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)

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

RESPONDENTS
(Respondents)

THE WORKERS' COMPENSATION BOARD OF ALBERTA

INTERVENER

INTERVENER'S FACTUM
(THE WORKERS' COMPENSATION BOARD OF ALBERTA, INTERVENER)

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I: OVERVIEW

1. The Intervener, The Workers' Compensation Board of Alberta, has the authority under Alberta's *Workers' Compensation Act*[1] to issue compensation policies. These policies are a form of delegated legislation akin to regulations and policies issued by the Respondent, Workers' Compensation Board of British Columbia.

2. One of the issues raised in this Appeal is whether section 26.2 of the Respondent, Workers' Compensation Board of British Columbia's Occupational Health and Safety Regulation ("the Regulation") is *ultra vires* the Respondent's jurisdiction under British Columbia's *Workers' Compensation Act.*[2] The Intervener makes the within submissions solely on the issue of the standard of review of the *vires* of subordinate legislation issued by a statutory delegate.

PART II: ISSUES

Issue 1. Did the British Columbia Court of Appeal err in finding that s. 26.2 of the Regulation was within the jurisdiction of the Respondent, Workers' Compensation Board of British Columbia?

Issue 2. Did the British Columbia Court of Appeal err in finding that the Appellant, as owner of the worksite, was properly made subject to an administrative penalty which expressly applies only to an employer?

PART III: ARGUMENT

3. On a *vires* challenge, the question is whether a piece of delegated legislation is legal, not whether it is proper. Accordingly, they definition of the reasonableness standard set out in *Dunsmuir v New Brunswick*[3] that applies to adjudicative decisions of a tribunal does not apply on a review of the legality of a bylaw, regulation or policy. Reasonableness in that context has its own definition.

4. Jurisprudence from the Supreme Court of Canada has established that subordinate legislation in the form of bylaws, regulations and policies, issued by a statutory delegate, is entitled to considerable deference upon a review of their *vires*. A piece of subordinate legislation

[1] RSA 2000 c W-15
[2] RSBC 1996 Ch 492
[3] 2008 SCC 9, [2008] 1 SCR 190

will be found to be *ultra vires* its enabling statute only if it is found to be inconsistent with the objective of its enabling statute or the scope of the delegate's statutory mandate.

Dunsmuir

5. In *Dunsmuir v New Brunswick*, the Supreme Court held that the standard of correctness applies to "true questions of jurisdiction or *vires*", where "jurisdiction" was considered in the narrow sense of whether or not the tribunal had the authority to decide a particular matter. The Court stated that a tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction.[4] This Court in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* noted that true questions of jurisdiction are extremely rare, stating that "[i]f the legislation gives a statutory body the authority to decide or to act, the manner in which it makes that decision or exercises that authority is not a question of "true jurisdiction".[5]

6. These cases assert that a statutory delegate must be "correct" when deciding whether it has the authority to perform a particular action. The cases do not directly address the *vires* of a statutory delegate's issuance of subordinate legislation. *Dunsmuir*, in particular, dealt with an adjudicative act (a labour relations adjudicator's finding that the employer's dismissal of a public office-holder was procedurally unfair) as opposed to the *administrative* act of a statutory delegate issuing subordinate legislation.

7. When the Supreme Court in *Dunsmuir* did address an administrative act of issuing subordinate legislation, however, it did so only tangentially. The Supreme Court gave an example from *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*, where it held that a reviewing court could decide on a correctness standard whether the City of Calgary had the legislative authority to enact bylaws limiting the number of taxi plate licences. The Court did not, however, address whether a reviewing court could weigh in on the content or form of such a bylaw once it was found that the legislative delegate had the authority to issue it.[6]

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[4] ***Dunsmuir v New Brunswick***, 2008 SCC 9, [2008] 1 SCR 190, at para 59 (*Dunsmuir*)
[5] ***Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association***, 2011 SCC 61, [2011] 3 SCR 654 at para 34
[6] ***Dunsmuir***, 2008 SCC 9, [2008] 1 SCR 190, at para 59

