IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Simard Westlink Inc. v. Office of the British Columbia Container Trucking Commissioner,* 2023 BCSC 2007

Date: 20230929
Docket: S235287
Registry: Vancouver

Between:

Simard Westlink Inc.

Petitioner

And

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

Respondents

Before: The Honourable Justice Kirchner

On Judicial review from: A Decision of the British Columbia Container Trucking Commissioner, May 26, 2023

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	D.S. Penner M.J. Lusk
Counsel for the Respondent Office of the British Columbia Container Trucking Commissioner:	D.L. Brownell
Counsel for the Respondent Attorney General of British Columbia:	Z. Froese
Place and Date of Hearing:	Vancouver, B.C. September 27, 2023
Place and Date of Judgment:	Vancouver, B.C. September 29, 2023

[1] **THE COURT:** I am going to give you my judgment on the application. I am going to give the usual caveat that if a transcript is ordered I reserve the opportunity to edit the judgment for style but the substance and the reasoning will not change.

[2] The petitioner, Simard Westlink Inc., applies for an interim order under s. 10 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 staying two orders and decisions of the respondent British Columbia Container Trucking Commissioner (the “Commissioner”) pending the hearing of the underlying petition for judicial review.

[3] The petitioner also seeks an interim order that the Commissioner cease levying administrative penalties against Simard in respect of container trucking services performed on behalf of Simard by its employees or contractors when those services do not require access to a marine terminal.

[4] In short, Simard seeks an order enjoining the Commissioner from enforcing the *Container Trucking Act,* S.B.C. 2014, c. 28 (the “*Act”)* and the *Container Trucking Regulations,* BC Reg. 248/2014 (the *"Regulation")* against Simard for the movement of shipping containers by truck on trips within the Lower Mainland that do not require access to a marine terminal. Simard refers to these trips as "Domestic Moves" and I am going to use that term throughout the reasons.

[5] The regulatory scheme, which I will discuss in a moment, provides for the setting of minimum rates of pay for truck drivers employed or contracted by companies like Simard who move shipping containers by truck in and out of marine terminals in Metro Vancouver. Simard asserts that the Commissioner has unreasonably interpreted the regulatory scheme as applying to Domestic Moves that are unrelated to accessing a marine terminal.

[6] Throughout these reasons, I am going to use the term "regulatory scheme" to describe the combined effect of the *Container Trucking Act* and the *Container Trucking Regulation*, and sometimes the licence that is issued to Simard under s. 16 of the *Act*. I am also going to use male pronouns to refer to the Commissioner who is presently Glen MacInnes.

Background

[7] By way of background, Simard is a transportation, warehousing, and logistics company that operates across Canada. It performs a variety of transportation services, including some trucking services regulated under the regulatory scheme.

[8] The Commissioner is appointed pursuant to s. 2 of the *Act* and serves as regulator of certain transportation services of marine shipping containers in British Columbia. The Commissioner is empowered to establish and manage a system of licensing under s. 16 of the *Act*, and minimum compensation rates for truckers under s. 22 of the *Act*. The Commissioner can also audit licensees, order licensees to compensate drivers who have been underpaid, and impose penalties for misconduct.

The Regulatory Scheme

[9] The regulatory scheme applies to container trucking companies like Simard that transport shipping containers to and from marine terminals in the Lower Mainland of British Columbia. In *Can. American Enterprises Ltd. v. The Office of the British Columbia Container Trucking Commissioner*, 2020 BCSC 2156, Justice Ker summarized the background and impetus for the regulatory scheme as follows:

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

[10] Justice Ker went on to observe at para. 10 that “the regulation of driver compensation is central to the regime governing container trucking services”. Citing the Court of Appeal's decision in *Aheer Transport Ltd. v. Office of the British Columbia Container Trucking Commissioner*, 2018 BCCA 210, Justice Ker noted that the purpose of the scheme is "to preserve stability in the drayage sector by addressing chronic rate undercutting and driver compensation issues through a

system of minimum rates, audits, licensing, and enforcement." The “drayage sector” is the transport of shipping containers by truck.

[11] Section 16(1) of the *Act* establishes a requirement for a container trucking company to obtain a licence to transport containers to and from a marine terminal in the Lower Mainland. It reads:

> 16 (1) A person must not carry out prescribed container trucking services in a prescribed area unless
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> (a) the person holds a licence issued to that person that gives the person permission to carry out container trucking services in the specified prescribed area, and
>
> (b) the person carries out the container trucking service in compliance with
>
> (i) this Act and the regulations,
>
> (ii) the licence, and
>
> (iii) if applicable, an order issued to the person under this Act.

