

**SUPREME COURT OF CANADA**

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| **Citation:** Rogers Communications Inc. *v.* Society of Composers, Authors and Music Publishers of Canada,  2012 SCC 35, [2012] 2 S.C.R. 283 | **Date:** 20120712  **Docket:** 33922 |

**Between:**

**Rogers Communications Inc., Rogers Wireless Partnership, Shaw Cablesystems G.P., Bell Canada and TELUS Communications Company**

Appellants

and

**Society of Composers, Authors and Music Publishers of Canada**

Respondent

- and -

**CMRRA-SODRAC Inc., Cineplex Entertainment LP, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Apple Canada Inc. and Apple Inc.**

Interveners

**Coram:** McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

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| **Reasons for Judgment:**  (paras. 1 to 57)  **Concurring reasons:**  (paras. 58 to 88) | Rothstein J. (McLachlin C.J. and LeBel, Deschamps, Fish, Cromwell, Moldaver and Karakatsanis JJ. concurring)  Abella J. |

Rogers Communications Inc. *v.* Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 35, [2012] 2 S.C.R. 283

Rogers Communications Inc., Rogers Wireless

Partnership, Shaw Cablesystems G.P., Bell

Canada and TELUS Communications Company *Appellants*

v.

Society of Composers, Authors and Music Publishers of Canada *Respondent*

and

CMRRA‑SODRAC Inc., Cineplex Entertainment LP,

Samuelson‑Glushko Canadian Internet Policy and

Public Interest Clinic, Apple Canada Inc. and Apple Inc. *Interveners*

**Indexed as: Rogers Communications Inc. *v.* Society of Composers, Authors and Music Publishers of Canada**

2012 SCC 35

File No.: 33922.

2011:  December 6; 2012:  July 12.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

on appeal from the federal court of appeal

*Intellectual property — Copyright — Right to communicate a work to the public by telecommunication — Copyright Board certifying tariff for communication rights in copyrighted music downloaded and streamed from the Internet — Meaning of “to the public” — Whether a point‑to‑point transmission from the website of an online music service to an individual customer is a private communication — Whether streaming of files from the Internet triggered by individual users constitutes communication to the public of the musical works contained therein by online music services who make the files available for streaming — Copyright Act, R.S.C. 1985, c. C‑42, s. 3(1)(f).*

*Administrative law — Judicial review — Standard of review — Copyright Board certifying tariff for communication rights in copyrighted music downloaded and streamed from the Internet — Whether decision reviewable on standard of reasonableness or correctness.*

The appellants are online music services that offer downloads and on‑demand streams of files containing musical works. A stream is a transmission of data that allows the user to listen to or view a work at the time of the transmission, resulting in a temporary copy of the file on the user’s hard drive. In 1995, the respondent proposed tariffs for various uses of musical works over the Internet for the years 1996 to 2006. When the Copyright Board proceeded to establish a tariff for the communication of musical works over the Internet, it held that a stream of a copyrighted work of music comes within the creator’s right to communicate to the public by telecommunication provided by s. 3(1)(*f*) of the *Copyright Act* and a claim for communication royalties was well‑founded. The Board proceeded to establish a tariff for the communication of musical works over the Internet for the years 1996 to 2006. The Federal Court of Appeal dismissed the appellant’s application for judicial review of the Board’s decision.

*Held*: The appeal should be allowed in part.

*Per* McLachlin C.J. and LeBel, Deschamps, Fish, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.: In light of the majority decision in *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231, the question of whether the online music services engage the exclusive right to “communicate to the public by telecommunication” by offering downloads to members of the public has now become moot and the appeal is allowed in respect of downloads. However, the appeal is dismissed in respect of music streamed from the Internet. A stream of a musical work from the Internet is not a private transaction outside the scope of the right to communicate to the public. It matters little for the purposes of copyright protection whether the members of the public receive the communication in the same or in different places, at the same or at different times, or at their own or the sender’s initiative.

A transmission of a single copy of a work to a single individual is not a communication to the public within the meaning of s. 3(1)(*f*) of the *Copyright Act*. However, where there is a series of repeated transmissions of the same work to different recipients, each transmission cannot be analyzed in isolation, even if each transmission is initiated at the request of an individual member of the public. Focusing on transmissions individually loses sight of the true character of the activity in question. Copyright protection is not dependant on the technicalities of methods of transmission. Under a principled approach to copyright protection, it is necessary to consider the broader context to determine whether a given point‑to‑point transmission engages the exclusive right to communicate to the public. In the case of online music services, it is hardly possible to maintain that there is no intention that the same work ever be transmitted again.

A rule that each transmission must be analyzed in isolation because each is initiated at the request of an individual member of the public would have the effect of excluding all interactive communications from the scope of the right to communicate to the public. Nothing in the wording of s. 3(1)(*f*) of the Act excludes pull technologies from its scope or restricts communications to the public to a purely non‑interactive context. Section 3(1)(*f*) is technology‑neutral. Although the right to communicate to the public used to be historically linked to traditional media that operated on a broadcasting or push model, amending the *Copyright Act* to grant a technologically neutral right to communicate to the public by telecommunication ensured the continued relevance of the right in an evolving technological environment. The historic relationship does not support reading into the Act restrictions that are not apparent from or consistent with the language of the Act.

The appropriate standard for reviewing the Copyright Board’s decision in this case is correctness. Normally, the legislature is presumed to have recognized the superior expertise of an administrative body in respect of issues arising under its home statute or a closely related statute, and deference warrants applying a reasonableness standard of review. However, under the *Copyright Act*, Parliament has given both the Copyright Board and courts concurrent jurisdiction at first instance over questions of law such as the pure question of law that arises in this case. It would be inconsistent to apply a reasonableness standard on judicial review of a decision by the Board when the same legal question would be decided *de novo* if it arose in the court at first instance. It would be equally inconsistent to apply a reasonableness standard to a determination of a legal question by the Board on an appeal from a judicial review but a correctness standard on an appeal from a decision of a court at first instance on the same legal question. Because the unusual statutory scheme under the *Copyright Act* does not give the Copyright Board a discrete and special administrative regime, it must be inferred that the legislative intent was not to recognize a superior expertise of the Board relative to the courts with respect to legal questions arising under the *Copyright Act*.

*Per*AbellaJ.: The standard of review should be reasonableness. The Copyright Board, when interpreting its home statute in setting tariffs for the communication of new forms of digital media, should be accorded the same deference and be reviewed on the same standard as every other specialized tribunal in Canada. Since *Dunsmuir*, this Court has unwaveringly held that institutionally expert and specialized tribunals are entitled to a presumption of deference when interpreting their mandate. Applying a correctness standard of review on the sole basis that a court could potentially interpret the same statute effectively drains expert tribunals of the institutional deference they are owed. The majority’s conclusion adds the new and unrelated exception of shared jurisdiction to the existing and narrow exceptions to the presumption of home statute deference.

Expertise is attributed to a tribunal on the basis that Parliament has delegated decision‑making to it as an institutionally specialized body that has day to day familiarity with its enabling statute. The Copyright Board has specialized expertise in interpreting the provisions of the *Copyright Act*. The fact of shared jurisdiction does not undermine this expertise. The Copyright Board does not simply work out the details of royalty tariffs, 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. It also has highly specialized knowledge about the media technologies used to create and disseminate copyrighted works, as well as related economic issues. This specialized knowledge is precisely the kind of institutional expertise that *Dunsmuir* concluded was entitled to deference. The fact that a court might in another case be asked to interpret the same provisions of the *Copyright Act* does not detract from the Copyright Board’s particular familiarity and expertise with the provisions of the Act.

