IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Safeway Trucking Ltd. v. Office of the British Columbia Container Trucking Commissioner,* 2023 BCSC 589

Date: 20230414
Docket: S244854
Registry: New Westminster

Between:

Safeway Trucking Ltd. and Coast Pacific Carrier Inc.

Petitioners

And

The British Columbia Container Trucking Commissioner and the Attorney General of British Columbia

Respondents

Before: The Honourable Mr. Justice Milman

On judicial review from: Decisions of the British Columbia Container Trucking Commissioner, dated March 8 and May 31, 2022.

Reasons for Judgment

Counsel for the Petitioners:	M. Evans
Counsel for the Respondents:	T. Bant M. Goodwin
Place and Date of Hearing:	New Westminster, B.C. March 31, 2023
Place and Date of Judgment:	New Westminster, B.C. April 14, 2023

I. Introduction

[1] The petitioners, Safeway Trucking Ltd. and Coast Pacific Carrier Inc., are affiliated trucking companies holding a joint licence under the *Container Trucking Act*, S.B.C. 2014, c. 28 (the "Act"). The Act requires trucking companies to hold such a licence in order to transport marine shipping containers from the Port of Vancouver to elsewhere in the Lower Mainland area of British Columbia.

[2] The Act is administered and enforced by the British Columbia Container Trucking Commissioner (the "Commissioner"). On March 8, 2022, the Commissioner cancelled the petitioners' licence following an audit and investigation, citing various alleged violations of the Act.

[3] After unsuccessfully applying to have the Commissioner reconsider his decision, the petitioners now apply for judicial review in this court, seeking to have the cancellation set aside. By order of this court, the cancellation has been stayed pending the outcome of this proceeding.

[4] The petition advances only one ground of review, namely, that the Commissioner lacked the jurisdiction to impose a penalty when he did, because that occurred more than six months after he became aware of the alleged violations and therefore after the expiry of the limitation period prescribed by the Act for enforcement action. The petitioners did not raise that argument before the Commissioner.

[5] In response, the Commissioner says that the petitioners should not be permitted to advance a new argument for the first time on judicial review. If the court does choose to consider the issue on the merits, then, in the Commissioner's submission, the petition must fail either because the cancellation occurred within the prescribed time limit, or alternatively, because it was still valid even if it did not.

[6] For the reasons that follow, I have concluded that the petition should be dismissed.

II. The Legislative Framework and Standard of Review

[7] The Act was promulgated in 2014 after a series of disruptive work stoppages at the Vancouver ports caused by widespread dissatisfaction among truck drivers about payment practices, among other things. Its intended purpose was to preserve stability in that sector by addressing chronic rate undercutting and driver compensation issues through a system of minimum rates, audits, licencing, and enforcement: *Can. American Enterprises Ltd. v. The Office of the British Columbia Container Trucking Commissioner*, 2020 BCSC 2156 at paras. 9 and 10; *Aheer Transportation Ltd. v. Office of the British Columbia Container Trucking Commissioner*, 2018 BCCA 210 at para. 60.

[8] To that end, the Act establishes a Commissioner with enumerated powers, including the licencing of prescribed trucking businesses in prescribed areas of British Columbia. Section 22 of the Act provides for trucking rates and fuel surcharges to be set by regulation. The process for enforcement, central to this case, is set out in Part 4, which is divided into three divisions, including:

a) driver complaints (Division 1);

b) audits, inspections and investigations (Division 2); and

c) penalties (Division 3).

[9] The Commissioner's power to impose penalties is set out in s. 34 of Division 3, which states as follows:

> Penalties relating to licences
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> 34 (1) Subject to subsection (2), if the commissioner is satisfied that a licensee has failed to comply with this Act or the terms and conditions of the licensee's licence, the commissioner may, in accordance with this Part and within 6 months after becoming aware of the licensee's failure to comply, take one or more of the following actions:
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> (a) order that the licensee's licence be suspended for the period specified by the commissioner;
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> (b) order that the licensee's licence be cancelled;
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> (c) order that an administrative fine be imposed on the licensee.

