Federal Court Cour fédérale

Date: 20150422

Docket: T-192-15
T-196-15

Citation: 2015 FC 520

Ottawa, Ontario, April 22, 2015

PRESENT: The Honourable Mr. Justice Barnes

T-192-15

BETWEEN:

GOODRICH TRANSPORT LTD. AND ROYAL TEAM CANADA TRANSPORT LTD.

Applicants

and

VANCOUVER FRASER PORT AUTHORITY (OPERATING AS PORT METRO VANCOUVER)

Respondent

T-196-15

AND BETWEEN:

ATL TRUCKING LTD., A-CAN TRANSPORT LTD., AMK CARRIER INC., COAST PACIFIC CARRIER INC., FORWARD TRANSPORT LTD., GPX EXPRESS INC., GREENLIGHT COURIER LTD., GRL FREIGHTWAYS INC., H RATTAN TRUCKING LTD., HUTCHISON CARGO TERMINAL INC., INTER CANADIAN TRUCKING LTD., JEEVAN CHOHAN TRANSPORT LTD., K D TRUCKLINE LTD., NILAM TRUCKING LTD.,

**ORCA CANADIAN TRANSPORT LTD.,
PRO LINE TRUCKING CORP., RAJA ROAD RAIL SERVICES LTD.,
ROADSTAR TRANSPORT COMPANY LTD.,
SAHIR TRUCKING LTD., SAFEWAY TRUCKING LTD.,
SALH TRUCKING 2001 LTD., SIDHU SERVICES LTD.,
SUPER SONIC TRANSPORT LTD., SUPER STAR TRUCKING LTD.,
TRASBC FREIGHT LTD., TRANSBC FREIGHTWAYS (2007) LTD.,
VILLAGER TRANSPORT LTD.**

Applicants

and

VANCOUVER FRASER PORT AUTHORITY

Respondent

JUDGMENT AND REASONS

[1] The Applicants are 28 businesses engaged in the transportation of shipping containers by truck in and around the Lower Mainland of British Columbia. Until recently much of this business had involved the movement of containers to and from four container piers managed by the Vancouver Fraser Port Authority [otherwise known as Port Metro Vancouver and hereafter referred to as PMV]. This form of trucking is known in the shipping industry as drayage.

[2] As of January 23, 2015 all of the Applicants have been denied licenses to access PMV facilities. In the result, the Applicants have lost the part of their business which involves the local transport of containers to and from PMV facilities. In some cases the resultant loss of business will undoubtedly be significant and may not be replaceable by other forms of cargo hauling.

[3] The Applicants contend that PMV's processing of their license applications was unlawful and procedurally unfair. In the result, they seek to have the license-refusal decisions quashed. They also ask that their applications for licenses be remitted to the PMV for reconsideration in accordance with directions from the Court sufficient to cure or correct the jurisdictional and procedural shortcomings they assert.

I. Background

[4] For several years PMV has been plagued by labour issues connected to the drayage sector. Work stoppages in 1999, 2005 and 2014 have caused significant delays in the movement of containers and led to millions of dollars in losses to the local and national economies. These work stoppages by truck drivers were precipitated by poor remuneration, increased operating costs, undercutting of wages and operational inefficiencies. Initial efforts to address the labour stability issues proved to be ineffective. In an effort to resolve the 2014 work stoppage, the Minister of Transport appointed Mr. Vince Ready to carry out an independent review of the underlying causes of driver dissatisfaction with a view to recommending appropriate changes.

[5] Mr. Ready, assisted by Ms. Corinn Bell, consulted with stakeholders over a period of several months and, in September 2014, they released a Recommendation Report [the Ready Report]. The Ready Report found there to be an oversupply of trucks licensed to access PMV facilities and this factor had led to a widespread practice of rate undercutting. Among a number of recommendations, Mr. Ready proposed reforms to the Truck Licensing System [TLS] under which truck access to the port was authorized. The justification and broad parameters of TLS reform were described by Mr. Ready in the following way:

> It is universally felt that because of the low barrier to entry in the drayage industry, there is an oversupply of trucks, even with the current decline in owner operators. With approximately 2,000 truck and licences/permits in the system, it is felt by many that there is an enormous oversupply of trucks. Prior to the recent work stoppage, the trip rate drivers worked longer hours and were paid less than hourly rated drivers. However, it is clear to us that with increased fluidity at the ports/terminals, the drivers on trip rates have a greater opportunity to enhance their income providing the congestion at the ports is cleared up. As stated above, the feeling is that there needs to be a significant reduction in the number of trucking companies and trucks. One way of achieving this goal is to impose requirements on TLS participants; such as security deposits or performance bonds as well as implementing reasonable and legitimate truck performance standards and efficiency goals. Another way of achieving this reality is through service level agreements ("SLA") which can work in tandem with any TLS reform and which we will outline as a concept below as a final recommendation.

[6] In October 2014, the PMV released a Fleet Size Analysis Report projecting an annual trip volume of 1,176,750 to and from port facilities. Based on a target of 6 trips per day per truck, the optimal number of authorized trucks was determined to be 1388. This fleet size was said to require a reduction in the number of licensed trucks by about 610.

