

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)**

B E T W E E N:

WEST FRASER MILLS LTD.

**APPELLANT
(APPELLANT)**

- and -

**WORKERS' COMPENSATION APPEAL TRIBUNAL and
WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA**

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(RESPONDENTS)**

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PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This case raises fundamental issues regarding the relationship between legislative intention expressed in defined terms in a statute and the presumption of deference to a tribunal's interpretation of its home statute. The Appellant submits that a tribunal's interpretation of a defined term must be correct and cannot be deferred to.
2. The Appellant's position is that where terms expressly defined in legislation are the fulcrum for the tribunal's establishment of regulations which authorize, sanction or prohibit particular conduct, then the tribunal's modification, alteration or expansion of the legislatively-defined terms invokes a true question of *vires* which does not permit of judicial deference.
3. The Appellant further submits that where the Legislature has provided in workers' compensation legislation that an administrative penalty may be imposed against an "employer" for a violation of the legislation, the tribunal may only impose that penalty against the entity functioning as *the* "employer" in the particular circumstances.
4. The tribunal may not impose an administrative penalty on an owner on the basis that the owner is also an employer in other circumstances. The tribunal must respect the Legislature's intention as expressed through the deliberate use of the defined term "employer".

B. Facts

(a) A Contractor's Employee is Fatally Injured

5. The Appellant is an integrated forest company that produces lumber, laminated veneer, fibre board, plywood and pulp and paper. It is the holder of a forest licence issued by the British Columbia Ministry of Forests, Lands and Natural Resource Operations.¹
6. In April 2010 the Appellant entered into a contract with a contractor who operated an unincorporated business falling trees. The contractor was retained to manually fall "trap

¹ 2016 BCCA 473 ("BCCA Reasons"), paras. 1, 21 [Appellant's Record ("AR"), vol. I, Tab E].

trees” at a specified location within the area of the Appellant’s forest licence.. Falling trap trees is work that falls outside the Appellant’s typical logging operations.²

7. On April 16, 2010 a faller employed by the contractor (the “**Faller**”) was fatally injured in the course of his employment with the contractor while working within that specified area covered by the Appellant’s forest licence.³ The Appellant was the “owner” of the workplace for the purposes of Part 3 of the British Columbia *Workers Compensation Act*⁴ (the “**Act**”) but was not the employer of the Faller.⁵

(b) **The Workers’ Compensation Board of British Columbia Imposes Liability on the Appellant as if the Appellant was the Responsible Employer of the Faller**

8. The Respondent Workers’ Compensation Board of British Columbia (the “**Board**”) investigated the accident and completed an Incident Investigation Report on January 28, 2011.⁶ On February 21, 2011 the Board issued an Inspection Report⁷ making an Order (among other Orders not relevant to this appeal) that the Appellant had failed to fulfill its obligations as an “owner of a forestry operation” under s. 26.2(1) of the *Occupational Health and Safety Regulation*⁸ (the “**Regulation**”) made by the Board under the *Act* (as discussed further below). The Board issued a separate Inspection Report and made a series of Orders with regard to the contractor as the employer of the Faller.⁹

9. Section 26.2 of the *Regulation* provides:

26.2 (1) The owner of a forestry operation must ensure that all activities of the forestry operation are both planned and conducted in a manner

² BCCA Reasons, para. 10 [AR, vol. I, Tab E].

³ BCCA Reasons, paras. 1, 8-15 [AR, vol. I, Tab E].

⁴ R.S.B.C. 1996, c. 462.

⁵ BCCA Reasons, para. 1 [AR, vol. I, Tab E].

⁶ BCCA Reasons, paras. 16-20 [AR, vol. I, Tab E]; Incident Investigation Report, Jan. 28, 2011 [AR, vol. IV, Tab N].

⁷ Inspection Report, Feb. 21, 2011 [AR, vol. IV, Tab O]; BCCA Reasons, para. 22 [AR, vol. I, Tab E].

⁸ B.C. Reg. 296/97.

⁹ Inspection Report, re: Gainer, March 16, 2011 [AR, vol. IV, Tab P].

consistent with this Regulation and with safe work practices acceptable to the Board.

(2) Every person who has knowledge and control of any particular activity in a forestry operation must ensure that the activity is both planned and conducted in a manner consistent with this Regulation and with safe work practices acceptable to the Board.

(3) The planning required under this section must

(a) include identification of any work activities or conditions at the workplace where there is a known or reasonably foreseeable risk to workers;

(b) be completed before work commences on the relevant activity, and

(c) be documented at the time of planning.

(4) If, after any planning referred to in subsection (3), there is a change in the workplace circumstances, including the work activities and the conditions of the workplace, and the change poses or creates a known or reasonably foreseeable risk to workers that was not previously identified, then

(a) the plan must be amended to identify and address the risk and provide for the health and safety of the workers at the workplace, and

(b) the amendment must be documented as soon as is practicable.

10. The Board's Order was made pursuant to Part 3 of the *Act*. Section 106 of the *Act* defines certain terms for the purposes of Part 3. These include the following:

“employer” means

(a) an employer as defined in section 1,

(b) a person who is deemed to be an employer under Part 1 of the regulations under that Part, and

(c) the owner and the master of a fishing vessel for which there is crew to whom Part 1 applies as if the crew were workers,

but does not include a person exempted from the application of this Part by order of the Board;

“owner” includes

- (a) a trustee, receiver, mortgagee in possession, tenant, lessee, licensee or occupier of any lands or premises used or to be used as a workplace, and
- (b) a person who acts for or on behalf of an owner as an agent or delegate;

“worker” means

- (a) a worker as defined in section 1, and
- (b) a person who is deemed to be a worker under Part 1 or the regulations under that Part, or to whom that Part applies as if the person were a worker,

but does not include a person exempted from the application of this Part by order of the Board.

11. As is evident, the definition of “employer” in s. 106 of the *Act* incorporates by reference the definition of “employer” in s. 1 of the *Act* which provides:

“employer” includes every person having in their service under a contract of hiring or apprenticeship, written or oral, express or implied, a person employed in work in or about an industry.

