IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Can. American Enterprises Ltd. v. The Office of the British Columbia Container Trucking Commissioner,* 2020 BCSC 2156

Date: 20201127
Docket: S2012286
Registry: Vancouver

Between:

Can. American Enterprises Ltd.

Petitioner

And

The Office of the British Columbia Container Trucking Commissioner (also known as the BC Container Trucking Commissioner) and the Attorney General of British Columbia

Respondents

Before: The Honourable Madam Justice Ker

On judicial review from: Decisions of Office of the British Columbia Container Trucking Commissioner, September 30, 2020, October 30, 2020, and November 17, 2020 (CTC Decision No. 12/2020)

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner, via teleconference:	K. Rejminiak
Counsel for the Respondents, via teleconference:	M.A. Witten
Place and Date of Hearing:	Vancouver, B.C. November 26, 2020
Place and Date of Judgment:	Vancouver, B.C. November 27, 2020

[1] These *Reasons for Judgment* were delivered as oral reasons. They have since been edited for distribution.

Introduction

[2] On November 19, 2020, the applicant filed a petition for judicial review of a series of decisions rendered by the Office of the B.C. Container Trucking Commissioner (the "OBCCTC") that impact its container trucking business operations. Specifically, they seek to challenge a direction from the OBCCTC that they conduct a self-audit, an order that they pay a $10,000 fine for failing to conduct the self-audit, and a further order temporarily suspending the applicant's licence pending compliance with the direction to conduct a self-audit. In the judicial review, the applicant also seeks to obtain further, more sweeping orders directing the Commissioner to apply uniform rules for reviewing payment structures, and how they conduct audits under the *Container Trucking Act*, S.B.C. 2014, c. 28 (the *CTA*) and the *Container Trucking Regulation,* B.C. Reg. 248/2014 (the *CTR*).

[3] Pending the hearing of its petition, the applicant has filed an application seeking: an interim stay of the orders of the Container Trucking Commissioner (the "Commissioner") dated September 30, 2020, October 30, 2020, and November 17, 2020; a stay of the November 17, 2020 decision suspending the applicant's licence for 30 days, which is set to come into effect on November 30, 2020; an injunction preventing the Commissioner from ordering the applicant to perform a self-audit pending determination of the petition; and other related orders as set out in its notice of application.

[4] It is common ground that the test to determine whether a stay and injunction should be granted is that contained in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. The applicant bears the onus of satisfying the test, which contains three components or criteria:

1) there is a fair issue or serious question to be tried;

2) the applicant will suffer irreparable harm if the relief is not granted; and

3) the balance of convenience favours granting the relief sought.

[5] The applicant contends it has satisfied the requirements of the *RJR-MacDonald* test and the respondent contends it has met none of the criteria.

Factual Background and Statutory Framework

[6] Before analyzing whether the applicant has discharged its onus of satisfying the test in *RJR-MacDonald*, it is necessary to provide the context and factual background that ground this application. Much of this background was undisputed. My summary of the facts and background are derived largely from the respondent's written submissions which comprehensively synthesize and outline the factual background and context of this matter. The factual assertions are supported in the evidentiary record provided.

[7] The applicant is a licensee within the meaning of the *CTA*. Its licence under the *CTA* allows it to engage in container trucking services that require access to a marine terminal within the Lower Mainland, an area defined in the *CTR*. In this case, it is the Port of Vancouver.

[8] Licensees undertake container trucking services with the use of drivers, some of whom are direct employees of the trucking companies and others who are independent operators (“IOs”).

[9] The *CTA* and the *CTR* were enacted in 2014 as part of a collective response by the provincial and federal governments to address ongoing labour disputes in the container trucking industry. Significant work stoppages occurred at the Vancouver ports in 1999, 2005, and 2014, primarily as a result of driver dissatisfaction about payment practices. The four-week shutdown in 2014 prevented approximately 3.5 billion dollars' worth of goods from moving through the ports and had a significant negative impact on British Columbia's economy and the Canadian economy.

