File No. 37423

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

BETWEEN:

WEST FRASER MILLS LTD.

APPELLANT
(Appellant)

AND:

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

RESPONDENTS
(Respondents)

WORKERS' COMPENSATION BOARD OF ALBERTA

INTERVENER

FACTUM OF THE RESPONDENT, WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This case is about two issues: the *vires* of an occupational health and safety regulation[1] made by the respondent Workers' Compensation Board of British Columbia ("the Board") and the imposition of an administrative penalty for breach of that regulation on an employer who is an owner of a forest license.

2. The appellant's challenge to the validity of s. 26.2(1) of the regulation follows the death of a young worker in a falling accident at one of its forest license areas. The appellant does not dispute that it failed to meet the safety requirements set out in s. 26.2(1), but questions the validity of the regulation and of the penalty assessed as a result of its breach.

3. The Board's argument focusses on the first issue, the *vires* of the Regulation. The Board adopts the argument of the co-respondent Workers' Compensation Appeal Tribunal ("WCAT") regarding the second issue, the imposition of the administrative penalty.

4. The Board is authorized by the *Workers' Compensation Act* (the "Act") to make regulations it considers necessary or advisable in relation to occupational health and safety and occupational environment.[2]

5. Section 26.2(1) of the regulation imposes obligations on owners of forestry operations to ensure that work carried out in their operations is both planned and conducted in a manner consistent with applicable regulations and with safe work practices.

6. The British Columbia Court of Appeal, applying the test set out by this Court in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care*),[3] correctly found that the Regulation is "manifestly" within the Board's jurisdiction and is authorized by the Act.[4] It is clearly consistent

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[1] *Occupational Health and Safety Regulation*, B.C. Reg. 296/97, s. 26.2(1) ("the Regulation").
[2] *Workers Compensation Act*, R.S.B.C. 1996, c. 492 ("the Act"), s. 225(1).
[3] 2013 SCC 64, [2013] 3 SCR 810 ("*Katz*"), para. 24.
[4] 2016 BCCA 473 ("BCCA Reasons"), para. 66 [Appellant's Record ("AR"), vol. I, Tab E, pg. 109].

with the objective of the Act, which is described in s. 107 as being to promote occupational health and safety and protect workers and others from work related risks to health and safety. It is also squarely within the scope of the Board's statutory mandate in s. 111 "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."

7. Faced with the clear consistency of purpose between the Act and the Regulation, the appellant raises a number of arguments based on an erroneous interpretation of the legislation. The appellant says that the legislature imposed different and mutually exclusive obligations on employers and owners and that the Regulation failed to respect this scheme by imposing duties on an owner that the Act had imposed on an employer. The appellant is wrong. The Act does not create sealed and distinct silos of obligations on employers and owners. Instead, the Act specifically contemplates that a single entity may have multiple roles under the Act, and directs such an entity to meet the obligations of each role. The Appellant has not met the burden set out in *Katz* of establishing that the Regulation is irrelevant, extraneous or completely unrelated to the statutory purpose of the Act such that it would be *ultra vires*.

B. Facts

(i) Regulation of Forestry Operations

8. Serious injury and death are significant risks in the forestry industry. From 1992 to 2002, the serious injury rate in forestry was twice as high as for other high-risk industries, and from 1998 to 2002 the serious injury rate increased. Also between 1998 and 2002, the fatality rate in forestry was three times higher than the fatality rate for other high-risk industries and 10 times higher than for all BC industries.[5]

[5] Affidavit #1 of Gerald W. Massing sworn January 14, 2014 ("Massing Affidavit"), Exhibit "2" "A Report and Action Plan to Eliminate Deaths and Serious Injuries in British Columbia's Forests: Final Report of the Forest Safety Task Force" ("Forest Safety Task Force Report"), pp. 25-26 [AR, vol. II, Tab M, pp. 166-167].

9. An important factor contributing to these high rates of serious injury and death was recent restructuring throughout the industry. Large companies decided to rely more on smaller contractors and sub-contractors to do some of the riskiest work. Large tenure holders (owners of forestry operations) had significantly more resources for safety programs than the small operators. These smaller firms and independent owner-operators lacked the safety resources and in-house expertise of the larger companies. The proliferation of small, independent firms led to a fragmented employer/employee relationship and hindered the formation of an integrated safety culture. Training and supervision at the small operations were lacking.[6]

10. In 2004 the Forest Safety Task Force specifically recommended that the Board adapt its compliance strategy to ensure that large tenure holders and prime contractors could not delegate their responsibility for safety and continued to bear responsibility for workplace health and safety.[7]

11. In a 2008 report, the Auditor General of British Columbia noted that the burden of workplace safety continued to fall on small contractors and sub-contractors, describing it as large forest firms "contracting out" the responsibility for workplace safety.[8] The Auditor General found that the small operators could not support the needed safety infrastructure that had once existed when larger integrated companies operated, and that many of the smallest operators were self-employed and so fell outside of the Board's jurisdiction.[9] A further consequence of this contracting out to competing small companies was the economic pressures on these small companies to cut safety-related expenditures in order to win bids and to undertake excessive production targets – a "race to the bottom" of safety.[10]

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[6] Forest Safety Task Force Report, pg. 32 [AR, vol. II, Tab M, pg. 173].
[7] Forest Safety Task Force Report, pp. 18-19 [AR, vol. II, Tab M, pp. 159-160].
[8] Massing Affidavit, Exhibit "6:" "Preventing Fatalities and Serious Injuries in B.C. Forests: Progress Needed," Office of the Auditor General of British Columbia, 2008 ("Auditor General Report"), pg. 31 [AR, vol. III, Tab M, pg. 54].
[9] Auditor General Report, pg. 40 [AR, vol. III, Tab M, pg. 63].
[10] Auditor General Report, pg. 37 [AR, vol. III, Tab M, pg. 60].

12. In his report, the Auditor General noted that safety as a consideration when planning work was largely absent[11] and supervision when working was rare even compared to other dangerous natural resource industries such as mining and oil and gas.[12]

13. Following extensive consultation with industry stakeholders, the Board amended Part 26 of the regulation in 2008 to respond to these concerns. Section 26.2(1), the section attacked in this case, was amended to its present form, effective May 1, 2008.[13]

14. In 2010 the Auditor General published a follow-up report to examine the implementation of recommendations from earlier reports, including his 2008 report on workplace safety in the forestry industry.[14] The Auditor General noted that his recommendation that the Board enforce the requirement that supervision be in place for all forest workers had been fully implemented by the time of the follow-up report.[15]

(ii) West Fraser Mills Ltd.

15. The appellant is an integrated forest products company that produces lumber, paper and other wood products, with dozens of operating locations throughout western Canada and the southern United States.[16]

16. The appellant is an employer under the Act.[17]

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[11] Auditor General Report, pg. 45 [AR, vol. III, Tab M, pg. 68].
[12] Auditor General Report, pg. 51 [AR, vol. III, Tab M, pg. 74].
[13] Massing Affidavit, Exhibit "7:" The Workers' Compensation Board of British Columbia Resolution of the Board of Directors 2008/01/29-01 ("Resolution") [AR, vol. III, Tab M, pp. 102-135].
[14] Massing Affidavit, Exhibit "10:" "Follow-Up Report: Updates on the Implementation of Recommendations from Recent Reports," Office of the Auditor General of British Columbia, 2010 ("Follow-Up Report") [AR, vol. III, Tab M, pp. 163-171].
[15] Follow-Up Report, pg. 48 [AR, vol. III, Tab M, pg. 168].
[16] Incident Investigation Report 2010131490146 ("IIR"), pg. 5 [AR, vol. IV, Tab N, pg. 96].
[17] *West Fraser Mills Ltd*. v. *British Columbia (Workers' Compensation Appeal Tribunal)*, 2015 BCSC 1098 ("BCSC Reasons"), para. 71 [AR, vol. I, Tab C, pg. 79].

