citing, in

particular, the “close and respectful attention” given by the SCC “to the reasoning of the Board.”

¹⁰⁵ *Ibid* at para 20.

¹⁰⁶ *Ibid* at para 25.

¹⁰⁷ *Ibid* at para 26.

¹⁰⁸ *Bell, supra* note 2 at para 9. Abella J delivered the reasons for judgment for the Court (McLachlin CJC and LeBel, Deschamps, Fish, Rothstein, Cromwell, Moldaver and Karakatsanis JJ concurring).

¹⁰⁹ *Ibid* at para 9.

¹¹⁰ *Bishop v Stevens*, [1990] 2 SCR 467 at 478-79 <<http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/640/index.do>>.

¹¹¹ *Bell, supra* note 2 at para 9.

¹¹² *Ibid*, citing Carys J Craig, “Locke, Labour and Limiting the Author’s Right: A Warning against a Lockean Approach to Copyright Law” (2002), 28 *Queen’s LJ* 1 at 14-15.

¹¹³ *Ibid*.

¹¹⁴ See in particular *ibid*.

¹¹⁵ *Ibid* at para 10. For an in-depth discussion of the benefits of a robust public domain, see e.g. James Boyle, *The Public Domain* (New Haven: Yale University Press, 2010) and Carys J Craig, “The Canadian Public Domain: What, Where, and to What End?” (2010) 7 *CJLT* 221. See also Carys J Craig, “Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright” (2006) 56 *Univ of Toronto LJ* 75. In this work, Craig describes copyright as “a policy tool whose purpose is to advance our common interest in the vibrant social exchange of meaning” (110). She characterizes this “explanation for the copyright system...as a ‘public interest’ approach. According to the public interest approach, copyright law must be understood in light of its public purpose, which is to encourage the creation and dissemination of intellectual works” (108).

¹¹⁶ In *Théberge, supra* note 12 at para 12, Binnie J stated that “[g]enerally speaking, Canadian copyright law has traditionally been more concerned with economic than moral rights.” Craig, *supra* note 115 at 109, suggests that “[c]opyright is granted to further the public interest in the maximum proliferation of intellectual goods in the belief that, unless authors are given sufficient opportunity to exploit their work for financial returns, intellectual works will be under-produced.”

¹¹⁷ See e.g. *ibid* at para 30; *CCH, supra* note 3 at para 2; *Bell, supra* note 2 at para 49.

¹¹⁸ *CCH, supra* note 3 at para 23.

¹¹⁹ *Théberge, supra* note 12 at para 32.

¹²⁰ *Ibid* at para 31.

¹²¹ *Ibid*.

¹²² *CCH, supra* note 3 at para 48.

¹²³ *Théberge, supra* note 12 at para 32.

¹²⁴ *Bell, supra* note 2 at para 11

¹²⁵ *CCH, supra* note 3 at para 48.

¹²⁶ *Ibid.*

¹²⁷ *Bell*, *supra* note 2 at paras 10-11 (citing David Vaver, *Intellectual Property Law: Copyright, Patents, Trademarks* (2d ed, 2011) at 60).

¹²⁸ *Bell*, *supra* note 2 at para 27.

¹²⁹ *CCH*, *supra* note 3 at para 54.

¹³⁰ *Alberta (Education)*, *supra* note 2 at para 59.

¹³¹ *Dunsmuir*, *supra* note 14 at para 47.

¹³² *Alberta (Education)*, *supra* note 2 at para 15 [emphasis added].

¹³³ *Ibid* at para 19 [emphasis added].

¹³⁴ *Ibid* at para 24 [emphasis added].

¹³⁵ *Ibid* at para 28 [emphasis added].

¹³⁶ *Ibid* at para 29 [emphasis added].

¹³⁷ *Ibid* at para 31 [emphasis added].

¹³⁸ *Ibid* at para 32 [emphasis added].

¹³⁹ *Ibid* at para 33 [emphasis added]. Also of note is Abella J's statement that she had concerns over *how* the Board applied several of [the *CCH*] factors" (*ibid* at para 14 [emphasis added]).