[7] In mid-October 2014, PMV publically announced its plan to move forward with TLS reform. The stated goals of a new licensing system were said to include improvements in service quality, efficiency, safety and operating standards, all intended to enhance market stability and to address environmental issues. The goal of reducing the number of licensed trucks was also clearly stated. Further consultation with stakeholders was proposed.

[8] On October 29, 2014, PMV announced a Transition Support Program available to any TLS independent operator license holders who were displaced by TLS reform. Compensation of up to $15,000.00 was made available.

[9] Between November 4 and 17, 2014, PMV engaged in a second phase of stakeholder consultation supported by a Participant Discussion Guide. The Guide proposed a new licensing model that would include or take account of the following factors:

a. Fleet age;

b. Performance bonds;

c. Damage deposits;

d. A commitment to remunerate drivers at regulated rates;

e. A new Provincial Commissioner's Officer to audit performance; and

f. A scorecard approach to be used to evaluate new license applications and to maintain ongoing licensing.

[10] With respect to the evaluation of license applications, it was also proposed that new licenses would be available only to currently licensed businesses operating a minimum of five trucks. The suggested evaluation criteria included adherence to environmental, safety and past performance standards.

[11] In December 2014, PMV issued a TLS Handbook [Handbook] setting out the finalized terms of its new licensing system intended to take effect on February 1, 2015. The stated goal of the new system 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 Handbook described an application assessment process to commence on December 10, 2014 with a possible completion date of January 16, 2015. Existing TLS licenses were to expire on January 31, 2015 and thereafter only newly licensed trucks would have access to PMV facilities.

[12] The Handbook informed readers that only current license holders would be permitted to apply and only to the limit of their previously authorized fleet size. Additional advice to applicants included the following:

> Because Port Metro Vancouver will process applications on a weekly basis, we encourage companies to submit complete and compliant applications as soon as possible. Port Metro Vancouver is committed to ensuring the selection process is consistent, fair and transparent, while meeting the TLS reform objectives.

[13] Mandatory entry criteria included a minimum fleet size of five trucks (achievable by a joint application), a damage deposit, sufficient insurance, an ability to secure a compliance bond, a Fleet Safety Plan, evidence of a DOC retrofit on trucks older that the 2006 model year, a fully completed application and evidence of a demonstrated need for service. The Handbook also advised that applications would be further assessed against several non-mandatory criteria including an applicant's past TLS history, a Certificate of Recognition (Safety), an annual WorkSafeBC statement indicative of current safety status, registration with Natural Resources Canada regarding environmental standards, proof of participation (or a letter of intent to participate) in the ICBC Safety and Hazard Management Assessment Program, and one's National Safety Code standing. The Handbook informed applicants that preference would be given to companies with newer and larger fleets and to single over joint applications.

[14] Additional detailed information helpful to the completion of an application was also provided including checklists of required documentation and a reminder that the assessment of completed applications would proceed in order of one's application intake number in weekly batches. The assessment process was also to be carried out in accordance with the following standards:

> Port Metro Vancouver aims to the fullest extent possible to select only those carriers that meet the outlined minimum entry standards outlined during the TLS reform process. Given the current state, Port Metro Vancouver anticipates the number of applications received that meet the minimum standards will exceed the targeted number of truck tags, and in that case additional considerations as outlined earlier in the User Guide will also be taken into account, and will contribute towards the ranking and selection process.
>
> Port Metro Vancouver is committed to ensuring the selection process is consistent, fair and transparent, while ensuring the objectives of the TLS reform are met and the integrity of the process maintained/preserved.

[15] Although the Handbook informed applicants the assessment of compliant applications involved a ranking or a scoring of the evidence submitted, nowhere did it precisely describe how the relevant criteria would be weighed. At the same time, it is apparent from the record that none of the Applicants to this proceeding made an effort to enquire about these details.

[16] On December 9, 2014, PMV informed existing license holders that it would then begin accepting applications for new TLS licenses to take effect on February 1, 2015. Careful review of the TLS Handbook was strongly recommended.

[17] On December 23, 2014, PMV issued a public notice confirming the approval of six applications under its new TLS program. The notice advised that applications would continue to

be processed until the end of January 2015 or when the target number of truck tags had been reached. It further stated:

> We are processing and approving applications on a weekly basis, and encourage interested trucking companies to submit their compliant applications as early as possible, to maximize your opportunity to [sic] being accepted.

Similar notices continued to be issued through the first two weeks of January including one dated January 14, 2015 advising that 49 companies had been conditionally approved for licenses representing about 1237 trucks.

[18] On January 16, PMV advised its licensees that the number of pending applications exceeded the number of available truck tags and no further applications would be accepted. On January 23, PMV gave notice of the completion of the process with the conditional approval of 68 companies operating approximately 1450 trucks. Unsuccessful applicants were told a debriefing meeting was available to discuss why their applications were not approved. PMV also sent letters to the unsuccessful applicants explaining the process of evaluation in the following way:

> All applicants that met the minimum requirements were then reviewed in the context of other applicants to determine which applicants best met Port Metro Vancouver's dual objectives, using additional entry criteria and recommended documents as outlined in the TLS Handbook, The primary objective was ensuring that the Pacific Gateway is served by container trucks, drivers and companies that reflect the highest standards of efficiency, sustainability, (both economic and environmental), and safety. The secondary objective was the timely approval of a sufficient number of applicants to ensure continuous, uninterrupted movement of containers during this period of TLS reform.

