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)

RESPONDENT'S FACTUM
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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. In a decision dated July 9, 2013,[1] the Workers' Compensation Appeal Tribunal ("WCAT" or the tribunal) found 1) that section 26.2 of the *Occupational Health and Safety Regulation*[2] is *intra vires* the Workers' Compensation Board (the "Board"); and 2) the Board had the authority to impose an administrative penalty against the appellant pursuant to section 196 of the *Workers Compensation Act*.[3] On the second point, WCAT found that section 196 must be read broadly and purposively, and that in the circumstances the Board could impose a penalty against the appellant notwithstanding the fact that it was nominally operating as an "owner" as that term is defined in the *Workers Compensation Act*. The Supreme Court of British Columbia and the Court of Appeal for British Columbia both found that WCAT's decision was not patently unreasonable.

2. The appellant appeals to this Court, arguing that 1) 26.2 of the *Occupational Health and Safety Regulation* is *ultra vires* the Board and 2) WCAT's interpretation of section 196 of the *Workers Compensation Act* is either incorrect or patently unreasonable. The appellant does not state in its factum the order it seeks regarding WCAT's second finding, but implicitly it seeks an order setting aside both of WCAT's findings. WCAT opposes any such order.

3. The crux of the appellant's argument, as it relates to the WCAT decision, is that it is illogical to impose a fine on an owner of a worksite under section 196 of the *Act*, because that section only authorizes the imposition of a penalty on an employer. However, the practical effect of the appellant's argument, if it is accepted by this court, is that it is immune from suit in tort in relation to a deadly accident that occurred on its job site, and it will not be subject to an administrative penalty from the Board. This result is not just, and is not consistent with the purposes of the *Act*.

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[1] (9 July 2013), *WCAT-2013-01952*, online: B.C.W.C.A.T. <wcat.bc.ca> [**AR, vol. I, Tab B**].
[2] B.C. Reg. 296/97.
[3] R.S.B.C. 1996, c. 492 as amended by *Workers Compensation Amendment Act (No. 2), 2002*, S.B.C. 2002, c. 66. Section 196 has been amended since the July, 2013 WCAT decision by the *Workers Compensation Amendment Act, 2015*, S.B.C. 2015, c. 22, s. 12.

4. This appeal raises two questions for this court. The first is whether section 26.2 of the *Occupational Health and Safety Regulation* was made within the jurisdiction of the Board. This is a "constitutional question", which WCAT lacked the jurisdiction to decide.[4] WCAT therefore makes no submissions on this issue.

5. The second question before this court is whether WCAT's interpretation and application of section 196 of the *Workers Compensation Act* and that section's use of the term "employer", was a decision made within the tribunal's exclusive jurisdiction. The appellant urges this court to find that a tribunal's interpretation of a provision within its "home" statute is subject to a correctness standard of review whenever the provision contains a defined term. WCAT says the appellant's argument about the applicable standard of review is wrong at law and even if defined terms have a superordinate importance in legislation, they do not give rise to true questions of jurisdiction warranting a court to review the tribunal's interpretation of them on a standard of correctness. Acceding to the appellant's position would be to return to the preliminary questions doctrine which this court rejected in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp*.[5]

6. In the alternative, on the second point, the appellant argues that WCAT was patently unreasonable in its interpretation of section 196. The appellant mischaracterizes the tribunal's finding by suggesting that it concluded that West Fraser Mills Ltd. could be liable for an administrative penalty merely because it was coincidentally an employer. In fact, WCAT found that the appellant's failure to ensure the safety of its workplace constituted a failure to fulfil its obligations as an owner of the forestry operation and as an employer. The former finding warranted the Board's inspection order, and the latter warranted the administrative penalty. Nevertheless, the British Columbia Court of Appeal held that it would not have been

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[4] When the WCAT decision was made, s. 44 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 applied to the tribunal (see s. 245.1 of the *Workers Compensation Act*, as amended by *Administrative Tribunals Act*, S.B.C. 2004, c. 45) and WCAT therefore did not have jurisdiction over any question that requires notice to be given under s. 8 of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68. Section 8(3) of the latter statute requires that notice under that section must be served on the Attorney General of British Columbia if in a proceeding the validity or applicability of a regulation is challenged on grounds other than its constitutional validity or applicability.

[5] [1979] 2 S.C.R. 227.

unreasonable to conclude that the appellant could be liable for an administrative penalty as an employer even if the underlying violation was in respect of its obligations as an owner of a forestry operation. WCAT's finding that the imposition of the administrative penalty was warranted was a finding of mixed law and fact which was not patently unreasonable.

Facts

7. The appellant acknowledges that is an integrated forest products company whose business includes the manufacture of wood products from harvested trees.

8. At relevant times, the appellant had a forest license in central British Columbia. The forest within the license area was infested with fir beetles. On April 9, 2010, in an effort to mitigate the effects of the infestation, the appellant contracted with an individual, who operated an unincorporated tree falling business (the "Contractor"), to fall several "trap" trees within the area. Once felled, the trees would emit a scent that attracts the beetles and keeps them away from other healthy standing trees. As noted by the Court of Appeal, falling trap trees is hazardous work.

9. To assist him with the work, the Contractor hired a worker, who was working as a faller at the time, although his certificate had expired in 2009 (the "Worker").[6]

10. The work was scheduled for four days. Trees were to be cut in two locations within the area of the forest license several kilometres apart from one another. On April 12th, a supervisor employed by the appellant met with the Contractor and the Worker at the first location. A note from the meeting indicates that the three of them discussed hazards that could be expected, including people; animals; wind; steep, unstable ground; and pine snags. They walked through the first location. West Fraser Mills' supervisor provided the fallers with maps of both locations and information about the appellant's generic emergency response procedures.[7]

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[6] Board Incident Investigation Report, Jan 28, 2011, p. 9 [**AR, vol. IV, Tab N**].
[7] *Ibid.*

11. On April 15th, the appellant's supervisor met with the fallers at the second location. This second meeting did not involve a walk-through of the location and no notes were made of the meeting. They did not discuss a falling plan.[8]

12. The following day, the Worker was working in the second location. As he felled a tree a large rotten section of a nearby tree broke loose and fell on him, causing severe injuries. The Contractor, who had been working some distance away, became concerned about the Worker and came to check on him. The Contractor discovered the Worker, who was unresponsive and clearly badly injured. The Contractor went to summon help, but due to the remoteness of the area, it took several hours before the Worker could be evacuated to a hospital in Williams Lake. He was later transported to a hospital in Kamloops, but died of his injuries on April 17th.[9]

13. The Board investigated the accident. The investigator found that the Worker's workmanship was substandard on the day of the accident. In the report, the Worker is referred to as the "Faller". The inspector noted evidence of several unsafe falling practices. The investigation report determined that "on the day of the incident the Faller was not removing hazards or obstructions prior to falling and was engaged in hazardous falling activities without taking the required precautions".[10]

14. The Board investigator also made specific findings against the appellant, ultimately concluding that West Fraser Mills did not properly plan or organize the work. As noted at paragraph 20 of the Court of Appeal's reasons for judgment:

> The report concluded that the following were underlying factors in the accident:
>
> Before falling the trap tree, [Mr. E] did not remove the nearby danger tree that caused the incident. He did not clear the obstructions that blocked his escape route from the trap tree…
>
> No pre-work planning was done to account for the hazards, no site-specific written procedures existed, and no walk-through was conducted by West Fraser or [Mr. G] to identify hazards. …

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[8] *Ibid.*, p. 10.
[9] *Ibid.*, p. 9.
[10] *Ibid.*, p. 14.

