
Noteworthy Decision Summary

Decision: A1603250 **Panel:** Warren Hoole **Decision Date:** December 12, 2016

Jurisdiction – Constitutional question – Canadian Charter of Rights and Freedoms – Charter Values – Section 45 of the Administrative Tribunals Act.

This decision is noteworthy for its consideration of WCAT's jurisdiction with respect to constitutional questions.

The employer operated a number of sawmills in British Columbia. Safety officers from the Workers' Compensation Board, operating as WorkSafeBC (Board), inspected one of the employer's mills in 2014 and observed what they considered to be unsafe accumulations of wood dust, contrary to section 5.81 of the *Occupational Health and Safety Regulation* (Regulation). The Board issued a Contravention Order, and, subsequently, a Penalty Order. On appeal of both the Contravention Order and the Penalty Order, the employer challenged the constitutional validity of section 5.81 of the Regulation.

The panel found that as a result of the interplay between section 245.1 of the *Workers Compensation Act*, section 45 of the *Administrative Tribunals Act* and the Supreme Court of Canada (SCC) decision in *Nova Scotia (Workers' Compensation Board) v. Martin*, WCAT may consider any constitutional question that does not involve the *Canadian Charter of Rights and Freedoms* (Charter). WCAT does not have the authority to declare the Regulation generally invalid; rather, WCAT may find in any particular case that the Regulation is invalid and therefore inapplicable to that case.

The panel did not consider the employer's argument that the Regulation is contrary to the Charter because WCAT does not have jurisdiction to consider Charter questions. Relying on the SCC decision in *Doré v. Barreau du Quebec*, the employer argued that the Regulation was contrary to Charter values, and was therefore inapplicable. The panel concluded that it could not find the Regulation to be invalid as being contrary to Charter values when it could not declare it to be invalid as being contrary to the Charter. Additionally, the panel concluded that the Charter values analysis supported by *Doré* and the cases following that decision arises only in the context of discretionary decision-making or statutory interpretation. The issue of the validity of the Regulation did not concern the exercise of discretion or interpretation; consequently, the Charter values analysis did not apply. The panel expressed doubt that Charter values could invalidate legislation or subordinate legislation.

The panel shared some of the employer's concerns with respect to the Board's approach to regulating dust in saw mills; however, it concluded that those concerns arose from the guidelines published by the Board rather than from the Regulation. Consequently, the panel concluded that those concerns were not a basis for refusing to apply section 5.81 of the Regulation.

DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

Introduction

- [1] This appeal is about wood dust in sawmills. The employer operates a number of sawmills in British Columbia. Safety officers from the Workers' Compensation Board (Board) inspected one of the employer's mills in early 2014. The officers observed what they considered to be unsafe wood dust accumulations, contrary to section 5.81 of the *Occupational Health and Safety Regulation*, B.C. Reg. 296/97, as amended (the OHS Regulation).
- [2] In light of their observations, the officers issued a safety contravention order against the employer by way of an inspection report dated April 17, 2014 (the Contravention Order). The Board decided that the circumstances of the Contravention Order required the imposition of an administrative penalty. The Board therefore fined the employer \$74,850.04 by way of a further inspection report dated July 22, 2014 (the Penalty Order).
- [3] The employer disagreed with the Contravention Order and the Penalty Order. It therefore requested a review. In *Review Decision #R0174577* and *Review Decision #R0180531*, both dated July 9, 2015, a review officer confirmed the Board decisions except that the review officer reduced the amount of the Penalty Order by 30%.
- [4] The employer now appeals to the Workers' Compensation Appeal Tribunal (WCAT). The employer challenges as a preliminary issue the constitutional validity of section 5.81 of the OHS Regulation. This preliminary decision deals with that challenge.

Issue(s)

- [5] Is section 5.81 of the OHS Regulation inapplicable to this appeal because it is constitutionally invalid?

Jurisdiction

- [6] The WCAT's jurisdiction in these appeals arises under subsection 239(1) of the *Workers Compensation Act* (Act), as an appeal of a final decision of a review officer under paragraph 96.2(1)(c) of the Act confirming a Board order respecting an occupational health and safety matter under Part 3 of the Act.

Scope of the employer's appeals

- [7] A bare contravention order is not in itself appealable to WCAT; however, where a contravention order is relied on to justify a Penalty Order, the WCAT may address both orders.¹ In this case,

¹ See item 3.13 of the WCAT's *Manual of Rules of Practice and Procedure* (MRPP).

the Board relied on the Contravention Order as the basis for imposing the Penalty Order. I therefore have the necessary jurisdiction to consider both.

