Federal Court Cour fédérale

Date: 20170127

Docket: T-1650-15

Citation: 2017 FC 110

Ottawa, Ontario, January 27, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

**UNIFOR and UNIFOR,
LOCAL UNION No. VCTA**

Applicants

and

VANCOUVER FRASER PORT AUTHORITY

Respondent

JUDGMENT AND REASONS

[1] The Applicants seek judicial review of a decision made by the Vancouver Fraser Port Authority to adopt requirements concerning the age of container trucks licenced to operate in the Port of Vancouver.

I. Background

[2] The Applicants, Unifor, and its local union, Unifor Local Union No. VCTA, represent truck drivers engaged in the transportation of shipping containers to and from the Port of Vancouver [the Port]. A number of union and non-union organizations represent container truck drivers working at the Port; Unifor Local Union No. VCTA is the union with the largest number of legally certified members operating container trucks at the Port.

[3] The Respondent, the Vancouver Fraser Port Authority, which operates as Port Metro Vancouver [PMV], is responsible for the management and control of the lands that form the Port. It is established pursuant to and governed by the *Canada Marine Act*, SC 1998, c 10 [the *CMA*], and operates under letters patent issued under section 8 of the *CMA*. Subsections 28(2) and 28(4) contain limits on PMV's authority:

28 (2) The power of a port authority to operate a port is limited to the power to engage in	**28 (2)** L'autorisation donnée à une administration portuaire d'exploiter un port est restreinte aux activités suivantes :
(a) port activities related to shipping, navigation, transportation of passengers and goods, handling of goods and storage of goods, to the extent that those activities are specified in the letters patent; and	**a)** les activités portuaires liées à la navigation, au transport des passagers et des marchandises, et à la manutention et l'entreposage des marchandises, dans la mesure prévue par les lettres patentes;
(b) other activities that are deemed in the letters patent to be necessary to support port operations.	**b)** les autres activités qui sont désignées dans les lettres patentes comme étant nécessaires aux opérations portuaires.

…	…
(4) A port authority shall not carry on any activity or exercise any power that it is restricted by its letters patent from carrying on or exercising, nor shall it carry on any activity or exercise any power in a manner contrary to its letters patent or this Act.	**(4)** L’administration portuaire n’exerce que les pouvoirs et activités prévus par ses lettres patentes; elle ne peut les exercer d’une façon incompatible avec ces dernières ou avec la présente loi.

[4] The Port is the largest in Canada, with four major container terminals, and handles approximately 2.8 million container units annually. Approximately half of these containers arrive or depart by truck. The process of transporting containers to and from container terminals by truck is known as “drayage” in the shipping industry. PMV regulates the drayage sector in the Port through a truck licencing system [TLS]. The TLS requires trucks to meet certain conditions in order to enter the Port’s lands.

[5] As noted by my colleague Justice Barnes in *Goodrich Transport Ltd v Vancouver Fraser Port Authority*, 2015 FC 520 at para 4, 479 FTR 130 [*Goodrich Transport*], the Port has been “plagued by labour issues connected to the drayage sector.” Significant work stoppages occurred at the Port in 1999, 2005, and, most recently, in 2014. The work stoppages shared similar root causes such as low rates of compensation for truck drivers and problematic operating practices. The volatile work environment during the 2014 work stoppage prompted the federal Minister of Transport to order an independent review of the underlying causes of driver dissatisfaction; on March 6, 2014, Vince Ready was appointed to review these causes and propose recommendations to the British Columbia and federal governments.

[6] On March 26, 2014, the federal government, the British Columbia government, PMV, the United Truckers Association, and Unifor agreed to a Joint Action Plan [the Plan] which ended the 28-day work stoppage. One item of the Plan required PMV to commence consultations with stakeholders on restructuring the TLS in order to increase stability in the drayage sector. In order to achieve this stability, the Plan proposed, among other things, steps to control the number of licenced container trucks in order to avoid the surplus of trucks which had contributed to a pervasive practice of rate undercutting.

[7] Following the 2014 work stoppage, PMV engaged in a two-phase consultation process. In April 2014, during the first phase of consultation, PMV hosted twelve meetings where dozens of individuals, representing a broad range of drayage industry stakeholders, including representatives of Unifor, the Teamsters, and the United Trucking Association, attended and provided input.

[8] Mr. Ready, along with Corinn Bell, also consulted with various stakeholders following the 2014 work stoppage. Their report [the Ready Report] strongly recommended that the TLS be revised through meaningful consultations among PMV and all stakeholders. The rationale and need for TLS reform were described in the Ready Report as follows:

> 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.

[9] Following the Ready Report, PMV commenced the second phase of the consultation process in November 2014. PMV's stakeholder meetings were attended by over 150 individuals and PMV received over 700 feedback forms, including 343 forms from Unifor affiliated drivers. During the second phase, PMV distributed a discussion guide which outlined its intention to implement a rolling 10 year truck age policy [the Policy].