[12] “Container trucking services” are defined in s. 1 of the *Act* as “the transportation of a container by means of a truck”. “Prescribed container trucking services”, for the purposes of s. 16(1), are defined in s. 2(1) of the *Regulations* as follows:

> 2 (1) The container trucking services prescribed for the purposes of section 16 (1) [*licence required*] of the Act are container trucking services that require access to a marine terminal, but do not include
>
> (a) container trucking services performed by a trucker on behalf of a licensee, using a truck with a truck tag issued by the commissioner, or
>
> (b) transportation of a container to or from a location outside the Lower Mainland.

[13] The prescribed area for the purposes of s. 16(1) of the *Act* is defined in s. 2(2) of the *Regulation* as the "Lower Mainland". That, in turn, is defined in the *Regulation* by listing the municipalities that make up the Lower Mainland.

[14] "Marine terminal" is also defined in the *Regulation* as the four marine container terminals in the Lower Mainland (Centerm; Deltaport; Fraser Surrey Docks; and Vanterm), plus other container terminals for which a trucking

authorization or port access agreement is required by the Vancouver Fraser Port Authority.

[15] Finally "container" is also a defined term in the *Regulation*. It means:

> . . . a metal box furnished or approved by an ocean carrier for the marine transportation of goods.

[16] Thus, the effect of s. 16(1) is that anyone performing container trucking services that require access to a Lower Mainland marine container terminal must have a licence under s. 16(1) or be operating a truck on behalf of a licensee with a truck tag issued by the Commissioner. Truck tags issued by the Commissioner may be attached to trucks that transport containers on behalf of a s. 16(1) licensed trucking company. They are inspected at marine terminals. Essentially the tags allow regulators to verify that the truck is being operated on behalf of a licensee and they are a mechanism for monitoring compliance with the regulatory scheme, specifically to ensure the trucker is being paid the minimum rates as prescribed under the scheme.

[17] Under s. 22(1) of the *Act*, the Lieutenant Governor in Council is authorized to make regulations to establish an initial minimum rate and a minimum fuel surcharge that licensees must pay to truckers who provide specified container trucking services. Section 22(1)(c) states that those regulations may specify things like the starting and end point for container trucking services, the geographic area within which the container trucking services are carried out, and the duration or distance travelled during the carrying out of the container trucking services.

[18] Subsections 22(3) and (4) of the *Act* essentially provide that the Commissioner may, by order, issue new minimum rates or new minimum fuel surcharges after the initial rates were set by the Lieutenant Governor in Council. The initial rates were repealed from the *Regulation* in 2015 and replaced by an order of the Commissioner setting new rates that are now in effect.

[19] Broadly speaking, under the original *Regulations* and now under the Commissioner's order, there are two categories of minimum rates that have been established: one for “on-dock trips” and one for “off-dock trips”. Those terms are both defined in the *Regulations* as follows:

> "on-dock trip" means one movement of one or more containers by a trucker from
>
> > (a) a marine terminal to a location in the Lower Mainland, or
> >
> > (b) a location in the Lower Mainland to a marine terminal;
>
> "off-dock trip" means one movement of one or more containers by a trucker from one facility in the Lower Mainland to a different facility in the Lower Mainland, but does not include
>
> > (a) an on-dock trip, or
> >
> > (b) a movement of a container from one location in a facility to a different location in the same facility;

[20] A "facility" is defined in the *Regulation* to mean:

> . . . a location in the Lower Mainland where containers are stored, loaded, unloaded, trans-loaded, repaired, cleaned, maintained or prepared for shipping, but does not include a marine terminal.

[21] The Commissioner has determined that once a container trucking company, like Simard, is brought under the regulatory scheme by obtaining a licence under s. 16(1), that company must pay its truckers the minimum rates prescribed by the Commissioner under s. 22, even for Domestic Moves that do not require access to a marine terminal. The Commissioner considers that he has been given broad powers under s. 22(1)(a), (d), and (f) to specify the container trucking services to which the minimum rates apply.

[22] Since the container trucking services, as opposed to <u>prescribed</u> container trucking services, are broadly defined as the transportation of a container by truck, the Commissioner maintains he can require s. 16(1) licensees to pay minimum rates for Domestic Moves that do not engage, either directly or indirectly, access to a marine terminal.

