IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Aheer Transportation Ltd. v. The British Columbia Container Trucking Commissioner, 2022 BCSC 1779

Date: 20221012
Docket: 239732
Registry: New Westminster

Between:

Aheer Transportation Ltd.

Petitioner

And

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

Respondents

Before: The Honourable Mr. Justice Brongers

Reasons for Judgment

Counsel for the Petitioner:	A.N. Mathur
Counsel for the Respondents:	T. Bant
Place and Dates of Hearing:	Port Coquitlam, B.C. April 21-22, 2022 Written Submissions Received June 28 and July 4, 2022
Place and Date of Judgment:	New Westminster, B.C. October 12, 2022

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INTRODUCTION

[1] This is a judicial review of a decision made by the British Columbia Container Trucking Commissioner (the "Commissioner"). The petitioner is Aheer Transportation Ltd. ("Aheer"), a trucking company. Aheer takes issue with two aspects of the Commissioner's decision.

[2] First, Aheer challenges the Commissioner's finding that Aheer underpaid a specific truck driver by $22,069.91. Second, Aheer objects to the Commissioner's imposition of a $60,000.00 fine on Aheer for having systematically underpaid its drivers over a four-year period.

[3] Aheer argues that these orders are patently unreasonable and procedurally unfair. It also requests an order of *mandamus* to redress the absence of any formal rules of practice and procedure for proceedings before the Commissioner.

[4] The Commissioner disagrees that his decision suffers from these alleged flaws. He also notes that a set of practice and procedure rules has recently been adopted.

[5] On my review of the petition record, I am not persuaded that the Commissioner's decision is patently unreasonable or that the process used to reach it was unfair. Furthermore, Aheer's *mandamus* application is now moot. Aheer's petition will therefore be dismissed.

BACKGROUND

The Commissioner

[6] The tumultuous history of labour relations at the Port of Vancouver that led to the statutory creation of the Commissioner is set out in some detail in a number of court decisions, including: *Aheer Transportation Ltd. v. Office of the British Columbia Container Trucking Commissioner,* 2017 BCSC 1111 at paras. 1 to 3 and 9 to 27; aff'd 2018 BCCA 210 at paras. 1 to 4 and 10 to 28; *Can. American Enterprises Ltd. v. The Office of the British Columbia Container Trucking Commissioner*, 2020 BCSC 2156 ["*Can. American*"] at paras. 6 to 12; and *Port Transportation Association v. The Office of the British Columbia Container Trucking Commissioner,* 2022 BCSC 387 ["*Port Transportation Association"*] at paras. 12 to 18.

[7] Briefly put, there was a series of work stoppages that culminated in 2014 when Greater Vancouver area container truck drivers withdrew their services to manifest their dissatisfaction with trucking company payment practices. This costly strike was resolved through a "Joint Action Plan", the implementation of which was the subject of a report prepared by two experienced labour mediators, Vince Ready and Corinn Bell. That report recommended the establishment of a provincial agency to oversee the container trucking industry, including the setting and enforcement of driver payment rates. This recommendation was accepted by the provincial government. It then enacted the *Container Trucking Act,* SBC 2014, c. 28 ("*Act*") and the *Container Trucking Regulation,* BC Reg 248/2014 ("*Regulation*"), both of which came into force in December 2014.

[8] The purpose of the *Act* and the *Regulation* is to preserve stability in the short haul (drayage) sector of the container trucking industry by addressing chronic rate undercutting and driver compensation issues through a system of minimum rates, audits, licensing, and enforcement: *Can. American*, at para. 10. This was done primarily by instituting the office of the Commissioner and bestowing it with a number of powers. In particular, the Commissioner is now responsible for licensing container trucking companies: *Act,* ss. 16 to 21. The Commissioner also establishes minimum rates and fuel surcharges that licensees must pay truck drivers: *Act,* s. 22. In order to ensure licensee compliance, the Commissioner may conduct audits: *Act,* ss. 31 to 33. When there has been a failure to comply, the Commissioner may impose administrative fines of up to $500,000, and may also suspend or cancel licences: *Act,* s. 34.

Aheer

[9] Aheer is a container trucking company that has been in business since 1993. Pursuant to its license under the *Act,* Aheer performs drayage container trucking services at various Port of Vancouver terminals. It employs company drivers directly and also contracts with independent operator drivers. Both the company drivers and the independent operators that work for Aheer are members of UNIFOR Local Union No. VCTA.

[10] Aheer has been the subject of a number of Commissioner decisions that predate the one that is at issue in the present proceeding.

[11] First, the Commissioner conducted a 2015 audit into Aheer's payment practices from April 3, 2014 to July 31, 2015. The Commissioner found that Aheer had underpaid drivers by a total of $141,769.23 during this period.

[12] Second, a driver complained to the Commissioner in 2016 when Aheer docked his pay to reflect the cost of repairing a truck chassis the driver had allegedly damaged. The Commissioner found that this was a business cost that cannot lawfully be deducted from a driver's remuneration. Aheer was directed to pay the driver $4,648.64 in respect of the improper pay deduction.

[13] Third, the Commissioner addressed a 2018 complaint from a driver who claimed that he had been underpaid. The Commissioner allowed the complaint and ordered Aheer to pay $6,622.59 in lost remuneration owing. In addition, the Commissioner imposed a $50,000.00 administrative fine on Aheer for having ceased to dispatch the driver following his complaint. The Commissioner found this to be a violation of s. 28(a) of the *Act* as it amounted to an attempt by Aheer to punish the driver for having brought the complaint.

The Commissioner's Audit

[14] The genesis of the present proceeding is an audit of Aheer that the Commissioner began in November 2018 after having received complaints from both independent operators and company drivers who had worked for Aheer. These complaints related to Aheer's payment practices.