Catalyst

8. The Supreme Court reviewed of the *vires* of a municipal taxation bylaw in *Catalyst Paper Corp. v North Cowichan (District)*, and applied the reasonableness standard. The court acknowledged that a bylaw differs from a quasi-judicial decision in that bylaws engage an array of social, economic, political and other non-legal considerations. Accordingly, the manner in which the reasonableness standard is applied to a bylaw will depend on the context in which the delegated power is being exercised. The court explained the concept in the following manner:

> It is thus clear that courts reviewing bylaws for reasonableness must approach the task against the backdrop of the wide variety of factors that elected municipal councillors may legitimately consider in enacting bylaws. The applicable test is this: only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside. The fact that wide deference is owed to municipal councils does not mean that they have *carte blanche*.
>
> Reasonableness limits municipal councils in the sense that the substance of their bylaws must conform to the rationale of the statutory regime set up by the legislature. The range of reasonable outcomes is thus circumscribed by the purview of the legislative scheme that empowers a municipality to pass a bylaw[7].

9. *Catalyst* is significant in that it takes *Dunsmuir*'s definition of reasonableness and applies it specifically to subordinate legislation. The decision also acknowledges and identifies the key distinction between adjudicative decisions, which must fall within a range of reasonable "outcomes", and regulations or bylaws, which must conform to the rationale of the statutory regime.

Katz Group

10. In *Katz Group Canada Inc. v Ontario (Health and Long-Term Care)*, the Supreme Court, echoing *Catalyst*, stated that a successful challenge to the *vires* of a regulation requires that it be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate". The court then explained what this means, (quoting from *Waddell v Governor in Council*[8]):

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[7] ***Catalyst Paper Corporation v Corporation of the District of North Cowichan***, 2012 SCC 2, [2012] 1 SCR 5, at paras 15 – 19, 24 - 25

[8] (1983) 8 Admin LR 266, at p 292

> In determining whether impugned subordinate legislation has been enacted in conformity with the terms of the parent statutory provision, it is essential to ascertain the scope of the mandate conferred by Parliament, having regard to the purpose(s) or object(s) of the enactment as a whole. The test of conformity with the Act is not satisfied merely by showing that the delegate stayed within the literal (and often broad) terminology of the enabling provision when making subordinate legislation. The power-conferring language must be taken to be qualified by the overriding requirement that the subordinate legislation accord with the purposes and objects of the parent enactment read as a whole.[9]

11. The court stated that regulations benefit from a presumption of validity, which: (a) places the burden on the challengers to demonstrate invalidity, and (b) favours an interpretive approach that reconciles the regulation with its enabling statute so that, where possible, the regulation is construed in a manner which renders it *intra vires*.[10]

12. The Supreme Court stated that both the enabling statute and the challenged regulation should be interpreted using a broad and purposive approach, the regulation being interpreted in a manner that reconciles it with its enabling statute so that, where possible, the regulation is construed in a manner that renders it *intra vires*.[11] The court's enquiry also does not involve assessing the policy merits of the regulation or the underlying motive of enactment to determine whether it is "necessary, wise, or effective in practice". In addition, the reviewing court does not inquire into the underlying political, economic, social or partisan considerations for the regulation, and the *vires* of a regulation does not hinge on whether, in the court's view, it will actually succeed at achieving the statutory objectives.[12] Lastly, the court held that to be found *ultra vires* on the basis of inconsistency with statutory purpose, a regulation must be "irrelevant", "extraneous" or "completely unrelated" to the statutory purpose.[13]

13. Although *Catalyst* already required that the *vires* of subordinate legislation was to be conducted on the reasonableness standard, *Katz* directed that standard toward greater deference.

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[9] ***Katz Group Inc. v Ontario (Health and Long-Term Care)***, 2013 SCC 64, [2013] SCJ No 64 at para 24 (*Katz Group*)
[10] ***Katz Group***, 2013 SCC 64, [2013] SCJ No 64 at para 25 (*Katz Group*)
[11] ***Katz Group***, 2013 SCC 64, [2013] SCJ No 64 at para 26
[12] ***Katz Group***, 2013 SCC 64, [2013] SCJ No 64 at paras 27 – 28
[13] ***Katz Group***, 2013 SCC 64, [2013] SCJ No 64 at paras 28; also ***Yuan, Li v Transitional Council of the College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario***, 2014 ONSC 351, [2014] OJ No 420 at para 3

