IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Port Transportation Association v. The Office of the British Columbia Container Trucking Commissioner,* 2022 BCSC 387

Date: 20220309
Docket: S2010056
Registry: Vancouver

Between:

Port Transportation Association, Can. American Enterprises Ltd., H. Rattan Trucking Ltd., Canada West Warehousing Ltd., Future Trucking Ltd., Gur-Ish Trucking Ltd., Safeway Trucking Ltd., Coast Pacific Carrier Inc., KD Truckline Ltd., Full Load Transport Ltd., Jete's Lumber Co. Ltd., Rideway Transport Ltd., Supersonic Transport Ltd., TSD Holding Inc., United Coastal Logistics Ltd., Orca Canadian Transport Ltd., Aheer Transportation Ltd., Indian River Transport Ltd., Burton Delivery Services Ltd., AMK Carrier Inc., KTL Transport Inc., Lally Bros. Holding Ltd., and ADP Transport Ltd.

Petitioners

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 Mr Justice Crerar

Reasons for Judgment

Counsel for the Petitioners:	G.S. Badh A.N. Mathur K. Rejminiak
Counsel for the Respondents:	M.A. Witten J.M. Patrick
Place and Date of Hearing:	Vancouver, B.C. June 16-18, September 7 and 9, 2021
Place and Date of Judgment:	Vancouver, B.C. March 9, 2022

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I. INTRODUCTION

[1] The term “drayage” comes from the word “dray”: a wagon with no sides dragged by a dray horse. Dray, drag, draught, draft, and draw are etymological

cousins. Today, drayage refers to the short-distance transportation of goods: in the present case, the transportation of containers by trucks to and from ports and other terminals, to and from warehouses and other locations.

[2] All but one of the petitioners is a company conducting drayage trucking at Vancouver Fraser Port Authority (the "**Port Authority**") terminals in the Lower Mainland; the first-named petitioner, the Port Transportation Association, is a society which has such companies as its members.

[3] In this judicial review, the petitioners challenge the 2020 Container Trucking Services Licence Application Invitation, issued by the provincial regulator, the respondent The Office of the British Columbia Container Trucking Commissioner (the "**Commissioner**" or the "**Office**" or the "**OBCCTC**"), pursuant to the *Container Trucking Act,* SBC 2014, c 28 (the ***Act***) and the *Container Trucking Regulation,* BC Reg 248/2014 (the ***Regulation***). The petitioners allege that in initiating and conducting the 2020 licensing process, the Office exceeded its jurisdiction under the *Act* and *Regulation*; abused or fettered its discretion; and breached principles of procedural fairness under those enactments.

[4] The regulatory scheme was enacted in early 2015, in part to address an excessive number of trucks providing drayage services at Port facilities. This oversupply caused long queues and delays, as well as low driver incomes, with too little work spread amongst too many drivers, and too many inefficient half-empty trips to and from port facilities. This problem erupted in orchestrated work stoppages by frustrated drivers in 1999, 2005, and 2014. These work stoppages at Canada's busiest port significantly delayed the movement of containers, and inflicted millions of dollars in losses on the local and national economies.

[5] The new scheme limits access to the facilities through the issuance of licences to applicants. A successful applicant receiving a licence is also issued a specific number of truck "tags": each tag permits one of that company's vehicles to access the port facilities. Each truck tag is readable by GPS, allowing both the Office and the Port Authority to collect trip data, including individual visits to facilities and wait times. This information is shared with licence holders, who receive monthly "scorecards" setting out their trip efficiency data.

[6] There is a finite number of available licences and tags. Licences have expiry dates.

[7] The present dispute arises in part due to the infancy of the new scheme. Existing operators each possessed a certain number of tags leading into the 2016 application process. Each of those existing operators received a licence, and each received the same number of tags as before. Those 2016 licences were described as having a one-year term, after which an applicant would have to apply afresh for both licence and tags, neither of which were guaranteed. In fact, due to the nascency of the scheme, and ongoing consultation and reforms, the 2016 licences were extended twice, such that the 2020 process (the "**2020 Application Process**") was only the second round of applications for these petitioners. After the 2020 Application Process, these petitioners were surprised to learn that while they all successfully received licences, the number of tags received under each licence dropped, at times significantly.

[8] Mr Badh, for the petitioners, argued forcefully that each lost tag removes employment from a truck driver, and disrupts significant and long-term investments and customer relations for each of the petitioners. He argues that the 2020 Application Process fell short of the petitioners' reasonable expectations that they would receive the same number of truck tags, or, alternatively, would be able to make further arguments and take further steps towards retaining the previous tag number. In this, the petitioners describe themselves as being "entrenched" in the system: the Commissioner knew that anything other than a confirmation of consistent tag allotment would be disruptive, and contrary to their reasonable expectations. The petitioners describe any 2020 issuance of fewer tags than were previously possessed as a "removal" of tags.

[9] Mr Witten, for the respondents, argued that the 2020 application invitation and package, and all of the surrounding communications, made clear that the application process was just that: an application. An applicant may or may not receive a licence, and the number of tags allocated under each licence was up to the discretion of the Commissioner. That discretion was not exercised arbitrarily, but was based upon the contents of the application, including each applicant's business case, customer references, and other criteria, but also on regulatory compliance, truck efficiency data, and other factors, all of which were

communicated to applicants in advance, and all of which were consistent with the Commissioner's mandate and powers under the *Act* and *Regulation*.

[10] For the reasons set out below, the Court dismisses the petition. The acts and decisions of the Commissioner in implementing and administering the 2020 Application Process were not unreasonable, let alone patently unreasonable. Nor did the Commissioner fetter his discretion in considering, *inter alia*, trip efficiency data in his allocation of licences and tags. Nor did the 2020 Application Process deny natural justice to the petitioners: the criteria were clearly and repeatedly stated to applicants, who had ample opportunity to set out their case for why they should receive a specific number of tags under the licence.

II. FACTS

[11] The Court will attempt to briefly summarise this complicated dispute, set out in the record, consisting of six three-inch binders.

A. 2014: work stoppage and the Ready/Bell Report

[12] In an effort to resolve the 2014 work stoppage, in March 2014 the Federal Minister of Transport appointed Vince Ready to carry out an independent review of the underlying causes of driver dissatisfaction, and recommend reforms. Mr Ready, with Ms Corinn Bell, consulted widely with interested parties, including with trucking companies themselves.

[13] In September 2014, Mr Ready and Ms Bell released their report. The report identified an "universal" opinion that the low barriers to entry created an "enormous oversupply of trucks" licensed to access port facilities. The oversupply had led to a widespread practice of rate undercutting that destablilised the industry. It also harmed individual drivers, with increased wait times, lower earnings, and pay inequality. They also reported a general consensus that the number of trucking companies and trucks must be reduced. In short, the oversupply of trucks harmed all stakeholders: the Port Authority, the public, the drivers, and the trucking companies.

[14] Among various recommendations, Mr Ready and Ms Bell proposed reforms to the truck licensing system to limit the number of trucks authorised to access port facilities. The proposed truck licensing system would subject participants to

new requirements, including truck performance standards and efficiency goals. They also recommended the creation of a provincial regulatory agency to oversee licensing and compliance for the trucking sector.

B. 2014-2015: licence reforms and enactments

[15] Before the creation of the Office of the Commissioner, the Port Authority began the licensing system reform, in late 2014. The stated goal was to achieve a balance between the number of licensed trucks and the amount of available cargo, thereby improving the stability of port operations. The optimal number of authorised trucks was determined to be 1388.

[16] On December 22, 2014 the Province brought into force the *Act* and *Regulation*. The *Act* created the Office of the Commissioner to oversee the container trucking licensing system.

[17] The *Act* required container trucking companies seeking to provide services to a Port Authority terminal to obtain a licence from the Commissioner.

[18] The Commissioner did not immediately take over container truck licensing regulation. The Port Authority continued its reform of the licensing system, with the intention that the Commissioner would assume responsibility for the licensing system once the reform was complete.

C. 2015 Federal Court review of the licence application process

[19] In early 2015 the Port Authority reform process was completed. Licences with approximately 1450 truck tags were issued, effective March 1, 2015. Many existing drayage companies were denied licences.

[20] Most of the Port Authority's licence denials were, however, set aside on judicial review, based on a breach of procedural fairness: *Goodrich Transport Ltd. v. Vancouver Fraser Port Authority*, 2015 FC 520.