[23] However, since his jurisdiction extends only to trucking companies that are licensed under s. 16(1), it is only those licensed trucking companies that are compelled to pay the minimum charge for Domestic Moves. Thus, according to the Commissioner's interpretation, where a licensee like Simard has an employee or contractor pick up a container from a railyard in the Lower Mainland that is not a marine terminal and deliver that container to a customer in the Lower Mainland

that is also not a marine terminal, it must pay the trucker the minimum rate prescribed by the Commissioner under s. 22 for an off-dock trip.

[24] However, any other container trucking company that is not licensed under s. 16(1), and thus not subject to the Commissioner's jurisdiction, is free to have its employees or contractors perform Domestic Moves without having to pay those truckers the minimum rates. That is because those companies do not fall under the purview of the regulatory scheme.

[25] Simard argues this interpretation is absurd and patently unreasonable. It says the focus of the regulatory scheme is on access to marine terminals, and the mischief the scheme was aimed at addressing was compensation or trucking rates for bringing containers to or from a marine terminal. It argues it is absurd that companies who are not licensed under s. 16(1) are free to pay their drivers whatever rates the drivers might accept to do Domestic Moves but companies who are licensed under s. 16(1) must pay the minimum rates for the very same Domestic Moves.

[26] The Commissioner's response is that the regulatory scheme established a trade-off whereby a limited number of container trucking companies are given the privilege to move containers by truck in and out of marine terminals in the Lower Mainland. In exchange for this privilege, those limited number of companies must pay their truckers the minimum rates for all container movements within the Lower Mainland.

[27] Simard also argues that the Commissioner's interpretation is patently unreasonable because there is no geographical limit under s. 22 of the *Act*. It argues that unless that section is tied to trips that engage access to a marine terminal, it would give the Commissioner authority to impose the minimum rates to Domestic Moves anywhere in the province.

[28] However, as I understand the Commissioner's interpretation, which I will discuss in more detail in a moment, s. 22 does not have that effect. That is because the Commissioner views the combination of s. 22 and the definition of "off-dock trips" in the *Regulation* as giving him the authority to apply the minimum rates on Domestic Moves in the Lower Mainland. In other words, he equates all

Domestic Moves as being off-dock trips. Since off-dock trips are defined as trips between two facilities both within the Lower Mainland, the Commissioner views his authority under s. 22 as being confined to the Lower Mainland.

The Dispute

[29] The present dispute came to a head when the Commissioner learned that on March 15, 2023, truckers under contract with Simard had transported two containers within the Lower Mainland from a railway yard to another location using untagged trucks. Neither the railyard nor the other destination was a marine terminal. The containers had arrived at the railyard by train from Montreal. Thus, the transport of these containers from Montreal to the railyard in the Lower Mainland, and ultimately to the customer in the Lower Mainland, did not involve any aspect of marine transport.

[30] As the Commissioner found in his investigation, these containers had at some point been used to transport goods by marine shipping but that was not related to the present use of the containers which, as I said, was to move goods from a warehouse in Montreal to a customer in the Lower Mainland. This was done entirely by rail and truck.

[31] On investigation, the Commissioner learned the truckers who moved these containers for Simard on March 15, 2023, had not been paid the minimum rates under the regulatory scheme. By letter dated April 18, 2023, the Commissioner advised Simard of the observation of these untagged trips and said it constituted an offence under the *Container Trucking Act* because it involved "prescribed container trucking services within the Lower Mainland with an untagged truck." This statement is not correct. The trips were not prescribed container trucking services in that they did not require access to a marine terminal, as the definition of "prescribed container truck service" requires. At most, as the Commissioner would later determine, these were specified container truck services as might be contemplated by s. 22 of the *Act*.

[32] According to the Commissioner's interpretation of the regulatory scheme, Simard, as a licensee, was required to pay these truckers the minimum rate for an off-dock trip as prescribed in the Commissioner's order. Contrary to the Commissioner's original position, that is not an offence under the *Act*. At best,

using the Commissioner's interpretation of the legislation, it is a violation of s. 23, which requires licensees to pay rates set under s. 22.