> West Fraser did not have procedures in place to ensure that fallers have valid certification or to require fallers to demonstrate that they can perform the work prior to starting. …
>
> Four days may not have been enough time to safely fall all of the trap trees in the two locations specified. [Mr. E's] substandard cuts and failure to remove hazards and obstructions on the day of the incident may have been due to working within a short time frame.[11]

15. On February 21, 2011, the Board issued an inspection report against the appellant. The report determined that West Fraser Mills did not meet certain of its obligations under section 26.2 of the *Occupational Health and Safety Regulation*. The officer issuing the report noted the investigator's observation that "West Fraser Mills Ltd., as owner of this workplace, did not ensure that all activities of the forestry operation were both planned and conducted in a manner consistent with this Regulation and with safe work practices acceptable to the Board".[12]

16. On July 13, 2011, the Board imposed a $75,000 administrative penalty on the appellant because, as stated in the Board's order, West Fraser Mills:

a. failed to take sufficient precautions for the prevention of work related injuries or illnesses;

b. did not comply with sections of the *Occupational Health and Safety Regulation*, including section 26.2(1);

c. did not maintain a safe workplace or safe working conditions; and

d. did not exercise due diligence to prevent these circumstances.[13]

17. The appellant applied to the Board's Review Division seeking a review of both the order finding West Fraser Mills in violation of section 26.2 of the *Regulation* and the order imposing

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[11] Reasons for Judgment of the Court of Appeal for British Columbia, 2016 BCCA 473 [**AR, vol. I, Tab E**].
[12] Board Inspection Report, Feb. 21, 2011, p. 5 [**AR, vol. IV, Tab O**].
[13] Board Inspection Report enclosed with Administrative Penalty Package, Jul. 13, 2011, p. 2 [**AR, vol. IV, Tab Q**].

the administrative penalty. The review officer conducted a review under authority of section 96.2 of the *Workers Compensation Act* and confirmed both penalties.[14]

18. West Fraser Mills appealed the review officer's decision to WCAT.

19. WCAT purported to find, at paragraphs 49-51 of its decision, that the Board had jurisdiction to enact section 26.2 of the *Occupational Health and Safety Regulation*. It would appear that the WCAT panel was not aware of the implications of section 8 of the *Constitutional Question Act* that made West Fraser Mills' challenge to the *Regulation* a constitutional question outside of the tribunal's jurisdiction.[15]

20. On the second issue, which was within WCAT's jurisdiction, the tribunal found that section 196 of the *Workers Compensation Act* did allow the Board to impose an administrative penalty against West Fraser Mills:

> [83] There is no dispute that the appellant was the owner of the forest licence at the time of the workplace accident. There is also no dispute that the appellant is an employer within the meaning of the Act, is registered with the Board, and employs workers in the province. The question that arises is whether the appellant in its role as an owner of the forest licence, rather than in its role as an employer, can be subject to an administrative penalty under section 196(1) of the Act. …
>
> [94] In the present appeal, I am unable to agree with the appellant that an administrative penalty can only be imposed on an employer under section 196(1) of the Act when the employer assumed the function of an employer with regard to its own workers at its workplace. Such a finding would be contrary to the use and application of the word employer in Part 3 of the Act. Indeed, the Court of Appeal in *Petro-Canada* found that the definition of employer in Part 3 of the Act is broad and does not result in redundancy were it to include owners as employers, or entities that have dual obligations under the Act. This is recognized in section 123 of the Act, which provides that persons may be subject to obligations in relation to more than one role. Subsection (2) provides that if a person has two or more functions under Part 3 of the Act in respect of one workplace, the person must meet the obligations of each function.
>
> [95] In the facts of this case the appellant is both an owner and an employer as defined by the Act. As set out above, I have found that the appellant as an owner of the forest license had sufficient degree of knowledge and control over the

[14] Review Decision of Review Officer Boddez, Apr. 16, 2012 [**AR, vol. I, Tab A**].
[15] See footnote 4 *supra*.

> workplace to be able to ensure the health and safety of workers at the worksite locations. The appellant's obligation in that regard is not limited to the health and safety of its own workers. As both an employer and as an owner, the appellant's duty extends to ensure the health and safety of all workers and to take sufficient precautions for the prevention of work related injuries.
>
> [96] The appellant as an owner had an obligation to ensure the activities of the forestry operation were planned and conducted in a manner consistent with the Regulation and with safe work practices acceptable to the Board. I have found the appellant failed to meet this obligation. The appellant is an employer within the meaning of the Act. I agree with the panel in *WCAT-2009-01363* that section 196(1)(a) provides authority to impose an administrative penalty on an employer/owner. The violation by the appellant of section 26.2(1) of the Regulation provides the basis for finding the appellant failed to take sufficient precautions for the prevention of work related injuries. This provides the basis for imposing an administrative penalty on an employer, as set out in section 196(1)(a) of the Act. I find the Board had the authority to impose an administrative penalty against the appellant, the owner of the forest licence, in the circumstances of these appeals where the owner was also an employer within the meaning of the Act and the worksite in question was a workplace for the appellant's worker. …
>
> [98] In summary, when an owner is also an employer within the meaning of "employer" in the Act, and the worksite in question is a workplace for the owner/employer's workers, I find the Board has the authority to impose an administrative penalty against the owner/employer, even when the underlying violation is one related to the obligations of an owner.

21. The appellant then petitioned the Supreme Court of British Columbia for judicial review of the WCAT decision. The Board successfully applied to be added as a party to the judicial review proceeding in light of the fact that the tribunal did not have jurisdiction over the question of the *vires* of the *Regulation*.[16] The chambers judge hearing the petition considered the *vires* question on the standard of *correctness* and held that the *Regulation* was *intra vires* the statute.