12. The purposes of Part 3 are set out in s. 107 of the *Act*, which provides:

- 107**
- (1) The purpose of this Part is to benefit all citizens of British Columbia by promoting occupational health and safety and protecting workers and other persons present at workplaces from work related risks to their health and safety.
 - (2) Without limiting subsection (1), the specific purposes of this Part are
 - (a) to promote a culture of commitment on the part of employers and workers to a high standard of occupational health and safety,
 - (b) to prevent work related accidents, injuries and illnesses,
 - (c) to encourage the education of employers, workers and others regarding occupational health and safety,
 - (d) to ensure an occupational environment that provides for the health and safety of workers and others,

(e) to ensure that employers, workers and others who are in a position to affect the occupational health and safety of workers share that responsibility to the extent of each party's authority and ability to do so,

(f) to foster cooperative and consultative relationships between employers, workers and others regarding occupational health and safety, and to promote worker participation in occupational health and safety programs and occupational health and safety processes, and

(g) to minimize the social and economic costs of work related accidents, injuries and illnesses, in order to enhance the quality of life for British Columbians and the competitiveness of British Columbia in the Canadian and world economies.

13. The Board's mandate under Part 3 is set out in s. 111, which provides:

111 (1) In accordance with the purposes of this Part, the Board has the mandate to be concerned with occupational health and safety generally, and with the maintenance of reasonable standards for the protection of the health and safety of workers in British Columbia and the occupational environment in which they work.

(2) In carrying out its mandate, the Board has the following functions, duties and powers:

(a) to exercise its authority to make regulations to establish standards and requirements for the protection of the health and safety of workers and the occupational environment in which they work;

(b) to undertake inspections, investigations and inquiries on matters of occupational health and safety and occupational environment;

(c) to provide services to assist joint committees, worker health and safety representatives, employers and workers in maintaining reasonable standards for occupational health and safety and occupational environment;

(d) to ensure that persons concerned with the purposes of this Part are provided with information and advice relating to its administration and to occupational health and safety and occupational environment generally;

- (e) to encourage, develop and conduct or participate in conducting programs for promoting occupational health and safety and for improving the qualifications of persons concerned with occupational health and safety and occupational environment;
- (f) to promote public awareness of matters related to occupational health and safety and occupational environment;
- (g) to prepare and maintain statistics relating to occupational health and safety and occupational environment, either by itself or in conjunction with any other agency;
- (h) to undertake or support research and the publication of research on matters relating to its responsibilities under this Act;
- (i) to establish programs of grants and awards in relation to its responsibilities under this Act;
- (j) to provide assistance to persons concerned with occupational health and safety and occupational environment;
- (k) to cooperate and enter into arrangements and agreements with governments and other agencies and persons on matters relating to its responsibilities under this Part;
- (l) to make recommendations to the minister respecting amendments to this Act, the regulations under this Part or Part 1 of this Act, or other legislation that affects occupational health and safety or occupational environment;
- (m) to inquire into and report to the minister on any matter referred to it by the minister, within the time specified by the minister;
- (n) to fulfill its mandate under this Part in a financially responsible manner;
- (o) to do other things in relation to occupational health and safety or occupational environment that the minister or Lieutenant Governor in Council may direct.

14. The duties of an employer are set out in s. 115(1) of the *Act*. Section 115 provides:

- 115** (1) Every employer must
- (a) ensure the health and safety of
 - (i) all workers working for that employer, and

- (ii) any other workers present at a workplace at which the employer's work is being carried out, and
 - (b) comply with this Part, the regulations and any applicable orders.
- (2) Without limiting subsection (1), an employer must
 - (a) remedy any workplace conditions that are hazardous to the health or safety of the employer's workers,
 - (b) ensure that the employer's workers
 - (i) are made aware of all known or reasonably foreseeable health or safety hazards to which they are likely to be exposed by their work,
 - (ii) comply with this Part, the regulations and any applicable orders, and
 - (iii) are made aware of their rights and duties under this Part and the regulations,

...

15. The duties of an owner are set out in s. 119 of the *Act*, which provides:

119 Every owner of a workplace must

- (a) provide and maintain the owner's land and premises that are being used as a workplace in a manner that ensures the health and safety of persons at or near the workplace,
- (b) give to the employer or prime contractor at the workplace the information known to the owner that is necessary to identify and eliminate or control hazards to the health or safety of persons at the workplace, and
- (c) comply with this Part, the regulations and any applicable orders.

16. Circumstances where a person may be subject to obligations in relation to more than one role in the *Act* are set out in s. 123, which provides:

123 (1) In this section, "function" means the function of an employer, supplier, supervisor, owner, prime contractor or worker.

(2) If a person has two or more functions under this Part in respect of one workplace, the person must meet the obligations of each function.

17. On July 26, 2011, the Board imposed an administrative penalty on the Appellant for the violation identified in the Inspection Report, purporting to do so under s. 196 of the *Act*:¹⁰

- 196** (1) The Board may, by order, impose on an employer an administrative penalty under this section if the Board is satisfied on a balance of probabilities that
- (a) the employer has failed to take sufficient precautions for the prevention of work related injuries or illnesses,
 - (b) the employer has not complied with this Part, the regulations or an applicable order, or
 - (c) the employer's workplace or working conditions are not safe.

18. Section 26.2(1) of the *Regulation* was made by the Board pursuant to s. 225 of the *Act* which provides:

- 225** (1) In accordance with its mandate under this Part, the Board may make regulations the Board considers necessary or advisable in relation to occupational health and safety and occupational environment.
- (2) Without limiting subsection (1), the Board may make regulations as follows:
- (a) respecting standards and requirements for the protection of the health and safety of workers and other persons present at a workplace and for the well-being of workers in their occupational environment;
 - (b) respecting specific components of the general duties of employers, workers, suppliers, supervisors, prime contractors and owners under this Part;
 - (c) requiring employers to prepare written policies or programs respecting occupational health and safety and occupational environment in accordance with the regulations;
 - (d) regulating or prohibiting the manufacture, supply, storage, handling or use of any tool, equipment, machine or device or the use of any workplace;

¹⁰ BCCA Reasons, para. 23 [**AR, vol I, Tab E**]; Administrative Penalty Package, July 26, 2011 [**AR, vol. IV, Tab Q**].

