IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Aheer Transportation Ltd. v. Office of the British Columbia Container Trucking Commissioner,* 2017 BCSC 1111

Date: 20170630
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

Corrected Judgment: this judgment was corrected on page 1 on July 6, 2017 and at paras. 2 and 3 on July 19, 2017

Before: The Honourable Mr. Justice Schultes

Reasons for Judgment

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Place and Date of Hearing:	Vancouver, B.C. September 20-21, 2016
Place and Date of Judgment:	Vancouver, B.C. June 30, 2017

1. INTRODUCTION

[1] In February of 2014, the container truck drivers who provide services to the various ports in the Vancouver area withdrew their services. This economically disruptive action was the culmination of a lengthy history of discord in the industry. The federal and provincial governments and representatives of the drivers eventually arrived at a "Joint Action Plan" for resolving the dispute in March and the drivers returned to work in April.

[2] In December of that year, in an effort to address the problems that had led to the withdrawal, the provincial government created the Office of the British Columbia Container Trucking Commissioner. Its empowering legislation, the *Container Trucking Act*, S.B.C. 2014, c. 28, established the initial rates and fuel surcharges that must be paid to drivers who provide these services.

[3] Crucially, the *Container Trucking Regulation*, BC Reg. 248/2014, created pursuant to the Act, purported to authorize payment to drivers of these rates and fuel surcharges on a retroactive basis, to cover the period after the drivers returned to work but before the Regulation came into force in December.

[4] The petitioners are companies that provide container trucking services and either employ drivers or hire their services as independent contractors. They seek

a finding that ss. 19, 22, and 23 of the Regulation are invalid, because the Act does not actually authorize their retroactive effect.

[5] In the event that argument does not succeed, they seek judicial review of what they say was a patently unreasonable interpretation by the British Columbia Container Trucking Commissioner of the term “off-dock trip”, a term of art in the industry, as defined in s. 1.1 of the Regulation.

[6] The respondents submit that the language of the empowering legislation clearly provides for retroactive payments of this kind. With respect to the judicial review, they say that the absence of an actual decision on this issue by the Commissioner, with the record that would normally accompany it, makes judicial review of his interpretation inappropriate at this point.

[7] The roles of the Commissioner and the Attorney General as respondents in this petition are obvious. As to Unifor, it is the union that previously represented drivers at two of the petitioner companies, although it has since been decertified in relation to them. It was granted status as a party in a pre-hearing application on May 20, 2016[1] on the basis that the outcome of the petition could affect its legal rights.

[8] Because the Commissioner and Attorney General as the main respondents advanced different arguments than Unifor in some respects, I will refer to them as “the government respondents” and Unifor by its own name, to distinguish them.

2. BACKGROUND AND LEGISLATION

[9] While all counsel agree that the retroactivity issue will be resolved as a matter of statutory interpretation, they have also relied on the events leading up to the coming into force of the Act and Regulation as relevant context for determining the legislative intent of the relevant provisions. Therefore, it will be helpful to set out some of the background.

[10] The business of moving containers to and from ports and between storage locations is known as the drayage industry. It involves areas of both federal and provincial jurisdiction and regulation. The federal authority that manages ports in the lower mainland is known as Port Metro Vancouver.

[11] In the lower mainland most of this work is done by non-union drivers. They are either employees of companies like the petitioners, driving company-owned trucks and for the most part being paid hourly; or owner-operators providing their services to those companies, driving their own trucks and for the most part being paid per trip.

[12] A distinction is drawn in the industry between two types of container movements that are carried out by drivers. “On-dock” moves are those in which a container goes to or from a port. “Off-dock” moves are to or from a location other than a port, such as a container storage facility.

[13] Disputes leading to withdrawal of services by drivers had also occurred in 1999 and 2005. The main concerns from the drivers’ point of view throughout this process were rates of payment for trips, the fuel surcharges that they received and other related issues that affected their earnings, such as waiting times to load and unload at the ports.

[14] The 2005 dispute had been resolved by a memorandum of understanding that established minimum rates of payment for drivers. These were known as the “Ready Rates” because of the involvement of well-known labour mediator Vince Ready in recommending the terms for resolving the dispute. By regulation the federal government subsequently required companies to pay the Ready Rates as a condition of their access to the ports.

[15] By 2014 those rates were being widely “undercut” -- competition between companies was resulting in lower rates than the minimum being paid to drivers -- with the result that some drivers were making less than before the 2005 dispute. Fuel surcharges had also not been raised for a significant period. The resulting economic pressures on the drivers, exacerbated by long wait times at the ports, led to the February 2014 withdrawal of service.

[16] The Joint Action Plan to end the withdrawal was agreed to on March 26, 2014. In addition to the participation of the federal and provincial governments in the negotiation process, the drivers were represented by an unincorporated association and, in the case of its unionized workers, Unifor. It is an important fact from the petitioners’ perspective that the companies were not part of the process that led to the creation of the Plan.

[17] For the purposes of this petition, the significant aspects of the Plan were that:

- The federal government committed to an increase in per-trip rates by 12% from the Ready Rates, as well as a doubling of the multiplier rate to calculate fuel surcharges. The per-trip rates were to take effect 30 days after the return to work and there was a provision to compensate the drivers for the period from seven days after that return to the date of the increase, by a “temporary rate increment.”

- A mechanism was to be established to attach a “benchmark minimum” rate for all hourly-paid drivers to the federal regulation ($25.13 per hour initially and $26.28 after one year of service).

- A mechanism was also to be put in place to ensure that off-dock trips were compensated “in a manner consistent with the revised rates”.

- Port Metro Vancouver was required to pay fees to the companies in the event of excessive waiting time for their trucks when attending the ports. The companies were required by the Plan to pass those fees on to owner-operators. The amount of the fees increases with the length of the delay.

- Since the Plan was the means of resolving the dispute, and the withdrawal was to end upon it being reached, there was no need to address the issue of retroactive payment, except for the temporary rate increment for the period between seven and 30 days after the return to work.

- Mr. Ready, who had been asked to make recommendations to resolve this dispute before the Plan was agreed to, was now “seized with” issuing recommendations about its implementation, which were to be acted upon within 90 days of the return to work by the drivers.