The Board’s mandate was to decide whether a particular activity triggers a tariff. The view that we can extricate a legal question from this context of complex, interlocking facts and policies considered by the Board in setting a tariff, is unrealistic. The tribunal’s decision should be reviewed as a whole. Unlike trial courts, which have no expertise relative to appellate courts when interpreting a statute, tribunals have particular mandates which give them specialized expertise in interpreting and applying their home statute to a given set of facts. Extricating legal questions in the context of judicial review — referred to as “segmentation” — should be an exceptional practice.

This Court has repeatedly held that the application of multiple standards of review to different aspects of a tribunal’s decision — one for questions of law and one for questions of fact — should be avoided. As a result, even if an aspect of the tribunal’s decision would otherwise attract a correctness standard, the decision as a whole should be reviewed on a deferential standard. Segmenting the definition of each word or phrase in a statutory provision into discrete questions of law is a re‑introduction by another name — correctness — of the unduly interventionist approach championed by the jurisdictional and preliminary question jurisprudence, jurisprudence which this Court definitively banished in *Dunsmuir* and *ATA*.

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By Rothstein J.

**Distinguished:**  *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, rev’g 2002 FCA 187, [2002] 4 F.C. 213, rev’g [2000] 2 F.C. 451; **not followed:** *Cartoon Network v. CSC Holdings, Inc.*, 536 F.3d 121 (2008); **referred to:** *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231; *SOCAN Statement of Royalties, Public Performance of Musical Works 1996, 1997, 1998 (Tariff 22, Internet) (Re)* (1999), 1 C.P.R. (4th) 417; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395; *Canadian Wireless Telecommunications Assn. v. Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6, [2008] 3 F.C.R. 539, leave to appeal refused [2008] 2 S.C.R. vi; *Composers, Authors and Publishers Assoc. of Canada Ltd. v. CTV Television Network Ltd.*, [1968] S.C.R. 676; *Canadian Admiral Corp. v. Rediffusion, Inc.*, [1954] Ex. C.R. 382; *Apple Computer Inc. v. Mackintosh Computers Ltd.*, [1987] 1 F.C. 173, aff’d [1988] 1 F.C. 673, aff’d [1990] 2 S.C.R. 209; *Robertson v. Thomson Corp*., 2006 SCC 43, [2006] 2 S.C.R. 363; *Théberge v. Galerie d’Art du Petit Champlain inc*., 2002 SCC 34, [2002] 2 S.C.R. 336; *Compo Co. v. Blue Crest Music Inc.*, [1980] 1 S.C.R. 357.

By Abella J.

**Referred to:** *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Chamberlain Group Inc. v. Lynx Industries Inc.*, 2010 FC 1287, 379 F.T.R. 270; *Alticor Inc. v. Nutravite Pharmaceuticals Inc.*, 2005 FCA 269, 339 N.R. 56; *Molson Breweries v. John Labatt Ltd.*, [2000] 3 F.C. 145; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157; *Law Society of New Brunswick* *v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247; *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650; *Mattel, Inc. v. 3894207 Canada Inc.*, 2006 SCC 22, [2006] 1 S.C.R. 772; *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364.

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*Canadian Human Rights Act*, R.S.C. 1985, c. H‑6, ss. 53(2)(*c*), (*d*).

*Copyright Act*, R.S.C. 1985, c. C‑42, ss. 2 “telecommunication”, 3(1)(*f*).

*Ontario Human Rights Code, 1961-62*, S.O. 1961-62, c. 93.

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**Treaties and Other International Instruments**

*Berne Convention for the Protection of Literary and Artistic Works*, 828 U.N.T.S. 221, September 9, 1886; rev. in Berlin November 13, 1908; rev. in Rome June 2, 1928, Arts. 11*bis*, 20.

*North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, Can. T.S. 1994 No. 2, Art. 1721(2).

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APPEAL from a judgment of the Federal Court of Appeal (Létourneau, Nadon and Pelletier JJ.A.), 2010 FCA 220, 409 N.R. 102, 323 D.L.R. (4th) 42, 14 Admin. L.R. (5th) 159, 86 C.P.R. (4th) 239, [2010] F.C.J. No. 1087 (QL), 2010 CarswellNat 3112, affirming a decision of the Copyright Board, www.cb-cda.gc.ca/decisions/2007/20071018-m-e.pdf, (2007), 61 C.P.R. (4th) 353, [2007] C.B.D. No. 7 (QL), 2007 CarswellNat 3466. Appeal allowed in part.

*Gerald L. Kerr‑Wilson*, *Ariel A. Thomas* and *Julia Kennedy*, for the appellants.

*Gilles Daigle*, *D. Lynne Watt*, *Paul Spurgeon* and *Henry Brown*, *Q.C.*, for the respondent.

Written submissions only by *Casey M. Chisick*, *Timothy Pinos* and *Jason Beitchman*, for the intervener CMRRA‑SODRAC Inc.

Written submissions only by *Tim Gilbert*, *Sana Halwani* and *Sundeep Chauhan*, for the intervener Cineplex Entertainment LP.

Written submissions only by *Jeremy de Beer* and *David Fewer*, for the intervener the Samuelson‑Glushko Canadian Internet Policy and Public Interest Clinic.

Written submissions only by *Michael Koch*, for the interveners Apple Canada Inc. and Apple Inc.

The judgment of McLachlin C.J. and LeBel, Deschamps, Fish, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. was delivered by

Rothstein J. —

I. Introduction

1. Online music services offer permanent downloads, limited downloads and on-demand streams of files containing musical works. A download is the transmission over the Internet of a file containing data, such as a sound recording of a musical work, that gives the user a permanent copy of the file to keep as his or her own. A limited download allows the copy to be used as long as the user’s subscription is paid up. A stream is a transmission of data that allows the user to listen to or view the content transmitted at the time of the transmission, resulting only in a temporary copy of the file on the user’s hard drive. The Copyright Board was of the opinion that downloads and streams, among other uses of music that it examined as part of the certification process of a proposed tariff for the communication of musical works over the Internet, come within the scope of the exclusive right of copyright holders to communicate to the public by telecommunication provided by the *Copyright Act*, R.S.C. 1985, c. C-42 (the “Act”). Accordingly, it found that a claim for communication royalties by the holders of copyright in the communicated works was well founded, in addition to any reproduction royalties received when a work is copied through the Internet ((2007), 61 C.P.R. (4th) 353 (“Tariff 22.A decision”)). On appeal, the Federal Court of Appeal agreed (2010 FCA 220, 409 N.R. 102).
2. The sole issue in this appeal is the meaning of the phrase “to the public” in s. 3(1)(*f*) of the Act. The online music services brought this appeal on the basis that their uses of music do not engage the right to communicate to the public by telecommunication in s. 3(1)(*f*) because they do not come within the scope of the phrase “to the public”. The issue of whether *downloads* can be “communication[s]” within the meaning of s. 3(1)(*f*) was left to be determined in the companion case *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231 (“*ESA*”). In *ESA*, a majority of this Court determined that musical works are not “communicated” by telecommunication when they are *downloaded*. This conclusion affects this appeal. The question of whether the online music services engage the exclusive right to “communicate . . . to the public by telecommunication” by offering *downloads* to members of the public has now become moot. However, the ESA did not contest the Board’s conclusion that a *stream* constitutes a “communication” within the meaning of s. 3(1)(*f*) of the Act. As a result, the remaining issue here is whether, based on *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13,[2004] 1 S.C.R. 339(“*CCH*”), such communication of protected works nevertheless does not engage the exclusive right to communicate to the public because a point-to-point transmission from the website of an online music service to any individual customer is a *private* communication.