[21] In *Goodrich,* Justice Barnes of the Federal Court found that the application process was "procedurally deficient and profoundly unfair": at para. 32. Specifically, the Port Authority had promised truck companies "a consistent, fair and transparent" process: at para. 36. Instead of accepting applications and issuing licences together, on set dates, the Port Authority had issued licences in

batches. It appears that the batch approach resulted in the issuance of a higher than expected number of licences, such that, on an apparent *ad hoc* and *sub rosa* basis, the Port Authority imposed a more onerous scoring benchmark on later batches of licence applications, such that in some cases a short delay in application was fatal to the applicant: at paras. 23, 27, 40, 41. In breach of procedural fairness, applicants were never told this risk. The Court concluded:

> [42] The adoption of a batching approach to the applications could have worked fairly had PMV applied a higher approval benchmark from the outset. If too few applications got through at that level, the benchmark could be safely lowered provided that any earlier unapproved application was reconsidered. By proceeding as it did, PMV issued licences to applicants whose scores were lower than the scores of some rejected applications perfected later in the process. This was unfair because the scoring system was intended to be and was promoted as merit-based. The Handbook told the interested parties their applications would be assessed on the basis of merit-based criteria with a goal of enhancing the stability of port operations. In the face of this advice, it was unfair to secretly subordinate the consideration of merit to that of timing.

[22] The Court set aside the Port Authority's decisions denying licences to the applicants, and ordered that their licence applications be reassessed on their merits. Specifically, the Port Authority was directed to reassess the applications in accordance with the most favourable benchmark applied to any of the successful licensing applications, and to issue licences to any qualified applicant whose application met that benchmark.

[23] As a result, the Port Authority was required to issue additional licences and, under those licences, hundreds of additional truck tags: some 1717 in total at the end of the process. Market saturation remained an issue.

D. 2015-2017: development of licence and truck tag policies, and extensions

[24] To ensure a smooth transition of control over the licensing system from the Port Authority to the Commissioner, s. 4 of the *Regulation* provided that the licences issued by the Port Authority in 2015 were deemed to be licences under the *Act*. Truck tags issued under those licences were also deemed to be issued by the Commissioner. Due to the Federal Court ruling, the 1717 truck tags were transferred from the Port Authority to the jurisdiction of the Commissioner.

[25] The 2015 licences issued by the Port Authority were set to expire on May 31, 2016. On expiry, the Commissioner would become responsible for issuing licences and truck tags.

[26] From its creation, the Office started work on developing its own licensing and truck tag system, under its statutory mandate. It held many consultations with stakeholders in developing those policies. In response to those consultations, the Office has revised its policies, including truck tag policies, several times over the past five years.

[27] In December 2015, the Commissioner issued an “Interim Truck Tag Policy”, in order to accept requests for additional truck tags made by licensees during the term of a licence. In March 2016, a modified version of the 2015 Interim Truck Tag Policy became the “Interim Additional and Vacant Truck Tag Policy.”

[28] In April 2016, nearing the expiry of the 2015 licences, the Commissioner invited licence applications for new licences, effective June 1, 2016. The Commissioner issued a public bulletin and an application package.

[29] The 2016 package reminded would-be applicants that existing licences would expire on May 31, 2016. It made clear that an existing licence holder may not receive a licence, and may not receive the same number of tags:

> The BC-CTC will review the documents submitted and determine:
>
> - How many tags your company will receive
> - If your application meets the mandatory TLS Program criteria for conditional approval of a Licence

[30] In the 2016 licence application process, the Commissioner reviewed and approved all of the applications. Licensees were assigned the same number of truck tags that had been assigned to them previously. In the end, the total number of truck tags assigned was 1724.

[31] On March 15, 2017, the Commissioner wrote to licensees. The document noted that the 2016 licences were set to expire on May 31, 2017. It advised that the Commissioner would extend the term of the 2016 licences for another year: to May 31, 2018. The Commissioner also confirmed that it would not be inviting any new licensees to apply for licences that year.

E. 2017-2018: development of licence and truck tag policies, and further extension

[32] On January 1, 2018, the Commissioner rescinded the 2016 Interim Truck Tag Policy. The 2018 Licence Tag Management Policy addressed the allocation of truck tags both during the term of a licence and at the licence application stage. It also set out the criteria to be considered in allocating truck tags under each licence. The Policy indicated that the Commissioner would grant and remove truck tags from licences based on the Port Authority's trip efficiency scorecards. The 2018 CTS Licence Tag Management Policy also indicated that a fixed number of truck tags would be issued at the time of licensing, but that the number of truck tags could vary during the term of the licence.

[33] Once again, however, the Commissioner opted not to carry out a fresh application process, in order to allow for further consultations and development of policies. Instead, on April 30, 2018, it again wrote to licence holders. It noted that the licences were scheduled to expire on June 30, 2018. The Commissioner advised licence holders that he would extend the term of 2017 licences for a period of two years. Again, the Commissioner confirmed that he would not be inviting new applications for licences that year. The Commissioner further confirmed that requests for additional truck tags could be made in the next licence application process.

[34] The Commissioner accordingly amended all 2017 licences, extending their term to June 1, 2020. The total number of truck tags at this time was 1746.

F. The 2018 and 2019 Tag Management Policy iterations

[35] In October 2018, the Commissioner amended the 2018 CTS Licence Tag Management Policy. That iteration of the policy explained, under the bolded heading of "**Annual Licence/Tag Application Process**", that "the Commissioner will review and determine the number of tags to be allocated to each applicant under an approved Licence based upon information provided by the [Port Authority], including a performance review and any other matters that the Commissioner in his or her discretion may consider relevant." Under the separate bold heading of "**Tag Withdrawal Process during Annual Term of Licence**", it explains how a licensee could lose truck tags during the lifespan of the licence if the licensee failed to maintain efficient tag performance.

[36] In September 2019 the Commissioner issued an amended Tag Management Policy, with the same headings and content quoted above.

G. The 2020 licensing process reforms

[37] The 2018 licences, previously extended, were set to expire in June 2020. To accommodate the 2020 process the expiry date was adjusted to November 30, 2020.

[38] From 2018 through 2020, the Commissioner further developed his licensing policy, in anticipation of the upcoming licensing process for 2020. Concurrently, the Commissioner held consultations on further changes to the truck tag policy.

[39] In November 2019, the Commissioner published a bulletin inviting submissions from trucking companies and other interested parties on the 2020 licence reform process. The bulletin attached a summary of the proposed licence and truck tag policy changes, and an annotated copy of both the proposed new truck tag policy and the new licence document. Under the heading of "TLS Truck Tags", the bulletin set out the policy that would eventually be adopted:

> TLS truck tags would initially be assigned to licensees upon OBCCTC review of a business case submitted by licence applicants as part of the June 2020 licence application process, information provided by the [Port Authority], including a performance review, and an applicant's past compliance with the *Act*.

[40] The comment period was open until February 28, 2020. The bulletin stated that the licence application process and truck tag policy would be finalised in spring 2020.

[41] The consultation documents set out several proposals for the June 2020 issuance of truck tags, all of which would eventually be implemented:

a) the Commissioner would review and determine the number of truck tags to be allocated to each applicant under an approved licence, based upon performance metrics;

b) a fixed number of truck tags would be assigned to licence holders. Those licence holders could continue to either assign these tags to

company-owned trucks or independent operator trucks requiring access to Port Authority terminals; and

c) additional truck tags would be assigned to licensees based upon the Commissioner's review of the business case submitted by an applicant, fleet performance information provided by the Port Authority, and an applicant's historic compliance with the *Act*.

[42] The consultation document also provided an evaluation matrix, showing in part how the Commissioner would decide tag allocation.

[43] Under the heading of "TLS Truck Tags Business Plan" it stated that "[t]he business plan may include an analysis of company truck and/or [independent operator] truck trips/movement records to accurately assess the number of on and off-dock trips per day undertaken by the applicant's drivers and/or [independent operators]." It provided further details on what should be included in the "business case" submission to be made by each applicant.

[44] Under the heading of "Compliance History", it set out a decision matrix:

- No Decision Issued: Good
- Decision Issued no penalty: Average
- Decision Issued With penalty: Poor

[45] The Commissioner invited submissions from industry stakeholders directly. He also organised a series of stakeholder consultation sessions with licensees, drivers, and other industry participants. The petitioner Port Transportation Association provided extensive submissions, *inter alia*, in the form of a letter from its present counsel to the Commissioner.

[46] In February 2020, based on the stakeholder submissions and consultations, the Commissioner released a supplemental consultation document. Some stakeholders had expressed concern about the Commissioner considering compliance history in allocation of truck tags. Specifically, new applicants, with no compliance history, were perceived to enjoy an advantage over existing licence holders who might be hobbled by past infractions. The supplemental consultation

document sought to address these concerns by giving existing licence holders the first opportunity to increase the number of allocated truck tags, before consideration of new applicants:

> The OBCCTC recognizes that adding past compliance history as a scored factor gives new licence applicants an advantage because they have not been subject to regulatory oversight by the Commissioner. New tag applicants also may not have guaranteed business contracts and will not have performance measures which will be a required factor for business cases submitted by existing licence holders.
>
> > ***The OBCCTC proposes that the applications of existing licensees be reviewed and assessed prior to the evaluation of new applicants and that licences and tags be allocated to new applicants only if the TLS tag target has not been exceeded following the assignment of TLS tags to existing licensee applicants.***
>
> [emphasis in original]

[47] The supplemental document also cautioned that neither a license, nor a specific number of truck tags, was guaranteed to existing licence holders:

> Applicants who currently hold or have held a licence in the past are not guaranteed a licence and must meet the mandatory requirements. Failure to meet the mandatory requirements will result in rejection of the application. The number of [truck tags] allocated to a licence will be assessed by applying the criteria specified above. The OBCCTC will also consider an applicant's current tag allotment and fleet composition (company and [independent operator] tags) in relation to the request (i.e. is the applicant asking for a higher/lower number of tags) and any target that may be imposed on the overall fleet size when allocating the number and type of tags (company or [independent operator]) to applicants who are granted a Licence.

