IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *0769449 B.C. Limited v. British Columbia Container Trucking Commissioner,* 2017 BCSC 1622

Date: 20170914
Docket: S183652
Registry: New Westminster

Between:

0769449 B.C. Limited doing business as Kimberly Transport Limited

Petitioner

And

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

Respondent

Before: The Honourable Mr. Justice A. Saunders

Corrected Judgment: The front page and the text of the judgment at paragraph 49 were corrected where changes were made on September 19, 2017.

On judicial review from: Decisions of the British Columbia Container Trucking Commissioner dated February 11, July 12, July 19, and August 24, 2016.

Reasons for Judgment

Counsel for the Petitioner:	G. Badh K. Scorer
Counsel for the Respondents:	K. Horsman, Q.C. A. Harlingten
Place and Dates of Hearing:	New Westminster, B.C. January 25-26, 2017
Place and Date of Judgment:	New Westminster, B.C. September 14, 2017

Introduction

[1] The petitioner was the holder of an authorization issued by the Vancouver Fraser Port Authority (also referred to herein as “Port Metro Vancouver", or “PMV”), under federal legislation, the *Port Authorities Operations Regulations* [*PAO Regulations*], SOR/2000-55 to the *Canada Marine Act*, S.C. 1998, c. 10. Under that authorization – the “Petitioner’s PMV Licence” – the petitioner had been permitted to provide container trucking, or drayage, services within the Port of Vancouver (the “Port”). Authorizations to conduct such activities within the Port are referred to generally in the industry as Truck Licensing System or “TLS” licences.

[2] In late 2014, a new container truck licensing regime came into effect, and the power to issue authorizations functionally became the sole responsibility of the British Columbia Container Trucking Commissioner (the “Commissioner” – also referred to in the materials as the “Office of the British Columbia Container Trucking Commissioner”, or “OBCCTC”), pursuant to new provincial legislation, the *Container Trucking Act*, S.B.C. 2014, c. 28 [*CT Act*].

[3] The Petitioner’s PMV Licence had, however been terminated by PMV several months prior to the *CT Act* coming into effect. It therefore did not fall into the grandfathering provisions by which holders of PMV-issued licences were able to transition to the new licensing regime.

[4] The petitioner sought judicial review in Federal Court of the termination of the Petitioner’s PMV Licence, but with the new licensing regime in effect the matter was judged to be moot, and its petition was dismissed.

[5] The petitioner then sought to have the Petitioner’s PMV Licence reinstated by the Commissioner. The Commissioner declined to entertain that application, on the basis that he does not have the statutory authority to do so (the “Reinstatement Decision”). That decision was conveyed to the petitioner through a letter dated February 11, 2016; an email message date July 12, 2016; and, a letter dated July 19, 2016. The substance of those communications will be described further, below. The respondent concedes that these three communications, collectively, constitute the Commissioner’s reasons, and are reviewable.

[6] The petitioner then sought reconsideration, which was denied (the "Reconsideration Decision").

[7] In this judicial review, the petitioner now seeks orders in this court that, in a broad sense, would compel the Commissioner to consider under the *CT Act* an application made by the petitioner for reinstatement of the Petitioner's PMV Licence, and compel the Commissioner to treat such a reinstated authorization as a licence issued by the Commission under the *CT Act*.

Background

[8] The factual background to this application is somewhat convoluted, as it arises out of both the particular licensing history of the petitioner, and more generally the recent history of changes in the regulation of the British Columbia container trucking, or drayage, sector of the trucking industry as regards Port Metro Vancouver's operations. In the brief description of this background that follows, I am drawing on a number of documents admitted into evidence by way of affidavit, including the September 25, 2014 "Recommendation Report – British Columbia Lower Mainland Ports" authored by Mr. Vincent Ready and Ms. Corinn Bell (the "Ready/Bell Report"), and the December 2014 "PMV Truck Licensing System for Local Drayage TLS Handbook". I am also drawing on the outlines as to the history of recent developments at PMV as set out in previous judicial review decisions that arose out of those developments, including *ATL Trucking Ltd. v. Vancouver Fraser Port Authority*, 2015 FC 420, and *Goodrich Transport Ltd. v. Vancouver Fraser Port Authority*, 2015 FC 520, and, including two previous Federal Court judicial review decisions involving the petitioner and the Petitioner's PMV Licence, under the style of cause *0769449 B.C. Ltd.(Kimberly Transport) v. Vancouver Fraser Port Authority*, indexed at 2015 FC 252 and 2016 FC 645.