[19] Further details of the evaluation process adopted by PMV are set out in several affidavits of its Manager (Supply Chain Performance), Mr. Dale Thulin. Mr. Thulin confirmed that TLS applications were processed in batches. Completed applications were assigned an intake number once all of the mandatory minimum criteria documentation had been submitted. Completed applications were then ranked in batches with reference to the additional evaluation criteria described in the Handbook. Up to two points were available based on an applicant's average fleet age. One point was available for each of the remaining criteria. Half points could be assigned for joint applications where only one of the companies fulfilled any of the additional criteria.

[20] Mr. Thulin's first affidavit confirmed the batch evaluation of applications created the possibility of early applications being approved with lower scores than the scores assigned to successful applications considered in subsequent batches. For most of the Applicants in this proceeding, the applications were completed late in the overall process and many of those were incomplete when first submitted.

[21] Mr. Thulin's second affidavit offered more detail about the scoring system employed by PMV. The process involved an Application Review Committee [Committee] that included PMV's Director of Land (Operations), Mr. Greg Rogge. Scores were assigned by the Committee on the basis of the information submitted by applicants. Committee recommendations for conditional approvals were then submitted for final decision to either Mr. Rogge or to PMV's Vice-President, Mr. Peter Xotta. Mr. Thulin's description of why PMV adopted batch scoring bears repeating:

WHY WERE TLS APPLICATIONS CONSIDERED IN BATCHES?

37. I understand that the applicants in these proceedings assert that PMV should have considered all applications for New TLS Agreements at one time, rather than considering the applications in batches.

38. I was directly involved in the determination of the mandatory entry criteria, additional criteria and other matters referred to in the TLS Handbook, including the decision that applications for new TLS Agreements should be considered by PMV in batches. Discussions on this subject involved Mr. Rogge, Mr. Xotta and possibly other PMV representatives. PMV also consulted with the Governments of British Columbia and Canada on this issue prior to concluding that assessment in batches was the most appropriate process to follow.

39. PMV considered various possibilities in terms of the process for assessment of applications for New TLS Agreements. Specifically, PMV considered: (a) a process in which the applications would be considered and approved in phases; (b) a process in which the applications would be considered in batches; (c) a process in which all applications would be considered at one time; and (d) a process in which applications would be considered on a purely "first come-first served" basis.

40. PMV concluded that, of the various methods of assessment considered, review in batches was the only feasible option that was consistent with PMV's mandate to manage the Port in a safe, efficient, environmentally sustainable and cost-effective manner.

41. We recognized that PMV had to be in a position to begin granting conditional approvals for New TLS Agreements early during the review and assessment period. If PMV waited for all applications to be received, and deficiencies corrected before granting conditional approval to any trucking companies, this would have serious negative consequences.

42. Specifically, adopting such a process would have resulted in a lengthy period of uncertainty for all trucking companies (approximately 100 applicant companies) and all of their respective drivers, (approximately 2000) regarding who would have access after the January 31, 2015 expiry of the old licences. PMV was concerned that such prolonged and wide-spread uncertainty could cause unnecessary unrest and destabilize the local drayage sector.

43. PMV was also concerned that waiting for all applications before commencing processing and approval might result in a period of time in which there were either no, or not enough trucking companies to provide needed container drayage services. PMV recognized the importance of being able to begin reassuring both the successful trucking companies and their drivers who would have New TLS Agreements, and to be able to give that assurance within a reasonable period of time after the applications received from those companies were complete.

44. In addition to being very important in terms of avoiding uncertainty, we considered that early advice to successful applicants was important in terms of fairness to those who applied early in the process.

45. We also took into account the fact that any process which would involve consideration of all applications at one time would require a very short application period. As explained in affidavits previously filed by PMV in this proceeding, the timing of the issuance of the final Ready and Bell report, the appropriate period of consultation, and the time necessary for final selection of the criteria and preparation of the TLS Handbook, meant that the process of accepting applications for New TLS Agreements could not begin until December, 2014. It was necessary that the New TLS Agreements be in place by February 1, 2015. This is explained in more detail below.

46. If all applications were received and considered at once, a period of some weeks would be necessary for consideration of applications, and correction of any errors or provision of missing information. As noted above, cumulatively, the applications reflected over 160 trucking companies with almost 2,000 identified trucks and 2,000 specific drivers (whether employee drivers or sponsored owner-operators).

47. We were aware that it would take some period of time following the grant of conditional approval to have all of the matters necessary in connection with the New TLS Agreements complete. These matters included obtaining compliance bonds and/or letters of credit, making of various payments, and execution of statutory declarations.

48. For that reason, we recognized that, were PMV to consider all of the applications together, this would require an extremely short period during which applications could be received. This period could not be more than approximately one week. We concluded that was too short a period.