[48] The supplemental document also confirmed that the number of truck tags would be limited, to achieve the policy goal of combatting congestion and inefficiency occasioned by truck oversupply:

> … there continues to remain a significant over supply of drayage trucks in the sector competing for [twenty-foot equivalent unit] volumes that are increasingly relying upon intermodal services. This imbalance, if unaddressed, will lead to further industry instability as competition within the drayage sector intensifies. Further efficiencies and optimization within the drayage sector such as short haul shipping, industry consolidation and double-ended moves will bring added pressures upon driver income if the number of drayage trucks isn't more closely aligned with present and future [twenty-foot equivalent unit] volumes.
>
> …

> ***The OBCCTC is proposing that an overall target number of [truck] tags issued during the licensing application process be set with the goal of improving Gateway efficiency and increased work opportunities for drivers. The target number of trucks will be determined following additional consultation with stakeholders and will be published in the final licensing package to be issued in April 2020.***
>
> [emphasis in original]

[49] Again, the supplemental document also provided a detailed bullet-point list of the criteria that the Commissioner would use to assess the applicant's request for truck tags. It set out the specific forms of evidence that would assist in filling out the application under the headings of "Business case", "Compliance history", and "Fleet utilization and efficiency."

[50] Consultation on the 2020 licence reform process completed in March 2020. That month, the Commissioner released a 26-page consultation report (the "**Final Consultation Report**"). The Final Consultation Report set out, *inter alia*, particulars of the upcoming 2020 Application Process:

a) The target range for the number of truck tags issued will be between 1450 and 1550;

b) new applicants will be permitted to apply, but their applications will only be considered after the applications from existing licensees have been reviewed and if there are remaining truck tags to be allocated within the target range, and will be determined by assessing the applicant's business plan;

c) allocation of truck tags for existing licensees will be determined by assessing an applicant's business case, compliance history, and fleet efficiency data;

d) there will be an annual fixed application period, at the time of licensing and once during the term of the Licence, to accept additional tag applications; and

e) the Commissioner will continue to issue truck tags throughout the term of the Licence at his discretion and in exceptional circumstances.

[51] In June 2020, the Commissioner also issued the final version of the Truck Tag Policy. That document repeated many of the themes in past truck tag management policies including:

- the policy "is intended to balance the number of trucks with the volume of container movements in the sector generally, and, more specifically, encourage the movement of drivers to high performing companies."

- "The Commissioner considers a licensee's performance metrics (including those under the [Port Authority]'s… performance review program) and the size and performance of the [independent operator] fleet under Sponsorship/Joinder when issuing and withdrawing additional tags."

- Under **POLICY**:

    - "2. The Commissioner will review and determine the number of tags to be allocated to each applicant under an approved Licence based upon information provided by the [Port Authority] and a performance review that identifies, in part, the number of on and off-dock trips per day conducted by each tagged truck."

    - "3. The Commissioner may consider any other matters that the Commissioner in his or her discretion may consider relevant to the performance review."

- Under "**Tag Application Process**":

    - "5. Licensees may apply to increase the number of tags authorized under its Licence at the time of licensing and/or once during the term of the Licence…"

    - "9. The business plan must include an analysis of company truck and/or [independent operators] truck trips/movements to accurately assess the number of on and off-dock trips per day undertaken by the applicant's drivers and/or [independent operators]."

- Under "**Tag Withdrawal Process**": "13. Approval of tags is subject to a Licensee maintaining the performance metrics associated with all the tags

assigned to it under its Licence as well as its performance requirements under the [Port Authority]'s Access Agreement. Failure to maintain performance may result in a reduction of the number of tags under the Licence."

H. July 2020: the 2020 licensing application process

[52] On July 6, 2020, the Commissioner opened the 2020 Application Process, with the publication of two documents.

[53] First, he issued the "2020 Container Trucking Services Licence Application Invitation". That one-page document stated:

> Between 1450 and 1550 Truck Tags will be available for distribution between all successful applicants. Allocation of company and Independent Operator Truck Tags for 2018 CTS licence holders will be determined by assessing an applicant's business case, compliance history and fleet efficiency data. Allocation of company and independent operator truck tags for applicants who have not previously held a licence will be determined by assessing the applicant's business plan only, and only if additional Truck Tags are available for allocation after licences have been issued to applicants who were 2018 licence holders.

[54] Second, the Commissioner posted a 21-page document entitled "2020 CTS Licence Application Package" on its website (the "**Application Package**"). The Application Package contained pages for each applicant to fill out with information, which information could be supplemented by additional pages.

[55] The application document was not a perfunctory blank form to fill out. It also explained the licence application process in detail. That explanation included, on the first page, the following "[c]ritical changes to the 2020 Licence":

- Between 1450 and 1550 Truck Tags will be available for distribution between all successful applicants;
- Applicants who have not previously held a licence will be permitted to apply for a licence, but their applications will only be considered after the applications by 2018 CTS Licence holders have been reviewed and if there are Truck Tags remaining;

  …
- Allocation of….Truck Tags for 2018 CTS Licence holders will be determined by assessing an applicant's business case, compliance history and fleet efficiency data. …

[56] The Application Package also provided a table of licence criteria, including eligibility and financial security. It set out the three stages of the approval process:

a) First, the Office will review each application, and "makes its best efforts to request any additional documentation and/or information required from you…"

b) Second, "[t]he OBCCTC will review your application and assign your company a specified number of Truck Tags based upon its assessment of your submitted business case and compliance history…" The package indicated that if the application meets all of the other requirements for conditional approval, the Commissioner will issue a conditional approval letter which will specify the number of truck tags issued under the licence.

c) Third, the Commissioner will issue a final approval letter and the executed licence, effective December 1, 2020, for a term of two years, expiring November 30, 2022.

[57] The Application Package also set out a list of key dates and deadlines, for each phase of the approval process.

[58] Form B of the Application Package invited the applicant to request a certain number of truck tags. The applicant was required to set out a business case justifying the requested number of truck tags. The business case looked to both the past and the future. The applicant set out the number of containers moved by the applicant company from 2015 to 2019, as well as the number of on-dock (a trip to or from a port facility) and off-dock (a related trip not directly to a port facility, such as a transportation of containers between warehouses) trucking movements provided by the applicant company each month in 2019. It also required a fleet efficiency overview, setting out the number of containers moved and average movements per driver for July to December 2019. The applicant also sets out its current and projected business volume and container movement, and its projected fleet efficiency, from December 2020 to May 2021; the applicant lists specific current and anticipated customers for which the container movement would be provided. The application form also invited the applicant to submit evidence, such

as letters from customers, to support the information provided in the business case section.

[59] The application period ran from July 6, 2020 to August 4, 2020.

[60] On July 10, 2020, during the application period, the Commissioner issued a further bulletin, providing further details on the “business case” section of the Application Package. The bulletin reiterated that the information requested in the “business case” section would be used in assessing an applicant’s truck tag request. The document also reiterated that the Commissioner would base his decision in part on fleet efficiency scorecard data provided by the Port Authority:

> The container movement and fleet performance information requested in Form B.2.1 is information that should be in the possession of the applicant. There is no need to contact the Port ***for scorecard data***. The OBCCTC has access to all [Port Authority] ***data*** and does not require applicants to use or submit [Port Authority] ***data as part of the licence application.***
>
>
>
> In the event an applicant’s records are not accessible and/or a manual process is required to collate the information requested in the licence application package, applicants are encouraged to make best estimates to complete the Business Case. The OBCCTC will ***then use [Port Authority] data and the information supplied in Form B.2.2 to determine the number of truck tags assigned to the applicant.***
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> [emphasis added]

I. 2020 consideration of applications

[61] The Commissioner considered various criteria in assessing each applicant’s request for a specific number of truck tags. For the future business case, it compared trip projections made by an applicant to anticipated trip need information supplied by its customers. For the efficiency analysis, the Commissioner compared the applicant’s average trips per day to the industry average. The Commissioner also assessed the fleet statistics provided by applicants against the Commissioner’s efficiency data obtained from the truck tag GPS and the Port Authority, to evaluate the accuracy of the applicant’s application.

