IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Aheer Transportation Ltd. v. Office of the British Columbia Container Trucking Commissioner,* 2016 BCSC 898

Date: 20160520
Docket: S161081
Registry: Vancouver

Between:

Aheer Transportation Ltd., Bestlink Transport Services Inc., Burton Delivery Service Ltd., Gantry Trucking Ltd., Gur-ish Trucking Ltd., Indian River Transport Ltd., Roadstar Transport Company Ltd., Sunlover Holding Co. Ltd., Triangle Transportation Ltd. and T S D Holding Inc.

Petitioners

And

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

Respondents

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Judgment

Counsel for the Petitioners:	I.J. Chafetz, Q.C. D. Woolias
Counsel for the Respondents:	K. Horsman, Q.C.
Counsel for the Applicants, Unifor and Unifor Local Union No. VCTA:	P.R. Shklanka
Place and Date of Trial/Hearing:	Vancouver, B.C. May 6, 2016
Place and Date of Judgment:	Kelowna, B.C. May 20, 2016

Introduction

[1] The petitioners challenge the validity of certain provisions of the *Container Trucking Regulation*, B.C. Reg. 248/2014 [*Regulation*], made pursuant to the *Container Trucking Act,* S.B.C. 2014, c. 28 [*Act*]. The *Regulation* imposes minimum rates of payment for truck drivers, which operate retroactively. In simple terms, the issue is whether the petitioners are obliged to pay retroactive trucking rates established by the *Regulation,* which became law on December 19, 2014. The *Regulation* was made retroactive to April 3, 2014. The petitioners allege that the wording of the *Act* does not authorize the making of retroactive regulations and therefore the *Regulations* were invalidly made and/or are of no force and effect.

[2] The petition is set to be heard the week of June 27, 2016. In advance of the hearing of the petition, two notices of application were filed.

Application #1

[3] Unifor Local Union No. VCTA ("Unifor") seeks an order adding it as a party respondent to this proceeding. In the alternative, it seeks an order granting it intervenor status.

Application #2

[4] The petitioners seek directions from the Court regarding whether they are required to give notice of the petition to each individual truck driver who performed trucking services during the period affected by the impugned *Regulation*. If notice is required, the petitioners seek direction as to how that notice should be given.

Background

[5] The Petitioners are 10 of some 100 trucking companies ("Companies") involved in the hauling and movement of shipping containers ("Drayage") for the Port of Metro Vancouver ("PMV"). The Companies operate under a Trucking Licencing System ("TLS"), which involves some 1,720 licences and approximately 2,000 truck drivers ("Truckers").

[6] Some Truckers are employees of the Companies, some are owner/operators and some are employees of the owner/operators. Some Truckers are unionized and some are not. Many individual non-represented truck drivers belong to an informal association known as United Trucker's Association ("UTA").

[7] Unifor is a large union engaged in all sectors of the Canadian economy. It claims to represent the largest number of certified truck drivers working under the TLS at the PMV. At the time these applications were heard, it represented the employees of four trucking companies. Prior to these applications being heard, it also represented the truck drivers employed by the petitioners Aheer Transportation Ltd. (“Aheer”) and Sunlover Holding Co. Ltd. (“Sunlover”), but those companies have recently been decertified from the union.

[8] For several years, the PMV has been plagued by labour issues connected to the Drayage sector. Work stoppages occurred in 1999, 2005 and 2014. On February 26, 2014, UTA truckers withdrew their services from the PMV. On March 1, 2014, Unifor received a 100% strike vote from the PMV truckers it represented. On March 3, 2014, Unifor served a 72 hour strike notice and on March 10, 2014, went on strike.

[9] On March 4, 2014, Mr. Vince Ready and Ms. Corinn Bell were appointed by the Federal Transportation Minister to conduct an independent review aimed at resolving the disruption.

[10] In an effort to return the PMV to normal operations, Unifor, the UTA, and the provincial and federal governments met to negotiate their differences (“Negotiations”). None of the Companies participated in the Negotiations.

[11] On March 24, 2014, the Province of British Columbia tabled back to work legislation.

[12] On March 26, 2014, the Negotiations resulted in an agreement successfully resolving the disruption and the Truckers returned to work. The agreement, called a Joint Action Plan (“JAP”), was signed by Unifor, UTA and the provincial and federal governments. The JAP provided that both levels of government would take immediate action to increase the Truckers’ pay.

[13] On April 3, 2014, the federal government passed an Order in Council amending the previous regulatory scheme to implement the JAP, with the provision that the pay would be retroactive to April 3, 2014.

[14] Mr. Reddy and Ms. Bell continued their investigation into why the Truckers withdrew their services. Their report was completed on September 25, 2014. They

made a series of recommendations to improve the Drayage industry. That report, known as the “Reddy and Bell Report”, was released to the public on October 15, 2014.