[9] In brief, there was a history of work stoppages under the former licensing system managed by PMV, arising out of issues such as the remuneration rates for drivers; excess number of licenced trucks, creating congestion at the port and leading to lower effective rates of remuneration for driver's paid by the load; and, the lack of an effective scheme for ensuring compliance with various operational and remuneration standards.

[10] A further work stoppage in March 2014 ended with stakeholders agreeing to a “Joint Action Plan”, which included provision for the well-known labour mediators Vince Ready and Corinn Bell to issue recommendations for the implementation of matters agreed to under that Plan. The Ready/Bell Report, issued in September 2014, recommended that a provincial agency be created to regulate the drayage sector, including licensing of container trucks. It also recommended a significant reduction in the number of trucking company licensees and the number of trucks, possibly through imposing more stringent conditions on licensees, or through imposition of service level agreements.

[11] Following consultations with stakeholders, the Province introduced the *CT Act* in the legislature on October 23, 2014. The *CT Act* was brought into force by the *Container Trucking Regulation*, B.C. Reg. 248/2014 [*CT Regulation*], on December 22, 2014. The *CT Act* provided for the appointment of the Commissioner, who was given exclusive power to regulate container trucking services through licences. The *CT Act* also set up a transitional scheme for the grandfathering of licences previously issued by PMV, through what were termed “deemed licences”. A “deemed licence” is defined in the *CT Act* as a trucking authorization deemed to be a licence pursuant to the regulatory authority of the Lieutenant Governor in Council created by way of s. 17 of the *CT Act*. Part 2 of the *CT Regulation* provided that authorizations issued by the PMV in effect as of March 1, 2015 were to be deemed to be licences under the *CT Act.* This was the only statutory mechanism by which a PMV-issued authorization could become a licence under the *CT Act*.

[12] The transitional scheme further provided that all outstanding PMV-issued licences would expire on January 31, 2015. Therefore, any licence holder who wished to make the transition into having a deemed licence would require a new licence from PMV. In mid-December 2014 PMV began accepting applications for new licences from existing licence holders. The process for obtaining these new licenses from PMV was competitive, and not all applicants were successful. As of February 1, 2015 only the holders of those new licences were permitted to operate.

[13] Those new licences issued by PMV then became deemed licences under the *CT Act* as of March 1, 2015. All of the successful applicants for new PMV-issued licenses who became deemed licensees under the *CT Act* were required to

enter into a standard form licence expiring on May 31, 2016. Thereafter, the Commissioner was responsible for the issuance of new licences, in accordance with s. 16(2) of the *CT Act*, and the *CT Regulation*. The *PAO Regulations* were amended to stipulate that PMV could only issue an authorization to conduct drayage operations in the Port, to persons licensed under the *CT Act.*

[14] Meanwhile, in May 2014, before the Bell/Ready Report had even been written and before the *CT Act* had been introduced in the legislature, PMV had advised the petitioner that applications to renew approvals of some of its trucks were being disapproved. The following month, in June 2014, the Petitioner's PMV Licence was suspended by reason of allegedly non-approved trucks having accessed PMV property. In August 2014 the Petitioner's PMV Licence was terminated.

[15] Due to that termination, the petitioner was unable to avail itself of the transitional provisions. As it was not a holder of a valid PMV-issued licence as of December 2014, it was not eligible to apply for a new licence from PMV, and therefore unable to become a holder of a deemed licence under the *CT Act*.

[16] In October 2014 the petitioner began to take steps to seek judicial review in Federal Court of the termination of the Petitioner's PMV Licence. This necessitated filing an application for judicial review that sought an order requiring PMV to issue its August 2014 termination decision in a final, signed form identifying the decision maker; or alternatively, an order extending the time for filing for a judicial review of the termination decision. That application was heard in Federal Court on February 16, 2015 and by way of an order made by Zinn J. on February 27, 2015 the petitioner obtained an extension of time: *0769449 B.C. Ltd. (Kimberly Transport) v. Vancouver Fraser Port Authority*, 2015 FC 252.

