

COPYRIGHT

Judicial review of Copyright Board decision certifying royalty rates in two proposed tariffs filed by applicant (Access Copyright) concerning copying of published works by provincial, territorial governments during 2005–2009, 2010–2014 periods — First tariff proposed by Access Copyright not covering making of digital copies — Second tariff proposed by Access Copyright authorizing making, distribution of digital copies subject to certain terms — One term requiring government licensees, when no longer covered by proposed tariff, to cease use of digital copies, delete them from their computer hard drives and other electronic media (Deletion Provision) — In its decision, Board deciding not to include Deletion Provision in second tariff — Access Copyright submitting that Board having no authority under *Copyright Act*, R.S.C., 1985, c. C-42 to (1) vary terms, conditions on digital uses that Access Copyright agreed to authorize; (2) remove term of digital use and thereafter remove entire class of digital use from tariff on basis of that improperly removed condition — Characterizing this issue as going to Board’s jurisdiction — Respondents characterizing Board’s actions differently, i.e. Board not deciding to remove Deletion Provision but instead deciding not to include it in tariff, thus exercising its discretion under *Copyright Act*, s. 70.15 to set tariffs — *Per* Stratas J.A.: Regardless of characterization adopted, reasonableness, not correctness, applicable standard of review — No jurisdictional issue warranting correctness review present — Question of what Board may do question of statutory interpretation (i.e. *Copyright Act*, its home statute) — Supreme Court of Canada recently affirming reasonableness applicable standard of review in such cases — Respondents properly characterizing decision under review — Court previously upholding jurisdiction of Board to exclude classes of uses from tariff — Board’s decision not to include matters related to Deletion Provision in tariff herein reasonable — While under *Copyright Act*, s. 70.12, collective society such as Access Copyright, not Board, having power to set terms, conditions upon which society agreeing to license use of works in its repertoire, Board still having discretion, under *Copyright Act*, s. 70.15, regarding what matters should, should not form part of tariff — Here, well within Board’s proper discretion to rule as it did — Access Copyright also arguing Board’s evaluation of substantial copying, assessment of fair dealing unreasonable — *Copyright Act*, s. 3, defining copyright as sole right to reproduce, perform in public and publish, if unpublished, copyright-protected work or any “substantial part” thereof in any material form whatever — Not defining “substantial part” — Supreme Court stating that analysis of qualitative aspect of portion reproduced essential element of analysis under s. 3(1) — Also holding that substantial part of work is part of work representing substantial portion of author’s skill, judgment expressed therein — Here, copying at issue entirely direct, literal, consisting primarily of photocopying excerpts from journals, newspapers, books — Access Copyright attacking Board’s “bright-line” rule that one to two copied pages of a published work not exceeding 2.5 percent of overall work constituting “reasonable approximations in establishing non-substantiality” — However, not clear Board could have proceeded differently as no qualitative evidence before it about levels of skill, judgment used to create portions of original works copied by government employees — Board’s adoption of bright-line rule providing guidance concerning what copying is permitted — Board not proceeding in unacceptable or indefensible way — Board’s assessment of fair dealing also acceptable, defensible — Board faithfully applying Supreme Court’s teachings — With respect to procedural fairness, Access Copyright aware of issues in play before Board, having ample opportunity to offer submissions on those issues — Board therefore not breaching any obligations of procedural fairness — *Per* Rennie J.A. (concurring reasons): Existence of jurisdictional questions not foreclosed, Supreme Court not rejecting correctness standard for jurisdictional questions — Application of reasonableness standard in *Quebec (Attorney General) v. Gu  rin*, 2017 SCC 42, [2017] 2 S.C.R. 3 flowing from majority’s interpretation that issue therein not true jurisdictional question, not from rejection of correctness standard for jurisdictional questions or from determination true jurisdictional questions do not exist — Furthermore, role of reviewing courts in assessing procedural fairness not unsettled — Regardless, no jurisdictional question arising herein in light of established case law —

Application dismissed.

CANADIAN COPYRIGHT LICENSING AGENCY (ACCESS COPYRIGHT) V. CANADA (A-293-15, 2018 FCA 58, Stratas and Rennie JJ.A., judgment dated March 22, 2018, 54 pp.)