- [8] The employer's notices of appeal also challenge Board orders dated December 4, and December 5, 2013. Those orders were confirmed as part of the same omnibus Review Division findings that confirmed the Contravention Order and Penalty Order². Because the Board did not rely on either the December 4, or December 5, 2013 orders in deciding to impose the Penalty Order, it follows that the December 4, and December 5, 2013 orders, and the related Review Division findings, are not properly before me. My jurisdiction is therefore limited to addressing the Contravention Order and the Penalty Order.

Constitutional Jurisdiction

- [9] With respect to my jurisdiction to hear the employer's constitutional argument, the Supreme Court of Canada in *Nova Scotia (Workers' Compensation Board) v. Martin* 2003 SCC 54 concluded as a general matter that tribunals such as the WCAT have the necessary common law authority to apply constitutional law in matters before them. The Court noted that it was potentially open to Legislatures to limit by statute any particular tribunal's presumptive constitutional authority.
- [10] In this regard, section 245.1 of the Act referentially incorporates section 45 of the BC *Administrative Tribunals Act* (ATA). Section 45 of the ATA provides that the WCAT may not hear questions relating to the *Canadian Charter of Rights and Freedoms* (Charter). However, section 245.1 of the Act does not referentially incorporate section 44 of the ATA. Section 44 of the ATA precludes an affected tribunal from consideration of all "constitutional questions" as that phrase is defined in section 1 of the ATA³.
- [11] The result of the interplay between the ATA, *Martin*, and the Act, is that the WCAT may consider any "constitutional question" that does not involve the Charter. Consequently, to the extent the employer's challenge to the validity of the impugned regulatory provision is a "constitutional question" that does not relate to the Charter, I have the necessary jurisdiction to address that challenge.
- [12] I note as a final point that the WCAT does not have the authority to declare the OHS Regulation to be generally invalid. That authority is reserved for the superior courts. Rather, the WCAT may find in any particular case that the OHS Regulation is invalid and therefore inapplicable to that case. A WCAT decision to this effect therefore has no effect outside the confines of the appeal in question.

² The December 4, 2013 Board order was confirmed in *Review Decision #R0172088*, and the December 5, 2013 Board order was confirmed in *Review Decision #R0172086*.

³ A "constitutional question" for the purposes of the ATA is any question for which notice is required pursuant to section 8 of the BC *Constitutional Questions Act*.

Background and Evidence

- [13] As the validity of section 5.81 of the OHS Regulation is largely a legal matter, it will suffice to set out only a brief summary of the employer's circumstances.
- [14] I note at the outset that the Contravention Order arose in the context of a significant initiative by the Board over the last several years to mitigate the hazard posed by combustible wood dust in mills. This initiative was obviously a response to the tragic explosions and fires at the Burns Lake and Lakeland mills in early 2012.
- [15] Initially, the Board undertook a period of engagement, education, and collaboration with the forestry industry to improve wood dust management systems and awareness. By early 2014, the Board moved to more active enforcement measures. It was in the context of this more active enforcement phase that the April 17, 2014 inspection occurred.
- [16] In the April 17, 2014 inspection report, the Board officers described their observations of what they considered to be dangerous accumulations of sawdust and debris in the "reducer quad saw" area of the employer's mill. The officers took photographs showing that dust and debris was present in the area, up to a depth of what appears to be several inches in places. I reference in this regard photos 330 and 332. The employer does not appear to dispute that those photos are reasonably accurate representations of the wood dust and debris present in and around the reducer quad saw at the time of the Board officers' inspection.
- [17] The Board officers did not sample or test the wood dust and debris. Their conclusions depended on a visual inspection alone. On the basis of that visual inspection the Board officers considered that the circumstances reflected a serious risk of fire. They ordered that the mill be shut down and the dust removed. The employer complied and a crew of four or five workers completed a dust clean-up satisfactory to the Board officers within three hours.
- [18] Although the employer complied with the stop-work order, the employer disagreed that the wood dust and debris was of a size, composition, and moisture content that made it combustible at the time of the inspection. In support of this view, the employer relies on an August 16, 2012 report that the employer commissioned to test the wood dust and debris produced at various locations in the mill. The report suggested that, at the time of testing, much of the dust and debris at the various locations was too big and/or too wet to be readily combustible.
- [19] The employer emphasizes in its submissions to me that the logs used on the production line were, immediately prior to use, stored as part of a water-borne log boom. Much of the wood dust and debris from the production process was therefore wet at the time of the Board officers' inspection. The employer concedes that some of the wood dust and debris from the production work would be sufficiently fine and dry to pose a combustion hazard; however, the employer says the bulk of it would not.
- [20] Further, the employer says it had a regular clean-up schedule for the reducer quad saw area. The clean-up crew performed this work each graveyard shift from Monday to Friday. The Board officers inspected the mill in the late morning and prior to the scheduled clean-up. The employer considers this point of significance because it says that the area would have been cleaned later

that evening and before any significant amounts of dust formed that could have posed a reasonable combustion hazard.

