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

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

(Filed pursuant to the direction of the Court)

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A. Introduction

1. The Respondent Workers' Compensation Board of British Columbia (the "Board") will address the question of standard of review as it pertains to the *vires* of s. 26.2(1) of the *Occupational Health and Safety Regulation*.[1] The Board submits that the *vires* of the Regulation should be determined solely by using the analytical framework set out by this Court in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care*).[2] It is neither necessary nor desirable to impose an additional level of scrutiny based on the reasonableness of the Regulation.

2. Before addressing this issue further the Board will address a number of preliminary matters concerning the standard of review in this case.

B. Matter under review is the vires of the Regulation, not an administrative decision

3. The British Columbia Court of Appeal indicated it was not clear whether it was being asked to review the *vires* of the Regulation or the decision of the Respondent Workers' Compensation Appeal Tribunal ("WCAT") upholding its *vires*.[3] The Board submits in fact the WCAT had no jurisdiction to consider the *vires* of the Regulation (as explained by WCAT in its main factum at footnote 4). Therefore the matter under review is only the *vires* of the Regulation.

C. Vires of the Regulation is reviewed under the common law

4. The Appellant suggests at paragraph 28 of its main factum that s. 58 of the *Administrative Tribunals Act* ("ATA")[4] applies to the Board, which determines the standard of review of the Regulation. The Appellant says that the courts below agreed with this proposition. In fact the British Columbia Court of Appeal did not agree, and specifically held that the ATA does not apply to the Board.[5]

5. A plain reading of the ATA shows it does not apply to the Board. Section 1.1(1) provides that the ATA is not applicable to a tribunal unless made applicable by an enactment. Section 245.1 of the Act makes the ATA applicable specifically to WCAT but not to the Board. The ATA is, therefore, clearly irrelevant to the consideration of the *vires* of the Regulation.

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[1] B.C. Reg. 296/97 ("the Regulation").
[2] 2013 SCC 64, [2013] 3 SCR 810 ("*Katz*").
[3] 2016 BCCA 473 ("BCCA Reasons"), para. 47.
[4] S.B.C. 2004, c. 45.
[5] BCCA Reasons, para. 48.

D. The Regulation is not the same as a policy

6. The Intervener suggests at paragraph 1 of its factum the policies that it passes are a form of delegated legislation akin to regulations and policies issued by the Board. The Intervener appears to argue policies and regulations should be reviewed in the same manner.

7. The Board disagrees. The regulations made by the Board are distinct from policies, are made under different authority and attract a different standard of review.

8. British Columbia's *Workers Compensation Act*[6] provides the Lieutenant Governor in Council with regulation-making power in s. 224. The Act also provides the Board with regulation-making power (specifically relating to occupational health and safety) under s. 225.

9. The Board submits when it passes regulations it acts in a legislative capacity, no different from the Lieutenant Governor in Council, and the exercise of that authority must be reviewed using the same framework set out in *Katz*.

10. The Board also has the power to make policy under s. 82(1)(a) of the Act. A comprehensive scheme is set out in s. 251 of the Act for the review of such policies by the WCAT and board of directors of the Board if challenged by a stakeholder. After the internal process is exhausted the policy may be reviewed by a court, and a reasonableness standard is applied.[7]

11. The case before this Court only concerns the assessment of the *vires* of the Regulation and not the review of policy. The reasonableness analysis which would apply to policy-making is not engaged here.

E. The vires of the Regulation is determined using the *Katz* analytical framework

12. It is well established that adjudicative decisions of the Board are reviewed on a standard of reasonableness applying *Dunsmuir*. However, when the Board exercises its regulation-making power it is acting in a legislative, not an adjudicative, capacity. As such, the *vires* of the Regulation is determined, as all regulations are, under the framework established by this Court in *Katz*. A regulation is either consistent with the objective of the enabling statute and within the scope of the Board's statutory mandate or it is not. *Katz* provides the framework for analysis.

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[6] R.S.B.C. 1996, c. 492 ("the Act").
[7] *Jozipovic* v. *British Columbia (Workers' Compensation Board)*, 2012 BCCA 174, paras. 78-79.

13. It is submitted it would be illogical to apply a reasonableness standard to the Board exercising a legislative function when no such standard is applied to the Lieutenant Governor in Council.

14. Prior decisions of this Court support the distinction between a tribunal exercising a legislative function and acting in an adjudicative role. In *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*,[8] this Court drew a distinction between the review of the *vires* of a by-law passed by a municipality and the review of its adjudicative or policy-making function. The analysis was directed at whether the City had the power, under its enabling statute, to pass the by-law in question which limited the number of taxi licenses in the city.

15. Approximately a decade after *United Taxi*, this Court reiterated the distinction between the standard of review applicable to a legislative act and that which applies to an adjudicative decision. In *Canadian National Railway Co. v. Canada (Attorney General)*,[9] the Governor in Council had exercised a statutory authority to review a decision of the Canadian Transportation Agency. This Court observed the Governor in Council was not acting in a legislative capacity, but in an adjudicative role in the circumstances of the case.