17. The appellant possessed a forest licence issued by the B.C. Ministry of Forests and Range (as it then was) near Williams Lake, where the appellant operated a sawmill and a plywood plant.[18]

18. As a licensee of lands used as a workplace, the appellant was an owner under the Act.[19]

(iii) The Death of the Worker Mr. E

19. An area within the appellant's licence contained trees infested with fir beetles. Fir beetles bore into fir trees and lay eggs in the tree's bark. An infestation of fir beetles will kill the tree. Trap trees are live trees that are felled specifically to attract beetles away from standing trees, limiting the spread of beetles. The falling of trap trees must occur in April or May, when beetles take flight from already infested trees.[20]

20. On April 9, 2010, the appellant contracted Mr. G, an individual running an unincorporated falling business, to fall trap trees in two locations.[21] The appellant hired Mr. G to fall trap trees at two locations over four days.[22]

21. Mr. E, a 29 year old tree faller, worked for Mr. G.[23]

22. Mr. E had more than 10 years' experience falling trees. He had received his B.C. Faller Certificate five and a half years earlier, but that certificate had expired after five years, roughly six months before the incident.[24]

23. On April 12, 2010, Mr. G and Mr. E met with a supervisor of the appellant's operations, at the first worksite. This meeting was documented.[25]

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[18] IIR, pg. 5 [AR, vol. IV, Tab N, pg. 96].
[19] BCCA Reasons, para. 1 [AR, vol. I, Tab E, pg. 90].
[20] IIR, pg. 5 [AR, vol. IV, Tab N, pg. 96].
[21] IIR, pg. 9 [AR, vol. IV, Tab N, pg. 100].
[22] IIR, pg. 5 [AR, vol. IV, Tab N, pg. 96].
[23] IIR, pg. 5 [AR, vol. IV, Tab N, pg. 96].
[24] IIR, pg. 9 [AR, vol. IV, Tab N, pg. 100].
[25] IIR, pg. 9 [AR, vol. IV, Tab N, pg. 100].

24. During the meeting at the first worksite the supervisor was informed that Mr. E's B.C. Faller Certificate had expired, but Mr. G's certificate was still current. The supervisor walked through the first worksite with Mr. G and Mr. E to review markings and locations. The supervisor provided maps of both worksites and the appellant's generic emergency response procedures. The supervisor also confirmed that safety was a priority, and the Faller's Code of Conduct and all relevant rules, regulations, policies and procedures applied to the work, including the applicable provisions of the regulation.[26]

25. Work at the first location was completed before the incident that gave rise to this case.[27]

26. At the second work location Mr. G was to fall trap trees into shady areas with dense standing timber within a 5-metre-wide area (marked with ribbons) that would later be used as a skid trail.[28]

27. On April 15, 2010, the appellant's supervisor met with Mr. G and Mr. E at the second worksite. This meeting was not documented. No hazards were identified, and the supervisor did not walk through the worksite to identify hazards or determine a falling plan.[29]

28. The supervisor had no training in assessing the quality of work of a faller. The supervisor did not have Mr. G or Mr. E demonstrate their falling qualifications, and did not ask to see Mr. E's log book before he allowed them to begin work.[30]

29. On April 16, 2010, Mr. G and Mr. E arrived at the landing for access to the second worksite. Mr. G stayed close to the landing, while Mr. E walked roughly 500 metres down a slope into the worksite.[31] Mr. E later radioed Mr. G for assistance, and Mr. G worked closer to Mr. E, but did not see the incident.[32]

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[26] IIR, pp. 9-10 [AR, vol. IV, Tab N, pp. 100-101].
[27] IIR, pg. 6 [AR, vol. IV, Tab N, pg. 97].
[28] IIR, pg. 5 [AR, vol. IV, Tab N, pg. 96].
[29] IIR, pg. 10 [AR, vol. IV, Tab N, pg. 101].
[30] IIR, pg. 10 [AR, vol. IV, Tab N, pg. 101].
[31] IIR, pg. 6 [AR, vol. IV, Tab N, pg. 97].
[32] IIR, pg. 7 [AR, vol. IV, Tab N, pg. 98].

30. Mr. E was working in an area of forest containing fir, poplar and paper birch trees, with fir trees reaching 45 metres in height. There were visible indications of several tree diseases in addition to beetle infestations, and there were numerous dead and dying firs.[33]

31. It was later determined that on April 16, 2010, Mr. E's falling work was below the minimum standard for certification. Numerous trees were felled into standing timber, escape trails were blocked, and danger trees were not felled. Mr. E had crossed behind the stumps of trees while the trees were falling. He was not removing hazards and was engaged in hazardous falling activities without taking required precautions.[34]

32. Mr. E was struck by the falling section of a dead fir tree close to a tree he was falling.[35] The investigation concluded that although it is possible that the dead tree was struck by part of the tree he was falling, it is more likely that the vibrations caused by the numerous trees Mr. E had recently felled within a short distance of that dead tree caused the rotten section of that dead tree to break off.[36]

33. Mr. E was likely struck and injured between 10:50 and 11:15 a.m. Mr. G attempted to contact him by radio between 10:45 and 11:00 a.m., but failed. He then found the severely injured Mr. E. [37]

34. Mr. G had no method of contacting emergency services. He left Mr. E and traveled 650 metres on foot from the worksite to Jacobson Road, and then along Jacobson Road for 300 metres to reach the nearest house. Although that house was empty, there was a vehicle with a key, which Mr. G used to drive 2.5 kilometres to another house. There he called the appellant. The supervisor then called the B.C. Ambulance Service at 12:22 p.m.[38]

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[33] IIR, pg. 7 [AR, vol. IV, Tab N, pg. 98].
[34] IIR, pp. 12-14 [AR, vol. IV, Tab N, pp. 103-105].
[35] IIR, pg. 7 [AR, vol. IV, Tab N, pg. 98].
[36] IIR, pg. 11 [AR, vol. IV, Tab N, pg. 102].
[37] IIR, pg. 7 [AR, vol. IV, Tab N, pg. 98].
[38] IIR, pg. 8 [AR, vol. IV, Tab N, pg. 99].

35. Paramedics arrived at the worksite at 1:30 p.m. They carried Mr. E 400 metres to a clearing, where at 3:55 p.m. he was taken by helicopter to Williams Lake Hospital and then to Royal Inland Hospital.[39]

36. On April 17, 2010, life support was discontinued, and Mr. E died shortly afterward.[40]

(iv) Causes of the Incident

37. The Board investigated the workplace fatality, and identified several factors that contributed to the incident, or constituted a failure to meet regulatory requirements.

