

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

BETWEEN:

WEST FRASER MILLS LTD.

APPELLANT
(Appellant)

- and -

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

RESPONDENTS
(Respondents)

- and -

WORKERS' COMPENSATION BOARD OF ALBERTA

INTERVENER

**RESPONDENT'S SUPPLEMENTARY FACTUM
(WORKERS' COMPENSATION APPEAL TRIBUNAL, RESPONDENT)**

**WORKERS' COMPENSATION
APPEAL TRIBUNAL**

150 – 4600 Jacombs Rd.
Richmond, BC V6V 3B1
Tel: (604) 664-7800
Fax: (604) 664-7898
jeremy.lovell@wcat.bc.ca

Jeremy Thomas Lovell
Counsel for the Respondent,
Workers' Compensation Appeal Tribunal

GOWLING WLG (CANADA) LLP

2600 – 160 Elgin St.
Ottawa, ON K1P 1C3
Tel: (613) 783-8817
Fax: (613) 788-3500
robert.houston@gowlingwlg.com

Robert E. Houston, Q.C.
Agent for Counsel for the Respondent,
Workers' Compensation Appeal Tribunal

ORIGINAL TO: THE REGISTRAR

COPIES TO:

HARRIS & COMPANY LLP

1400-550 Burrard Street
Vancouver, BC V6C 2B5
Tel: (604) 684-6633
Fax: (604) 684-6632
djordan@harrisco.com

Donald J. Jordan, Q.C.

Paul Fairweather
Counsel for the Appellant,
West Fraser Mills Ltd.

GOWLING WLG (CANADA) LLP

2600-160 Elgin Street
Ottawa, Ontario K1P 1C3
Tel: (613) 786-0171
Fax: (613) 788-3587
jeff.beedell@gowlingwlg.com

Jeffrey W. Beedell

Agent for Counsel for the Appellant,
West Fraser Mills Ltd.

**WORKERS' COMPENSATION
BOARD OF BRITISH COLUMBIA**

6951 Westminster Highway
Richmond, BC V7C 1C6
Tel: (604) 279-7505
Fax: (604) 279-8116
Nick.bower@worksafebc.com

Nicolas J. Bower

Ben Parkin
Counsel for the Respondent,
Workers' Compensation Board of
British Columbia

MICHAEL J. SOBKIN

331 Somerset Street West
Ottawa, Ontario K2P 0J8
Tel: (613) 282-1712
Fax: (613) 288-2896
msobkin@sympatico.ca

Michael J. Sobkin

Agent for Counsel for the Respondent,
Workers' Compensation Board of British
Columbia

**WORKERS' COMPENSATION
BOARD OF ALBERTA**

P.O. Box 1960
11th floor, 9925-107 Street
Edmonton, Alberta T5T 2P3
Tel: (780) 498-7901
Fax: (780) 498-7876
Jason.bodnar@wcb.ab.ca

Jason J. Bodnar

Counsel for the Intervenor,
Workers' Compensation Board of Alberta

SUPREME ADVOCACY LLP

100-340 Gilmour Street
Ottawa, Ontario K2P 0R2
Tel: (613) 695-8855 ext: 102
Fax: (613) 695-8580
mfmajor@supremeadvocacy.ca