Green

14. The Supreme Court addressed a challenge to the validity of a law society rule in the 2017 *Green v Law Society of Manitoba* decision. This case dealt with a challenge to the legality of a set of law society rules that mandated 12 hours of continuing professional development ("CPD") for lawyer each year, and under which the applicant lawyer was penalized. Here, the court applied a standard of review analysis to determine the validity of the law society rule, finding that the *Dunsmuir* framework still applies given that the issuance of the rule was an exercise of public authority and statutory powers. The issue was the same as in *Catalyst* and in *Katz Group* -- a challenge to the validity of a piece of subordinate legislation – although the court did not use the language of *vires*. (In fact, the word "vires" is only used once in the decision, and that in a direct quote from paragraph 21 of *Catalyst*.)[14]

15. The Supreme Court concluded that the reasonableness standard applies to a review of the *vires* of the Law Society's rule. Then, citing both *Catalyst* and *Katz Group*, the court reiterated that such a rule will be set aside only if it "is one no reasonable body informed by [the relevant] factors could have [enacted]". It stated that this meant "that the substance of [law society rules] must conform to the rationale of the statutory regime set up by the legislature". [15]

16. The Supreme Court then applied a two-step approach for determining whether the Law Society rule was reasonable:

> First: construe the scope of the Law Society's statutory mandate in accordance with the court's modern principle of statutory interpretation, taking into consideration namely: (a) the object of the *Act*, (b) the words in their ordinary and grammatical sense, and (c) the scheme of the *Act*;
>
> Second: address whether, in light of such mandate, the impugned rules are unreasonable because they expose a lawyer to a suspension in the event of non-compliance, and unreasonable having regard to their procedural protections.[16]

17. Under the first step in the two-step analysis, the Supreme Court concluded that the purpose, words, and scheme of Manitoba's *Legal Professions Act* support an expansive

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[14] ***Green v Law Society of Manitoba***, 2017 SCC 20, [2017] SCJ No 20, at paras 19, 66 (*Green*)
[15] ***Green***, 2017 SCC 20, [2017] SCJ No 20, at paras 20 - 25
[16] ***Green***, 2017 SCC 20, [2017] SCJ No 20, at para 26

construction of the Law Society's rule-making authority. A summary of the court's examination into the statute is as follows:

> **(a) Object of the act** – The court recognized that the legislature has given the Law Society a broad public interest mandate and broad regulatory powers to accomplish that mandate, which required that the court interpret that mandate using a broad and purposive approach. It found that the *Act* contains an expansive purpose clause that obligates the Law Society to act in the public interest, and that the independence the legislature has given the Law Society under the *Act* is evidence of an intention to give the Law Society all necessary powers to regulate its members. The court concluded that construing the Law Society's rule-making authority broadly is consistent with the approach taken by the Court in previous cases.[17]
>
> **(b) The Words in Their Ordinary and Grammatical Sense** – The court found that the wording of the *Legal Professions Act* conferred on the Law Society a broad authority and rule-making power to establish and maintain a continuing legal education program and to establish consequences for contravening the *Act*. It then found that the purpose of the *Act* supplements the open-ended wording of the relevant provisions to indicate that the implied exclusion rule of statutory interpretation should not be applied in this case.[18]
>
> **(c) Scheme of the *Act*** – The court found that the fact that the *Legal Professions Act* permits suspensions with respect to non-compliance with four mandatory rules does not limit suspensions to only those specific circumstances. Since the Law Society has the power to create a CPD scheme, it necessarily has the power to enforce the scheme's standards.[19]

18. Turning to the second step in the two-step analysis, the Supreme Court found that it was reasonable for the Law Society rules to expose a lawyer to a suspension as a consequence for non-compliance with the CPD program. The court found that the *Legal Profession Act*, as

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[17] ***Green***, 2017 SCC 20, [2017] SCJ No 20, at paras 28 - 31
[18] ***Green***, 2017 SCC 20, [2017] SCJ No 20, at paras 32 - 37
[19] ***Green***, 2017 SCC 20, [2017] SCJ No 20, at paras 38 - 42

interpreted in relation to the *Act*'s public interest purpose, provides clear authority for the Law Society to create a CPD program that can be enforced by means of a suspension. The mandatory CPD standards set out in the rules were found to be compatible with the Law Society's purpose and duties, and the Law Society was permitted to establish consequences for those failing to adhere to them.