[17] There is no indication in the record before me that the timing of these steps in relation to judicial review was influenced to any extent by the deadlines inherent in the process of transition to the new licensing regime that was then ongoing. It does not appear that the petitioner sought judicial review on a timeline that would have allowed the matter of the status of the Petitioner's PMV Licence to be resolved before PMV-issued licences expired on January 31, 2015. In addition, counsel for the petitioner concedes that during the transitional period the petitioner could have, but did not take any steps to determine if PMV would issue a

provisional licence, entitling the petitioner to participate in the transition process and obtain a deemed license, while the legitimacy of the termination was under judicial review.

[18] The petitioner's application for judicial review of the licence termination was heard in Federal Court more than a year later, on March 16-17, 2016, and judgment was issued June 9, 2016 (indexed as 2016 FC 645). Applying the tests for mootness set out *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, Boswell J. held that in view of the new regulatory framework governing the issuing of licences, there was no longer any live issue or concrete dispute between the parties. Moreover, it was held that this was not an appropriate case for the exercise of the court's residual discretion to determine the merits of the case notwithstanding its mootness; a decision would have no practical effect on the rights of the parties, and hearing the case on its merits without there being any practical effect would exceed the proper role of the court. Boswell J. stated:

> [25] …PMV is no longer responsible for or capable of issuing licences under the TLS; that role now lies with the British Columbia Container Trucking Commissioner. The transfer of that jurisdiction from PMV to the Commissioner for the issuance of licences under the TLS is clearly within the purview of the legislative branch. The Court should be mindful of its role as the adjudicative branch of government and refrain from making any pronouncements or determinations concerning how that jurisdiction may have been exercised in the past which might impact upon some future exercise of such jurisdiction.

[19] This decision left the petitioner with no formal legal recourse against PMV. The petitioner continued to engage in efforts to meet with PMV and discuss means by which it might become licensed under the new regime, and attempts to persuade PMV to intercede with the Commissioner on its behalf.

[20] The petitioner had continued to provide some drayage services at PMV of a nature that were not subject to the truck licensing system, and PMV had advised the petitioner in November 2015 that its operational practices had been sufficiently rehabilitated to warrant an opportunity to apply for TLS-related port access, if it became eligible to secure a new licence from the Commissioner under the new regime.

The Statutory Scheme – Licensing Under the *CT Act*

[21] The petitioner grounds its claim for judicial review in sections 6 and 16 of the *CT Act*, which provide as follows:

> Rules of practice and procedure
>
> 6 (1) The commissioner may make rules respecting practice and procedure for all applications, audits, complaints, reconsiderations, submissions and hearings coming before the commissioner and for all investigations.
>
> (2) The commissioner must make the rules respecting practice and procedure made under this section accessible to the public in the manner the commissioner considers appropriate.
>
> …
>
> Licence required
>
> 16 (1) A person must not carry out prescribed container trucking services in a prescribed area unless
>
> (a) the person holds a licence issued to that person that gives the person permission to carry out container trucking services in the specified prescribed area, and
>
> (b) the person carries out the container trucking service in compliance with
>
> (i) this Act and the regulations,
>
> (ii) the licence, and
>
> (iii) if applicable, an order issued to the person under this Act.
>
> (2) The commissioner, by publishing an advertisement in accordance with the regulations, may invite applications for a licence.
>
> (3) Within the time specified in an advertisement published under subsection (2), a person may apply to the commissioner for a licence by submitting, in the form and manner the commissioner requires,
>
> (a) the required information and records,
>
> (b) the required fee, and
>
> (c) the security required under section 20, if any.
>
> (4) Subject to subsection (5), on receiving an application under subsection (3) and after considering the prescribed matters, if any, the commissioner may
>
> (a) issue a licence to an applicant if the applicant meets the prescribed requirements, or
>
> (b) refuse to issue a licence.
>
> (5) If the commissioner refuses, under subsection (4) (b), to issue a licence to an applicant, the commissioner must provide notice to the applicant of that refusal.

[22] The Commissioner's power to issue licenses is constrained by regulation, as provided for in s.44 of the *CT Act*. Section 6 of the *CT Regulation* provides:

> Commissioner may invite applications
>
> 6 (1) The commissioner may invite applications for a licence under section 16 (2) [licence required] of the Act if the commissioner is satisfied that it is desirable to increase the number of licensees.
>
> (2) If the commissioner decides to invite applications under subsection (1), the commissioner must determine
>
> > (a) the period during which applications for a licence will be accepted,
> >
> > (b) any mandatory requirements for a licence the commissioner considers appropriate, and
> >
> > (c) any desirable criteria the commissioner considers relevant to determine whether, and to whom, to issue a licence.