49. PMV considered processing applications in three phases. Under the "phased" approach the first phase would be restricted to large companies, the second phase would be restricted to medium sized companies, and the third phase would be open to small companies (assuming any tags remained available after phases 1 and 2). PMV considered this approach because company size was one of the factors PMV considered relevant in terms of improving the quality of the drayage sector. PMV concluded that, on the whole, larger companies are more stable and stronger than smaller companies.

50. We rejected this pure form of a "phased" approach as it appeared to give too much weight to company size. We recognized that, while company size was a relevant factor, it should not be considered to the exclusion of all other factors. Adopting the phased approach created a risk that only large companies would be in a position to succeed in obtaining New TLS Agreements.

51. PMV considered processing applications strictly on a "first come-first served" basis. PMV rejected this approach. Adopting a pure "first in time" approach did not reflect PMV's mandate to develop a strong and stable drayage sector. As explained elsewhere, TLS reform was intended to give additional consideration to companies better able to meet PMV's higher standards in terms of environmentally sound, safe and efficient operations. A first-come-first serve approach would not accomplish this, as it would give no scope for consideration of the additional criteria.

52. After considering these options, PMV concluded that batching of review and approvals was the preferable approach. This approach would allow for a hybrid of a full merit based approach and an approach which would give additional consideration to timely applications. Under the approach adopted, applicants would be graded on merit, but only against other trucking companies in their batch.

53. An additional consideration in favour of this approach was the effect that PMV expected granting of conditional approvals to have. PMV expected that ongoing conditional approval announcements, coupled with repeated urging by PMV that trucking companies needed to apply early as tractor tags were being granted and there were a finite number of tags available, would create impetus on trucking companies to apply in a timely manner.

> 54. PMV had been managing TLS, in its various forms, for nine years as of late 2014. From PMV's experience with TLS, PMV has observed that many trucking companies wait until the very last minute to commence required administrative work. TLS reform could not accommodate procrastination of that type, as had occurred in the past. This was an additional reason why PMV designed and communicated a selection process that would award timely submission of applications.

[22] Mr. Thulin's affidavit further disclosed that PMV expected a very large number of companies to meet the minimum requirements, meaning that, in the vast majority of cases, license approvals would be based on the evaluation of the additional criteria on a 10-point scale. Evaluating applications in batches ensured license approvals would be made on a rolling and timely basis. At the same time, PMV wanted to ensure a reasonable number of truck tags would remain available for later batches of applications Its approach to this allocation conflict involved the adoption of a variable scoring benchmark for approval.

[23] For the first two batches considered by PMV between December 23,2014 and January 9, 2015, the threshold for approval was set at 4 points. The number of applications conditionally approved with scores of 4 or higher in the two initial batches was 21 involving 691 truck tags. At this point almost half of the available tags had been issued and notification to successful applicants had been given.

[24] Between January 12 and 15, 2015 a third batch of applications was considered by the Committee. At that point the benchmark for approval was raised to 5 points and 25 applications were approved involving 619 truck tags. At this stage of the process, tags for 1310 trucks had been conditionally authorized leaving less than 200 for distribution.

[25] After January 15, 2015, three additional batches were considered. For those batches, the benchmark for approval was raised to 6 points. The total number of applications approved for those batches was 14 involving 130 truck tags.

[26] On January 23, 2015, a final application was approved for 24 additional truck tags. This application was approved with a score of 5 points. According to Mr. Thulin, this applicant had been excluded from consideration because of a mistake by PMV. On that basis the application was considered against the scoring benchmark that, but for the mistake, would have applied. Since that time an additional application has been received and approved on similar grounds.

[27] Mr. Thulin's affidavit does not clearly explain why PMV thought it advisable to apply a more onerous scoring benchmark to later batches of applications beyond the following paragraph:

> 63. The TLS Application Review Committee was not aware, at the outset of the review process, that a higher additional criteria score would necessarily be required later in the process. We did recognize that this was a possibility. The fact that a higher score was required later in the process is consistent with the hybrid approach adopted by PMV in connection with the new TLS Agreements, in which there would be consideration for merit of the trucking company, and consideration for early application.

[28] At the end of the process, 33 applications for TLS licenses involving requests for slightly more than 400 truck tags were denied by PMV. The Applicants constitute most of that group. The combined total of their requested truck tags appears to be slightly more than 250.

[29] In a third affidavit sworn by Mr. Thulin, additional details were provided explaining how applications were handled including their allocation to specific batches. He stated that the administrative burden associated with the receipt and review of large volumes of documents was considerable. However, in the case of the Applicants, the turn-around time was usually within 24 hours. In other words, those applications would be rapidly updated and incorporated within the next batch of pending applications. On some occasions, supplementary materials received on one day were included within batches considered for approval on the following day. At the same time, the difference of a point between one day and the next was, in some cases, fatal for an application (e.g. between the batch approved on January 15 at 5 points and the batch approved on January 16 at 6 points as per the affidavit of Heather Watson at paragraphs 16 and 17 and affidavit No. 3 of Dale Thulin at paragraph 13). In the case of Goodrich Transport Ltd. [Goodrich], additional insurance information was sent to PMV on January 16, 2015 – one day after an application batch was assessed against an approval benchmark of 5 points. Goodrich was then placed in the succeeding batch where the benchmark was 6 points. The Goodrich application was rejected with a score of 5 points.