[62] Finally, the Commissioner reviewed the compliance record of all applicants. Approximately 70% of current licence holders had been found to be non-compliant with the minimum rate requirements. Approximately 73.2% had been found in breach of the *Act*, the *Regulation*, or their licence. These infractions included

harassing or punishing drivers for lodging complaints with the Commissioner, “clawing back” wages already paid to drivers, and not following record-keeping requirements. The Commissioner also considered the number and severity of infractions, the penalties imposed, and the licensee’s cooperation with the audit process.

J. The 2020 licensing application process outcome

[63] In the end, the Commissioner issued 2020 licences to all applicants who had previously held licences.

[64] The present controversy arises from the fact that several previous licence holders found themselves assigned fewer tags than they had previously held under their 2016 licences.

[65] On September 9, 2020, the Commissioner wrote to each applicant to advise of the application result. That letter advised that its application for a 2020 licence was conditionally approved, and set out the number of truck tags attached to each licence, and whether that number represented an increase or decrease.

[66] Most such letters were four or five pages long. They did not merely perfunctorily set out the licence confirmation and number of tags, but explained the reasoning and process behind those decisions. Under “Truck Tag Allocation”, the letters set out the criteria on which the allocation was based, reiterating in five bullet points the specific criteria earlier described in the application form:

- Business/fleet information;
- Historical container movement volumes by year and month;
- The average number of moves per driver per month (2019);
- Customer information; and
- Projected fleet efficiency.

[67] Under the headings of “Business case”, “Fleet Efficiency” and “Compliance History” -- tracking the criteria explained and solicited in the Application Package -- each letter explained the basis for the number of truck tags allocated. The bullet-point explanations were detailed, and specific to the individual applicant. Under “Business case”, for example, the letters set out disparities between the stated and anticipated need for truck tags, and the trips actually made, or the trips that

the customer references indicated they would need. Under “Fleet efficiency”, the bullet points analyse the size of the applicant’s trucking fleet, their historic trip efficiency, and its efficiency relative to other applicants. Under “Compliance history”, the bullet points set out with particularity past violations of the *Act*, *Regulation* and licence, including enactment section numbers, dates, and, where applicable, fine amounts.

[68] That analysis is then synthesised and summarised under the heading of “Decision”, setting out the number of truck tags granted under the licence.

[69] These explanations were supplemented by letters from the Commissioner in response to inquiries and complaints by certain of the petitioners, directly or through their legal counsel, including, *inter alia*, their present counsel Mr Badh, and Hunter Litigation Chambers.

[70] On September 15, 2020, the Commissioner issued a bulletin summarizing the results of the 2020 Application Process:

a) the target range of issued truck tags was 1450 to 1550;

b) 1921 truck tags were requested;

c) 1557 truck tags were issued (higher than the target range of 1450-1550);

d) 107 truck tags were withdrawn;

e) 46 truck tags were added to licensees who had demonstrated need;

f) 14% of licensees received an increase in truck tags from the allotment under their previous license;

g) 48.5% of licensees maintained the same number of truck tags;

h) 31% of licensees were allocated fewer truck tags than were requested or held under their previous licence.

[71] There were 79 licensees in total, 22 of which are petitioners in this judicial review. In addition to the previous licensees, one new licensee was added, and assigned 10 truck tags.

[72] All licensees have been operating under their 2020 licences and truck tag allocations since December 1, 2020. The exception are the present petitioners who continue to operate with their pre-2020 allocation of truck tags, pursuant to a consent stay order of February 2021.

III. ISSUES

[73] The petitioners advance three grounds for review of the 2020 Application Process:

a) **Issue 1:** Did the Commissioner act beyond or misapply or misuse his jurisdiction under the *Act* or *Regulation* in implementing and undertaking the 2020 Application Process?

b) **Issue 2:** Did the Commissioner fetter or abuse his discretion in considering trip efficiency data in issuing truck tags?

c) **Issue 3:** Was the 2020 Application Process procedurally unfair?

[74] As set out below, the gravamen of all three grounds is whether the 2020 Application Process constituted a new application process or a renewal process, and whether the issuance of licences and truck tags was part of an application process or represented the cancellation or removal of existing tags to which the existing holders had an ongoing proprietary right or expectation. As expanded below, the 2020 Application Process was a new application process, was clearly stated to be such, was in compliance with the *Act* and *Regulation*, and was fair and reasonably transparent throughout.

IV. LAW

A. Standard of review

1. Issue 1

[75] The parties agree that the Commissioner's creation, implementation, and execution of the 2020 licence reform and application processes were discretionary exercises of authority granted under the *Act* and *Regulation*. Pursuant to ss. 2 and 12 of the *Act*, the standard of review applicable to the Commissioner's decisions is deferential, with judicial interference being permitted only if that discretion was

exercised in the patently unreasonable manner, as set down in s. 58 of the *Administrative Tribunals Act*, SBC 2004, c 45 [the ***ATA***].

[76] The parties also agree that the standard of patent unreasonableness is a "very strict test": *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 SCR 941 at 963-964. It permits judicial interference with a decision only when there is no evidence to support the findings, or the decision is "clearly irrational"; "openly, clearly, evidently unreasonable"; or "border[ing] on the absurd": *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal),* 2018 SCC 22 at paras. 28-29**;** *Speckling v British Columbia (Workers' Compensation Board)*, 2005 BCCA 80 at para. 33; *Vandale v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2013 BCCA 391 at para. 42. Although it no longer exists as a common law standard of review, British Columbia courts continue to cite pre-*Dunsmuir v. New Brunswick*, 2008 SCC 9 articulations of the patent unreasonableness standard for the purpose of applying the standard as it now exists, as a statutory standard; for instance, the Court in *Ahmad v. Merriman*, 2019 BCCA 82 notes that "[a] patently unreasonable decision is one that is 'so flawed that no amount of curial deference can justify letting it stand'": at para. 37 citing *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20 at paras. 52-53.

[77] Under the *ATA*, s. 58(3), a discretionary decision is patently unreasonable if it:

a) is exercised arbitrarily or in bad faith,

b) is exercised for an improper purpose,

c) is based entirely or predominantly on irrelevant factors, or

d) fails to take statutory requirements into account.

[78] Jurisdictional questions, such as that raised by the petitioners, no longer attract a correctness review: *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 at paras. 65-68; *Provincial Health Services Authority v. Campbell*, 2021 BCSC 823 at paras. 57-59. Instead, a robust reasonableness review (or, in British Columbia, a patent unreasonableness review) applies to the review of a tribunal's assessment and implementation of its statutory jurisdiction.

[79] A statutory standard of review for patent unreasonableness maintains its pre-*Vavilov* meaning, and continues to be applicable in British Columbia: *The College of Physicians and Surgeons of British Columbia v. The Health Professions Review Board*, 2022 BCCA 10 at para. 130; *Yellow Cab Company Ltd. v. Passenger Transportation Board,* 2021 BCSC 86 at para. 35.

2. Issues 2 and 3

[80] Both parties accept that under *ATA*, s. 58(2)(b), "questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly". Justice Groberman explained the fairness standard of review in *Seaspan Ferries v. British Columbia Ferry Services Inc.*, 2013 BCCA 55:

> [52] A tribunal is entitled to choose its own procedures, as long as those procedures are consistent with statutory requirements. On review, the courts will determine whether the procedures that the tribunal adopted conformed with the requirements of procedural fairness. In making that assessment, the courts do not owe deference to the tribunal's own assessment that its procedures were fair. On the other hand, where a court concludes that the procedures met the requirements of procedural fairness, it will not interfere with the tribunal's choice of procedures.

[81] *Seaspan* refers to Groberman JA's earlier decision in *Gichuru v. Law Society of BC*, 2010 BCCA 543 at para. 29, where he explained that "[p]rocedural fairness requirements are functional rather than technical, so there will most often be a range of different procedures that meet the requirements" of the fairness standard of review.

B. The *Act* and *Regulation*

[82] The Commissioner is appointed pursuant to s. 2 of the *Act*.

[83] Section 6 of the *Act* broadly authorises the Commissioner to make rules concerning, *inter alia*, licence applications:

> **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.

[84] Section 16 of the *Act* requires an operator of container trucking services to hold a licence, and to carry out those services in compliance with the *Act*, the *Regulation*, the licence, and any orders issued under the *Act*.

[85] Pursuant to s. 16(2), the Commissioner may invite applications for a licence.

[86] Subsection 6(1) of the *Regulation* permits the Commissioner to invite applications for a licence under s. 16(2) of the *Act* “if the [C]ommissioner is satisfied that it is desirable to increase the number of licensees.”

[87] If the Commissioner invites applications, the Commissioner must determine (a) the period during which applications will be accepted, (b) any mandatory requirements for a licence the Commissioner considers appropriate, and (c) any desirable criteria the Commissioner considers relevant to determine whether, and to whom, to issue a licence: s. 6(2) of the *Regulation*.