[10] PMV had been contemplating a truck age policy before the 2014 work stoppage. Throughout 2012, PMV was involved in internal discussions with industry stakeholders regarding a truck age policy. For example, in May 2012, PMV held meetings with various stakeholders concerning reforms to the TLS, including an age limit on trucks. An internal working group at PMV recommended proposing a truck age policy of seven years with a three year transitional period. In May 2013, PMV released a TLS Communiqué regarding a proposed seven year truck age policy for outreach to industry stakeholders. PMV also retained the accounting firm KPMG to prepare a report on how to maintain an efficient and sustainable drayage sector. In its March 2014 report, KPMG compared the proposed seven year truck age policy with a 10 year age policy; the report concluded that while a seven and a 10 year truck age policy had comparable operating benefits, the net sector-wide cost for a seven year truck age policy was $15.1 million versus $4.9 million for a 10 year truck age policy. Ultimately, PMV determined that a rolling 10 year truck age policy would be implemented.

[11] In December 2014, after completion of the consultation process, PMV released the Local Drayage TLS Handbook [the Handbook] which outlined the reformed TLS. The Handbook took into account the input received during the consultation process, the input of the federal and British Columbia governments, the Plan, and the Ready Report. The Handbook listed the mandatory criteria for a container truck to access the Port's facilities. With respect to truck age, the Handbook stated:

> The new TLS has a minimum age of 2007 or newer for any new fleet additions or replacements. Older trucks that are approved for use within the existing TLS may be accepted during the transition period. If you have a truck that is 2005 or older, you must provide evidence that it has been retrofitted with a diesel oxidation catalyst (DOC) prior to the application date, as per existing environmental requirements. Note that by 2019, all trucks must be 10 years of age or newer for annual approval.

[12] The Handbook also outlined the transition plan for existing container trucks operating at the Port. In 2015, all trucks with a model year of 2005 or older required a diesel oxidation catalyst [DOC]. In 2016, all trucks with a model year of 2006 or older required a DOC. In 2017 and 2018, all trucks with a model year of 2005 or 2006 would require a diesel particulate filter [DPF], while trucks with a model year of 2004 or older would not be allowed access to the Port. From 2019 onwards, no trucks older than 10 years old would be permitted, regardless of whether the truck had been retrofitted with a DOC or a DPF. According to the affidavit testimony of Greg Rogge, PMV's Director of Land Operations, delaying implementation of the Policy until 2019 was to provide the drayage sector with adequate notice of the changes. As matters now stand, the Policy, once fully implemented, will replace the TLS Truck Renewal Environmental Requirements which were implemented in 2008.

[13] During January 2015, PMV consulted with various drayage stakeholders, including Unifor and the United Truckers Association, to discuss the Policy. These consultations resulted in a TLS Notice dated January 30, 2015, which deferred full implementation of the Policy from 2019 to 2022. This notice stated in relevant part:

> During consultation last fall, Port Metro Vancouver introduced a proposal to establish a 10 year truck model age policy. This policy was to be phased in over the period from 2015 to 2019 and by 2019 all trucks in TLS would have had to be no older than 10 years old.
>
> In consultation with industry representatives, Port Metro Vancouver has reconsidered the truck model age policy transition plan. Port Metro Vancouver has agreed to extend the transition period for this policy. The 10 year truck model age requirement will now be phased in over seven years. This means that by 2022 all trucks in TLS will have to be no older than 10 years old.

[14] This notice also modified the initial transition plan included in the Handbook. Under the revised transition plan, in 2015 and 2016, all trucks with a model year of 2006 or older would require a DOC. From 2017 to 2021, all trucks with a model year of 2005 or 2006 would require a DPF, while trucks with a model year of 2004 or older would be excluded from the TLS. From 2022 onwards, no trucks older than 10 years would be permitted, regardless of whether they had been retrofitted with a DOC or a DPF.

[15] On February 1, 2015, authority for the issuance of licences under the TLS passed from PMV to the British Columbia Container Trucking Commissioner, a provincial official appointed under section 2 of the *Container Trucking Act*, SBC 2014, c 28, whose office was established in the wake of the 2014 work stoppage. PMV, however, retained authority to grant access to Port lands through access agreements with truck owners. The current form of access agreement only

permits “Approved Vehicles” to enter the Port’s lands and PMV retains the authority to define and determine what constitutes an approved vehicle. The TLS now requires both a BC Container Trucking Services Licence from the Office of the British Columbia Container Trucking Commissioner and an access agreement from PMV.

[16] On September 29, 2015, the Applicants filed this application for judicial review and, after reviewing the application, PMV believed there might be some confusion about the Policy. Consequently, on October 8, 2015, PMV issued a Notice to TLS Access Agreement holders, which clarified the Policy’s transitional period and 10 year truck age policy. The notice removed the maximum truck age requirement during the transitional period for trucks currently registered in the TLS, provided that either a DOC or DPF was installed. Specifically, in 2015 and 2016, trucks registered in the TLS with a model age of 10 years or older would be permitted if they were equipped with a DOC, while in the years 2017 to 2021, trucks registered in the TLS with a model year of 2006 or older would be permitted if they have a DPF. For replacement or returning trucks, the truck had to be a model year of 2007 or newer in the year 2015, and a model year of 2010 or newer in the years 2016 to 2021.