(2) If the commissioner proposes to impose a penalty under subsection (1), the commissioner must provide notice to the licensee of that intention, and the notice must

> (a) advise which of the penalties referred to in subsection (1) the commissioner proposes to impose,
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> (b) if the commissioner proposes to impose a penalty referred to in subsection (1) (a), indicate the period proposed for that suspension or prohibition,
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> (c) if the commissioner proposes to impose a penalty referred to in subsection (1) (c), indicate the amount of the proposed administrative fine,
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> (d) set out the reasons for the proposed penalty,
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> (e) advise that the licensee may, within 7 days after receipt of the notice, provide to the commissioner a written response setting out why the proposed penalty should not be imposed, and
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> (f) advise that the commissioner will, if the licensee provides a written response in accordance with paragraph (e), provide notice to the licensee of the commissioner's decision respecting that response.

(3) If a licensee who receives a notice under subsection (2) does not provide a written response within the time specified in the notice, the commissioner

> (a)may impose the penalty proposed in the notice, and
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> (b)must provide notice to the licensee of any penalty imposed.

(4) If a licensee who receives a notice under subsection (2) provides a written response within the time specified in the notice, the commissioner must consider that response and may make a decision to

> (a)refrain from imposing any or all of the proposed penalties, or
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> (b)impose any or all of the proposed penalties.

(5) The commissioner must provide notice to the licensee of the commissioner's decision under subsection (4).

(6)A penalty referred to

> (a)in subsection (1) (a) must not exceed a period of 1 year, and
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> (b)in subsection (1) (c) must not exceed the prescribed amount.

(7) On application, the commissioner may, at any time after imposing a penalty under subsection (1), reduce or rescind that penalty.

[10] Part 5 of the Act sets out the process for reconsideration of the Commissioner's decisions. Part 6 deals with general matters, including provision for the prosecution of offences.

[11] The parties agree that the combined effect of the privative clause in s. 12 of the Act and s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, is to make decisions of the Commissioner, like the one in issue here, subject to review on a standard of patent unreasonableness. By that standard, the court may interfere with the decision under review only when there is no evidence to support it, it is clearly irrational or borders on the absurd: *Aheer Transportation Ltd. v. The British Columbia Container Trucking Commission*, 2022 BCSC 1779; *Port Transportation Association v. Office of the British Columbia Container Trucking Commission*, 2022 BCSC 387 at para. 76.

III. The Factual Background

[12] Although the petitioners are two separate companies, they operate in tandem as a single business.

[13] In June 2020, four of their drivers made confidential complaints to the Commissioner's office. The complainants were interviewed by an investigator in July and August of that year. The petitioners were then audited between September 1, 2020 and March 8, 2021.

[14] On August 12, 2021, the Commissioner issued his proposed decision under s. 34(2) of the Act, finding that the petitioners had contravened the Act in various ways. The proposed penalty to be imposed was a cancellation of their licence.

[15] The seven-day period prescribed by s. 34(2)(e) for the petitioners to respond would have expired on August 19, 2021. However, they sought and were granted an extension of time until September 13, 2021. In their response, the petitioners:

a) identified a number of appendices to the audit report that had not previously been disclosed to them;

b) asked the Commissioner or an investigator to interview the petitioners' principal; and

c) asked for the opportunity to cross-examine the complainants.

[16] On September 24, 2021, the Commissioner delivered to the petitioners a complete copy of the audit report with all of its appendices. He agreed to conduct an interview of the petitioners' principal but refused to allow the petitioners to cross-examine the complainants. The first of those interviews occurred on November 15, 2021. The petitioners were not satisfied with the result and asked for another interview. The Commissioner agreed and conducted it on December 10, 2021. On December 22, 2021, the petitioners delivered further submissions, along with some additional evidence for the Commissioner's consideration.

[17] The Commissioner released his final decision on March 8, 2022, which was six months and 21 days after the release of his proposed decision. In summary, the Commissioner found the petitioners had violated the Act by:

a) failing to keep and produce certain records;

b) requiring four drivers to become independent operators;

c) requiring four drivers to have an ownership interest in equipment in which the petitioners had an ownership interest;

d) underpaying seven drivers by a total of $141,379.59;

e) failing to comply with a 2018 order of the Commissioner to pay a sum of money to one of their drivers; and

f) retaliating against the complainants by ceasing to provide or threatening to cease to provide work, cancelling or threatening to cancel their truck insurance and sending them threatening letters.

[18] In light of those findings, the Commissioner concluded that the petitioners' licence should be cancelled and made an order accordingly.