[15] On October 23, 2015, the Province of British Columbia introduced Bill 5 -2014, *Container Trucking Act,* 3rd Sess, 40th Parl., British Columbia, 2014. On December 19, 2014, the *Act* and the *Regulation* were enacted and became law.

[16] In January 2015, each of the petitioners signed a licence assuming the obligation to pay their truck drivers in accordance with the *Act* and *Regulation.* They also signed a statutory declaration confirming compliance.

[17] On February 15, 2015, Mr. Andy Smith was appointed Commissioner pursuant to the *Act.* At that time, he was the President and CEO of the BC Maritime Employer's Association.

[18] On July 19, 2015, Unifor filed a complaint against Commissioner Smith under s. 26 of the *Act* and requested an independent decision maker be appointed. Unifor was concerned that the retroactive pay required by the *Act* was not being enforced.

[19] On September 15, 2015, Commissioner Smith resigned. On October 6, 2015, Ms. Bell was appointed interim Commissioner and Mr. Reddy was appointed interim Deputy Commissioner under the *Act*.

[20] On November 5, 2015, Commissioner Bell advised the Companies that the issue of retroactive pay to April 3, 2014, required immediate attention. She required the Companies to ensure Truckers would be paid the revised minimum rates, failing which penalties would be assessed and other sanctions imposed.

[21] A follow-up memo was issued to the trucking industry on November 16, 2015, with the provision that the Commissioner would be conducting audits of offending Companies.

[22] On December 11, 2015, the Commissioner issued an industry-wide memo stating that all retroactive pay must be paid to the Truckers by January 22, 2016 or penalties would be imposed. A follow-up memo was issued January 20, 2016.

[23] This petition was filed on January 29, 2016, and each of the respondents served on February 4, 2016.

[24] On February 25, 2016, the petitioners served a notice of constitutional question on the Attorney General of British Columbia ("AGBC") in accordance with s. 8(3) of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68.

[25] As stated above, Unifor previously represented unionized Truckers under a collective agreement with two of the petitioners in this proceeding, Aheer and Sunlover. It takes the position that, despite being recently decertified and no longer representing Aheer's and Sunlover's drivers, the rights and duties under the collective agreements in place prior to its decertification continue to be enforceable against Aheer and Sunlover. Those collective agreements provide*, inter alia*, for increased rates of pay for Truckers in accordance with the JAP.

[26] Unifor has filed a grievance pursuant to those collective agreements, which is currently before Arbitrator James Dorsey in related proceedings ("Related Proceedings"). On April 11, 2016, submissions were made in the Related Proceedings. Arbitrator Dorsey adopted Sunlover's position and adjourned the Related Proceedings pending the outcome of this petition on the basis that the grievance may become moot if the petition is successful.

[27] It is on this background that these applications were brought.

Unifor's Position

[28] Even though Unifor's position before Arbitrator Dorsey is that the terms of the collective agreement regarding pay rates for truckers apply regardless of the outcome of this petition, Unifor argues it has a direct interest in the outcome of these proceedings and ought to be joined as a party.

Petitioners' Position

[29] The petitioners take the position that the issues involved in this petition are narrow in scope and simply require the Court to interpret the *Act* to determine if its wording allows the *Regulation* to require retroactive payments to the Truckers. The purpose of notice under s. 8 of the *Constitutional Questions Act* is to allow the AGBC to argue these sorts of issues on behalf of all British Columbians who may

be affected by the outcome of the petition. Adding Unifor as a respondent will add nothing to the legal argument.

[30] The petitioners point to the Supreme Court of Canada decision in *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, where Justice Sopinka explains at 264-265:

> …In our constitutional democracy, it is the elected representatives of the people who enact legislation. While the courts have been given the power to declare invalid laws that contravene the *Charter* and are not saved under s. 1, this is a power not to be exercised except after the fullest opportunity has been accorded to the government to support its validity. To strike down by default a law passed by and pursuant to the act of Parliament or the legislature would work a serious injustice not only to the elected representatives who enacted it but to the people. Moreover, in this Court, which has the ultimate responsibility of determining whether an impugned law is constitutionally infirm, it is important that in making that decision, we have the benefit of a record that is the result of thorough examination of the constitutional issues in the courts or tribunal from which the appeals arise.

[31] The petitioners argue that the AGBC is perfectly capable of arguing the merits of the petition on behalf of the Truckers and notice does not need to be given to them. The AGBC has already filed a response to the petition opposing the orders sought in it and will present all available arguments in defence of the validity of the impugned *Regulation*. No purpose would be served by providing notice to unknown masses of Truckers.