II. Facts and Procedural History

1. The appellants, Rogers Communications Inc., Rogers Wireless Partnership, Shaw Cablesystems G.P., Bell Canada and Telus Communications Company, offer online music services. Online music services provide catalogues of digital audio files that consumers can browse at their convenience. A consumer may select a song or an album and download or stream the digital audio file containing the musical work to his or her computer or mobile phone, or both.
2. The respondent, Society of Composers, Authors, and Music Publishers of Canada (“SOCAN”), is a collective society of composers, authors and publishers of music. It administers the right to perform in public and the right to communicate to the public by telecommunication the works covered by its members’ copyrights. It files proposed tariffs with the Board and collects licence royalties, as set in tariffs certified by the Board, on behalf of its members.
3. The issue in the present appeal is now whether streaming of files from the Internet triggered by individual users constitutes communication “to the public” of the musical works contained therein by online music services who make the files available to the users for streaming.
4. These proceedings involve proposed tariffs first filed by SOCAN in 1995 for various uses of musical works constituting, in SOCAN’s view, communication of musical works to the public over the Internet. There were objections to the filed proposals. In 1996, the Board decided to deal with legal issues separately from the determination of the actual tariffs. The first step was to “determine which activities on the Internet, if any, constitute a protected use [of SOCAN’s repertoire of music] targeted in the tariff” (*SOCAN Statement of Royalties, Public Performance of Music Works 1996, 1997, 1998 (Tariff 22, Internet) (Re)* (1999), 1 C.P.R. (4th) 417 (“Tariff 22 decision”), at p. 424). Issued on October 27, 1999, the Board termed this its Phase I decision, dealing with legal and jurisdictional issues. Some of its determinations are directly relevant to this appeal. The Tariff 22 decision was ultimately appealed to this Court, albeit on different issues. However, in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427 (“*SOCAN v. CAIP*”), at para. 30, Binnie J. noted the Board’s interpretation of the phrase “to the public”, which was that a communication may be to the public when it is made to individual members of the public, regardless of whether they receive it at the same or at different times (Tariff 22 decision, at p. 435). He found that this particular issue was “no longer contested.”
5. After this Court’s decision in *SOCAN v. CAIP*, the Board proceeded to Phase II of the process to establish a tariff for the communication of musical works over the Internet for the years 1996 to 2006. In these proceedings, the appellants argued both before the Board and subsequently on judicial review, that a point-to-point transmission of a musical work is not a communication “to the public”. This argument is in large part based on *CCH* and on the finding in that case that fax transmissions of copyrighted works by the Great Library at Osgoode Hall to its patrons were private communications.
6. The Board rejected this argument in its decision issued on October 18, 2007. The Tariff 22.A decision reiterates the Board’s earlier-stated view that communications to individual members of the public through downloads or streams requested by them at different times are communications “to the public”. Accordingly, finding SOCAN’s claim to be valid in law, the Board proceeded to establish the tariffs it considered appropriate.
7. The appellants’ application for judicial review was unanimously dismissed by the Federal Court of Appeal. Pelletier J.A., writing for the court, considered that the application should be reviewed on the standard of reasonableness and found the Board’s determination of what constitutes a “communication to the public” under the Act to be reasonable.

III. Analysis

A. *Standard of Review*

1. The appropriate standard for reviewing the Board’s determinations on points of law was considered by Binnie J. in *SOCAN v. CAIP*. In concluding that the correctness standard must apply, he wrote, at para. 49:

There is neither a preclusive clause nor a statutory right of appeal from decisions of the Copyright Board. While the Chair of the Board must be a current or retired judge, the Board may hold a hearing without any legally trained member present. The *Copyright Act* is an act of general application which usually is dealt with before courts rather than tribunals. The questions at issue in this appeal are legal questions. [Emphasis added.]

1. Since that decision, this Court has substantially revised the appropriate approach to judicial review. *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, made clear that an administrative body interpreting and applying its home statute should normally be accorded deference on judicial review. See also *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 (“*Canada (CHRC)*”), at para. 16, and *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 26. In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 (“*ATA*”), at para. 39, the Court held 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.” By setting up a specialized tribunal to determine certain issues the legislature is presumed to have recognized superior expertise in that body in respect of issues arising under its home statute or a closely related statute, warranting judicial review for reasonableness.
2. As stated by Binnie J. in *SOCAN v. CAIP*, the core of the Board’s mandate is “the working out of the details of an appropriate royalty tariff” (para. 49). Nevertheless, in order to carry out this mandate, the Board is routinely called upon to ascertain rights underlying any proposed tariff. In this, it is construing the Act, its home statute.
3. However, as Binnie J. noted in *SOCAN v. CAIP*, the Act is a statute that will also be brought before the courts for interpretation at first instance in proceedings for copyright infringement. The court will examine the same legal issues the Board may be required to address in carrying out its mandate. On appeal, questions of law decided by the courts in these proceedings would be reviewed for correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8.
4. It would be inconsistent for the court to review a legal question on judicial review of a decision of the Board on a deferential standard and decide exactly the same legal question *de novo* if it arose in an infringement action in the court at first instance. It would be equally inconsistent if on appeal from a judicial review, the appeal court were to approach a legal question decided by the Board on a deferential standard, but adopt a correctness standard on an appeal from a decision of a court at first instance on the same legal question.
5. Because of the unusual statutory scheme under which the Board and the court may each have to consider the same legal question at first instance, it must be inferred that the legislative intent was not to recognize superior expertise of the Board relative to the court with respect to such legal questions. This concurrent jurisdiction of the Board and the court at first instance in interpreting the *Copyright Act* rebuts the presumption of reasonableness review of the Board’s decisions on questions of law under its home statute. This is consistent with *Dunsmuir*, which directed that “[a] discrete and special administrative regime in which the decision maker has special expertise” was a “facto[r that] will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied” (para. 55 (emphasis added)). Because of the jurisdiction at first instance that it shares with the courts, the Board cannot be said to operate in such a “discrete . . . administrative regime”. Therefore, I cannot agree with Abella J. that the fact that courts routinely carry out the same interpretive tasks as the board at first instance “does not detract from the Board’s particular familiarity and expertise with the provisions of the *Copyright Act*” (para. 68). In these circumstances, courts must be assumed to have the same familiarity and expertise with the statute as the board. Accordingly, I am of the opinion that in *SOCAN v. CAIP*, Binnie J. determined in a satisfactory manner that the standard of correctness should be the appropriate standard of review on questions of law arising on judicial review from the Copyright Board (*Dunsmuir*, at para. 62).
6. I must also respectfully disagree with Abella J.’s characterization, at para. 62, of the holding in *ATA* as meaning that the “exceptions to the presumption of home statute deference are . . . constitutional questions and questions of law of central importance to the legal system and outside the adjudicator’s specialized expertise”. *Dunsmuir* had recognized that questions which fall within the categories of constitutional questions and questions of general law that are both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise were to be reviewed on a correctness standard (paras. 58 and 60). *ATA* simply reinforced the direction in *Dunsmuir* that issues that fall under the category of interpretation of the home statute or closely related statutes normally attract a deferential standard of review (*ATA*, at para. 39; *Dunsmuir*, at para. 54). My colleague’s approach would in effect mean that the reasonableness standard applies to *all* interpretations of home statutes. Yet, *ATA* and *Dunsmuir* allow for the exceptional *other* case to rebut the presumption of reasonableness review for questions involving the interpretation of the home statute.
7. My colleague refers to pre-*Dunsmuir* decisions for the proposition that shared jurisdiction at first instance does not prevent reasonableness review of a tribunal’s decision under its home statute. However, such precedents will only be helpful where they “determin[e] in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question” (*Dunsmuir*, at para. 62).
8. The recent examples raised by Justice Abella where reasonableness review was applied all involved bodies with exclusive primary jurisdiction under their home statute, constituting “discrete . . . administrative regime[s]”. *Canada (CHRC)* concerned the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, which does not create shared primary jurisdiction between the administrative tribunal and the courts. In these circumstances, the Court simply found that the standard applicable on the facts of that case was the reasonableness standard and confirmed the presumptive rule that “if the issue relates to the interpretation and application of its own statute, . . . the standard of reasonableness will generally apply” (para. 24 (emphasis added)). *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, involved the judicial review of a decision of a disciplinary body under a professional *Code of ethics of advocates*,R.R.Q. 1981, c. B-1, applicable to lawyers. There was no question of the constitutionality of the provision in the *Code of ethics*. The question, rather, was whether the adjudicator, making his fact-specific determination in the circumstances of that case, had “act[ed] consistently with the values underlying the grant of discretion, including *Charter* values” (*Doré*, at para. 24). In any case, the adjudicator was operating as part of a discrete administrative regime with exclusive jurisdiction over disciplinary matters under the *Code of ethics*.
9. I wish to be clear that the statutory scheme under which both a tribunal and a court may decide the same legal question at first instance is quite unlike the scheme under which the vast majority of judicial reviews arises. Concurrent jurisdiction at first instance seems to appear only under intellectual property statutes where Parliament has preserved dual jurisdiction between the tribunals and the courts. However, I leave the determination of the appropriate standard of review of a tribunal decision under other intellectual property statutes for a case in which it arises. Nothing in these reasons should be taken as departing from *Dunsmuir* and its progeny as to the presumptively deferential approach to the review of questions of law decided by tribunals involving their home statute or statutes closely connected to their function.
10. It should be equally clear that the Board’s application of the correct legal principles to the facts of a particular matter should be treated with deference, as are the decisions of this nature by trial judges on appellate review. However, I cannot agree with Abella J. that the question arising in this appeal is a question of mixed fact and law (para. 74). The issue in this case has been argued by the parties as a pure question of law. The Court is asked to determine whether a point-to-point transmission can *ever* constitute a communication “to the public” within the meaning of s. 3(1)(*f*) of the *Copyright Act* (A.F., at para. 2). This is not a “questio[n] of mixed fact and law [that] involve[s] applying a legal standard to a set of facts” (*Housen v. Nikolaisen*, at para. 26); it is an extricable question of law.