[17] The notice of October 8, 2015, also explained the Policy for the years 2022 onward, stating in relevant part:

> **10-year maximum truck age implementation**
>
> In addition to the existing environmental standards and the Northwest Ports Clean Air Strategy, Port Metro Vancouver introduced a 10-year maximum truck age requirement in January 2015 that will be in full effect on January 1, 2022. This means all trucks in the Truck Licencing System should not be any older than 10 years beginning in 2022.

> In unique circumstances and provided all associated costs are borne by the applicant, Port Metro Vancouver will consider applications for exemptions to the 10-year maximum truck age policy, on a case-by-case basis, provided those applications seek an exception for a truck that meets or exceeds all factors contributing to the policy. More details will be available nearer to the effective date for the policy.
>
> The new requirement supports the port authority's focus on a safe, professional, reliable and stable drayage sector and economically, environmentally and socially responsible operations.

[18] Following the notice of October 8, 2015, the Applicants amended their application to allege that their "central concern remains equipment type and age rather than emissions objectives" and that "a large financial burden" was being placed on those with trucks older than model year 2007 because, as of January 1, 2017, the trucks would require a DOC or DPF.

[19] On February 16, 2016, PMV issued an additional TLS Notice which provided updates to the Policy. This notice stated that implementation of environmental requirements for trucks with an engine older than 2007 would be postponed pending determination of this application for judicial review. It also included a list of frequently asked questions and answers, one of which provided further information as to the question of exemptions from the Policy:

> Will you allow for exemptions for truck age when the Rolling 10-Year Truck Age Policy takes effect?
>
> Port Metro Vancouver can confirm that there will be an exemption process that, if approved, will allow owners of trucks older than 10 years to continue servicing the port. There will be a need to prove to Port Metro Vancouver's satisfaction that the truck is comparable or better than a well-maintained, 10-year old truck of reasonable quality, having regard to: financial investment, including, but not limited to, the fair market value of the truck, environmental impact, including, without limitation, emission rates, safety, reliability and aesthetics. At this time, details of how and when to apply for an exemption have not been finalized. Upon finalization,

> further information will be provided. It is anticipated that exemptions will not be issued frequently or commonly.

II. PMV's Rationale for the Policy

[20] Mr. Rogge's uncontradicted affidavit testimony offers background information about PMV's rationale for adopting the Policy. Currently, there are over 1,700 container trucks licensed under the TLS. The majority of these trucks have been purchased as used trucks after being retired from long haul service. These trucks typically have high mileage and are no longer suitable for long haul transport. As of December 8, 2014, the average age of trucks within the TLS was 10.4 years old. In 2008, PMV adopted the TLS Truck Renewal Environmental Requirements which require container trucks operating within the Port to meet certain environmental standards. These Requirements will be superseded once the Policy is fully implemented.

[21] PMV considers a container truck's age important because of its "relation to safety, environmental standards, aesthetics, reflection of investment, and reliability of trucks." Since 2007, there have been significant advances in truck design and technologies to reduce the environmental impact associated with the drayage industry, and PMV anticipates that technological advances will continually improve to address growing environmental concerns. According to Mr. Rogge, the Policy will ensure that container trucks operating within the Port are equipped with the most recent technologies and comply with PMV's environmental objectives. Mr. Rogge says PMV believes that the Policy is beneficial to the drayage sector as it ensures efficiency, reliability, and avoids rate undercutting caused by the surplus of cheaper, older trucks.

[22] In an internal PMV briefing note dated January 21, 2015, Mr. Rogge explained why PMV considers a truck's age to be an important matter, noting that:

> - More than 43% of the existing TLS FSO [full service operator] fleet is greater than 10 years of age and operating well beyond their optimal replacement age; 18% of the fleet exceeds 15 years of age.
>
> - PMV anticipates appropriate ongoing re-investment in equipment (trucks) is necessary to ensure an efficient, reliable drayage service for the gateway and critical to help protect against erosion of drayage sector rates.
>
> - Currently a significant percentage of trucks (operating in the drayage sector) transition from long-haul highway operations with high mileage, and at or beyond their optimal replacement age.
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> - Lengthy operating lifecycles result in the accumulation of excessive mileage and wear and tear which results in these trucks becoming increasingly prone to the potential for breakdown and unscheduled maintenance, while also incurring increased down time as a result of a greater dependency on routine maintenance.
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> - After fuel and depreciation, maintenance is the third largest expense. Maintenance directly affects reliability, which can conceal significant "hidden" or "soft" costs such as down time, lost revenue, lost business, diminished productivity, unanticipated or unscheduled major repairs, break-downs and towing.
>
> - The amended 10 year rolling truck age proposal, introduced after consultation in November 2014, has permitted 361 truck owners to apply to continue to operate their trucks within the newly reformed TLS environment for an additional two-years, before having to make investment decisions.
>
> - Prior to December 31, 2016, Independent Operators (351) and FSO fleet owners of company trucks (333) will be required to make strategic decisions regarding whether to invest in DPF units or recapitalize newer trucks due to prevailing environmental standards.