[30] It is clear PMV did not advise any of the Applicants that it was employing a variable scoring benchmark to license applications based on the date of filing.

II. Analysis

[31] The Applicants raise two primary challenges to the decisions taken by the Respondent. They argue that the impugned decisions were made without lawful authority in the sense that PMV fettered its statutory discretion by adopting an inflexible evaluation model. They also

contend that the process of evaluating their applications was procedurally flawed. This argument is based on PMV's failure to notify them of its intended scoring model, most particularly, in relation to its use of an increasingly onerous scoring benchmark.

[32] I need not deal at length with the fettering issue because I have concluded that PMV's evaluation model was procedurally deficient and profoundly unfair. The legal standard for assessing the fairness issue is correctness.

[33] I am satisfied that PMV owed a duty of fairness to the Applicants at common law and by virtue of its explicit representations to them. That duty of fairness was breached when PMV applied an increasingly onerous approval benchmark to the Applicants' perfected applications without informing them of that approach. I do not believe that any fair-minded person examining the history of what took place behind PMV's closed doors would find this practice to be fair or acceptable.

A. *Was the Process Adopted by PMV Procedurally Fair?*

[34] There is no doubt a duty of fairness applies to the evaluation process undertaken by PMV and PMV does not contend otherwise. The duty to comply with the rules of natural justice extends to all administrative decision-makers acting under statutory mandates where the rights, privileges or interests of an individual are at stake: see *Moreau-Bérubé v New Brunswick*, [2002] 1 SCR 249, 2002 SCC 11 at para 75 and *Baker v Canada*, [1999] 2 SCR 817, [1999] SCJ No 39 at para 30. An entitlement to a fair process is triggered when an administrative decision is taken

that precludes a party's access to a certain commercial market: see *2300246 Ontario Ltd. v Ontario*, 2014 ONSC 6958, 123 OR (3d) 513 at para 92.

[35] PMV accepts that the duty of fairness applies but it says that the content of that duty falls at the lower end of the range of participatory possibilities. It describes the impugned decisions as largely contractual in nature where enhanced procedures are inapt. It relies on *Mavi v Canada*, 2011 SCC 30, [2011] 2 SCR 504, where the Supreme Court held that the content of procedural fairness will typically be minimal in the context of a largely contractual relationship. Nevertheless, in that case it was incumbent on the decision-maker to give notice of an intention to take action, to afford the affected party an opportunity to explain, to consider the relevant circumstances, and to give notice of the final decision. The Court expressly distinguished the decision-making context of a debt collection from one involving access to "a government benefits or licensing program" where greater participatory rights would typically be expected [para 41].

[36] In this case the applicable legislation did not impose procedural limitations over PMV's issuance of TLS licenses. PMV was thus afforded considerable leeway to design the process. However, the decisions here were of considerable economic importance to the Applicants and PMV promised them a "consistent, fair and transparent" process. Furthermore, the Applicants had no right to a reconsideration or appeal. In this context, the Applicants were entitled to a fair, impartial and open process and one that afforded them meaningful rights of participation: see *Baker*, above, at para 28.

[37] At the foundation of procedural fairness is the right to effective notice. The opportunity to participate is only truly available to those who know how a decision will be made. This point was made by Justice Mary Gleason in the following passage from *Fisher v Canada*, 2012 FC 720, 219 ACWS (3d) 590 at para 25:

> [25] In my view, in the circumstances of this case, the requirements of procedural fairness did require that the Committee disclose that it was considering downgrading the Professional Responsibility factor and did require that it afford the parties the opportunity to make submissions on the potential downgrade prior to rendering its decision. While it is certainly true that the content of the duty of fairness, in the context of classification grievances in the federal public service, falls "somewhere in the lower zone of the spectrum" (*Chong II* at para 12), in my view, even the minimal requirements of procedural fairness were not respected here. Mr. Fischer is not seeking the right to call *viva voce* evidence, cross-examine witnesses or other trappings of a full-blown adversarial hearing; rather, he is seeking the minimal right to be aware of and be afforded an opportunity to make arguments regarding the determinative issue in his grievance. As Justice Evans noted at para 10 in *Bulat*, which dealt both with a failure to disclose an unanticipated point being an issue and a failure to disclose evidence the classification grievance committee collected in respect of that point:
>
> > […] this case does not turn on the precise location on the procedural spectrum of the content of the duty that the Committee owed to the appellant. An elementary incident of the duty of fairness is that the individual adversely affected should have an adequate opportunity to address an issue that the Committee regarded as central to the disposition of the grievance, but which the grievor did not realise was in dispute and therefore could not have been reasonably expected to anticipate, and to address.

Also see *Wong v Canada*, 141 FTR 62, 76 ACWS (3d) 1157 at paras 26-27.

[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.

[39] The Handbook also indicated that the anticipated number of applications would likely exceed the number of available licenses and that applications would be considered weekly and issued in batches. Applicants were also forewarned that, by January 16, 2015, the process could be completed. Accordingly, if a later applicant lost out because the supply of truck tags had been exhausted, there would be no cause for complaint. Many of the Applicants, though, submitted their applications well within the projected completion date for the issuance of licenses and most of them would have been successful with an approval benchmark of 4.