22. On the second issue – WCAT's finding that the Board could impose the administrative penalty under section 196(1) – the chambers judge rejected West Fraser Mills' argument that the issue engaged a true question of jurisdiction requiring application of the standard of *correctness*. The judge agreed with WCAT that interpretations of the *Workers Compensation Act* are questions of law coming within the tribunal's jurisdiction and that the standard of *patent*

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[16] Order of Master Scarth, Jan. 31, 2014 [**AR, vol. II, Tab K**].

unreasonableness applies to the court's review. The chambers judge concluded as follows at paragraph 86 of his reasons for judgment:

> In my view, a determination that an employer responsible for occupational health and safety may be subject to an administrative penalty for failing, as an owner, to take sufficient precautions for the prevention of work-related injuries at its workplace, is not a patently unreasonable conclusion. I am satisfied that the WCAT's reasons, when considered as a whole, "are tenable as support" for this conclusion: *Law Society of New Brunswick*, at para. 56.[17]

23. The British Columbia Court of Appeal unanimously dismissed West Fraser Mills' appeal of the chambers judge's order, finding that section 26.2 of the *Regulation* was *intra vires* the statue and the Board's authority and that WCAT's decision confirming the Board's authority to impose the administrative penalty was not patently unreasonable.[18]

24. The Court of Appeal treated WCAT's decision as though it concluded that section 196 gives the Board the ability to impose an administrative penalty on any "employer", as that term is defined in the statue, where that person has violated Part 3 of the *Act* or the *Regulation*.[19] Actually, WCAT took pains to note in its decision that the work area was one used by West Fraser Mills' own employee and that it was one where its work as an integrated forest products business was being carried out. Thus, the tribunal found that as an *employer*, the appellant was not a stranger to the occupational health and safety concerns pertaining to the dangerous work being done at the workplace. The court's judgment, however, was that even if the tribunal had concluded that administrative penalties could be imposed by the Board on *any* "employer", it would still not be patently unreasonable. It gave the following reasons in explaining this conclusion:

> [90] The interpretation of s. 196(1)(b) of the *Workers Compensation Act* is problematic. The Board has authority, under s. 196(1)(b) to impose an administrative penalty if two conditions are satisfied: the person against whom the penalty is imposed is an "employer", and that person has violated the statute or the regulation. The difficult question is whether these two requirements are

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[17] Reasons for Judgment of the Supreme Court of British Columbia, 2015 BCSC 1098, Jun. 25, 2015 [**AR, vol. I, Tab C**], citing *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247.

[18] Reasons for Judgment of the Court of Appeal for British Columbia, 2016 BCCA 473, Nov. 28, 2016 [**AR, vol. I, Tab E**].

[19] See *ibid.* at para. 69.

independent, or conjoined: is it necessary that the contravention have been committed by a person *while* they were acting in their capacity as an employer?

[91] West Fraser argues that treating the two requirements as completely independent of one another leads to "absurd" consequences. It notes that under such an interpretation two owners, only one of which is registered as an employer under the *Act*, could commit exactly the same violation, yet only the one registered as an employer would be liable to an administrative penalty.

[92] Such a consequence, while mildly curious, is not "absurd", particularly given that administrative penalties are not the only sanctions available for violations of the *Act* or the *Regulation*. In any event, the potential for differential treatment, while it may lead us to question the proffered interpretation, does not necessarily require us to cast it aside.

[93] I note, as well, that there are equally curious consequences that result from interpreting s. 196(1) as applying only to violations of the statute that are committed by persons acting in the capacity of employers. Violations of the statute or regulation by employers are not, as a class, any more harmful, blameworthy, or easily deterred than violations by other individuals. Why then, are employers singled out for "administrative penalties" by s. 196 when there is no analogous provision applying to other classes of person?

[94] One possible explanation is the central role of "employers" in this statutory scheme. The compensation regime (largely comprised of Part 1 of the *Act*) has been described as a "historic trade-off" between workers and employers: *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890 at paras. 24-26. Employers fund the scheme (including occupational health and safety functions of the Board) by making payments into the accident fund either by way of assessments (s. 39), levies (s. 73), Part 1 penalties (ss. 38, 40, 47 and 78), or administrative penalties under s. 196. Persons other than employers do not pay into the scheme.

[95] In turn, under s. 10 of the statute, employers enjoy immunity from a broad range of tort actions by employees. An expansive definition of "employment" in the statute (which includes all parts of "an establishment, undertaking, trade or business") ensures that the immunity extends beyond activities undertaken by an employer in the employment of workers. Again, non-employer owners, supervisors, and suppliers do not have the same benefits that persons in those roles have when they are also registered employers under the *Act*. It is not incongruous, then, that they may also not face exactly the same liabilities.

[96] Put another way, the core administrative regime of the *Workers Compensation Act* is concerned with "employers", as that term is defined in the statute, and with workers. While persons who are not "employers" but are "supervisors", "owners", or "suppliers" are incidentally regulated, to a limited

> degree, by certain provisions of Part 3 of the statute, they are, for the most part, strangers to the administrative regime. In the circumstances, a legislative decision not to draw such persons into the administrative regime through an ancillary statutory provision like s. 196 is not entirely surprising.

PART II – RESPONDENT'S POSITION ON ISSUES

25. As it did in the courts below, the appellant raises two issues. The first of these pertains to whether s. 26.2(1) of the *Occupational Health and Safety Regulation* is valid. Because WCAT did not have jurisdiction to consider the *vires* of the *Regulation* and because the *Regulation* was passed by the Board pursuant to the authority of section 225 of the *Workers Compensation Act*, WCAT makes no argument on this issue.

26. On the issue of WCAT's finding that the administrative penalty was properly imposed, the question for this court is whether the Court of Appeal and the chambers judge correctly identified and applied the standard of review.[20] WCAT says that both courts were correct. The tribunal's decision is a finding of mixed law and fact, within its exclusive jurisdiction. Accordingly, the applicable standard of review is *patent unreasonableness*. WCAT says that its decision was not patently unreasonable.

PART III – STATEMENT OF ARGUMENT

Relevant Law

27. Part 4 of the *Workers Compensation Act* enables WCAT, and contains the appeals process. WCAT is external to, and independent of, the Board.

28. WCAT's jurisdiction to hear appeals from decisions of the Board's Review Division is granted by section 239 of the *Act*. Its jurisdiction is exclusive and its decisions are final and binding. The tribunal is subject to a strong privative clause set out in sections 254 and 255 of the *Act*.

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[20] *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 at para. 18.

29. Section 1 of the *Workers Compensation Act* sets out definitions applicable to the whole statute. The definitions of "employer" and "worker" in section 1 are discussed below. Section 1 defines "employment" as:

> when used in Part 1, means and refers to all or part of an establishment, undertaking, trade or business within the scope of that Part, and in the case of an industry not as a whole within the scope of Part 1 includes a department or part of that industry that would if carried on separately be within the scope of Part 1.

30. Part 1 of the *Workers Compensation Act* (comprising sections 2-101) contains the compensation scheme, empowers the Board, including its policy making function, and contains the Board's internal review process.

31. Central to the workers' compensation scheme in all provinces is the bar to actions by workers or their dependants against employers. The bar is found in section 10(1) of the British Columbia *Act* and reads as follows:

> The provisions of this Part are in lieu of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, to which a worker, dependant or member of the family of the worker is or may be entitled against the employer of the worker, or against any employer within the scope of this Part, or against any worker, in respect of any personal injury, disablement or death arising out of and in the course of employment and no action in respect of it lies. This provision applies only when the action or conduct of the employer, the employer's servant or agent, or the worker, which caused the breach of duty arose out of and in the course of employment within the scope of this Part.

32. British Columbia's occupational health and safety legislation is set out in Part 3 of the *Workers Compensation Act* (comprising sections 106-230). The Part was enacted in 1998 by the *Workers Compensation (Occupational Health and Safety) Amendment Act, 1998*.[21] The introduction of Part 3 followed consideration by the legislature of a Royal Commission report.[22]

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[21] S.B.C. 1998, c. 50 (Bill 14).