- [21] In essence, the employer believes that there was no danger of a fire or explosion due to wood dust and debris at its mill at the time of the Board officers' inspection. To the extent that wood dust and debris was present, it would have been removed in accordance with the regular maintenance schedule before there was any real risk of the material becoming combustible.
- [22] The employer believes that, in these circumstances, the Contravention Order is unreasonable. The employer says the Contravention Order depends on a regulatory approach devoid of clear and reasonable measures to identify the point at which wood dust and debris becomes hazardous and must be removed. The employer says that the absence of clear guidance makes it impossible for employers to know how to manage wood dust and debris – a necessary and constant by-product of the employer's operations.
- [23] The employer says that the absence of clear "goalposts" also leaves too much discretion in the hands of Board officers as to when wood dust and debris poses a workplace hazard. It is this uncertainty and vagueness, as well as the scope for arbitrary and over-broad application, which the employer considers to collectively and individually render section 5.81 of the OHS Regulation unconstitutional.

Reasons and Findings

- [24] The Board's regulatory approach to wood dust has substantially changed since the time of the Contravention Order. Effective September 1, 2014, the Board amended its *Prevention Manual* by introducing policy item D3-115-3 "RE: Employer Duties - Wood Dust Mitigation and Control. My reasons in this decision address the regulatory regime in place prior to those changes.
- [25] In this regard, the Contravention Order relied on section 5.81 of the OHS Regulation, which provides:

Combustible dust

5.81 if combustible dust collects in a building or structure or on machinery or equipment, it must be safely removed before accumulation of the dust could cause a fire or explosion

- [26] It is apparent that section 5.81 is of a general nature. Indeed, it is not even specific to the wood products industry and applies more broadly to any industry that generates combustible dust. Section 5.81 has been in force and unchanged in substance since the promulgation of the original version of the OHS Regulation.
- [27] As already noted, the employer attacks section 5.81 of the OHS Regulation largely on the basis that it is unreasonable, overly broad, arbitrary, and impossible to comply with. The employer relies on the Charter in support of its view that these failings render invalid section 5.81 of the OHS Regulation. Although I agree with several of the employer's concerns, I do not agree that I may invalidate section 5.81 of the OHS Regulation for Charter reasons.

- [28] Simply put, the employer's Charter arguments about vagueness or uncertainty cannot succeed because I am unable to undertake a Charter analysis. I have already discussed the reasons for this conclusion above. As I understand the law, arguments about vagueness or uncertainty are rooted in section 7 and section 1 of the Charter. As I lack the jurisdiction to hear Charter arguments, it follows that I cannot address this aspect of the employer's submissions.
- [29] The employer also raises the related argument that "Charter values" offer a further ground for finding section 5.81 of the OHS Regulation to be invalid. The Charter values in question spring from "rule of law" notions such as certainty, predictability, freedom from arbitrary state action, and clear notice of legal requirements. These values are said to be inherent in the Charter and to mitigate in favour of finding section 5.81 of the OHS Regulation to be invalid and therefore inapplicable in this case.
- [30] The employer relies on *Doré v. Barreau du Québec*, 2012 SCC 12 and its progeny in support of this argument. I do not find the employer's position persuasive. The Legislature has seen fit to specifically deprive the WCAT of the jurisdiction to consider the Charter. It would seem to me to that the employer's argument is nothing more than an effort to do indirectly what it cannot do directly. It is therefore an impermissible collateral attack on the Legislature's clear direction that I not consider the Charter. On that basis alone, I would decline to give effect to the employer's Charter values argument.
- [31] Even if I could apply Charter values such a conclusion would not assist the employer. As I understand the *Doré* line of authority, the Charter values analysis arises only in the context of discretionary decision-making or statutory interpretation; however, the employer's argument is about the validity of section 5.81 of the OHS Regulation rather than about its interpretation or discretionary elements. I am unaware of any authority to support the proposition that Charter values may invalidate legislation or subordinate legislation and I doubt such an outcome is possible under the Charter values analysis.
- [32] On the contrary, I note *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2016 BCSC 1764 and Russell J.'s reasoning at paragraph 1036 that invalidation of legislation is a matter for a direct Charter challenge rather than a matter for Charter values:

Having reviewed the history of the evolution of the *Doré* approach, I conclude that the *Doré* framework is to be applied in a narrower set of circumstances than the defendants suggest. It is not intended to apply when a court is assessing the constitutionality of all government actions. It is meant to apply on a review of government adjudications of the rights of individuals where there is no corresponding challenge to the legal framework. Where there is a challenge to a law, and its application by government actors to groups or individuals, the traditional Oakes framework ought to apply.

[my emphasis]

- [33] It may be that a Charter values analysis could be said to arise in the context of exercising the discretionary authority to impose an administrative penalty under section 196 of the Act; however, I see no discretionary dimension to the validity of section 5.81 of the OHS Regulation or to whether there has been a contravention of that section.

- [34] It follows that, even if I am wrong and Charter values are properly within my jurisdiction, I would in any event not agree with the employer's argument that Charter values provide an independent ground for invalidating section 5.81 of the OHS Regulation.
- [35] This means that I disagree with the employer's argument that section 5.81 of the OHS Regulation is invalid on Charter grounds or because of Charter values. I reach this conclusion because the employer's arguments fall outside the scope of my jurisdiction rather than because I necessarily consider section 5.81 to be Charter compliant.
- [36] However, I note as a general point that I see nothing in section 5.81 of the OHS Regulation that is, in itself, objectionable. Our Court of Appeal recently provided a convenient summary of the already well-accepted principles applicable to regulations at paragraph 67 of *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2016 BCCA 473. The Court held that a provision of the OHS Regulation is to be measured against whether it "...is not contrary to any provision of the Act, and conforms with the purposes and objectives of the statute, and with the Board's mandate."
- [37] In my view, section 5.81 of the OHS Regulation satisfies these requirements. I recognize that the provision is broadly worded; however, it has application across many industries and such broad wording appears to me to be inevitable. Its purpose is clearly to prevent dangerous accumulations of dust in workplaces and to prevent the type of devastating circumstances that came to pass with the Burns Lake and Lakeland mill explosions.
- [38] Consequently, I see nothing objectionable in section 5.81 of the OHS Regulation on its own. To the extent that the employer has raised reasonable concerns about the details of the Board's overall regulatory approach to wood dust, I consider those problems to arise from the Board's practice guidance made pursuant to section 5.81 of the OHS Regulation rather than from the section itself.
- [39] With respect to the employer's objections to the Board's approach to wood dust, I agree with three of the employer's areas of concern. Before discussing these concerns, it is necessary to first summarize the Board's regulatory approach to wood dust prior to September 1, 2014.
- [40] As I noted earlier in my reasons, section 5.81 of the OHS Regulation is of a general nature and has been in place since the initial promulgation of the OHS Regulation. Following the Burns Lake and Lakeland mill explosions in 2012, the Board did not enact any specific changes for managing dust within section 5.81 of the OHS Regulation itself. Rather, the Board developed a "Guideline" under section 5.81: *G5.81 Combustible dust - Sawmills and other wood products manufacturing facilities* (the Guideline).
- [41] The Guideline has been amended on several occasions⁴. In essence, it relies substantially on an American standard developed by the National Fire Protection Association entitled *NFPA 664: Standard for the Prevention of Fires and Explosions in Wood Processing and Woodworking Facilities* (the NFPA Standard).

⁴ It is the version in force at the time of the Contravention Order that applies here.