[19] On April 18, 2022, the petitioners applied to the Commissioner for a reconsideration of that decision. The Commissioner dismissed that application on May 31, 2022.

[20] The petitioners commenced this proceeding on June 17, 2022. On July 7, 2022, I granted the petitioners a stay of the Commissioner's cancellation order pending the hearing of the petition (the order had been stayed by consent until then). On March 31, 2023, at the conclusion of the hearing of the petition, I extended the stay until the release of this decision.

IV. Discussion

[21] Because the petitioners advance a single ground of review that they could have raised before the Commissioner, but did not, I must decide, as a threshold matter, whether they should be permitted to do so now.

[22] In arguing that they should not, the Commissioner relies on *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 457. There, Saunders J.A., writing for the Court, had occasion to consider the principles that bear on the question of whether an appellant or applicant for judicial review should be permitted to raise a new ground for the first time on appeal or review, stating as follows:

> [46] The restrained approach to entertaining new issues engaging the evidentiary record also applies to legal questions that have not been the subject of a reasoned decision. For example, in *R. v. Trieu*, 2010 BCCA 540, this court referred with approval to the observation in *R. v. R. (R.)* (1994), 91 C.C.C. (3d) 193 (Ont. C.A.), that when a court of first instance does not have the opportunity to undertake an analysis, the appellate function is compromised. There is, however, room for the exceptional case where there is no prejudice to the other party: *Braber Equipment Ltd. v. Fraser Surrey Docks Ltd*., 1999 BCCA 579.
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> [47] Moving this proposition to judicial review, it is generally considered that a judge should not find a decision to be patently unreasonable based on a submission the Tribunal never heard. It is even less desirable that an appellate court should consider, for the first time, a submission neither made

> to the judge nor made to the tribunal. While there may be rare exceptions to this approach so as not to allow a potential error of law to be perpetuated as in, for example, *Prince George (City) v. Columbus Hotel Company* (1991) Ltd., 2011 BCCA 218, those cases are few, and serve to illustrate that the overarching question is always the interests of justice in the context of the appellate function.

[23] More recently, in *Aheer*, Brongers J. refused to allow a petitioner to raise the expiry of the six-month limitation period in s. 34(1) of the Act for the first time on review, explaining her decision as follows:

> [76] I accept the Commissioner's threshold objection to Aheer's argument that the Fine Order was imposed outside of the 6-month period as required by s. 34(1) of the Act. This argument was never made to the Commissioner, even though Aheer had ample opportunity to do so. Indeed, when Aheer filed its penalty submissions on March 19, 2021, it was well aware that over 6 months had passed since the date Aheer claimed the auditor knew that Aheer had violated the Act and the terms of its license. There was no reason why Aheer could not have argued then that the Commissioner was now time-barred from imposing a fine by virtue of s. 34(1) of the Act. Aheer could also have included this argument as part of its May 20, 2021 reconsideration request pursuant to s. 38 of the Act. Aheer did neither.
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> [77] As a result of Aheer's silence, the Commissioner has been denied an opportunity to consider this argument and to set out the Commissioner's interpretation of this important aspect of its constituent statute in the Commissioner's reasons for decision. Had the Commissioner been given a chance to provide such an interpretation, it could then have been assessed and reviewed by this Court on a standard of patent unreasonableness, as required by the *ATA*. The Commissioner is therefore correct to say that if Aheer were permitted to raise this argument now, it would effectively circumvent the deferential standard of review to which the Commissioner would otherwise be entitled.
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> [78] In *Gorenshtein v. British Columbia (Employment Standards Tribunal),* 2016 BCCA 457 at paras. 47, our Court of Appeal noted that it is well-established that a judge should not find a decision to be patently unreasonable based on submissions that a tribunal never heard. While there are rare exceptions to this approach so as not to allow a potential error of law to be perpetuated, I can see no basis for invoking one in the case at bar. In particular, it is by no means clear that the 6-month time limit imposed by s. 34(1) of the Act starts to run prior to when the Commissioner makes an actual finding that there has been a violation of the Act or the terms of a licence, as Aheer claims. I will not entertain this argument for the first time here.
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> [79] This ground of judicial review is therefore dismissed.

[24] In response, the petitioners argue that this case fits within the exception described in *Gorenshtein*, inasmuch as it is necessary for this court to address the

issue raised by the petition so as "not to allow a potential error of law to be perpetuated." The "potential error of law" here is said to be the illegal cancellation of their licence, without authority under the Act.