[15] The temporal scope of the Commissioner's audit in relation to the independent operators' complaints was initially limited to September 2018. The auditor found that Aheer had underpaid these drivers by $7,007.52 in that month. The auditor also found instances of Aheer using a hybrid compensation formula involving payments per trip and per hour, contrary to the terms of Aheer's licence. As a result, the scope of the audit was expanded to encompass the period from May 1, 2015 to November 30, 2019. Ultimately, the auditor found that Aheer had underpaid 36 independent operators by a total of $73,390.72 between May 2015 and November 2019.

[16] The Commissioner's audit in relation to the company drivers' complaints covered the pay periods from mid-March to mid-April 2019, and August 2019. After examining what she described as Aheer's "complicated" and "confusing" payroll

structure, the auditor noted that Aheer had also been using a hybrid system for paying company drivers using a calculation based on both hours of work and the number of containers moved plus trips made. However, the auditor concluded that Aheer was adequately paying the company drivers at rates above the minimum that is legally required.

[17] In August 2020, the auditor instructed Aheer to remedy the $73,390.72 underpayment of the independent contractors by issuing cheques directly to these drivers for the amounts they were individually owed. The auditor then attempted to verify that the payments were actually made. One of the underpaid drivers contacted by the auditor was Ramandeep Gill. Mr. Gill reported that he had received a cheque from Aheer for $720.30, but was refusing to cash it since he felt he was owed significantly more for trips he had made between February and April 2015. Mr. Gill also provided the auditor with copies of Aheer's payroll records that related to him for this period. Using these records, the auditor calculated that Aheer had underpaid Mr. Gill by $22,069.61 from February to April 2015.

[18] Mr. Gill's information prompted the auditor to ask Aheer to provide payroll records for all independent contractors that performed container trucking services between January and April 2015. Aheer objected to this request, noting that its licence only requires such records to be retained for four years. Production of these records was ultimately not insisted upon by the Commissioner.

[19] On January 15, 2021, the auditor completed her final report on the Aheer audit that she had started in November 2018. Aheer was given an opportunity to comment upon the report, but Aheer did not do so.

The Commissioner's Decision

[20] On March 5, 2021, the Commissioner issued an initial decision in relation to the complaints that were the subject of the auditor's January 15, 2021 report.

[21] In this decision, the Commissioner found that Aheer owed Mr. Gill $22,069.91 for the period from February to April 2015. The Commissioner ordered Aheer to prepare a money order in this amount payable to Mr. Gill and to deliver it to the Commissioner for distribution by April 5, 2021.

[22] The Commissioner found further that Aheer had violated the *Act* and the *Regulation* by failing to pay its independent operators at the proper rate for all of

the trips they performed. In addition, the Commissioner found that Aheer had violated the *Act,* the *Regulation,* the Commissioner's Rate Order, and the terms of Aheer's licence by using a prohibited hybrid hourly and trip rate payment system that used an incorrect rate. The Commissioner suggested that a fine of $60,000 would be an appropriate sanction for these violations, although Aheer was invited to first present submissions on the proposed penalty before a final decision was made.

[23] Aheer availed itself of this opportunity by filing a letter prepared by its counsel on March 19, 2021. It contained a request that no penalty be imposed.

[24] The Commissioner considered Aheer's plea, but it was not accepted. On April 20, 2021, the Commissioner ordered Aheer to pay an administrative fine in the amount of $60,000.

[25] On May 20, 2021, Aheer applied for a reconsideration of the fine order pursuant to s. 38 of the *Act.* That application was dismissed by the Commissioner on June 8, 2021.

Aheer's Petition

[26] On July 28, 2021, Aheer filed the present petition to challenge the Commissioner's decision ordering it to: (1) compensate Mr. Gill in the amount of $22,069.91 (the "Gill Order"); and (2) pay an administrative fine of $60,000.00 (the "Fine Order").

[27] Aheer's petition is supported by affidavits made by the director and the operations manager of Aheer, as well as one made by a legal assistant employed by counsel for Aheer. The responding evidence consists of an affidavit made by the Commissioner's registrar. The latter effectively confirms that, with the addition of two documents, all of the material that was before the Commissioner when the impugned decision was made is contained within the petition record filed with the Court.

[28] The petition was heard on April 21 and 22, 2022. In addition, the parties filed supplemental written submissions on June 28 and July 4, 2022. These submissions address a relevant development that arose after the hearing, namely, the June 14, 2022 publication of the Commissioner's Rules of Practice and Procedure ("*Rules*").

ISSUES

[29] Adjudication of this petition requires consideration of the following five issues raised by Aheer to challenge the Commissioner's decision:

a) was the Gill Order patently unreasonable because it related to events that took place over four years prior to the start of the Commissioner's audit?

b) was Aheer denied procedural fairness because the Commissioner audited Aheer and issued the Gill Order in respect of a time period prior to when Aheer was required to maintain payroll records?

c) was the Fine Order patently unreasonable because it was issued over six months after the Commissioner became aware of Aheer's non-compliance with its statutory obligations?

d) was the Fine Order patently unreasonable because its quantum was disproportionately high?

e) should a *mandamus* order be issued to require the Commissioner to issue rules of practice and procedure?

[30] These questions will be addressed in turn after consideration of two preliminary issues: (1) the timeliness of Aheer's petition; and (2) the applicable standard of review.

ANALYSIS

Timeliness of Aheer's Petition

[31] The Commissioner raises a preliminary objection to Aheer's petition based on s. 57(1) of the *Administrative Tribunals Act,* SBC 2004, c. 45 ("*ATA*"). This provision effectively imposes a 60-day time limit for seeking judicial review of final decisions of the Commissioner, although the Court has the discretion to extend the deadline by virtue of s. 57(2) of the *ATA,* as follows:

> **57(1)** Unless the Act or the tribunal's enabling Act provides otherwise, an application for judicial review of a final decision of the tribunal must be commenced within 60 days of the date the decision is issued.
>
> **57(2)** Despite subsection (1), either before or after expiration of the time, the court may extend the time for making the application on terms the court considers proper, if it is satisfied that there are serious grounds for relief, there is a reasonable explanation for the delay and no substantial prejudice or hardship will result to a person affected by the delay.