[18] The petitioners stress the non-binding nature of the Plan and the number of significant issues that it either left vague or did not deal with, such as whether benefits were included in the rates.

[19] On April 3 the federal government, by regulation, made adherence to the increased per-trip rates and fuel surcharges contained in the Plan a condition of access to the ports by license holders. This regulation did not incorporate the increase in hourly rates that had been described in the Plan, or any of its other recommendations.

[20] The drivers returned to work on that date. Despite their return, Unifor members remained in a legal strike position until they reached a new collective agreement.

[21] No other steps were taken within the 90-day commitment that had been made under the Plan. This meant that only those drivers being compensated on a per-trip basis (overwhelmingly owner-operators) had yet received any officially-sanctioned increase over the Ready Rates.

[22] Mr. Ready and Corinn Bell, another well-known labour mediator, delivered their recommendations for implementation of the Plan to the federal and provincial governments in September of 2014. Their report was then publicly released in October.

[23] They recommended the establishment of a provincial agency to oversee various aspects of the industry, including licensing of trucks and the setting and enforcement of driver rates, both on- and off-dock, and fuel surcharges.

[24] They also made recommendations for a structure of compensation that addressed all of these rates and charges. Specifically, the per-trip and hourly rates from the Plan were to be implemented, as well as the fuel surcharges. The “relatively small” group of employee drivers who were paid by the trip should also receive minimum per-trip rates. They recommended a payment model for off-dock moves based on a formula that takes into account the time and distance involved in each move.

[25] They declined to recommend a move to hourly rates “across the board” in the industry, despite its potential benefits, because at that point it was not possible to come to a general agreement about what such rates should be, or the circumstances in which they would be paid.

[26] Mr. Ready and Ms. Bell did not address the issue of retroactive payment for the period between the return to work following the withdrawal and the

implementation of new rates in their recommendations. The petitioners stress that to this point there had been no indication of a retroactive implementation in any of the processes that had taken place since the drivers' return to work.

[27] The Act came into force on December 22, 2014. As I have said, it established the position of Commissioner. It required that all container trucking services be carried out under licenses issued by the Commissioner and in compliance with the Act and Regulation.

[28] Section 22 of the Act provides the authority to establish initial and subsequent rates and fuel surcharges:

> **Rates and fuel surcharges may be established**
>
> 22 (1) The Lieutenant Governor in Council may, by regulation,
>
> (a) establish an initial minimum rate that a licensee must pay to a trucker who provides, in specified circumstances, specified container trucking services to or on behalf of the licensee,
>
> (b) establish a rate under paragraph (a) based on one or more of the following:
>
> (i) a rate per trip;
>
> (ii) an hourly rate;
>
> (iii) any other basis the Lieutenant Governor in Council considers appropriate,
>
> (c) for the purposes of paragraph (a), specify one or more circumstances and one or more container trucking services on any one or more of the following:
>
> (i) the starting point of the container trucking services;
>
> (ii) the end point of the container trucking services;
>
> (iii) the geographic area within which the container trucking services are carried out;
>
> (iv) the dates or times of the container trucking services;
>
> (v) the duration or distance travelled during the carrying out of the container trucking services;
>
> (vi) any other basis the Lieutenant Governor in Council considers appropriate,
>
> (d) for the purposes of paragraph (b) (i), specify which container trucking services or which parts of the container trucking services constitute a trip to which a rate established under paragraph (b) is to apply,
>
> (e) specify the time by which a rate established under paragraph (a) must be paid, and
>
> (f) establish an initial minimum fuel surcharge, based on a specified unit of fuel used during the provision of container trucking services,

that a licensee must pay to a trucker who provides, in specified circumstances, specified container trucking services to or on behalf of the licensee.

(2) For certainty, an initial minimum rate and an initial minimum fuel surcharge established under subsection (1) may be based on container trucking services provided before this section comes into force.

(3) If the Lieutenant Governor in Council repeals the initial minimum rate established under subsection (1), the commissioner may establish, by order, a minimum rate, and, for that purpose, subsection (1) applies as if a reference in that subsection to the Lieutenant Governor in Council were a reference to the commissioner.

(4) If the Lieutenant Governor in Council repeals the initial minimum fuel surcharge established under subsection (1), the commissioner may establish, by order, a minimum fuel surcharge, and, for that purpose, subsection (1) applies as if a reference in that subsection to the Lieutenant Governor in Council were a reference to the commissioner.

(5) An order made under subsection (3) or (4) comes into force on the date the order is published under section 11 or on a later date specified in the order.

[Emphasis added.]

[29] "Initial minimum rate" is not otherwise defined.

[30] As I mentioned, ss. 19, 22 and 23 of the Regulation are the ones that require the retroactive payments that are in issue:

Back pay

19 (1) On the date this regulation comes into force, it is a condition of every licence that the licensee pay each trucker who performed an on-dock trip on behalf of the licensee on or after April 3, 2014 any amounts owed under this section.

(2) A trucker is owed the difference, if any, between the following:

(a) the amount the trucker would have been paid for container trucking services performed on behalf of the licensee on or after April 3, 2014 if this regulation had been in force on the date the container trucking services were performed;

(b) the amount the trucker was in fact paid for the container trucking services, not including amounts the trucker was paid as a fuel surcharge.

(3) An independent operator paid per trip is owed the difference, if any, between the following:

(a) the amount the independent operator would have been paid for any on-dock or off-dock trips performed on behalf of the licensee on or after April 3, 2014 if this regulation had been in force on the date the trip was performed;

(b) the amount the independent operator was in fact paid for the on-dock or off-dock trip, not including any amounts the independent operator was paid as wait time remuneration or fuel surcharges.

…

Back fuel surcharge for independent operators

22 On the date this regulation comes into force, it is a condition of every licence that a licensee pay each independent operator who performed container trucking services on behalf of the licensee on or after March 27, 2014, the difference, if any, between the following:

(a) the amount the licensee would owe the independent operator in fuel surcharge if this regulation had been in force when the independent operator performed the container trucking services on behalf of the licensee;

(b) the amount the licensee paid the independent operator for the fuel surcharge.