B. *Can a Point-to-Point Transmission Effected at the Request of the Recipient Be a Communication “to the Public”?*

(1) Arguments of the Parties and Relevant Legislative Provisions

1. Before this Court, the appellants maintain that a point-to-point communication by telecommunication of a discrete copy of a musical work is not a communication *to the public*, regardless of whether another copy of the same work is transmitted to a different customer at a different time. They argue that “the [Federal Court of Appeal’s] decision is directly contrary to . . . *CCH*”, where “all three Courts concluded that the Great Library’s facsimile service did not infringe the right to communicate to the public by telecommunication — based on analyzing whether each transmission was a communication to the public” (A.F., at paras. 8 and 45 (emphasis in original)). The appellants further support their position by reference to the legislative history of s. 3(1)(*f*) of the Actand U.S. authorities. SOCAN views the decisions of the Board and of the F.C.A. as correct and consistent with relevant international copyright conventions.
2. The legal question in this appeal involves the interpretation of s. 3 of the Act. The right to communicate to the public by telecommunication is set out in s. 3(1)(*f*) of the Act:

**3.** (1) For the purposes of this Act, “copyright”, in relation to a work, means the sole right . . .

. . .

(*f*) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

. . .

and to authorize any such acts.

1. Section 2 broadly defines “telecommunication” as “any transmission of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system”. There is no dispute in this appeal that the communications in issue are “telecommunications” within the meaning of the *Copyright Act*.

(2) The Precedent in *CCH*: Interpreting “to the Public”

1. The words “to the public” within the meaning of s. 3(1)(*f*) of the Act were considered in *CCH*. The Great Library offered the service of faxing reported judgments and excerpts of other legal materials to individual lawyers at the lawyer’s request. The publishers holding copyrights in the transmitted works argued that the fax transmissions of copies of their works to individual lawyers were communications to the public by telecommunication by the Great Library. Contrasting this situation with telecommunications in the context of subscription or pay-per-view television, at trial, Gibson J. found no communication to the public since “the telecommunications, by facsimile, emanated from a single point and were each intended to be received at a single point” ([2000] 2 F.C. 451 (T.D.), at para. 167).
2. The conclusion was affirmed on appeal by the Federal Court of Appeal (2002 FCA 187, [2002] 4 F.C. 213) and this Court. This Court, as did the F.C.A., held that “transmission of a single copy to a single individual is not a communication to the public”: *CCH* (SCC), at para. 78; *CCH* (FCA), at paras. 101 and 253. Both sets of reasons in the Federal Court rely on the ordinary meaning of the phrase “to the public”, as well as the definition of “public” in Art. 1721(2) of the *North American Free Trade Agreement*, Can. T.S. 1994 No. 2 (“NAFTA”), to conclude that “to be ‘to the public’ a communication must be targeted at an aggregation of individuals, which is more than a single person but not necessarily the whole public at large” (Linden J.A., at para. 100 (emphasis added)). This Court agreed with the F.C.A.’s conclusion (para. 78).
3. However, this Court expressly limited its ruling to the facts in *CCH*.McLachlin C.J. wrote:

The fax transmission of a single copy to a single individual is not a communication to the public. This said, a series of repeated fax transmissions of the same work to numerous different recipients might constitute communication to the public in infringement of copyright. However, there was no evidence of this type of transmission having occurred in this case.

On the evidence in this case, the fax transmissions were not communications to the public. [Emphasis added; paras. 78-79.]

(3) A Disagreement Based on Perspective

1. Both parties in this appeal rely on *CCH* in support of their respective positions. They disagree, however, on the meaning of the caveat in *CCH* that “a series of repeated fax transmissions of the same work to numerous different recipients might constitute communication to the public in infringement of copyright”. The appellants argue that all three courts in *CCH* ruled that each transmission must be analyzed on its own, as a separate transaction, regardless of whether another communication of the same work to a different customer may occur at a later point in time. They submit that a “series of repeated fax transmissions of the same work to numerous different recipients might constitute communication to the public in infringement of copyright” only where the series of transmissions to multiple users originate from a *single act* by the sender. They provide the example of multiple fax transmissions occurring successively as a result of a decision by the sender to fax to multiple recipients (“a broadcast fax” (A.F., at para. 70)). This is distinguishable in their view from discrete point-to-point transmissions which result from multiple unrelated acts by the sender. In SOCAN’s view, there is no requirement in *CCH* that the series of transmissions originate from a single act of the sender.
2. The disagreement is based on perspective. Where the appellants argue that we must consider the *recipient* of each transmission, SOCAN and the decisions below focused on the *sender’s activities* in communicating a given work over time.