16. This Court noted the case before it was "not about whether a regulation made by the Governor in Council was *intra vires* its authority" in which case the *Katz* approach would have applied.[10] As the Governor in Council had exercised an adjudicative function, the Court applied the *Dunsmuir* "reasonableness" analysis.

17. The distinction set out by this Court in *CN Rail* between the application of the *Katz* standard to a legislative function and the *Dunsmuir* approach to an adjudicative decision, was applied by a five judge panel of the Nova Scotia Court of Appeal in *The Nova Scotia Barristers' Society v. Trinity Western University*.[11] The court held that the *Katz* standard governs whether the regulation is *intra vires*. The court said: "The *Katz* standard is not *Dunsmuir*'s reasonableness. *Dunsmuir* governs adjudicative or discretionary administrative decisions."[12]

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[8] 2004 SCC 19, [2004] 1 SCR 485 ("*United Taxi*"), para. 5.
[9] 2014 SCC 40, [2014] 2 SCR 135 ("*CN Rail*").
[10] *CN Rail*, para. 51.
[11] 2016 NSCA 59 ("*Nova Scotia Barristers' Society*").
[12] *Nova Scotia Barristers' Society*, para. 44-45.

18. It is submitted the approach adopted in the above-referenced authorities is the appropriate one: *vires* is assessed at a jurisdictional level – whether the legislating body has the power to enact the regulation – while adjudicative decision making is assessed using the *Dunsmuir* analysis, applying a reasonableness test and taking into account the expertise of the decision-maker.

19. In the present case, this Court is being asked to review not the exercise of an adjudicative function, but the *vires* of a regulation. As such, the *Katz* analysis applies and the *Dunsmuir* reasonableness approach is not engaged.

20. The Intervener agrees at paragraph 3 of its factum that the reasonableness standard set out in *Dunsmuir* applies to adjudicative decisions of a tribunal and does not apply on a review of the legality of a by-law or regulation. The Intervener points out a regulation is not to be reviewed against a "range of possible, acceptable outcomes" because a regulation is not an administrative decision and so there can be no "outcomes," only "forms" (at para. 22).

21. However, the Intervener refers to this Court's decision in *Catalyst Paper Corp. v. North Cowichan (District)*,[13] where notwithstanding the above distinction the *Dunsmuir* approach was applied to an exercise of subordinate legislation-making.

22. *Catalyst* dealt with the analysis that must be applied to the review of municipal by-laws. The Chief Justice noted the standard of review depends in part on the "nature of the body to which the power is delegated" and observed that review of municipal by-laws takes into account that fact municipal councillors fulfill a task that affects their community as a whole and "in this context courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable." She also noted that approaches to judicial review developed in particular contexts in previous cases continue to be relevant in determining the standard of review. In the particular circumstances of the *Catalyst* case, the parties agreed a reasonableness standard applied, and the Chief Justice noted a deferential approach to the review of municipal by-laws has been in place for over a century.[14]

23. The Board submits that a wide application of a reasonableness approach to regulation-making would ignore this Court's analysis of the distinction between legislative and adjudicative

[13] 2012 SCC 2, [2012] 1 SCR 5 ("*Catalyst*").
[14] *Catalyst*, paras. 13, 16, 19, 21, 23.

functions set out in *CN Rail*. It is submitted in light of *CN Rail* it cannot be said *Catalyst* supports a general application of a reasonableness test in assessments of *vires*.

24. The Intervener also mentions this Court's decision in *Green v. Law Society of Manitoba*,[15] in which a reasonableness approach was used to evaluate the validity of a law society rule. It is submitted the analysis in *Green* is not applicable, however, to the case on appeal. *Green* involved the validity of a rule passed by the elected benchers of a law society. As stated by this Court at paragraph 19, the decision is particular to the standard of review to be applied "when considering the validity of rules made by a law society."

25. While *Catalyst* and *Green* might be interpreted (as by the Intervener) to require a two-step approach to the determination of the *vires* of a regulation – where the regulation is first assessed under the *Katz* framework and then assessed for reasonableness under *Green* – the Board submits it is neither necessary nor desirable to develop the law in this direction.

26. *Katz* already mandates a deferential approach including a presumption of validity when reviewing the *vires* of a regulation. As such *Katz* is compatible with *Dunsmuir*. But *Katz* does not suggest that a two-step process including a reasonableness test is required. Rather, the deference is built in to the factors considered in a one-step review of *vires*. Further, *Katz* makes it clear that a *vires* assessment does not involve assessing the policy merits of the regulation; the motives for their promulgation are irrelevant.[16] It is submitted there is no benefit to complicating the analysis of *vires* by adding the second step of a reasonableness assessment. Moreover, once it is found that a regulation is consistent with the purposes of the statute and within the scope of the statutory mandate it should not be subject to a further assessment for substantive reasonableness.

27. The Board submits that whether solely the *Katz* analysis is used, or a two-step analysis including reasonableness is applied, the Regulation is valid. It is *intra vires* the Board's legislative powers under the Act and clearly a reasonable exercise of those powers.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of November, 2017.

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[15] 2017 SCC 20, [2017] 1 SCR 360 ("*Green*").
[16] *Katz*, para. 27.

LIST OF AUTHORITIES

Cases

Statutes and Regulations