[23] Sections 7-9 of the Regulation then prescribe the process for publishing invitations for applications and requirements for obtaining a licence, and grant the Commissioner the power to issue licenses after the period for submitting applications has expired.

[24] The Commissioner's jurisdiction to reconsider decisions is set out in Part 5 of the *CT Act*, ss. 36-39. The term "commissioner's decision" under Part 5 is defined in s. 36 as being restricted to decisions made under ss. 16(4)(b), 21 or 34(3) or (4). Sections 21 and 34 deal with, respectively, cancellations upon a licensee ceasing container trucking operations, and penalties; the only section conceivably relevant to the present circumstances would be the licensing power under s. 16(4)(b). The reconsideration process is set out in s. 39:

> Reconsiderations
>
> 39 (1) Despite the filing of a notice of reconsideration under section 38 (1) but subject to subsection (2) of this section, the commissioner's decision that is subject to the reconsideration remains in effect until the outcome of the reconsideration.
>
> (2) On a reconsideration from an order of the commissioner referred to in section 34 (1) (a), (b) or (c), the commissioner may, at any time before making a final determination on the reconsideration, order that the commissioner's order be suspended until the outcome of the reconsideration.
>
> (3) On a reconsideration under this section, the commissioner must, after considering the information provided by the licensee,
>
> > (a) rescind the commissioner's decision, or
> >
> > (b) confirm the commissioner's decision.

> (4) The commissioner must provide notice to the licensee of the decision made under subsection (3).
>
> (5) If the suspension or cancellation of a licence is rescinded, the commissioner must promptly reinstate and, if necessary, reissue the licence that was suspended or cancelled.
>
> (6) If the imposition of a condition or the amendment of a licence is rescinded, the commissioner must promptly reissue the licence with the condition removed or the amendment reversed.

The Impugned Decisions of the Commissioner

The Reinstatement Decision

[25] The first of the communications from the Commissioner making up the Reinstatement Decision is a letter to the petitioner from the Acting Commissioner and the Deputy Acting Commissioner – Ms. Bell, and Mr. Ready – dated February 11, 2016. The correspondence from the petitioner to the Commission preceding this letter has not been disclosed, but I infer from the content of the February 11 letter that the petitioner had asked the Commission to issue a new interim license, and then deem it to be a licence issued by the PMV effective March 1, 2015. The Commissioners wrote that the *CT Act* and the *CT Regulations* did not allow for such a step. The petitioner was invited to consider responding to any new calls for applications for new licences.

[26] Next came the email of July 12, 2016, in which the deputy commissioner, then a Mr. Crawford, wrote:

> It is the position of the OBCCTC, that the Commissioner does not have the authority to reinstate a licence which was cancelled by the Port of Vancouver prior to the creation of the Commissioner's Office and therefore there is not a licence to be reinstated. If the Commissioner wishes to issue a new licence, the Commissioner must follow the process laid out in Part 3 of the Container Trucking Act. Should an application call for new licences be made by the OBCCTC, you are welcome to submit an application.

The email concluded with an invitation to the petitioner to consider its options under a forthcoming change to the Commissioner's policies regarding changes in beneficial ownership or control of licensed companies.

[27] Finally, counsel for the OBCCTC wrote to the petitioner on July 19, 2016. The salient portion of the letter reads:

> I interpret your correspondence to mean that, on behalf of Kimberley Transport, you seek either a reinstated container trucking services licence from the OBCCTC or the issuance of a new licence. Addressing the

> request for reinstatement first – in order to give effect to this request, the OBCCTC would be required to: (1) find that Kimberley Transport held a valid TLS on December 22, 2014 (the day of coming into force of the *Container Trucking Act*); (2) find that Kimberley Transport would have succeeded in the TLS 2 application process, meaning that it held a document conclusively deemed to be a licence to carry out container trucking services under provincial legislation on March 1, 2015; and (3) conclude that your company would have succeeded in the OBCCTC's recent call for licenses which culminated in the issuance of licences on June 1, 2016. The jurisdiction of the OBCCTC is established by the *Container Trucking Act* (S.B.C. 2014, c. 28) and the *Container Trucking Regulation* (B.C. Reg. 248/2014, as amended). Neither the *Act* nor the *Regulation* gives the OBCCTC the jurisdiction to make any of the described findings or conclusions required to give effect to your request for a reinstated licence.