[40] The Applicants were entitled to know that the actual risk of delay of a day or two could be the difference between success and failure. Here, fairness demanded the disclosure of the more onerous scoring system applied to later applications. This failure is particularly surprising given Mr. Thulin's acknowledgement that the possibility of this approach had been contemplated

by PMV apparently from the outset. If this was, indeed, contemplated, one is left to wonder why this obviously deficient model was chosen over one that was fair to everyone.

[41] I agree with Mr. Badh that PMV's decision to raise the benchmark was likely done on an *ad hoc* basis with little, if any, regard to fairness. PMV effectively trapped itself by initially adopting a low benchmark. Once it began to issue conditional licenses, PMV was left with only two options: it could continue to issue licenses to applicants who obtained a score of 4 or higher at the cost of too many licenses or it could raise the benchmark for subsequent batches to get to the desired number but at the cost of even-handedness. As a general rule, the desire for administrative convenience gives way to the requirement for fairness: see *Singh v Canada*, [1985] 1 SCR 177, [1985] SCJ No 11 at para 70.

[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 licenses 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.

B. *Did PMV Fetter Its Discretion?*

[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 licenses. 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.

[44] In *Carpenter Fishing Corp. v Canada*, [1997] FCJ No 1811, [1998] 2 FC 548 (FCA), the Court considered a Ministerial authority to create a quota policy and to develop and apply guidelines for issuing commercial fishing licenses. The Court's discussion concerning the permissible grounds of judicial review in this area bears repeating:

> 28 The imposition of a quota policy (as opposed to the granting of a specific licence) is a discretionary decision in the nature of policy or legislative action. Policy guidelines outlining the general requirements for the granting of licences are not regulations; nor do they have the force of law. It flows from the decision of the Supreme Court of Canada in Maple Lodge Farms v. Government of Canada and from the decision of this Court in Canadian Assn. of Regulated Importers v. Canada (Attorney General), that the Minister, provided he does not fetter his discretion to grant a licence by treating the guidelines as binding upon him, may validly and properly indicate the kind of considerations by which he will be guided as a general rule when allocating quotas. These discretionary policy guidelines are not subject to judicial review, save according to the three exceptions set out in Maple Lodge Farms: bad faith, non-conformity with the principles of natural justice where their application is required by statute and reliance placed upon considerations that are irrelevant or extraneous to the statutory purpose.
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> 29 Once the Minister, through his Department, has defined policy guidelines, what is requested from him when granting a

licence is to direct his attention to the applicant and to satisfy himself that the general guidelines may be fairly applied to that applicant. To the extent that the policy is developed by the Minister in the exercise of his general duties under the Fisheries Act4 and that it is not blindly applied by him in the later exercise of his discretion when granting a specific licence, the act of granting the licence, however administrative in nature and otherwise subject to ordinary judicial review as it may be, cannot be challenged under the general rules applicable to administrative actions in so far as its policy component, i.e. the implementation of the quota policy by the Minister is concerned. When examining an attack on an administrative action -- the granting of the licence -- a component of which is a legislative action -- the establishment of a quota policy -- reviewing courts should be careful not to apply to the legislative component the standard of review applicable to administrative functions. The line may be a fine one to draw but whenever an indirect attack on a quota policy is made through a direct attack on the granting of a licence, courts should isolate the former and apply to it the standards applicable to the review of legislative action as defined in Maple Lodge Farms.

[…]

37 It follows that when examining the exercise by the Minister of his powers, duties, functions and discretion in relation to the establishment and implementation of a fishing quota policy, courts should recognize, and give effect to, the avowed intent of Parliament and of the Governor in Council to confer to the Minister the widest possible freedom to manoeuvre. It is only when actions of the Ministry otherwise authorized by the Fisheries Act are clearly beyond the broad purposes permitted under the Act that courts should intervene.

38 Assuming for the sake of the discussion that the purpose of the Department's officers can be imputed to the Minister -- there is no evidence as to why the Minister endorsed the policy suggested by his officers --, and that one can isolate a segment of a formula in looking for the purpose of the whole formula, the Trial Judge's finding does not withstand scrutiny.

39 Quotas invariably and inescapably carry with them some element of arbitrariness and unfairness. Some fishermen may win, others may lose, some may win or lose more than others, most if not all will find themselves with less catches than before. It is at best in that sense, and not in the legal sense, that one can speak, in cases such as the present one, in terms of discrimination. If this were found to be discrimination, then it would be discrimination