(4) Transmissions Must Be Looked at in Context

1. In my respectful view, the appellants’ proposition is untenable. Such a rule would produce arbitrary results. For example, where a copyright-protected work is sent to 100 randomly selected members of the general public by way of a single e-mail with multiple recipients, on the appellants’ approach, this would constitute a communication “to the public”. However, under the same approach, the sender could avoid infringing copyright simply by executing the same task through sending separate e-mails to each of the 100 recipients. If the nature of the activity in both cases is the same, albeit accomplished through different technical means, there is no justification for distinguishing between the two for copyright purposes.
2. Focusing on each individual transmission loses sight of the true character of the communication activity in question and makes copyright protection dependant on technicalities of the alleged infringer’s chosen method of operation. Such an approach does not allow for principled copyright protection. Instead, it is necessary to consider the broader context to determine whether a given point-to-point transmission engages the exclusive right to communicate to the public. This is the only way to ensure that form does not prevail over substance.
3. Sharlow J.A. addressed this issue in *Canadian Wireless Telecommunications Assn. v. Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6, [2008] 3 F.C.R. 539, leave to appeal refused, [2008] 2 S.C.R. vi (“*CWTA*”), holding that a person offering members of the public the opportunity to download ringtones for their mobile phones thereby communicates the musical works contained in the ringtones to the public. She wrote that this approach

is consistent with the language of [s. 3(1)(*f*) of the Act] and its context. It also accords with common sense. If a wireless carrier were to transmit a particular ringtone simultaneously to all customers who have requested it, that transmission would be a communication to the public. It would be illogical to reach a different result simply because the transmissions are done one by one, and thus at different times. [para. 43]

(5) The Appellants’ Interpretation Would Exclude All On-Demand Transmissions

1. In oral argument, counsel for the appellants seemed to go somewhat beyond the mere technicality of the transmissions by looking at the *intention* of the sender in accomplishing a given transmission. In the case of a “blas[t]” communication, he pointed out that the sender has “take[n] it upon [himself] to send [the work] out” (Transcript, at p. 24). By contrast, in the case of a one-to-one transmission, at least that from an online music service to a customer at the customer’s request, or from the Great Library in *CCH* to a patron, he argued that there is no intention that the same work ever be transmitted again “because it is entirely at the request of the consuming public” (p. 26). In the appellants’ view, this would justify differential treatment of the point-to-point transmission and the “blas[t]” communication.
2. With respect, this proposition too must be rejected, for the same reason that focusing the analysis on the recipient of a transmission rather than on the overall context of the communication produces results inconsistent with the true character of the communication. The facts of this case underscore the point. The Board found that “[d]ownloads are ‘targeted at an aggregation of individuals’” and are “offered to anyone with the appropriate device who is willing to comply with the terms” (para. 97). It is hardly possible to maintain that “there is no intention that the same work ever be transmitted again”.
3. In addition, the appellants’ proposed rule that each transmission be analyzed in isolation because each is initiated at the request of individual members of the public would have the effect of excluding all interactive communications from the scope of the copyright holder’s exclusive rights to communicate to the public and to authorize such communications. A stream is often effectuated at the request of the recipient. On-demand television allows viewers to request and view the desired program at the time of their choosing. By definition, on-demand communications — relating to the so-called “pull” technologies — are initiated at the request of the user, independently of any other user, and each individual transmission happens in a point-to-point manner. None of these telecommunications would be considered as being made “to the public” simply because the *actual* transmission occurs at the initiative and discretion of the consumer to accept the invitation to the public to access the content.
4. Nothing in the wording of s. 3(1)(*f*) of the Act implies such a limitation. A communication is not restricted to a purely non-interactive context.

(6) Section 3(1)(*f*) Is Not Limited to Traditional “Push” Technologies; It Is Technology-Neutral

1. The right to communicate to the public is historically linked to traditional media that operated on a broadcasting, or “push”, model. As pointed out by the appellants, the predecessor to s. 3(1)(*f*) guaranteed copyright holders an exclusive right to communicate literary, dramatic, musical or artistic works by *radio-communication*. The predecessor section was introduced in 1931, implementing Article 11*bis* of the *Berne Convention for the Protection of Literary and Artistic Works*, 828 U.N.T.S. 221 (Rome Revision of 1928): J. S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs*, (4th ed. (loose-leaf), at p. 21-86); *Composers, Authors and Publishers Assoc. of Canada Ltd. v. CTV Television Network Ltd.*, [1968] S.C.R. 676, at p. 681. Radio-communications were understood to include transmissions by microwave over the airwaves: *Canadian Admiral Corp. v. Rediffusion, Inc.*, [1954] Ex. C.R. 382. As such, the radio-communication right extended to radio and traditional over-the-air television broadcasting, notably leaving transmissions by cable outside of copyright protection.
2. This technology-specific communication right was amended to the technologically *neutral* right to “communicate . . . to the public by telecommunication” to reflect the obligations entered into by Canada under NAFTA (*Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65, ss. 61 and 62). The change from radio-communication to telecommunication meant that Canadian *cable* companies which previously escaped any payment of royalties under the “radio-communication” right, were now caught by the Act: S. Handa, *Copyright Law in Canada* (2002), at p. 320.
3. The historic relationship between the right to communicate to the public and broadcasting-type, “push” technologies, and the 1988 amendment in particular, is evidence that the Act has evolved to ensure its continued relevance in an evolving technological environment. The historic relationship does not support reading into the Act restrictions which are not apparent from and are even inconsistent with the neutral language of the Act itself.
4. In addition, this Court has long recognized in the context of the reproduction right that, where possible, the Act should be interpreted to extend to technologies that were not or could not have been contemplated at the time of its drafting: *Apple Computer Inc. v. Mackintosh Computers Ltd.*, [1987] 1 F.C. 173 (T.D.), aff’d [1988] 1 F.C. 673 (C.A.), aff’d [1990] 2 S.C.R. 209. That the Act was to apply to new technologies was recently reaffirmed in *Robertson v. Thomson Corp.*, 2006 SCC 43, [2006] 2 S.C.R. 363, at para. 49, *per* LeBel and Fish JJ.:

Media neutrality is reflected in s. 3(1) of the *Copyright Act* which describes a right to produce or reproduce a work “in any material form whatever”.  Media neutrality means that the *Copyright Act* should continue to apply in different media, including more technologically advanced ones. . . . [I]t exists to protect the rights of authors and others as technology evolves.

Although the words “in any material form whatever” qualify the right to “produce or reproduce the work” in s. 3(1), the same principle should guide the application of the neutral wording of the right to “communicate . . . to the public by telecommunication”. The broad definition of “telecommunication” was adopted precisely to provide for a communication right “not dependent on the form of technology” (*SOCAN v. CAIP*, at para. 90).

1. Ultimately, in determining the extent of copyright, regard must be had for the fact that “[t]he *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator” (*Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, at para. 30). This balance is not appropriately struck where the existence of copyright protection depends merely on the business model that the alleged infringer chooses to adopt rather than the underlying communication activity. Whether a business chooses to convey copyright protected content in a traditional, “broadcasting” type fashion, or opts for newer approaches based on consumer choice and convenience, the end result is the same. The copyrighted work has been made available to an aggregation of individuals of the general public.

(7) Developments at the International Level Are Consistent in Encompassing On-Demand Communications to the Public in Copyright Protection

1. Developments at the international level are consistent with this conclusion. Article 11*bis* of the *Berne Convention*, of which Canada is a party, sets out certain communication rights in literary and artistic works:

*[Broadcasting and Related Rights]*

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;

(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

1. As stated earlier, s. 3(1)(*f*) is based on Article 11*bis* of the *Berne Convention*.
2. The advent of on-demand technologies, and the Internet in particular, led to questions as to whether such new telecommunication technologies were encompassed in the communication right existing under the Berne regime. While it was possible to interpret the relevant articles as extending to on-demand transmissions over the Internet, there was ambiguity: S. Ricketson and J. C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed. 2006), vol. I, at para. 12.48. For example, the word “broadcasting” used in Article 11*bis*(1) “may well imply widely sending a communication simultaneously to many recipients” (para. 12.49).
3. In 1996, the *WIPO Copyright Treaty*, 2186 U.N.T.S. 121(“WCT”), was entered into. The WCT is a special agreement within the meaning of Art. 20 of the *Berne* *Convention*, which stipulates that “[t]he Governments of the countries of the [Berne] Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention” (see Art. 1(1) of the WCT).
4. Article 8 of the WCT reads:

*[Right of Communication to the Public]* Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

1. Ricketson and Ginsburg comment on the meaning and legislative history of Art. 8 in these terms:

The WCT’s principal innovation is its specification that the right of communication to the public includes a right of “making available to the public of [literary and artistic] works in such a way that members of the public may access those works from a place and at a time individually chosen by them”. This right targets on-demand transmissions (whether by wire or wireless means), for it makes clear that the members of the public may be separated both in space and in time. [Emphasis added; para. 12.57.]