- [42] For example, the Guideline states that “secondary” dust (dry and fine dust) must not be permitted to accumulate to a depth of more than 1/8 inch on upward facing surfaces comprising more than 5% of a work area. This numerical threshold is derived from the NFPA Standard. The reference in the Guideline to “secondary” dust is intended to capture accumulations of dust that might cause an explosion.
- [43] It follows that in relation to the risk of explosion from wood dust the Guideline, and by extension section 5.81 of the OHS Regulation, provides at least some specific “bright line” direction in relation to permitted accumulations of “secondary” dust.
- [44] Even then, that guidance is still imprecise. This is the first difficulty that I observe regarding the Board’s regulatory approach to wood dust prior to September 1, 2014. Unlike the NFPA Standard, the Guideline does not refer to particle size and moisture content as a basis for identifying when wood dust or debris is “secondary” dust such that it poses a hazard of explosion. In the NFPA Standard this threshold is crossed where the dust or debris is smaller than 500 microns and its moisture content is below 25%. However, other than describing such debris as smaller and drier, the Guideline offers no direction as to when dust or debris becomes “secondary” dust.
- [45] Consequently, for potentially explosive “secondary” dust, the Guideline offers only partial clarity to employers tasked with managing dust in their workplace because it does not offer any meaningful direction regarding when dust is sufficiently dry and fine to constitute “secondary” dust. In other words, while the Guideline provides useful direction regarding the threshold for removal of secondary dust (1/8 inch over 5% of a work area), it does not provide any useful direction regarding whether “secondary” dust is present in the first place. This lack of clarity is my first concern with the Board’s regulatory approach to dust in wood in wood mills prior to September 1, 2014.
- [46] My second concern with the Board’s regulatory approach to dust prior to September 1, 2014, relates to “primary” dust as that phrase is used in the Guideline. “Primary” dust is a hazard because, if left unmitigated, “primary” dust will dry and sift over time, producing the more dangerous “secondary” dust. In addition, in certain circumstances “primary” dust might catch fire on its own account, causing both an ignition source and a “puffing” effect that may mix existing “secondary” dust into the air, increasing the risk of an explosion. It follows that, while perhaps less immediately hazardous, “primary” dust also requires careful and prudent management.
- [47] However, such management seems to me to depend on a clear understanding of when circumstances are such that, with proper regard to the “precautionary principle” inherent in occupational health and safety, there is some reasonable risk of a fire. Unfortunately, the Guideline does not provide any direction in relation to either identifying hazardous “primary” dust or identifying removal thresholds for such dust. Rather the Guideline merely offers the overly-broad suggestion that any dust that is not “secondary” dust is “primary” dust and presents a fire hazard when in “...direct contact with equipment that produces heat or that might be a potential ignition source.”
- [48] The broad nature of this statement in relation to “primary” dust is troubling. It seems to me that wood mills necessarily produce large quantities of wood dust and debris that will accumulate in and around high voltage and/or hot equipment. This debris will have a range of profiles from

coarse and wet to fine and dry. Much of the debris may not be combustible by any measure at the time of production and will not become combustible for a lengthy period, depending on variables such as: wood type, moisture content, ventilation, local weather conditions, size of particle, and so on.

- [49] Thus, the very nature of a wood mill is that, although dust removal systems and other mechanical processes may mitigate the accumulation of wood dust and debris, such accumulation will nevertheless inevitably take place. That is, quite simply, an essential feature of wood mills. An employer obviously cannot send in clean-up crews without shutting down and locking out the equipment in question. Employers, such as the employer in this case, therefore schedule cleaning shifts; however, in between those clean-up shifts, wood dust and debris inevitably accumulates on and around hot equipment and near ignition sources such as high-voltage electrical components.
- [50] This in turn means that, if a mill wishes to operate, it will almost always be, at least technically, in non-compliance with the fire hazard aspect of the Guideline and therefore generally considered to be in contravention of section 5.81 of the OHS Regulation. This, despite the fact that as a practical matter and properly applying the precautionary principle there may be no reasonable risk of a fire at all because the composition of the dust and debris is not combustible and would not likely become so until well after it is cleaned up. Nevertheless, because there is an accumulation of any dust or debris on equipment, the Guideline directs that a fire hazard is present.
- [51] Consequently, it seems to me that the regulatory regime in place prior to September 1, 2014, fails to adequately describe reasonable thresholds both for identifying hazardous “primary” dust and knowing when accumulations require removal. My second concern is therefore the Board’s overly-broad and uncertain directions in the Guideline regarding “primary” dust.⁵
- [52] My third concern relates to the “reverse onus” in the Guideline suggesting that the Board may simply assume that finer, drier wood dust accumulations are “secondary” wood dust accumulations that pose a threat of explosion. It is stated that a Board officer need only visually observe dust accumulations that he or she considers to be dry and fine and those accumulations will be presumed to be “secondary” wood dust. It is then stated in the Guideline that the employer must disprove this conclusion. I do not agree with the Guideline on this point.
- [53] In my view, the evidentiary approach for contravention of section 5.81 is no different than the approach to any other aspect of the OHS Regulation. It is for the Board to prove any contravention, including one under section 5.81. The less positive evidence the Board develops in support of an alleged contravention, the less likely the contravention order will be sustained in the event an employer challenges the contravention. This is not to say that observation and assertion of a contravention is necessarily insufficient evidence to ground a contravention order. Rather, it is to say that such evidence is of only superficial value and an employer may have little difficulty overcoming such evidence. This is particularly so where an alleged contravention will be relied on for the purposes of imposing a substantial administrative penalty.