[25] In support of that argument, the petitioners rely on *Casavant v. British Columbia (Labour Relations Board),* 2020 BCCA 159. There, administrative proceedings were initiated in what was later determined to be the wrong forum. When the review applicant sought to raise the jurisdictional deficiency for the first time on judicial review in this court, the chambers judge refused to permit it and dismissed the petition. On appeal, the Court of Appeal took a different view and set aside the board's decision, finding that the chambers judge had failed to give adequate weight to an established body of law demonstrating that the board lacked jurisdiction and, on that basis, that the review applicant should have been allowed to raise the issue for the first time on judicial review.

[26] The petitioners also argue that *Aheer* is distinguishable because in that case, the petitioner was advancing a novel interpretation of the Act by asserting that the six-month limitation period had begun running when the auditor discovered the evidence that was later seen to justify the penalty imposed. In this case, the parties do not dispute that the six-month limitation clock began running when the Commissioner issued his proposed decision on August 12, 2021.

[27] I am not persuaded that *Aheer* is so easily distinguished. Although there is no dispute in this case about when the limitation clock began to run, there is a comparable issue raised as to whether the six-month limitation period was effectively tolled when the petitioners sought and obtained an extension of the statutorily mandated seven-day period for the petitioners to make responding submissions. The Act contemplates a six-month time limit in circumstances where the licensee has received no more than seven days to respond. The extra 25 days that the petitioners were given for their initial submissions exceeds the 21 days by which the Commissioner exceeded the six-month period to impose a penalty, even without accounting for the additional steps taken later, including the interviews of the

petitioners' principal and the delivery of the petitioners' supplemental submissions and evidence.

[28] In any event, regardless of whether the Commissioner is correct in asserting that the six-month period was effectively tolled by the extra time given to the petitioners to respond, it is far from clear that the Commissioner had lost jurisdiction even if he did impose a penalty after the stipulated deadline for doing so had expired.

[29] The petitioners argue that the Act is clear in that regard. They note that there are only three provisions in the Act that set time limits. Two of them, s. 34(1) and s. 43 (which sets a three-year time limit for the laying of an information to commence a prosecution for an offence under the Act), are penal. The other one, s.38 (requiring that an application for reconsideration be brought within 30 days), adds a clause that expressly allows the Commissioner to extend the time for doing so in specified circumstances. The petitioners say this must mean that the Legislature did not intend for the penal deadlines to be extendable in the same manner.

[30] The petitioners also refer to the purpose of limitation periods generally, articulated in the following terms by Moldaver, J., writing for the majority in *McLean v. British Columbia (Securities Commission),* 2013 SCC 67:

> [63] … Limitations periods exist for good reasons, two of which deserve mention here. First, "[t]here comes a time . . . when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations" (*M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at p. 29). Second, at some point "[i]t is better that the negligent [plaintiff], who has omitted to assert his right within the prescribed period, should lose his right, than that an opening should be given to interminable litigation" (*Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1, 37 E.R. 527, at p. 577; see also *M. (K.)*, at p. 30).

[31] In arguing that he retained jurisdiction to impose a penalty even after six months, the Commissioner relies on the distinction drawn in some of the authorities between "mandatory" and "directory" provisions. The distinction was explained in *Doucet v. Adult Forensic Psychiatric Services*, 2000 BCCA 195, as follows:

[44] The appellant relies on certain principles of statutory construction to support his argument that a failure to comply with the time requirements set out in s. 672.47 necessarily results in a loss of jurisdiction. Central to the appellant's argument is the principle set out in s. 11 of the *Interpretation Act*, R.S.C. 1985, c.I-23, that the word "shall" is to be construed as imperative and the word "may" as permissive.

[45] Imperative provisions must be complied with, that is, performance is not at the discretion of the tribunal, but the consequences of the failure to comply will vary depending on the statutory context.

[46] There is no issue that s. 672.47(1) is mandatory in the sense that it imposes on the Review Board a requirement to hold a hearing within the time specified. The contentious question is what consequences flow from non-compliance with the time requirement.