(e) respecting standards and requirements for the monitoring of atmospheric or other workplace conditions or to demonstrate compliance with this Part, the regulations or an applicable order;

(f) restricting the performance of specified functions to persons possessing specified qualifications or experience, including establishing certification requirements and establishing or arranging certification and instructor training programs;

(f.1) for the purposes of section 196.1, prescribing administrative penalties or schedules of administrative penalties, any penalty of which must not be more than \$1,025.42, but which penalties or schedules of penalties may

(i) vary according to the nature or frequency of the failure to comply or the number of workers affected by any failure to comply, or

(ii) provide for greater penalties for a second penalty and for third or subsequent penalties in a 3 year period or any other period that may be prescribed.

(g) requiring the preparation, maintenance and submission of records respecting statistical data related to occupational health and safety or occupational environment;

(h) respecting the form and manner of reporting on any matter required to be reported under this Part or the regulations;

(i) respecting any other matter for which regulations, other than regulations of the Lieutenant Governor in Council, are contemplated by this Act.

19. The Appellant requested that the Board review the Orders. The Appellant contended that the Board could not impose liability on it as the owner of a worksite in respect of responsibilities that were those of the employer of the deceased Faller.¹¹ The Appellant further contended that s. 196 of the *Act* only authorized the imposition of an administrative penalty against a person who had violated the statute or regulations while acting in the capacity of an “employer” as defined in the *Act*.¹² On April 16, 2012, a Review Officer of the Board’s

¹¹ BCCA Reasons, para. 25 [AR, vol. I, Tab E].

¹² BCCA Reasons, para. 27 [AR, vol. I, Tab E].

Review Division confirmed the Board's penalty order and the finding that the Appellant violated s. 26.2(1) of the *Regulation*.¹³

(c) The Workers' Compensation Appeal Tribunal Rejects the Appellant's *Vires* and "Employer" Arguments on Appeal

20. The Appellant then appealed to the Respondent Workers' Compensation Appeal Tribunal (the "WCAT") contending that the Board lacked the jurisdiction to enact s. 26.2(1) of the *Regulation* and, further, that the Board had misinterpreted s. 196 of the *Act* as permitting an administrative penalty to be imposed upon it as an "owner" when not the "employer" of the deceased Faller. WCAT dismissed the appeal.¹⁴

(d) The Supreme Court of British Columbia Upholds the Workers' Compensation Appeal Tribunal's Decision

21. The Appellant unsuccessfully applied to the Supreme Court of British Columbia for judicial review of the WCAT decision.¹⁵

(e) The British Columbia Court of Appeal Dismisses the Appellant's *Vires* Challenge and Position that an "Owner" is not an "Employer" for the Purpose of Imposing an Administrative Penalty under the Legislation

22. The Appellant appealed to the British Columbia Court of Appeal (the "BCCA") which dismissed the Appellant's appeal in Reasons for Judgment dated November 28, 2016 (2016 BCCA 473).¹⁶

23. In response to the Appellant's position that s. 26.2 of the *Regulation* was not authorized by the *Act*, the BCCA accepted that the appropriate standard of review was "correctness".¹⁷ It then noted that s. 225(2)(a) of the *Act* authorized the Board to make regulations "respecting standards and requirements for the protection of the health and safety of workers and other

¹³ WorkSafeBC Review Decision (Review Reference Nos. R0126792 and R0134069) [AR, vol. I, Tab A]; BCCA Reasons, paras. 25-28 [AR, vol. I, Tab E].

¹⁴ WCAT Decision No. WCAT-2013 – 01952 [AR, vol. I, Tab B]; BCCA Reasons, paras. 29, 32-36 [AR, vol. I, Tab E].

¹⁵ 2015 BCSC 1098 ("BCSC Reasons") [AR, vol. I, Tab C].

¹⁶ BCCA Reasons [AR, vol. I, Tab E].

¹⁷ BCCA Reasons, paras. 42, 51 [AR, vol. I, Tab E].

persons present at the workplace, and for the well-being of workers in their occupational environment”. It held:

[66] In my view, the impugned regulation is manifestly one “respecting standards and requirements for the protection of the health and safety of workers and other persons present at the workplace and for the well-being of workers in their occupational environment”. It is, therefore, authorized by s. 225(2)(a) of the *Workers Compensation Act*. It is unnecessary, in the circumstances, to determine whether it might also be authorized under another provision.

[67] The regulation is not contrary to any provision of the *Act*, and conforms with the purposes and objectives of the statute, and with the Board’s mandate.

[68] In the result, I would reject West Fraser’s challenge to the *vires* of the regulation. Section 26.2(1) of the *Occupational Health and Safety Regulations* is *intra vires*.¹⁸

24. In respect to the Appellant’s position that s. 196(1) of the *Act* only permitted the Board to impose an administrative penalty on an “employer” when acting in the capacity of employer, the BCCA rejected the Appellant’s argument that the question of whether the Board had the ability to impose an administrative penalty on a person who was not acting as an “employer” as that term is defined in the *Act* raised a true question of *vires*. The BCCA held¹⁹ that the standard of review for WCAT’s interpretation of s. 196(1) of the *Act* was that of “patently unreasonable” as that term is used in s. 58(2)(a) of the *Administrative Tribunals Act*²⁰ (the “*ATA*”).
25. The BCCA rejected the Appellant’s position that pursuant to s. 196(1)(b) of the *Act* an administrative penalty could only be imposed upon the Appellant if the contravention of the *Act* had been committed by the Appellant while it was acting in its capacity as the employer. After setting out certain contextual arguments, the BCCA held:

[98] It is not necessary to decide which of these contextual arguments is the stronger, because the Court cannot interfere with WCAT’s interpretation unless it finds it to be “patently unreasonable”. In my view, no such finding can be made in this case. The statute is capable of supporting an interpretation of s. 196(1) that subjects employers to administrative penalties for violations of the *Act*, even when

¹⁸ BCCA Reasons, paras. 66-68 [AR, vol. I, Tab E].