19. The Supreme Court also found that the Law Society's rule was not unreasonable for exposing a non-complying lawyer to a suspension without a right to a hearing or appeal. This, the court stated, is because the common law duty of procedural fairness applies only to a specific decision made by the Law Society that affects a lawyer's interests. The court also found that in light of the administrative nature of the suspension and the discretion the Law Society's CEO has under the Rules when imposing a suspension, the fact that the impugned rules do not provide for a right to a hearing or a right of appeal does not make them unreasonable.[20]

20. The court refrained from reviewing the rules from the perspective of what form the court would have preferred the rules took. The court did not inquire into the policy merits or wisdom of the rules.

The Legal Test for the *Vires* of Subordinate Legislation

21. The legal framework for determining the validity of subordinate legislation (referred here to as a "regulation" for ease of reference) is thus as follows:

> (i) Regulations benefit from a presumption of validity, which: (a) places the burden on the challengers to demonstrate invalidity, and (b) favours an interpretive approach that reconciles the regulation with its enabling statute so that, where possible, the regulation is construed in a manner that renders it *intra vires*; (*Katz Group*)
>
> (ii) A regulation will only be unreasonable if it does not conform to "the rationale of the statutory regime set up in its enabling legislation". (*Catalyst*)

[20] ***Green***, 2017 SCC 20, [2017] SCJ No 20, at paras 51 - 57

(iii) The following two-part test is used to determine whether a regulation conforms to "the rationale of the statutory regime set up in its enabling legislation":

(a) the regulation's statutory mandate must be construed in accordance with the court's modern principle of statutory interpretation, considering namely: (i) the object of the enabling legislation, (ii) the words in their ordinary and grammatical sense, and (iii) the scheme of the enabling legislation; and

(b) it shall be determined whether, in light of such mandate, the regulation is unreasonable on the basis alleged; (*Green*)

(iv) In construing the scope of the regulation's statutory mandate (part one of the two-part test), both the enabling statute and the challenged regulation should be interpreted using a broad and purposive approach, the latter being interpreted in a manner that reconciles it with its enabling statute so that, where possible, the regulation is construed in a manner that renders it *intra vires*; (*Katz Group*, *Green*)

(v) The reviewing court's enquiry does not involve assessing the policy merits of the regulation or the underlying motive of the enactment to determine whether it is "necessary, wise, or effective in practice". Similarly, the court does not inquire into the underlying political, economic, social or partisan considerations for the regulation. The *vires* of a regulation will never hinge on whether, in the court's view, it will actually succeed at achieving the statutory objectives; and (*Katz*)

(vi) To be found *ultra vires* on the basis of inconsistency with statutory purpose, a regulation must be "irrelevant", "extraneous" or "completely unrelated" to the enabling statute's purpose. (*Katz*)

Conclusion

22. *Dunsmuir* provides that the standard of review framework applies to "all exercises of public authority" and to "those who exercise statutory powers". However, the traditional

definition of 'reasonableness' as it applied to administrative decisions does not transfer to the review of a piece of subordinate legislation. A regulation is not to be reviewed against a "range of possible, acceptable outcomes which are defensible in respect of the facts and law" because a regulation is not an "administrative decision" and so there can be no "outcomes" when it comes to subordinate legislation, only "forms".

23. Although the Supreme Court in *Green* did not declare that the reasonableness standard applies to every piece of subordinate legislation issued by a statutory delegate, it is likely that this standard will always apply as long as the delegate is given discretion in the form a regulation can take. Thus, to the extent that correctness can apply, it is only in relation to the question of whether the statutory delegate had the authority to issue the regulation in the first place. Once that question is answered in the affirmative, the reasonableness test, as detailed above, is applied.

PART IV: COSTS

24. The Intervener does not seek costs and requests that no award of costs be made against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 16th day of October, 2017.

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PART VI: TABLE OF AUTHORITIES

Authorities	Paragraph(s)
Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association, 2011 SCC 61, [2011] 3 SCR 654	5
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STATUTORY PROVISIONS

Workers' Compensation Act, RSA 2000, c W-15RSBC 1996 Ch 492

Workers Compensation Act, RSBC 1996, c 492