[32] Further, given the sheer number of Truckers and impossibility to identify those who may be affected, requiring the petitioners to serve them would be onerous, expensive and have the practical effect of defeating the petition on a matter of procedure.

[33] Further, the petitioners say that the issue raised in this petition is a matter of statutory interpretation and ought to be decided independent of the complex nature of the container trucking business, the 100 or so trucking companies involved, the 1720 trucking licences issued by the PMV and Truckers numbering approximately 2000.

Respondents' Position

[34] The respondents take no position on Application No. 1.

[35] Respecting Application No. 2, the respondents say that the Truckers are entitled to be notified of this petition because their interests *may* be affected by the petition's outcome. Rule 16-1(3) of the *Supreme Court Civil Rules* requires that the petitioners personally serve the petition on each of the Truckers, as well as each union representing the affected truck drivers.

[36] The respondents submit that this case is exceptional because if the petitioners are successful, they will argue that a third-party, the Truckers, will become liable to repay the retroactive pay they have received. Therefore, as a matter of fairness, the Truckers should be made aware of the petition.

Application #1: Should Unifor be added as a party?

[37] Yes.

[38] Unifor's application is brought pursuant to Rule 6-2(7) of the *Rules* and the Court's inherent jurisdiction.

[39] Rule 6-2(7) governs the addition of a party to a proceeding:

> (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
>
> (a) order that a person cease to be party if that person is not, or has ceased to be, a proper or necessary party,
>
> (b) order that a person be added or substituted as a party if
>
> (i) that person ought to have been joined as a party, or
>
> (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and
>
> (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
>
> (i) any relief claimed in the proceeding, or
>
> (ii) the subject matter of the proceeding
>
> that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[40] In *Kitimat (District) v. Alcan Inc.*, 2006 BCCA 562 [*Kitimat*], the Court of Appeal stated (in respect of now Rule 6-2(7)(b)(i)) that the use of the word "ought" encompasses all the cases where adding a party is necessary, but may be even

broader and include situations were joinder is more than a mere convenience but less than a necessity: para. 29.

[41] In *Canadian Labour Congress v. Bhindi* (1985), 61 B.C.L.R. 85 at 95, the Court of Appeal stated in dealing with the predecessor to Rule 6-2(7):

> … In my opinion, R. 15 of the Supreme Court Rules is not applicable to the case on appeal. It is only applicable to cases where the party sought to be added has a direct interest in the outcome of the particular action between the particular parties. It is not intended to cover cases where a person can be granted standing on the basis of being affected by the answer to the legal question in dispute, rather than being affected by the precise outcome between the parties.

[42] In *Lau v. Canada (Attorney General)*, 2014 BCSC 2384 [*Lau*] at para. 35, Justice Fitzpatrick stated that the court's approach to applications to join a party to a proceeding should be generous. The party should be added unless the application is frivolous. The bar is low.

[43] In my opinion, there are three reasons why Unifor should be added as a party to the litigation, pursuant to both Rule 6-2(7)(b)(ii) and (c)(i)(ii), and I so order.

[44] Firstly, the outcome of the petition may be determinative of the outcome of the Related Proceedings. In his reasons for adjourning the hearing, Arbitrator Dorsey correctly confirmed that it remains his role to interpret the language of the collective agreement between Unifor and Sunlover. Nonetheless, the outcome of this petition could have a significant impact on the Related Proceedings. I find it significant that they have been adjourned until this petition has concluded. At the very least, I anticipate that if the petitioners are successful on this petition, they will argue that it ought to be determinative of the Related Proceedings. Therefore, an issue exists between Unifor and the petitioners that is intimately connected with the subject matter and the relief claimed in the petition. On this basis alone, Unifor ought to be added as a party to this petition.

[45] Secondly, Unifor argues that bringing the petition violates agreements between itself and two of the petitioners (Sunlover and Aheer). The collective agreements executed on November 28, 2015, committed Sunlover and Aheer not to engage in any legal challenges to the *Act* and/or its regulations. I understand that counsel for the petitioners takes the position that this clause was agreed to in

bad faith and has brought a complaint to the BCLRB to have it declared unenforceable. The complaint was dismissed in *Sunlover Holding Co. Ltd. and Unifor, Local Union No. VCTA*, [2016] BCLRB No B53/2016. However, Sunlover has applied for reconsideration of that decision. This is an issue that may have an impact on Sunlover's and Aheer's ability to challenge the *Regulation* and Unifor should have the ability to argue the point at the hearing of the petition.

[46] Finally, I note Unifor's argument that the core purpose of the petition is the "non-payment and/or recovery of retroactive pay that was payable to Unifor truckers, including Unifor truckers employed at Sunlover and Aheer." While it is not necessary at this stage to comment on the petitioners' motives for bringing this petition, the evidence before me does not rule out this scenario. It is possible that if the petition is allowed, the petitioners will seek reimbursement of the already paid retroactive fees from the Truckers, some of whom are represented by Unifor. This could involve significant sums of money having to be repaid by Truckers and could have serious financial consequences to them.