[33] The Commissioner invited Simard to make submissions on this preliminary determination and then, on May 26, 2023, the Commissioner issued an order under s. 9 of the *Act* requiring Simard to comply with the *Act* and the terms of its licence. The reasons given for this order were substantially similar to those set out in the preliminary determination. The order required Simard to cease and desist performing untagged container trucking services work in contravention of the *Act* and its licence.

[34] On June 5, 2023, Simard advised the Commissioner that it disagreed with his view of the requirements of the regulatory scheme and intended to seek judicial review of the May 26, 2023 order. It requested the Commissioner suspend enforcement of the order pending the resolution of the proceeding. The Commissioner did not respond to that request.

[35] On June 14, 2023, the Commissioner provided a supplemental investigation report to Simard. It was in this report that the Commissioner now identified s. 22 as his authority for imposing the tag requirement and the minimum rate for an off-dock trip on the impugned container moves.

[36] The Commissioner also found that there were additional containers trucked in contravention of the *Act* on March 15, 2023. He found that one driver was underpaid by $6.29 and another by just over $1,200 in fees and improper deductions. The Commissioner requested a response from Simard by June 26, 2023.

[37] Simard maintains that the Commissioner’s June 14, 2023 determination is a recently-changed interpretation of the regulatory scheme. Simard says that prior to that determination it had been permitted to transport containers on trips not involving marine terminals without using tags issued under the *Regulation*. Thus, Simard says, the Commissioner's interpretation is a change to the *status quo*.

[38] On June 16, 2023, Simard provided a response to the June 14 determination that repeated its March 15, 2023 response, namely that the trips did not fall under the regulatory scheme. It reiterated its request that the

Commissioner confirm that the enforcement of the May 26 order would be suspended pending the resolution of the judicial review.

[39] On August 25, 2023, the Commissioner issued a final decision which largely confirmed its preliminary June 14, 2023 conclusion. In the final decision, however, the Commissioner broadened the rationale for his conclusion by referring to policy imperatives behind the adoption of off-dock rates. He referred to a report prepared by mediators Vince Ready and Corinn Bell in 2014 that had led to the adoption of the *Act* and the *Regulations*. In that report, Mr. Ready and Ms. Bell recommended that adequate compensation for off-dock trips was necessary for truckers who "spend considerable time moving containers at off dock facilities."

[40] It strikes me from the brief excerpts of the Ready/Bell report that are in evidence that Mr. Ready and Ms. Bell seemed to contemplate some association between an off-dock trip and the transported container ultimately being shipped from a marine terminal. For example, a container might be moved from one location in the Lower Mainland to a holding yard before it is later transported to a marine terminal for shipping. It is not clear that Mr. Ready and Ms. Bell were contemplating pure Domestic Moves that would not involve a marine terminal at any point in the container's larger voyage. However, the full report is not in evidence and the brief excerpts available to the Court are insufficient to reach a conclusion on this point.

[41] The Commissioner also addressed the fact that only container trucking companies who are licensed under s. 16(1) must pay off-dock rates, whereas non-licensed companies who do not access marine terminals are free to pay lower fees and are not subject to regulation by the Commissioner. He said at para. 38 and 39 of his determination:

> 38. Both the historical context above and the legislative scheme as a whole make clear that while the *Act* requires companies who perform container trucking services via a marine terminal to be licensed, it also requires licensees to comply with the legislation more broadly, including by paying off-dock rates for containers that move between facilities within the Lower Mainland that do not involve a marine terminal.
>
> 39. One of the benefits associated with having a container trucking services licence is access to marine terminals. Non-licensees - presumably the licensees' competitors -- who perform container trucking work in the Lower Mainland do not have such access. Such a restriction elicits many complaints from non-licensees who argue that it

> is unfair that access to marine terminals is an advantage bestowed on only licensed companies. However, this is how the regime works, for various reasons (including because limiting access to marine terminals relieves congestion and wait times and contributes to the stability of the industry). Paying off-dock regulated rates is one of the "costs" associated with the grant of a license to access a marine terminal.

[42] As a result of this conclusion, the Commissioner determined that Simard had not been paying its drivers in compliance with the requirements of the *Act*.

[43] The August 25, 2023 order also proposed to impose an administrative penalty against Simard in the amount of $12,000. The Commissioner formally declined to suspend the May 26, 2023 order pending judicial review. He gave this explanation at para. 69 of his decision:

> 69. Finally, given the mandate of the [Commissioner] to maintain stability in the drayage sector by ensuring licensees pay the prescribed rates to drivers who perform CTS work and penalize licensees who employ practices that contribute to the undercutting of those rates, I find that permitting Simard – or any other licensee – to continue to underpay drivers while it challenges the Order in court does not swing the balance of convenience in favour of Simard.