[32] The Commissioner submits that by operation of s. 57(1) of the *ATA,* Aheer's challenge to the Gill Order is time-barred. While the Commissioner's decision was rendered on March 5, 2021, Aheer's petition was only filed 145 days later on July 28, 2021. Therefore, Aheer's challenge must be dismissed unless the Court grants an extension of time pursuant to s. 57(2) of the *ATA.* The Commissioner does not, however, "strenuously oppose" the granting of such an extension since it is acknowledged that there has been no hardship or prejudice resulting from Aheer's delay.

[33] Aheer's position is that the 60-day deadline only started to run on June 8, 2021, the date on which the Commissioner issued his reconsideration decision pursuant to s. 39 of the *Act.* Since Aheer filed its petition 50 days afterwards, Aheer did not run afoul of the s. 57(1) *ATA* deadline. Aheer adds that if it had sought judicial review prior to the Commissioner's reconsideration decision, it risked having its petition dismissed for failure to exhaust all adequate remedial recourses provided by the *Act*: *Can. American* at paras 51 to 60.

[34] Aheer's argument is well-founded in respect of the portion of its petition that is directed at the Fine Order. That order was the subject of Aheer's reconsideration application. However, Aheer never requested a reconsideration of the Gill Order. The Commissioner is therefore correct that Aheer cannot contest the Gill Order unless the Court grants Aheer an extension of time for that particular challenge.

[35] I also note parenthetically that it would have seemingly been open to the Commissioner to object to Aheer's judicial review of the Gill Order because of Aheer's failure to first request that the Gill Order be reconsidered. As the Commissioner did not raise such an objection, however, I will not exercise my discretion to refuse to conduct a judicial review of the Gill Order because Aheer did not avail itself of this internal avenue of appeal.

[36] The criteria that must be satisfied by an applicant who seeks an extension of time pursuant to s. 57(2) of the *ATA* are threefold: (1) serious grounds for relief; (2) an explanation for the delay; and (3) the absence of substantial prejudice or hardship to the respondent. Curiously, Aheer did not bother to lead any evidence or even present argument as to why it meets this test in respect of its challenge to the Gill Order.

[37] Aheer's cavalier approach to this issue is troubling. Had the Commissioner chosen to actively oppose an extension of time, I might have been inclined to deny it. In the circumstances, however, I will exercise my authority under s. 57(2) of the *ATA* to grant Aheer an extension of time to challenge the Gill Order. In particular, I find that Aheer's grounds for seeking relief in respect of the Gill Order are arguable and therefore serious. I am also satisfied that there is an implicit explanation for the delay in that Aheer was awaiting the outcome of its application for reconsideration of the Fine Order before bringing its petition in respect of all aspects of the Commissioner's decision that Aheer is contesting. I further accept the Commissioner's reasonable concession that Aheer's relatively brief delay has not caused any tangible prejudice or hardship. Aheer's judicial review of both the Gill Order and the Fine Order will therefore be permitted to proceed.

Standard of Review

[38] There is no dispute regarding the standard of review that applies to the adjudication of the grounds raised by Aheer to contest the Gill Order and the Fine Order.

[39] With respect to Aheer's procedural fairness challenge to the Gill Order, the standard is fairness. This standard is prescribed by the combined operation of ss. 2(4) and 12 of the *Act,* as well as s. 58(2)(b) of the *ATA.* Practically speaking, this means that the process undertaken by an administrative decision-maker either complies with the duty of fairness or it does not, and no deference is afforded to its procedural choices or decisions: *R.N.L. Investments Ltd. v. British Columbia (Agricultural Land Commission),* 2021 BCCA 67 at para. 57. I will therefore conduct a non-deferential review of the procedure employed by the Commissioner to audit and issue the Gill Order.

[40] On the other hand, Aheer's substantive challenge to the merits of the Gill Order and the Fine Order is subject to a standard of patent unreasonableness. This flows from ss. 2(4) and 12 of the *Act*, as well as s. 58(2)(a) of the *ATA.* A comprehensive consideration of the notion of patent unreasonableness and how this standard is to be applied to the Commissioner's decisions can be found in Justice Crerar's recent decision in *Port Transportation Association* at paras. 76 to 79. The following principles are worth highlighting:

a. under s. 58(3) of the *ATA,* a discretionary decision is patently unreasonable if it: (1) is exercised arbitrarily or in bad faith; (2) is exercised for an improper purpose; (3) is based entirely or predominantly on irrelevant factors; or (4) fails to take statutory requirements into account;

b. the standard of patent unreasonableness is a very strict test that permits judicial interference with an administrative decision only when there is no evidence to support the findings, or the decision is clearly irrational, openly, clearly and evidently unreasonable, or borders on the absurd; and

c. a patently unreasonable decision is one that is so flawed that no amount of curial deference can justify letting it stand.

[41] Accordingly, I will conduct a highly deferential review of the Commissioner's substantive decision to require Aheer to pay Mr. Gill $22,069.91 and to fine Aheer $60,000.00.

Issue #1: Timeliness of the Gill Underpayment Audit and Order

Aheer's Position on Issue #1

[42] Aheer advances four arguments as to why the Gill Order is substantively flawed, all of which are variations on the single theme that the Commissioner's underlying audit and ultimate decision were untimely.

[43] First, Aheer submits that the Commissioner's audit included a wrongful demand for payroll records in relation to Mr. Gill dating from January to April 2015. This demand was made by the auditor in October 2020. Aheer says that such a demand was unlawful since its license provides that Aheer is only required to provide payroll records in accordance with the terms of s. 28 of the *Employment Standards Act,* RSBC 1996, c. 113 ["*ESA*"]. Section 28(2)(c) of the *ESA* states that such records need only be retained for four (4) years.