Wait time remuneration

23 On the date this regulation comes into force, it is a condition of every licence that a licensee pay each trucker who performed container trucking services on behalf of the licensee on or after April 3, 2014, and is, or was, paid per trip, all amounts paid to the licensee as wait time remuneration[2]. [Emphasis added.]

[31] The petitioners have paid the retroactive amounts required by the Regulation in order to maintain their status as licensees under the Act and avoid the significant penalties for non-compliance that it provides.

3. ARGUMENTS

a. The Petitioners

i. Sufficiency of the Authorizing Legislation

[32] The legal principle underlying the petitioners' argument is the presumption that the legislature did not intend to create provisions that have retroactive or retrospective effect or interfere with vested rights[3]. This long-standing presumption has a close relationship to the rule of law, because of the inherent unfairness of imposing a different legal standard on past events when people have governed their conduct based on the law as it then stood[4]. The petitioners refer to authority that the presumption is "heavily weighted" and "difficult to rebut"[5].

[33] To rebut it, the reviewing court needs to be able to discern "a clear legislative intent" that the law is to operate in that manner[6]. Phrases such as

"crystal clear"[7], "manifest"[8] and "so clear that it cannot be reasonably be interpreted otherwise"[9] have been used by courts to describe the necessary standard of clarity needed demonstrate an intention of retroactivity.

[34] In addition to the basic unfairness of being the subject of a retroactive increase in their obligations, the petitioners have entered into financial arrangements with their clients and drivers on the basis of their financial obligation to the drivers as it was known to them -- the more narrowly-focused changes that were actually made by the federal government arising from the Plan. A retroactive application of the extensive additional obligations created by the Regulation would also interfere meaningfully with those vested rights.

[35] Starting with the language of the enabling statute, the petitioners submit that s. 22(2) of the Act, which is the only potential support in it for the retroactive effect of the Regulation, does not meet the standard of clarity required to demonstrate the legislative intent that is being attributed to it. They say that any implication that retroactive payments are authorized by it is negated by the language of the rest of s. 22.

[36] The authority to set the initial minimum rate conferred by s. 22(1)(a) is with respect to "a trucker *who provides*…container trucking services" (emphasis added). This is exclusively prospective language. Further, the words "based on", which are key to the operation of s. 22(1) are used elsewhere in the same section. In s. 22(1)(b) they indicate the units of measurement by reference to which the initial minimum rate may be set. In s. 22(1)(f) they indicate the unit of fuel by reference to which an initial minimum surcharge may be set. In both cases "based on" used to mean "justified by" or "founded upon".

[37] In the petitioners' submission that is the proper meaning to be attributed to those words in s. 22(2) as well. Leaving aside the opening phrase "For certainty", which they say is superfluous and does not refer to anything, the following words, "…an initial minimum rate and an initial minimum fuel surcharge established under subsection (1) may be based on container trucking services provided before this section comes into force" clearly means that the new rates can be set based on, *in other words, with reference to* what they were previously. It says nothing about when such a rate comes into effect.

[38] Adding force to this argument is the fact that there actually was a previous rate in effect -- the Ready Rates plus 12% that the Plan recommended and that the federal government tied to the companies' port access by its regulation. This is in contrast to the totally new kinds of rates that the Act created.

[39] Put simply, the submission is that when read in the context of the entire section and the history of the dispute, "based on" in s. 22(2) makes sense as a unit of measure, not as an indication of when it applies.

[40] In his reply submissions, the petitioners' counsel expanded on this suggested reading of the subsection. He argued that the need to include it arose from the fact that the Province was taking over regulatory responsibilities that had previously been federally managed, and was establishing rates that had never existed before. It was therefore necessary to make explicit that when establishing those rates the Lieutenant Governor in Council could look to the kinds of services that had been provided previously by drivers.

[41] Even if that interpretation is not accepted, and one attempts to read s. 22(2) as authorizing retroactive payments, the petitioners submit that the meaning conveyed by the language used, at its best, is not "crystal clear". Without that degree of clarity, the presumption that there was not a legislative intention to address past services, thereby interfering with the petitioners' vested rights, cannot be rebutted.

[42] The petitioners concede that a requirement of retroactivity can be expressed in legislation in different ways, but emphasize that it still has to be clear. To demonstrate that the legislature is quite capable of using clear language when retroactivity is actually its intention, they have provided a list of 36 other provincial statutes that make explicit reference to their retroactive operation. For example, s. 125(4) of the *Water Sustainability Act*, S.B.C. 2014, c. 15, provides that "[a] fee, rental or charge may be made retroactive…" The phrases "is retroactive" and "may be made retroactive" are used frequently in these examples.

[43] Although they acknowledge that the legislative debates accompanying the passage of the Act (commonly referred to as "Hansard") can be considered as extrinsic aids to interpretation, the petitioners stress the caution that must be attached to such an exercise:

> [47] This Court has observed that, while Hansard evidence is admitted as relevant to the background and purpose of the legislation, courts must

> remain mindful of the limited reliability and weight of such evidence (*Rizzo & Rizzo Shoes Ltd., (Re),* [1998] 1 S.C.R. 27, at para. 35; *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484; Sullivan, at pp. 608-14). Hansard references may be relied on as evidence of the background and purpose of the legislation or, in some cases, as direct evidence of purpose *(Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 44, *per* LeBel and Cromwell JJ.). Here, Hansard is advanced as evidence of legislative intent. However, such references will not be helpful in interpreting the words of a legislative provision where the references are themselves ambiguous (*Placer Dome Canada Ltd. v. Ontario (Minister of Finance),* 2006 SCC 20, [2006] 1 S.C.R. 715 (S.C.C.), at para. 39, *per* LeBel J.)…[10] [Emphasis added.]

[44] In this case the petitioners submit that the legislative proceedings in connection with the legislation are “confused and ambiguous” and do not assist in ascribing an intent to the words actually used in s. 22(2), which is of course the exercise in which a court is to engage.