[47] Given the already complex nature of the dispute, the addition of Unifor as a party will not cause significant inconvenience to the parties.

[48] On the material before me, it is my opinion that Unifor's participation in this proceeding is necessary to ensure that all matters may be effectually adjudicated on.

[49] It is also my opinion that because of the relief claimed by the petitioners and the subject matter of the petition, it is just and convenient that Unifor be added as a party so that the Truckers' interests can be represented and the Court will have the benefit of Unifor's submissions. While I understand that Unifor represents a small sampling of Truckers, it is a sufficient representation that the interests of the Truckers in general will be protected.

[50] Accordingly, the outcome of this proceeding *may* affect Unifor's legal rights. As stated by Fitzpatrick J. in *Lau*, provided the application is not frivolous, the threshold for adding a party in these circumstances is low.

[51] In sum, I order that Unifor shall be added as a party respondent to the petition and not as an intervenor: see *Kitimat* at para. 45.

Application #2 - Should the Petitioners be required to give notice of the Petition to individual truckers?

[52] Yes.

[53] The Petitioners seek direction from the Court regarding whether they are required to give notice of the petition to the Truckers. This application is brought pursuant to Rule 16-1(3) and s. 8 of the *Constitutional Question Act.*

[54] Shortly after the petition was filed, the respondents took the position that the Truckers were persons whose interests could be affected by the petition's outcome and must be served.

[55] The petitioners argue that the only notice that need be given is to the AGBC, pursuant to s. 8 of the *Constitutional Questions Act.* I agree with the respondent AGBC that the *Constitutional Question Act* does not override Rule 16-1(3).

[56] Rule 16-1(3) provides:

> Unless these Supreme Court Civil Rules otherwise provide *or the court otherwise orders*, a copy of the filed petition and of each filed affidavit in support must be served by personal service on all persons whose interests may be affected by the order sought.
>
> [Emphasis added]

[57] By the words "or the court otherwise orders", the court retains discretion to order that personal service on persons whose interests may be affected by the order sought is not required.

[58] The test for who is entitled to notice is separate from the question of who may be added as a party and is given a broad interpretation: *Kitimat* at para 20.

[59] During the hearing of these applications all parties agreed that requiring the petitioners to serve the Truckers was unrealistic and unmanageable. There is no easy way to determine how many Truckers may be affected if the petitioners are ultimately successful. Some Companies have paid the Truckers retroactively. Others have not. Some Companies will likely continue to pay the Truckers regardless of the petition's outcome.

[60] Further, the materials that have been filed are volumous and the expense to the petitioners if service on the Truckers was required would be would be prohibitive.

[61] I have already ordered that Unifor will be added as a respondent to this proceeding. Although Unifor does not represent the Truckers as a whole, it represents a sufficient number of them that their interests will be heard and, I have no doubt, ably represented.

[62] Accordingly, even though the Truckers' interests *may* be affected by the outcome of this petition, I am satisfied that their interests will be protected by Unifor and the respondents' involvement. I exercise my discretion and order that the petitioners are not required to personally serve the Truckers with the petition or the supporting material.

[63] However, the petitioners have made it clear that they may seek reimbursement of retroactive pay from the Truckers if the petition is successful. The petitioners concede that the Truckers may "indirectly" be affected. I therefore agree with the respondents that the Truckers should be given some form of notice of the proceedings. I am satisfied on the material filed and counsel's submissions that there are centralized methods of communications, such as notice boards, industry bulletins and newsletters available in the Drayage industry where the Truckers could be given effective notice of the petition. Unifor already had notice and through it, so does its members. Likewise, I am satisfied that notice to UTA would result in its members being similarly notified.

[64] Rule 4-4 permits the court to order substitutional service in cases where it is impracticable to serve a document by personal service. Such substitutional service can include advertisements in newspapers.

[65] Given that the petition is set to be heard the week of June 27, 2016, prompt notice should be given. I direct that within seven days of the release of these reasons, the petitioners notify UTA of these proceedings by emailing a copy of the petition and responses and a copy of these reasons to its offices. The petitioners must also apply to the court under Rule 4-4 for an order for substitutional service on the Truckers.

Disposition

[66] Regarding Application #1, I order that Unifor be added as a respondent to this proceeding.

[67] Regarding Application #2, I order that the petitioners do not have to serve the petition or supporting affidavits on the Truckers. However, within seven days, the petitioners must give notice of this proceeding to UTA by emailing a copy of the petition, response and these reasons to its offices and must apply for an order for substitutional service on the Truckers.

"G.P. Weatherill J."