¹⁹ BCCA Reasons, paras. 70, 75 [AR, vol. I, Tab E].

²⁰ S.B.C. 2004, c. 45.

those violations consist of breaches of duties belonging to the employer in its capacity as a “supervisor”, “owner”, or “supplier”, rather than as “employer” *per se*.²¹

PART II - STATEMENT OF ISSUES

26. Did the British Columbia Court of Appeal err in finding that s. 26.2 of the *Regulation* was within the jurisdiction of the Board?
27. Did the British Columbia Court of Appeal err in finding that the Appellant, as owner of the worksite, was properly made subject to an administrative penalty which expressly applies only to an employer?

PART III - STATEMENT OF ARGUMENT

A. The *Vires* of Section 26.2(1) of the *Occupational Health and Safety Regulation*

(a) The Standard of Review is Correctness

28. Decisions of the Board are protected by a privative clause (*Act*, s. 96). Therefore the appropriate standard of review is determined by application of s. 58 of the *ATA*. Applying this section the Learned Trial Judge held that the appropriate standard of review for determination of statutory *vires* of subordinate legislation was correctness.²² The BCCA agreed with this conclusion.²³ The courts below were correct in concluding that no deference is owed to the Board or WCAT in respect of the *vires* of s. 26.2 of the *Regulation*.

(b) Section 26.2(1) of the *Occupational Health and Safety Regulation* is *Ultra Vires*

29. Section 26.2 of the *Regulation* purports to require an “owner” to assume and adhere to duties, obligations and responsibilities which are beyond those contemplated by s. 119 of the *Act*. In doing so, it exceeds the jurisdiction of the Board and is necessarily *ultra vires*.

²¹ BCCA Reasons, para. 98 [AR, vol. I, Tab E].

²² BCSC Reasons, para. 26 [AR, vol. I, Tab C].

²³ BCCA Reasons, paras. 42, 46, 50-51 [AR, vol. I, Tab E].

30. Unlike Parliament and Provincial Legislatures which possess inherent legislative power, regulatory bodies can exercise only those legislative powers delegated to them by their enabling statute. The jurisdiction to enact subordinate legislation is not unfettered. The rule of law permits of judicial review to ensure that subordinate legislation complies with the rationale and purview of the statutory scheme under which it is promulgated.²⁴
31. In *Katz Group Canada Inc. v. Ontario (Health and Long Term Care)*²⁵ (“**Katz Group**”) this Court outlined the approach to judicial review of subordinate regulations holding:
- a. A successful challenge to the *vires* of regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate (at para. 24).
 - b. Regulations benefit from a presumption of validity which places a burden on challengers to the validity of regulations to demonstrate their invalidity and “favours an interpretative approach that reconciles the regulation with its enabling statute so that, *where possible*, the regulation is construed in a manner which renders it *intra vires*” (at para. 25, italics in original).
 - c. Both the challenged regulation and the enabling statute should be construed in a broad and purposive manner (at para. 26).
 - d. The inquiry does not involve assessing the policy merits of the regulations. The impugned regulation must be found to be “irrelevant”, “extraneous” or “completely unrelated” to the statutory purpose of the parent legislation to be found to be *ultra vires* (at para. 28).
32. An assessment of the scope of the regulation-making authority granted to an administrative or regulatory body under its enabling statute requires an assessment of the effect of the regulation in order to consider whether it is consistent with the objective of the enabling

²⁴ *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 15 at para. 15. See also *United Taxi Drivers’ Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485 at para. 5.

²⁵ 2013 SCC 64, [2013] 3 S.C.R. 810.

statute or the scope of the subordinate body's statutory mandate. This is determined according to the modern approach to statutory interpretation which requires that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.²⁶

33. In addition to this overarching statement of the modern approach to statutory interpretation, the following interpretive principles are also relevant in determining the scope of the authority delegated to the Board to pass regulations:

- a. Broad policy statements, such as those found in ss. 107(1), 111(1) and 225(1) of the *Act*, do not confer jurisdiction. Declarations of policy cannot serve to extend the powers of a subordinate body. If the only constraint on the Board's powers to promulgate regulations under s. 225 is whether the enacted regulation can be said to be directed to a policy objective set out in ss. 107(1), 111(1) or 225(1), then the only limit to the Board's regulatory power would be its own view of the wisdom of its proposed regulation in light of its own interpretation of such policy objectives. This would be an impermissible unfettered discretion.²⁷
- b. In determining whether impugned subordinate legislation has been enacted in conformity with the terms of the enabling statute, it is essential to ascertain the scope of the mandate conferred by the legislation, having regard to the purpose(s) or object(s) of the enactment as a whole. The test of conformity with an Act is not satisfied merely by showing that the delegate stayed within the literal and often broad terminology of the regulation enabling provision when promulgating subordinate legislation. The language conferring authority to enact subordinate

²⁶ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21.

²⁷ *Reference Re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010 -168*, 2012 SCC 68, [2012] 3 S.C.R. 489 at paras. 11-33 (“**Reference re Broadcasting Regulatory Policy**”).

legislation must be taken to be qualified by the overriding requirement that it accord with the purposes and objects of the enabling enactment when read in its entirety.²⁸

- c. Broad and open-textured language such as is found in ss. 107(1), 111(1) and 225(1) of the *Act* which refers to the policy objectives of the legislation itself provides limits to the Board's regulation-making authority. It is axiomatic that a regulation that is inconsistent with the substantive statutory provisions cannot carry out the provisions of legislation nor meet its policy objectives.²⁹
 - d. Section 12 of the British Columbia *Interpretation Act*³⁰ provides that definitions or interpretation provisions in an enactment, unless the contrary intention appears in the enactment, apply to the whole enactment including the section containing the definition or interpretation provision.
 - e. Section 13 of the British Columbia *Interpretation Act* provides that an expression used in a regulation has the same meaning as in the enactment authorizing the regulation.
34. In light of the foregoing principles, it is necessary to construe the regulation-making authority found in s. 225 of the *Act* through the prism of the full context provided by Part 3 of the *Act*. Section 225 of the *Act* does not stand alone. It does not confer plenary power and cannot be read in isolation from the rest of Part 3 of the *Act*.
35. While the approach set out in *Katz Group* posits a presumption of regulatory validity, there are limits to that presumption. Indeed, the limits are acknowledged by the use of the italicized phrase "*where possible*" in para. 25 of this Court's decision. Such limits are also

²⁸ *Katz Group, supra*, para. 24, quoting *Waddell v. Governor in Council* (1983), 8 Admin. L.R. 266 at 292 (BCSC). See also *Wildlands League v. Ontario (Natural Resources and Forestry)*, 2016 ONCA 741 at paras. 40-43 (leave to appeal dismissed May 4, 2017, SCC Docket 37340).