[44] The Commissioner concluded his decision by stating that Simard may, within seven days, provide a written response to the decision setting out why the proposed penalty should not be imposed.

[45] Simard responded on September 1, 2023, essentially reiterating its position as to why it says the March 15, 2023 trips were not subject to the regulatory scheme.

[46] On September 15, 2023, the Commissioner issued a decision notice in response to Simard’s September 1, 2023 letter, essentially restating his previous conclusions and rationale.

[47] Simard has brought an application for judicial review to challenge the Commissioner's interpretation of the regulatory scheme and the orders that have been imposed. Its real concern is not so much with the orders imposed to date, but rather with the future application of the regulatory scheme to Domestic Moves. As I said at the outset, that is essentially what Simard seeks to enjoin pending the hearing of the judicial review.

[48] Simard has also applied for reconsideration of the Commissioner's decision under Part 5 of the *Act*, and I will return to that reconsideration process in a moment.

Application for a Stay

Legal Principles

[49] Turning to the application for a stay, the parties agree that the court's jurisdiction to grant a stay is found in s. 10 of the *Judicial Review Procedure Act*. The test for an interim or interlocutory stay is the well-known framework set out in *RJR - MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 [*RJR-MacDonald*] at para. 334:

a) is there a serious question to be tried;

b) will there be irreparable harm to the applicant if a stay is not granted; and

c) does the balance of convenience favour granting the stay?

[50] These three considerations are not a checklist but a guide for considering the overarching question of whether the granting of a stay would be just and fair in all the circumstances: *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2019 BCCA 29 at para. 19.

[51] It is for this reason that, at least in this province, the test is sometimes cast in two stages where irreparable harm is subsumed within the balance of convenience: *British Columbia (Attorney General) v. Wale* 1986), 9 B.C.L.R. (2d) 333, aff'd., [1991] 1 S.C.R. 62. In that case, Justice McLachlin, then of the B.C. Court of Appeal, said "the practical effect of the two approaches is the same."

Analysis

Serious Question

[52] Dealing with the serious question, the first element of the *RJR* test sets a low bar. Absent some exceptions that do not apply in this case, applicants for a stay need only show the underlying issue for adjudication is serious in the sense

that it is not frivolous or vexatious: *RJR-MacDonald* at para. 337. This assessment is to be based on "an extremely limited review of the case on its merits": *B.C. Teachers Federation v. British Columbia* 2014 BCCA 75 at para. 10. Once the court is satisfied the low bar is met, it should avoid a deep inquiry into the merits of the claim: *RJR-MacDonald* at para. 338.

[53] I am persuaded that Simard's argument as to the interpretation of the regulatory scheme meets the low threshold for a serious issue for determination. However, I also agree with the Commissioner that the judicial review application is premature because the reconsideration process provided for in the *Act* has not yet been completed. Thus, there is not yet a serious issue for determination.

[54] I also conclude that the stay application is premature in that the Commissioner has jurisdiction under the reconsideration process in the *Act* to suspend his order pending reconsideration. In my view, it would not be appropriate in the present circumstances for the court to usurp that role by issuing a stay before the Commissioner has had an opportunity to consider that first.

[55] I will now explain my reasons for these conclusions.

[56] With respect to the statutory interpretation question, while the Commissioner's interpretation of the *Act* (which I note is his home statute) and the *Regulations* will attract considerable deference and be reviewed on a standard of patent unreasonableness, I cannot say that Simard's argument is frivolous.

[57] First, the focus of the *Act* is on the transportation of containers in relation to marine shipping. This is apparent from the definition of "container" being a metal box furnished or approved by an ocean carrier for the marine transportation of goods. It is also apparent from the licensing requirement under s. 16(1), as elucidated by s. 2 of the *Regulations*, which requires a licence the movement of containers (as just defined) through container trucking services that require access to marine terminals. The focus on the marine transportation of containers is also apparent from the events that gave rise to the adoption of the *Act*, which was to avoid work stoppages in the container trucking service industry to and from marine ports in Metro Vancouver.