[88] Pursuant to s. 7(2) of the *Regulation*, an invitation for application for a licence must include: (a) the period during which applications will be accepted; (b) the number of truck tags available in relation to the licence; (c) all mandatory requirements for a licence; (d) all other qualifications and criteria set out by the Commissioner to determine whether, and to whom, to issue a licence; and (e) a statement that a person, by applying for a licence, waives any claim for compensation or damages in the event the Commissioner refuses to issue a licence, unless the Commissioner’s conduct is dishonest, malicious or otherwise in bad faith.

[89] Upon receiving an application for a licence, the Commissioner may issue the licence or may refuse to issue the licence: s. 16(4) of the *Act*.

[90] The Commissioner may, after reviewing the application criteria set out pursuant to s. 6(2)(c) of the *Regulation*, issue licences to all applicants, certain applicants, or no applicants: s. 9(1) of the *Regulation*.

[91] If the Commissioner issues a licence under s. 9(1) of the *Regulation*, the Commissioner must provide the licensee with a number of truck tags no greater than the total specified in the invitation under s. 7(2)(b) of the *Regulation*: s. 9(2) of the *Regulation*.

[92] In issuing a licence pursuant to s. 16, the Commissioner “may impose any conditions that the [C]ommissioner considers necessary”: s. 18 of the *Act*.

[93] Under s. 19 of the *Act*, the Commissioner may amend a licence, "[a]fter giving a licensee an opportunity to be heard."

[94] Section 12 of the *Act* erects a strong privative clause protecting decisions of the Commissioner:

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

V. DISCUSSION AND DECISION

[95] There is considerable overlap between the three issues advanced by the petitioners. The Court concludes that none of the grounds of review have merit, and that the 2020 Application Process, and the denial of licence truck tags should not be judicially interfered with, either on a patently unreasonable or correctness standard.

A. Issue 1: Did the Commissioner act beyond or misapply or misuse his jurisdiction under the *Act* or *Regulation* in implementing and undertaking the 2020 Application Process?

[96] The petitioners argue that the Commissioner exceeded his jurisdiction and statutory direction under the *Act* and *Regulation* in the manner in which it implemented, undertook, and executed the 2020 Application Process, in three ways.

[97] First, they argue that the Commissioner was not entitled to invite or consider new licence applicants, given the policy objective of reducing the number of truck tag holders, with its attendant physical congestion and market oversaturation. They argue that the Commissioner failed to adhere to the *Regulation*, ss. 6 and 7:

> **Commissioner may invite applications**
>
> **6** (1) The commissioner may invite applications for a licence under section 16 (2) [*licence required*] of the Act ***if the commissioner is satisfied that it is desirable to increase the number of licensees.***
>
> (2) If the commissioner decides to invite applications under subsection (1), the commissioner must determine

(a) the period during which applications for a licence will be accepted,

(b) any mandatory requirements for a licence the commissioner considers appropriate, and

(c) any desirable criteria the commissioner considers relevant to determine whether, and to whom, to issue a licence.

Publishing invitation for applications

7 (1) An invitation for applications for a licence under section 6 [*commissioner may invite applications*] must be published by posting the invitation on the commissioner's website.

(2) The invitation for applications for a licence referred to in subsection (1) must include:

(a) the period during which applications will be accepted;

(b) the number of truck tags available in relation to the licence;

(c) all mandatory requirements for a licence;

(d) all other qualifications or criteria set out by the commissioner to determine whether, and to whom, to issue a licence;

(e) a statement that a person, by applying for a licence, waives any claim for compensation or damages in the event the commissioner refuses to issue a licence, unless the commissioner's conduct is dishonest, malicious or otherwise in bad faith.

[emphasis added]

[98] They argue that s. 6(1) represents a sort of condition precedent that was never triggered before the 2020 Application Process. The consistent refrain of market saturation indicated that it was not desirable to increase the number of licences. Further, the fact that the Commissioner felt obliged to award fewer truck tags to some previous licence holders contradicts the need to increase the number of licensees, or grant tags to new licensees.

[99] As a preliminary point, throughout their argument, the petitioners conflate the concepts of “licences” and “truck tags.” No petitioner was denied a licence. Their complaint solely focuses on the number of truck tags allocated under each licence.

[100] Section 16 establishes that a person must not carry out container trucking services in a prescribed area unless that person holds a specific licence to do so, as issued by the Commissioner. The Commissioner may, but is not required to issue a licence, and may refuse to issue a licence: s. 16(4) of the *Act*. Section 6 refers solely to licences.

[101] All of the existing licences were set to expire on November 1, 2020. The licence holders, in fact, were aware that they had been set to expire on two earlier dates, when they were extended to allow for greater time for consultations, and for honing the process.

[102] In other words, on November 1, 2020 the number of issued licences would fall to zero. Under s. 6(1) of the *Regulation*, the Commissioner was entitled to exercise his discretion to increase the number of licences from zero to a specified higher number. Most relevant communications since the Ready/Bell report discuss and contemplate a target range of licences and truck tags well above zero. Specifically, all communications connected with the 2020 Application Process set out the range of licences and truck tags that were available.

[103] Those communications also made clear that the Commissioner would receive applications from both new applicants as well as existing licence holders. Indeed, there had been considerable consultation and debate on that specific issue leading up to the 2020 Application Process. To address specific concerns of the drayage industry, the Commissioner had modified the application process to, in effect, only consider new applicants if there existed available truck tags after consideration of the applications of existing licence holders. As stated in the March 2020 Final Consultation Report:

> Section 6 of the *Regulation* states that if the Commissioner is satisfied that it is desirable to increase the number of licensees, the Commissioner may invite applications for a licence. In this case, the Commissioner considers it desirable to accept licence applications from new entrants that can demonstrate a substantial investment in the industry and a commitment to pay their drivers compliant rates. The introduction of new applicants will also assist in putting downward pressure on the valuation of licences which are presently considered to be only attainable through sale.
>
> > **New applicants will be permitted to apply for a licence, but their applications will be only be considered after the applications for existing licensees have been reviewed and if there are remaining truck tags to be allocated from within the target range.**
>
> [emphasis in original]

[104] In short, the Commissioner's decision that it was desirable to allow new applicants to apply in 2020 was reasonable and within his jurisdiction. It also represented a reasonable interpretation of the jurisdiction bestowed upon him by the *Act* and *Regulation*.

[105] Second, the petitioners argue that the Commissioner used the 2020 Application Process to "effectively amend" their existing licences, and to "cancel" and "take away" truck tags that the petitioners had been allotted under the system. As the petitioners argue at their paragraph 269, "[t]he Commissioner, by taking away truck tags from the Petitioners, in fact, took away an existing privilege of the Petitioners." The petitioners note that before the 2020 invitation for licence applications, the Commissioner regularly renewed the licences of the existing licensees. They characterise the 2020 licensing decision as a "renewal decision", rather than a regular fresh application process. They also argue that past practice created a reasonable expectation amongst licence holders of renewal. The petitioners ultimately argue that the 2020 Application Process "was, in fact, an amendment of the licences of the existing licensees." As they plead in the amended petition, "existing Licensees cannot be asked to apply all over again": at para. 127.

[106] As a related argument, the petitioners argue that an existing licence holder is entitled to 90 days' notice before any reduction of in their number of truck tags: they refer to this as a "grace period." The petitioners argue that the Commissioner was accordingly required to provide "notice to the licensee of the amendment" and "an opportunity to be heard, pursuant to ss. 19(1) and (3) of the *Act*, and failed to do so. In support, they point to the "tag withdrawal process" set out in the 2020 CTS Licence Tag Management Policy:

> **Tag Withdrawal Process**
>
> 13. Approval of tags is subject to a Licensee maintaining the performance metrics associated with all the tags assigned to it under its Licence as well as its performance requirements under the VFPA's Access Agreement. Failure to maintain performance may result in a reduction of the number of tags under the Licence.
>
> …
>
> 16. The Commissioner will utilize the Licensee's Balanced Scorecard as issued monthly by the VFPA, as well as and [*sic*] any other information that the Commissioner may consider relevant to evaluate licensee fleet performance. This may include any information provided by a Licensee regarding its fleet performance.
>
> 17. Should the Commissioner consider reducing the number of tags under a Licence, the Commissioner will provide the Licensee with a warning and a 90-day opportunity to improve tag performance, which is detailed on the Licensee's Balanced Scorecard. If, after 90 days, tag performance has not improved, the Licensee will be given reasonable notice of the Commissioner's intention to withdraw the tags.

[107] At a fundamental level, the petitioners' arguments here, as throughout their submissions, mischaracterise the 2020 Application Process as merely a renewal process rather than a new application process. When pressed, counsel for the petitioners acknowledged that it could not be the case that an existing licence holder holds its licence, or the truck tags allocated under that licence, in perpetuity. Nor is there a presumption that an existing licence holder will receive a licence, let alone the specific number of truck tags, at the end of every application cycle.