²⁹ D. Holland and J. McGowan. *Delegated Legislation in Canada* (Ontario: Carswell, 1989), p. 182; *McMeekin v. Government of the Northwest Territories (Department of Education, Culture and Employment)*, 2010 NWTSC 27, paras. 40-42. See also: *Re Gach and Director of Welfare (Brandon)* (1973), 35 D.L.R. (3d) 152 at 154 (Man. C.A.) and *Reference re Broadcasting Regulatory Policy, supra*, para. 25.

³⁰ R.S.B.C. 1996, c. 38 ("*Interpretation Act*").

inherent in the notion that a delegate cannot assume an impermissible legislative role in the passage of regulations. The regulations must manifest the intention of the Legislature and not simply the preferences of the delegate.

36. It is clear from a review of Part 3 of the *Act*, the provision of defined terms and use of such defined terms throughout that the Legislature's intention was to provide defined duties and roles for, among others, "employers" and "owners". Moreover, the Legislature intended to, and did, impose different duties and obligations upon persons occupying those roles. This legislative intention is clear from the following:
- a. In enacting ss. 115 to 121 of the *Act*, the Legislature chose to expressly differentiate the general responsibilities under the *Act* for owners, employers and other entities that are commonly in the workplace and in a position to influence the health and safety of workers.³¹
 - b. Section 106 of the *Act* separately defines each of the terms "employer" and "owner", evidencing a legislative intention that persons performing those functions at a workplace are to be treated as separate entities, with separate duties and obligations. The intention inherent in these definitions is made manifestly clear by the existence of s. 115 which outlines the duties of employers and s. 119 which outlines the duties of owners.
 - c. The duties of an employer outlined in s. 115 of the *Act* have as their central concern duties related to the relationship between the employer and "workers". Indeed, each paragraph of s. 115(2) (except para. (h) which provides that employers must cooperate with the Board) specifically references the relationship of an employer to its "workers".
 - d. The duties of an owner set out in s. 119 do not impose any obligations upon the owner related to "workers". The obligations of an owner relate to the owner's land and premises that are being used as a workplace (subs. (a)) and the provision of

³¹ *British Columbia Hydro and Power Authority v. Workers' Compensation Board of British Columbia*, 2014 BCCA 353, 64 B.C.L.R. (5th) 101 at para. 46.

information to the “employer or prime contractor” (subs. (b)). The language of s. 119, by referencing the term “owner” separately and distinctly from that of “employer” in the body of the section, itself compels the conclusion that the Legislature intended that the persons performing separate functions were intended to have separate duties and obligations.

- e. Section 123(1) provides that, for the purpose of that section, the functions of employer, supplier, supervisor, owner, prime contractor or worker are separate. Section 123(2) then provides that it is only when a person has two or more of the functions referred to in s. 123(1) at one workplace that they must meet the obligation of each function under Part 3.
- f. The regulation-making authority found in s. 225(1) provides that the Board may make regulations “in accordance with its mandate under this Part”. The relevant statutory provisions, all of which distinguish between the roles, duties and obligations of an “owner” and an “employer” are part of the Board’s mandate under Part 3. A regulation passed pursuant to s. 225(1) must not be inconsistent with that mandate. Regulations which are inconsistent with the mandate in Part 3 are not “in accordance” with it.
- g. In addition, the Board’s mandate under Part 3, set out in s. 111(1), provides that it must be exercised in accordance with the purposes of Part 3. Any regulation which is inconsistent with Part 3’s express delineation of separate duties and obligations for an “employer” and an “owner” is not made “in accordance” with the purposes of Part 3.
- h. The regulation-making authority in s. 225(2)(b) also specifically distinguishes between the duties of an “employer” and those of an “owner” under Part 3. A regulation which conflates the duties of “employers” and “owners” would be inconsistent with the regulation-making authority described in this section, and again, with the existence of separate definitions for those terms in Part 3.

37. With these observations related to the context created by the language of Part 3, we turn to an examination of s. 26.2 of the *Regulation*.
38. Section 26.2(1) of the *Regulation* requires that the “owner” ensure that activities are planned and conducted in a manner consistent with s. 26.2 itself and with safe work practices acceptable to the Board. The obligation set out in s. 26.2, which requires an owner to assume responsibility for how activities are “planned and conducted” on the owner’s premises, goes far beyond the duties and obligations of an owner set out in s. 119 of the *Act*. It also presumes an expertise which the owner might not reasonably be expected to possess. The “activities” which involve the utilization of “safe work practices” are the activities which will be undertaken by the employer’s workers under the supervision of the employer. Section 26.2 imposes obligations on “owners” of a forestry operation that go beyond, and are therefore inconsistent with, the obligations intended by the Legislature and outlined in s. 119 of the *Act*.
39. Section 26.2(3) of the *Regulation* outlines the planning required by the owner of a forestry operation. Obligations created under s. 26.2(3)(a) clearly conflate the duties of “employers” and “owners” contrary to the scheme of Part 3 of the *Act*. Indeed, s. 26.2(3)(a) uses, in part, the same and or similar substantive language used to impose duties on an “employer” under s. 115(2)(a) and (b) of the *Act*. Similarly, s. 26.2(4) overlaps with the duty of employers imposed under s. 115 of the *Act*.
40. In this regard, s. 26.2 of the *Regulation* not only disregards and is inconsistent with the Legislature’s creation of distinct functions and correlative responsibilities in the *Act*, it also violates the purpose of the *Act*. The Legislature, through the creation of defined functions intended to clearly set out the respective duties of different actors in the workplace. Section 26.2, by imposing on owners parallel duties to those of the employer under the *Act*, is contrary to the *Act*’s approach and gives rise to potential for confusion, accountability errors and the employer looking to the owner to assume responsibility for matters that under the *Act*’s approach properly reside with the employer.
41. The Appellant submits that the BCCA’s conclusion that s. 26.2 of the *Regulation* was authorized by s. 225(2)(a) of the *Act* because s. 26.2 was one “respecting standards and