[58] In my view, the argument that it is patently unreasonable to interpret the *Act* in a way that gives the Commissioner jurisdiction over the movement of containers in circumstances that are wholly unrelated, either directly or indirectly, to the movement of containers and their contents through marine terminals is not a frivolous argument.

[59] In this respect, it is notable that in October 2022, the Commissioner issued an industry advisory stating:

> The *Container Trucking Act* . . . is intended to regulate on-dock and off-dock container trucking services in the Lower Mainland (container trucking services that require access to marine terminals at some stage).
> . . .
>
> [Emphasis added]

[60] From this directive, the Commissioner appears to have accepted, at least in 2022, that even off-dock container services must bear some relation to accessing marine terminals "at some stage". This might include, for example, the movement of a container to a holding yard in the Lower Mainland temporarily before it is taken to a port for marine transportation, but that is not the kind of Domestic Move that occurred here.

[61] Second, it is apparent that the Commissioner has not fully considered all aspects of the legal issue as it relates to interpreting the statute. The Commissioner's interpretation that licensees can be compelled to pay the prescribed minimum rates for all Domestic Moves hinges on the fact that he may fix a minimum rate for off-dock trips, namely “the movement of one or more containers from one facility in the Lower Mainland to a different facility in the Lower Mainland that is not an on-dock trip.”

[62] An on-dock trip is a movement of a container to or from a marine terminal or from "a location" in the Lower Mainland. An off-dock trip is more specific. It is not just the movement of a container to and from a location in the Lower Mainland, but to and from a facility in the Lower Mainland. "Facility" is defined as a location in the Lower Mainland where containers are stored, loaded, unloaded, trans loaded, repaired, cleaned, maintained, or prepared for shipping. Thus, off-dock trips

contemplate locations in the Lower Mainland that are more narrowly defined than locations in the Lower Mainland for the purposes of on-dock trips.

[63] In addressing this point in his May 16, 2023 letter to Simard, the Commissioner refers incompletely to the definition of "facility" as being a place where "containers are stored, loaded, unloaded, etc." He did not turn his mind to the modifier “for shipping”. He goes on to say that both the CP Rail yard and the customer to whom the containers were delivered on March 15, 2023 are "facilities", but this is based on an incomplete assessment of the definition of "facility" that excludes consideration of “for shipping”.

[64] “Shipping” can have a broad meaning. Goods can be shipped by rail, truck, or air, as well as by ship. On this basis, a railyard may well be a “facility”. On the other hand, given the very heavy focus in the regulatory scheme on marine transport of containers, including in s. 16(1) as elucidated by s. 2 of the *Regulations* and the definition of "container", the text, context, and purpose of the *Act* might suggest a more literal interpretation of "shipping" to apply to marine transport. If that were the case, it would call for some nexus between the movement of the container within the Lower Mainland to a “facility” and the ultimate transport of that container by ship.

[65] I offer no opinion on the correct interpretation, which is not before me, but I do observe the Commissioner has not turned his mind to the modifier “for shipping” or to the fact that locations in the Lower Mainland are more specifically and narrowly defined for the purposes of off-dock trips than they are for on-dock trips. That could affect the interpretation of the *Act* and it is potentially patently unreasonable for the Commissioner not to have turned his mind to the full definition of "facility". I find there is at least a non-frivolous argument that it is patently unreasonable for the Commissioner not to have considered this aspect of the definition of “facility”.

[66] However, as I have said, I am persuaded that the application for judicial review is premature and, for this reason, I am compelled to find that there is no serious issue for determination at this stage.

[67] This question was addressed by Justice Ker in *Can. American Enterprises*. In that case, the petitioner sought judicial review of an order by the Commissioner requiring it to conduct certain audits of its payments to truckers. The petitioner had refused to do the audits, maintaining that the trips in question should not be subject to minimum rates. Unlike here, the petitioner in *Can. American* did not seek reconsideration under Part 5 of the *Act*. Justice Ker observed at para. 54 that courts will not entertain an application for judicial review where an adequate alternative remedy exists within the administrative process.