[10] As the evidence of Karm Jauhal establishes, the regulation of driver compensation is central to the regime governing container trucking services set out in the *CTA* and the *CTR*. The purpose of the *CTA* and the *CTR* is to preserve stability in the drayage sector by addressing chronic rate undercutting and driver compensation issues through a system of minimum rates, audits, licensing, and enforcement: *Aheer Transport Ltd. v. Office of the British Columbia Container Trucking Commissioner*, 2018 BCCA 210 (para. 60). The drayage sector relates to the transport of goods over a short distance in the shipping industry.

[11] The OBCCTC is the governing agency responsible for licensing and ensuring compliance with the *CTA* and the *CTR*. The Commissioner is charged with ensuring that all licensees compensate their drivers at the minimum required rates. Section 22 of the *CTA* allows the Lieutenant Governor in Council or the Commissioner, as the case may be, to establish by regulation the minimum compensation rates for drivers (the “Rate Order”).

[12] Prior to July 1, 2019, the Lieutenant Governor in Council set the rates by regulation. However, since that date, the Commissioner has set the rates by order. The Rate Order sets out per-trip rates that apply to most IOs.

[13] At issue in the underlying petition are orders and decisions made by the Commissioner in relation to the applicant's failure to pay the required rates to the IOs it hired to provide container trucking services between March 1, 2019, and the present day.

[14] Pursuant to ss. 31–33 of the *CTA*, the Commissioner has the power and responsibility to conduct audits and inspections to ensure that licensees are complying with the *CTA*, the *CTR*, and the terms of their licences. As a result, the Commissioner regularly audits licensees to ensure that they are paying their drivers the required rates. When non-compliance is established, s. 34 of the *CTA* sets out penalties the Commissioner may impose upon licensees, ranging from administrative fines to licence cancellation.

The Commissioner’s Audit of the Applicant

[15] In July 2019, the Commissioner received complaints from three of the applicant's IOs, alleging that it was not paying them for a particular type of trip, and that it was directing them not to record these trips on their timesheets. The trips in issue were those where the IO moved a loaded container from a customer's facility to the applicant's container yard for storage until it was ready to be shipped to its outbound destination (the "Disputed Trips"). The applicant summarily determined that these trips were short enough that it need not pay for them, notwithstanding the fact that they are indistinguishable from any other regulated trip captured by the *CTA*, the *CTR*, and the Rate Order.

[16] The Commissioner ordered an audit of the applicant, which took place between July 2019 and September 2020. The applicant and the OBCCTC auditor

communicated regularly during this timeframe. Initially, the applicant denied that the Disputed Trips were occurring. It told the auditor that empty containers were dropped off at a customer's facility and picked up at a later time once loaded and ready for shipment to their outbound destination, bypassing the Disputed Trip to the applicant's storage facility. This assertion was contrary to the evidence of the IO complainants. The auditor, as part of its investigation, contacted one of the applicant's customers. The customer verified the evidence of the complainants and advised that it generally did not keep loaded containers on its property. Rather, empty containers arrived at its facility, were live loaded within an hour, and then moved to another location; that is, the applicant's storage yard.

[17] The OBCCTC auditor, in its report of August 10, 2020, concluded that the Disputed Trips to the applicant's storage yard were, in fact, occurring, and that the applicant was not paying its IOs for these trips. The OBCCTC directed the applicant to self-audit these unpaid trips and calculate the outstanding amounts it owed its drivers.

[18] Eventually the applicant admitted to not recording and paying its IOs for some of the Disputed Trips because they were a short distance. However, it contended that this was not happening to the extent found by the OBCCTC auditor. The applicant then refused to conduct the self-audit or calculate outstanding amounts, simultaneously arguing that the drivers benefited from not being paid for the Disputed Trips and that the regulated rate structure was unsustainable for its business.

[19] The Commissioner accepted the findings of the OBCCTC auditor and concluded that the applicant was not paying its IOs for the Disputed Trips in violation of its licence and s. 23(2) of the *CTA*. The Commissioner also found that the applicant had failed to retain records of all trips as required by a condition of its licence.