38. All parties – the appellant, Mr. G and Mr. E – should have participated in preparing a comprehensive work plan specific to those two worksites. This was quite simply not done.[41]

39. The work at both worksites was scheduled to be completed in four days. However, the work at the first worksite took three days to finish, leaving only one day scheduled for the second worksite. The extent of the work at the second worksite was not obvious without a walk-through, which would have revealed that one day was insufficient. As a result of the short timeframe, Mr. E may have been rushing to complete his work and in doing so may have failed to take proper safety precautions.[42]

40. Mr. E was not adequately supervised by the appellant and Mr. G. Both were aware that his certificate had expired but allowed him to work. There was no inspection at any time of the quality of his work.[43]

41. The appellant did not consider the characteristics of the worksites in planning for any emergency response. Instead, it simply provided its generic procedure. There was no clear signage or guidance for the emergency responders to locate the worksites, and there was no helipad

[39] IIR, pg. 9 [AR, vol. IV, Tab N, pg. 100].
[40] IIR, pg. 9 [AR, vol. IV, Tab N, pg. 100].
[41] IIR, pp. 15-16 [AR, vol. IV, Tab N, pp. 106-107].
[42] IIR, pg. 16 [AR, vol. IV, Tab N, pg. 107].
[43] IIR, pg. 15 [AR, vol. IV, Tab N, pg. 106].

identified or prepared. Although the resulting delays did not likely contribute to Mr. E's death in the circumstances of this case, the delays should not have occurred.[44]

42. The appellant's generic emergency procedures did not address site specific requirements at the second worksite.[45]

43. Although the appellant conducted a walk-through and identified hazards at the first worksite, the appellant did not do so at the second worksite. There was no systematic evaluation of hazards at the second worksite, where Mr. E was killed, and there was no identification of and plan for hazards that existed there.[46]

44. The second worksite contained hazards which included diseased trees, fir danger trees, wind thrown trees and the inherently hazardous task of falling large trees in dense forest.[47]

45. The specific work to be done at the second worksite required Mr. E to fall trap trees within a 5-metre span, continually opening up a new area for each tree felled in different locations throughout dense standing timber. However, the appellant did not provide written procedures for the safe falling of trap trees, and did not ensure that Mr. G had such written procedures (Mr. G did not.)[48]

46. No falling plan was developed to deal with risks that should have been, but were not, identified.[49]

(v) The Board's Investigation and Orders

47. On February 21, 2011, the Board issued an Inspection Report to the appellant containing three orders. The first order found the appellant had contravened s. 26.2(1) of the regulation by failing to ensure that all activities of the forestry operation were planned and conducted in a manner

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[44] IIR, pg. 17 [AR, vol. IV, Tab N, pg. 108].
[45] BCCA Reasons, para. 19 [AR, vol. I, Tab E, pg. 94].
[46] IIR, pg. 16 [AR, vol. IV, Tab N, pg. 107].
[47] BCCA Reasons, para 19 [AR, vol. I, Tab E, pg. 94].
[48] IIR, pp. 16-17 [AR, vol. IV, Tab N, pp. 107-108].
[49] BCCA Reasons, para 18, 20 [AR, vol. I, Tab E, pp. 93-95].

consistent with the regulation and safe work practices. The second order found the appellant had contravened s. 26.21(1) of the regulation by permitting Mr. E to fall trees when he was not qualified and was not performing within his capabilities. The third order found the appellant had contravened s. 26.22(1) of the regulation by failing to ensure a qualified supervisor was designated for falling.[50]

48. The Inspection Report summarized that the death of Mr. E was caused or contributed to by: a lack of planning and site-specific written procedures, a failure to conduct a walk-through to identify site-specific hazards; a failure to ensure that Mr. E was qualified and properly supervised for the work he was to do; and the short time frame for the work to be completed.[51]

49. As a result of these contraventions, on July 26, 2011, the Board imposed an administrative penalty of $75,000.00 on the appellant pursuant to s. 196 of the Act.[52]

50. On March 16, 2011, the Board issued an Inspection Report to Mr. G, finding that he had contravened ss. 26.21(1), 26.23(2), 26.26(4), and 26.28(2) of the regulation, and s. 115(2)(e) of the Act.[53] As a result of these contraventions, the Board imposed an administrative penalty on Mr. G.[54] The Inspection Report and administrative penalty imposed on Mr. G are not challenged in this proceeding.

51. The appellant sought a review of the orders and penalty imposed on them. The Review Division of the Board found that the appellant had not contravened ss. 26.21(1) or 26.22(1), but confirmed the finding that the appellant had breached s. 26.2(1) of the regulation.[55] The Review Division confirmed the imposition and the amount of the administrative penalty.[56]

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[50] Inspection Report 2011118050089 (“Inspection Report”) [AR, vol. IV, Tab O, pp. 112-117].
[51] Inspection Report, pg. 3 [AR, vol. IV, Tab O, pg. 114].
[52] Order for Administrative Penalty (“Penalty”) [AR, vol. IV, Tab Q, pp. 125-146].
[53] Inspection Report 2011118050088 [AR, vol. IV, Tab P, pp. 118-124].
[54] Review Decision R0126792 and R0134069 (“Review Decision”), pg. 3 [AR, vol. 1, Tab A, pg. 5].
[55] Review Decision, pp. 10-13 [AR, vol. I, Tab A, pp. 12-15].
[56] Review Decision, pp. 13-20 [AR, vol. I, Tab A, pp. 15-22].

52. WCAT, an independent tribunal, confirmed that the appellant had contravened the Regulation, finding that the failure of the appellant's supervisor to conduct a walk-through of the second worksite was fatal to the appellant's argument that it had met its regulatory obligations.[57] WCAT confirmed the imposition of the administrative penalty but varied the amount down by 30%.[58]

53. These orders were imposed and confirmed on the appellant as the owner of the forestry operation where Mr. E died, not as the employer of Mr. E.[59] Mr. G, a sole proprietor, was the employer of Mr. E.

54. The appellant sought judicial review of WCAT's decision, challenging the *vires* of the Regulation and the legality of the imposition of the administrative penalty. The parties agreed that WCAT lacked jurisdiction to determine the constitutional question of the *vires* of the Regulation, and the Board was added as a party to respond to that issue in court.[60]

55. Notably, the appellant does not contest that it was factually in breach of the provisions of the Regulation. It argues only the *vires* of the Regulation and the reasonableness of the WCAT decision allowing the imposition of a penalty on an employer who is an owner.[61]

56. The Supreme Court of British Columbia held that the challenged Regulation was *intra vires*, and that WCAT's decision confirming the administrative penalty was not patently unreasonable.

57. The British Columbia Court of Appeal unanimously upheld that decision and dismissed the appeal.

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[57] WCAT Decision No. WCAT-2013-01952 ("WCAT Decision"), paras. 76-78 [AR, vol. I, Tab B, pp. 43-44].
[58] WCAT Decision, pp. 20-32 [AR, vol. I, Tab B, pp. 44-56].
[59] See Inspection Report, pg. 5 [AR, vol. IV, Tab O, pg. 116] and WCAT Decision, para. 78 [AR, vol. I, Tab B, p. 44].
[60] BCSC Reasons, para. 14 [AR, vol. I, Tab C, pg. 60].
[61] BCSC Reasons, para. 12 [AR, vol. I, Tab C, pg. 60].

PART II – RESPONDENT'S POSITION AS TO QUESTIONS IN ISSUE

58. With respect to the first issue identified by the appellant, the Board submits that the British Columbia Court of Appeal was correct in finding that the Regulation was within the jurisdiction of the Board, that is, *intra vires*.