1. The *WIPO Intellectual Property Handbook: Policy, Law and Use*, chapter 5, “International Treaties and Conventions on Intellectual Property”, No. 489 (2nd ed. 2004), comments that the “WCT . . . clarifies that that right also covers transmissions in interactive systems” (para. 5.226 (emphasis added)).
2. In the end, “[t]he core concept of ‘making available’ . . . can fairly be called neither a reaffirmation nor a novelty, for it resolves an ambiguity as to whether the old communication to the public rights accommodated or excluded ‘pull technologies’” (J. C. Ginsburg, “The (new?) right of making available to the public”, in D. Vaver and L. Bently, eds., *Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish* (2004), 234, at p. 246).
3. Canada has signed, but not yet ratified or legislatively adopted the WCT. Therefore, the WCT is not binding in this country. The WCT is only cited to demonstrate that the broad interpretation of s. 3(1)(*f*) of the Act, recognizing that a communication “to the public” subject to copyright protection may occur through point-to-point transmissions at the user’s request, is not out of step with Art. 8 of the WCT and international thinking on the issue.

(8) American Jurisprudence

1. The appellants’ remaining argument is based on American jurisprudence. This argument must also be dismissed. They mainly rely on the decision of the Court of Appeals for the Second Circuit in *Cartoon Network v. CSC Holdings, Inc.*, 536 F.3d 121 (2008), in which it was held that the potential audience of *each point-to-point transmission* must be considered to determine whether a given transmission is “to the public”. The Second Circuit Court of Appeals found in that case that the transmissions were not “to the public”.
2. This case is of no assistance to the appellants. The Court of Appeals for the Second Circuit relied on the specific language of the U.S. “transmit clause”. It held that the language of the clause itself directs considering who is “capable of receiving” a particular “transmission” or “performance”, and not of the potential audience of a particular “work” (p. 134). Quite to the contrary, our *Copyright Act* speaks more broadly of “communicat[ing a] work to the public”. This Court has recognized in the past important differences both in wording and in policy between Canadian and American copyright legislation. It has warned that “United States court decisions, even where the factual situations are similar, must be scrutinized very carefully” (see *Compo Co. v. Blue Crest Music Inc.*, [1980] 1 S.C.R. 357, at p. 367). The difference in statutory wording between the relevant provisions of the American legislation and of the Canadian *Copyright Act* is sufficient to render the U.S. decisions of no assistance in the interpretive exercise engaged here.

(9) Summary

1. These considerations are sufficient to dispose of the appellants’ argument that a point-to-point transmission is necessarily a private transaction outside of the scope of the exclusive right to communicate to the public. To quote Sharlow J.A., at para. 35 of *CWTA*,

in determining whether paragraph 3(1)(*f*) applies to the transmission of a musical work in the form of a digital audio file, it is not enough to ask whether there is a one-to-one communication, or a one-to-one communication requested by the recipient. The answer to either of those questions would not necessarily be determinative because a series of transmissions of the same musical work to numerous different recipients may be a communication to the public if the recipients comprise the public, or a significant segment of the public.

*CCH* (SCC) determined that a “series of repeated . . . transmissions of the same work to numerous different recipients” may constitute a communication “to the public” within the meaning of s. 3(1)(*f*) of the Act(para. 78). Where such a series of point-to-point communications of the same work to an aggregation of individuals is found to exist, it matters little for the purposes of copyright protection whether the members of the public receive the communication in the same or in different places, at the same or at different times or at their own or the sender’s initiative.

IV. Application to the Facts — Whether Online Music Services “Communicate to the Public”

1. Although they occur between the online music provider and the individual consumer in a point-to-point fashion, the transmissions of musical works in this case, where they constitute “communications”, can be nothing other than communications “to the public”.
2. Online music services provide catalogues of musical works. It is open to any customer willing to pay the purchase price to download or stream the works on offer. The works in the catalogues could as a result be transmitted to large segments of the public — if not the public at large. Through the commercial activities of the online music services, the works in question have the potential of being put in the possession of an aggregation of customers. Indeed, the appellants’ business model is premised on the expectation of multiple sales of any given musical work. Achieving the highest possible number of online sales is the very *raison d’être* of online music services. The number of actual transmissions depends only on the commercial success of a given work. The necessary implication of this business model is that there will be a “series of repeated . . . transmissions of the same work to numerous different recipients” (*CCH* (SCC), at para. 78). The conclusion that a communication “to the public” occurs is consistent with reality. As Professor Vaver explains,

[i]f the content is intentionally made available to anyone who wants to access it, it is treated as communicated “to the public” even if users access the work at different times and places.

(D. Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (2nd ed. 2011), at p. 173)

1. These facts are distinguishable from those in *CCH* and the holding in that case does not assist the appellants. The publishers alleging infringement in *CCH* had presented no evidence that the Great Library was communicating the same works in a serial fashion or that the Great Library had made the works generally available at any lawyer’s request. The Great Library’s employees examined and accordingly accepted or refused every request on its own merits, thus retaining control over access to the works.
2. Following the online music services’ business model, musical works are indiscriminately made available to anyone with Internet access to the online music service’s website. This means that the customers requesting the streams are not members of a narrow group, such as a family or a circle of friends. Simply, they are “the public”. In these circumstances, the transmission of any file containing a musical work, starting with the first, from the online service’s website to the customer’s computer, at the customer’s request, constitutes “communicat[ing] the work to the public by telecommunication”.

V. Conclusion

1. The appeal is allowed in respect of downloads for the reasons set out by the majority in *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada* and dismissed in respect of music streamed from the Internet in accordance with these reasons. In view of the divided result, each party should bear its own costs.

The following are the reasons delivered by

1. Abella J. — I agree with Justice Rothstein that in the case of streams only, not downloads, we ought not to disturb the Copyright Board’s conclusion that a point-to-point communication from an online service provider, effected at the request of a customer, can be a communication “to the public”. The focus of these concurring reasons, however, is on the standard of review.
2. In my respectful view, the majority’s conclusion about how to approach the standard of review overcomplicates what should be a straightforward application of the reasonableness standard. The Board, when interpreting its home statute in setting tariffs for the communication of new forms of digital media, should be accorded the same deference and be reviewed on the same standard as every other specialized tribunal in Canada.
3. Since *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, this Court has unwaveringly held that institutionally expert and specialized tribunals are entitled to a presumption of deference when interpreting their home statute. Applying a correctness standard of review on the sole basis that a court might interpret the same statute, in my view, takes us back to the pre-*Dunsmuir* focus on relative expertise between courts and tribunals and the view that courts prevail whenever it comes to questions of law. This effectively drains expert tribunals of the deference and respect they are owed, as is reflected in the language of *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*,[2004] 2 S.C.R. 427 (*SOCAN v. CAIP*), which the majority’s reasons rely on to conclude that the Board’s legal determinations should be reviewed on a correctness standard:

The *Copyright Act* is an act of general application *which usually is dealt with before courts rather than tribunals*. The questions at issue in this appeal are legal questions. . . . [T]he Board’s ruling . . . addresses a point of general legal significance far beyond the working out of the details of an appropriate royalty tariff, which lies within the core of the Board’s mandate. [Emphasis added; para. 49.]

1. This Court recently held in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, [2011] 3 S.C.R. 654 (*ATA*), that deference on judicial review is presumed *any time* a tribunal interprets its home statute:

*[U]nless the situation is exceptional*, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of “its own statute or statutes closely connected to its function, with which it will have particular familiarity” should be presumed to be a question of statutory interpretation subject to deference on judicial review. [Emphasis added; para. 34.]