The Commissioner’s Decisions

[20] On September 30, 2020, the Commissioner issued his first decision wherein he details the background and findings of fact from the extensive record review and audit process that had been conducted from July 2019 through August 31, 2020 (the “Commissioner’s September 30, 2020 Decision”). Pursuant to

s. 34(1) of the *CTA*, the Commissioner concluded the applicant had failed to comply with the provisions of the *CTA* and with the terms of its licence. On September 30, 2020, the Commissioner issued an order pursuant to s. 9 of the *CTA* that the applicant calculate, using the OBCCTC auditor's methodology, the amounts owing to each of its IOs for services performed between April 1, 2019, to present, and to submit those calculations to the OBCCTC's auditor for review (the "Self-Audit Order").

[21] The self-audit was to be completed by October 14, 2020. The Commissioner further ordered the applicant to pay the amounts owing once the auditor had reviewed the calculations: see the Commissioner's September 30, 2020 Decision at para. 26.

[22] The Commissioner also gave the applicant notice pursuant to s. 34(2) of the *CTA* that he proposed to impose an administrative fine of $10,000: see the Commissioner's September 30, 2020 Decision at para. 48.

[23] In accordance with s. 34(2)(e) of the *CTA*, on October 15, 2020, the applicant provided a written response disputing the proposed administrative fine. The Commissioner considered the applicant's response submissions and on October 30, 2020, gave notice pursuant to s. 34(5) of the *CTA*, of his decision under s. 34(4)(b) of the *CTA*, that he would not refrain from imposing the fine (the "Fine Decision Notice"): see the Fine Decision Notice at paras. 12, 20.

[24] It should be noted that by October 30, 2020, the applicant had failed to comply with the Self-Audit Order by the deadline of October 14, 2020. As a result, the Commissioner in his October 30, 2020 Fine Decision Notice also gave notice in accordance with s. 34(2) of the Act that he intended to impose an additional penalty of a licence suspension, until the applicant complied with the Self-Audit Order or made submissions as to why it should not have to comply. The Commissioner gave the applicant until November 13, 2020, to either comply with the Self-Audit Order or provide a written response to the proposed suspension penalty in accordance with s. 34(2)(e) of the *CTA*.

[25] The applicant did not comply with the Self-Audit Order by the revised deadline of November 13, 2020, and did not provide a written response to the

proposed suspension penalty. Instead, on November 13, 2020, it notified the Commissioner of its intention to bring a petition for judicial review.

[26] As such, on November 17, 2020, the Commissioner gave notice to the applicant, in accordance with s. 34(3)(b) of the *CTA,* of its decision under s. 34(3) to suspend the applicant's licence until it complied with the Self-Audit Order or for a period of one month, whichever was shorter (the “Suspension Decision Notice”): see Suspension Decision Notice (para. 8).

[27] Thus, the temporary suspension of the applicant's licence will end as soon as it complies with the Self-Audit Order, or after 30 days.

Reconsideration of a Commissioner’s Decision

[28] Section 38(1) of the *CTA* provides that:

> 38 (1) A commissioner's decision may be reconsidered by filing a notice of reconsideration … not more than 30 days after … receipt of the decision notice.

[29] Section 36 of the *CTA* provides that a Commissioner's decision, as referred to in s. 38(1), includes a decision under s. 34(3) of the *CTA*.

[30] On a reconsideration, after considering the information provided by the licensee, the Commissioner must either confirm or rescind the Commissioner's decision, as provided in s. 39(3) of the *CTA*. Section 39(2) allows the Commissioner to suspend a penalty until the outcome of the reconsideration is determined.

[31] In the current case, both the Commissioner's decision to impose an administrative penalty in the Fine Decision Notice of October 30, 2020, and the decision to suspend the applicant's licence in the Suspension Decision Notice of November 17, 2020, are “decisions” as defined under s. 34(3) of the *CTA*. This means they may be reconsidered under s. 38(1) of the *CTA.* In both decisions, the Commissioner advised the applicant that it can seek reconsideration in accordance with the provisions of the *CTA*.

