SCC File No. 37423

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

BETWEEN:

WEST FRASER MILLS LTD.

APPLICANT
(APPELLANT)

AND:

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

RESPONDENTS
(RESPONDENTS)

REPLY TO THE RESPONSE OF THE RESPONDENT, WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA (WEST FRASER MILLS LTD., APPLICANT)

(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada)*

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MEMORANDUM OF ARGUMENT IN REPLY

1. In order to reply to the Response of the Respondent Workers' Compensation Board ("Board"), it is convenient to reproduce the two issues of public importance that the Applicant submits are raised by the proposed appeal:

   Issue 1: Are the introductory words of the statutory provision authorizing the making of regulations to further the purposes of the *Act* sufficient to authorize the promulgation of regulations which are inconsistent with specific conduct-regulating provisions of the legislation that are conjoined with specific defined terms?

   Issue 2: Is the application of a deferential standard of review sufficient to permit an administrative tribunal to act inconsistently with the legislative intention expressed in defined terms in legislation?

A. Reply relating to the Board's Position on the First Issue of Public Importance

2. In reply to paragraph 27 of the Board's Response, the proposed appeal raises an issue of public importance that is not restricted to the particular language of British Columbia's *Workers' Compensation Act*. Underlying the resolution of the *vires* of s. 26.1 of the *Occupational Health and Safety Regulation* is the relationship between legislative intention as expressed in the parent statute's use of defined terms and the use of those defined terms throughout the legislation where the statute authorizes, prohibits and sanctions particular conduct in relation to those defined terms.

3. This is a fundamental issue of statutory interpretation and legislative delegation that applies to all legislation across Canada that contains defined terms and a grant of regulation-making authority. The present case merely provides one context, workers' compensation legislation, in which the issue arises.[1] However, the issue does not only arise from, nor is it restricted to,

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[1] See also the other provincial workers' compensation legislation referred to in the Applicant's Application for Leave to Appeal, paragraph 31, as well as the statement of the primacy of

the particular language of the *Workers Compensation Act*. It is also an issue that this Honourable Court has not yet addressed.

4. In reply to paragraph 16 of the Response and the Board's position with respect to the "broad" grant of regulation-making authority to the Board under the *Act*, the Board fails to address the relationship between the regulating-making authority granted by a parent statute and the impact of the statute's defined terms. The Board's position necessarily is that so long as the Board considers the regulation to be necessary or advisable in relation to occupational health or safety, it is authorized to make the regulation. The Board, while acknowledging that its regulation-making authority is not unlimited and can only be exercised in accordance with the purpose and objects of the *Act*, ignores the import of the *Act's* definitions as in any way restricting its regulating-making authority. The proposed appeal provides this Court with the opportunity to provide guidance as to the principles governing the relationship between a statute's defined terms and a grant of regulation-making authority.

5. Further, and also in response to paragraph 23 of the Board's Response, the Board's and British Columbia Court of Appeal's approach to the Board's regulating-making authority treats the enabling provision of the *Act* as if it were a "Henry VIII" clause. That approach ignores the importance of the Legislature providing defined terms that serve as the fulcrum for the application of the legislation's sanctioning provisions when determining the permissible scope of regulating-making power, i.e., that the statute's defined terms embody the Legislature's intent and in relation to which any regulations must be consistent.

6. Granting the regulation-making entity the power to establish subordinate legislation (regulations) that amend, repeal or are inconsistent with the parent statute without parliamentary scrutiny, and in the absence of a "Henry VIII" clause, constitutes an impermissible assumption of a legislative role by that entity. Again, the relationship between regulation-making authority and the importance of definitions set forth in the parent statute is

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definitions in an enactment to the whole enactment as enunciated in Interpretation Acts across Canada, as set out in the Application for Leave to Appeal, paragraphs 24-25.

an issue of public importance applicable to any piece of legislation that contains defined terms, conduct regulating and sanctioning provisions, and a regulation-making provision.

7. In further reply to paragraph 23 and also in reply to paragraph 24 of the Board's Response, s. 26.2 of the *Occupational Health and Safety Regulation* does not, with respect, merely impose "supplemental obligations" on owners. The *Act* provides defined terms and roles for, among others, "employers" and "owners", and imposes duties and obligations upon the different roles, thus evincing the Legislature's intention. The Board, in reliance upon its regulatory-making authority under s. 225 of the *Act*, imposed new planning and supervisory duties upon owners of a forestry operation by s. 26.2(1) of the *Regulation*. The Applicant's position in the proposed appeal is that those planning and supervisory duties are qualitatively inconsistent with the general duties of an owner that the Legislature created in s. 119 of the *Act*. The Board has imposed by regulation duties that the Legislature did not contemplate nor empower the Board to make. Thus, there is an inconsistency between the *Act* and the impugned s. 26.2 of the *Regulation* rendering it *ultra vires*. Again, the underlying, fundamental issue of public importance arises. It raises for consideration the relationship between legislative intention as stipulated in the parent statute's defined terms and their use throughout the legislation, with the statute's grant of regulation-making authority for regulations considered necessary or advisable to further the purposes of the statute.