[44] Second, Aheer submits that the Commissioner erred by entertaining a complaint that related to an underpayment that had allegedly taken place over 4 years earlier. Aheer says that the Commissioner's interpretation of its jurisdiction pursuant to the *Act* whereby it may consider complaints against licensees dating

to periods prior to when a licensee is statutorily required to retain payroll records is absurd. This is because, in the absence of a mandatory obligation to preserve older records, licensees may choose not to do so and will then be unable to respond to such complaints.

[45] Third, Aheer submits that the Commissioner failed to consider the doctrine of laches in issuing the Gill Order. Aheer says that this doctrine ought to have been applied to dismiss Mr. Gill's complaint since he knew of his underpayment in 2015 yet did not bring it to the Commissioner's attention until 2020.

[46] Fourth, Aheer submits that the Commissioner was estopped from considering Mr. Gill's complaint in respect of the February to April 2015 underpayment since the Commissioner had conducted a previous audit in 2015 regarding Aheer's payment practices from April 3, 2014 to July 31, 2015. The Commissioner would have had access to Aheer's payroll records in relation to Mr. Gill at that time yet apparently chose not to examine them when the Commissioner had the chance. As the records relate to a time period for which Aheer is no longer statutorily required to maintain them, it is now too late for the Commissioner to issue the Gill Order.

[47] In Aheer's submission, any or all of these four reasons demonstrate that the Gill Order is patently unreasonable and ought to be set aside.

The Commissioner's Position on Issue #1

[48] The Commissioner submits that none of Aheer's arguments as to why the Gill Order is substantively flawed are well-founded.

[49] First, the Commissioner denies that Aheer was ever required to produce payroll records in relation to Mr. Gill. To the contrary, the Commissioner accepted Aheer's objection to this request based on the lack of a statutory obligation to keep payroll records after 4 years. Furthermore, Aheer's inability to provide these records did not factor into the Commissioner's decision to issue the Gill Order.

[50] Second, the Commissioner submits that Aheer is wrong to assert that the *Act* implicitly imposes a time-bar on complaints brought in relation to underpayments made during a period prior to when a licensee is required to preserve payroll records. The *Act* does not contain a limitation period for complaints, unlike some other similar labour relations statutes, such as the *ESA.*

[51] Third, the Commissioner argues that the doctrine of laches is discretionary in nature. The Commissioner's choice not to dismiss Mr. Gill's complaint on the basis of laches is not a patently unreasonable exercise of discretion as per s. 58(3) of the *ATA.*

[52] Fourth, the Commissioner submits that the preconditions for issue estoppel were not present to preclude consideration of Mr. Gill's complaint in respect of the 2015 underpayment. In particular, the Commissioner's previous audit of Aheer did not result in a final decision as to whether Aheer had met its obligations to independent operators during the period from January to April 2015.

[53] As such, the Commissioner concludes by submitting that the Gill Order is not patently unreasonable and does not warrant being quashed.

Discussion and Conclusion regarding Issue #1

[54] I have considered all four of Aheer's arguments in support of its assertion that the Gill Order is patently unreasonable. In my view, however, none of them have merit.

[55] First, I do not agree that the Gill Order can be impugned on the basis that the Commissioner's auditor asked Aheer to provide payroll records in relation to Mr. Gill that dated from 2015. The Commissioner clearly explained in his March 5, 2021 decision the auditor's rationale for this request, the Commissioner's acceptance of Aheer's explanation for its inability to comply with the request, and, most importantly, that this inability is not relevant to the Commissioner's decision:

> 64. It is the practice of the [Commissioner] to request documents from licensees under audit for some or all drivers in the period under audit and, in the case of [Mr. Gill's] complaint, the auditor requested documents from Aheer for the period between January 1, 2015 and April 30, 2015. In so doing, the auditor was trying to establish Aheer's compliance not only as it related to [Mr. Gill] but also to the balance of Aheer's sponsored [independent contractors] in the period. Aheer has advised that it is unable to locate the requested records and points out that it is not required to have kept the records for a period longer than four years.
>
> 65. I agree with Aheer in this respect. Per the Container Trucking Services License, licensees are required to keep payroll records as defined and required by section 28 of the *ESA.* Section 28 of the *ESA* requires employers to retain specific records for each employee for four years after the date on which the payroll records were created. For this reason, I will not require Aheer to provide [independent operator] records for the period

> between February 2015 and April 2015 and will not penalize Aheer for its inability to do so. [*emphasis added, not in original*].

[56] The mere fact that the Commissioner's auditor requested documents from Aheer that it was not statutorily required to preserve does not constitute an "excess" or "enlargement" of the Commissioner's jurisdiction when the Commissioner accepted Aheer's position and did not issue the Gill Order on the basis that Aheer was unable to produce its own copies of Mr. Gill's payroll records. Accordingly, Aheer is wrong to suggest that the auditor's request demonstrates that the Commissioner failed to take statutory requirements into account thereby rendering the Gill Order patently unreasonable as defined by s. 58(3)(d) of the *ATA.*

[57] Second, I can see no flaw in the Commissioner's thorough consideration of the question of whether the *Act* imposes a time limit on the Commissioner's ability to consider complaints, as follows:

> 61. I do not agree that it is unfair and unreasonable to pursue a five-year old complaint. Section 26 of the *Act* stipulates that any person may make a complaint to the Commissioner that a licensee has contravened the *Act*. Unlike the *Employment Standards Act* ("*ESA*"), it does not set a time limit for making a complaint. Section 29 of the *Act* requires the Commissioner to accept and review a complaint. Section 29(2) of the *Act* sets out the reasons why the Commissioner may refuse to accept or review or stop reviewing a complaint. Section 29 of the *Act* is similar to section 76 of the *ESA,* but, unlike the *ESA,* it does not contain a provision allowing the Commissioner to stop reviewing a complaint if it is made outside of a specified time limit. If a person can reasonably demonstrate that a licensee has contravened the *Act,* then it is not only fair, but necessary, that the Commissioner pursue the complaint. To do otherwise would be unfair and contrary to the purpose of the *Act* which is to ensure that drivers are properly remunerated for container trucking services.