[32] The applicant has not filed a notice of reconsideration of either the Fine Decision Notice of October 30, 2020, or the Suspension Decision Notice of November 17, 2020.

The Applicant's Position on the Disputed Trips

[33] During the course of the investigation and audit, the applicant admitted that it had not paid its drivers for at least some of the Disputed Trips. It contends that it should not have to pay for these trips because doing so is not cost-effective for the applicant or its drivers. However, the disputed trips are captured by the *CTR*, which mandates that drivers must be paid for these trips in accordance with the Rate Order. More specifically, the Disputed Trips are included within the definition of "off-dock trip" in the *CTR*, s. 1:

> "off-dock trip" means one movement of one or more containers 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, or
>
> (b) a movement of a container from one location in a facility to a different location in the same facility;

[34] A trip that falls within this definition is a regulated trip, regardless of the length of the distance travelled.

[35] As Mr. Jauhal's affidavit establishes:

1) IO drivers often make unregulated trips during the course of their work. These are trips without a container, including "empty-chassis trips," which is where a truck drives with its chassis/container bed attached, but no container loaded, and "bobtail trips," which is a trip where a truck drives with its cab only. These trips are not captured by the *CTR* and do not attract a required trip rate; and

2) To account for the fact that IOs occasionally must make trips that are not compensated for, the Rate Order includes the "Positioning Movement Rate," which is a surcharge added to each payment for an eligible trip, at $25 per trip for a single-chassis truck.

[36] The applicant contended through the course of the audit, and continues to contend, that requiring it to pay its IOs for the Disputed Trips, something mandated by the *CTA*, would not be cost-effective for itself or its drivers. It asserts that if it had to pay for the Disputed Trips, it would need to direct its drivers to perform more bobtail trips, and therefore the drivers would make less money. Essentially, in the applicant's view, its business model of not paying for the Disputed Trips results in better overall compensation for its drivers because it allows the applicant to assign drivers fewer unpaid trips.

[37] The applicant's contention that its drivers are better compensated by its pay structure which fails to conform to the *CTA* was specifically rejected in the Commissioner's September 30, 2020 Decision (paras. 29–30). Payment of the required rates is mandatory under the *CTA*, not permissive or discretionary. It is not open to licensees to unilaterally determine that not following the requirements of the *CTR* and the Rate Order is better for their drivers.

[38] Before the Commissioner, the applicant endeavoured to rationalize and justify its approach by relying on a previous decision of the Commissioner in *Canadian National Transport Ltd.*, CTC Decision No. 02/2019 (the "*CNTL Decision*").

[39] In the CNTL Decision, the Commissioner expressly confined its conclusions to the specific facts of the case, because of its unique circumstances: *CNTL Decision* (paras. 29–30). The unique circumstances included the fact that CNTL employed a different pay structure established by a national collective agreement that was in place prior to the 2014 enactment of the *CTA* and the *CTR*.

[40] One final point to this factual background is that this is not the applicant's first audit or violation of these provisions, as the Commissioner notes in the Commissioner's September 30, 2020 Decision (paras. 47–48), and in the Fine Decision Notice (paras. 14–15).

Application of the *RJR-MacDonald* Test for a Stay or Injunction

[41] With that factual background in mind, I turn to a consideration of whether the applicant has discharged its onus of satisfying the three criteria for a stay or injunction as set out in *RJR-MacDonald*.

Is there a serious question to be tried?

[42] In this respect, the applicant must establish that the issues are not frivolous or vexatious. This threshold is not onerous. Nevertheless, it requires a preliminary assessment of the merits of the petition, to determine if the applicant has satisfied the first branch of the *RJR-MacDonald* test.

[43] The applicant contends that it is being treated unfairly and that its petition raises issues of legislative authority, abuse of discretion, unfair and/or preferential

treatment, and lack of uniformity in the application of the provisions of the *CTA* and the *CTR* by the Commission when its dealings with the applicant and CNTL are compared. The central feature of the applicant's argument is that the *CNTL Decision* ought to apply to it, or that the applicant should be treated in a similar fashion.