59. The second issue, properly framed, is whether the British Columbia Court of Appeal erred in finding that WCAT's decision to uphold the administrative penalty imposed on the appellant for its breach of the Regulation was patently unreasonable. The Board adopts the submissions of WCAT on this issue.

PART III – STATEMENT OF ARGUMENT

A. Principles Applied in Determining the *Vires* of a Regulation

60. Making a regulation is an exercise of statutory power. The Regulation is either *intra vires* or *ultra vires*.[62]

61. Review of a regulation made pursuant to the Act is different from judicial review of a decision of the Board to create a policy. The Act specifically sets out a comprehensive procedure for the challenge of a Board policy and provides the standard of review of a policy is patent unreasonableness.[63] That procedure and standard of review do not apply to the review of a regulation, which instead proceeds in the manner set out by this Court in *Katz*.

62. The test is whether s. 26.2(1) of the regulation is consistent with the objective of the enabling statute or within the scope of the statutory mandate.[64] This is partially encoded in s. 225(1) of the Act which also requires that any regulations made by the Board be in accordance with the Board's statutory mandate.[65]

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[62] BCSC Reasons, para. 16-17 [AR, vol. 1, Tab C, pg. 61].
[63] Act, s. 251.
[64] *Katz*, para. 24.
[65] Act, s. 225(1)

63. A regulation is presumed to be valid. The challenger must demonstrate that the regulation is invalid; the regulatory body that created the regulation does not have to justify the regulation.[66]

64. Both the enabling statute and the challenged regulation should be interpreted using a broad and purposive approach that, where possible, construes the challenged regulation in a manner that renders it *intra vires*.[67]

65. Review of a challenged regulation does not involve assessing the merits of the regulation, or whether the regulation is likely to succeed at achieving the objectives of the enabling statute. A challenged regulation is not reviewed for the wisdom of its creation or its effectiveness in practice. The motives for making a regulation[68] and the effects of the regulation are irrelevant to the *vires* of the regulation.[69]

66. To be struck down as inconsistent with the purpose of the enabling statute, a regulation must be irrelevant, extraneous or completely unrelated to that purpose. Such an instance will be very rare.[70]

67. As developed below, the Regulation is not irrelevant, extraneous or unrelated to the purpose of the Board. As found by the British Columbia Court of Appeal, the Regulation is clearly consistent with the objective of the Act and is manifestly within the scope of the Board's statutory mandate.

68. The appellant has not demonstrated the invalidity of the Regulation.

B. The Scope of the Board's Regulation-Making Power is broad

69. The Legislature has given the Board very broad regulation-making authority aimed at achieving the Board's mandate of preventing workplace injury and death. Section 225(1) of the

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[66] *Katz*, para. 25.
[67] *Katz*, paras. 25-26.
[68] *Thorne's Hardware Ltd*. v. *The Queen*, [1983] 1 SCR 106, pg. 112.
[69] *Katz*, paras. 27-28.
[70] *Katz*, para. 28.

Act authorizes the Board to make regulations that it considers necessary or advisable in relation to occupational health and safety and occupational environment, in accordance with the Board's mandate under Part 3 of the Act.

70. Section 225(1) of the Act is consistent with section 41 of the *Interpretation Act* which deals with the power to make regulations:

> 41(1) If an enactment provides that the Lieutenant Governor in Council or any other person may make regulations, the enactment must be construed as empowering the Lieutenant Governor in Council or that other person, for the purpose of carrying out the enactment according to its intent, to
> (a) make regulations as are considered necessary and advisable, are ancillary to it, and are not inconsistent with it,
> …
> (2) A regulation made under the authority of an enactment has the force of law.

71. The Schedule under the *Regulations Act* identifies regulations made by the Board under the Act as regulations for the purposes of the *Regulations Act*.[71] Section 2 of the *Regulations Act* provides that before a regulation is enacted, it must be submitted for examination to a person designated by the minister. The Office of Legislative Counsel examines all proposed Board amendments to the regulations prior to their deposit with the Registrar to ensure they meet all principles of legislative drafting including communication of the law clearly to the people who are affected by it, the officials who administer it and the judges who interpret it.[72]

72. The power of the Board to enact regulations it considers necessary and advisable is a wide ranging authority. One reason that Parliament and legislatures grant certain administrative delegates like the Board wide ranging regulation-making powers is to allow the delegate to respond expeditiously to new challenges facing the system without requiring amendment of the enabling legislation (see for example *Katz* at paragraphs 40 to 42).

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[71] R.S.B.C. 1996, c. 402.
[72] *A Guide to Legislation and Legislative Process in British Columbia*, Ministry of Justice, August 2013, Part 2, page 1: https://www.crownpub.bc.ca/Content/documents/2-DraftingPrinciples_August2013.pdf.

73. Section 225(1) has two requirements: the Board must make regulations that are in accordance with its mandate and it may enact such regulations as it considers necessary or advisable in relation to occupational health and safety.

74. The Board's mandate under Part 3 of the Act is explained in section 111 as 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.

75. The purposes of Part 3 of the Act are set out in section 107 as being 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.

76. Without limiting those purposes, section 107 also provides a non-exhaustive list of specific purposes, including ensuring 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.[73] Section 107 reads:

> 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,

[73] Act, s. 107(2)(e).

> (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.

77. The regulation of industrial health and safety was part of the first *Workers Compensation Act* in British Columbia assented to in 1916 and is an integral part of the historic trade-off: in exchange for immunity from lawsuits, employers fund the no-fault compensation system and the occupational health and safety regime. Employers, workers, and others are subject to the occupational health and safety provisions.

78. In British Columbia, one of the primary purposes of workers compensation legislation is to set and enforce standards for occupational health and safety in the workplace. The Honourable Mr. Justice Charles W. Tysoe in the 1966 Commission of Inquiry, *Workmen's Compensation Act*, discussed the objects of the British Columbia Act:

> Some individuals misconceive the purpose and intention of the Act and of the scheme or plan it embodies. It was not designed to be a social welfare measure. Nor in my view, should it be. The time may come when it will be integrated with a broad system of social security, but it is my feeling that its purpose is so different to that of a social welfare scheme that it ought not to be completely swallowed up in such a scheme. I think that it would undesirable from the standpoint of accident prevention alone. **The prime mission of those who administer workmen's compensation and the prime purpose of the Act is not to furnish financial benefits, but to promote and encourage measures for the prevention of injury to workmen in the course of their work and, should any be so unfortunate as to become disabled as a result of such injury, means for their rehabilitation and return to useful employment as soon as possible. To keep work-connected**

> **injuries to a minimum is the first object. Restoration of injured workmen physically and economically is the second.** …[74]
> (emphasis added)

79. This statement of the objects of the Act was cited with approval by the British Columbia Court of Appeal in *Jim Pattison Enterprises Ltd. v. British Columbia (Workers' Compensation Board).*[75]

80. In carrying out its mandate and fulfilling its purpose, the Board has functions, duties and powers which are set out in Section 111(2) of the Act. The very first is the duty 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.

81. Section 225 provides a very broad general authority to make regulations, informed by the mandate to protect occupational health and safety, and the purpose of preventing work-related accidents and injuries and of ensuring that those in a position to affect occupational health and safety share that responsibility.