B. Reply relating to the Board's Position on the Second Issue of Public Importance

8. In reply to paragraphs 28-31 of the Board's Response, the imposition of an administrative penalty under s. 196 of the *Act* on an owner who is not acting as an "employer" as defined by the *Act*, is the very essence of patent unreasonableness. The proposed appeal raises for consideration the appropriate principles of deference owed by a reviewing court to an administrative tribunal's policy preference over that of the Legislature's policy as expressed in defined terms in the legislation.

9. The statute only provides for the imposition of an administrative penalty under s. 196 on an "employer" as defined in the *Act*, where the *Act* differentiates between and imposes separate obligations upon an "employer" and "owner". WCAT's determination that the Board may impose an administrative penalty pursuant to s. 196 of the *Act* on an owner who is not acting

qua "employer" in relation to the injured worker but, rather, simply on the basis that the owner fortuitously happens to be an employer in relation to other workers, overrides the *Act's* purposeful definitions and, as such, is patently unreasonable.

10. In reply to paragraph 32 of the Board's Response with respect to the Ontario Court of Appeal's ("ONCA") decision in *Blue Mountain*,[2] surely patent unreasonableness is satisfied by a finding of absurdity (as the ONCA found in *Blue Mountain*), regardless of how "patent unreasonableness" under the British Columbia *Administrative Tribunals Act*[3] differs from the common law standard of reasonableness.

11. In further reply to paragraph 32 of the Board's Response, the approach of the administrative tribunal in *Blue Mountain* that the ONCA found to be unreasonable is analogous to WCAT's interpretation and application of the *Act* in the present case. In *Blue Mountain* the ONCA considered a company's obligation to notify the Ministry of the death of a guest at the resort's swimming pool, where the swimming pool was unsupervised and its use intended for guests. The applicable Ontario legislation imposed an obligation upon an "employer" to notify the Ministry where a person was killed or critically injured at a "workplace". The ONCA held that an "absurd" result would arise should the obligation be found to apply on the basis that the company was an "employer" and the swimming pool a "workplace" simply as a worker may, at some time, be at that place. The ONCA held that the result could not stand. The tribunal's approach would be to make virtually every place a "workplace" and represent an unwarranted expansion of the legislation, there being no nexus between the hazard giving rise to the death or critical injury and realistic risk to worker safety at the location.

12. Similarly, an absurd – and patently unreasonable – result arises from WCAT's policy preference to make an owner liable to an administrative penalty under s. 196 (a section applicable only to "employers"). WCAT's policy is that, although there is no nexus to an employment relationship between the owner and the deceased worker, it is sufficient that the owner is in another, unrelated context also an "employer" of other workers. This represents

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[2] *Blue Mountain Resorts Ltd. v. Bok*, 2013 ONCA 75, 359 D.L.R. (4th) 276.
[3] *Administrative Tribunals Act*, S.B.C. 2004, c. 45, s. 58.

an unwarranted expansion of the legislation. WCAT's interpretation and approach exalts its own policy preferences over the Legislature's legislated choice, as the latter is evinced by the *Act's* differentiation between an owner and employer in their respective definitions, roles and duties. The British Columbia Court of Appeal's decision to defer to WCAT's approach to the *Act's* framework and WCAT's interpretation of the *Act's* administrative penalty provision applicable to "employers" (s. 196 of the *Act*), conflicts with the principles and approach of the ONCA in *Blue Mountain* and gives rise to the second issue of public importance.

13. In reply to paragraph 33 of the Board's Response, the British Columbia Court of Appeal's decision in the present case is inconsistent with the Saskatchewan Court of Appeal's decision in *Campbell*[4] and that Court's recognition that deference is not owed to an expert administrative tribunal's policy preference (in that case, the Saskatchewan Workers' Compensation Board) where the policy is inconsistent with the legislated policy (in that case, as evinced in a regulation in relation to which the Workers' Compensation Board established a policy interpreting the regulation). This was the result notwithstanding that the tribunal was granted exclusive jurisdiction to hear and determine all matters arising under the legislation that may be characterized as public welfare legislation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Vancouver, British Columbia, this 3rd day of March, 2017.

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Paul Fairweather
Counsel for the Applicant

[4] *Campbell v. Workers' Compensation Board*, 2012 SKCA 56, 393 Sask. R. 246.

TABLE OF AUTHORITIES

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