[44] The applicant's contention completely ignores the fact that the *CNTL Decision* is entirely circumscribed to the unique facts raised therein.

[45] The applicant grounded its submission to the Commission, and again grounds its petition, in the CNTL Decision. As the respondent so adroitly notes, the applicant's complaint distils into one essential complaint: the Commissioner should have applied the "meets or exceeds" principle used in the *CNTL Decision* to the applicant, and that his failure to do so was unfair, *ultra vires*, biased, arbitrary, and inconsistent.

[46] In my view, the applicant's argument is bound to fail for at least one reason: the *CNTL Decision* was expressly confined to its unique facts by the Commissioner. It was confined first in the *CNTL Decision* (paras. 28–30), and later in the April 17, 2020, industry-issued OBCCTC Bulletin, "Off-Dock Rates and Truck Tag Requirements." The bulletin stated that the *CNTL Decision* was based on unique circumstances and could not be broadly applied in other circumstances.

[47] It must be remembered here that the applicant acknowledges its petition would be adjudicated on the high standard of patent unreasonableness. This standard permits judicial interference with a decision only when there is no evidence to support the findings or the decision is "openly, clearly, evidently unreasonable" or "border[ing] on the absurd": *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80 (para. 33), and *Vandale v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2013 BCCA 391 (para. 42).

[48] A review of the *CNTL Decision* demonstrates that it concerned a unique driver-compensation scheme under a national collective agreement entered into prior to the enactment of the *CTA* and the *CTR*. The compensation structure at issue in the CNTL decision was set by a national collective agreement. The pay structure was found to be more generous than the minimum rate set under the *CTA* and the *CTR*, requiring CNTL to pay its unionized drivers a 21-percent fuel

subsidy, wait-time payments, and separate rates for trips without a chassis (bobtail trips), or with an unloaded trailer with no container (empty-chassis trips). In contrast, the OBCCTC does not require licensees to pay for bobtail or empty-chassis trips.

[49] Although the Commissioner's audit detected instances of both over and underpayment of drivers, the Commissioner accepted that overall, CNTL paid its drivers above the regulated rates. Calculations show that after underpayments were set off by overpayments, CNTL overpaid its drivers in each year reviewed, for a total of $2,273,183.88 over a four-year audit period: *CNTL Decision* (para. 21). In that unusual circumstance, the Commissioner accepted that CNTL's compensation met or exceeded the regulated rates and fuel surcharges. He exercised his discretion not to sanction CNTL in this instance: *CNTL Decision* (paras. 24–25).

[50] As the respondent notes in its written argument at para. 64, even without the express limitation placed on the *CNTL Decision*, there are a number of distinguishing factors as between the circumstances of CNTL and those of the applicant. Most significantly, CNTL had overpaid its drivers, whereas the applicant has underpaid its drivers in clear violation of the *CTA*, the *CTR*, and the established Rate Orders. The distinguishing factors more than amply demonstrate that the applicant's reliance upon the *CNTL Decision* is misconceived.

[51] There is a further reason for concluding that the applicant has failed to satisfy the first branch of the *RJR-MacDonald* test of demonstrating a serious question to be tried. As the respondent points out and I agree, the petition for judicial review is premature. The applicant's petition seeks to set aside the Self-Audit Order, the Fine Decision Notice, and the Suspension Decision Notice. However, the Fine Decision Notice and Suspension Decision Notice are decisions made pursuant to s. 34(3) of the *CTA*. As such, they are subject to the reconsideration framework provided for in ss. 38 and 39 of the *CTA*.

