

**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)

WORKERS' COMPENSATION BOARD OF ALBERTA

INTERVENER

**APPELLANT'S SUPPLEMENTARY FACTUM ON THE STANDARD OF REVIEW
(WEST FRASER MILLS LTD., APPELLANT)**
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

HARRIS & COMPANY LLP
Barristers and Solicitors
1400 - 550 Burrard Street
Vancouver, BC V6C 2B5
Tel: (604) 684 6633
Fax: (604) 684 6632
Email: djordan@harrisco.com

Donald J. Jordan, Q.C.
Paul Fairweather
Counsel for the Appellant,
West Fraser Mills Ltd.

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Tel: 613-786-0171
Fax: 613-788-3587
Email: jeff.beedell@gowlingwlg.com

Jeffrey W. Beedell
Ottawa Agent for the Appellant,
West Fraser Mills Ltd.

ORIGINAL TO: THE REGISTRAR

COPIES TO:

WORKERS' COMPENSATION BOARD
LEGAL SERVICES DEPARTMENT
6951 Westminster Hwy
Richmond, British Columbia
V7C 1C6
Tel: (604) 279-7505
Fax: (604) 279-8116
E-mail: nick.bower@worksafebc.com

Nicolas J. Bower
Ben Parkin
Counsel for the Respondent, Workers'
Compensation Board of British Columbia

WORKERS' COMPENSATION
APPEAL TRIBUNAL
150 – 4600 Jacombs Road
Richmond, BC V6V 3B1
Tele: (604) 664-7881
Fax: (604) 664-7898
Email: jeremy.lovell@wcat.bc.ca

Jeremy T. Lovell
Counsel for the Respondent,
Workers' Compensation Appeal Tribunal

WORKERS' COMPENSATION BOARD
OF ALBERTA
11th Floor, 9925 – 107 Street
Edmonton, AB T5T 2P3
Tel: (780) 498-7901
Fax: (780) 498-7876
Email: jason.bodnar@wcb.ab.ca

Jason J.J. Bodnar
Counsel for the Intervener,
Workers' Compensation Board of Alberta

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

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

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Tel: 613-783-8817
Fax: 613-788-3587
Email: robert.houston@gowlingwlg.com

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

SUPREME ADVOCACY LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3
Tel: (613) 695-8855 Ext. 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Marie-France Major
Ottawa Agent for Counsel for the Intervener,
Workers' Compensation Board of Alberta

TABLE OF CONTENTS

Memorandum of Argument1

Table of Authorities5

1. This Supplementary Factum is submitted pursuant to the Court's invitation to the parties for further submissions on the standard of review in this appeal.
2. There are two issues raised in this appeal, each of which involves judicial review of administrative action. The first issue is whether the promulgation of s. 26.2 of the *Regulation* was within the jurisdiction of the Board. The second issue is whether the Respondent Board had the jurisdiction to impose an administrative penalty on the Appellant, as owner of a worksite, which expressly applies only to an employer. As discussed in detail herein, the Appellant submits that both issues are properly reviewed on a standard of correctness.
3. We start from the unassailable proposition that judicial review plays a role in the preservation of the rule of law.
4. The rule of law is a "fundamental postulate of our constitutional structure".¹ It is the constitutional foundation which explains the purpose of judicial review and guides its function and operation. By virtue of the rule of law, all exercises of public authority must find their source in law and have legal limits, derived from the enabling statute itself. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, a decision maker transgresses the principle of the rule of law.²
5. While "rule of law" is a highly textured expression, it conveys in its essence,

"a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority. At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs."³
6. In *Dunsmuir*, the Court gave express recognition to the existence of "true questions of jurisdiction or *vires*" reviewable on the standard of correctness. "Jurisdiction" was intended

"in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true questions of jurisdiction arise where the

¹ *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at p. 142.

² *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 ("*Dunsmuir*") at paras. 27-29.

³ *Reference re Succession of Quebec*, [1998] 2 S.C.R. 217 at para. 70.

tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The 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

7. Subsequent jurisprudence has posited that, if they exist, “true questions of jurisdiction are narrow and will be exceptional” and case law has held that there is a presumption in favour of the reasonableness standard of judicial review in circumstances where a tribunal is interpreting its home statute. This case law was most recently reviewed in *Quebec (Attorney General) v. Guérin*.⁵
8. The determination of which standard of review is to be applied is essentially the search to determine what authority the Legislature intended to give to the administrative tribunal in relation to a particular issue.⁶ *Dunsmuir* established an interpretive principle that courts should ordinarily defer to a tribunal’s interpretation when a tribunal is interpreting its own statute and only apply a correctness standard when interpretation of that statute raises a broad question of the tribunal’s authority.⁷
9. The presumption of deference to a tribunal’s interpretation of its own statute is not, however, carved in stone. A contextual analysis may rebut the presumption of reasonableness review for questions involving the interpretation of the home statute.⁸ True questions of *vires* or jurisdiction are narrow and exceptional, but they still exist.⁹
10. None of the previous case law on these issues delimit the standard of review to be used to address issues of *vires* arising where the grant of authority under review involves terms which have been defined by the Legislature. The Appellant submits that, in those circumstances,

⁴ *Dunsmuir, supra*, at para. 59.