¹⁴⁰ *Ibid* at para 37.

¹⁴¹ *Alberta (Education) (CB)*, *supra* note 4 at para 75.

¹⁴² See Part II.C.a.ii, above.

¹⁴³ *Alberta (Education) (CB)*, *supra* note 4 at para 114.

¹⁴⁴ Article 9(2) of the Berne Convention <http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html>, states that "[i]t shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author" (Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, as revised at Paris on 24 July 1971 and amended in 1979, S Treaty Doc No 99-27 (1986) [Berne Convention]).

¹⁴⁵ Article 13 of the TRIPS Agreement <http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm> states that "[m]embers shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder" (*Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299, 33 ILM 1197 (1994) [TRIPS Agreement]).

¹⁴⁶ *Alberta (Education) (CB)*, *supra* note 4 at para 114.

¹⁴⁷ *Ibid.*

¹⁴⁸ See, for instance, the decision of the SCC in *National Corn Growers Assn. v Canada (Import Tribunal)*, [1990] 2 SCR 1324 at 1371 <<http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/674/index.do>> [*National Corn Growers Assn.*], in which Gonthier J, who delivered the reasons for judgment, held that "in circumstances where the domestic legislation is unclear it is reasonable to examine any underlying

international agreement.” Gonthier J went on to note that “where the text of the domestic law lends itself to it, one should also strive to expound an interpretation which is consonant with the relevant international obligations” (1371). The latter passage was cited with approval in *Re:Sound*, another pentalogy case (*supra* note 2 at para 51). Detailed consideration of the extent to which the SCC is required to interpret the *Copyright Act* in a manner consistent with the Berne Convention, the TRIPS Agreement, and other international treaties in light of Canada being a signatory to these treaties is beyond the scope of this chapter to address. For the purposes of this chapter, it is assumed that the SCC is not required to interpret the *Copyright Act* in a manner consistent with these agreements.

¹⁴⁹ *Alberta (Education) (CB)*, *supra* note 4 at para 75.

¹⁵⁰ *Ibid* at para 76.

¹⁵¹ *Ibid* [citations omitted].

¹⁵² *NLNU*, *supra* note 80 at para 16.

¹⁵³ *CCH*, *supra* note 3 at para 48.

¹⁵⁴ *Ibid* at para 70.

¹⁵⁵ TRIPS Agreement, *supra* note 145 at art 13.

¹⁵⁶ *CCH*, *supra* note 3 at para 10, citing *Théberge*, *supra* note 12 at paras 30-31.

¹⁵⁷ *Alberta (Education) (CB)*, *supra* note 4 at para 114.

¹⁵⁸ *CCH*, *supra* note 3 at para 23.

¹⁵⁹ *Alberta (Education) (CB)*, *supra* note 4 at para 89.

¹⁶⁰ *CCH*, *supra* note 3 at para 51.

¹⁶¹ *Alberta (Education) (CB)*, *supra* note 4 at para 90.

¹⁶² The Copyright Board chose to interpret *CCH* in such a manner despite its acknowledgement that “all exceptions provided in the Act are now users’ rights [that]...must be given a liberal interpretation” (*ibid* at para 76).

¹⁶³ *CCH*, *supra* note 3 at para 54 [emphasis added].

¹⁶⁴ *Alberta (Education)*, *supra* note 2 at para 19.

¹⁶⁵ *Alberta (Education) (CB)*, *supra* note 4 at para 98.

¹⁶⁶ *Ibid* at para 113.

¹⁶⁷ *Alberta (Education)*, *supra* note 2 at para 32.

¹⁶⁸ *Ibid* at paras 24-25.

¹⁶⁹ *Alberta (Education) (CB)*, *supra* note 4 at para 107.

¹⁷⁰ *Ibid*.

¹⁷¹ *Ibid*.

¹⁷² *Alberta (Education)*, *supra* note 2 at para 32.