82. Section 225(2) provides, without limiting the general power explained above, a non-exhaustive list of subjects for regulation, including standards and requirements for the protection of the health and safety of workers and other persons present at a workplace[76] and specific components of the general duties of employers, owners, and other parties.[77]

83. Further, by section 230, a regulation may be made applicable to any person working in or contributing to the production of an industry, which may, of course, include owners such as the appellant.[78]

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[74] The Honourable Mr. Justice Charles W. Tysoe, Commission of Inquiry, *Workmen's Compensation Act*, 1966, pp. 18-19: https://www.wcat.bc.ca/research/WorkSafeBC/WSBC_Hist_Rpt/1966-tysoe-report.pdf.
[75] 2011 BCCA 35, para. 37.
[76] Act, s. 225(2)(a).
[77] Act, s. 225(2)(b).
[78] Act, s. 230(2)(a).

84. The Board is clearly authorized to make regulations concerned with occupational health and safety generally, including regulations establishing requirements for the protection of the health and safety of workers and worksites and regulations setting out the specific components of the general statutory duties on owners. A specific purpose in making regulations is to ensure that owners (among other parties) who are in a position to affect the occupational health and safety of workers share in that responsibility.

85. When examining the vires of subordinate legislation made by a regulatory body, such as s. 26.2(1), the analytical framework as set out in *Katz* applies.[79] Applying the principles of *Katz*, the Regulation is squarely within the scope of Board's statutory mandate and is consistent with the objective of the Act.

C. The Regulation is *Intra Vires*

86. Section 26.2(1) requires the owner of a forestry operation to "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."

87. The terms used in the Regulation, "owner", "forestry operation" and "workplace" are defined in the Act and regulation.

88. An owner is defined in s. 106 of the Act as including a licensee of any lands used or to be used as a workplace.

89. A forestry operation is defined in s. 26.1 of the regulation as a workplace where work is done in relation to silviculture or harvesting trees, including constructing the means of access and transporting the harvested trees to a facility where they are processed or from which they are exported.

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[79] *The Nova Scotia Barristers' Society v. Trinity Western University*, 2016 NSCA 59, para. 43; *Yuan, Li v. Transitional Council of the College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario*, 2014 ONSC 351, paras. 3-5.

90. A workplace is defined in s. 106 of the Act as any place where a worker is or is likely to be engaged in any work.

91. The obligations imposed by the Regulation are straightforward and do not require any further interpretation beyond the section's plain meaning. It is clear that the Regulation applies to an owner of a forestry operation, such as the appellant, and requires that owner to ensure that all activities of the forestry operation are both planned and conducted in a manner consistent with the Regulation and with safe work practices acceptable to the Board.

Mandate and Purpose

92. The Regulation is manifestly consistent with the Board's mandate and purpose under the Act to ensure that owners who are in a position to affect the occupational health and safety of workers share in the responsibility to prevent workplace injury.

93. In particular, the Regulation is concerned with occupational health and safety as it specifically requires that all activities of a forestry operation are both planned and conducted in a manner consistent with safe work practices.

94. By requiring the planning and conduct of forestry operations to be consistent with regulations and safe work practices, the Regulation explicitly promotes occupational health and safety and protects workers from work related risks.

95. A specific purpose of Part 3 of the Act is to ensure that employers, workers and others, including owners, who are in a position to affect the occupational health and safety of workers share the responsibility to protect workers from work related risks.[80] The Regulation recognizes the position of owners of forestry operations to affect the occupational health and safety of workers in forestry operations, and requires owners to share in that responsibility with employers. The Regulation does not negate any duties that apply to an employer at a forestry operation, and does not transfer responsibility from an employer to the owner; instead, the Regulation establishes sharing of responsibility in accordance with the purposes of Part 3.

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[80] Act, s. 107(2)(e).

96. Pursuant to section 230(2)(a) of the Act, the Board may make regulations that are applicable to employers, workers, and any other persons contributing to the production of an industry. Pursuant to section 230(2)(b) of the Act, regulations may also be different for different workplaces, industries and persons.

97. Thus, while some general duties of employers, workers, owners and others are set out in sections 115 through s. 121 of the Act, s. 230 of the Act provides that regulations under Part 3 of the Act can be made applicable to any person contributing to the production of an industry and may be different for different workplaces, industries, activities, persons, things or categories of any of these.

Necessary or Advisable

98. The Board may make regulations that it considers necessary or advisable, according to s. 225 of the Act. The Board considered extensive amendments to Part 26 of the regulation, including the making of s. 26.2(1) of the regulation, as both necessary and advisable.[81]

99. That the Board considered the approach taken in the Regulation "necessary or advisable in relation to occupational health and safety" is apparent from the Resolution of the board of directors amending Part 26 of the Regulation. The Resolution provides that the board of directors:

> …after due consideration of all presentations to the WCB, considers it necessary and advisable in accordance with the WCB's mandate under the Act in relation to occupational health and safety and occupational environment to amend Part 26 of the Occupational Health and Safety Regulation ("OHSR")[82]

[81] Resolution, pg. 1 [AR, vol. III, Tab M, pg. 102].
[82] Resolution, pg. 1 [AR, vol. III, Tab M, pg. 102].

100. The lengthy reports produced by the Forest Safety Task Force in 2004[83] and the Office of the Auditor General in 2008[84] demonstrate that the Government of British Columbia, the Board, and employers and workers in the industry all recognized that action needed to be taken to reduce the high number of serious injuries and deaths in forestry.

101. These reports both recognized that the contracting out of work from large firms to smaller firms transferred responsibility for worker safety to small firms without sufficient safety resources or expertise, leaving a safety vacuum.[85]

102. The Forest Safety Task Force Report recommended that owners of forestry operations[86] clearly share in the responsibility for worker safety, and that the Board focus its compliance efforts on all industry participants.[87] The Auditor General recommended in its report that amendments be made to Part 26 of the regulations to clarify the responsibilities of all forest companies for worker safety.[88] The Auditor General noted in its follow-up report that this recommendation had been substantially implemented.[89]

103. The Board was directed by a task force that included representatives from employers and government that action was needed, and was specifically advised to ensure that all parties, including owners, share responsibility for worker safety. Amendments including the Regulation substantially implemented the Auditor General's recommendation. The Board specifically stated that the Regulation was both necessary and advisable. The Regulation is clearly within the scope of the Board's mandate.

104. The Regulation is consistent with both the general overarching purpose of Part 3 of the Act and with specific enumerated purposes referred to above.

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[83] Forest Safety Task Force Report [AR, vol. II, Tab M, pp. 129-217].
[84] Auditor General Report [AR, vol. III, Tab M, pp. 22-101].
[85] Forest Safety Task Force Report, pp. v-vi [AR, vol. II, Tab M, pp. 139-140 and 184-185]; Auditor General Report, pp. 31-32 [AR, vol. III, Tab M, pp. 54-55].
[86] Owners of forestry operations are described in the reports as 'tenure holders.'
[87] Forest Safety Task Force Report, pp. 46 and 52 [AR, vol. II, Tab M, pp. 187 and 193].
[88] Auditor General Report, pg. 68 [AR, vol. III, Tab M, pg. 89].
[89] Follow-Up Report, pg. 48 [AR, vol. III, Tab M, pg. 168].

105. The Board submits that the Regulation is consistent with the statutory purpose and regulatory scope. Placing obligations for health and safety on owners of forest operations is not inconsistent with or extraneous to the statutory purpose; it is part of a regulatory attempt to fulfill the purposes of Part 3 of the Act by focusing on areas which have been identified as creating safety challenges in the forest sector. Allocating responsibility for health and safety within a given industrial operation lies at the heart of promoting health and safety in the workplace.