[108] A licence is generally a fixed-term permit subject to reassessment, retraction, rejection, or reissue by the issuing authority, with no inherent right to continued possession. As stated by Rothstein J (then on the trial court) in *Oswan Tucker and Tucker & Son Ltd. v. Canada (Minister of Fisheries and Oceans)* (2000), 197 FTR 66 (FC) at para. 43, "[t]here is no vested right in a licence." As Sara Blake sets out in *Administrative Law in Canada*:[1]

> 4.23 A licence is issued for a fixed term, typically one year, so that suitability may be periodically reassessed in accordance with licensing purposes, including the licensee's compliance with regulatory requirements. ***There is no right to a renewal of a licence.…***
>
> 4.24 Though licences are sometimes bought and sold, ***a licence does not vest any interest or property right in the licensee*** beyond the profits earned or a property right in natural resources acquired pursuant to a licence.…
>
> 4.25 A power to grant a licence includes a power to amend or revoke any licence previously granted.
>
> [emphasis added]

[109] This principle is reflected in the documents leading up to and including the Application Package, which make clear that an existing licence holder is not guaranteed the re-issue of a license, let alone the existing number of tags. The documents specifically remind licence holders that the licence is set to "expire". Those documents also referred to an "Annual Term of Licence." Both phrases reinforce that a licence is finite and discretionary, and not held in perpetuity, or with a presumption of re-issuance each year.

[110] The 2020 Application Package (and earlier iterations thereof), under the heading of "Licence Application Process" clearly anticipates that some applicants will receive fewer truck tags, and some applicants will not be approved at all:

> ***If your application meets all the other requirements for conditional approval***, the OBCCTC will issue a conditional approval letter which

> includes a Truck Tag decision detailing the number and type of Truck Tags to be assigned. ***If the number of Truck Tags to be assigned is less than the number of Truck Tags assigned under a 2018 CTS Licence***, applicants may be asked to submit a proposal regarding how they anticipate allocating the Truck Tags assigned.
>
> Applicants who do not meet all the requirements ***will be given notice of non-approval*** at this time. …
>
> [emphasis added]

[111] The first page of the Application Package refers to "successful applicants", clearly indicating that some applicants would be unsuccessful. That same sentence indicates that only between 1450 and 1550 truck tags will be distributed, emphasising a finite number such that not every applicant will receive the amount it wishes.

[112] Similarly, the supplemental document to the 2020 licence application process and tag management policy document states:

> **Licence Assessment process**
>
> Applicants who currently hold or have held a licence in the past are ***not guaranteed a licence*** and must meet the mandatory requirements. Failure to meet the mandatory requirements ***will result in a rejection of the application***. ***The number of TLS and CTC tags allocated to a licence will be assigned by applying the criteria specified above***. …
>
> [emphasis added]

[113] Conversely, nowhere does the Application Package indicate that an existing licence holder would receive a 90-day grace period after learning of its allocation of truck tags. Nowhere does that document describe the allocation of truck tags at the end of the application process as an "amendment" of the existing number. None of the many policy and consultation documents preceding and anticipating the Application Package make reference to a 90-day (or other) correction period allowing the applicant the opportunity to preserve the same number of tags for the upcoming licence term.

[114] The petitioners' cited section 19 of the *Act* ("Amendment of licence") does not refer to the issuance of a licence after application: that process is governed by s. 16 of the *Act* ("Licence required"). Section 16 is located textually before s. 19, and prescribes a process that precedes that described in s. 19, which concerns the amendment of a licence during its term, *after its post-application issuance* under s. 16. The licensee who has "an opportunity to be heard" under s.19 has

already become a licensee after applying for and receiving a licence under s. 16. Similarly, s. 21 (“Cancellation of licence”) concerns the cancellation of a licence after its application and issuance under s. 16.

[115] Nor does the petitioners’ cited Tag Withdrawal Process referred to in 2020 CTS Licence Tag Management Policy, quoted above, address the application for and issuance of a tag or licence at the beginning of the process. The previous heading in the 2018 Tag Management Policy, under the bolded heading of “**Tag Application Process**”, governs that first stage. The Tag Withdrawal Process relied upon by the petitioners concerns performance failures during the term of the licence, which failures, if unaddressed, may be addressed by the Commissioner’s decision to withdraw a tag from the delinquent licensee. Apart from the heading, the tag withdrawal process requirement that an existing licensee maintain performance, based on an *ongoing review of the monthly scorecards*, also clearly indicates that it concerns mid-licence term performance, rather than a consideration on application. Finally, the language of the 2020 policy tag renewal process tracks closely the language in the 2018 and 2019 Tag Management Policies, each of which bore the more specific heading of “Tag Withdrawal Process *during Annual Term of Licence*” [emphasis added].

[116] Finally, implementation of the petitioners’ conception of the 90-day grace period would be logistically impracticable. A finite number of licences exist. Applicants apply in July and receive licences and tags in December. Under the petitioners’ conception, the Commissioner would be obliged to advise each applicant of any deficiencies in their application or the underlying facts and data, and then give them 90 days to correct those deficiencies. Some applicants may do so, and others may not. Thus the complete number of licences and tags would not be issued well into the licence term, with many licences and tags going to waste in the meantime.

[117] Third, the petitioners argue that the *Act* and *Regulation* do not authorise the Commissioner to consider an applicant’s compliance history in determining the number of truck tags to be issued under a licence. They argue that the Divisions 2 and 3 of the *Act* already provide a “comprehensive scheme” by which the Commissioner may investigate, discipline or penalise non-compliant licensees, and that it is somehow impermissible to also consider compliance history as an application criterion.

[118] The existence of statutory powers to address non-compliance in the course of a licence does not make an applicant's history of compliance or non-compliance with the *Act*, *Regulation*, or licence unreasonably irrelevant as a criterion considered for the issuance of a licence or tag in the application process. Section 6(2)(b) bestows broad powers on the Commissioner to impose "any mandatory requirements for a licence the commissioner considers appropriate." It is not unreasonable, let alone patently unreasonable, for the Commissioner to identify compliance, including safety compliance, as a relevant criterion for licence issuance. The ability and willingness of a licence holder to obey the licence and the governing enactments is quintessentially relevant to the issuance of a licence. Apart from administrative convenience and legal compliance, these considerations are critical to public safety in the context of large trucks carrying large containers on public roads. As stated in *Administrative Law in Canada*:

> 4.20 Protection of the public is the main purpose of licensing. Each applicant for a licence, or for renewal of a licence, must demonstrate competence, integrity, trustworthiness and compliance with regulatory requirements. An applicant must honestly provide information respecting qualifications, experience and past conduct. A licence may be revised or revoked for a misrepresentation in the application. The past conduct requirement is not restricted to conduct in the operation of a licensed business. It may include any conduct relevant to the public interest purposes of licensing.…

[119] The petitioners have failed to demonstrate that the Commissioner's interpretation and implementation of its home statute and regulation -- the *Act* and *Regulation* -- was patently unreasonable. Rather, on the plain wording of those enactments, and with an eye to the context and objectives of the entire legislative scheme, and the broad discretionary powers bestowed on the Commissioner, the Commissioner's interpretation and implementation of its duties and rights under the legislative framework were, in fact, correct.

B. Issue 2: Did the Commissioner fetter or abuse his discretion in considering trip efficiency data in issuing truck tags?

[120] The petitioners further argue that the Commissioner abused or fettered his discretionary powers by unduly relying upon the trip efficiency data scorecards provided by the Port Authority in issuing truck tags. Specifically, the petitioners argue:

> By relying upon incomplete data in the form of scorecards, and upon the scorecards generally in a rigid and binding manner, to evaluate the truck

> tag efficiency of the licensees, and to treat them as legally binding, exhaustive and restrictive, the Commissioner abused/fettered its discretion.

[121] The petitioners allege three specific means by which the Commissioner abused or fettered his discretion:

> (a) [By] utilizing the criteria/requirements to determine the number of truck tags to be issued to an applicant, which it itself had directed the applicants to not use as part of the licence application;
>
> (b) By, after the fact, imposition of a condition that the applicants should have used the scorecard data in explaining how the scorecard affected/ influenced their business needs; and
>
> (c) By rigid and binding application of the scorecards in determining the number of truck tags to be issued to an applicant.

[122] Reliance upon the trip efficiency data scorecards does not constitute a fettering or abuse of discretion.