1. The existing exceptions to the presumption of home statute deference are, as noted in *ATA*, constitutional questions and questions of law of central importance to the legal system and outside the adjudicator’s specialized expertise (*ATA*, at para. 30; *Dunsmuir*, at paras. 58 and 60). The Court in *ATA* also questioned the continued existence of another exception: the problematic category of true questions of jurisdiction or *vires* (paras. 33-34).
2. In concluding that the Copyright Board’s concurrent jurisdiction with all federal and provincial courts in Canada warrants a correctness standard of review, the majority’s reasons have added a new exception — shared jurisdiction with courts. This is not even hinted at in *Dunsmuir*.Nor is anything about this new category obviously analogous to the other exceptions to the presumption of home statute deference, which are essentially legal questions beyond the quotidian work of a tribunal. Nor is it obvious to me why shared jurisdiction should be seen to displaceParliament’s attributed intention that a tribunal’s specialized expertise entitles it to be reviewed with restraint. It appears to spring full panoplied from a different brow.
3. We attribute expertise to a tribunal on the basis that Parliament has delegated decision making to it as an *institutionally specialized body*. *Dunsmuir* recognized the reality that “in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime”: at para. 49, citing David J. Mullan, “Establishing the Standard of Review: The Struggle for Complexity?” (2004), 17 *C.J.A.L.P.* 59, at p. 93. This idea was reinforced by this Court in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, where the majority held that express or implied statutory direction was not required before granting deference to a tribunal — deference flowed instead from the tribunal’s “day to day” statutory familiarity (para. 25).
4. The Board has specialized expertise in interpreting the provisions of the *Copyright Act*, R.S.C. 1985, c. C-42. The fact of shared jurisdiction does not undermine this expertise, the basis for institutional deference. The Boarddoes 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: Margaret Ann Wilkinson, “Copyright, Collectives, and Contracts: New Math for Educational Institutions and Libraries”, in Michael Geist, ed., *From “Radical Extremism” to “Balanced Copyright”* (2010), 503, at p. 514.
5. The Board has highly specialized knowledge about the media technologies used to create and disseminate copyrighted works, such as the Internet, digital radio, satellite communications, as well as related economic issues: Copyright Board Canada, Performance Report for the period ending 31 March 2003 (online), at Section II: Departmental Context — Organization, Mandate and Strategic Outcomes. This specialized knowledge is precisely the kind of institutional expertise that *Dunsmuir* concluded was entitled to deference.
6. In the case before us, the Board is tasked with determining whether downloading a musical work constitutes a “communicat[ion] . . . to the public” within s. 3(1)(*f*) of the *Copyright Act*. This question involves examining many facets, including how music is accessed (e.g., through a stream versus a download), recent changes and trends in the way that users and consumers access music, and how all of this impacts on the ability of copyright owners to obtain compensation for their work.
7. In exercising its mandate, the Board must interpret the meaning of several provisions in the *Copyright Act*, including the exclusive rights of copyright owners listed in s. 3(1). The fact that a court might in another case be asked to interpret the same provisions of the *Copyright Act* does not detract from the Board’s particular familiarity and expertise with the provisions of the *Copyright Act*. Nor does it make this legislation any less of a home statute to the Board. 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*.
8. The majority bases its conclusion that shared jurisdiction attracts a correctness standard on the possibility of inconsistent results stemming from a more deferential standard of review for the Board’s interpretation of the *Act.* But this Court in *Smith v. Alliance Pipeline Ltd.*, [2011] 1 S.C.R. 160, considered — and rejected — concerns over the possibility of multiple interpretations flowing from deference. Justice Fish noted that even prior to *Dunsmuir*, the standard of reasonableness was based on the idea that multiple valid interpretations of a statutory provision were inevitable, and ought not to be disturbed unless the tribunal’s decision was not rationally supported (paras. 38-39).
9. The majority’s reasons also suggest that concurrent jurisdiction between tribunals and courts is rare, and therefore no threat to the integrity of the “home statute” presumption. Yet tribunals often share jurisdiction with courts in interpreting and applying the same statutory provisions. Both the Trade-marks Opposition Board and the Federal Court, for example, interpret and apply s. 6 of the *Trade-marks Act*, R.S.C. 1985, c. T-13, to determine whether a trade-mark is “confusing”. The Board applies s. 6 in the context of opposition proceedings seeking to block registration of a trade-mark, while the Federal Court applies s. 6 in the context of actions for infringement or claims seeking the expungement of a registered trade-mark on the basis that it is invalid: see *Chamberlain Group Inc. v. Lynx Industries Inc.*, 2010 FC 1287, 379 F.T.R. 270; *Alticor Inc. v. Nutravite Pharmaceuticals Inc.*, 2005 FCA 269, 339 N.R. 56.
10. Notwithstanding this shared jurisdiction, the Trade-marks Opposition Board’s decisions are nevertheless reviewed on a reasonableness standard, as Rothstein J.A. concluded for the majority in *Molson Breweries v. John Labatt Ltd.*, [2000] 3 F.C. 145 (C.A.):

*Having regard to the Registrar’s expertise* . . . I am of the opinion that decisions of the Registrar, whether of fact, law or discretion, within his area of expertise, *are to be reviewed on a standard of reasonableness simpliciter* . . . [unless] additional evidence is adduced in the Trial Division that would have materially affected the Registrar’s findings of fact . . . . [Emphasis added; para. 51.]

1. And in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471, this Court applied a reasonableness standard to the Canadian Human Rights Tribunal’s conclusion that the terms “compensate . . . for any expenses incurred by the victim” in s. 53(2)(*c*) and (*d*) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, gave it the authority to award costs. Justices LeBel and Cromwell, for the Court, noted that even though the issue of “costs” could arise before other adjudicative bodies, *including the courts*, this was not an automatic reason to apply a correctness standard. Instead, the Court found that the question was *within the Tribunal’s expertise*, and therefore reviewable on a reasonableness standard of review:

There is no doubt that the human rights tribunals are often called upon to address issues of very broad import. But, the same questions may arise before other adjudicative bodies, particularly the courts. . . .

. . . if the issue relates to the *interpretation and application of its own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply and the Tribunal will be entitled to deference*. [Emphasis added; paras. 23-24.]

1. There are other examples of the application of a reasonableness standard notwithstanding shared jurisdiction between tribunals and courts. Most recently, in *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, this Court applied a reasonableness standard in determining whether a disciplinary board properly applied the *Canadian Charter of Rights and Freedoms*’ guarantee of freedom of expression in disciplining a lawyer under Quebec’s *Code of ethics of advocates*, R.R.Q. 1981, c. B-1. The fact that “freedom of expression” is concurrently interpreted by the courts did not in any way detract from the deference given to the discipline board in applying the *Charter*. If concurrent jurisdiction with the courts in interpreting and applying something as legally transcendent as the *Charter* does not affect the deference to which tribunals are entitled in interpreting their own mandate, surely it is hard to justify carving out copyright law for unique judicial “protection”.
2. Even if shared jurisdiction is accepted as a justification for reviewing the Board’s legal determinations on a standard of correctness, the Board’s mandate was to decide whether a particular activity — downloading a musical work — is the type of activity captured by the phrase “communicate . . . to the public” in s. 3(1)(*f*) of the *Copyright Act*, thereby triggering a tariff. This is a question of mixed fact and law which, according to *Dunsmuir*, attracts deference. The view that we can extricate a legal definition of “communicate . . . to the public” under s. 3(1)(*f*), from the context of the complex and interlocking facts and policies considered by the Board in setting a tariff, strikes me as unrealistic. The majority, however, sees two extricable legal questions: the definition of “communicate” and the definition of “to the public”: see also the companion appeal, *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 S.C.R. 231.
3. “Extricating” legal issues from a question of mixed fact and law is an appellate review concept that was developed in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235. In the context of judicial review, however, extricating legal issues — sometimes referred to as “segmentation” — presents several problems. Unlike trial courts, which have no expertise relative to appellate courts when interpreting a statute, most tribunals are granted particular mandates, giving them specialized expertise in interpreting and applying their home statute to a particular set of facts.
4. In *Dunsmuir*, while Bastarache and LeBel JJ. for the majority did not define “mixed fact and law” questions, they did discuss the issue of “separat[ing]” legal and factual issues at paras. 51-53:

Where the question is one of fact, discretion or policy, deference will usually apply automatically. We believe that *the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated*. [Emphasis added; citations omitted; para. 53.]