[45] For example, the Minister of Transportation, who was responsible for putting forward the legislation, referred to dealing with the issues in the industry “on a go-forward basis, including rates of trucker pay”. The terms “go-forward” or “moving forward” were also used to describe the Commissioner’s ongoing responsivities with respect to setting and enforcing rates. In addition, the Minister made repeated references to using the rates negotiated in the Joint Action Plan as “a starting point”, without ever suggesting that they were to take effect retroactively.

[46] While there were exchanges with opposition members in which the Minister referred to retroactivity in relation to amounts owed to drivers by the companies, and specifically to s. 22(2) as the section that addressed it, I am asked to bear in mind that these questions and answers took place within the context of the enforcement of what had been agreed to in the Plan -- the Ready Rates plus 12% and the increased fuel surcharge multiplier. Nowhere had the retroactivity of the newly-imposed rates been previewed.

[47] Such was the degree of vagueness and ambiguity in the language of s. 22(2) that well into 2015 the Commissioner himself was interpreting the Act in the way that is now being argued by the petitioners. They have provided copies of pages from the Commissioner’s website that, according to the affidavit of Mr. Aheer, the proprietor of the first-named petitioner, were printed in November of 2015. Under the heading “Joint Action Plan” in the “History & Mandate” section of

the site, the page states that the Plan "is not prescriptive with respect to retroactivity applying to all rates". In the same section, under "Provincial Rate Regulations" it states:

> Provincial regulations only apply a requirement for retroactive payment to on-dock moves for Independent Operations paid by the trip and the fuel surcharge

(Those were of course the changes created by the Plan that were reflected in the federal regulation.)

[48] It was only after the first commissioner resigned in September of 2015 and Mr. Ready and Ms. Bell were appointed as acting commissioners in October that an interpretation that imposed retroactivity across the board for the rates in the Act was applied.

ii. Review of the Commissioner's Interpretation

[49] When the Regulation came into force, s. 1.1 defined "off-dock trip" as meaning:

> …one movement of a container by a trucker from one facility in the Lower Mainland to a different facility in the Lower Mainland, but does not include
>
> (a) an on-dock trip,
>
> (b) a short trip, or
>
> (c) a movement of a container from one location in a facility to a different location in the same facility;

[50] "Short trip" was defined in that same section as meaning:

> …one movement of a container a distance of 5 km or less by a trucker from one facility to a different facility;

[51] On May 14, 2015 the section was amended to delete the definition of "short trip" and the reference to it in the definition of "off-dock trip". It also substituted the words "of one or more containers" for "of a container" in the definition.

[52] Relevant to an understanding of the issue raised by the petitioners is the definition of "on-dock trip" as meaning:

> …one movement of a container by a trucker from
>
> (a) a marine terminal to a location in the Lower Mainland, or
>
> (b) a location in the Lower Mainland to a marine terminal;

[53] As was the case for off-dock trips, the words “one or more containers” were substituted for “of a container” by the May 2015 amendments.

[54] Mr. Aheer deposes that his company has been audited twice by the Commissioner in relation to work by his drivers between April 3 and December 31, 2014, which encompasses the retroactive period in question in this petition. In each case the auditor acting on behalf of the Commissioner has treated each movement of a container as a separate off-dock trip for the purposes of the rate paid to the driver. As an example, Mr. Aheer cited the movement of a container between two facilities on October 28, which was followed by its movement to a third facility the following day. The auditor assessed the off-dock rate for each move, despite what the petitioners contend is the clear language of the Regulation that an off-dock trip consists of one move.

[55] They submit that such an interpretation by the Commissioner is “patently unreasonable”, which all parties agree is the appropriate standard of review to be applied here. The only reasonable way to interpret the express language of the definition, it is argued, is that the prescribed rate for an off-dock trip is applied to one movement of a container before it returns to a port in the form of an on-dock trip. Otherwise the rate would apply to unlimited numbers of moves between facilities that have no connection at all to a port, simply because the container at one time came from a port. In contrast, the moves of a container that had never met the definition of an off-dock move would not be subject to these payments at all.

[56] Practical considerations also favour undertaking a judicial review at this point, the petitioners argue. The Commissioner’s approach, as demonstrated in the audit process, raises a straightforward issue of the reasonableness of that statutory interpretation, one that does not require a further record for this court to review it effectively. And compelling the petitioners to request a reconsideration from the Commissioner, as provided under the Act, and be denied before they seek a review, subjects them to the unacceptable risk of fines and licence suspensions for non-compliance in the interim.

b. The Respondents

i. Sufficiency of the Authorizing Legislation

[57] The government respondents emphasize that the presumption against retroactivity and retrospectivity relied on by the petitioners is only a rule of construction. Legislatures can and do create laws that have such effects and no particular language or technique is required in order to achieve them, as long as the intention is expressed clearly[11]. Even when there is no express language in the statute, indications such as the purposes of the legislation and the circumstances in which it was adopted, the procedure employed by the legislature, or the fact that a retroactive interpretation is the only one that makes sense, may all lead to a finding of such intent[12].

[58] It is also important, they submit, to balance against the presumption against retroactivity the equally important presumption of the validity of regulations. The Supreme Court of Canada has held that this presumption "favours an interpretative approach that reconciles the regulation with its enabling statute so that, *where possible*, the regulation is construed in a manner which renders it *intra vires* (emphasis in original)"[13]. And when a court is engaged in that process, "[b]oth the challenged regulation and the enabling statute should be interpreted using a broad and purposive approach ... consistent with [the Supreme Court's] approach to statutory interpretation generally"[14]

[59] In contrast to this correct approach, they characterize the petitioners' proposed reading of s. 22(2) as "formalistic and technical".

[60] It makes no sense, in the government respondents' submission, for the legislature to have enacted s. 22(2) solely to endorse the ability of the Lieutenant Governor in Council to consider past events when setting initial minimum rates. All legislation is to be construed as remedial[15] and there would have been no need to authorize the consideration of the events that preceded a remedial scheme, when it had been enacted specifically to address those events. Such an intention would render the section superfluous, and the presumption against tautology, under which "[e]very word in a statute is presumed to make sense and to have a

specific role to play in advancing the legislative purpose" weighs against an interpretation that leads to that outcome[16].