[47] Traditionally the courts have resolved the question of the consequences of non-compliance by categorizing the imperative direction as either "mandatory" or "directory":

> Failing to comply with a mandatory direction will render any subsequent proceedings void while failing to comply with a directory command will not result in such invalidation (although the person to whom the command was directed will not be relieved from the duty of complying with it - i.e. he may be subject to an order of mandamus or to internal discipline).
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> The determination of whether an imperative command is mandatory or directory, however, turns on the intent of the statute.
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> * * *
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> The various Interpretation Acts, however, do not provide much guidance as to whether a "shall do" provision is mandatory-imperative or directory-imperative.
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> [MacAulay and Sprague, *Practice and Procedure Before Administrative Tribunals* (Carswell, Looseleaf ed.) Vol. 2 at p. 22-11, para. 22.5.1.]

[48] A similar point is made by P. Côté in *The Interpretation of Legislation in Canada*, 2d ed. (Quebec: Les Éditions Yvon Blais, 1992) at pp. 203-204:

> "Shall" by itself is insufficient to suggest the legislator intended nullity as a consequence of non-respect. The Quebec *Interpretation Act* (s. 51) and its federal counterpart (s. 28) "... clearly distinguish between that which is permissive and that which is not, but they do not decree the nullity of that which has not been done (according to the law)".
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> * * *
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> If the statute provides that non-compliance, be the formality imperative or directory, does not result in nullity unless the law so states or unless real prejudice has been caused, the question is easily resolved. The courts distinguish between

> mere technicalities and seriously vitiated procedures in order to interpret such provisions strictly.
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> See also Maxwell on *The Interpretation of Statues*, 12th ed. (London: Sweet & Maxwell, 1969) at pp. 314-315.
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> [49] The factors which the courts have looked to in undertaking the task of categorizing imperative provisions as "directory" or "mandatory" include the subject matter of the legislation, whether the statute provides a remedy in case of non-compliance, and the prejudice caused by non-compliance on the facts of the case. See *Interpretation of Legislation*, *supra*, at 204-205, and *Jones and de Villars, Principles of Administrative Law*, 2d ed. (Carswell, 1994) at 137.

[32] It appears that the law in this area has evolved considerably since *Doucet* was decided. The more modern approach is to be found in the subsequent decision of the House of Lords in *R v. Soneji*, [2005] UKHL 49. In that case, Lord Steyn canvassed various authorities from across the Commonwealth holding that the courts should eschew the traditional terminology asking whether a provision is “mandatory” or “directory”, and focus instead on the following two questions:

a) did the legislature intend the person making the decision to comply with the prescribed time limit; and

b) if so, did the legislature intend that a failure to comply with such a time provision would deprive the decision maker of jurisdiction and render any decision which he purported to make null and void.

[33] Among the authorities to which Lord Steyn looked to demonstrate that shift in approach were some from Canada, including *British Columbia (Attorney General) v. Canada (Attorney General); An Act respecting the Vancouver Island Railway (Re)*, [1994] 2 S.C.R. 41, 1994 CanLII 81 and *Society Promoting Environmental Conservation v. Canada (Attorney General),* 2003 FCA 239. In the latter case, Evans J.A., for the majority, helpfully elaborated upon the more modern approach in the following terms:

> [35] The jurisprudence of the Supreme Court of Canada on the mandatory/directory distinction, and the contextual analysis now required by a pragmatic and functional approach to issues of administrative law, suggest a reformulation of the legal tests for determining when a reviewing court should set aside administrative action on the ground that it was taken in

breach of a statutory provision of a procedural or formal nature. An analytical framework should include the following considerations:

(1) Is compliance with the statutory provision obligatory or permissive? If it is permissive, the inquiry is at an end because no legal consequences normally follow merely from non-compliance with a provision that is permissive. If, on the other hand, the provision is obligatory, the consequences of non-compliance must be determined by reference to the circumstances of the case, including the factors described in (4) below.

Whether a provision is obligatory or permissive is a question of statutory interpretation to be undertaken according to the usual principles, including the ordinary and grammatical meaning of the statutory text, and the legislative purpose, both general and specific. Thus, for example, "shall" normally indicates a legislative intention to impose a legal duty to comply, while "may" normally indicates that a procedural provision is permissive.

(2) If compliance with a statutory provision is obligatory, a refusal by a public authority to comply when requested may enable a court to issue an order requiring it to perform its legal duty. The circumstances in which a court will issue an order of mandamus define when it may order compliance with a formal or procedural statutory provision.