106. As the Regulation is consistent with the purpose of the Act and the scope of the Board's statutory mandate under the Act, it is clearly *intra vires*.

D. The Appellant's Challenges are Without Merit

107. The appellant attacks the *vires* of the Regulation on four main grounds:

i. The Regulation requires an owner to assume and adhere to duties, obligations and responsibilities which are beyond those contemplated by s. 119 of the Act;[90]
ii. The effect of the Regulation is inconsistent with the objective of the Act;[91]
iii. The statements of the purpose of the Act in s. 107 and of the mandate of the Board in s. 111 provide limits to the Board's regulation-making authority and do not confer jurisdiction,[92] and
iv. The definitions of "owner" and "employer" are distinct in the Act and there are defined duties and roles for each. The Regulation improperly conflates the roles.[93]

108. Each challenge shall be dealt with in turn.

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[90] Appellant's Factum, paras. 29, 38.
[91] Appellant's Factum, para. 32.
[92] Appellant's Factum, para. 33.
[93] Appellant's Factum, paras. 33, 36, 39 and 40.

(i) The Regulation Falls Squarely Within the Duties Imposed on Owners by Section 119 of the Act.

109. The appellant argues that the Board is not authorized by the Act to create a regulation that imposes duties different from those in Section 119 of the Act. According to the appellant, anything that "goes beyond" the duties set out in s. 119 is therefore inconsistent with the obligations intended by the legislature. This is nonsensical in several respects.

110. First, section 119(c) specifically requires an owner to comply with the Act, with the regulations, and with any applicable order of the Board. For subsection (c) to have meaning, the statute must intend for regulations to impose duties on owners that "go beyond" those particular duties set out in sections 119(a) and (b).[94]

111. Secondly, if a regulation could not impose any duties beyond s. 119 (a) and (b), subsection (c) would be superfluous, contrary to well-established principles of statutory interpretation.[95]

112. Third, legislatures frequently set out some rights and duties in a statute and leave others to be defined by regulation. There is no rule of law or interpretation that prevents a regulation from supplementing rights or duties set out in the governing statute.[96]

113. Fourth, section 122 of the Act states 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 by the regulations. This contemplates a specific obligation being set out by regulation that will not limit the generality of an obligation contained in the Act and directly contradicts the appellant's assertion that a regulation cannot impose an obligation that is not already set out in a section of the Act.

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[94] BCSC Reasons, para. 54 [AR, vol. I, Tab C, pp. 74-75]; BCCA Reasons, para 56 [AR, vol. I, Tab E, pg. 106].
[95] *Teal Cedar Products Ltd*. v. *British Columbia*, 2017 SCC 32, para. 86.
[96] BCCA Reasons para 52-53 [AR, vol. I, Tab E, pg. 105]; *Roncarelli* v. *Duplessis*, [1959] S.C.R. 121, pg. 139 (noting that provisions of a statute "may be supplemented by detailed regulations").

114. Although the appellant argues that the British Columbia Court of Appeal has ceded to the Board "a limitless jurisdiction to pass regulations,"[97] by upholding the *vires* of the Regulation, the effect of the court's decision is not to allow limitless authority. It allows only the authority to make regulations authorized by the governing statute.

115. Any regulation made by the Board that imposes a duty on an owner, or on any other person, must be *intra vires*. It will only be *intra vires* if it is consistent with the purpose of the Act and the mandate of the Board.[98] The appellant's argument attempts to reframe the issue as being whether the Regulation somehow goes "beyond" the intent of s. 119 of the Act, which is not the proper test.

116. In any event, the Regulation does not impose duties on owners that are inconsistent in any manner with those in s. 119 of the Act. Rather, the Regulation imposes on an owner of a forestry operation specific requirements in order to achieve the general obligations appearing in section 119 of the Act, based on the unique nature of the forest industry.

117. Section 119 of the Act requires every owner of a workplace (which includes a forest licence area) to provide and maintain the owner's land in a manner that ensures the health and safety of persons at or near the workplace, to give to the employer at the workplace the information known to the owner that is necessary to identify and eliminate or control hazards at the workplace, and to comply with the Act, the regulations and any applicable orders of the Board. The owner of a worksite has an ongoing positive obligation to actively maintain the land to keep workers safe and to provide necessary information.

118. The nature of ownership of a forestry operation requires that the owner must take particular care to comply with the obligations imposed by s. 119 of the Act. A forestry worksite has hazards that are unique to the industry and pose significant risks to workers, such as unstable and steep terrain, extreme weather and wind, and the unpredictable reactions of both live and dead trees to forestry activity.[99] Each worksite has its unique characteristics and risks. As work progresses, the

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[97] Appellant's Factum, para. 41.
[98] *Katz*, para. 28.
[99] Auditor General Report, pp. 17-18 [AR, vol. III, Tab M, pp. 41-42].

land – the worksite – is significantly altered, including through runaway harvested logs dislodging other lumber and rocks.[100]

119. The owner of a forestry operation must be involved in the planning of the forestry work to be done to ensure that the workplace will be safe for that work and to ensure that the workers there (through their employer or the prime contractor) have the necessary information to control hazards, as required by s. 119(a) of the Act. Given the nature of forestry operations, the owner must have knowledge of the specific work to be done at the worksite. Otherwise the owner cannot meet its statutory obligation to ensure workplace health and safety on its land.

120. The owner of a forestry operation must be involved in the ongoing forestry work on its land to meet its ongoing obligations to maintain its land and to provide necessary information about its land, as required by s. 119(b) of the Act. Given that forestry work significantly changes the land, without ongoing involvement in that work, the owner cannot maintain the land as required, and cannot provide new information that becomes known or relevant because of changes to the land used.

121. This obligation is entirely consistent with the status of an owner of property. The owner has the final authority to decide what exactly happens on its property, including any changes made to the property (for example, by cutting down trees and building logging roads).

122. An owner's duties under the Regulation simply particularize what it means to provide and maintain safe premises and to provide necessary information in the context of a forestry operation, as an owner is required to do under s. 119 of the Act. Particularizing general duties is an important regulatory function of the Board. The duties set out in the Regulation are inherent in an owner's general obligations and are entirely consistent with those obligations.

123. The general duties imposed on an owner by s. 119(a) and (b) of the Act do not set out the outer limits of an owner's obligations to protect worker health and safety. Instead, these duties are the most basic minimum duties that every owner in every circumstance must comply with. These delineated statutory duties are a floor, not a ceiling, to the owner's responsibilities.

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[100] Auditor General Report, pg. 18 [AR, vol. III, Tab M, pg. 42].

124. The duties specific to owners of a forestry operation set out in the Regulation may be more specific than the general duties set out in section 119(a) and (b), but that does not mean they are inconsistent with the section. The Regulation may validly set out additional duties as long as they are consistent with the purpose of the Act and the scope of the Board's mandate.

125. The circumstances of this case demonstrate the level of control the owner of a forestry operation has over the work to be done on its land. The appellant specified the part of its land to be forested down to a 5-metre-wide marked area that would become a trail for future work on the land.[101] The appellant specified the size, condition and number of trees to be felled through its own documented guidelines.[102]

126. The appellant had a statutory duty under s. 119 to provide and maintain all its land in a manner that ensured worker safety, and to inform Mr. G of all information necessary to identify and eliminate or control hazards to workers there. The appellant had to ensure the forestry work done on its land was planned and conducted consistent with regulations and safe work practices in order to ensure that the land was maintained in a safe condition and all necessary information was provided as work progressed.