[61] The legislative debates surrounding the passage of the Act also support an intention of retroactivity. The government respondents cite a statement by the Minister during them in which he stated that:

> The rates - hourly and trip - and fuel charges are all well known, well understood, have been in the public domain for the better part of this year and were reinforced through the recommendations that came out of the Ready-Bell report. Those rates will form the starting point of this regulation[17]. [Emphasis added.]

[62] And, in response to a question about "[h]ow broad is the retroactivity?" the Minister said that the retroactive date for the fuel surcharge would be March 27, and for the hourly and trip rates April 3[18].

[63] In essence, the respondents contend that s. 22(2) clearly demonstrates the Legislature's purpose. In fact, they say that the intent of the Act to require the retroactive payments in the Regulation might have been sufficiently implied by the circumstances leading up to the legislation, including the commitments made in the Plan, even without that subsection. But the Legislature, "for certainty" chose to authorize it expressly.

[64] In that regard, the respondents say that reference to statements on the Commissioner's website about what specific payments the retroactive obligations applied to are "unhelpful." Even if those statements reflect a different view than the subsequent commissioners have applied, that is not relevant to the statutory analysis here, which involves discerning the Legislature's intentions.

ii. Review of the Commissioner's Interpretation

[65] The respondents submit that I should decline to consider the petitioners' argument under this heading, because it was never raised by them before the Commissioner. The Act permitted them to raise the interpretation of "off-dock trips" before him and to seek reconsideration of his initial decision if necessary. Entertaining their argument for the first time on judicial review would allow them to bypass the Commissioner in an area of his exclusive jurisdiction under the legislation.

[66] Even if the merits are considered, the submission is that the attack on the Commissioner's decision is misconceived. The petitioners' alternative reading of "off-dock trips" does not advance their position -- the standard of patent unreasonableness means that the administrative decision-maker is permitted to choose between competing reasonable alternatives[19]. Only a statutory interpretation by the Commissioner that is "clearly irrational", as patent unreasonableness has been characterized in this context[20], would lead to a successful review. That is not what has occurred here, they say.

c. Unifor

i. Sufficiency of the Authorizing Legislation

[67] With respect to the relevant background, Unifor takes issue with the suggestion by the petitioners that only a narrow range of obligations on the companies' part were established by the Plan. In addition to trip rates and fuel surcharges that the petitioners refer to, benchmark hourly rates were put forward in the Plan, as was the commitment to a mechanism for establishing off-dock rates.

[68] Just as importantly, Unifor points out that on April 29, Port Metro Vancouver issued a "Joint Action Plan -- Technical Clarification", which treated payment of the hourly rate contained in the Plan as a requirement, in addition to the trip rate and fuel surcharge that had been established in the federal regulation on April 3. It concluded:

> The Federal and Provincial governments and Port Metro Vancouver are developing a mechanism to ensure the full rate regime in the Joint Action plan is made binding on the sector. In keeping with the intentions of the Joint Action Plan, these rates must be paid or access to the Port will be at risk.

[69] Thus, the petitioners would have been on notice, from early on in the process of resolving the withdrawal of services, that full implementation of the Plan was the goal.

[70] Similarly, Mr. Ready and Ms. Bell stated in their report that "we are of the view that any rates not paid in accordance with the Joint Action Plan to date are owed to drivers".

[71] Like the government respondents, Unifor submits that the comments of the Minister in the Legislature, which make reference to the rates negotiated in March and retroactivity in relation to them, are helpful in identifying the purpose of s. 22(2).

[72] Unifor disagrees that the petitioners have had their vested rights interfered with by the Regulation. Significantly, all of the petitioners agreed to the payments as a term of entering into their licences under the new truck licensing systems developed by Port Metro Vancouver and swore statutory declarations that they had complied with those payments[21]. And, the collective agreement that Unifor negotiated with two of the petitioner companies in November 2015 required that the retroactive payments provided for under the Regulation be made[22]. As a result, it is not accurate to describe these arrangements as having been imposed on the petitioners in interference with their relationships with their customers and drivers.

[73] Unifor also questions whether it was reasonable for the petitioners to assume that the rates they were paying drivers, either before or after the Plan and the federal regulation imposing some of its provisions, were somehow guaranteed to stay the same, or that it would be reasonable for them to enter into commitments with their customers or drivers on that basis. In reality, Unifor says that the vulnerability of rates to change through negotiation or government action was the antithesis of the kind of “tangible and concrete” and ”sufficiently constituted” legal situation that is required to meet the definition of a vested right[23].

[74] Nor can it be said that the drivers obtained any sort of “windfall” through the retroactive provisions. They returned to work on the basis of the increases that they had negotiated in the Plan.

[75] Unifor frames the issue of statutory interpretation here as being “whether the retroactive aspects of the Regulation line up with clear statutory authority under s. 22” of the Act. In its submission, the petitioners do not offer a coherent reading of s. 22(2) on that issue. As the government respondents also pointed out, there would be no reason for the subsection to specifically authorize the Lieutenant Governor in Council to take into account prior experience when setting the initial minimum rates and fuel surcharges, as the petitioners would have me

interpret it, when the events preceding the legislation were self-evidently relevant to arriving at those amounts.

ii. Review of the Commissioner's Interpretation

[76] Like the government respondents, Unifor submits that the reconsideration mechanism before the Commissioner was the appropriate forum for addressing concerns about the interpretation of his empowering legislation, and any judicial review could then have taken place on the basis of a record reflecting his specialized expertise.

[77] On the merits, Unifor submits that it cannot be patently unreasonable for the Commissioner to refuse to read into the definition of off-dock trips an additional limitation (that only one move is to be compensated, no matter how many times the container is actually moved by the driver) that the Legislature clearly decided not to include.

4. DISCUSSION

[78] It is common ground that ss. 19, 22, and 23 of the Regulation impose obligations on the petitioners based on service provided by truckers before the Regulation came into force. It is also obvious that the only express justification for such retroactive effects in the Act is s. 22(2). The essential question is therefore whether s. 22(2) makes the Legislature's intention to create those effects clear enough to overcome the general rule of construction against them.