Marie-France Major

Agent for Counsel for the Intervenor,
Workers' Compensation Board of
Alberta

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1. It is possible that there are two standards of review in this appeal: one in respect of whether section 26.2 of the *Occupational Health and Safety Regulation*¹ is *intra vires* the Workers' Compensation Board (the "Board") and another in respect of whether the determination by the Workers' Compensation Appeal Tribunal ("WCAT" or the tribunal) that the Board had the authority to impose an administrative penalty against the appellant pursuant to section 196 of the *Workers Compensation Act*² was made within the tribunal's jurisdiction.
2. WCAT says that the standard of review to apply to the second issue – whether its decision regarding the administrative penalty was made within the tribunal's jurisdiction – is *patent unreasonableness*. WCAT takes no position on which standard of review applies to the first issue.
3. The appellant argues that the Legislature's use of a defined term in section 196 of the *Workers Compensation Act* renders any interpretation of that section a "true question of jurisdiction" requiring judicial review on the standard of *correctness*.
4. WCAT urges this Court to reject the appellant's argument, because the relevant legislative scheme prescribes the standard of review and clearly limits any residual "true question of jurisdiction". The combined effect of section 58 of the *Administrative Tribunals Act*³ and section 254 of the *Workers Compensation Act*⁴ clearly implies that WCAT's interpretation of section 196 is entitled to curial deference. Alternatively, to the extent the combined effect of section 58 of the *Administrative Tribunals Act* and section 254 of the *Workers Compensation Act* codifies a sort of "true question of jurisdiction", the interpretation of section 196 is very clearly not such a question.
5. A "true question of jurisdiction" was one of the categories of exceptions to the principle, articulated by this court in *Dunsmuir v. New Brunswick* that an administrative body interpreting its home statute or a statute closely connected to its function will usually be entitled to

¹ B.C. Reg. 296/97.

² R.S.B.C. 1996, c. 492 as amended by *Workers Compensation Amendment Act (No. 2)*, 2002, S.B.C. 2002, c. 66. Section 196 has been amended since the July, 2013 WCAT decision by the *Workers Compensation Amendment Act, 2015*, S.B.C. 2015, c. 22, s. 12.

³ S.B.C. 2004, c. 45.

⁴ R.S.B.C. 1996, c. 492.

deference.⁵ This Court was careful to stress that with respect to a true question of jurisdiction, “jurisdiction” was used in the:

narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter.⁶

6. In its judgment in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, a majority of this Court suggested that “[a]s long as the true question of jurisdiction category remains, the party seeking to invoke it must be required to demonstrate why the court should not review a tribunal’s interpretation of its home statute on the deferential standard of reasonableness”.⁷

7. The standard of review analysis in respect of decisions of the Workers’ Compensation Appeal Tribunal should be very straightforward. The Legislature of British Columbia has prescribed that – with respect to a tribunal such as WCAT to which section 58 of the *Administrative Tribunals Act* applies – “a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable”.⁸ The Legislature has also prescribed in section 254 of the *Workers Compensation Act*, the broad scope of matters that are within WCAT’s exclusive jurisdiction:

The appeal tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined under this Part and to make any order permitted to be made, including the following:

- (a) all appeals from review officers' decisions as permitted under section 239;
- (b) all appeals from Board decisions or orders as permitted under section 240;

⁵ 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 54.

⁶ *Ibid.* at para. 59.

⁷ 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 39. See also *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615 at para. 39.

⁸ *Supra* note 3.

(c) all matters that the appeal tribunal is requested to determine under section 257;

(d) all other matters for which the Lieutenant Governor in Council by regulation permits an appeal to the appeal tribunal under this Part.⁹

8. Karakatsanis J. said the following in *obiter* in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*:

I would add this comment. The contextual approach can generate uncertainty and endless litigation concerning the standard of review. Subject to constitutional constraints, the legislature can specify the applicable standard of review. In British Columbia, for example, the legislature has displaced almost the entire common law on the standard of review (see the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, ss. 58 and 59). Unfortunately, clear legislative guidance on the standard of review is not common.¹⁰

9. Although her comment was with respect to the contextual aspects of standard of review analysis as opposed to the exceptional categories to which “true questions of jurisdiction” belongs, WCAT submits that the Legislature’s decision to specify the applicable standard of review for WCAT’s findings significantly and substantially simplifies any standard of review analysis.