1. This statement was recently affirmed by this Court in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650, at para. 65. In that decision, the Chief Justice held that the B.C. Utilities Commission’s conclusion that consultation with First Nations was not required for the approval of an Energy Purchase Agreement was a question of mixed fact and law (at para. 78). She declined to classify the Commission’s decision within the scheme of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, as a “constitutional question” or question of law on the one hand, or a finding of fact on the other. Instead, citing *Dunsmuir*,she held that the mixed question “falls between the legislated standards and thus attracts the common law standard of ‘reasonableness’” (para. 78).
2. Moreover, this Court has repeatedly held that the application of multiple standards of review to different aspects of a tribunal’s decision — one for questions of law and one for questions of fact — should be avoided, urging instead that the tribunal’s decision be reviewed as a whole. As Iacobucci J. explained for the majority in *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157 (*CBC v. Canada*):

While the [Canada Labour Relations Board] may have to be *correct in an isolated interpretation of external legislation, the standard of review of the decision as a whole, if that decision is otherwise within its jurisdiction, will be one of patent unreasonableness*. Of course, the correctness of the interpretation of the external statute *may affect the overall reasonableness* of the decision. Whether this is the case will depend on the impact of the statutory provision on the outcome of the decision as a whole. [Emphasis added; para. 49.]

1. And in *Law Society of New Brunswick* *v. Ryan*, [2003] 1 S.C.R. 247, at para. 56, Iacobucci J. confirmed that what should be reviewed are the “reasons, taken as a whole”(see also *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, at para. 14).
2. In other words, even if an aspect of the tribunal’s decision would otherwise attract a correctness standard, the decision “as a whole” should be reviewed on a deferential standard. As suggested by Iacobucci J. in *CBC v. Canada* (at para. 49 (emphasis added)), even when the tribunal incorrectly interprets an *external* statute, that would merely “*affect the overall reasonableness of the decision*”, as opposed to being a completely extricable error of law.
3. There are several other directives from this Court to the effect that the application of more than one standard of review to a tribunal’s decision is an exceptional practice. In *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, LeBel J. warned:

This Court has recognized on a number of occasions that it may, in certain circumstances, be appropriate to apply different standards of deference to different decisions taken by an administrative adjudicator in a single case. This case provides an example of one type of situation where this may be the proper approach. It involves a fundamental legal question falling outside the arbitrator’s area of expertise. This legal question, though foundational to the decision as a whole, is easily differentiated from a second question on which the arbitrator was entitled to deference: the determination of whether there was just cause . . . .

However, as I have noted above, the fact that the question adjudicated by the arbitrator in this case can be separated into two distinct issues, one of which is reviewable on a correctness standard, should not be taken to mean that this will often be the case. *Such cases are rare; the various strands that go into a decision are more likely to be inextricably intertwined, particularly in a complex field such as labour relations, such that the reviewing court should view the adjudicator’s decision as an integrated whole.* [Emphasis added; citations omitted; paras. 75-76.]

1. This view was endorsed in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650, where the majority said:

The Agency is responsible for interpreting its own legislation, including what that statutory responsibility includes. The Agency made a decision with *many component parts*, each of which fell squarely and inextricably within its expertise and mandate. It was therefore entitled to *a single, deferential standard of review*. [Emphasis added; para. 100.]

1. And in *Mattel, Inc. v. 3894207 Canada Inc.*, [2006] 1 S.C.R. 772, the Trade-marks Opposition Board concluded that use of the name “Barbie’s” for a small Montreal restaurant chain would not create confusion in the marketplace with the Mattel doll of the same name. On judicial review and at this Court, Mattel argued that the Board wrongly interpreted a provision of the *Trade-marks Act* defining “confusion”. Binnie J. for the majority refused to extricate a definitional legal question from the mixed question of whether the word “Barbie” created “confusion” in the marketplace. Concluding that the factual and legal issues were intertwined, he applied a deferential standard:

The determination of the likelihood of confusion requires an expertise that is possessed by the Board (which performs such assessments day in and day out) in greater measure than is typical of judges. This calls for some judicial deference to the Board’s determination . . . .

. . .

While the appellant frames its argument as a challenge to the correctness of the interpretation given to s. 6 . . . I think that in reality . . . its challenge is directed to the relative weight to be given to the s. 6(5) enumerated and unenumerated factors. *The legal issue is not neatly extricable from its factual context, but calls for an interpretation within the expertise of the Board*. [Emphasis added; paras. 36 and 39.]

1. Binnie J., rightly in my view, was reluctant to extricate a pure question of statutory interpretation from the Board’s overall conclusion that the name “Barbie” did not create “confusion”. The case before us raises the identical issue of reviewing statutory interpretation.
2. Prof. David Mullan, persuasively in my view, has also warned against segmentation. In his view, “[o]ver-willingness” to see a question as a “court” question rather than a “tribunal” question (i.e., jurisdictional questions, questions of law or statutory interpretation), “can lead to excessive and wrong-headed intervention” (p. 74):

In my view, it is quite inappropriate to place much, if any store in the context of a judicial review application on the fact that the tribunal might be resolving a “pure question of law” which will have “precedential value”. To see that as an indicator of a need for correctness review would be *to undercut seriously the philosophy of deference that prevails in judicial review* . . . .

. . .

To the extent that segmentation frequently involves the extraction of overarching legal principles, *it will have a tendency to promote correctness review or greater intervention*. [Emphasis added; pp. 77 and 79.]

1. The Board was not tasked with definitively or even separately defining the terms “communicat[ion]” and “to the public” in its decision about whether s. 3(1)(*f*) applied to downloading music. It is not clear to me that Parliament intended this phrase to be defined categorically at all, as opposed to contextually depending on the facts of each case.
2. Segmenting the definition of each word or phrase in a statutory provision into discrete questions of law is a re-introduction by another name — correctness — of the unduly interventionist approach championed by the jurisdictional and preliminary question jurisprudence, jurisprudence which this Court definitively banished in *ATA*. When that jurisprudence was in full flight, in *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756 (*Bell (1971)*), this Court held that the Ontario Human Rights Commission exceeded its jurisdiction when it defined the term “self-contained dwelling unit” within the *Ontario Human Rights Code, 1961-62*, S.O. 1961-62, c. 93, to include a boarding house. In *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, [2012] 1 S.C.R. 364, this Court overturned *Bell (1971)* on the basis that it represented an unduly interventionist approach on the part of the reviewing courts:

Early judicial intervention . . . allows for judicial imposition of a “correctness” standard with respect to legal questions that, had they been decided by the tribunal, might be entitled to deference . . . . [para. 36]

1. The Copyright Board’s conclusion that a music download is a “communicat[ion] . . . to the public” was a decision entirely within its mandate and specialized expertise, involving a complex tapestry of technology, fact, and broadcast law and policy. Pulling a single legal thread from this textured piece and declaring it to be the determinative strand for deciding how the whole piece is to be assessed strikes me, with great respect, as an anomalous jurisprudential relapse.

*Appeal allowed in part.*

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