The letter continued with a note that if the Commissioner were to be satisfied, pursuant to Part 3 of the *CT Regulation*, that it was desirable to increase the number of licensees, it would be open to the petitioner at such time to make an application for a new licence.

The Reconsideration Decision

[28] The petitioner sought reconsideration of the Reinstatement Decision. By way of a letter dated August 24, 2016, counsel for the OBCCTC issued the Reconsideration Decision, rejecting the request for reconsideration on the grounds that the power to reconsider is limited by s. 36 of the *CT Act* to decisions made by the Commissioner under ss. 16(4)(b), 21, and 34(3) or (4).

Relief Sought by the Petitioner

[29] The Petition claims the following forms of relief:

1. A declaration that the Commissioner has the jurisdiction to reinstate a TLS (Truck Licensing System) Licence suspended or cancelled prior to December 22, 2014;

2. A declaration that the Commissioner has the jurisdiction to reinstate the TLS (Truck Licensing System) Licence of the petitioner.

3. An order directing the Commissioner to make rules respecting the practice and procedure for dealing with the petitioner’s application for a TLS

License, as per Section 6 of the *Container Trucking Act* [SBC 2014] Chapter 28 (hereinafter called the "CTA");

4. An order quashing the decision dated August 24, 2016, issued on behalf of the Commissioner whereby the Commissioner declined to exercise its jurisdiction to reconsider its decision dated July 19,2016;

5. An order directing the Commissioner to reconsider the request for reconsideration dated August 16, 2016, doing so in a manner that accords with the principles of fundamental and natural justice, and which is consistent with the findings and directions (if any) of this Honourable Court;

6. In the alternative, directing the Commissioner to reinstate the TLS Licence of the Petitioner to allow access to the Petitioner's trucks into the areas owned and controlled by the Vancouver Fraser Port Authority;

7. A declaration that the decision dated July 19, 2016 issued on behalf of the Commissioner constitutes a decision subject to reconsideration under the CTA;

8. A declaration that the Commissioner has the jurisdiction to reconsider the decision, dated July 19, 2016, issued on behalf of the Commissioner;

9. An order that the petitioner be granted its costs of and in connection with this proceeding; and

10. An order for any further relief that to this Honourable Court may seem just.

[30] The claim for costs under paragraph 9 was not strenuously asserted.

The Standard of Review

[31] The petitioner contends that both the Reinstatement Decision and the Reconsideration Decision amounted to rulings by the Commissioner on a matter that falls within the category of what the Supreme Court of Canada referred to in *Dunsmuir v. New Brunswick*, 2008 SCC 9, as a "true question of jurisdiction", and that as such the decision is reviewable on the standard of correctness.

[32] Post-*Dunsmuir* jurisprudence from the Supreme Court, however, has stated that the category of a "true question of jurisdiction" is exceedingly narrow, to the

point that its existence might now be questionable. In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, the Court (as per Rothstein J. for the majority) said:

> [33] … Experience has shown that the category of true questions of jurisdiction is narrow indeed. Since *Dunsmuir*, this Court has not identified a single true question of jurisdiction [*citations omitted*]. Although this Court held in *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50 that the question was jurisdictional and therefore subject to review on a correctness standard, this was based on an established pre-*Dunsmuir* jurisprudence applying a correctness standard to this type of decision, not on the Court finding a true question of jurisdiction (para. 10).
>
> [34] The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.
>
> …
>
> [39] What I propose is, I believe, a natural extension of the approach to simplification set out in *Dunsmuir* and follows directly from *Alliance* [*Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7] (para. 26). True questions of jurisdiction are narrow and will be exceptional. When considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness. As long as the true question of jurisdiction category remains, the party seeking to invoke it must be required to demonstrate why the court should not review a tribunal's interpretation of its home statute on the deferential standard of reasonableness.
>
> …
>
> [42] As I have explained, I am unable to provide a definition of what might constitute a true question of jurisdiction. The difficulty with maintaining the category of true questions of jurisdiction is that without a clear definition or content to the category, courts will continue, unnecessarily, to be in doubt on this question. However, at this stage, I do not rule out, in our adversarial system, counsel raising an argument that might satisfy a court that a true question of jurisdiction exists and applies in a particular case. The practical approach is to direct the courts and counsel that at this time, true questions

> of jurisdiction will be exceptional and, should the occasion arise, to address in a future case whether such category is indeed helpful or necessary.
>
> [Emphasis added.]