[23] In addition to Mr. Rogge’s affidavit testimony, the Respondent filed an affidavit of Christine Rigby, an Environmental Specialist - Air Emissions, who is responsible for PMV’s initiatives related to air quality and climate change. She states that PMV has established various environmental programs over the years and, in 2008, PMV adopted the TLS Truck Renewal Environmental Requirements which aim to make all drayage trucks at the Port meet or surpass federal emission standards for particulate matter for 2007 engine model trucks. According to Ms. Rigby, the Policy is preferable to the practice of setting environmental requirements periodically, something which is difficult to implement as it requires significant technical knowledge, program management, and is vulnerable to abuse in the absence of significant enforcement. Ms. Rigby further states that the Policy will provide certainty to the drayage sector as truckers will know when their trucks need replacement; this level of certainty is not achieved where the container trucking community does not know when or how existing environmental requirements will be changed. In addition to the environmental requirements for drayage trucks, PMV has also implemented environmental programs and policies for vessels and non-road diesel vehicles such as cranes, forklifts and front-end loaders. Although PMV does not impose strict age requirements on vessels utilizing the Port, it does impose higher fees on those vessels which do not meet minimum international emission standards. Similarly, PMV imposes fees on those non-road diesel vehicles having older, higher emitting equipment based on engine tier.

III. The Decision under Review

[24] The specific or precise decision under review is somewhat of a moving target. The Policy has not yet been fully implemented or, for that matter finalized, to the extent that the exemption process remains open to further details. The Policy is outlined and contained in the Handbook

and in the PMV notices dated January 30, 2015, October 8, 2015, and February 16, 2016. The PMV notice dated January 30, 2015, outlines the Policy from now until 2021. The notice dated October 8, 2015, clarifies the Policy from now until 2021, while also outlining the Policy for 2022 onwards. Finally, the notice dated February 16, 2016, provides further explanation of the Policy for 2022 onwards. These latter two notices state that more details about "applications for exemptions to the 10-year maximum truck age policy… will be available nearer to the effective date for the policy" and that "details of how and when to apply for an exemption have not been finalized."

[25] By virtue of Rule 302 of the *Federal Courts Rules*, SOR/98-106, unless the Court orders otherwise, an application for judicial review normally may be made in respect of only one decision (see: *Canada (Prime Minister) v Khadr*, 2009 FCA 246 at para 36, [2010] 1 FCR 73, rev'd on other grounds 2010 SCC 3, [2010] 1 SCR 44). In response to questions at the hearing of this matter, counsel for PMV pointed to the PMV notice of October 8, 2015 as being the decision for review in this case. In my view, the Policy as stated in this notice is the relevant decision for review, and not the decision to extend the implementation date of the Policy to 2022, nor the pronouncement as stated in the Handbook that "all trucks must be 10 years of age or newer for annual approval." Despite certain modifications or amendments to the Policy since release of the Handbook, the decision for review is PMV's decision to adopt a rolling 10 year truck age requirement which may be subject to exemptions in certain, as yet undefined, cases.

IV. Issues

[26] This application for judicial review raises the following issues:

1. Do the Applicants lack standing to apply for judicial review of the Policy?
2. Is the application for judicial review of the Policy premature?
3. What is the appropriate standard of review?
4. Is the Policy reasonable?

V. Analysis

A. *Do the Applicants lack standing to apply for judicial review of the Policy?*

[27] Although the Applicants did not address this issue in their written submissions, they did so at the hearing of this matter where, essentially, they argued that they have a "direct interest" in the Policy and, in any event, they should be afforded public interest standing since they raise a serious issue which affects their members. The Applicants say they have the requisite standing to challenge the Policy because of the unique nature of collective bargaining for unionized container truck drivers at the Port and because they were instrumental in effecting the Plan, to which they are a party, and are thus directly interested in the reforms flowing from the Plan and the Ready Report. In the Applicants' view, they are not an "outside meddler" or a "busybody" and it would not be practical for an individual driver to challenge the Policy because of the costs involved and a driver would have less knowledge than the Applicants about the TLS reform process.