[79] The importance of clarity in the expression of legislative intention was helpfully described in *British Columbia v. Imperial Tobacco Canada Ltd.*[24]:

> 69 Except for criminal law, the retrospectivity and retroactivity of which is limited by s. 11(g) of the *Charter*, there is no requirement of legislative prospectivity embodied in the rule of law or in any provision of our Constitution. Professor P. W. Hogg sets out the state of the law accurately (in *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 48-29):
>
> > Apart from s. 11(g), Canadian constitutional law contains no prohibition of retroactive (or ex post facto) laws. There is a presumption of statutory interpretation that a statute should not be given retroactive effect, but, if the retroactive effect is clearly expressed, then there is no room for interpretation and the statute is effective according to its terms. Retroactive statutes are in fact common.
>
> …

> 71 The absence of a general requirement of legislative prospectivity exists despite the fact that retrospective and retroactive legislation can overturn settled expectations and is sometimes perceived as unjust: see E. Edinger, "Retrospectivity in Law" (1995), *29 U.B.C. L. Rev. 5*, at p. 13. Those who perceive it as such can perhaps take comfort in the rules of statutory interpretation that require the legislature to indicate clearly any desired retroactive or retrospective effects. Such rules ensure that the legislature has turned its mind to such effects and "determined that the benefits of retroactivity [or retrospectivity] outweigh the potential for disruption or unfairness": *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), at p. 268.
>
> [Emphasis added.]

[80] The correct approach to determining legislative intent was most recently summarized by the Supreme Court of Canada in *Wilson v. Atomic Energy of Canada Ltd.*[25]:

> [102] …[W]e must begin with the modern principle of statutory interpretation articulated in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> The modern principle requires that statutes "be read to give the words their most obvious ordinary meaning which accords with the context and purpose of the enactment in which they occur": *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14; *Rizzo Shoes*, at para. 41. When a court interprets a statute, it is "seeking not what Parliament meant but the true meaning of what they said": *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] A.C. 591 (H.L.), at p. 613 (per Lord Reid).
>
> [Emphasis added.]

[81] The context and purpose of a provision can assist in resolving an apparent ambiguity in its wording and enable its proper scope to be determined: *Montréal (City) v. 2952-1366 Québec Inc.*[26]

[82] The evidence that has been provided demonstrates that the Act was created within the context of a long-standing dispute about fair compensation for container truck drivers who service the Lower Mainland's marine ports, and that its core purpose was to create a comprehensive provincial regulatory regime to establish such compensation and enforce it through the licensing of container truck companies.

[83] Sections 19 and 22 of the Regulation require that truckers be paid the rates and fuel surcharges established by it as though those rates and fuel surcharges had been in effect from April 3, 2014 onwards[27]. Can an intention to do this be found in s. 22(2) -- that is, can it be said that these sections are instances of *basing* the initial minimum rates and fuel surcharges on services provided before the Act came into force, which is what s. 22(2) purports to authorize?

[84] While the petitioners are correct that in the other places that it is used in s. 22, “based on” identifies an action or amount by which the rate or surcharge that is being established will be measured, and there is an interpretive principle that terms should be assigned the same meaning throughout a statute or legislative instrument[28], one must be careful not to conflate the context within which that term appears in those subsections with the assignment of a specific meaning to it for all purposes in the section. In my opinion, those are just examples of “based on” being used to convey the factors that may be taken into account in arriving at the rate or surcharge in question. Those uses do not assign any narrower a meaning *to that term itself* in the section than its ordinary one, which is simply “on the basis of” or “by reference to”. As a result, I see no inconsistency in reading “based on” in s. 22(2) as meaning “on the basis of” or “by reference to” trucking services that were provided before the legislation came into effect.

[85] The petitioners are also correct that both the initial minimum rate and the initial fuel surcharge are expressed in s. 22 as being established in relation to a trucker “who provides” specified container trucking services. This is prospective language and no alternative past tense is included. But while it may not be the most elegant drafting technique, I do not see any inconsistency in the Legislature then carving out an exception to that general prospectivity, by referring those rates and surcharges to services “provided” previously, as it appears to have done in s-s (2).

[86] I agree with the government respondents and Unifor that the competing reading of s-s (2) offered by the petitioners is not persuasive.

[87] First of all, this would require reading in the additional words “the rates and fuel surcharges previously imposed for”, or words to that effect, before “container trucking services provided”. Rather than complementing the meaning of these

words in the subsection, these additional read-in words would alter its meaning substantially, from past services performed to past payments for those services.

[88] More importantly, the petitioners have not offered a convincing explanation for why the Legislature would need to specify, “[f]or certainty”, that rates and fuel surcharges that had already been imposed by the federal government pursuant to the Plan could form the basis of the initial minimums under the Act. There would be nothing counterintuitive about the Legislature referring to existing payment practices on a non-retroactive basis to establish the initial rates and surcharges that would require clarification of this kind. In contrast, imposing the rates and surcharges with retroactive effect would require an explicit signalling of legislative intent.

[89] The slight variation of this proposed reading that the petitioners’ counsel offered in his reply submissions -- that the assumption of provincial responsibility over an area of regulation that was previously the responsibility of the federal government and the imposition of entirely new kinds of rates required clarification of the kinds of trucking services that could be taken into account -- is somewhat more plausible. For one thing, it does not require reading in “the rates and fuel surcharges previously imposed for” to be effective, as the initial submission does. But I still fail to see why the Legislature would need a specific subsection empowering the Lieutenant Governor in Council to take into account, when establishing initial rates and surcharges, the very types of services that truckers had been performing up to that point, let alone needing to express it “for certainty.” It still seems too obvious a consideration to require elaboration or emphasis in the manner that is being suggested.

[90] While the fact that the Legislature has shown itself capable, in the numerous other statutes pointed out by the petitioners, of indicating retroactive intent in express terms may reflect badly on the skill of the draftsperson in this case, it cannot tell us anything meaningful about the intent that actually underlay the creation of s-s (2), according to the tools of interpretation that I am required to use. The same is true of the non-retroactive meaning that was apparently attributed to the subsection by the first commissioner. Indeed, unless he was purporting to interpret the Act as not empowering the retroactive sections of the Regulation, in the same manner as the petitioners now argue, it is difficult to understand how he could decline to apply them according to their express language.