[68] She said at paras. 58 to 60:

> [58] The exhaustion doctrine, as outlined in *C.B. Powell*, requires that courts focus on the question of whether the application for relief is appropriately respectful of the statutory framework within which that application is taken and the normal processes provided by that framework for challenging administrative action: *Strickland* (para. 44); *Miller* (para. 22).
>
> [59] Allowing circumvention of the reconsideration process whenever an order made under s. 9 of the *CTA* precedes or accompanies a s. 34 penalty order would render the ss. 38–39 reconsideration process meaningless in many circumstances, and would not respect the statutory framework enacted by the legislature.
>
> [60] Accordingly, I conclude the applicant has failed to satisfy the first branch of the *RJR-MacDonald* test and has not demonstrated that there is a serious question to be tried.
>
> [Emphasis added]

[69] As Simard points out, there are factual differences between *Can. American* and the present case. In particular, Simard has proceeded with the reconsideration process, whereas *Can. American* did not. Further, Simard is not flouting the regulatory scheme while it seeks judicial review. Rather, it is working responsibly through the legal processes that are available to it to seek a resolution of its dispute with the Commissioner over the interpretation of the regulatory scheme. Simard submits, however, that the reconsideration process will be futile because it is clear from the history of this matter that the Commissioner is firm in his interpretation of the regulatory scheme.

[70] In short, while Simard does not suggest it need not pursue reconsideration under Part 5 of the *Act*, it nevertheless suggests that the outcome of that process is inevitable, such that the court should now step in.

[71] I agree that the record suggests the Commissioner has become quite firm in his view of the regulatory scheme. Nevertheless, to determine at this stage that the Commissioner has closed his mind to a reconsideration would not "respect the statutory framework enacted by the legislature": *Can. American* para. 58.

[72] I would add that the statutory framework enacted by the legislature includes giving the Commissioner the authority to suspend an order that is under reconsideration pending the final determination on that reconsideration. This is effectively a stay of the order. The legislature has seen fit to give the Commissioner that authority.

[73] There may be circumstances where a court might rightly step in and grant a stay pending a reconsideration decision, but in most cases that would not be giving respect to the jurisdictional bounds established by the *Act*. It is the Commissioner who is given the authority to make determinations under the regulatory scheme, and the court is required to give considerable deference to those determinations on a standard of patent unreasonableness. Courts should ordinarily be reluctant to step in and make a determination before the statutory decision maker has had the opportunity to do so.

[74] For these reasons, I find there is not a serious question to be tried, at least at this stage, until the reconsideration process is exhausted.

Irreparable Harm and Balance of Convenience

[75] In view of my conclusion on the serious question, it is not necessary to address the balance of convenience of the *RJR-MacDonald* test, but I will make some comments about irreparable harm and balance of convenience for the sake of completeness.

[76] At this stage of the *RJR-MacDonald* analysis, the court looks to the nature of the harm the applicant may suffer if the injunction is not granted. The harm will be irreparable if it cannot be remedied even if the applicant is eventually successful on the merits in the underlying proceeding. It is "harm which either cannot be quantified in monetary terms or which cannot be cured": *RJR-MacDonald* at p. 341. Examples include where a party will be put out of business or suffer permanent loss of market share or damage to its business reputation.

[77] The balance of convenience (or the balance of inconvenience, as it is sometimes called) weighs which party will suffer the greater harm from the granting or refusing of an injunction pending a decision on the merits.

[78] Simard argues that it will suffer irreparable harm by paying its contract truckers off-dock rates for domestic moves pending the conclusion of the judicial review. It points out that it has some 23 truckers under contract plus 17 employee truckers. The employee truckers are already paid at rates equivalent to the minimum rates, even for Domestic Moves, so it is only payment to contract truckers that concerns Simard at this point.

[79] Simard says that the additional amounts it must pay each contract trucker are relatively small but cumulatively across the 23 truckers it amounts to an estimated $2.5 million per annum. It submits it will be very difficult to recoup any overpayments to those contract truckers should it ultimately be successful in the judicial review. It cites *Bodner v. Alberta*, 2002 ABCA 20, as authority for that proposition.

[80] A strictly pecuniary loss rarely constitutes irreparable harm as it is generally harm that can be compensated for by way of damages. However, in these circumstances, I accept that this constitutes irreparable harm to Simard. This is a judicial review in which damages cannot be claimed. The contract truckers to whom additional payments must be made under the Commissioner's orders are not parties to this proceeding and cannot be compelled through this proceeding to repay the additional fees. Nor can the Commissioner be compelled, at least through this proceeding, to compensate Simard for those payments. On this basis, I accept that there is some irreparable harm to Simard.

[81] Simard goes further and says the need to make additional payments will put it in a position of competitive disadvantage in relation to non-licensed container trucking firms that need not pay the minimum rates under the regulatory scheme. It suggests this puts Simard at a significant risk of losing business and market share.