[28] The Respondent argues that the Applicants lack standing since they are not "anyone directly affected by the matter in respect of which relief is sought" as required by subsection 18.1(1) of the *Federal Courts Act*, RSC, 1985, c F-7 [*FCA*]. The Respondent points to

the decision in *Forest Ethics Advocacy Assn v Canada (National Energy Board)*, 2014 FCA 245 at para 30, [2015] 4 FCR 75 [*Forest Ethics Advocacy*], where the Federal Court of Appeal held that a party is not "directly affected" if the decision does "not affect its legal rights, impose legal obligations upon it, or prejudicially affect it in any way." The Respondent says there is no evidence that the Policy will affect the Applicants' legal rights, impose legal obligations upon them, or prejudicially affect them in any way. According to the Respondent, the Applicants' connection with the Policy is tenuous and indirect. The Respondent notes that the Applicants did not submit any evidence from any individual truck driver affected by the Policy and also failed to provide evidence as to whether their members own or lease trucks, the status and age of such trucks, and whether any of these trucks have been denied access to the Port as a result of the Policy.

[29] A party has standing on an application for judicial review only if they can establish that they are: "anyone directly affected by the matter in respect of which relief is sought" under subsection 18.1(1) of the *FCA*. Although this Court has previously found that the words "directly affected" should not be given a restricted meaning (see e.g.: *Fond du Lac Denesuline First Nation v Canada (Attorney General)*, 2010 FC 948 at para 172, 377 FTR 50 [*Fond du Lac Denesuline*]; *Alberta v Canadian Wheat Board*, [1997] FCJ No 1484 at para 26, 138 FTR 186 [*Alberta*]; *Friends of the Island Inc v Canada (Minister of Public Works)*, [1993] FCJ No 233, [1993] 2 FC 229, rev'd on other grounds [1995] FCJ No 948, 97 FTR 160), an applicant must still adduce evidence sufficient to establish a direct affect; evidence which merely shows an applicant's interest in a matter will not be sufficient to ground a claim for standing (see: *Alberta* at para 31).

[30] In *Public Service Alliance of Canada v Canada (Treasury Board)*, 2001 FCT 568 at para 47, 205 FTR 270, this Court determined that an employee organization under the now repealed *Public Service Staff Relations Act*, RSC, 1985, c P-35 [*PSSRA*], did not have standing to represent its members in the context of an application for judicial review because it was "not directly affected by the respondents' decision to place 'operational employees' on 'off-duty status' " and the decision fell within matters covered by the grievance procedure under the *PSSRA* and the collective agreements. Similarly, in *Construction and Specialized Workers' Union, Local 1611 v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1353, [2012] FCJ No 1459 [*Construction and Specialized Workers' Union*], this Court found that there was insufficient evidence of "direct affect" under section 18.1 of the *FCA* upon which to grant the two union applicants standing to challenge a decision allowing a company to hire approximately 200 temporary foreign workers; the Court did, however, after reviewing the requirements for public interest standing established in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 [*Downtown Eastside*], grant the applicants public interest standing to challenge the decision because, ultimately, no other realistic means existed to engage judicial accountability with respect to the decision.

[31] In *United Steel Workers v. Canada (Citizenship and Immigration)*, 2013 FC 496, 432 FTR 225, the applicant union, like those in *Construction and Specialized Workers' Union*, sought judicial review of a decision to permit an employer to hire a temporary foreign worker. The union conceded it was not "directly affected" by the decision inasmuch as it did not represent any workers at the bank which was not unionized. The union argued, however, that it

should be granted public interest standing but this was denied by the Court, not only because it did not have a long history of representing workers in the affected industry as was the case in *Construction and Specialized Workers Union*, but also because the individuals directly affected by the decision were not interested in bringing an application.

[32] In *Fond du Lac Denesuline*, this Court observed that:

> [172] This Court has determined that the phrase "anyone directly affected by the matter" should not be given a restricted meaning. See *Alberta v. Canadian Wheat Board*, [1998] 2 F.C. 156 (*Alberta*). However, the Court has also held in *Friends of the Island Inc. v. Canada (Minister of Public Works)*, [1993] 2 F.C. 229, 102 D.L.R. (4th) 696 at 737 (*Friends* cited to D.L.R.) that
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>> the wording in subsection 18.1(1) allows the court discretion to grant standing when it is convinced that the particular circumstances of the case and the type of interest which the applicant holds justify status being granted. (This assumes there is a justiciable issue and no other effective and practical means of getting the issue before the courts.)
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> …
>
> [176] Jurisprudence from other jurisdictions is also helpful in determining the scope of the term "directly affected." For instance, the Alberta Court of Queen's Bench noted in *Athabasca Environmental Assn. (Friends of) v. Alberta (Public Health Advisory and Appeal Board)*, (1993), 24 Admin. L.R. (2d) 156, [1994] A.J. No. 296 (*Athabasca*) (QL), that the phrase 'directly affected' is different from the mere use of the word 'affected' because "the adverb 'directly' brings a restrictive connotation to the word 'affects'."
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> [177] The Privy Council has also offered some insight into this term in *Re Endowed Schools Act*, [1898] A.C. 477 (P.C.) at 483, noting that "directly affected" points to "a personal and individual interest as distinct from the general interest which appertains to the whole community."