[22] Royal Commission on Workers' Compensation in British Columbia, *Report on Sections 2 and 3(a) of the Commission's Terms of Reference*, (Vancouver: Queen's Printer, 1997).

33. The issue in this appeal to which WCAT is speaking concerns the tribunal's interpretation of section 196 of the *Workers Compensation Act*. Subsections (1) and (7), as they read at the time of the WCAT decision, are relevant:

> (1) The Board may, by order, impose an administrative penalty on an employer under this section if it considers 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. …
>
> (7) If an administrative penalty is imposed on an employer under this section, the employer must not be prosecuted under this Act in respect of the same facts and circumstances upon which the Board based the administrative penalty.[23]

34. As an alternative to administrative penalties, section 213(1) provides that "[a] person who contravenes a provision of this Part, the regulations or an order commits an offence".

35. On conviction for an offence, a person is liable to fines and imprisonment: section 217.

36. Section 106 defines terms used in Part 3. They include:

> In this Part and in the regulations under this Part:
>
> **"employer"** means
>
> (a) an employer as defined in section 1,
>
> (b) a person who is deemed to be an employer under Part 1 or 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; …

[23] The wording of section 196 originally introduced by Bill 14, *supra* note 21, was modified by section 28 of the *Workers Compensation Amendment Act (No. 2), 2002*, S.B.C. 2002, c. 66, but the substance of what became subsections (1) and (7) remained unchanged.

> **"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; …
>
> **"workplace"** means any place where a worker is or is likely to be engaged in any work and includes any vessel, vehicle or mobile equipment used by a worker in work.

37. The definitions of "worker" and "employer" in section 106 each incorporate the definitions of those same words found in section 1. "Worker" is defined inclusively in section 1 of the *Act*. The definition of "employer" in section 1 of the *Act* is also defined inclusively and reads:

> **"employer"** includes every person having in their service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged in work in or about an industry; …

38. The purpose of Part 3 is set out in section 107, which reads, in part:

> (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…

39. Division 3 of Part 3 of the *Workers Compensation Act* is entitled "General Duties of Employers, Workers and Others". The following excerpts from that Division are relevant:

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 that employer's work is being carried out, and

(b) comply with this Part, the regulations and any applicable orders….

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….

122 A specific obligation imposed by this Part or the regulations does not limit the generality of any other obligation imposed by this Part or the regulations.

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

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

40. The *Occupational Health and Safety Regulation*, *supra*, is made pursuant to Part 3 (see section 225). Section 26.2(1) of the Regulation reads as follows:

> The owner of a forestry operation must ensure that all activities of the forestry operation are both planned and conducted in a manner consistent with this Regulation and with safe work practices acceptable to the Board.

The Standard of Review

41. Section 58 of the *Administrative Tribunals Act*[24] applies to WCAT.[25] Paragraph 58(2)(a) provides that in a judicial review proceeding, "a finding of fact or law… by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable". Section 254 of the *Workers Compensation Act*, in turn, says that WCAT "has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined" in an appeal from a review officer's decision.

42. Last year, this court confirmed that the standard of patent unreasonableness applies to WCAT's findings.[26] That case involved the evidentiary basis for a finding of fact made by the tribunal. WCAT submits that this court's discussion in *Law Society of New Brunswick v. Ryan* of the content of the standard of *patent unreasonableness* is relevant to findings of law:

> A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.[27]

43. The appellant argues that WCAT's interpretation of section 196 of the *Workers Compensation Act* is a true question of jurisdiction and therefore falls within one of the very few exceptions where, otherwise, curial deference is required on judicial review. The concept of a

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[24] S.B.C. 2004, c. 45.
[25] As provided by section 245.1(w) of the *Workers Compensation Act*.
[26] *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25, [2016] 1 S.C.R. 587, at paras. 29 and 30.
[27] *Supra* note 17 at para. 52.

true question of jurisdiction was discussed by this court in *Dunsmuir v. New Brunswick* in the context of its refinement of the deferential standard of judicial review.[28] Deference to administrative decision-makers is the way the courts respect the legislative decision to vest jurisdiction over certain matters with such decision-makers.[29] In *Dunsmuir*, this court discusses the idea of true questions of jurisdiction in a part of the decision where it was charting the limits of deference. According to this court at paragraph 59 of *Dunsmuir*, the fundamental question of whether an administrative decision-maker even has the statutory authority to embark upon the enquiry put before it is of such a fundamental nature that it lies outside the sphere of deference.

44. This court took pains to distinguish what it called true questions of jurisdiction from the broader concept of jurisdictional error so as to avoid returning to the preliminary question doctrine which, to use the words of Bastarache and LeBel JJ., "plagued the jurisprudence" before *CUPE*. Since *Dunsmuir*, this court has reemphasized the very limited nature of a true question of jurisdiction.[30] As recently as July of this year, this court has underscored that a true question of jurisdiction is limited to the essential question of whether the issue placed before the tribunal is of the sort the legislature intended it to decide.[31]

45. What might a true question of jurisdiction look like in the context of an appeal before WCAT? It is WCAT's position that it would be limited to holding the issue up against sections 239 and 254 of the *Workers Compensation Act* to see if it comes within the tribunal's purview and nothing more. This is the simple test employed by a majority of this court in *Edmonton (City) v. Edmonton East Capilano Shopping Centres Ltd*.[32] In the present case, it is clear from section 239 of the *Act* that WCAT had the authority to hear the appeal from the April 16, 2012 decision of the review officer and that it therefore had, pursuant to section 254, the exclusive jurisdiction to determine questions of law arising from the appeal.

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[28] 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 59.
[29] *Ibid.* at para. 48, citing *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at 596, *per* L'Heureux-Dubé J., dissenting.
[30] Most notably, in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 34, where the majority questioned the theoretical existence of a true question of jurisdiction.
[31] *Quebec (Attorney General) v. Guérin*, 2017 SCC 42 at para. 32.
[32] 2016 SCC 47, [2016] 2 S.C.R. 293 at para. 26.

46. At paragraph 47 of its factum, the appellant suggests that the *presumption* that a court should defer to an administrative tribunal's interpretation of its home statute cannot apply to an exhaustively-defined term in legislation. With respect, the application of section 58 of the *Administrative Tribunals Act* to WCAT obviates the need to presume anything, as noted by Karakatsanis J., in *obiter dicta*, in the *Capilano Shopping Centres* case:

> I would add this comment. The contextual approach can generate uncertainty and endless litigation concerning the standard of review. Subject to constitutional constraints, the legislature can specify the applicable standard of review. In British Columbia, for example, the legislature has displaced almost the entire common law on the standard of review….[33]

47. At paragraph 48 of its factum, the appellant argues that use of a defined term in a legislative provision "precludes any notion of deference". The suggestion is untenable and the appellant has provided no authority in support of the proposition it seeks to advance. By our count, there are 102 sections in Part 3 of the *Workers Compensation Act* (not including sections not in force or section 106, which contains only definitions). Of these, 57 of them contain the term "employer". The implication of the appellant's argument is that WCAT and the Board are not entitled to deference in considering any of these sections. What about all the other sections of the *Act* which contain any of the many other defined terms? Acceding to the appellant's argument would effectively undermine the clearly stated legislative intention to give WCAT exclusive jurisdiction to decide all questions of law arising on an appeal brought before it.