(3) If compliance with a statutory provision is obligatory, failure to comply may enable a court on an application for judicial review to set aside or declare invalid administrative action taken in breach of the statutory duty. Legislative intent must be the focus of the inquiry, both when a court is determining whether a statutory provision is obligatory or permissive and, if obligatory, what should be the legal consequences of non-compliance.

However, since the factual circumstances of non-compliance are infinitely variable, legislative intent regarding the consequences of non-compliance must be determined in light of all the relevant circumstances of the particular case. In contrast, whether a provision is obligatory or permissive is not determined by reference to particular facts. It is a question of statutory interpretation that does not depend on the facts of any given case.

(4) The factors to be considered in determining whether non-compliance with an obligatory statutory provision invalidates administrative action include the following:

(i) The importance of the provision, both as regards the overall purposes of the statutory scheme and the purposes served by the imposition of the procedural duty. A high degree of importance in either respect indicates a legislative intent that administrative action taken in breach of the procedural provision may be set aside.

(ii) The seriousness of the breach of the statutory duty: a technical violation is an indicator that the court should not intervene, while a public authority that flouts the statutory requirement can expect judicial intervention.

(iii) The impact of the impugned administrative action on the rights of individuals: the more important the individual rights affected and the more serious the effect on them, the more likely it is that a reviewing court will set

> aside administrative action taken in breach of a statutory procedural provision.
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> (iv) Conversely, the more serious the public inconvenience and injustice likely to be caused by invalidating the resulting administrative action, including the frustration of the purposes of the legislation, public expense and hardship to third parties, the less likely it is that a court will conclude that legislative intent is best implemented by a declaration of invalidity.
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> (v) The nature of the administrative process of which the statutory provision is part: the meticulous protection of procedural rights is likely to be regarded as more important when they are integral to a process of a broadly adjudicative nature than when they are part of an essentially political process culminating in an order of general application. Courts have traditionally tended to exercise less strict procedural surveillance over the process (including public consultation) whereby ministers determine broad polycentric public policy questions.
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> (5) Even if a failure to comply with an obligatory statutory procedural provision is found to invalidate administrative action, a reviewing court still retains a discretion to deny relief by reference to one or more of the accepted discretionary remedial bars. Some of these may already have been taken into account in determining whether, in all the circumstances, the breach invalidated the impugned action, such as the trivial nature of the breach and public inconvenience. However, other discretionary bars to granting relief on an application for judicial review may still be in play: delay, lack of standing and the existence of an adequate alternative remedy, for instance.

[34] The petitioners argue that this line of authority applies only to "failed procedural preconditions", and that this case does not fit in that category. In support of that argument they cite *International Forest Products Limited v. British Columbia*, 2006 BCSC 233, in which Cohen J. rejected the Crown's submission that the issue before him (namely, whether the statutory decision maker, a "scaler", had the requisite authority to make the decision under review) turned on whether the legislation was mandatory or directory. Justice Cohen held the distinction to be inapplicable in that case for the following reasons:

> [185] I find that as the authorization of scalers is a substantive obligation, rather than a procedural precondition, the mandatory/directory analysis is not applicable to this situation. As Interfor notes, all the authorities cited by the Crown involved failed procedural preconditions, not substantive obligations: *British Columbia (Attorney General) v. Canada (Attorney General), supra*, involved the Canadian Transport Commission's failure to observe a right of reconsideration every five years; *Tesky*, *supra*, involved the breach of a requirement of "prompt" notification by the Law Society's executive committee of an intention to refer a decision for review; *Society Promoting Environmental Conservation, supra*, involved a failure to give timely notice of

> a hearing regarding the expropriation of a seabed; and, *Stephen, supra*, involved the failure to elect union officials at the time specified in the union's rules.

[35] The petitioners say that limitation statutes, like s. 34(1) of the Act, create "substantive obligations" in the same sense, citing *Castillo v. Castillo*, 2005 SCC 83. I am not persuaded that is so. *Castillo* was about private international law rules, not statutory interpretation. As the Commissioner argues, this case is more like those distinguished by Cohen J., which involved the failure to meet statutory deadlines, than it is like *International Forest Products*.