[33] In the present application, the Applicants have not established that the Policy affects their legal rights, imposes legal obligations upon them, or prejudicially affects them in any way (*Forest Ethics Advocacy* at para 30; *League for Human Rights of B'Nai Brith Canada v Odynsky*, 2010 FCA 307 at para 58, [2012] 2 FCR 312). The Applicants here, like those in *Construction and Specialized Workers' Union*, have provided insufficient evidence of how they are "directly affected" by the Policy in a manner such that they should be afforded direct interest standing to challenge it. In the absence of evidence to show how their interests are directly affected by the Policy, they lack standing to challenge it. The fact that the Applicants were involved in discussions and consultations about the Policy does not elevate their position to that of a party who is directly affected by the Policy.

[34] Moreover, there is no basis upon which the Applicants should be granted public interest standing to challenge the Policy. Even if it could be said that the Applicants have raised a serious issue about the Policy and have a genuine interest in it, their application for judicial review is not a reasonable and effective means to bring the matter to this Court (see: *Downtown Eastside* at para 2). Unlike *Construction and Specialized Workers' Union*, where the Court determined that no other realistic means existed to judicially review the decision under scrutiny in that case, in this case the Policy clearly and directly affects the Applicants' members and it is they, or at least one of them, who should be before the Court challenging the Policy. In view of the KPMG report, it can be inferred that the Policy has and will have financial implications for those of the Applicants' members who own container trucks. However, the Applicants have provided scant evidence on behalf of their members as to the extent of such implications, other than noting the costs for installing a DOC or a DPF and suggesting they face uncertainty in making financial

decisions about acquiring new trucks or retrofitting existing ones in the absence of details concerning exemptions from the Policy.

[35] The Applicants' application for judicial review is, therefore, dismissed because they lack either direct or public interest standing to challenge the Policy. If, however, I am mistaken in this determination, their application for judicial review should also be dismissed because it is premature.

B. *Is the application for judicial review premature?*

[36] The Applicants focus upon the premature nature of exemptions from the Policy which, in their view, are "unspecified and therefore unfair" and assert that the Policy is "inflexible" and "without exceptions" for mileage, engine age, and emission retrofits. The Respondent contends that this application for judicial review is premature because the specifics of any exemptions from the Policy, including the process to determine them, have yet to be mapped out and, consequently, the Court cannot review whether the Policy is inflexible. The Respondent says it is not unreasonable that the exemptions have not been finalized because the Policy will not be fully implemented until 2022.

[37] A matter may be premature or not ripe for judicial review if "it is not clear that the [administrative action] will be inconsistent with the grant of authority, or in contravention of the requirements of procedural fairness" (Donald JM Brown and John M Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf), (Toronto: Thomson Reuters), ch 3 at 65). Similarly, in *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61, [2011] 2

FCR 332, the Federal Court of Appeal commented on the principle of judicial non-interference with ongoing administrative processes, stating that:

> [30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. …
>
> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.
>
> [32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway...Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker’s findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience… Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge…

[38] Generally speaking, courts are reluctant to review the merits of an administrative decision until it has been finalized. For example, in *Shea v Canada (Attorney General)*, 2006 FC 859, 296 FTR 81, the Court dismissed an application for judicial review of a hiring process implemented

by the Canada Revenue Agency because the process was not completed. To similar effect, in *EH Industries Ltd v Canada (Minister of Public Works and Government Services)*, 2001 FCA 48, 104 ACWS (3d) 5, the Court of Appeal determined, upon review of a decision of the Canadian International Trade Tribunal to not investigate a complaint, that the Tribunal should have dismissed the complaint on the ground of prematurity because it referred to criteria that had not been finalized. Likewise, in *Geophysical Service Inc v Canada (National Energy Board)*, 2011 FCA 360, 428 NR 237, the Court of Appeal dismissed a statutory appeal and the applicant's applications for judicial review on the grounds that they were premature since the issues raised by the appellant were not yet ripe for decision. These cases highlight the principle that a court should not review an administrative decision that has not yet been finalized.

[39] In the present application, the Respondent points out that the Policy for the years 2022 onwards has not been finalized since the process and criteria for an exemption to the Policy are still under consideration. According to the Respondent, the Court cannot review the reasonableness of the Policy as to any exemptions from it because they are not yet known.

[40] In my view, the exemption criteria cannot be severed from a review of the Policy as a whole. Indeed, the Applicants' submissions show that the exemption process and criteria are relevant in reviewing the Policy. For example, the Applicants say the Policy is "arbitrary and inflexible" because of "the absence of any clearly recognized exceptions to application of the age standard." The Applicants characterize the Policy as an "inflexible truck model age requirement without exceptions." The Applicants' submissions that the Policy is unreasonable are based, in part, on the fact that the exemption process and criteria have not yet been finalized.

[41] In light of the fact that PMV has not finalized the exemption process or criteria, and the fact that the exemption process is a component of the Policy, this application for judicial review is premature. This Court cannot review the Policy for the years 2022 onwards until PMV has finalized an exemption process and criteria. This aspect of the Policy is not yet “ripe” for judicial review.