requirements for the protection of the health and safety of workers and other persons present at the workplace and for the well-being of workers in their occupation environment”,³² was clearly in error. The effect of the BCCA’s decision is to cede to the Board a limitless jurisdiction to pass regulations, unconstrained by the context provided by Part 3 of the *Act* and, in particular, unconstrained by the expressions of legislative intent found in the definitions and description of respective duties and obligations of employers and owners outlined in ss. 106, 115 and 119 of the *Act*.

B. The Administrative Penalty

42. The administrative penalty imposed on the Appellant pursuant to s. 196(1) was based upon a finding that the Appellant had breached s. 26.2 of the *Regulation*.³³ The BCCA upheld the penalty finding that the *Act* was capable of supporting an interpretation of s. 196(1) that would subject employers to administrative penalties for violations of the *Act* even when, as here, those violations consist of breaches of duties belonging to the person in its capacity as the “owner” rather than as the “employer”.³⁴ This conclusion was premised upon a finding that such an interpretation was not “patently unreasonable” as that term is used in s. 58(2)(a) of the *ATA*. The BCCA rejected the Appellant’s argument that, with regard to terms defined in the legislation, the Board commits a true error of jurisdiction or *vires* when it refuses to give a defined term the meaning assigned to it by the Legislature.³⁵

(a) The Interpretation of Section 196 of the *Workers Compensation Act* Raises a True Question of *Vires* Reviewable on a Standard of Correctness

43. In *Dunsmuir v. New Brunswick*³⁶ (“*Dunsmuir*”) this Court held that true questions of jurisdiction or *vires* arise where an administrative tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter (see para. 59). If a matter is appropriately characterized as a true question of jurisdiction or *vires*, the

³² BCCA Reasons, para. 66 [AR, vol. I, Tab E].

³³ Administrative Penalty Package, July 26, 2011 [AR, vol. IV, Tab Q, pp. 125-126].

³⁴ BCCA Reasons, paras. 89-98 [AR, vol. I, Tab E].

³⁵ BCCA Reasons, paras. 70-78 [AR, vol. I, Tab E].

³⁶ 2008 SCC 9, [2008] 1 S.C.R. 190.

standard of review is correctness. This Court's recent jurisprudence has emphasized that true questions of jurisdiction or *vires*, if they exist as a category at all, are rare and exceptional.³⁷

44. This Court's recent jurisprudence also posits that the presumptive standard of review of a tribunal's interpretation of a provision in its home statute is that of reasonableness which incorporates the concept of judicial deference to the tribunal's interpretation. This presumption of deference is asserted to be respectful of the principle of legislative supremacy and the choice made to delegate decision-making to a tribunal rather than to the courts.³⁸
45. The Appellant submits that the use of a defined term in a provision is a prototypical example of when an administrative tribunal "must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter."³⁹ When a word is defined by the Legislature in a statute, "the binding character of the stipulated meaning depends not on shared linguistic convention amongst lawyers and judges, but on legislative sovereignty."⁴⁰ The Legislature has dictated, through the use of a definition, that the defined term is to be given the stipulated meaning. A tribunal may not change, modify or alter that meaning or otherwise fail to apply it. This is particularly the case with an exhaustive definition introduced by the verb "means".⁴¹
46. The existence of exhaustively-defined terms is a clear indication that the Legislature did not intend to cede any aspect of their legislative function to the administrative tribunal. The Legislature's intention is clearly expressed by the deliberate use of the definition.⁴² Further,

³⁷ *ATCO Gas and Pipelines v. Alberta (Utilities Commission)*, 2015 SCC 45, [2015] 3 S.C.R. 219 at para. 27; *Canadian Broadcasting Corp. v. SODRAC 2013 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615 at para. 39.

³⁸ *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293.

³⁹ *Dunsmuir*, *supra*, para. 59.

⁴⁰ Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. (Ontario: LexisNexis Canada Inc., 2008) ("*Sullivan on the Construction of Statutes*") at p. 61.

⁴¹ *Yellow Cab Ltd. v. Alberta (Board of Industrial Relations)*, [1980] 2 S.C.R. 761 at 768-769; *Mattabi Mines Ltd. v. Ontario (Minister of Revenue)*, [1988] 2 S.C.R. 175 at 191-194.

⁴² *Sullivan on the Construction of Statutes*, *supra*, pp. 61-62.

this is the only conclusion consistent with the provisions of the *Interpretation Act*.⁴³ Issues relating to standard of review involve “seeking the polar star of legislative intent”⁴⁴ and when that legislative intent is clearly expressed in an exhaustively-defined term, to disregard the definition is to disregard legislative supremacy.