[36] An even closer parallel to this case can be found in one of the cases discussed by Lord Steyn in *Soneji*:

> [17] *Charles v Judicial Legal Service Commission* [2003] 1 LRC 422 involved an appeal from Trinidad and Tobago. It is a decision of some importance. The case concerned the effect of failures to observe time limits laid down by regulations dealing with discipline and misconduct in the public service. Giving the judgment of the Privy Council Tipping J (of the New Zealand Court of Appeal) observed, at pp 428-429, para 12:
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> > "At the outset their Lordships observe that it seems highly unlikely that the Commission can have intended that breaches of time limits at the investigation stage would inevitably prevent it from discharging its public function and duty of inquiring into and, if appropriate, prosecuting relevant indiscipline or misconduct. A self-imposed fetter of such a kind on the discharge of an important public function would seem inimical to the whole purpose of the investigation and disciplinary regime."
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> He added at p 430, para 17:
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> > ". . . If a complaint is made about the non-fulfilment of a time limit the giving of relief will usually be discretionary. This discretionary element to which Lord Hailsham referred [in the *London & Clydeside Estates* case] underlines the fact that problems arising from breach of time limits and other like procedural flaws are not generally susceptible of rigid classification or black and white a priori rules. With this in mind their Lordships note that in the present case the delays were in good faith, they were not lengthy and they were entirely understandable. The appellant suffered no material prejudice; no fair trial considerations were or could have been raised, and no fundamental human rights are in issue."
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> …

[37] Like *Charles*, this case involves the failure to observe a time limit set out in legislation designed to implement and enforce a code of conduct in the public interest. Here too, setting aside a penalty for what the Commissioner has found to be a series of serious infractions, on the basis that it was imposed beyond the stipulated time limit, can likewise be said to be "inimical to the whole purpose of the investigation and disciplinary regime."

[38] I have no doubt that the six-month time limit in s. 34(1) of the Act is "obligatory" rather than "permissive", for the purpose of the test as set out by Evans J.A. in *Society Promoting Environmental Conservation,* at para. 35(1) quoted above. In particular, I agree with the petitioners that the legislature has signalled its intention in that regard by distinguishing as it has between the deadlines for the imposition of penalties or the initiation of prosecutions, on the one hand, and the time to initiate a reconsideration application, on the other. However, that is not the end of the inquiry. The required analysis begins, but does not end, with that distinction.

[39] The next question that arises, having found the provision to be obligatory, is "what should be the legal consequences of non-compliance." At this stage of the analysis, "legislative intent regarding the consequences of non-compliance must be determined in light of all the relevant circumstances of the particular case." As Evans J.A. noted, that analysis is to be contrasted with the purely objective one that must be applied in determining whether a provision is obligatory or permissive, which "is not determined by reference to particular facts" but is rather "a question of statutory interpretation that does not depend on the facts of any given case."

[40] In answering that second question, the considerations set out by Evans J.A. in para. 35(4)(i)-(v) are helpful and relevant to the analysis. Although I also agree with the petitioners that the purposes of limitation statutes are properly considered as part of that analysis, they are not determinative and must be balanced against other factors weighing on the other side of the scales.

[41] For example, the six-month time limit in issue here could also be construed as a means of ensuring that harmful conduct by licensees is addressed promptly once it is detected, in order to protect drivers and discourage renewed labour unrest, rather than just, as the petitioners would have it, to promote administrative diligence on the part of the Commissioner, for the benefit of licensees. That goal too would be undermined if the interpretation urged by the petitioners were to prevail.

[42] There are other factors that weigh in favour of the Commissioner's interpretation. The 21-day delay was not a lengthy one. It caused no prejudice to the petitioners. There is no suggestion of bad faith. On the contrary, the delay can be explained, at least in part, by the extension given to the petitioners for the delivery of their responding submissions and evidence after their own statutory deadline had expired.

[43] In summary, this is not a case like *Casavant* in which the legislation lends itself to only one reasonable interpretation, resulting in a loss of jurisdiction. In view of the strong arguments supporting the Commissioner's competing interpretation, I have concluded that, as in *Aheer*, and for similar reasons, the petitioners should not be allowed to raise the timeliness argument for the first time on review in this court. Indeed, if I were called upon to decide the issue on the merits, I would find the Commissioner's interpretation to be the better one.

[44] It follows that the petition should be dismissed and I so order.

V. Disposition

[45] The petition is dismissed.

"Milman J."