48. In *McLean v. British Columbia (Securities Commission)*, this court said that in the context of judicial review, the tribunal holds the interpretive upper hand. The court is to defer to *any* reasonable interpretation adopted by the tribunal, *even if* other reasonable interpretations may exist.[34] In other words, as long as the interpretation adopted by the tribunal is "reasonable", there is no basis for interference by the court on judicial review, even in the face of a competing reasonable interpretation.[35] The question is simply whether the tribunal's interpretation finds *some* support in the text, context, and purpose of the statute.[36]

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[33] *Ibid.* at para. 35.
[34] *Supra* note 20 at para. 40.
[35] *Ibid.* at para. 41.
[36] *Ibid.* at para. 39.

The Tribunal's decision

49. In its decision, the tribunal considered:

a. section 8 of the *Interpretation Act*, which requires that legislation "be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects"[37] (para. 46); and

b. section 111(1) of the *Workers Compensation Act* (which sets out the Board's mandate: (para. 48)); section 107 (which sets out the purpose of Part 3 of the *Act*: (para. 48)), section 122 (which provides that a specific obligation imposed by Part 3 of the *Act* or the regulations does not limit the generality of any other obligation imposed by Part 3 or the regulations: (para. 52)); and section 119 (the general duties of owners: paras. 52-54).

50. Next, the tribunal considered:

a. the arguments of the appellant and the Board's investigations legal officer (paras. 80-81);

b. past WCAT decisions that had considered the scope of section 196(1) of the *Workers Compensation Act* (paras. 84-91);

c. the B.C. Court of Appeal's judgment in *Petro-Canada v. British Columbia (Workers' Compensation Board)*[38], (para. 92); and

d. other provisions found in the *Act*, such as section 106 (specifically, the definition of "employer" (para. 82)); section 108(1) (regarding the application of Part 3 of the *Act* (para. 86)); sections 194, 213 and 217 (which are other enforcement provisions in the *Act* that apply to "persons" (para. 97)); and section 123 (which addresses multiple obligations under the *Act*) para. 94)).

[37] R.S.B.C. 1996, c. 238.
[38] 2009 BCCA 396.

51. WCAT found that there was no dispute that the appellant was an employer within the meaning of the *Act*, was registered with the Board, and employed workers in the province (para. 83).

52. It rejected the appellant's argument that an administrative penalty can only be imposed on an employer under section 196(1) of the *Act* when the employer assumed the function of an employer with regard to its own workers at its workplace. At paragraph 94, the tribunal said:

> Such a finding would be contrary to the use and application of the word employer in Part 3 of the Act. Indeed, the Court of Appeal in *Petro-Canada* found that the definition of employer in Part 3 of the Act is broad and does not result in redundancy were it to include owners as employers, or entities that have dual obligations under the Act. This is recognized in section 123 of the Act, which provides that persons may be subject to obligations in relation to more than one role. Subsection (2) provides that if a person has two or more functions under Part 3 of the Act in respect of one workplace, the person must meet the obligations of each function.

53. WCAT noted that it had already found that the appellant as owner of the forest licence had sufficient degree of knowledge and control over the workplace to be able to ensure the health and safety of workers at the worksite locations (para. 95).

54. The worksite in question (that is, the area of the forest licence) was a workplace for the appellant's own workers (specifically, its supervisor) (para. 91).

55. The appellant's violation of section 26.2(1) of the *Regulation* provided the basis for finding that the appellant failed to take sufficient precautions for the prevention of work related injuries, which, in turn, provided the basis for imposing an administrative penalty on it as an employer, as set out in section 196(1)(a) of the *Act* (para. 96).

56. Thus, the panel ultimately concluded that the appellant's violation of its obligations under the *Regulation* as an owner provided the basis in these circumstances for finding that the appellant, as an employer, failed to take sufficient precautions for the prevention of work related injuries.

57. WCAT adopted the reasoning of two other authorities. First, that of another WCAT panel in *WCAT-2009-01363*, where the tribunal reasoned that section 196 applied to an employer

who is also an owner for its actions as an owner.[39] Second, WCAT relied on the B.C. Court of Appeal's reasons for judgment in *Petro-Canada*, chiefly for the proposition that the definition of "employer" can be interpreted broadly.[40]

58. In *WCAT-2009-01363*, WCAT considered whether the owner of a business park was liable for a penalty under section 196 of the *Workers Compensation Act* based on being found in contravention of section 119 of the *Act*. Thus, the facts before WCAT in the present case were similar to those in *WCAT-2009-01363*. In *WCAT-2009-01363*, an employee of one of the owner's tenants was killed when a cube van he was driving struck a concrete trellis at the entrance to the business park, knocking the trellis over and onto the cab of the van. The Board determined that the owner of the business park had failed, contrary to its obligations in section 119 as an owner, to provide and maintain its land and premises that were being used as a workplace in a manner that ensured the health and safety of persons at or near the workplace. Subsequently, the Board assessed the owner with an administrative penalty under section 196. Before WCAT, the owner argued it could not be liable for such a penalty, which is assessable only against an employer, on account of a failure of its obligations as an owner.[41]

59. The panel in *WCAT-2009-01363* rejected the argument that the word "employer" in section 196 demonstrated a legislative intention that liability for administrative penalties only arises upon a firm's breach in its capacity as an employer.[42]

60. Although the panel in the 2009 decision considered it significant that it may have been the case that the business park was one of the owner's workplaces, it proceeded to consider, on an alternative basis, "whether an administrative penalty may be imposed on the owner under section 196, in connection with a worksite which was not one of its workplaces". In a passage quoted in the impugned decision, the panel in *WCAT-2009-01363* explained a likely rationale for the legislature's use of the word "employer" in section 196:

> If the legislature had used the word "person" in section 196, this would have conferred authority on the Board to impose administrative penalties on workers.

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[39] (20 May 2009), *WCAT-2009-01363*, online: B.C.W.C.A.T. <wcat.bc.ca>.
[40] *Supra* note 38.
[41] *Supra* note 39 at para. 49.
[42] *Ibid.* at para. 56.

> I infer that the legislature did not wish to confer such authority on the Board, in restricting to Board's authority to levy an administrative penalty so that such a penalty can only be imposed on an employer. This provides an explanation as to why the legislature may have avoided using the term "person" in section 196, without necessarily having an intention to exclude owners who are also employers.[43]

61. In fact, the Royal Commission had recommended that both employers and workers be subject to administrative penalties.[44] The fact that section 196, once enacted, only referred to employers supports the observation made by WCAT in *WCAT-2009-01363*.