¹⁷³ *Ibid* at para 56.

¹⁷⁴ *Ibid* at para 68.

¹⁷⁵ *Alberta (Education) (CB)*, *supra* note 4 at para 104.

¹⁷⁶ Abella J also critiqued the approach taken by the Copyright Board with respect to this factor on the basis that in considering the total number of pages copied over

time under the amount of the dealing factor as well as under the character of the dealing factor, the Copyright Board “conflated the two factors, which had the effect of erasing proportionality from the fairness analysis” (*Alberta (Education)*, *supra* note 2 at para 30).

¹⁷⁷ *CCH*, *supra* note 3 at para 59.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid* at para 72.

¹⁸⁰ *Ibid.*

¹⁸¹ *Alberta (Education) (CB)*, *supra* note 4 at para 110.

¹⁸² *Ibid* at para 111.

¹⁸³ *Ibid.*

¹⁸⁴ *CCH*, *supra* note 3 at para 72 [emphasis added].

¹⁸⁵ *Alberta (Education) (CB)*, *supra* note 4 at para 112.

¹⁸⁶ *Alberta (Education)*, *supra* note 2 at para 34.

¹⁸⁷ *Ibid* at para 35.

¹⁸⁸ *Alberta (Education) (CB)*, *supra* note 4 at para 114.

¹⁸⁹ *Dunsmuir*, *supra* note 14; *CHRC*, *supra* note 90; *HRM*, *supra* note 99; and *Toronto Police Services Board*, *supra* note 13.

¹⁹⁰ *Hubbard*, *supra* note 68.

¹⁹¹ *Ibid* at para 40.

¹⁹² *Hubbard*, *supra* note 68, cited in *CCH*, *supra* note 3 at para 52 and *Bell*, *supra* note 2 at para 32, among other cases.

¹⁹³ *CCH*, *supra* note 3 at para 51.

¹⁹⁴ *Bell*, *supra* note 2 at para 27.

¹⁹⁵ *Ibid* at paras 10-11 (citing *Vaver*, *supra* note 127 at 60).

¹⁹⁶ *CCH*, *supra* note 3 at para 53.

¹⁹⁷ I am currently writing a paper in which I examine these questions in depth.

¹⁹⁸ *Dunsmuir*, *supra* note 14 at para 48.

¹⁹⁹ *Wildeman*, *supra* note 95 at 350.

²⁰⁰ *Rogers*, *supra* note 2 at para 65.

²⁰¹ *Wildeman*, *supra* note 95 at 324.

²⁰² *Ibid* at 325.

²⁰³ Jeremy de Beer, “Twenty Years of Legal History (Making) at the Copyright Board of Canada” <<http://www.jeremydebeer.ca/images/20%20years%20of%20legal%20history%20making%20book%20chapter.pdf>> in ALAI Canada, ed, *The Copyright Board of Canada: Bridging Law and Economics for Twenty Years* (Cowansville, QC: Editions Yvon Blais, 2011) 5 at 7 [*Bridging*].

²⁰⁴ Giuseppina D’Agostino, “Copyright Exceptions and Limitations and the Copyright Board of Canada” in *Bridging*, *supra* note 203 at 221.

²⁰⁵ This epilogue may already be partially written. The Copyright Board, subsequent to the SCC's decision in *Alberta (Education)*, supra note 2, in which Abella J remitted the matter for reconsideration in accordance with her reasons, ruled that "[t]he decision of the Supreme Court is clear and leaves no room for interpretations: based on the record before the Board and the findings of fact of the Supreme Court, Category 4 copies [copies made by teachers for distribution to students] constitute fair dealing for an allowable purpose and as such, are non-compensable. The FTE rate must be reduced accordingly", Copyright Board of Canada, Ruling of the Board, 19 September 2012; cited in Ariel Katz, "Copyright Board: Category 4 copies are fair dealing" Ariel Katz Blog (19 September 2012) <<http://arielkatz.org/copyright-board-category-4-copies-are-fair-dealing/>>.