[33] More recently, in *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45, the Court (with Rothstein J. writing the unanimous decision) affirmed, at para. 27:

> …This Court's recent jurisprudence has emphasized that true questions of jurisdiction, if they exist as a category at all, an issue yet unresolved by the Court, are rare and exceptional.

[34] I am not persuaded that either of the impugned decisions ought to be subject to anything other than a deferential standard on this judicial review. The petitioner's request that the Commissioner invoke its statutory jurisdiction to reinstate the Petitioner's PMV License, and in particular that the Commissioner do so through the exercise of its jurisdiction conferred by s.16 of the *CT Act*, called for interpretation of the Commissioner's home statute within the context of the interplay between the previous licensing regime under the authority of PMV, the aforementioned transitional provisions, and the new regime. A fair, contextual consideration of these issues would call for a specialized understanding of the historical reasons for the new regime, policy considerations that might dictate the issuance of new licences, and other similar considerations within the specialized body of knowledge of the Commissioner's office. There are no considerations, in my view, militating in favour of a correctness standard being applied.

[35] The *CT Act* incorporates a strong privative clause, in s. 12:

> Jurisdiction of commissioner exclusive
>
> 12 (1) The commissioner has exclusive jurisdiction in all cases and for all matters in which jurisdiction is conferred on the commissioner by this or any other enactment.
>
> (2) An order, decision or proceeding of the commissioner must not be questioned, reviewed or restrained by any process or proceeding in any court.

[36] By virtue of s. 2 of the *CT Act*, s. 58 of the *Administrative Tribunals Act*, SBC 2004, c. 45 [*AT Act*] applies to the Commissioner. Section 58 provides:

> Standard of review with privative clause
>
> 58 (1) If the Act under which the application arises contains or incorporates a privative clause, relative to the courts the tribunal must be considered to

> be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> > (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
> >
> > (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
> >
> > (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

[37] The Reinstatement Decision and the Reconsideration Decision, I find, were findings of law in respect of a matter within the exclusive jurisdiction of the Commissioner, within the meaning of the privative clause. The appropriate deferential standard is that of ‘patent unreasonableness’.

[38] Although the common law standard of patent unreasonableness was ‘collapsed’ into the standard of unreasonableness in *Dunsmuir*, its application in the statutory context of the *AT Act* continues to be guided by the pre-*Dunsmuir* case law. "Patently unreasonable" has been held to mean “openly, clearly, evidently unreasonable”: *Canada (Director of Investigation and Research)* v. *Southam Inc.*, [1997] 1 S.C.R. 748. Further, as stated by La Forest J. (Dickson C.J.C. concurring) in *CAIMAW v. Paccar of Canada Ltd.* [1989] 2 S.C.R. 983:

> Mere disagreement with the result arrived at by the tribunal does not make that result "patently unreasonable". The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it. The emphasis should be not so much on what result the tribunal has arrived at, but on how the tribunal arrived at that result. [at 1004].

Analysis

[39] As will be seen, the petitioner’s positions as to the Reconsideration Decision and the Reinstatement Decision overlap somewhat. I begin my analysis by describing generally the theory of the petitioner’s claim as a whole.

[40] The petitioner submits that the effect of the new legislative scheme governing the issuance of TLS licences has been to transfer jurisdiction over such licences from PMV to the Commissioner. As PMV would have had the power to reinstate the Petitioner's PMV Licence – under the former scheme, the Commissioner must be understood to have inherited that power as well, and it therefore falls to the Commissioner to make rules for the reinstatement of PMV-issued licences, under the rule-making authority conferred by s.6 of the *CT Act*, and to accept the petitioner's reinstatement application.

[41] With respect to the Reconsideration Decision, the petitioner's initial position on the hearing of the present judicial review was that the Reinstatement Decision was a matter falling within s.16(4) of the *CT Act*, and therefore eligible for reconsideration. This position is plainly wrong; s.16(4) clearly applies only to decisions refusing to grant licences for which an application has been made under the practice established in s. 16, and no such application from the petitioner was ever before the Commissioner.

[42] Next, the petitioner – as I perceived the submissions – attempted to argue that the matter involved the reinstatement of a licence that had been cancelled or suspended, and therefore fell within the reconsideration provisions of s. 39(5). That section, however, clearly refers only to reinstatement through reconsideration of suspended or cancelled licences issued by the Commissioner; it provides no stand-alone authority to reconsider a refusal to reinstate a licence issued by PMV.