62. The conclusion of the panel in *WCAT-2009-01363* relied on sections 107 and 122 of the *Act*. Section 122 provides that an obligation imposed by Part 3 or by the *Regulation* does not limit the generality of any other obligation imposed by Part 3 or the *Regulation*. "Accordingly", the panel writes, "the appellant may be considered responsible as an owner under section 119, and as an employer under section 196(1)(a) of the Act".[45]

63. Thus, the 2009 WCAT decision concludes, "[t]he violation of section 119(a) by the appellant, as an owner, also provides a basis for concluding that the appellant, as an employer, failed to take sufficient precautions for the prevention of work related injuries or illnesses". Such precautions are, of course, specifically identified in section 196(1)(a). Having previously acknowledged the possible ambiguity in section 196 (*i.e.*, whether it could ever apply to an employer's violation of its responsibilities as an owner), the panel held that it should be resolved by interpreting section 196 in a fashion consistent with the purposes of Part 3 of the *Act*, which, as set out in section 107(2) include:

> (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…[46]

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[43] *Ibid.* at para. 61. See also para. 89 of the subject WCAT decision [**AR, vol. I, Tab B**].
[44] *Supra* note 22 at 69-78, esp. 77-78.
[45] *WCAT-2009-01363*, *ibid.* at para. 63.
[46] *Ibid.* at para. 66 [emphasis added].

64. This reasoning from *WCAT-2009-01363* was summarized by the tribunal at paragraphs 87-91 of the WCAT decision at issue in this appeal. Although WCAT is not bound by precedent[47], the panel in the present matter found the other panel's reasoning to be persuasive.

65. Turning to the *Petro-Canada* decision, the WCAT panel in the present matter notes the Court of Appeal's rejection of "the notion that a broad interpretation of employer in section 115 would result in redundancy as a single entity would have responsibilities both as an employer and as an owner under Part 3 of the Act. Rather, this dual role is specifically recognized by section 123 of the Act".[48]

66. The tribunal had found that West Fraser Mills, as owner of the forest licence, had a sufficient degree of knowledge and control over the workplace to be able to ensure the health and safety of workers at the worksite locations and that the forest license was a workplace for the appellant's workers (again, its supervisor).[49]

67. Seen in this light, the question asked and answered in the WCAT decision is not whether the appellant is immunized from section 196 because it was found to have contravened its obligation as an owner of the workplace, but rather whether the same act or omission could be the basis for both an order citing West Fraser Mills in violation of section 26.2(1) of the *Regulation* and an administrative penalty for failing in its responsibilities as an employer. This is explained by the WCAT panel at paragraphs 94-96 of the decision.

68. The tribunal notes again *Petro-Canada* for the court's finding "that the definition of employer in Part 3 of the Act is broad and does not result in redundancy were it to include owners as employers, or entities that have dual obligations under the Act".[50]

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[47] *Workers Compensation Act*, s. 250. An exception applies to decisions of a panel appointed under section 238(6) of the *Act*. That exception does not apply to this analysis.
[48] WCAT Decision at para. 92 [**AR, vol. I, Tab 2**], citing *Petro-Canada*, *supra* note 38 at para. 46.
[49] WCAT Decision, *ibid.* at paras. 91 and 95.
[50] WCAT Decision at para. 94 [**AR, vol. I, Tab B**], referring to *Petro-Canada*, *supra* note 38.

69. At paragraph 95 of the decision, WCAT writes:

> In the facts of this case the appellant is both an owner and an employer as defined by the Act. As set out above, I have found that the appellant as an owner of the forest license had sufficient degree of knowledge and control over the workplace to be able to ensure the health and safety of workers at the worksite locations. The appellant's obligation in that regard is not limited to the health and safety of its own workers. As both an employer and as an owner, the appellant's duty extends to ensure the health and safety of all workers and to take sufficient precautions for the prevention of work related injuries.[51]

70. Thus, WCAT reaches its two part conclusion at paragraph 96:

> The violation by the appellant of section 26.2(1) of the Regulation provides the basis for finding the appellant failed to take sufficient precautions for the prevention of work related injuries. This provides the basis for imposing an administrative penalty on an employer, as set out in section 196(1)(a) of the Act.

71. As the interpretation of the *Workers Compensation Act* is within WCAT's exclusive jurisdiction, cases such as *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*[52] and *McLean*[53] mean any interpretation given by the tribunal will be one made within its jurisdiction unless that interpretation is *patently unreasonable*, or, as this court said in *Ryan*, "so flawed that no amount of curial deference can justify letting it stand".[54] The chambers judge and three justices of the British Columbia Court of Appeal came to the conclusion that the tribunal's interpretation of section 196 of the *Workers Compensation Act* was not patently unreasonable. As noted by Frank Falzon, Q.C., in a paper delivered to the 2015 British Columbia Administrative Law Conference:

> … a presumption of deference implicitly recognizes that even our most gifted jurists disagree with surprising frequency about what particular statutory provisions mean, and even about whether those provisions are ambiguous. The presumption of deference recognizes the considerable degree of uncertainty that is associated both with the analytical process and the outcomes of statutory interpretation.[55]

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[51] Emphasis added.
[52] 2007 SCC 15, [2007] 1 S.C.R. 650 at para. 92.
[53] *Supra* note 20 at paras. 39-40.
[54] *Supra* note 27.
[55] Frank Falzon, Q.C., "Statutory Interpretation, Deference and the Ambiguous Concept of 'Ambiguity' on Judicial Review" (Paper delivered at the Continuing Legal Education Society of

WCAT respectfully submits that its interpretation and application of section 196 of the *Workers Compensation Act* is reconcilable with the ordinary meaning of the words in section 196 and with the purposes of the *Act* and, contrary to the appellant's arguments, does not yield an absurd or irrational result. This conclusion has already been reached by four judges in the courts below and that fact alone is some indication of the correctness of their respective conclusions.

72. In the impugned decision, the tribunal found that the appellant was an employer who had failed to take sufficient precautions for the prevention of work related injuries. None of the basic elements of a finding under section 196(1)(a) is disputed by the appellant. It does not dispute that it is an employer. It does not dispute that it failed to take sufficient precautions for the prevention of work related injuries. Instead, the appellant argues that because it was also found to have violated its obligations as an owner, it is immunized from being assessed an administrative penalty under section 196.

73. WCAT adopts the Board's arguments made between paragraphs 138-176 of its factum on the effect of the definitions of "employer" and "owner" under the *Workers Compensation Act*.

74. The purpose of occupational health and safety legislation is generally understood across Canada to encourage internal responsibility:

> The concept of internal workplace responsibilities suggests that it is the workplace stakeholders who are most effectively able to assess and determine the particular workplace hazards and health and safety needs of workers and to provide the most localized, specific and effective solutions to reducing workplace hazards, risks to workers, injuries and accidents. The origin, or at least the introduction of the internal responsibility system was the now famous Ham Royal Commission report.[56]

Section 107 of the *Workers Compensation Act* articulates this same purpose for occupational health and safety law in British Columbia.

British Columbia Administrative Law Conference, Vancouver, 16 November 2015), in *Administrative Law Conference – 2015* (Vancouver: Continuing Legal Education Society of British Columbia, 2015) §3.1 at para. 26.

[56] Norman A. Keith, *Canadian Health and Safety Law*, loose-leaf (consulted on 7 September 2017), (Toronto: Thomson Reuters, 2016) at 1-25.