[58] To the contrary, I find that this interpretation of the *Act* is a cogent one that was open to the Commissioner to adopt. It is certainly not patently unreasonable, and therefore does not provide a basis for quashing the Gill Order as Aheer is requesting.

[59] Third, I do not accept that the absence of an express consideration of Aheer's laches argument in the Commissioner's decision renders it patently unreasonable. It is trite law that administrative decision-makers are not expected to respond to every argument or line of possible analysis in their reasons for decision: *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 at para. 128. In this case, Aheer only invoked the notion of laches in its March

19, 2021 request for reconsideration, and did not develop the argument beyond reiterating its fundamental assertion that it was unreasonable for the Commissioner to address a complaint relating to events that took place five years earlier. In any case, the Commissioner's explanation for dismissing Aheer's timeliness argument in respect of Mr. Gill's complaint also implicitly addresses the question of whether the doctrine of laches ought to have applied here. As the Supreme Court of Canada explained in *Manitoba Metis Federation Inc. v. Canada (Attorney General),* 2013 SCC 14 at paras. 145 to 146, the doctrine of laches is designed to address injustice stemming from undue delay in prosecuting a claim where there has been acquiescence by the claimant, or where it would be unreasonable to allow the claim to proceed. I was not shown evidence that was before the Commissioner that would clearly have warranted a summary dismissal of Mr. Gill's complaint on either basis. In sum, the Commissioner's apparent rejection of Aheer's laches argument was not patently unreasonable.

[60] Fourth, I agree with the Commissioner that estoppel did not arise in this case simply because a previous audit had been conducted. The Commissioner dealt with this question in significant detail at paragraphs 25 to 28 and 66 of his March 5, 2021 reasons for decision. In particular, the Commissioner noted the following:

> 28. The [Commissioner] does not have a record of any decisions or instructions of then-Commissioner Andy Smith pertaining to the request of Aheer's records for the period between January 2015 and April 2015, other than the statement of the auditor that she was instructed not to audit this period. Despite the reference to "alternative plans…to resolve the rate issues" in the interim audit report, no such plans ever came to fruition. The period was not audited, and the rate issues were not resolved. Aheer has not made any payments to independent operators for this period. <u>There is no issue estoppel as the [Commissioner] never determined the issue</u>. [*emphasis added, not in original*].

[61] As the Commissioner never made a final decision in relation to whether Aheer had met its obligations to independent operators during the period from January to April 2015, the Commissioner was not estopped from ordering Aheer to remedy its underpayment of Mr. Gill during that time frame.

[62] In sum, I find that the Gill Order is not patently unreasonable. This aspect of Aheer's petition is dismissed.

Issue #2: Procedural Fairness of the Gill Underpayment Audit and Order

Aheer's Position on Issue #2

[63] The foundation for Aheer's procedural fairness argument in respect of the Gill Order is similar to the one Aheer advances in support of its substantive challenge to that decision. Specifically, Aheer says that it was procedurally unfair for the Commissioner to consider Mr. Gill's complaint in relation to a time period for which Aheer was not statutorily required to maintain payroll records, particularly when the Commissioner knew that Aheer had not kept such records. Aheer submits that its inability to verify Mr. Gill's claim by having recourse to these records significantly prejudiced Aheer's right to be heard before the Commissioner.

The Commissioner's Position on Issue #2

[64] The Commissioner disagrees that the fact that Aheer no longer had its own copy of its payroll records in relation to Mr. Gill constitutes a denial of procedural fairness. In addition to reiterating that the Commissioner did not decide to issue the Gill Order simply because Aheer was unable to produce the records, the Commissioner also argues that Aheer has not shown that it suffered any actual procedural prejudice in this case.

[65] In particular, the Commissioner says that while Aheer's inability to access its own copies of its 2015 payroll records may have made it more difficult for Aheer to respond to Mr. Gill's complaint, Aheer was not incapable of defending itself: *Investment Industry Regulatory Organization v. Crandall,* 2020 NBCA 76 at paras. 86 and 90. For example, Aheer could have tested the authenticity and accuracy of Mr. Gill's records by seeking out corroborative documentation from other institutions, such as banks and Port Metro Vancouver. Furthermore, the Commissioner notes that Mr. Gill's copy of Aheer's payroll records appears to be authentic, and Aheer did not argue before the Commissioner that these documents were fraudulent.

Discussion and Conclusion regarding Issue #2

[66] As noted earlier, the Commissioner's view of whether Aheer was afforded procedural fairness is not entitled to deference by the reviewing court. I must make

my own assessment of whether the procedure employed by the Commissioner to consider and determine Mr. Gill's complaint was fair.

[67] On my review of the petition record, however, I am unable to accede to Aheer's argument that the Gill Order was vitiated because of a denial of procedural fairness. The fundamental basis for this argument is that the documentary foundation for the Commissioner's decision was a copy of Aheer's payroll records supplied directly by Mr. Gill, and not by Aheer itself. However, Aheer has not tendered any evidence in this proceeding to suggest that Mr. Gill's copies of Aheer's own payroll records are incomplete, inauthentic, or otherwise unreliable. Furthermore, by letter dated February 9, 2021, the Commissioner wrote to counsel for Aheer the following:

> I have re-attached the auditor's calculation spreadsheet and have attached the complainant's records to this letter. I request that your client review the spreadsheet and attached records and provide comments/analysis respecting the accuracy of the records and the auditor's calculations to the [Commissioner] by no later than February 23rd, 2021.

[68] Aheer did not respond to this invitation.

[69] Given that Aheer was afforded a full opportunity to comment upon and dispute the veracity of the auditor's assessment of Mr. Gill's complaint and the authenticity of his copy of Aheer's payroll records, I can see no basis for concluding that the process employed by the Commissioner to issue the Gill Order was procedurally unfair.