[123] Fettering of discretion occurs when, rather than exercising its discretion to decide the individual matter before it, an administrative body binds itself to policy or to the views of others, without considering other legally relevant factors. As stated in *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470:

> [62] The general rule concerning fettering is set out in *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2, which holds that ***decision makers cannot limit the exercise of the discretion imposed upon them by adopting a policy, and then refusing to consider other factors that are legally relevant.*** … Government agencies and administrative bodies must, of necessity, adopt policies to guide their operations. And valid guidelines and policies can be considered in the exercise of a discretion, ***provided that the decision maker puts his or her mind to the specific circumstances of the case rather than blindly following the policy***: see *Maple Lodge Farm, supra* at pages 6-8 and *Clare v. Thompson* (1983), 83 B.C.L.R. (2d) 263 (C.A.)…..
>
> [emphasis added]

[124] Notably, *Goodrich Transport*, which set aside licence rejections under the 2015 application process on the ground of procedural unfairness, rejected an argument based on fettering of discretion even directed towards a process found to be flawed:

> [43] I am satisfied that PMV's grant of authority to establish a licensing scheme to control truck access to its marine facilities is very broad. ***PMV is entitled, as a matter of policy, to identify and apply as it sees fit the criteria for issuing licences. The only constraint that would apply to***

> ***this aspect of PMV's discretion is where bad faith or unfairness can be shown or where undue reliance has been placed on clearly irrelevant considerations extraneous to the broad underlying statutory purpose.***
>
> …
>
> [47] ***In the absence of statutory confinement, a decision-maker does not act unreasonably or fetter its discretion by developing and applying firm rules to the evaluation of license applications. So long as the rules it adopts are relevant to the exercise of its proper discretion, it is open to a decision-maker, acting fairly, to apply them strictly and without regard to other arguably relevant factors.*** In short, neither an interested party nor the Court can impose upon the decision-maker their own standards of relevance. This is not to say that such matters are always beyond the scope of judicial review. Administrative decisions of this sort are reviewable where there has been an abuse of discretion or procedural unfairness. Even so-called policy choices may be overturned on the reasonableness standard where a decision-maker clearly deviates from applicable legislative requirements or standards.
>
> [48] ***In this case it was not unreasonable or unlawful for PMV to adopt the criteria set out in the Handbook or to assign scores solely on the basis of binary choices. Indeed, the suggestion by the Applicants that the system ought to have left room for the exercise of some residual discretion would have invited a host of problems not the least of which would be uncertainty or the appearance of favouritism or some other form of unequal treatment.*** The system adopted here lacked nuance but it was based on relevant considerations that fell well within the scope of PMV's authority. It is not the role of the Court to interfere with that discretion on this record.
>
> [emphasis added]

[125] As set out in the passages above, administrative agencies such as the Commissioner are entitled and, indeed, expected to adopt and follow policies to guide their operations.

[126] Further, as canvassed above, the *Act* and *Regulation* grant the Commissioner broad powers to establish policies and procedures with respect to the issuance of licences.

[127] The Commissioner repeatedly made clear that it would consider the fleet efficiency scorecard data in considering applications. For example, in the Application Package, the Commissioner indicated that it would look to three broad criteria in issuing tags:

> Allocation of company and Independent Operator Truck Tags for 2018 CTS Licence holders will be determined by assessing an applicant's business case, compliance history and fleet efficiency data.

[128] Similarly, the February 2020 supplemental consultation document stated that:

> An applicant's fleet utilization over the past 12 months will be assessed for the purpose of assigning TLS truck tags using balanced scorecard information and data supplied by the [Port Authority].

[129] Similarly, the March 2020 Final Consultation Report stated:

> … the truck tag assignment process will consider all information supplied by the applicants, ***not only the data contained on the performance score cards***. Applicants will be required to submit supporting information to demonstrate truck tag utilization. It should be noted, however, that ***on-dock efficiency metrics do serve as a useful guide in determining the optimal size of the fleet that is required to access port terminals***.
>
> [emphasis added]

[130] Page 1 of the June 2020 CTS Licence Truck Tag Management Policy stated clearly:

> **CRITERIA**
>
> The Commissioner considers a Licensee's performance metrics (including those under the [Port Authority]'s… performance review program) and the size and performance of the [independent operator] fleet under Sponsorship/Joinder when issuing and withdrawing additional tags.

[131] During the application process, the July 2020 bulletin reiterated:

> The container movement and fleet performance information requested in Form B.2.1 is information that should be in the possession of the applicant. There is no need to contact the Port ***for scorecard data***. The OBCCTC has access to all [Port Authority] ***data*** and does not require applicants to use or submit [Port Authority] ***data as part of the licence application.***
>
> [emphasis added]

[132] In the licence itself, at article 6.10, the licence holder acknowledges that the Commissioner may consider information provided by the Port Authority in determining the number of truck tags issued.

[133] The Commissioner's reliance on the fleet efficiency data was consistent with the very purpose of the revised regulatory scheme: to promote fleet efficiency and decrease the number of inefficient half-full truck visits to port facilities.

[134] Further, by s. 58(3)(c) of the *ATA*, a discretionary decision is patently unreasonable if it "is based entirely or predominantly on irrelevant factors." The

Commissioner did not fetter his discretion by relying solely or predominantly upon the historic trip efficiency data, or doing so at the expense of other relevant considerations. As indicated in the Application Package, the Commissioner considered many other factors, including each applicant's business case, customer references, and history of regulatory compliance. In the Final Consultation Report, the Commissioner advised applicants that:

> … ***the truck tag assignment process will consider all information supplied by the applicants, not only the data contained on the performance score cards.*** Applicants will be required to submit supporting information to demonstrate truck tag utilization. It should be noted, however, that on-dock efficiency metrics do serve as a useful guide in determining the optimal size of the fleet that is required to access port terminals.
>
> [emphasis added]

[135] The petitioners also argue that the Commissioner communicated that applicants should not discuss scorecard efficiency data in its application:

> 210. Furthermore, the Commissioner stated that Licensees had access to their scorecard data, and had the opportunity, in their business case, to provide detailed explanation about how their business model was influenced by the VFPA scorecard metrics.
>
> 211. This was contrary to the clarification bulletins issued by the Commissioner on July 10, 2020. In the first bulletin the Commissioner stated that there was no need for the applicants to contact the Port for scorecard data. The OBCCTCC [*sic*] has access to all VFPA data and does not require applicants **to use** or submit VFPA data as part of the licence application. **[EMPHASIS ADDED]**
>
> 212. In the second bulletin, the Commissioner reiterated that there was no need to contact the Port for scorecard data. The Commissioner had access to all VFPA data and did not require the applicants **to either use** or submit that data as part of the licence application; and the Commissioner **would not be contacting** off-dock facilities on behalf of applicants. **[EMPHASIS ADDED]**
>
> [emphasis in original submission]

[136] With respect, this is a mischaracterisation of the basic meaning and intent of the Application Package and related communications. As indicated by the passages above, it was not necessary for an applicant to attach the scorecard efficiency data to its application form, as the Commissioner already had that data. The Commissioner's courtesy communication, relieving an applicant of the burden of gathering that data, does not, literally or by implication, tell the applicant that the Commissioner would not rely upon that data. Nor does it indicate that the applicant

should or could not discuss or provide explanations for that data, if the applicant wishes to do so. Indeed, the July bulletin expressly instructed the applicants to discuss the trip efficiency data, under the "Business case" section (Form B.2.1):

> … In the event an applicant's records are not accessible and/or a manual process is required to collate the information requested in the licence application package, applicants are encouraged to make best estimates to complete the Business Case. The OBCCTC will ***then use [Port Authority] data and the information supplied in Form B.2.2 [the Business case section] to determine the number of truck tags assigned to the applicant.***
>
> [emphasis added]

[137] In that Form B.2 "Business case" portion of the Application Package, each applicant had every opportunity to, if so desired, distinguish and explain any past fleet inefficiency, and set out why an equal or greater number of tags should be issued to that applicant.

[138] There is no merit to the petitioners' fettering or abuse of discretion argument. The Commissioner explained in advance and in the Application Package that he would consider various relevant criteria, and did so, reasonably and fairly.

C. Issue 3: Was the 2020 application process procedurally unfair?

[139] The parties agree on the general legal principles concerning the duty of procedural fairness.

[140] Administrative decisions must be made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para. 22.

[141] The requirements of procedural fairness are flexible and variable. Its requisite content will vary depending on the context, guided by several non-exhaustive factors:

a. the nature of the decision being made and the process followed in making it;
b. the nature of the statutory scheme;
c. the importance of the decision to the individual or individuals affected;

d. the legitimate expectations of the person challenging the decision; and
e. the choices of procedure made by the administrative decision maker itself.

[*Baker* at paras. 23-28]

[142] Throughout their fairness argument, the petitioners emphasise factors (c) and (d), above. The Court accepts that a decision to reduce the number of truck tags does have a potentially significant impact on the business of an individual licence-holder, and on individual drivers. The Court also accepts the legitimate expectations of fairness on the part of the petitioners. For the reasons that follow, however, the process did not breach procedural fairness, and was, in fact, procedurally fair.

[143] The petitioners advance several arguments to allege that the 2020 Application Process was procedurally unfair.

[144] First, the petitioners argue that "[i]n spite of raising several serious issues with the manner in which the 2020 Application Process was undertaken by the Commissioner, and issues pertaining to the manner in which the Commissioner chose to decide the Petitioners' applications; the Petitioners were constrained to participate in the process undertaken by the Commissioner."