127. It can be seen from the facts of the case on appeal how a failure by the owner to properly identify and communicate hazards to the contractor and to properly plan the forestry work, in short a failure to comply with the Regulation, can lead to catastrophic results.

(ii) The Effect of the Regulation is Consistent with the Objective of the Act

128. While the appellant urges this Court to consider the effect of the Regulation, the *effect* of the Regulation is not actually at issue. As stated in *Katz*, the *vires* of a regulation does not hinge on its effect or whether it will actually succeed in achieving the statutory objectives.[103]

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[101] IIR, pg. 5 [AR, vol. IV, Tab N, pg. 96].
[102] IIR, pg. 10 [AR, vol. IV, Tab N, pg. 101].
[103] *Katz*, para 28.

129. In any event, the effect of the Regulation is consistent with the purpose of achieving shared responsibility for health and safety in the workplace.

(iii) The Effect of the Statement of Purpose in s. 107 and of the Mandate of the Board in s. 111 of the Act.

130. The appellant characterizes s. 107 and s. 111 of the Act, which set out the Board's purpose and mandate, as being "broad policy statements" that cannot confer regulation-making jurisdiction.

131. The Board agrees that those sections do not confer regulation-making jurisdiction. They set out the scope of the Board's purpose and mandate which is instructive in determining the extent of the Board's regulation-making jurisdiction which is set out in s. 225 of the Act.

132. The appellant relies on the decision of this Court in *Reference Re Broadcasting Regulatory Policy*.[104] However, that decision does not support the appellant's argument.

133. In *Reference Re Broadcasting Regulatory Policy*, the challenged regulation gave individual broadcasters the right to require cable and satellite television providers (known as "BDU's") to delete the broadcasters' programming from their services. This gave the broadcasters leverage with which to bargain for compensation from the BDUs. This was contrary to the broadcasting environment as it existed before the making of the challenged regulation.

134. This Court found that such a regulatory scheme effectively regulated the economic relationship between broadcasters and BDUs.[105] This fell outside the purpose of the regulator's statutory mandate,[106] which was focused on the content of programming rather than the economics of distributing programming.[107] The regulatory body had the authority to work towards implementing cultural objectives, but did not have the authority to regulate economic relationships by creating exclusive control rights over programming, which was not a matter dealt with in the

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[104] *Reference Re Broadcasting Regulatory Policy CRTC 2010-167- and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 ("*Reference Re Broadcasting Regulatory Policy*").
[105] *Reference Re Broadcasting Regulatory Policy*, para. 19.
[106] *Reference Re Broadcasting Regulatory Policy*, para. 31.
[107] *Reference Re Broadcasting Regulatory Policy*, para. 18.

parent statute.[108] In short, the regulations were *ultra vires* as being outside the statutory mandate of the regulator.

135. In the case under appeal, on the other hand, the Regulation is squarely within the purpose and mandate of the parent legislation. Part 3 of the Act is expressly focused on workplace health and safety, and the prevention of injury to workers. The Regulation is wholly consistent with that purpose.

(iv) The Effect of the Definitions of "Owner" and "Employer" in the Act.

136. The appellant does not argue that the Board is unable to require by regulation that work be planned and performed at a forestry operation in a manner consistent with safe work practices. The appellant argues only that the Regulation imposes that duty on the wrong party: on an owner of a forestry operation instead of an employer conducting work there.

137. The appellant tacitly accepts that the provisions of the Regulation fit within the purpose of the Act and mandate of the Board (rendering it *intra vires*). The only objection is to whom the Regulation is directed.

138. The appellant argues that the Act was intended to establish distinct roles, including the roles of 'employer' and 'owner,' and that each have separate and distinct duties.

139. However, the Act does not create the silos of responsibility suggested by the appellant. There is nothing in the Act drawing hard and fast lines around the roles a party may play under the Act, or dividing obligations between distinct roles with no crossover.

140. The fundamental purpose of the Act is to protect the health and safety of workers, and all actors in the workplace share in that responsibility. As discussed below, the legislation makes express provision for different parties at the same worksite to share the same duties.

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[108] *Reference Re Broadcasting Regulatory Policy*, para. 32.

141. Section 115 of the Act includes an obligation that employers must comply with the regulations. Section 119 includes an identical obligation that owners must comply with the same regulations. The clear legislative intent of these sections is that both employers and owners are obliged to comply with the regulations that are applicable to them in the circumstances.

Overlapping and Shared Obligations

142. The appellant argues that because the definitions of 'owner' and 'employer' are different, a regulation is invalid if it imposes obligations on an owner that may also exist on an employer. This is wrong. The Act specifically contemplates one actor in the workplace having multiple roles, and multiple actors in the workplace sharing the same responsibilities. The scheme specifically provides for redundancy in the quest for safety at the workplace.

143. For example, section 123 of the Act contemplates situations where a person may be obliged to perform more than one occupational health and safety function at a workplace. A person with more than one function must comply with the duties that correspond to each of those functions.

144. The appellant argues that s. 123(1) of the Act, at least for the purposes of that section, provides that the various functions under Part 3 of the Act, including employers' and owners', are separate, and that s. 123(2) then requires a person to meet the obligations of multiple functions only when those functions are both present at one workplace.[109] This is incorrect.

145. Section 123(1) of the Act defines 'function' to mean the function of employer, supplier, supervisor, owner, prime contractor or worker. It does not state that these functions are separate, but only defines the term 'function' when used in s. 123(2).

146. Section 123(1) simply establishes the <u>definition</u> of 'function' for that section. It cannot have the substantive effect of creating divisions between the functions listed in that definition.[110]

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[109] Appellant's Factum, para. 36(e).
[110] *Hrushka v. Canada (Foreign Affairs)*, 2009 F.C. 69 ('*Hrushka*"), para. 16.

147. Section 123(2) confirms that, when one person has multiple functions at the same workplace, that person must meet the obligations of each function. It does not state that a person is otherwise excused from meeting the obligations of one function by the obligations of another.

148. Also, section 124 contemplates situations where several people share the same obligation at a workplace. The section may relieve a person of an obligation where other persons are subject to the same obligation only when simultaneous compliance would result in unnecessary duplication of effort and expense and where health and safety is not put at risk by compliance by only one person. This squarely contradicts the appellant's suggestion that the legislature did not intend to impose the same obligation on multiple players in the workplace, because that would become too confusing.[111]

149. Further, a stated specific purpose of the Act is to ensure that all parties who may affect the health and safety of workers share that responsibility.[112] Creating mutually exclusive silos of responsibility would be inconsistent with the purpose and mandate of the Act, and is not supported by a plain reading of the Act. Excluding a person from responsibility at a workplace based on that person's nominal function, where the person has an ability to affect safety, is contrary to the Board's mandate of ensuring occupational health and safety.

150. The Act's overriding purpose is to protect the health and safety of workers. The language of the Act makes it clear that this responsibility is to be shared among all persons who have a role affecting the health and safety of workers.

Definitions

151. The appellant argues that the intention of the legislature to distinguish between the duties of employers and owners can be found in the definitions of those terms. Because the terms are defined separately, the appellant argues, this indicates a legislative intention to create mutually

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[111] Appellant's Factum, para 40.
[112] Act, s. 107(2)(e).

exclusive roles and responsibilities. This is incorrect. The fact that actors in the workplace are defined separately has no bearing on whether obligations may be validly imposed on any of them (individually or collectively) by regulation. The *vires* of any such regulation is dependent on whether it is in compliance with the purpose of the Act and mandate of the Board.