[91] Acknowledging the limited reliability and weight that should be attributed to the Hansard evidence here, to the extent that it sheds any light on the purpose of the legislation I think that on balance it tends to favour the interpretation of s. 22(2) offered by the government respondents and Unifor. In context, the repeated references by the Minister to the legislation as a “starting point” and “going forward” in the passages to which I have been referred were not used in explicit contrast to competing assertions of retroactivity, as the petitioners argue. I am also hard put to read the various references to retroactivity in the debates, including the Minster’s explicit references to s. 22(2) as the source of it and the legislation’s incorporation of “the hourly rates, the trip rates, the fuel surcharges and so forth” from the Plan, as reflecting only a continuation of the federally-enforced parts of the Plan that been carried out by then.

[92] Consequently, I do not think this is a situation where there is ambiguity resulting from the competing interpretation of s. 22(2) offered by the petitioners. In my opinion their characterization of the legislative intent that it reflects does not reasonably arise from either the language itself or the context and purpose of the Act.

[93] The real question is whether the subsection has been drafted with sufficient clarity to demonstrate a legislative intention of retroactivity that can support the impugned sections of the Regulation. Even acknowledging that retroactivity can be authorized in any number of ways, expressly or by implication, and that I should take a broad and purposive approach to my interpretation, one that reconciles the Regulation with the Act if possible, I am not empowered to torture the language that has been used beyond any plausible ordinary meaning to achieve those purposes. Even without a plausible alternative reading that creates an ambiguity, there can still be a provision that is just so poorly drafted and ambiguously expressed that it fails to coherently perform the function that the surrounding context suggests it was given.

[94] Looked at superficially, there is a challenge in reading s-s (2) in a way that supports the retroactive sections of the Regulation, as I suggested to the government respondents’ counsel during submissions.

[95] The minimum rates and fuel surcharges appear to be identified elsewhere in s. 22 as a means of measuring the amounts to be paid to truckers for the number of services performed by them and the amount of fuel they used. As I put

to counsel, if these terms are being used as means of measurement in the section as a whole, then the ordinary sense of s-s (2) would be that the measurements themselves are what can be based on work done before the Act came into force. This would not support regulations that impose retroactive payments, unless words to the effect of “payments to truckers pursuant to” are read in before “an initial minimum rate and an additional minimum fuel surcharge.” Another alternative along the same lines would be to read “based on” as actually meaning “applied to”, so that these means of measurement are stated to govern the activities that took place before they came into force.

[96] Both of these readings require a degree of interpretive flexibility that may exceed what can reasonably be described as attributing an obvious meaning to the words of the subsection, even under an appropriately broad and purposive approach.

[97] However, when one looks at the way in which ss. 19 and 22 of the Regulation actually carry out their task, in contrast to the way that s. 22 would otherwise operate, a coherent reading of s-s (2) emerges.

[98] Section 19 states that a trucker or an independent operator is owed the difference between what they were paid between April 3, 2014 and the coming into force of the Regulation and what they would have been paid for those services if the Regulation had been in effect during that period. Section 22 takes the same approach to the amount of fuel surcharges that would have been owed to an independent operator if it had been in force. The initial minimum rate and fuel surcharges are therefore “based on” these earlier services and surcharges, in the sense that the work done and fuel costs before the Regulation took effect are, by the operation of s-s (2), made part of the work done and fuel costs that are specified as being the basis of the measurements under s. 22 of the Act. In other words, the scope of those measurements has been expanded -- to encompass activities and expenses that would have fallen within them if the Regulation had been in effect.

[99] A review of s. 22 of the Act as a whole makes the validity of this interpretation clear. Without s-s (2), a rate established under s-s (1)(b) could only have been “based on” prospective trips and hourly work, and the fuel surcharge established under s-s (1)(f) could only have been “based on” prospective fuel

expenses. This is demonstrated by the use of the term “a trucker *who provides*… specified container trucking services” in both subsections.

[100] In essence then, what s-s (2) creates is an exception to this prospective application of the rest of s. 22, by expanding its scope to the interim period following the resolution of the withdrawal of services.

[101] In my opinion such legislative intention makes sense of the grammatical construction and words used in s-s (2), integrates the subsection with s. 22 as a whole and provides explicit support for the manner in which retroactivity is achieved under the Regulation. As a result, I am satisfied that ss. 19 and 22 of the Regulation are authorized by the Act and the argument with respect to them must be rejected.

[102] Wait time remuneration under s. 23 of the Regulation is not addressed in s. 22(2) of the Act, so the question of whether the Act authorizes its effect must be addressed separately.

[103] Section 18 of the Act provides:

> Conditions on licence
>
> 18 (1) In issuing a licence under section 16 (4) (a), the commissioner may impose any conditions that the commissioner considers necessary.
>
> (2) Without limiting subsection (1), the commissioner may impose a condition on a licence respecting
>
> > (a) the payment of wait time remuneration by the licensee to truckers employed or retained by the licensee…
>
> [Emphasis added.]

[104] The first thing to note about s. 23 is that it requires the licensee to pay the wait time remuneration that the licensee received to the trucker who performed services since April 3 and was paid per trip. As I have mentioned, this remuneration is paid from Port Metro Vancouver to the companies pursuant to the Plan, with the understanding that it will be passed on to the per-trip drivers. Section 23 makes it a condition of the licences that these payments be passed on, as the Plan required.

[105] I doubt that it actually operates retroactively, because the obligation to pass on the payments preceded the coming into force of the Regulation. It is at worst

retrospective, in that it attaches a present consequence -- being able to obtain a license -- to compliance with obligations that arose before it came into force[29].