75. "The establishment of liability of workplace stakeholders is a reasonable and appropriate means of motivating compliance with the important values of workplace health and safety".[57] Thus, it is reasonable to conclude that penalty provisions such as section 196 of the *Workers Compensation Act* are to be viewed in furtherance of the purposes of the legislation as described by section 107 and not, as the appellant suggests, narrowly so as to separate workplace stakeholders into discrete functional silos. The interpretation urged by the appellant is antithetical to the purpose of the legislation. It also goes against the direction in section 8 of British Columbia's *Interpretation Act*, which requires that legislation "be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".[58]

76. Occupational health and safety legislation is inextricably linked with workers' compensation legislation. The interpretation given by WCAT to section 196 is consistent with the historic compromise at the heart of the workers' compensation scheme in British Columbia and all other Canadian jurisdictions. Employers are immune from lawsuits which would otherwise arise in connection with work-related injuries.[59] On the facts of this case, the Worker's dependants would be barred by section 10 of the *Workers Compensation Act* from suing the appellant for losses arising from the accident at the place where West Fraser Mills' work was being carried out. This immunity is based on the appellant's status as an employer. The appellant does not cease to be an employer immune from suit merely because it was found to have violated an obligation placed on it as the owner of the forestry operation.

77. As noted by Norman A. Keith in his text *Canadian Health and Safety Law*:

> The establishment of legal duties and responsibilities on workplace parties for occupational health and safety is not new. The common law of negligence has long placed a duty on an employer and other workplace stakeholders to provide a safe workplace for workers that was free of unnecessary and unreasonable hazards. Under the Canadian common law, if an employer failed to meet a reasonable standard of health and safety for workers in the workplace and an injury resulted, the employer could be successfully sued for negligence. However, with the development of workers' compensation legislation, the legal

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[57] *Ibid.* at 3-60.
[58] *Supra*, note 37.
[59] See, for example, the frequently-cited discussion in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890 at paras. 24-26. This is the point made at paras. 94-96 of the judgment of the Court of Appeal [**AR, vol. I, Tab E**].

> right of a worker to sue an employer for breach of this common law duty was effectively and largely ended…. By establishing legal duties and responsibilities on various workplace stakeholders, Canadian health and safety law has legislatively mandated an essential aspect of the internal responsibility system.[60]

78. Although the historic compromise pertains directly to compensation rights and obligations, in the absence of occupational health and safety legislation, it effectively denudes the law of the coercive effect provided by the common law and occupiers' liability legislation encouraging owners of worksites to take reasonable steps to ensure the safety of those places where the owner is also an employer.

79. In light of the benefit the historic compromise confers upon the appellant as an employer, it is imperative that the Board have an administrative tool at its disposal aimed at promoting safety-conscious behaviour of employers, regardless of whether they are also operating as an owner in the circumstances. It is difficult to imagine that this would not have been the intent of the legislature when it enacted Part 3 of the *Act*.

80. In Part 3 of the *Workers Compensation Act*, administrative penalties are one of the means through which the Board can enforce a person's occupational health and safety obligations. Given that employers have an integral role in the workers' compensation scheme and enjoy immunity from civil actions, using section 196 to penalize contraventions of the employer's obligations seems sensible. As core stakeholders in the workers' compensation scheme, employers are connected to the Board's administrative authority in ways that owners who are not also employers are not.

81. The *Workers Compensation Act* allows for prosecutions against any *person* who contravenes their obligations under Part 3.[61] If there is such a person as an owner of a forestry operation who is not also an employer, the Board would have to prosecute that person under other sections of the *Act*, such as section 213.

82. Although West Fraser Mills argues that WCAT's interpretation of section 196 is patently unreasonable because it yields an absurd result – *i.e.*, making West Fraser Mills liable to an

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[60] *Supra* note 56 at 3-1.
[61] *Workers Compensation Act*, R.S.B.C. 1996, c. 492, ss. 213 and 217.

administrative penalty when a non-employer owner would not be – the non-employer owner would still be liable under the *Act*, just not under section 196.

83. The appellant refers to two decisions in footnote 48 of its factum in support of its general argument: *Blue Mountain Resorts Ltd. v. Ontario (Ministry of Labour)*[62] and *Campbell v. Workers' Compensation Board*[63]. Neither of these cases assists the appellant.

84. In *Blue Mountain Resorts*, the court applied the interpretive principle that broad language in a statute can be given a somewhat restricted interpretation in order to avoid absurdity.[64] The provision at issue, section 51(1) of the Ontario *Occupational Health and Safety Act*, provided in relevant part that where a "person" was "killed or critically injured from any cause" at a "workplace", the employer was required to notify an inspector under the *Act*.[65] The court found that the potentially all-embracing expression "from any cause" called for a restrictive interpretation. It could not be that section 51(1) was to capture any death or critical injury involving any person at a place frequented, or sometimes frequented by workers.[66] Such an interpretation would lead to absurd results.

85. The court restrictively interpreted the phrase "from any cause" as engaged where there was some reasonable nexus between the hazard giving rise to the death or critical injury and a realistic risk to worker safety at that workplace.[67] In such a case, the obligation to notify an inspector under the *Act* arose. The court found that this interpretation was consistent with the *Act*'s purpose and objective of protecting the health and safety of workers.[68] The purpose of the *Act* was to further worker safety, not to capture death by natural causes.[69]

86. Returning to the instant case, the WCAT panel also employed a restrictive approach when interpreting section 196 of the *Workers Compensation Act*. Pursuant to section 196(1)(a), an employer is obligated to take "sufficient precautions for the prevention of work related

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[62] 2013 ONCA 75.
[63] 2012 SKCA 56.
[64] *Supra* note 62 at paras. 29 and 51.
[65] R.S.O. 1990, c. O.1. See also *ibid*. at para. 7.
[66] *Blue Mountain Resorts*, *ibid.* at para. 54
[67] *Ibid.* at para. 59.
[68] *Ibid.* at para. 62.
[69] *Ibid.* at para. 61.

injuries or illnesses". The Board may impose an administrative penalty on an employer that fails to meet this obligation. In its decision, WCAT interpreted this obligation (that is, an employer's obligation to take sufficient safety precautions for the prevention of work related injuries or illnesses) as not being limited to an employer's own workers. However, the panel limited this obligation by essentially finding that it only applied where an employer had a sufficient degree of knowledge and control over the workplace to be able to ensure the health and safety of workers.[70]

87. *Campbell v. Workers' Compensation Board* concerned the Saskatchewan *Workers' Compensation Act, 1979*[71], which provided that the *Act* applied to all workers, except those excluded by regulation.[72] Section 3(y) of the applicable regulation excluded, *inter alia*, the occupation of "sports professionals, sports instructors, players and coaches" from the provisions of the *Act*.[73] The Workers' Compensation Board promulgated a policy in relation to section 3(y) of the regulation. The policy essentially interpreted "sports instructors, players and coaches" as meaning only instructors, players and coaches of professional sports organizations. In other words, the policy interpreted section 3(y) of the regulation as excluding only instructors, players and coaches of professional sports organizations from coverage under the *Act*.[74]

88. The Court of Appeal found that the Saskatchewan Workers' Compensation Board's policy interpretation of section 3(y) of the regulation could not be reasonably supported by the wording of the regulation and the principles of statutory interpretation. Nothing in the ordinary meaning or grammar of the regulation would support interpreting "sports instructors, players and coaches" as meaning only instructors, players and coaches of professional sports organizations. No disharmony resulted from the normal and clear grammatical meaning of "sports instructors, players and coaches". Thus, there was no need to depart from that meaning.[75]

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[70] WCAT Decision at para. 95 [**AR, vol. I, Tab B**].
[71] S.S. 1979, c. W-17.1.
[72] *Ibid.*, s. 3. See also *Campbell*, *supra* note 63 at para. 14.
[73] *The Workers' Compensation Act Exclusion Regulations*, c. W-17.1 Reg. 2. See also *Campbell*, *ibid.* at para. 16.
[74] *Campbell*, *ibid.* at para. 18.
[75] *Ibid.* at paras. 63-65.