> authorized by statute. The need for objective standards in regulating an industry that was until then self-governed requires tough decisions to be made that will hurt some less than others. Seldom, if ever, is the imposition of quotas a win-win situation.
>
> 40 Considering the wide ambit of the permissible purposes under the Fisheries Act, considering the factors retained by the Minister in the present case, considering that the Department was searching for a consensus in order to experiment a totally new approach in licensing the halibut fishery, and keeping in mind the observations and recommendations made by Commissioner Pearce in his Report, can it reasonably be said that a compromise which attracted the support of the halibut industry, which was centred on the personal fishing experience of the licence holders, which allowed for new entrants to participate in the quotas on the basis of the personal fishing experience of their immediate predecessor and which preserved the right of dissatisfied licence holders to challenge the quotas attributed to them under the chosen formula, is based on considerations irrelevant or extraneous to the statutory purpose of the Fisheries Act? Of course not.
>
> 41 Perhaps the formula adopted is not the best one, or the wisest one, or the most logical one, but the Minister is not bound to pick the best, the wisest or the most logical one and it is certainly not the function of the courts to question his judgment as to whether a quota policy is good or bad. Perhaps the factors considered by the Minister are not of equal relevance, but as Linden J.A. observed in Canadian Assn. of Regulated Importers10:
>
> > It is not fatal to a policy decision that some irrelevant factors be taken into account; it is only when such a decision is based entirely or predominantly on irrelevant factors that it is impeachable [...]
>
> [Footnotes omitted]

[45] In *Baker*, above, the Court also discussed in broad terms the need for judicial deference in evaluating the exercise of discretion by administrative decision-makers. Where Parliament has left it to the decision-maker to make choices among an array of polycentric considerations, judicial deference is clearly owed. On my reading, *Baker*, above, stands for the proposition that

so-called fettering of administrative discretion is not a standalone ground of judicial review but, rather, a concern properly addressed in a context of reasonableness review. This, I think, is evident from the following passage in the decision:

> 53 Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations: see, for example, *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2, at pp. 7-8; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231. A general doctrine of "unreasonableness" has also sometimes been applied to discretionary decisions: *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 223 (C.A.). In my opinion, these doctrines incorporate two central ideas -- that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction. These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038).
>
> 54 It is, however, inaccurate to speak of a rigid dichotomy of "discretionary" or "non-discretionary" decisions. Most administrative decisions involve the exercise of implicit discretion in relation to many aspects of decision making. To give just one example, decision-makers may have considerable discretion as to the remedies they order. In addition, there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify,

fill in legislative gaps, and make choices among various options. As stated by Brown and Evans, *supra*, at p. 14-47:

> The degree of discretion in a grant of power can range from one where the decision-maker is constrained only by the purposes and objects of the legislation, to one where it is so specific that there is almost no discretion involved. In between, of course, there may be any number of limitations placed on the decision-maker's freedom of choice, sometimes referred to as "structured" discretion.

55 The "pragmatic and functional" approach recognizes that standards of review for errors of law are appropriately seen as a spectrum, with certain decisions being entitled to more deference, and others entitled to less: *Pezim*, *supra*, at pp. 589-90; *Southam*, *supra*, at para. 30; *Pushpanathan*, *supra*, at para. 27. Three standards of review have been defined: patent unreasonableness, reasonableness *simpliciter*, and correctness: *Southam*, at paras. 54-56. In my opinion the standard of review of the substantive aspects of discretionary decisions is best approached within this framework, especially given the difficulty in making rigid classifications between discretionary and non-discretionary decisions. The pragmatic and functional approach takes into account considerations such as the expertise of the tribunal, the nature of the decision being made, and the language of the provision and the surrounding legislation. It includes factors such as whether a decision is "polycentric" and the intention revealed by the statutory language. The amount of choice left by Parliament to the administrative decision-maker and the nature of the decision being made are also important considerations in the analysis. The spectrum of standards of review can incorporate the principle that, in certain cases, the legislature has demonstrated its intention to leave greater choices to decision-makers than in others, but that a court must intervene where such a decision is outside the scope of the power accorded by Parliament. Finally, I would note that this Court has already applied this framework to statutory provisions that confer significant choices on administrative bodies, for example, in reviewing the exercise of the remedial powers conferred by the statute at issue in *Southam*, *supra*.

56 Incorporating judicial review of decisions that involve considerable discretion into the pragmatic and functional analysis for errors of law should not be seen as reducing the level of deference given to decisions of a highly discretionary nature. In fact, deferential standards of review may give substantial leeway to the discretionary decision-maker in determining the "proper

> purposes" or "relevant considerations" involved in making a given determination. The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options. However, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

[46] The same point was more recently made by Justice David Stratas in *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2013] FCJ No 1155 at para 74:

> [74] At one time, the taking into account of irrelevant considerations and the failure to take into account relevant considerations were nominate grounds of review – if they happened, an abuse of discretion automatically was present. However, over time, calls arose for decision-makers to be given some leeway to determine whether or not a consideration is relevant: see, *e.g.*, *Baker*, *supra* at paragraph 55; *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at paragraph 24. Today, the evolution is complete: courts must defer to decision-makers' interpretations of statutes they commonly use, including a decision-maker's assessment of what is relevant or irrelevant under those statutes: *Dunsmuir*, *supra* at paragraph 54; *Alberta Teachers' Association*, *supra* at paragraph 34. Accordingly, the current view is that these are not nominate categories of review, but rather matters falling for consideration under *Dunsmuir* reasonableness review: see *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at paragraphs 53-54.

Also see *Stemijon Investment Ltd. v Canada*, 2011 FCA 299, [2011] FCJ No 1503 at paras 20-25.