[42] However, the Court can still review the Policy insofar as it pertains to the transition period from now until 2021. The Policy for these years requires trucks with certain model years to install emission-reducing technologies and, at least in this regard, the application is not premature.

C. *Standard of Review*

[43] The parties agree that the applicable standard of review is reasonableness with a high level of deference afforded to PMV’s decision to adopt and implement the Policy. In *Goodrich Transport*, Justice Barnes explained the considerable amount of deference owed to PMV in establishing a truck licencing scheme:

> [43] I am satisfied that PMV’s grant of authority to establish a licencing 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.
>
> …
>
> [45] … Where Parliament has left it to the decision-maker to make choices among an array of polycentric considerations, judicial deference is clearly owed.

…

> [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.

[44] Under the reasonableness standard, the Court is tasked with determining whether the decision-maker's decision is justifiable, transparent, and intelligible, and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708. Additionally, "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome" (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339).

D. *Is the Policy reasonable?*

[45] The Applicants assert that the Policy "clearly deviates from applicable legislative requirements or standards" and is unreasonable because it is contrary to the purpose of the *CMA* and exceeds PMV's statutory authority. The Applicants point to the statutory objectives listed in section 4 of the *CMA*, noting also that subsection 28(4) of the *CMA* restricts PMV from carrying on any activity or exercising any power in a manner that is contrary to its letters patent or the objectives of the *CMA*. In particular, the Applicants say the Policy fails to promote rules and policies that safeguard Canada's competiveness and trade objectives because: it requires truck owners to replace their trucks based solely on model age year, without any exceptions or monetary incentives; it will result in higher trucking rates that will be passed on to consumers; and it will affect the PMV's competiveness with nearby ports.

[46] According to the Applicants, the Policy does not provide for a high level of safety or environmental protection as stated in paragraph 4(d) of the *CMA* because it focuses solely on a truck's age, without referencing emissions objectives or providing clear exceptions, and ignores other factors which are relevant to the environmental impact of container trucks such as mileage, engine age, and emissions technologies. The Applicants state that the Policy does not reasonably support safety objectives because the correlation between truck age and vehicle safety is a factor in less than five percent of fatal or injury collisions in British Columbia.

[47] The Applicants point to PMV's policies with respect to non-road diesel vehicles as being more flexible than the Policy because those policies provide financial incentives for

environmental upgrading rather than outright prohibitions based on a vehicle's age. Furthermore, according to the Applicants, the Policy contradicts subsections 4(e) and 4(f) of the *CMA* since it is not responsive to local needs and priorities. The Applicants assert that some truck owners and companies will be unable to purchase replacement trucks, potentially forcing them to leave the industry, and thereby impacting the livelihood of the drivers and their families.

[48] The Respondent contends that the Policy is clearly within the scope of PMV's authority and is reasonable. According to the Respondent, PMV's authority to establish a licencing regime to control access to the Port is clear, not only in view of cases such as *Goodrich Transport*, *PRTI Transport Inc v Vancouver Port Authority*, [1999] FCJ No 1701 at para 30, 178 FTR 310, and *Pro-West Transport Ltd v Canada (Attorney General)*, 2006 FC 881 at para 43, 296 FTR 289, but also by virtue of various provisions of the *CMA* such as paragraph 46(1)(a) which permits it to "grant a road allowance, an easement, a real servitude, a right of way or a licence for utilities, services or access". In addition, the Respondent points to subsection 31.1(2) of the *Port Authorities Operations Regulations*, SOR/2000-55, which provides that the PMV shall not permit a truck to gain access to the Port "for the purpose of transporting a container unless… the driver of the truck is employed by or is acting, either directly or indirectly, on behalf of a person who holds a valid authorization." The Respondent also notes that article 7.1(c) (i) of PMV's letters patent authorizes the licencing of transport services to provide access to the Port and its facilities.

[49] The Respondent maintains that the Policy is reasonable since it is based on PMV's long term objectives of lowering harmful emissions, achieving a stable and efficient drayage supply,

and maintaining relations with neighbouring communities. According to the Respondent, the Policy will ensure that the entire container truck fleet is compliant with the environmental standards imposed on manufacturers of heavy-duty diesel engines for the last 10 years; technologies over the last 10 years have resulted in significant advancements and PMV's current environmental measures and the Policy will decrease particulate matter emissions as well as other pollutants. The Respondent notes that re-investment in equipment is necessary to ensure efficiency and reliability, and to prevent rate-undercutting; the previously low barrier to enter the drayage sector, based on relatively inexpensive older trucks, left truck owners vulnerable to rate undercutting.

[50] The Respondent submits that the Policy is not unreasonable because it does not provide truck owners with monetary incentives. There is no law or regulation which requires subsidization, nor, according to the Respondent, is it feasible, appropriate, or necessary to provide monetary incentives. It is not feasible, the Respondent says, because PMV would have to contribute significant resources to ensure that subsidized trucks remain within the TLS and continue to operate at the Port. It is not appropriate, the Respondent states, because it is not sustainable in the long term and the drayage industry, like other industries, should be financially self-sufficient. Finally, it is not necessary, according to the Respondent, because trucking companies and drivers in the TLS already enjoy the benefits of a protected market, regulated minimum remuneration, and compensation for delays at the terminal.