47. The Appellant submits that the principle that a court should presumptively defer to an administrative tribunal’s interpretation of its home statute cannot apply to the interpretation or application of an exhaustively-defined term in legislation without transgressing legislative supremacy.
48. The concept of deference as articulated in this Court’s decisions involves a recognition that an administrative tribunal has the right to select from a range of outcomes which are reasonable in respect of the facts and the law. Where the Legislature has exhaustively defined a term, however, an administrative tribunal has no such leeway. There is no range of acceptable definitions. The tribunal is bound to apply the term as defined by the Legislature. The definition precludes any notion of deference. While the tribunal may purport to interpret the definition, fidelity to legislative supremacy requires that its interpretation must be reviewable by courts of inherent jurisdiction on the standard of correctness.
49. In the context of Part 3 of the *Act* examined previously, the only correct conclusion is that the Legislature intended, by the use of the defined term “employer”, that the administrative penalty provided under s. 196(1) could be imposed only on the entity functioning as *the* employer.
 - (b) **Alternatively, Interpreting Section 196 of the *Workers Compensation Act* as Allowing the Imposition of an Administrative Penalty on an Employer for a Contravention While Acting in its Capacity as an Owner and Not in its Capacity as an Employer is Patently Unreasonable**
50. In the alternative, if this Court rejects the Appellant’s argument that the standard of review is correctness, the Appellant submits that the standard of review is patent unreasonableness

⁴³ *Interpretation Act*, *supra*, ss. 12 and 13.

⁴⁴ *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 at para. 149.

as that term is utilized in s. 58(2)(a) of the *ATA*. In British Columbia, the BCCA applies the description of the phrase “patently unreasonable” from *Law Society of New Brunswick v. Ryan*⁴⁵ in the administration of s. 58 of the *ATA*: a patently unreasonable decision is one that is “clearly irrational” or “evidently not in accord with reason”.⁴⁶

51. The Appellant submits that an interpretation which permits the imposition of an administrative penalty on it, as owner, pursuant to the terms of s. 196 of the *Act* is an absurd interpretive conclusion. It is an unreasonable linguistic contortion to hold that the defined term “employer” includes an owner for the purposes of penalty. It is evidently not in accord with reason and clearly irrational for the following reasons:
- a. The Legislature defined the term “employer” exhaustively for the purposes of Part 3 of the *Act*. There would have been no need to separately define “owner” in s. 106, nor separately indicate the duties of an “owner” in s. 119 if the term “employer” could be used interchangeably with the term “owner” at the tribunal’s preference.
 - b. An interpretation of the term “employer” in s. 196 of the *Act* to include an “owner” is inconsistent with the context provided by Part 3 as a whole, as examined earlier.
 - c. The interpretation that “employer” may include “owner” is inconsistent with s. 123(2) of the *Act* whereby the Legislature has stipulated that it is only where a person has two or more functions at a workplace that they must meet the obligations of each function. In other words, the Legislature’s intent is that the responsibilities and obligations assumed under the *Act* directly relate to the “function” being performed at a workplace, i.e., of an employer, supplier, supervisor, owner, prime contractor or worker. The only function the Appellant had related to the workplace where the fatality occurred was that of owner as holder of a forest licence for the

⁴⁵ 2003 SCC 20, [2003] 1 S.C.R. 247 at para. 52.

⁴⁶ *Pacific Newspaper Group v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2014 BCCA 496 at paras. 39-40, 48, leave to the S.C.C. denied, [2015] S.C.C. No. 60 (Q.L.); *British Columbia (Workers’ Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25, [2016] 1 S.C.R. 587 at para. 8.

area in which the workplace was located. The contractor was the employer of the Faller at all relevant times.⁴⁷

- d. The Appellant was sanctioned for a breach of s. 26.2 of the *Regulation* which sets out obligations of an “owner of a forestry operation”. Only an “owner” may breach those obligations. Section 26.2 of the *Regulation* has no application to an employer. However, the effect of the approach approved of by the BCCA is that owners who happen to otherwise be an “employer” may be subject to an administrative penalty under s. 196(1) of the *Act* as *an* employer for breach of a regulation applying only to “owners”. An owner who is not otherwise an employer is not subject, and cannot be subject, to such a penalty.
 - e. It is absurd to hold that the concept of deference authorizes an administrative tribunal to substitute its own policy preferences for those which have been clearly expressed by the Legislature in a definition. Given the definitions used throughout Part 3, deference in these circumstances permits the tribunal to substitute its own policy preferences for those of the Legislature.⁴⁸
52. By use of the exhaustively-defined term “employer” the Legislature has required that the imposition of a sanction under s. 196 of the *Act* depends upon an employment relationship. The interpretation of the legislation approved of by the BCCA replaces that requirement of the Legislature with the perspective of the administrative tribunal that if an “owner” of land is otherwise *an* employer it may be sanctioned under s. 196(1) of the *Act* for a contravention, notwithstanding the absence of an employment relationship with the injured worker, simply

⁴⁷ BCCA Reasons, paras. 1, 8, 10, 21 [**AR, vol. I, Tab E**]; Incident Investigation Report, Jan. 28, 2011, s. 1.2 [**AR, vol. IV, Tab N, p. 96**]. The Appellant’s limited function as “owner” of the workplace was recognized and underlay the Board’s decision to rescind two orders made under other subsections of s. 26 of the *Regulation*: see WorkSafeBC Review Decision (Review Reference Nos. R0126792 and R0134069), pp. 10-13 [**AB, vol. I, Tab A, pp. 12-14**].

⁴⁸ *Blue Mountain Resorts Ltd. v. Bok* 2013 ONCA 75, 359 D.L.R. (4th) 276; *Campbell v. Workers’ Compensation Board*, 2012 SKCA 56, 393 Sask. R. 246.

because the contravention occurred on its land. The Appellant submits such a conclusion is clearly irrational.

PART IV - SUBMISSIONS CONCERNING COSTS

53. The Appellant requests its costs in this Court and throughout.

PART V - ORDER SOUGHT

54. The Appellant asks this Court to allow the appeal with costs in this Court and throughout, and declare s. 26.2 of the *Regulation* as *ultra vires* the *Act*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of July, 2017.