[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.

C. *Claim to Relief*

[49] PMV argues that even in the face of a breach of procedural fairness, the relief requested by the Applicants ought not to be granted. This approach is said to be consistent with the

decision in *Mining Watch Canada v Canada*, 2010 SCC 2, [2010] SCJ No 2, where the discretion to deny prerogative relief was justified on balance of convenience grounds.

[50] In my view, the outcome in *Mining Watch* is not something to be routinely applied in breach of fairness cases. In that case the applicant did not participate in the impugned environmental assessment and only got involved at the stage of judicial review. It had no direct interest in the outcome of the case and brought the challenge as a test case of the federal government's statutory obligations. Because the applicant's interests as a public interest litigant were met by the Court's declaratory ruling, it was considered to be disproportionate to require the environmental assessment to be done over. The Court noted, however, that the discretion to deny procedural relief has the potential to make inroads upon the rule of law and, for that reason, had to be exercised with the greatest of care [see para 52].

[51] This case is very different. These Applicants have a substantial pecuniary interest in the outcome of PMV's licensing decisions and were directly harmed by that process. Even if I was obliged to consider the balance of convenience between the parties, substantive relief favouring the Applicants is readily justified. At most PMV will be required to reopen the licensing process and it will lose some of the fleet-size advantage it had hoped to obtain – at least until the expiry of existing licenses in slightly more than a year. At that point the process can be redone fairly with a further reduction in licenses if appropriate. I specifically reject Mr. Xotta's opinion that this temporary retrenchment of positions will create a "strong likelihood" of serious labour problems, "chaos" and "disorder" at PMV or a serious destabilization of the drayage sector. If anything, the denial of relief to deserving parties is more likely to create such a risk.

[52] Furthermore, the successful applicants will most likely be mindful of the consequences of unlawful labour action bearing in mind that a later assessment of their conduct and that of their drivers can be carried out when licenses are again up for renewal next year. It is also worth remembering that the Applicants will still be required to comply with all of the new conditions of TLS licensing, many of which were created to mitigate or eliminate the causes of previous labour disruptions at PMV. Those conditions can still be enforced and any violations could result in the cancellation of licenses. In short, I have no doubt that any potential problems associated with the issuance of licenses to a number of these Applicants can be managed by PMV without any ensuing chaos.

[53] The only practical means of overcoming the breach of fairness in this situation without unduly interfering with the interests of third parties, is to order PMV to reconsider the Applicants' applications on the basis of the least onerous approval benchmark applied to any of the successful applications. Some of the Applicants may not obtain licenses under this process but they are no worse off in the result: their applications would have failed in any event.

[54] The decisions made by PMV denying licenses to the Applicants are, accordingly, set aside. They are to be reconsidered on the merits and in accordance with the most favourable approval benchmark applied to any of the successful licensing applications. Licenses are ordered to be issued to any qualified Applicant whose application meets that benchmark for approval.

[55] Costs are payable to the Applicants in each of these proceedings to be assessed in separate Bills of Costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

[1] The decisions made by the Respondent, VANCOUVER FRASER PORT AUTHORITY (OPERATING AS PORT METRO VANCOUVER), denying TLS licenses to the Applicants are hereby set aside. Those license applications are to be reassessed on their merits and in accordance with the following directions:

A. The Respondent is directed to reassess the Applicants' applications for TLS licenses in accordance with the most favourable benchmark applied to any of the successful licensing applications and to issue licenses to any qualified Applicant whose application meets that benchmark for approval.

[2] The Applicants will have their costs in each proceeding assessed in two separate Bills of Costs.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-192-15
STYLE OF CAUSE:	GOODRICH TRANSPORT LTD. AND ROYAL TEAM CANADA TRANSPORT LTD. v VANCOUVER FRASER PORT AUTHORITY (OPERATING AS PORT METRO VANCOUVER)
DOCKET:	T-196-15
STYLE OF CAUSE:	ATL TRUCKING LTD., A-CAN TRANSPORT LTD., AMK CARRIER INC., COAST PACIFIC CARRIER INC., FORWARD TRANSPORT LTD., GPX EXPRESS INC., GREENLIGHT COURIER LTD., GRL FREIGHTWAYS INC., H RATTAN TRUCKING LTD., HUTCHISON CARGO TERMINAL INC., INTER CANADIAN TRUCKING LTD., JEEVAN CHOHAN TRANSPORT LTD., K D TRUCKLINE LTD., NILAM TRUCKING LTD., ORCA CANADIAN TRANSPORT LTD., PRO LINE TRUCKING CORP., RAJA ROAD RAIL SERVICES LTD., ROADSTAR TRANSPORT COMPANY LTD., SAHIR TRUCKING LTD., SAFEWAY TRUCKING LTD., SALH TRUCKING 2001 LTD., SIDHU SERVICES LTD., SUPER SONIC TRANSPORT LTD., SUPER STAR TRUCKING LTD., TRASBC FREIGHT LTD., TRANSBC FREIGHTWAYS (2007) LTD., VILLAGER TRANSPORT LTD. v VANCOUVER FRASER PORT AUTHORITY
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