[43] As the hearing of this judicial review proceeded, the petitioner's position evolved to a concession that those sections did not apply on their face, and that what was being sought was that I interpret the legislation generally in a broad, remedial sense so as to read into it a power to deal with licences previously issued and suspended or terminated by PMV; and, that I find the Commissioner was wrong not to have interpreted the *CT Act* in that manner. The respondent did not take issue with this petition being dealt with as a review of the Reinstatement Decision, rather than the Reconsideration Decision, and the hearing of this petition essentially proceeded on that basis.

[44] Judged on the standard of patent unreasonableness, no grounds are made out for me interfering with the Reinstatement Decision. The letter of July 19, 2016 articulated a rational basis for the Commissioner's determination: on the plain

meaning of the *CT Act* and the *CT Regulation*, there is simply no jurisdiction conferred on the Commissioner to give effect to the petitioner's request.

[45] Arguing its case on the basis of the correctness standard, the petitioner's position is that the statutory power to issue and reinstate TSL licences was transferred from PMV to the Commissioner under the new licensing regime; that in effect, the Commissioner "stepped into the shoes" of PMV. The legislation, however, strictly construed – in the manner in which it has been construed by the Commissioner – has left a gap in the transition provisions, leaving the Commissioner unable to deal with a terminated PMV licence when the question of the legitimacy of the termination was still pending. The Petition puts the matter in the following terms:

> The Petitioner is in a unique position of having authority change in the midst of a live issue relating to their TLS licence. Keeping in mind the interpretative analysis of legislations, the Act should be interpreted as granting the authority to the Commissioner to deal with "live" issues at the time of assumption of power.

[46] The petitioner goes on to argue that the *CT Act*, being remedial legislation, ought to be given a broad, liberal wording, consistent with the rule in *Heydon's Case* (1584), 3 Co. Rep. 7a, 76 E.R. 637.

[47] Even if judged on the standard of correctness, I would find no basis to intervene in the Commissioner's decision. I find the petitioner's position is fatally flawed, in several respects.

[48] First, it is a gross simplification to say that the *CT Act* effected a transfer in "jurisdiction over TSL Licences". The phrase "TSL Licence" is not found anywhere in the statutory instruments. The *CT Act* instituted a completely new regime for the issuance of authorizations to provide drayage services at the Port.

[49] Second, even if what had been accomplished by the new legislation was nothing more than a transfer of jurisdiction, the Commissioner would have been in no better position to deal with the Petitioner's PMV Licence than PMV had been; and PMV had already terminated the licence. In the eyes of PMV, the Petitioner's PMV Licence was not "pending"; it had been cancelled. Nothing in the language of the Act indicates the legislature intended the Commissioner to revisit, or have the power to revisit, cancellation decisions that had been made by PMV. And even if

the Commissioner had the power to reconsider PMV's termination decision, there is no basis for assuming that the Commissioner's office could or would reach a different conclusion. The only body with jurisdiction to rescind the PMV decision was the Federal Court, and nothing in the *CT Act* impaired the petitioner's right to seek redress in that court.

[50] The third, related point is that any hardship suffered by the petitioner from the circumstances I have recounted appears to have arisen not from the legislation, but from the petitioner's failure to have taken steps to expedite the Federal Court's judicial review of the PMV termination decision, before the issue became moot.

[51] Fourth, the rule in *Heydon's Case* serves to ensure that courts interpret remedial legislation in a manner consistent with addressing the mischief the legislation is aimed at. Applying liberal rules of interpretation to the *CT Act* would not yield the result the petitioner seeks, because construing that statute in a manner consistent with its remedial purposes – broadly speaking, reform of regulation in the drayage sector – does not require vesting the Commissioner with authority to reinstate the petitioner's licence.

[52] Fifth, and finally, there was no "gap" in the legislation. There was a bright line, which the petitioner fell on the wrong side of. The remedy the petitioner seeks is not based on an interpretation that accords with the Legislature's clear intention. What is being sought, instead, is a rewriting of the legislation to compel the Commissioner to recognize terminated PMV licences as having been eligible, or at least potentially eligible, for participation in the transition process. For this court to do so would usurp the function of the legislature.

[53] The Reinstatement Decision, in any event, falls far short of being patently unreasonable.

[54] For these reasons, the application for judicial review is dismissed.

[55] In accordance with the submissions of counsel, each party will bear their own costs.

"A. Saunders J."