[82] I am not persuaded that is the case. Mr. Kimura, on behalf of Simard, has provided some explanation for how he arrived at the estimated additional cost of

$2.5 million per annum. However, he offers no explanation of how that will affect Simard's pricing policies for domestic moves. While the additional annual expense might suggest a need to increase the price Simard charges its customers or take a hit to its annual profits, there is no evidence as to how that additional expense might affect its ability to remain in business or potentially lose market share. Rather, the evidence is simply that the amount – $2.5 million – is large. That indeed seems like a lot of money but without the contextual evidence to understand how it affects Simard's overall operations, I am not able to conclude this extra expense amounts to irreparable harm or that it will cause Simard to lose market share.

[83] Further, the rates that Simard pays its own employee drivers for Domestic Moves is on par with minimum rates under the regulatory scheme. This tends to suggest that the Domestic Moves can be made economically for Simard if it is paying its contract drivers the same rate.

[84] More fundamentally though, there is no evidence as to how Simard will suffer a competitive disadvantage if it pays its contract drivers the minimum rates for Domestic Moves. I accept that Simard may be forced to compete for domestic moving work with trucking companies who are not licensed under s. 16(1) and are not bound by the minimum rates. However, it is in the same position as all other trucking companies who are licensed under s. 16(1). Granting the stay would give Simard a competitive advantage over those licensed trucking companies.

[85] In this respect, I note that compelling licensed trucking companies to pay the minimum off-dock rates for domestic moves has been the Commissioner's practice for some years. I do not accept Simard's argument that the Commissioner's decisions in this case constitute a new interpretation or a change in the *status quo*. As the Commissioner points out in his August 25, 2023 determination, in 2016 his predecessor, Commissioner MacPhail, found in *Forfar Enterprises Ltd*., CTC Decision No. 20/2016 that the inclusion of off-dock rates in the *Regulation* is consistent with an interpretation of the *Act* as applying to the movement of containers that did not travel directly to or from a marine terminal. As in this case, the trips in *Forfar* involved movement of containers from a railyard to customer locations in the Lower Mainland. Commissioner MacPhail confirmed that these moves were within the scope of the *Act* because "the legislation makes the

payment of the legislated rates a term of the privilege of holding a TLS [s. 16(1)] license."

[86] On that basis, it appears that the Commissioner's interpretation of the regulatory scheme has been consistent since 2016, even if perhaps it has been enforced with some inconsistency. Thus, maintaining that *status quo* will not put Simard in a competitive disadvantage *vis-à-vis* other s. 16(1) licensees when doing Domestic Moves.

[87] Finally, I note that the public interest considerations are of central importance in weighing the balance of convenience in the circumstances of this regulatory scheme. In *Can. American* at para. 76, Justice Ker said:

> [76] Here the considerations include the public interest in the efficacy and enforcement of a regulatory scheme that is designed to benefit the public . . .
>
> [77] It cannot be forgotten that the [Act and the Regulation] represent a concerted effort by the legislature to address drivers' legitimate compensation concerns and preserve stability in the container trucking industry. The Commissioner has a responsibility to both the public and drivers to enforce the [Act], and to curb the driver underpayment and non-compliance issues that have plagued the container trucking industry and resulted in three crippling shutdowns of the Vancouver ports in 1999, 2005, and 2014, which had a significant negative impact on the provincial and national economies.

[88] As I have said, the Commissioner is entitled to considerable deference in interpreting its home statute. The Commissioner also stands in a privileged position *vis-à-vis* the court when it comes to understanding how the Commissioner's determinations impact the dynamics of what is happening on the ground in the marine shipping container trucking industry in the Lower Mainland.

[89] Given the very important purposes of the regulatory scheme as outlined by Justice Ker, it is my view that this factor weighs heavily in considering the public interest component of the balance of convenience. Thus, while I accept that Simard will suffer a degree of irreparable harm in being challenged to recoup any unnecessary trucking fees it might pay to its contractors, I am not persuaded on the evidence that the amounts are so crippling as to cause serious harm to Simard's business. Even in the face of this limited irreparable harm, having regard

to the other factors I have just reviewed, I find that the balance of convenience in this case tips in favour of the Commissioner.

[90] For all these reasons, I dismiss the application with costs in the cause. I wish to thank counsel for their thorough and helpful submissions.

"Kirchner J."