[106] In either case, I am satisfied that the authority conferred by s. 18 of the Act "to impose a condition on a licensee respecting…the payment of wait time remuneration to truckers employed or retained by the licensee" is sufficiently clear and broad to authorize a present condition requiring that the companies immediately bring themselves into good standing with their existing known obligations to pass on expressly-earmarked payments from a third-party to the drivers. None of the potential unfairness that is associated with revisiting the previous state of the law or interfering with obligations and rights acquired in reliance on it arises from requiring the companies to do what they had known since April they were required to do, in order to obtain a license under the new legislative regime.

[107] Therefore I find that s. 23 of the Regulation is also properly authorized.

[108] Finally, in the event that I am incorrect in my interpretation of the Act on the petitioners' *ultra vires* argument, I have also concluded that this is not an appropriate case in which to embark on a judicial review of the Commissioner's interpretation of "off-dock trips" in the absence of an actual decision on that point.

[109] As the government respondents point out, s. 12 the Act confers exclusive jurisdiction on the Commissioner when exercising his powers under the Act. Part 5 of the Act establishes a regime for seeking a reconsideration of a decision by the Commissioner. Thus, there is a mechanism within the Act itself for the companies to challenge required payments arising from the Commissioner's interpretation of those trips and, equally importantly, an opportunity for the Commissioner to bring to bear the special expertise in the matters under their jurisdiction in responding to the challenge. This in turn would create a record on which an informed yet appropriately deferential judicial review could be conducted, if a company found that necessary.

[110] While the petitioners correctly point out that the default position is that the original decision remains in effect until the outcome of a reconsideration (s. 39(1)), there is also authority provided in the Act for the Commissioner to suspend the original decision pending it. Or, if the consequences to the petitioners of the penalty imposed are serious, they could seek a stay from the reviewing court

pending the outcome of a judicial review application. Thus I do not think that they are inevitably obligated to endure the fines or licence suspensions that the Act provides in the case of violations before they can have a patently unreasonable interpretation of the legislation reviewed.

[111] I also disagree that there is already everything available to me in this petition that an informed judicial review could require. It is anything but clear to me on the current material just what off-dock trips have come to mean in the industry and whether that meaning contrasts at all, let alone in a patently unreasonable manner, with the Commissioner's reading of the regulation. A review on this issue fairly cries out for the specialized knowledge that the Commissioner's position was created to channel, even if only to set the stage for a demonstration by the petitioners of how it falls short.

[112] And, if the merits of such a review are to even be previewed at this point, the government respondents make the telling point that the reading of "off-dock trips" that the petitioners offer is at best only another reasonable interpretation of the Regulation. The fact that such a competing interpretation may exist of course falls short of revealing the prevailing one to be patently unreasonable.

[113] I conclude that this argument fails as well.

[114] As a result, and despite the able submissions of the petitioners' counsel, the petition is dismissed.

[115] The government respondents quite properly do not seek costs, in keeping with the usual rule applicable to administrative tribunals in applications of this kind.

[116] Unifor seeks its costs of both this hearing and its successful application to be added as a party. There is no reason in principle why Unifor, having been added as a party and then participating fully in the hearing, would not be entitled to receive its costs, but if the petitioners wish to be heard on that issue then they and Unifor should arrange to make submissions, either orally or in writing as they prefer. In the absence of such submissions Unifor will receive its costs of both hearings, at the ordinary scale of difficulty.

The Honourable Mr. Justice T.A. Schultes

[1] 2016 BCSC 898

[2] The Regulation defined wait time remuneration as meaning “money owed by a licensee to an independent operator paid per trip for delays occurring when the independent operator is in a marine terminal.” It referred to the payments that were required by the Plan to be paid by Port Metro Vancouver to the companies for excessive waiting times.

[3] *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271 at 279, 282

[4] *Merck Frosst Canada & Co. v. Apotex Inc.*, 2011 FCA 329 at para. 35

[5] *Canada (Attorney General) v. Consolidated Canadian Contractors Inc.,* [1999] 1 F.C.R. 209 (C.A.) at para.31

[6] *R. v. Dinely*, [2012] 3 S.C.R. 272 at para. 10.

[7] *Consolidated Canadian Contractors* at para. 30

[8] *Martin v. Perrie*, [1986] 1 S.C.R. 41, at para. 27

[9] *Austria v. Canada (Citizenship and Immigration)*, 2014 FCA 191 at para. 77

[10] *Canadian National Railway Co. v. Canada (Attorney General)*, [2014] 2 S.C.R. 135

[11] P. Cote, *The Interpretation of Legislation in Canada*, 4th ed, (Toronto, ON: Thomson Reuters, 2011), p. 180.

[12] *Quebec (Attorney General) v. Healey*, [1987] 1 S.C.R. 158 at para. 71.

[13] *Katz Group Canada Inc. v, Ontario (Health and Long-Term Care*), [2013] 3 S.C.R. 810 at paras. 25-26

[14] *Ibid.*

[15] *Interpretation Act*, R.S.B.C. 1996, c. 238, s.8

[16] R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 159, cited with approval in *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, [2006] 1 S.C.R. 715 at para. 45

[17] British Columbia Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 17, No. 10,, 3rd Sess., 40th Parl., November 18, 2014, p. 5371

[18] *Ibid.*

[19] *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at para. 40

[20] *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 52

[21] In his reply submissions the petitioners’ counsel clarified that these agreements and declarations were with respect to the parts of the Plan that were immediately enforced by the federal regulation.

[22] Interestingly, the collective agreement also contained a term that those petitioner companies would not participate in any challenges to the Act or Regulation.

[23] *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73 at paras. 37-38.

[24] [2005] 2 S.C.R. 473

[25] [2016] 1 S.C.R. 770

[26] [2005] 3 S.C.R. 141, at para. 14

[27] Section 23 achieves the same effect by requiring the licensee companies to pay the drivers all of the wait time remuneration that they have received from Port Metro Vancouver from that date onwards. However s. 22(2) of the Act does not purport to address wait time remuneration so I will address the authority for s. 23 separately.

[28] Sullivan on the *Construction of Statutes*, (6th ed. 2014), para. 8.32

[29] *Épiciers Unis Métro-Richelieu Inc., division "Éconogros" v. Collin*, [2004] 3 S.C.R. 257, at para. 46