[70] This ground for challenging the Gill Order is therefore dismissed.

Issue #3: Timeliness of Fine Order

Aheer's Position on Issue #3

[71] Aheer acknowledges that it underpaid its independent operators by $73,390.72, in contravention of the *Act* and the terms and conditions of its license. However, Aheer submits that the Commissioner's decision to impose the Fine Order in respect of this violation is patently unreasonable as it is contrary to s. 34(1) of the *Act.* According to this provision, the Commissioner's power to issue penalties relating to licenses must be exercised within six (6) months after the Commissioner becomes aware of the licensee's failure to comply.

[72] Specifically, Aheer says that the Commissioner's auditor became aware of Aheer's incorrect trip payments in April 2020, and had determined that the independent operators were owed $73,390.72 by August 7, 2020. However, the Commissioner's decision to propose that Aheer be fined $60,000.00 was only made on March 5, 2021, after the expiry of the 6-month deadline imposed by s. 34(1) of the *Act.* As such, Aheer submits that the Fine Order cannot stand.

The Commissioner's Position on Issue #3

[73] The Commissioner raises a threshold objection to Aheer's assertion that the Fine Order was time-barred by operation of s. 34(1) of the *Act* on the basis that this argument was never raised before the Commissioner. The Commissioner says that Aheer should not be permitted to raise this issue for the first time on judicial review, as it would permit Aheer to do an end-run around the deferential standard of review.

[74] In the alternative, if Aheer is permitted to argue this issue now, the Commissioner submits that the 6-month limitation period for imposing a penalty pursuant to s. 34(1) of the *Act* only starts from the date on which the Commissioner himself makes a finding of non-compliance by the licensee. In the Commissioner's view, this is the most logical interpretation of s. 34(1) of the *Act*. As for Aheer's alternative interpretation whereby the starting point is calculated by reference to when an auditor becomes aware of and considers information provided by the licensee, the Commissioner says that it is untenable. The Legislature cannot have intended the 6-month period to begin by reference to an auditor's state of knowledge at a time prior to when a licensee would have had an opportunity to comment on the audit report, and prior to when the Commissioner made an actual finding of non-compliance by the licensee.

[75] In the case at bar, the Commissioner's non-compliance finding was made in his decision of March 5, 2021. The Commissioner then had 6 months from that date (i.e., until September 5, 2021) to impose a fine. The Commissioner did so on April 20, 2021, after considering Aheer's penalty submissions. As such, the Fine Order was issued in compliance with the s. 34(1) deadline.

Discussion and Conclusion regarding Issue #3

[76] I accept the Commissioner's threshold objection to Aheer's argument that the Fine Order was imposed outside of the 6-month period as required by s. 34(1) of the *Act*. This argument was never made to the Commissioner, even though Aheer had ample opportunity to do so. Indeed, when Aheer filed its penalty submissions on March 19, 2021, it was well aware that over 6 months had passed since the date Aheer claimed the auditor knew that Aheer had violated the *Act* and the terms of its license. There was no reason why Aheer could not have argued then that the Commissioner was now time-barred from imposing a fine by virtue of s. 34(1) of the *Act*. Aheer could also have included this argument as part of its May 20, 2021 reconsideration request pursuant to s. 38 of the *Act.* Aheer did neither.

[77] As a result of Aheer's silence, the Commissioner has been denied an opportunity to consider this argument and to set out the Commissioner's interpretation of this important aspect of its constituent statute in the Commissioner's reasons for decision. Had the Commissioner been given a chance to provide such an interpretation, it could then have been assessed and reviewed by this Court on a standard of patent unreasonableness, as required by the *ATA.* The Commissioner is therefore correct to say that if Aheer were permitted to raise this argument now, it would effectively circumvent the deferential standard of review to which the Commissioner would otherwise be entitled.

[78] In *Gorenshtein v. British Columbia (Employment Standards Tribunal),* 2016 BCCA 457 at paras. 47, our Court of Appeal noted that it is well-established that a judge should not find a decision to be patently unreasonable based on submissions that a tribunal never heard. While there are rare exceptions to this approach so as not to allow a potential error of law to be perpetuated, I can see no basis for invoking one in the case at bar. In particular, it is by no means clear that the 6-month time limit imposed by s. 34(1) of the *Act* starts to run prior to when the Commissioner makes an actual finding that there has been a violation of the *Act* or the terms of a licence, as Aheer claims. I will not entertain this argument for the first time here.

[79] This ground of judicial review is therefore dismissed.

Issue #4: Proportionality of Fine Penalty Order

Aheer's Position on Issue #4

[80] Aheer submits that the $60,000 quantum of the Fine Order is harsh, arbitrary, and unfair. It is therefore patently unreasonable and ought to be set aside. Four specific arguments are advanced in support of this ground of judicial review.

[81] First, Aheer says that it has been treated inconsistently by the Commissioner when compared with other licensees. Specifically, Aheer asserts that other trucking companies who have committed similar infractions to the one for which Aheer has been penalized were issued lower fines than Aheer. In support of this submission, Aheer prepared a table setting out a number of decisions rendered by the Commissioner involving other licensees. The fines imposed in these cases ranged from no penalty at all to $50,000. Aheer says that this table shows that the Commissioner is not fining licensees in a consistent manner. Aheer also points to three decisions in particular (*Gantry Trucking Ltd. and TSD Holding Inc.,* CTC Decision No. 8/2018; *Roadstar Transport Company Ltd.,* CTC Decision No. 20/2018; and *AMK Carrier Inc.,* CTC Decision No. 03/2020) as examples of where the Commissioner imposed lower penalties on licensees who are said to have committed more serious violations of the *Act* and *Regulation* than Aheer did here.

[82] Second, Aheer says that the Fine Order does not respect the principle of proportionality. In this case, Aheer underpaid its drivers by $73,390.72 over a period of four years. Accordingly, imposing a $60,000.00 fine in respect of this conduct is disproportionate and onerous.