[52] The Commissioner advised the applicant that it may seek a reconsideration of those two decisions: Fine Decision Notice (para. 22); Suspension Decision Notice (para. 9). The applicant has elected not to engage in this process and instead has filed its petition for judicial review. The applicant appears to contend it can bypass the reconsideration process and proceed directly to a judicial review in

this Court because its primary challenge is to the self-audit process. The applicant contends that as the Self-Audit Order is an order made under s. 9 of the *CTA*, it therefore is not subject to the reconsideration provisions of ss. 38–39 of the *CTA*.

[53] Pursuant to s. 39(3) of the *CTA*, on a reconsideration and after considering the information provided by the applicant, the Commissioner must either confirm or rescind the Commissioner's decision. Moreover, s. 39(2) of the *CTA* grants the Commissioner the power to suspend a penalty until the outcome of the reconsideration is determined.

[54] The flaw in the applicant's argument for avoiding the reconsideration route is that it ignores the rule that if an adequate alternative remedy exists within the administrative process and a party has failed to pursue it, the courts will not entertain an application for judicial review: *Strickland v. Canada (Attorney General)*, 2015 SCC 37 (paras. 40–41).

[55] The administrative penalty of the fine and the temporary licence suspension are inextricably tied to the Self-Audit Order due to the applicant's wilful non-compliance with the Self-Audit Order. Nevertheless, it is, as the respondent points out, open to the applicant to challenge the premise and methodology of the Self-Audit Order through the reconsideration process of the Fine Decision Notice and Suspension Decision Notice.

[56] Accordingly, what the applicant seeks to do is engage in a premature judicial review of the license suspension and administrative penalty orders by circumventing the *CTA*'s reconsideration process through its challenge to the Self-Audit Order.

[57] In my view, this would be inconsistent with the principle of judicial non-interference with ongoing administrative proceedings. This principle was summarized in *C.B. Powell Ltd. v. Canada (Border Services Agency)*, 2010 FCA 61, cited with approval in *Miller v. Arc Resources Ltd.*, 2017 BCSC 25 (para. 21). In *C.B. Powell*, Mr. Justice Stratas, writing for the Federal Court of Appeal, stated:

> [30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point: *Harelkin v. University of Regina*, [1979] 2 S.C.R.

> 561; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 at paragraphs 38-43; *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, at paragraphs 31 and 34; *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, at paragraph 14-15, 58 and 74; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141; *Vaughan v. Canada*, [2005] 1 S.C.R. 146, at paragraphs 1-2; *Okwuobi v. Lester B. Pearson School Board*, [2005] 1 S.C.R. 257, at paragraphs 38-55; *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, at paragraph 96.
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> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[58] The exhaustion doctrine, as outlined in *C.B. Powell*, requires that courts focus on the question of whether the application for relief is appropriately respectful of the statutory framework within which that application is taken and the normal processes provided by that framework for challenging administrative action: *Strickland* (para. 44); *Miller* (para. 22).

[59] Allowing circumvention of the reconsideration process whenever an order made under s. 9 of the *CTA* precedes or accompanies a s. 34 penalty order would render the ss. 38–39 reconsideration process meaningless in many circumstances, and would not respect the statutory framework enacted by the legislature.

[60] Accordingly, I conclude the applicant has failed to satisfy the first branch of the *RJR-MacDonald* test and has not demonstrated that there is a serious question to be tried.

[61] While not strictly necessary to address the two remaining branches of the *RJR-MacDonald* test, I will, for the sake of completeness, address them in brief

compass.

Irreparable harm

[62] The applicant contends it will suffer irreparable harm if the stays and injunction are not granted. The evidence on that point is thin and consists of four conclusory statements at paras. 30–33 of the affidavit of Mr. Brar, the director of the applicant.

[63] In *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 (para. 60) the Court of Appeal stated that:

> . . . Interlocutory injunctive relief pending the trial of the issues is a significant remedy, and should be invoked only when the test in *RJR-MacDonald* is satisfied on a sound evidentiary foundation.
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> [Emphasis in original.]

[64] Bald assertions and conclusory statements, such as those contained in Mr. Brar's affidavit, are an inadequate basis to establish irreparable harm.