152. Also, a plain reading of the definitions does not support the appellant's argument.

153. 'Employer' is defined in s. 106 of the Act for the purposes of Part 3 of the Act and the Regulation, as meaning "an employer as defined in section 1," as well as a person deemed an employer, and the owner and master of a fishing vessel.

154. 'Employer' is defined in s. 1 of the Act to include "every person having in their service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged to work in or about an industry."

155. This definition is inclusive and non-exhaustive. It does not narrow the scope of the word, but instead expands the ordinary meaning of 'employer.'[113] As the definition in s. 106 incorporates the definition of 'employer' from s. 1, the definition of 'employer' in Part 3 of the Act is necessarily inclusive rather than exhaustive.

156. 'Owner' is defined in s. 106 of the Act to include "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 "a person who acts for or on behalf of an owner as an agent or delegate." This is an inclusive meaning that expands the ordinary meaning of the word (for example, by expressly including occupiers of lands).

157. The definitions of 'employer' and 'owner' are not mutually exclusive. Neither term is defined to exclude the other. A party may easily meet the definition of both terms. Indeed, the appellant does not dispute that it, like any corporation in British Columbia that owns a worksite, is both an employer and an owner for the purposes of Part 3 of the Act.

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[113] *Hrushka*, para. 16.

158. A definition alone is not a substantive enactment with independent operative effect, and an attempt to make it so is an error in drafting the statute.[114] The definitions of 'employer' and 'owner' cannot have the substantive effect of creating separate roles with distinct and mutually exclusive responsibilities. Any such separation would have to be found in substantive sections of the Act.

No Silos Created by Substantive Sections of the Act

159. Sections 115 and 119 of the Act set out the general statutory duties of employers and owners respectively. The duties in each section may differ, but they are not contradictory or inconsistent with each other. The separation argued by the appellant is simply not present in the scheme.

160. Section 115 of the Act sets out the general duties of an employer. The employer's primary duty is to ensure the health and safety of its workers, wherever those workers are working, and the health and safety of any workers at the employer's workplace.[115] Specific duties include the duty to remedy hazardous workplace conditions and to provide information and protective equipment.[116] An employer must comply with Part 3 of the Act, the Regulation, and any applicable orders.[117]

161. Section 119 of the Act sets out the general duties of an owner, which have already been discussed. While the appellant argues that the duties set out in section 119 are focussed entirely on the workplace, and not on workers,[118] this is incorrect. The section deals with making a workplace safe for persons at or near the workplace, and providing information to the employer or prime contractor to eliminate or control hazards there. This is clearly intended to protect workers and others at the workplace.

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[114] *Hrushka*, paras. 16-17.
[115] Act, s. 115(1).
[116] Act, s. 115(2).
[117] Act, s. 115(1)(b).
[118] Appellant's Factum, para. 36(d).

162. These general duties set out in s. 115 and s. 119 of the Act are not contradictory. If the same party is both the employer and the owner at a worksite, that party is able to, and must, comply with the duties imposed on it both as an employer and as an owner.

163. The two sections impose similar duties on employers and owners, tailored to apply to their specific circumstances and to dovetail to ensure a safe workplace.

164. For example, an owner must provide information necessary to identify and eliminate or control hazards.[119] An employer must ensure that its workers are informed of all known or reasonably foreseeable health or safety hazards to which they are likely to be exposed.[120]

165. An owner must provide and maintain land and premises used as a workplace in a manner that ensures the health and safety of all persons at or near that workplace.[121] An employer must remedy any workplace conditions that are hazardous to the health or safety of its workers.[122]

166. These similar duties are entirely consistent with a sharing of responsibility where applicable.

167. Sections 115 and 119 must be interpreted in a broad and purposive manner.[123] As noted, a stated purpose of Part 3 of the Act is to ensure that employers and others share the responsibility of protecting the health and safety of workers.[124] Sections 115 and 119 must be interpreted in a manner consistent with that purpose.

168. These sections demonstrate a legislative intent to ensure that every person who may affect the health and safety of workers has responsibilities appropriate to her or his function. Rather than an intent to divide up and parcel out responsibilities between different roles, ss. 115 and 119, together with ss. 116, 117, and 120 (which impose duties on workers, supervisors and suppliers respectively), demonstrate a clear legislative intent to impose an obligation to protect the health

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[119] Act, s. 119(b).
[120] Act, s. 115(2)(b)(i).
[121] Act, s. 119(a).
[122] Act, s. 115(2)(a).
[123] *Katz*, para. 26.
[124] Act, s. 107(2)(e).

and safety of workers on all persons regardless of their particular connection to a workplace. This is consistent with the stated purpose of Part 3 of the Act of shared responsibility for occupational health and safety among all functions under the Act.

169. The appellant also relies on the decision in *British Columbia Hydro and Power Authority* v. *Workers' Compensation Board of British Columbia* to support its argument that the Act creates silos of responsibility.[125] However, the decision does not stand for that proposition.

170. In *B.C. Hydro* a worker was injured in a serious accident that occurred at a worksite owned by B.C. Hydro. The worker was employed by a different employer, and B.C. Hydro had no connection to the worker other than as owner of the worksite where the accident occurred. They did not report the accident to the Board and were penalized as a result for a breach of s. 172 of the Act.

171. The issue before the courts was the reasonableness of the Board's interpretation of s. 172 as imposing a reporting duty on B.C. Hydro where they were an employer, but not connected to the worker who was injured. The decision does not deal with the *vires* of any regulation, and does not support the appellant's argument that there are distinct silos of responsibility between owners and employers. It deals only with whether the term "employer" in s. 172 could properly be interpreted as applying to BC Hydro in the circumstances of that case.

E. Conclusion

172. Section 26.2(1) was passed in order to address a safety vacuum created by large forest companies contracting out falling work to small operators with limited safety resources. The Regulation fills that vacuum and requires owners to ensure that work on their property is planned and conducted in a safe manner, which is clearly in accordance with the purpose of the Act and mandate of the Board. The Regulation addresses circumstances such as those present in this case that led to the death of the young faller Mr. E. The appellant urges this Court to strike down the Regulation and restore a safety vacuum with all of its clearly catastrophic risks.

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[125] 2014 BCCA 353 ("*BC Hydro*").

173. The appellant has not overcome the presumption that the Regulation is valid.[126] The Regulation is not irrelevant, extraneous or completely unrelated to the statutory purpose of the Act.[127]

174. To the contrary, the Regulation is consistent with both the purpose of Part 3 of the Act and the scope of the Board's statutory mandate. It was validly adopted under the Board's clear regulation-making authority to better achieve the purpose of the Act in protecting the health and safety of workers at forestry operations. It is *intra vires*.

PART IV – COSTS

175. The Board requests its costs here and in the courts below.

PART V – ORDER SOUGHT

176. The Board seeks an order dismissing the appeal with costs throughout.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Ben Parkin
Nick Bower
Counsel for the Workers' Compensation Board of British Columbia

September 12, 2017

[126] *Katz*, para. 25.
[127] *Katz*, para. 28.

PART VI – LIST OF AUTHORITIES

Cases **Paragraph(s)**

Secondary Sources

Statutes and Regulations