[83] Third, Aheer takes issue with the Commissioner's justification of the $60,000 fine on the basis that it was an "escalating penalty" following Aheer's previous $50,000 fine in respect of a different complaint. Aheer says that the Commissioner ought not to have considered this earlier fine as a "starting point" for the present penalty as the first fine related to another issue.

[84] Finally, Aheer says that the Commissioner's decision contains incorrect findings regarding Aheer's conduct in respect of the audit. In particular, Aheer denies that it provided misleading, evasive or partial information regarding its

payment methodology. Aheer also says that it cooperated with the auditor, complied with the Commissioner's orders, and did not engage in meritless disputes.

The Commissioner's Position on Issue #4

[85] The Commissioner disputes all of Aheer's arguments to the effect that the Fine Order is patently unreasonable.

[86] The Commissioner submits primarily that every case turns on its particular circumstances, and ensuring parity in the treatment of offending licensees is not a mathematical exercise. Referencing his decision in *Smart Choice Transportation Ltd.* CTC Decision No. 21/2016 at para. 27, the Commissioner noted that a non-exhaustive list of factors that he may consider when assessing appropriate administrative penalties includes the following:

a) the seriousness of the licensee's conduct;

b) the harm suffered by drivers as a result of the licensee's conduct;

c) the damage done to the integrity of the container trucking industry;

d) the extent to which the licensee was enriched;

e) factors that mitigate the licensee's conduct;

f) the licensee's past conduct;

g) the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of having a container trucking services license;

h) the need to deter those licensees from engaging in inappropriate conduct; and

i) orders made by the Commissioner in similar circumstances in the past.

[87] In Aheer's case, factors (a), (b), (c), (d), (f), (g) and (h) were particularly important, as well as the extent of Aheer's cooperation with the auditor and whether it had engaged in any form of fraudulent, deceptive, dishonest, or bad

faith behaviour in respect of compliance with its statutory obligations. The Commissioner says that he is entitled to deference in relation to how he weighs one factor against another when comparing different licensees' non-compliance and determining appropriate penalties.

[88] In addition, while the Commissioner acknowledges that the gravity of the offence and degree of responsibility of the offender are relevant to determining the quantum of the penalty, the question before this Court is not whether a $60,000 fine is proportionate to the gravity of Aheer's conduct. The real question is whether there is a rational basis for the Commissioner's conclusion that the $60,000 quantum is proportionate to the gravity of Aheer's conduct.

[89] The Commissioner says that there was a rational basis in this case. The Commissioner was particularly concerned about Aheer's use of a hybrid compensation formula contrary to the terms of its licence. Such formulas were commonplace prior to the 2014 work stoppage, and were identified as a problematic practice in the Ready/Bell report which led to the adoption by the provincial government of the current regulatory regime set out in the *Act* that is now administered by the Commissioner.

[90] Furthermore, the Commissioner also placed weight on Aheer's history of non-compliance, which resulted in the previous imposition of a $50,000 fine. Given that this fine apparently did not deter Aheer from further violations of the *Act* and the terms of its licence, the Commissioner felt it appropriate to impose a larger fine in this case. The Commissioner also notes that to engage in progressive discipline, it is not necessary for the subject misbehaviour to be similar to the previous misbehaviour for which the earlier penalty was imposed: *Law Society of British Columbia v. Wilson,* 2020 LSBC 20.

[91] As such, the Commissioner says that his reasons for imposing the $60,000 fine are logical and entitled to deference.

Discussion and Conclusion regarding Issue #4

[92] The Commissioner's rationale for imposing a $60,000 fine on Aheer for its systematic failure to pay its drivers in accordance with its statutory obligations is set out in detail in both his decision notice dated April 20, 2021 and in his reconsideration decision dated June 8, 2021. I agree with counsel for the

Commissioner's submissions that this rationale is cogent, intelligible, and justified by the evidentiary record before the Commissioner. To a large extent, Aheer's argument on this issue amounts essentially to a plea that this Court first engage in a reweighing of the factors considered by the Commissioner, and to then conclude that a smaller fine would have been a more appropriate penalty. However, such an approach is not permissible when conducting judicial review on a standard of patent unreasonableness.

[93] Instead, the fundamental question before me is whether the Fine Order is substantively flawed as per s. 58(3) of the *ATA.* In my view, it is not. Simply put, the Fine Order is supported by the evidence, is not clearly irrational, and does not border on the absurd. It therefore does not warrant being set aside on judicial review.

[94] In reaching this conclusion, I have considered Aheer's position that the $60,000 fine is contrary to the principle of parity in the sense that it allegedly represents a substantial and marked departure from penalties in similar cases. While this is a criminal law concept, I accept that it applies in administrative law as well: *Mitelman v. College of Veterinarians of Ontario,* 2020 ONSC 3039 (Div. Ct.) at para. 18. However, it is also well established that there is no requirement for the degree of sanctions to be identical in similar cases: *Faa v. British Columbia (Superintendent of Motor Vehicles),* 2008 BCSC 1766 at para. 14. Furthermore, penalties imposed by administrative tribunals are still deserving of a high degree of deference and do not become patently unreasonable simply because they differ from penalties imposed in other cases: *Budarick v. Brudenell, Lyndoch and Raglan (Townships) (Integrity Commissioner),* 2022 ONSC 640 (Div. Ct.) at paras. 101 to 103.