⁵ 2017 SCC 42.

⁶ *Dunsmuir, supra*, at para. 29.

⁷ *Dunsmuir, supra*, at para. 48; *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678 at para. 34.

⁸ *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 at para. 22; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283 at para. 16.

⁹ *Guérin, supra*, at para. 32 and the cases cited therein.

the rule of law requires the application of the correctness standard because the applicable standard of review follows upon establishing legislative intent.

11. Defined terms are the cornerstone for the administration of legislation and are a direct expression of legislative intent. The definition comprises part of the tribunal's grant of authority and provides express limits to the exercise of that authority. If the tribunal's interpretation of a term expressly defined by the Legislature is not subject to review on a standard of correctness simply because it is found in the tribunal's enabling statute, then legislative intent and legislative supremacy are not respected and the rule of law is transgressed.
12. The existence of statutory obligations premised upon terms defined in legislation is the tether between judicial review and the rule of law. The definitions found in the legislation constitute legal limits on a tribunal's authority and are the legal rules necessary to provide the order, stability and subjection to known legal rules, which underlay the rule of law. A tribunal's interpretation of a defined term must be reviewed on a standard of correctness.
13. Further, the existence of defined terms in legislation must, as a matter of the application of the ordinary principles of statutory interpretation, be sufficient to rebut the presumption of review on a deferential standard. The existence of defined terms would be rendered nugatory if the administrative tribunal were entitled to select between a range of reasonable interpretations of every word in its enabling statute. Defined terms must be interpreted correctly.
14. A conclusion that all interpretations of a home statute by a tribunal are subject to review only on the deferential standard of review is antithetical to the type of stable, predictable and ordered society contemplated by the rule of law. A presumption of deference that is divorced from the context of the presence of defined terms and recognition of legislative intent imbued within those definitions, would mean that a citizen could not determine what obligations and responsibilities might govern their actions based upon a plain reading of the defined terms. The elucidation of the obligations and responsibilities created by the defined terms would be dependent upon determinations made by the tribunal and not by the Legislature or Parliament.

15. Unless there are questions of statutory interpretation which limit jurisdiction and are responsive to review on the standard of correctness, there are no limits on a tribunal's authority. Again, the absence of such limits is inconsistent with the rule of law.
16. Both of the issues raised in this case, the *vires* of s. 26.2(1) of the *Regulation* and the imposition of an administrative penalty upon an "owner" under s. 196(1) of the *Act* (which authorizes the imposition of administrative penalties on "employers"), raise the identification of the appropriate standard of review when the issues engage the proper interpretation of terms expressly defined in the statute. As outlined above, the Appellant submits that when dealing with direct expressions of legislative intention in the form of defined terms, the appropriate standard of review must be correctness.
17. It is the implications arising from the role that defined terms play, both in issues related to the *vires* of the regulation and the imposition of the administrative penalty, which distinguish this case from other cases identifying the appropriate standard of review in a given instance. Further, it should be noted that, with regard to the *vires* of the *Regulation*, those responsible for the promulgation of the *Regulation* are not elected representatives who serve the people who elected them and to whom they are ultimately responsible, a key consideration in the identification of "reasonableness" as the appropriate standard of review for rules passed by a law society considered in *Green v. Law Society of Manitoba*.¹⁰

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


as agent for

Donald J. Jordan, Q.C. and Paul Fairweather
Counsel for the Appellant

¹⁰ 2017 S.C.C. 20.

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Paragraph(s)</u>
<i>Dunsmuir v. New Brunswick</i> , 2008 SCC 9, [2008] 1 S.C.R. 190	4, 6, 8
<i>Green v. Law Society of Manitoba</i> , 2017 SCC 20	17
<i>McLean v. British Columbia (Securities Commission)</i> , 2013 SCC 67, [2013] 3 S.C.R. 895	9
<i>Nolan v. Kerry (Canada) Inc.</i> , [2009] 2 S.C.R. 678	8
<i>Quebec (Attorney General) v. Gu��rin</i> , 2017 SCC 42	7, 9
<i>Reference re Succession of Quebec</i> , [1998] 2 S.C.R. 217	5
<i>Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada</i> , 2012 SCC 35, [2012] 2 S.C.R. 283	9
<i>Roncarelli v. Duplessis</i> , [1959] S.C.R. 121	4
<u>Legislation</u>	
<i>Occupational Health and Safety Regulation</i> , B.C. Reg. 296/97	2, 16, 17
<i>Workers Compensation Act</i> , R.S.B.C. 1996, c. 462	16