[145] As set out elsewhere in these reasons, however, the Commissioner is empowered and indeed required, under the *Act* and *Regulation*, to set down an application process and criteria. The Commissioner arrived at the 2020 Application Process after extensive consultation in which at least some of the petitioners participated, directly, and through their legal counsel, including their present legal counsel. That process, and the criteria for issuance of licences and truck tags, was repeatedly communicated to stakeholders, including in the application document itself.

[146] Second, the petitioners argue that the 2020 Application Process, by considering historic fleet efficiency data, "penalized" existing licence holders and unfairly favoured new applicants, who, by definition, had no fleet efficiency data to consider. They further argue that the process was "designed" to favour new applicants.

[147] That submission ignores the fact that existing licence holders were in effect given a head start: they were considered first, before new applicants. The applications of new entrants would only be considered if there remained allocable truck tags within the target range, after their issuance to the existing licensees. Licence and truck tag allocation for new applicants would then, reasonably, be determined by assessing the applicant's prospective business plan. Even then, the new applicant would be at a disadvantage, lacking client relationships and references, and a track record in the drayage industry. It is telling that only one new applicant managed to obtain a licence under the 2020 process. Issue 1, above, also discusses compliance history as a reasonable criterion.

[148] Third, the petitioners argue that the Commissioner used the 2020 Application Process to "effectively amend" their existing licences, and to "take away" truck tags that the petitioners had been allotted under the system. Issue 1, above, addresses that misconception: the 2020 Application Process was indeed a fresh application process for an annual licence, not a matter of renewal or removal of existing licences to which their holders enjoyed a perpetual entitlement. The application process, and the repeatedly-communicated possibility that a given applicant may not receive the same number of truck tags as in the previous year, did not represent an excess of jurisdiction, nor did it represent a breach of natural justice.

[149] Fourth, the petitioners argue that the 2020 Application Process was "opaque, arbitrary, and in breach of statutory provisions." They argue that "no explanation/reasoning whatsoever, was provided by the Commissioner in its conditional decisions related to the impact compliance history had on each of its decisions."

[150] As set out in these reasons, there were copious communications from the Commissioner to members of the drayage industry before, during, and after the 2020 Application Process, including in the Application Package itself. Those communications made clear that the fleet efficiency data would be considered. Those communications also made clear that the number of tags issued under a licence could go up or down. Specifically with respect to compliance history, the truck tag policy consultation document set out an "Evaluation Matrix" that showed how the Commissioner would treat past infractions: no decision = good; decision with no penalty = average; decision with penalty = poor.

[151] These expansive communications continued after the application process. Again, following the truck tag decision, each applicant received a four- or five-page personalised and particularised letter setting out the basis for truck tag allocation; the number of truck tags granted to the applicant; and detailed reasons for those numbers, based upon aspects of the business case, fleet efficiency, and compliance history of the individual applicant. That information process did not stop at the approval letters. Several petitioners, directly, and through their legal counsel, wrote to the Commissioner to question its allocation of truck tags: the Commissioner provided full and detailed responses, further explaining the basis for his decisions.

[152] Sixth, the petitioners point to specific aspects of trip efficiency data that could affect a subset of the petitioners, as a ground of unfairness. First, the data did not take into account trips to Fraser Surrey Docks (a smaller component of the Port of Vancouver) or trips involving collection of empty containers from CN or CPA facilities. Further, the data did not include ancillary "off-dock" trips, such as transportation of empty containers between facilities.

[153] It was generally known among licence-holders that such off-dock trips were not counted in the efficiency data: that fact is referred to in the consultation documents and other documents leading up to the 2020 Application Process, as well as the petitioners' affidavits and letters from their counsel in the record. At paragraph 64 of their argument, the petitioners state that this issue was canvassed in the 2015 Federal Court hearing in *Goodrich Transport*. If a specific applicant feared that this quirk could unfairly harm its trip efficiency data, it could, and indeed was encouraged, to address that factor in its application. Under the business/fleet information section of the 2020 application, applicants were specifically prompted to "list the number of on and off dock container trucking movements", as well as "total container movements (on and off dock)" and "average container moves per day for each driver." Those petitioners potentially affected by such data could and should have stated so in their applications. As stated in the Final Consultation Report:

> The OBCCTC recognizes that most fleets perform both on and off dock movements and that relying exclusively on [on-]dock performance to make tag decisions is not fair and that additional data concerning off-dock and ancillary container movements needs to be considered. That is why the truck tag assignment process will consider all information supplied by the applicants, not only the data contained on the performance score cards.

> Applicants will be required to submit supporting information to demonstrate truck tag utilization.

[154] Further, and in any case, it is not clear that this aspect of the fleet efficiency scorecards had any effect on the final outcome. Again, fleet efficiency was only one of several criteria considered by the Commissioner in issuing truck tags. Consistent with the previous quotation, in considering applications, the Commissioner specifically and affirmatively adjusted trip efficiency data to address the issue of off-dock travel. The petitioners themselves do not identify any specific companies who claimed any specific prejudice as a result of this quirk of the trip efficiency data. At best, the petitioners provide a vague statement that "[t]here are several companies, including several Petitioners, who conduct trips to Fraser Surrey Docks."

[155] Seventh, the petitioners argue that they "expected the Commissioner to undertake the process of ensuring that their applications were complete." They point to the following passage in the Application Package, under the "Completeness Review phase":

> Application Packages will be reviewed for completeness upon receipt. The OBCCTC will make its best efforts to request any additional documentation and/or information required from you within five (5) business days of receipt. Your application will be deemed withdrawn if you fail to provide the requested documentation and/or information within five (5) business days of the request.

[156] The petitioners also point to the 2020 Application Package statement that the Commissioner may verify the information provided by the applicant: for example, customers listed in the "business case" section.

[157] The petitioners argue that these statements imposed an obligation on the Commissioner to go back to an applicant if its application appeared to fall short of justifying the issuance of the number of truck tags sought by the applicant.

[158] There is no merit to this argument. The onus is on the applicant not only to submit the required information, but to set out the basis for issuance of a licence, and issuance of the desired number of truck tags. The first cited statement conveys only that the Commissioner will review an application package to confirm that it contains the requisite pages and forms, and the bare information sought on the application. Page 10 in fact provides a "documents checklist", listing the

documents that “must be completed and included in your application materials.” The courtesy statement of the Commissioner, quoted above, does not go beyond such a high-level checklist review of the contents of the application. The second cited statement only cautions the applicants that the Commissioner may verify the information with third-party sources, potentially leading to embarrassment if the applicant submits false or erroneous information. Those statements impose no affirmative duty on the Commissioner to broadly verify the completeness or persuasiveness of an application.

[159] Nowhere in the Application Package or the associated documents leading up to the 2020 Application Process does the Commissioner indicate he will micromanage the process or hold the hand of the applicant to help them get everything they request in their application. Indeed, it would be unfair and would place the Commissioner in a conflict if he in effect helps individual applicants by pointing out how they could strengthen their applications.

[160] In short, the petitioners have not persuaded the Court that the 2020 Application Process breached procedural fairness in any manner. In this, it stands in contrast to the earlier drayage licence process under review in *Goodrich Transport.* There, while ultimately granting the applicants’ relief, the Court rejected their broad allegation that applicants were entitled to complete transparency in the application process:

> [38] Here the Applicants were told their applications would be assessed against identified criteria. It was at least implicit from the Handbook that an evaluation protocol had been adopted by PMV and a ranking or scoring method of some description would be used. The application forms were also clear and comprehensive. The scoring model adopted by PMV was blunt but it did have the advantages of simplicity and objectivity. I do not agree with the Applicants that they were entitled to know in advance precisely how the criteria would be weighed. While that information might have been helpful, all of the Applicants were aware that they would lose ground to others if they failed to address any of the identified criteria. Furthermore, it was open to any of the Applicants to seek further information. From the record before me, no one asked PMV how the criteria would be applied.

[161] The information imparted in that impugned 2015 application process was minimalist compared to that in the 2020 process, where the copious communications, and the expansive 2020 Application Package, repeatedly made clear the criteria on which an application for a licence, and truck tags under that

licence, would be considered. The petitioners had every opportunity to address those criteria in the 2020 Application Process. Indeed, in the extensive consultation process, they had ample opportunity to be heard in influencing the selection of those criteria. Finally, the September 2020 letters setting out the number of truck tags allocated, provided personalised and clear reasons for each allocation.

VI. CONCLUSION

[162] The petition is dismissed. The Commissioner does not seek costs, and none are ordered.

"Crerar J"

[1] Sara Blake, *Administrative Law in Canada*, 6th Ed (Lexis Nexis Canada: 2017) at 4.23-25. See also *Genex Communications Inc. v. Canada (Attorney General)*, 2005 FCA 283 at para. 43.