[95] A particularly helpful and clear explanation of the limits upon the principle of parity in administrative law can be found in *Qayyem v. Canada (Minister of Citizenship and Immigration),* 2020 FC 601, a judicial review of a decision of the Refugee Protection Division ("RPD") conducted by the Federal Court. Justice McHaffie wrote as follows at para. 20:

> Third, the applicants' basic submission—that the RPD must be consistent —cannot be accepted as an absolute principle. Even if the decisions highlighted by the applicants showed a true inconsistency, which I do not believe is the case, Canadian administrative law has long recognized that inconsistency in an administrative tribunal's decisions is not a stand-alone

> ground of review: *Domtar Inc v Quebec (Commission d'appel en matière de lésions professionnelles)*, 1993 CanLII 106 (SCC), [1993] 2 SCR 756 at pp 796–801; *Vavilov* at paras 72, 129–132. Consistency and the value of treating like cases alike are important goals that promote the rule of law. However, administrative decision-making also has other goals, including timeliness, effectiveness, and accessibility, which are reflected in the reasonableness standard. That standard recognizes that different decision-makers may reach different outcomes that are each reasonable and justifiable, even in cases that may have similarities.

[96] These remarks are apposite to the present case. The simple fact that Aheer has identified decisions made by the Commissioner in which lower fines were imposed on other licensees for other violations of the *Act* does not demonstrate that the Fine Order is patently unreasonable.

[97] In sum, Aheer's substantive challenge to the Fine Order is dismissed.

Issue #5: Mandamus Application

The Parties' Positions on Issue #5

[98] The final remedy Aheer has requested in its petition is an order of *mandamus* requiring the Commissioner to adopt rules of practices and procedure. At the time of the hearing, the Commissioner had yet to exercise his authority pursuant to s. 6(1) of the *Act* which provides:

> 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.

[99] Aheer had argued at the hearing that notwithstanding the fact that s. 6(1) of the *Act* uses the word "may" to characterize the Commissioner's ability to make practice and procedure rules, the provision should be interpreted as one that imposes an enforceable duty to do so. The Commissioner disagreed, noting that s. 29 of the *Interpretation Act*, RSBC 1996, c. 238 provides that the word "may" is to be construed as permissive and empowering, as opposed to obligatory.

[100] On June 14, 2022, however, counsel for the Commissioner advised the Court that his client had now exercised his power under s. 6(1) of the *Act* by publishing the *Rules*. This prompted counsel for Aheer to request leave to file further submissions. I granted such leave and directed that the parties' submissions were to address this development and what impact, if any, it has on the relief sought by Aheer. Written submissions were filed by Aheer on June 28, 2022. The Commissioner's response was filed on July 4, 2022.

[101] Aheer's submissions do not clearly state whether it is still pursuing its request for a *mandamus* order. Instead, Aheer simply asserts that while it "welcomes the notification of the *Rules",* Aheer was denied their benefit during the audit, complaint, investigation and decision-making process by the Commissioner. Furthermore, Aheer highlights that the *Rules* now contain two provisions which arguably would have been supportive of Aheer's position had they been in effect prior to the Commissioner's impugned decision. First, the *Rules* provide that "[s]ubject to limited exceptions, complaints received 4 years after the date of the alleged breach will not usually be considered". Second, the *Rules* provide that the "Commissioner will issue a decision proposing a penalty within 6 months of concluding that the licensee has failed to comply with the Act, Regulation, or licence".

[102] The Commissioner takes the position that the adoption of the *Rules* renders Aheer's request for a *mandamus* order moot. The Commissioner also says that the content of the *Rules* does not affect the disposition of the petition. In particular, the two aspects of the *Rules* highlighted by Aheer are consistent with the Commissioner's approach to the decision that is now under review. Furthermore, the Commissioner submits that Aheer is wrong to suggest that it was unfair for the Commissioner to have rendered this decision prior to the issuance of the *Rules* since there is no reason to think that the process or outcome in this matter would have been any different. Finally, the Commissioner notes that outside of the criminal sentencing context in which s. 11(i) of the *Canadian Charter of Rights and Freedoms* applies, there is no principle of law or fairness requiring a "beneficial" enactment to be retroactive.

Discussion and Conclusion regarding Issue #5

[103] I am in agreement with the Commissioner's position that the only possible impact the post-hearing adoption of the *Rules* could have on this petition is in respect of whether the Court should issue the *mandamus* order Aheer had requested. The *Rules* cannot be applied retroactively or retrospectively to Aheer's now concluded proceedings before the Commissioner. They are therefore not relevant to a determination of whether the Commissioner's impugned decision made prior to their adoption is substantively or procedurally flawed.

[104] With respect to Aheer's request for a *mandamus* order to compel the Commissioner to adopt rules of practice and procedure, the issue is whether this request can still be pursued now that the *Rules* have been published. It is an issue that requires the Court to consider the doctrine of mootness in accordance with the two-part test established by the Supreme Court of Canada in *Borowski v. Canada (Attorney General),* [1989] 1 SCR 342 ("*Borowski*") at 353. First, I must determine whether the tangible and concrete dispute regarding the absence of procedural rules has disappeared such that the issue is now academic. If this is the case, I must then determine whether I should nevertheless exercise my discretion to decide the issue. According to *Borowski,* the three criteria that are generally considered when making this latter determination are: (1) the existence of an adversarial context; (2) concern for judicial economy; and (3) avoiding intrusion into the role of the legislative branch of government.

[105] Beginning with the first question, clearly the answer is yes. The June 14, 2022 publication of the *Rules* renders Aheer's request that the Court order the Commissioner to do so academic.

[106] As for whether I should nevertheless decide the issue of whether the Commissioner has an obligation to promulgate rules of practice and procedure pursuant to s. 6(1) of the *Act,* I can see no valid reason for undertaking this examination. Since neither party asked me to conduct such an exercise in their post-hearing written submissions, the necessary adversarial context has disappeared. Furthermore, I can see no utility in devoting judicial resources to this question which is unlikely to arise again now that the Commissioner has the *Rules* in place. As for the final factor, I believe it would be preferable to refrain from pronouncing on this issue of statutory interpretation unless absolutely necessary, which it is not.

[107] For these reasons, Aheer's request for a *mandamus* order is denied on the basis of mootness.

DISPOSITION

[108] Aheer's petition is dismissed. As the Commissioner is not seeking costs, none shall be awarded.

"Brongers J."