10. After acknowledging that the terms “jurisdiction” and “vires” can be problematic, Cromwell J., for the minority in *Alberta Teachers’*, writes:

The touchstone of judicial review is legislative intent: *Dunsmuir*, at para. 30. (I put aside situations in which there is clear legislative intent to prevent judicial review of jurisdiction as such preclusion is not permitted as a matter of constitutional law: see, e.g., *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220.) This focus means that whether a question falls into the category of “jurisdictional” is largely beside the point. What matters is whether the legislature intended that a particular question be left to the tribunal or to the courts.¹¹

11. The Legislature has clearly articulated its intent as to what sorts of matters are within WCAT’s exclusive jurisdiction and therefore subject to judicial review only on the standard of

⁹ *Supra* note 4.

¹⁰ 2016 SCC 47, [2016] 2 S.C.R. 293 at para. 35.

¹¹ *Supra* note 7 at 96.

patent unreasonableness. If a question of law, such as the meaning of section 196 of the *Workers Compensation Act*, arises or is required to be determined in an appeal to WCAT, the Legislature has said that the question *is* within the tribunal's exclusive jurisdiction. In this case, there can be no question that in addressing the appellant's notice of appeal and submissions to WCAT, the application of section 196 of the *Act* was an issue that WCAT was required to determine.¹² It was, therefore, a finding made within its exclusive jurisdiction and, *ergo*, a finding requiring curial deference.

12. Arguably, the combination of section 58 of the *Administrative Tribunals Act* and section 254 of the *Workers Compensation Act* leaves room for something that looks like a true question of jurisdiction. If deference is required for every issue arising or required to be determined under Part 4 of the *Workers Compensation Act*, one must consider whether a given issue so arises or is required to be determined. Section 254 provides a non-exhaustive list of situations in which matters or questions of law or fact must arise or be determined. In brief, it is a list of the types of appeals or applications that can be brought before WCAT. In terms of the language used by this Court in *Dunsmuir*, it is a list of the situations in which WCAT has authority to make the inquiry.

13. In the case now before this Court, the question would be whether an appeal permitted under section 239 was made to WCAT. The answer to that simple question is answered by looking at the notice of appeal and consulting section 239, which says that:

(1) Subject to subsection (2), a final decision made by a review officer in a review under section 96.2, including a decision declining to conduct a review under that section, may be appealed to the appeal tribunal.

(2) The following decisions made by a review officer may not be appealed to the appeal tribunal:

(a) a decision in a prescribed class of decisions respecting the conduct of a review;

(b) a decision respecting matters referred to in section 16 [vocational rehabilitation benefits];

¹² Notice of Appeal from Review Division 121022-A dated May 3, 2012 [**Appeal Record (AR), vol. IV, Tab R**]. West Fraser Mills Ltd.'s submission to the Workers' Compensation Appeal Tribunal dated Aug. 28, 2012 [**AR, vol. II, Tab I, p. 34**].

(c) a decision respecting the application under section 23 (1) [permanent functional impairment] of rating schedules compiled under section 23 (2) where the specified percentage of impairment has no range or has a range that does not exceed 5%;

(d) a decision respecting commutations under section 35;

(e) a decision respecting an order under Part 3, other than an order

(i) relied upon to impose an administrative penalty under section 196 (1),

(ii) imposing an administrative penalty under section 196 (1), or

(iii) made under section 195 to cancel or suspend a certificate.¹³

14. In this case, the appellant clearly appealed the decision of a review officer to WCAT. While the review officer's decision was, in part, a decision respecting an order under Part 3 of the *Act*, that part of the decision was relied upon to impose an administrative penalty under section 196(1). The other part of the review officer's decision was to impose the administrative penalty itself.¹⁴ Clearly, WCAT had the authority to embark upon the inquiry. Just as importantly, the appellant has never challenged the tribunal's authority in this regard.

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



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

¹³ *Supra*, note 4.

¹⁴ Review Decision of Review Officer Boddez, Apr. 16, 2012 [AR, vol. I, Tab A].

TABLE OF AUTHORITIES

Authority **Paragraph(s)**

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[s. 58](#) 4, 7, 12

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