89. *Campbell* does not assist the appellant. To the extent that it cautions against reading words into a statute, the WCAT panel's interpretation of section 196(1)(a) of B.C.'s *Workers Compensation Act* reflects such an approach. Section 196(1)(a) obliges an employer to take "sufficient precautions for the prevention of work related injuries or illnesses". WCAT interpreted this obligation as not being limited to an employer's own workers. Reading the statute as the appellant urges (that is, as obliging an employer to take such precautions only in relation to its own workers) would require reading words into the statute that are not there, specifically the following underlined words: "the employer [is obliged] to take sufficient precautions for the prevention of work related injuries or illnesses <u>to its own workers</u>".

PART IV – SUBMISSIONS CONCERNING COSTS

90. The appellant seeks its costs both in this court and in the courts below. While section 47 of the *Supreme Court Act*, provides this court discretion to order costs throughout[76], the general rule in British Columbia is that costs are not paid to or from the tribunal, unless it either exceeds its standing or there is a significant breach of procedural fairness before the tribunal.[77]

91. In British Columbia, the law on standing and costs is intertwined. That is, if a tribunal has standing to appear, and does not exceed its standing at the hearing, then generally costs are not awarded to or from the tribunal.[78] Furthermore, the tribunal is generally not exposed to costs where, of necessity, it argues the merits.[79]

92. This court, in *Ontario (Energy Board) v. Ontario Power Generation Inc.,* explained that tribunal standing is a discretionary decision[80] and set out at paragraph 59 a list of criteria for a court to consider in determining whether to grant a tribunal standing. In particular, this court noted it may be appropriate for a tribunal to make more extensive submissions when it is the only respondent in the proceeding.[81]

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[76] R.S.C. 1985 c. S-26.
[77] *18320 Holdings Inc. v. Thibeau*, 2014 BCCA 494; *Laursen v. Director of Crime Victim Assistance*, 2017 BCCA 8.
[78] *Thibeau, ibid.* at para. 37.
[79] *Laursen, supra* note 77 at paras. 96 and 97.
[80] 2015 SCC 44, [2015] 2 S.C.R. 147 at para. 52.
[81] *Ibid.* at paras. 54 and 57.

93. While this court has the discretion to order costs, WCAT says that costs ought not to be ordered either for or against it. This court in *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority* did not award costs for or against WCAT.[82] Similarly, this court has declined to order costs against an administrative tribunal in a number of other cases: see for example *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*[83] and *Canadian Assn. of Industrial, Mechanical and Allied Workers, Local 14 v. Paccar of Canada Ltd.*[84]

94. WCAT says that, even if this court orders that WCAT pay costs, costs should be payable in this court only. This is because the law of costs in British Columbia as set out above militates against awarding costs against a tribunal in these circumstances. This, as WCAT understands it, would be consistent with the results in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*[85] and *Sharbern Holdings Inc. v. Vancouver Airport Centre Ltd.*[86], which took into account the practices around costs in British Columbia. Moreover, any costs in this court should exclude costs associated with the application for leave to appeal. In *Sharbern*, this court noted that leave to appeal was granted with costs in the cause. In contrast, this court did not order costs in granting leave in the present matter.[87] The appellant did not seek costs against the respondents in its application for leave.[88]

95. The chambers judge exercised his discretion to give WCAT standing to make the arguments it did.[89] WCAT furthermore says that its submissions were within the bounds set out by this court in *Ontario Energy Board.*

96. The appellant's written argument to the chambers judge expressly sought costs against the Board, but did not seek costs against WCAT. In the Court of Appeal, the appellant did not

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[82] *Supra* note 26 at para. 40.
[83] *Supra* note 32 at para. 62.
[84] [1989] 2 S.C.R. 983 at para. 41.
[85] 2013 SCC 57, [2013] 3 S.C.R. 477.
[86] 2011 SCC 23, [2011] 2 S.C.R. 175 at para. 178.
[87] Judgment of the Supreme Court of Canada granting Leave to Appeal [**AR, vol. I, Tab G**].
[88] Appellant's Memorandum of Argument in support of its Application for Leave to Appeal dated January 25, 2017 at para. 44.
[89] Reasons for Judgment of the Supreme Court of British Columbia at para. 22 [**AR, vol. I, Tab C**].

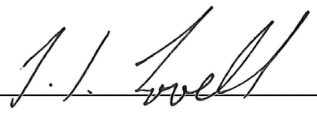
seek costs from either the Board or WCAT in its factum (although costs were sought in the appellant's Notice of Appeal). As WCAT was a successful party in the courts below and did not seek costs, no costs were awarded to it. However, WCAT says the appellant ought not to be permitted to resile from a position it took in the courts below.

PART V – STATEMENT OF ORDERS SOUGHT

97. The respondent, Workers' Compensation Appeal Tribunal seeks an order dismissing the appeal, without costs.

98. In the alternative, if this court finds that the tribunal's interpretation of section 196 of the *Workers Compensation Act* was patently unreasonable, WCAT seeks an order setting aside its finding and remitting the matter to the tribunal for reconsideration in light of the court's reasons for judgment, without costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of September, 2017



Jeremy Thomas Lovell, counsel for the respondent,
Workers' Compensation Appeal Tribunal

PART VI – TABLE OF AUTHORITIES

Authority	**Paragraph(s)**
Occupational Health and Safety Regulation, B.C. Reg. 296/97, s. 26.2	1, 2, 4, 15, 16, 17, 19, 23, 24, 25, 33, 40, 55, 56, 67, 70
Supreme Court Act, R.S.C. 1985 c. S-26, s. 47	90
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Workers Compensation Act, R.S.B.C. 1996, c. 492, s. 245.1 as amended by *Administrative Tribunals Act*, S.B.C. 2004, c. 45	4
Workers' Compensation Act, 1979, S.S. 1979, c. W-17.1, s. 3	87
The Workers' Compensation Act Exclusion Regulations, c. W-17.1 Reg. 2	87, 88
Workers Compensation Amendment Act, 2015, S.B.C. 2015, c. 22, s. 12	3
Workers Compensation Amendment Act (No. 2), 2002, S.B.C. 2002, c. 66	3, 33
Workers Compensation (Occupational Health and Safety) Amendment Act, 1998, S.B.C. 1998, c. 50	32, 33