

Judicial Review on the *Vires* of Subordinate Legislation

By: Shaun Fluker

Case Commented On: *West Fraser Mills Ltd. v British Columbia (Workers' Compensation Appeal Tribunal)*, [2018 SCC 22 \(CanLII\)](#)

Judicial review on the *vires* of subordinate legislation is a subject I previously examined in a March 2016 [post](#) concerning subordinate legislation enacted by the Alberta College of Pharmacists and its dispute with Sobeys over the use of consumer inducements in retail pharmacies. I noted back in 2016 there was some uncertainty over the applicable standard of review a court should apply when reviewing the *vires* of legislation enacted by a statutory tribunal or other delegate. Indeed, the whole concept of judicial review on the *vires* of subordinate legislation is a bit murky in Canadian administrative law. The Supreme Court's decision in *West Fraser Mills Ltd. v British Columbia (Workers' Compensation Appeal Tribunal)*, [2018 SCC 22 \(CanLII\)](#) addresses the topic, but unfortunately the Court is split and fails to situate its reasoning with Court's *Katz Group Canada Inc. v. Ontario (Health and Long Term Care)*, [2013 SCC 64 \(Katz\)](#) decision which also addresses the principles governing a *vires* determination of subordinate legislation. The majority in *West Fraser Mills* rules that the principles set out in *Dunsmuir* govern judicial review on the enactment of subordinate legislation by a statutory tribunal, and therefore where the tribunal's governing legislation provides for the power to enact subordinate legislation the presumption of reasonableness applies to a review on the *vires* of that legislation. The dissenting justices hold the standard ought to be correctness.

The subordinate legislation in question here is the *Occupational Health and Safety Regulation*, [BC Reg 296/97](#) (the Regulation) enacted by the British Columbia Workers' Compensation Board under section 225 of the *Workers' Compensation Act*, [RBSC 1996, c 492](#). The impugned section of the Regulation is section 26.2(1) which imposes a duty on owners of a forestry operation to ensure that operations are planned and conducted in accordance with safe work practices:

26.2 (1) The owner of a forestry operation must ensure that all activities of the forestry operation are both planned and conducted in a manner consistent with this Regulation and with safe work practices acceptable to the Board.

The facts in this case were that a tree faller was fatally struck by a rotting tree while working in an area covered by the forestry license held by West Fraser Mills, and the Workers' Compensation Board held that West Fraser Mills breached its duty under section 26.2 as the owner of the operations, and the Board imposed an administrative penalty of \$75,000 against West Fraser Mills. The tree faller was not employed by West Fraser Mills, but rather was working for a contractor employer. The distinction between an 'owner' and an 'employer' is of some significance here, and West Fraser Mills argued that the *Workers' Compensation Act* did not empower the Board to impose liability for this accident on it as an owner of the site and thus

West Fraser Mills sought to have section 26.2 struck as ultra vires the Board. In the alternative, West Fraser Mills argued the Board's decision to impose an administrative penalty against it was unlawful because the empowering statutory provision only provides for the authority of the Board to impose a penalty on an employer – which in this case was the contractor not West Fraser Mills.

My comments here are focused on the how the Supreme Court deals with the ultra vires argument by West Fraser Mills. The starting point is that the Regulation is legislation enacted by a delegate of the BC legislature – the Workers' Compensation Board. This places the Regulation into the category of subordinate legislation; in other words, the Regulation is enacted under the authority of a statute enacted by a legislature. The overwhelming majority of subordinate legislation enacted by Canadian jurisdictions is enacted by the Executive in the form of either cabinet or ministerial regulations. Cabinet regulations were the form of subordinate legislation under scrutiny in the Supreme Court's *Katz* decision at paras 24 – 28.

The *Katz* decision set out the following considerations in a vires determination: (1) is the impugned regulation (subordinate legislation) consistent with the objective of its parent statute – in order to demonstrate invalidity a person must establish that the regulation is not consistent with such objective or that it addresses a matter which is not set out in the regulation-making provision of the parent statute; (2) if the parent statute has a process or prerequisite condition for the enactment of the regulation, was it followed or satisfied; (3) there is a presumption of validity such that the onus or burden is on the challenger to demonstrate that the regulation is ultra vires – so where possible a regulation will be read in a 'broad and purposive' manner to be consistent with its parent statute; (4) the inquiry into the vires of a regulation does not involve assessing the policy merits of the regulation, nor does the reviewing court assess whether the regulation will successfully meet its objective.