[65] Moreover, in *Glooscap Heritage Society v. Canada (National Revenue),* 2012 FCA 255, Mr. Justice Stratas, again for the Federal Court of Appeal, noted:

> [32] The reason behind this was explained in *Stoney First Nation* as follows (paragraph 48):
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> > It is all too easy for those seeking a stay in a case like this to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert – not demonstrate to the Court's satisfaction – that the harm is irreparable.

[66] The applicant has not tendered any financial evidence in support of its assertions, nor has it explained to what extent its inability to access the Vancouver ports would interfere with its business operations, why it could not continue to operate its business by subcontracting with other companies with terminal access, or even what percent of its drivers' work requires access to the Vancouver ports.

[67] Failure to tender particularized financial evidence in support of an allegation of financial harm is usually fatal to an injunction application: *Glooscap Heritage Society* (paras. 35–36, 49). Given the economic nature of the applicant's claim of impact, it was incumbent upon it to tender some particularized financial information.

[68] There is a second and compelling reason that the applicant has failed to establish irreparable harm: the harm that the applicant asserts as irreparable is largely avoidable and self-induced. Avoidable or self-induced harm does not constitute irreparable harm: *Morguard Residential v. Mandel*, 2017 ONCA 177 (para. 25).

[69] Here the applicant has determined upon a course of defying the Self-Audit Order by refusing to engage in the regulatory process and justifying its approach by relying upon the *CNTL Decision* – a decision that clearly is exceptional, circumscribed, and seemingly inapplicable to its case. The applicant can avoid the purported harm by complying with the Self-Audit Order and calculating the amount it owes to its drivers. Paying what the applicant owes to its drivers does not constitute irreparable harm in these circumstances. Moreover, avoidable regulatory consequences or penalties that flow from refusing to comply with an order cannot constitute irreparable harm.

[70] An applicant must demonstrate irreparable harm if the relief sought is refused. But the harm here, the license suspension, the fine and their consequences, arise from the applicant's recalcitrance in disregarding the Commissioner's regulatory authority and failing to follow his orders that the applicant comply with the regulatory scheme.

[71] A decision by a licensee to unilaterally opt out of the regulatory framework of its own motion and to endeavour to suggest that it should be able to operate in a manner that ignores and undermines the regulatory framework, a process established to bring stability, certainty, and fairness to the container trucking industry in the province, is self-inflicted harm, not irreparable harm. The applicant's recalcitrance in this instance and its repeated attempts to import the *CNTL Decision* into its circumstances, arguably depicts an attitude that it is above the regulatory framework, a position antithetical to the rule of law.

[72] I turn now to the balance of convenience.

Balance of convenience

[73] In *526901 B.C. Ltd. v Dairy Queen Canada Inc*., 2018 BCSC 1092 [*Dairy Queen*], Mr. Justice Kent succinctly summarized the analytical approach to conducting the balance of convenience assessment, writing:

> [27] The third factor to be applied in an application for interlocutory injunction relief is "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits": *RJR-MacDonald*, para. 67. The Court observed that in light of the relatively low threshold of the "serious issue" requirement and the difficulty in applying the test of irreparable harm in some cases, many interlocutory proceedings will be determined at this third stage of analysis.
>
> [28] The Court in *RJR-MacDonald* noted that the factors to be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. It cautioned that it would be unwise to attempt even to list all of the various matters that may need to be taken into consideration, let alone to suggest the relative weight that should be attached to them.
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> [29] One case frequently referred to in injunction applications, which does list a number of factors that "should" be considered in assessing the balance of convenience, is *Canadian Broadcasting Corp. v. CKPG Television Ltd*. (1992), 64 B.C.L.R. (2nd) 96 at p. 102 (C.A.). The list is:
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> - the adequacy of damages as a remedy for the applicant if the injunction is not granted and for the respondent if an injunction is granted;
> - the likelihood that if damages are finally awarded they will be paid;
> - the preservation of contested property;
> - other factors affecting whether harm from granting or refusal of the injunction would be irreparable;
> - which of the parties has acted to alter the balance of their relationship and so affect the status quo;
> - the strength of the applicant's case;
> - any factors affecting the public interest; and
> - any other factors affecting the balance of justice and convenience.