⁵ I noted similar concerns in *WCAT-2016-00273*, dated January 28, 2016.

- [54] Where a Board officer does not even touch the dust or carry out any testing of the dust, it may be that mere visual observations will be overcome by virtually any evidence suggesting that the dust was in fact too wet and/or too large to pose a combustion hazard. I see no basis in the Act or OHS Regulation generally for a reverse onus to “bootstrap” an otherwise superficial evidentiary basis for sustaining a contravention order under section 5.81 of the OHS Regulation. I therefore disagree with the Guideline to the extent that it could be said to place a reverse onus on the employer to positively disprove a Board officer’s allegation of a contravention of section 5.81 of the OHS Regulation in relation to “secondary dust”. Similarly, and for the same reasons, I disagree that there is any reverse onus on an employer in relation to dust that has accumulated on or around equipment and on that basis alone is presumed to be “primary dust” that is capable of catching fire merely because of its location and without regard to any other aspects of the dust profile.
- [55] To summarize my concerns with the Board’s pre-September 1, 2014 approach to regulating dust in wood mills, I see an absence of useful guidance regarding the meaning of “secondary” dust and “primary” dust. I also see an absence of useful removal thresholds for “primary” dust. Finally, I consider the use of a reverse onus to be inappropriate and unsupported by the Act or the OHS Regulation.
- [56] However, as already noted, it seems to me that these concerns arise from the Guideline rather than from section 5.81 of the OHS Regulation. It is therefore only at the level of the Guideline that I consider the Board’s regulatory approach to wood dust to be problematic at the time in question. The proper solution to those concerns is to either read-down or even reject objectionable elements of the Guideline rather than to invalidate section 5.81 of the OHS Regulation.
- [57] Consequently, I disagree with the employer’s argument that I should refuse to apply section 5.81 of the OHS Regulation on the basis that it is invalid. To the extent that the OHS Regulation may run afoul of the Charter or Charter values I find I lack the necessary jurisdiction to give effect to the employer’s position.
- [58] In any event, to the extent that the employer’s arguments suggest the Board’s overall regulatory approach to wood dust prior to September 1, 2014, is problematic, I conclude that those problems are rooted in the Guideline rather than in section 5.81 of the OHS Regulation itself. Because the Guideline is not binding and instead must be consistent with the Act and with the OHS Regulation, as well as with the law generally, I conclude that it remains open to the employer to argue that some or all of the Guideline is not applicable to the employer in the particular circumstances of its appeal. That is a matter for further adjudication of the merits of the employer’s appeal.
- [59] In the result, I dismiss the employer’s preliminary constitutional challenge to the validity of section 5.81 of the OHS Regulation. I return the matter to the WCAT Registry to invite submissions from the employer on the merits of the employer’s appeal.
- [60] Because I have now resolved the employer’s constitutional challenge the Attorney General has no further interest in the employer’s appeal and will play no further role in it. I also do not consider it necessary to hear further from the Board.

- [61] As a final point, I note that nothing in my reasons is intended to impugn the Board's regulatory approach to wood dust after September 1, 2014. It seems to me that the approach set out in Policy Item D3-115-3 of the *Prevention Manual* is thoughtful, thorough, and sensitive to site-specific and process-specific features of wood dust accumulations at each particular worksite. That process also has a built-in due diligence component as well as objective measures of compliance. It may well be that, when faced with wood dust compliance concerns, the Board should focus on issuing orders under what I consider to be the better regulatory system set out in Policy Item D3-115-3 rather than relying on section 5.81 of the OHS Regulation and the Guideline. I note that the most recent version of the Guideline appears to suggest a similar symmetry between compliance with policy item D3-115-3 and compliance with section 5.81 of the OHS Regulation. I agree with this approach. My comments in this regard are obviously non-binding; however, I wish to be clear that the concerns I described earlier in my reasons relate to the Board's regulatory approach prior to September 1, 2014 only.
- [62] In the result, I dismiss the employer's constitutional challenge to the validity of section 5.81 of the OHS Regulation.

Conclusion

- [63] I dismiss the employer's constitutional challenge to the validity of section 5.81 of the OHS Regulation. The appeal will be returned to the WCAT Registry for further direction regarding the substantive merits of the employer's appeal.

Warren Hoole
Vice Chair