What the *Katz* decision did not speak to was whether its approach to determining the validity of subordinate legislation would also apply in cases where the impugned legislation was enacted by a statutory tribunal or delegate other than the Executive. In other words, the Supreme Court did not explicitly position *Katz* within the broader context of administrative law and the principles of judicial review set out in *Dunsmuir*. For example, the *Katz* decision states a vires inquiry is not to dig into the policy merits of the regulation, but surely this could be a factor in determining whether the exercise of power by a statutory delegate is reasonable. The reason the *Katz* decision refuses to go into the policy merits is likely because in that case the Court was considering a cabinet regulation, and the Executive is largely immune from judicial review on substantive decisions. The Court does not fully address this point in *Katz*, and this is unfortunate because it makes it more difficult to apply *Katz* to determining the vires of subordinate legislation enacted by statutory tribunals and other delegates where courts are less reluctant to examine substantive decisions, and so it was only a matter of time before the issue would return and questions arising from *Katz* would be faced. Questions such as: is the 'presumption of validity' in *Katz* analogous to principles of judicial deference under *Dunsmuir*? Or is the enactment of subordinate legislation by a statutory delegate presumed to be a matter of jurisdiction or another category in which the standard of review should be correctness? These questions, left unanswered in *Katz*, were squarely before the Supreme Court in *West Fraser Mills*.

The majority in *West Fraser Mills* characterizes the enactment of the Regulation as an exercise of delegated administrative power by the Workers Compensation Board, and on that basis rules judicial review of that exercise of power is governed by the principles of *Dunsmuir* (at para 8). As such, the presumption is that the standard of reasonableness applies unless rebutted by one of the prescribed categories for correctness. The only possible basis for rebuttal here was that the enactment of the Regulation raises a true question of jurisdiction, but the majority in *West Fraser Mills* dismisses the possibility of a jurisdictional issue as section 225 in the *Workers Compensation Act* provides the Board with broad authority to make regulations it considers necessary in relation to occupational health and safety.

The question for the majority then was whether the enactment of the Regulation constitutes a reasonable exercise of administrative power by the Board within the broad ambit of section 225, and the majority concludes it does. The Regulation easily fits within the purpose of advancing occupational health and safety (at para 13) and was enacted by the Board – an expert tribunal in occupational safety - to specifically address workplace safety in the forestry sector (at para 20). The majority mentions the *Katz* decision for the point that the Regulation must be seen as consistent with the purpose of its enabling statute, but otherwise primarily applies the principles of *Dunsmuir* to uphold the Regulation as intra vires the Board.

Justice Brown concurs with the majority in relation to finding the Regulation intra vires but departs from the majority on the jurisdictional question, and Justice Brown rules the question of whether a statutory delegate is authorized to enact subordinate legislation is manifestly jurisdictional and subject to the correctness standard of review. Similar to Madam Justice Côté in dissent (see below), Justice Brown envisions a vires determination as central to the judicial function in that no statutory delegate is entitled to deference on a question of whether it has the authority to enact legislation (at para 116). Notwithstanding this more scrutinizing review, Justice Brown sides with the majority in concluding that the Regulation is intra vires the Board given the broad grant of regulation making power set out in section 225 of the *Workers Compensation Act* (at para 121). Justice Brown however departs from the majority in final result by endorsing the finding of Justice Côté that the administrative penalty imposed by the Board was patently unreasonable (for why this standard lives on in British Columbia see [here](#)). Madam Justice Côté is alone in her dissent that the Regulation is ultra vires the Board, but aligns with Justices Brown and Rowe on the approach to determining the vires of subordinate legislation enacted by a statutory delegate in that a reviewing court should apply the standard of correctness. Where Justice Côté departs from the rest of the Court is in her assertion of the need to distinguish the exercise of adjudicative power by a statutory tribunal from the exercise of legislative power. While the former will usually attract judicial deference under the principles of *Dunsmuir*, the latter should never attract deference because a vires determination goes to the core of what judicial review is all about (at paras 59 to 63).