as agent for

Donald J. Jordan, Q.C. and Paul Fairweather
Counsel for the Appellant

PART VI - TABLE OF AUTHORITIES

<u>Cases</u>	<u>Paragraph(s)</u>
<u><i>ATCO Gas and Pipelines v. Alberta (Utilities Commission)</i></u> , 2015 SCC 45, [2015] 3 S.C.R. 219	43
<u><i>British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority</i></u> , 2016 SCC 25, [2016] 1 S.C.R. 587	50
<u><i>British Columbia Hydro and Power Authority v. Workers' Compensation Board of British Columbia</i></u> , 2014 BCCA 353, 64 B.C.L.R. (5th) 101	36.a
<u><i>Blue Mountain Resorts Ltd. v. Bok</i></u> , 2013 ONCA 75, 359 D.L.R. (4th) 276	51.e
<u><i>Campbell v. Workers' Compensation Board</i></u> , 2012 SKCA 56, 393 Sask. R. 246	51.e
<u><i>Canadian Broadcasting Corp. v. SODRAC 2013 Inc.</i></u> , 2015 SCC 57, [2015] 3 S.C.R. 615	43
<u><i>Catalyst Paper Corp. v. North Cowichan (District)</i></u> , 2012 SCC 2, [2012] 1 S.C.R. 15	30
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<u><i>Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.</i></u> , 2016 SCC 47, [2016] 2 S.C.R. 293	44
<u><i>Katz Group Canada Inc. v. Ontario (Health and Long Term Care)</i></u> , 2013 SCC 64, [2013] 3 S.C.R. 810	31, 33.b, 35
<u><i>Law Society of New Brunswick v. Ryan</i></u> , 2003 SCC 20, [2003] 1 S.C.R. 247	50
<u><i>Mattabi Mines Ltd. v. Ontario (Minister of Revenue)</i></u> , [1988] 2 S.C.R. 175	45
<u><i>McMeekin v. Government of the Northwest Territories (Department of Education, Culture and Employment)</i></u> , 2010 NWTSC 27	33.c
<u><i>Pacific Newspaper Group Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 2000</i></u> , 2014 BCCA 496	50

<u>Re Gach and Director of Welfare (Brandon)</u> (1973), 35 D.L.R. (3d) 152 (Man. C.A.)	33.c
<u>Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168</u> , 2012 SCC 68, [2012] 3 S.C.R. 489	33.a, 33.c
<u>Rizzo & Rizzo Shoes Ltd. (Re)</u> , [1998] 1 S.C.R. 27	32
<u>United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)</u> , 2004 SCC 19, [2004] 1 S.C.R. 485	30
<u>Waddell v. Governor in Council</u> (1983), 8 Admin. L.R. 266, 1983 CanLII 189 (B.C.S.C.)	33.b
<u>Wildlands League v. Ontario (Natural Resources and Forestry)</u> , 2016 ONCA 741	33.b
<u>Yellow Cab Ltd. v. Alberta (Board of Industrial Relations)</u> , [1980] 2 S.C.R. 761	45

Secondary Sources

D. Holland and J. McGowan. <i>Delegated Legislation in Canada</i> (Ontario: Carswell, 1989)	33.c
Sullivan, Ruth. <i>Sullivan on the Construction of Statutes</i> , 5 th ed. (Ontario: LexisNexis Canada Inc., 2008)	45, 46

Legislation

<u>Administrative Tribunals Act</u> , S.B.C. 2004, c. 45	
• <u>s. 58</u>	28, 50
• <u>s. 58(2)(a)</u>	24, 42, 50
<u>Interpretation Act</u> , R.S.B.C. 1996, c. 38	
• <u>s. 12</u>	33.d, 46
• <u>s. 13</u>	33.e, 46
<u>Occupational Health and Safety Regulation</u> , B.C. Reg. 296/97	

- [s. 26.2](#) 9, 23, 26, 28, 29, 37, 38, 40, 42, 51.d, 54
- [s. 26.2\(1\)](#) 8, 18, 19, 20, 38
- [s. 26.2\(3\)](#), 26.2(3)(a) 39
- [s. 26.2\(4\)](#) 39

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- [s. 1](#) 11
- [s. 96](#) 28
- [Part 3](#) 7, 10, 12, 13, 34, 36, 36.e, 36.f, 36.g, 36.h, 37, 39, 40, 47, 51.a, 51.b, 51.e
 - [s. 106](#) 10, 11, 36.b, 40, 51.a
 - [s. 107](#) 12
 - [s. 107\(1\)](#) 33.a, 33.c
 - [s. 111](#) 13
 - [s. 111\(1\)](#) 33.a, 33.c, 36.g
 - [s. 115](#) 36.a, 36.b, 36.c, 39, 40
 - [s. 115\(1\)](#) 14
 - [s. 115\(2\)](#) 14, 36.c
 - [s. 115\(2\)\(a\)](#), [115\(2\)\(b\)](#) 14, 39
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- [s. 225\(2\)\(a\)](#) 23, 40
- [s. 225\(2\)\(b\)](#) 36.h

**APPENDIX – NOTICE OF CONSTITUTIONAL QUESTION
(FILED JUNE 2, 2017 PURSUANT TO RULE 33(2))**

SCC File No: 37423

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)

BETWEEN:

WEST FRASER MILLS LTD.

APPELLANT
(Appellant)

-and-

WORKERS' COMPENSATION APPEAL TRIBUNAL and
WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA

RESPONDENTS
(Respondents)

NOTICE OF CONSTITUTIONAL QUESTION
(WEST FRASER MILLS LTD., APPELLANT)
(Pursuant to Rule 33(2) of the *Rules of the Supreme Court of Canada*)

TAKE NOTICE that I, Donald J. Jordan, Q.C., counsel for Appellant, West Fraser Mills Ltd., assert that the appeal raises the following constitutional question:

Is section 26.2 of the *Occupational Health and Safety Regulation*, B.C. Reg. 296/97 inoperable or otherwise invalid or inapplicable, its promulgation by the Workers' Compensation Board of British Columbia being unauthorized by the *Workers Compensation Act*, R.S.B.C. 1996, c. 462, including being outside the regulation-making powers granted to the Workers' Compensation Board of British Columbia under section 225 of the *Workers Compensation Act*?

AND TAKE FURTHER NOTICE that an Attorney General who intends to intervene with respect to this constitutional question may do so by serving a notice of intervention in Form 33C on all other parties and filing the notice with the Registrar of the Supreme Court of Canada within four weeks after the day on which this notice is served.

Dated at Vancouver, in the Province of British Columbia, this 2nd day of June, 2017.

SIGNED BY



as agent for

Party serving notice of constitutional question

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