[74] In respect of the considerations outlined in the *Dairy Queen* decision at para. 29, the applicant contends that the balance of convenience favours the granting of a stay as the OBCCTC does not stand to face any harm from the granting of the stay, whereas the applicant faces loss of business, loss of employees, and loss of reputation in the industry. Respectfully, the applicant draws the focus of the balancing assessment too narrowly and ignores its own intransigent behaviour in the audit process, and how the public interest will be undermined should its conduct be rewarded with a stay and an injunction.

[75] Public interest considerations are of central importance at this stage of the analysis: *Jean v. Canada (Citizenship and Immigration)*, 2009 FC 593 (para. 62) and *RJR-MacDonald* (at 343). Moreover, the public interest requires particular emphasis in the context of regulatory sanction: *Carvalho v. British Columbia (Medical Services Commission),* 2016 BCSC 1603 (para. 73).

[76] Here the considerations include the public interest in the efficacy and enforcement of a regulatory scheme that is designed to benefit the public: *RJR-MacDonald* (at 343) and *Carvalho* (paras. 68, 73).

[77] It cannot be forgotten that the *CTA* and *CTR* represent a concerted effort by the legislature to address drivers' legitimate compensation concerns and preserve stability in the container trucking industry. The Commissioner has a responsibility to both the public and drivers to enforce the *CTA,* and to curb the driver underpayment and non-compliance issues that have plagued the container trucking industry and resulted in three crippling shutdowns of the Vancouver ports in 1999, 2005, and 2014, which had a significant negative impact on the provincial and national economies.

[78] In this case, the applicant has defied the Commissioner's Self-Audit Order and refused to calculate the amounts owing to its drivers. It failed to meet the October 14, 2020 deadline established in the Commissioner’s September 30, 2020 Decision, and then the November 13, 2020 deadline in the Fine Decision Notice of October 30, 2020.

[79] Granting a stay in the present circumstances would encourage inexcusable regulatory non-compliance and undermine the integrity of the *CTA*'s audit and enforcement regime. This undeniable harm to the public interest, the Commissioner's authority, and drivers, weighs heavily against the granting of a stay.

[80] Compounding this harm to the public interest and the Commissioner are the implications that the issuance of a stay or injunction in these circumstances would present to the integrity of this Court's own process. An injunction is an equitable remedy, and a fundamental principle of equity is that "he who seeks equity must come with clean hands": *Devilmé v. Canada (Citizenship and Immigration)*, 2011 FC 1470 (paras. 11–16). This doctrine also applies when a court decides whether

to exercise its discretion to grant a stay: *Morguard Residential* (para. 18). Questionable conduct of an applicant may disentitle them to the injunctive relief sought: *International Forest Products Ltd. v. Kern*, 2000 BCSC 888 (para. 63).

[81] The applicant in this case, in my view, does not come before the court with clean hands. It has repeatedly failed to pay its drivers in accordance with the regulated rate, as established in Mr. Jauhal's affidavit at para. 33 and the Commissioner's September 30, 2020 Decision. The applicant has misled and obstructed the OBCCTC auditor, as the Commissioner's September 30, 2020 Decision outlines at paras. 38–41, and it has repeatedly refused to comply with the Commissioner's Self-Audit Order.

[82] Deception and disregard for legal authority are well-recognized bases of disentitlement for equitable relief: *Massoni Vasquez v. Canada (Citizenship and Immigration)*, 2011 FC 1144 (paras. 29–31); *Kern* (para. 63); *Carvalho* (para. 84); *Morguard Residential* (paras. 27–28). On this basis alone, the applicant's application fails.

[83] In my view, the balance of convenience and the need to protect the public interest, the Commissioner's authority, and the integrity of the regulatory scheme in the container trucking industry, militate strongly against the granting of a stay or injunctive relief. Accordingly, the application is dismissed.

"Ker J."