Justice Côté concludes the Regulation is ultra vires the Board because the Regulation purports to assign duties to an owner of a workplace and this is inconsistent with provisions in the *Workers' Compensation Act* which assign those duties to an employer. The majority and Justice Côté expressly disagree on this point, with the majority rejecting the premise that there are spheres - or 'silos' as the majority puts it at para 16 – of responsibility between an owner and an employer which do not overlap. Justice Côté, on the other hand, interprets the *Workers Compensation Act*

to mean that duties to ensure the safety of workers rests with the employer whereas an owner of a workplace – such as West Fraser Mills in this case – owes duties to ensure the workplace is properly maintained (at paras 79 – 83). In the view of Justice Côté, the Regulation does not accord with these distinct spheres of responsibility since it purports to assign liability to an owner for the safety of workers, and the Regulation should therefore be found ultra vires the Board (at para 86).

Similar to the majority, Justice Côté spends little time with the *Katz* decision but she does assert that *Katz* supports the case for correctness review by observing that the Court in *Katz* effectively engaged in a de novo analysis of the statutory authority for the regulations at issue (at paras 67 - 69). Finally Justice Côté also finds that even if the Regulation is intra vires the Board, the administrative penalty is patently unreasonable because the governing statutory provisions do not expressly empower the Board to impose the penalty on an owner of the workplace (at para 93). The final tally in *West Fraser Mills* regarding the vires of the Regulation is as follows:

- 8 of the 9 justices held the Regulation was intra vires the Board;
- 7 of the 9 justices applied the *Dunsmuir* principles and the standard of reasonableness to determine the vires of the Regulation (although Justice Rowe seems to hedge somewhat on this point);
- 2 of the 9 justices apply the standard of correctness to determine the vires of the Regulation on the basis that the question of whether a statutory delegate has authority to enact legislation is a question of jurisdiction;
- None of the justices make any real attempt to square *West Fraser Mills* with the *Katz* decision.

I think Justice Côté provides the strongest opinion here on how Canadian administrative law should address a vires determination on subordinate legislation enacted by a statutory tribunal. I agree with her reasoning that a distinction should be made between judicial review on an exercise of adjudicative power by a statutory tribunal which should presumptively attract judicial deference and an exercise of legislative power by a statutory tribunal which should not attract judicial deference (with limited exceptions). Justice Côté provides for two exceptions where the exercise of legislative power might attract deference: (1) the enactment of subordinate legislation (bylaws) by a municipality; and (2) the enactment of subordinate legislation which is not of general application (Justice Côté points to the enactment of rules by a self-governing regulatory agency such as a law society). Justice Côté points to the existence of other means of accountability to ground the basis for judicial deference in these limited exceptions (at paras 64 and 65).

Justice Rowe is very brief in his separate reasons for concurring with the majority but does so in order to take a swing at the presumption of tribunal expertise regarding statutory interpretation, which he labels one of the ‘myths of expertise that now exist in administrative law’ (at para 129). While he doesn’t say so explicitly, Justice Rowe seems to concur with Justices Côté and Brown that the superior courts should not presume expertise in statutory tribunals when reviewing the exercise of legislative authority.

The fact of the matter is that the exercise of legislative authority by a statutory tribunal or delegate should be reviewed on a different basis from the exercise of adjudicative or administrative authority. The majority stretches the principles of *Dunsmuir* to the breaking point when it purports to apply those principles to the enactment of legislation. Legislative enactments are by their very nature laws of general application, and when enacted outside of the legislative process these enactments should be subject to significant legal scrutiny.

At some point, I hope the Court returns to where it left off in the *Katz* decision and addresses how the *Katz* principles should apply in a case where the subordinate legislation is enacted by a statutory tribunal. Until it does so, there appears to be two paths in the jurisprudence for a vires determination on subordinate legislation depending on whether the enacting body is the Executive (*Katz*) or a statutory tribunal or other delegate (*West Fraser Mills/Dunsmuir*). Ironically, it seems possible that the statutory tribunal or delegate gets a lighter touch on judicial review of legislative authority than the Executive. This is clearly wrong.

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