[51] As noted above, the Applicants challenge PMV's decision to adopt a rolling 10 year truck age requirement which may be subject to exemptions in certain, as yet undefined, cases. Since

PMV has not finalized the exemption process or criteria, it is impossible to assess or review whether that aspect of the Policy is reasonable. It is possible, however, to review the other aspects of the Policy applicable during the transitional phase from now until 2021.

[52] It is important to emphasize that the Policy is a non-adjudicative, discretionary, policy decision. As such, PMV's decision to adopt and implement the Policy is entitled to a high degree of deference. As noted by the Supreme Court in *Dunsmuir*, if the question is "one of fact, discretion or policy, deference will usually apply automatically" (para 53). Indeed, as stated in *Goodrich Transport*:

> [43] … PMV's grant of authority to establish a licencing 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.

[53] The Policy currently requires trucks with certain model years to install emission-reducing technologies. Specifically, in 2016, all trucks registered in the TLS with a model year of 2006 or older required a DOC. From now until 2021, all trucks with a model year of 2006 or older will require a DPF and for replacement or returning trucks, it must be a model year of 2010 or newer. It is clear that, until 2022, the Policy is in a transitional phase designed to allow container truck owners sufficient time to comply with the Policy. According to the affidavit of Christine Rigby, a DOC reduces particulate matter emissions by 20 percent, while a DPF reduces such emissions by 85 percent. In view of these clear environmental benefits, it cannot be said that the Policy as it

now stands is unreasonable or that PMV's decision to adopt and implement the Policy "clearly deviates from applicable legislative requirements or standards" (*Goodrich Transport* at para 47).

[54] The Applicants argue that the Policy runs afoul of the *CMA*'s stated objectives. However, they have offered little, if any, persuasive evidence that the Policy undermines PMV's competiveness, increases the public's risk to safety, weakens environmental standards, or ignores local needs and priorities. The record shows that PMV had been considering a truck age policy since at least 2012, and the Policy as it now stands manifests PMV's accommodation of various competing interests subsequent to the 2014 work stoppage. In developing the Policy, PMV consulted with governmental officials and industry stakeholders, including the Applicants, before implementing it. PMV considered different policy options, including a seven, 12, or 15 year truck age policy. In deciding to reject a seven year policy, PMV relied on KPMG's report which concluded that a 10 year policy would have a lesser financial impact on the drayage sector. PMV believes that any increased costs may be beneficial inasmuch as the Policy will avoid the truck surplus which previously plagued the drayage sector as well as reduce truck maintenance costs. PMV's decision to adopt and implement the Policy is the result of an extensive consultation process and constitutes a non-adjudicative, discretionary, policy decision to which the Court must defer.

[55] In my view, the Policy is a reasonable exercise of PMV's discretionary policy-making authority. It is also justifiable, transparent, and intelligible in light of PMV's extensive public consultations, briefing notes, and public notices. The Applicants have failed to demonstrate how PMV clearly deviated from applicable legislative requirements or standards. Neither this Court

nor the Applicants can impose upon PMV their own "standards of relevance" and, so long as the PMV adopts policies which are "relevant to the exercise of its proper discretion, it is open to… [PMV], acting fairly, to apply them strictly and without regard to other arguably relevant factors" (*Goodrich Transport* at para 47).

VI. Conclusions

[56] The Applicants' amended application for judicial review is dismissed for the reasons stated above. The Applicants lack standing in this application because they are not "directly affected" by the Policy and there is another realistic means by which the Policy could be judicially reviewed upon application of one or more of the Applicants' individual members. Any judicial review of the Policy for the years 2022 onwards is premature. The Policy, as it currently stands, is a reasonable exercise of PMV's discretionary, policy-making authority because it is justifiable, transparent, and intelligible, and is within a range of possible, acceptable outcomes defensible in respect of the facts and law.

[57] The Respondent has requested its costs in its memorandum of fact and law. In view of the application having been dismissed, the Respondent is entitled to costs from the Applicants in such amount as may be agreed to by the parties. If the parties are unable to agree as to the amount of such costs within 15 days of the date of this judgment, either party shall thereafter be at liberty to apply for an assessment of costs by an assessment officer in accordance with the *Federal Courts Rules*, SOR/98-106.

JUDGMENT

THIS COURT'S JUDGMENT is that: the Applicants' amended application for judicial review is dismissed with costs to be paid by the Applicants in favour of the Respondent; and that the Respondent is entitled to costs in such amount as may be agreed to by the parties, provided that if the parties are unable to agree as to the amount of such costs within 15 days of the date of this judgment, either party shall thereafter be at liberty to apply for an assessment of costs by an assessment officer in accordance with the *Federal Courts Rules*, SOR/98-106.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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