LABOUR RELATIONS CODE
(Section 84 Appointment)
ARBITRATION DECISION

UNIFOR VCTA

UNION

AHEER TRANSPORTATION LTD.
SUNLOVER HOLDING CO. LTD.

EMPLOYERS

(Re: Employers' Legal Challenge to *Container Trucking Act* and *Regulation*)

Arbitration Board:	James E. Dorsey, Q.C.
Representing the Union:	Peter R. Shklanka
Representing the Employer:	Israel Chafetz, Q.C.
Dates of Hearing:	May 4, 5 and June 12, 2017
Date of Decision:	September 8, 2017

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Contents

1. Grievance, Damage Claim, Jurisdiction and Petition to B.C. Supreme Court

[1] The union seeks a declaration each employer contravened a provision of its collective agreement ratified November 29, 2014: "In signing this Memorandum of Agreement, the Company agrees it will not, in any way, participate in and/or fund any legal challenges to the *Container Trucking Act* and/or its Regulations."

[2] The union does not claim a quantifiable loss or seek a compensatory make-whole remedy for bargaining unit employees or the union. It seeks $70,000 general and $100,000 punitive damages from each employer.

[3] An objection by Aheer Transportation Ltd. to my jurisdiction to arbitrate the grievance was dismissed in February 2016.[1] By agreement, the two grievances were consolidated for hearing.

[4] Each employer petitioned the British Columbia Supreme Court for declarations that sections of the *Container Trucking Regulation* are void. A principal of each

[1] *Aheer Transportation Ltd.* [2016] B.C.C.A.A.A. No. 4 (Dorsey)

employer swore an affidavit in support of the Petition, which was filed by ten companies providing container trucking drayage services to and from Port Metro Vancouver marine terminals. Only these two employers among the ten were bound by a collective agreement with the union.

[5] The challenged regulations mandate initial minimum rate payments to driver for container trucking drayage services and remuneration for fuel surcharge and wait time during the period April 3 to December 19, 2014, when the *Act* and *Regulation* came into force.[2] The Petition sought a declaration that the Lieutenant Governor in Council had no authority under the *Act* to make the challenged regulations retroactive.

[6] The Petition was heard September 21 and 22, 2016. A judgment dismissing the Petition was issued June 30, 2017, after the conclusion of this arbitration hearing. The union and employers chose not to make additional submissions. The reported case summary of the judgment states, in part:

> The Act was created within the context of a long-standing dispute about fair compensation for container truck drivers who serviced the Lower Mainland's marine ports. Its core purpose was to create a comprehensive provincial regulatory regime to establish such compensation and enforce it through the licensing of container truck companies. Sections 19 and 22 of the Regulation required payment of rates and surcharges as if they had been in effect from April 2014 onward. The wording of s. 22(2) of the Act, when read in conjunction with ss. 19 and 22 of the Regulation, had sufficient clarity to demonstrate a legislative intention of retroactivity supporting the impugned sections of the Regulation through creation of an exception to the otherwise prospective application of s. 22 of the Act. In the absence of an actual decision by the Commissioner regarding off-dock trips under the Regulation, judicial review of the Commissioner's interpretation was premature.[3]

[7] Each employer submits it did not contravene its collective agreement and, if it did, there is no basis to award general or punitive damages.

[8] The context for the employers' promises not to "participate in and/or fund any legal challenges to the *Container Trucking Act* and/or its Regulations" and the two grievances is a well-recorded history of recurring driver dissatisfaction with working conditions and compensation in the Port Metro Vancouver container trucking drayage

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[2] S.B.C. 2014, c. 28. The *Act* was brought into force and the *Container Trucking Regulation,* B.C. Reg. 248/2014 was made by Order in Council 757 approved December 19, 2014 and deposited December 22, 2014. The OIC also amended the *Employment Standards Act Regulation*, B.C. Reg. 396/95. (www.bclaws.ca/civix/document/id/oic/oic_cur/0757_2014)

[3] *Aheer Transportation Ltd. v. Office of the British Columbia Container Trucking Commissioner,* [2017] B.C.J. No. 1287

sector, including three general work stoppages in 15 years. This history is relevant background to the conclusion of the collective agreements in November 2015.

[9] The 99 documents tendered by the union include a history of events since it gave notice to bargain in June 2013. I ruled on the employers' objections to the relevance and admissibility of several of the documents and excluded 15 of them.

2. Rate Undercutting, Work Stoppages, Legislation and Lawsuits (1999-2006)

[10] Transportation of containers over local roads is a critical part of the supply chain moving products through Port Metro Vancouver. In 1999 and 2005 union and non-union truckers engaged in work stoppages. Inordinate wait times and congestion had compounded the adverse effect of "cutthroat price competition" on their income. The work stoppages resulted in rate increases.[4]

[11] In 1999, through collective bargaining compensation for owner-operator drivers changed from a trip based system to hourly rates with wait time payments and a Port Metro Vancouver licensing system. Not all employers were party to the settlement negotiations, which were described by the Federal Court of Canada as follows:

> The Canadian Owner Operators Workers Association Local 2001 (COOWA) is certified to represent the dependent contractors retained by PRTI [Transport Inc.]. A collective agreement was entered into between this Applicant and it's dependent truckers on December 31, 1998, and was to remain in effect until December 31, 2000, with a monetary re-opener during the second year.
>
> Between the period of July 22, 1999, and August 20, 1999, dependent contractors retained by PRTI engaged in an illegal strike contrary to the *Canada Labour Code* and Article 31.02 of the Collective Agreement. PRTI filed a grievance against the union regarding this action.
>
> During the period of the illegal strike, dependent contractors retained by PRTI joined several hundred local haul truck drivers, the majority of whom are represented by the Teamsters Local Union No. 31 and COOWA Local 2001, in the withdrawal of container hauling services. The purpose of the withdrawal of services was primarily to protest the long wait times at marine terminals located on property managed by the Vancouver Port Authority when picking up or dropping off containers for inbound and outbound vessels.
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> Due to congestion and other factors of the marine terminals, waiting times had been inordinate and owner operators had suffered a decrease in income. The response of the Teamsters Local Union No. 31 and COOWA to this problem was to engage in an

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[4] Eric John Harris, Q.C., Kenneth Freeman Dobell and Randolph Kerry Morriss (Federal-Provincial Task Force), *Final Report of the Task Force on the Transportation and Industrial Relations Issues Related to the Movement of Containers at British Columbia Lower Mainland Ports*, October 26, 2005 (www.bctruckingforum.bc.ca/Task_Force_Final_Report.pdf) "The industry has a history of cutthroat price competition. In recent times the only significant rate increases occurred as a result of the 1999 and 2005 work stoppages." (p. 23)

> action designed to force employers, such as this applicant, to make compensation payments based on hourly rates as opposed to zone travelling rates.
>
> As a result of the illegal strike, informal picket lines were erected at and around entrances to the Port of Vancouver. This action effectively restricted access and immobilized trucking activity at the Port. The strike ended on or about August 20, 1999, when the Vancouver Port Authority implemented a licencing system which included as a condition a "fair return" provision.
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> The implementation of a licencing system was an integral part of the settlement of the strike and the Memorandum of Understanding was executed by the Teamsters, COOWA and some employers.
>
> PRTI was not a party to the settlement proposal and did not sign the Memorandum of Agreement. The terms of the licence issued by Vancouver Port Authority would deny access to its property to any trucking company that did not execute the licence agreement.
>
> The licence agreement required that the trucking companies pay its drivers a "fair return" for work performed within the Port of Vancouver. This primarily related to the waiting time that the drivers would encounter at the dock. It did not in any way refer to existing rates with respect to trips to and from stated pickup and delivery points.
>
> What led to the labour dispute and finally the resolution thereof, was insuring that all trucking companies using port facilities paid an hourly rate to drivers for waiting time while waiting on VPA property.
>
> There is evidence before me that the July August strike caused the local and regional economies to suffer a loss in excess of fifty million dollars. [5]

[12] PRTI Transport Inc. had "reluctantly" agreed to sign a licensing agreement.

> … after apparently having negotiated an agreement with COOWA with respect to remuneration for waiting time and that this agreement was to persist until December 31, 1999. Though PRTI executed the licence agreement with the Vancouver Port Authority it still did not agree to pay an hourly rate to its dependent contractors nor did they provide such an undertaking with the Vancouver Port Authority. [6]

[13] On September 20, 1999, the union complained to the Vancouver Port Authority that PRTI was in violation of its license agreement because it was not paying hourly rates to its dependent contractors.[7] The Vancouver Port Authority revoked PRTI's license. PRTI sought an injunction pending judicial review of that decision. The court found the Vancouver Port Authority could enforce licensing conditions. The injunction application was dismissed.

> As I see it the VPA did not impose any hourly wage on any of the unions or the owners that signed the agreement in August of 1999, that led to the strike settlement. They suggested a "fair hourly" rate be paid for waiting time while the truckers were on port business. It should be noted that in order to resolve the situation the authorities implemented scheduling which attained the objective of having the truckers being notified when their services would be required at the port thereby reducing waiting time considerably; the underlying issue of the problem that had occurred during the summer of 1999. The port authority certainly has the obligation to see to the proper handling of

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[5] *PRTI Transport Inc. v. Vancouver Port Authority*, [1999] F.C.J. No. 1701, ¶ 8 - 18
[6] *PRTI Transport Inc. v. Vancouver Port Authority*, [1999] F.C.J. No. 1701, ¶ 19
[7] *PRTI Transport Inc. v. Vancouver Port Authority*, [1999] F.C.J. No. 1701, ¶ 20

> cargo at its port as well as its continuing ongoing business operation. I am satisfied that they have the power to licence those who are to have access to the port; the fact that they have suggested that the truckers be paid a fair wage for waiting time is only incidental to the overall purpose of regulating trucking and the movement of cargo at its port.[8]

The application for judicial review was not pursued to hearing.

[14] Neither the licensing system nor enforcement of collective agreements curtailed undercutting. Hourly rate compensation did not endure. "Within weeks to months, most trucking companies reverted back to trip based rates."[9] The absence of an enforceable minimum rate generated a second work stoppage in 2005. It began June 24th.

> Certain trucking companies, as well as certain importers, commenced actions for damages against the Vancouver Container Truck Association, its executive members and persons whose names were unknown. Two injunctions were sought and obtained, aimed at preventing members of the Vancouver Container Truck Association from blocking access to the Fraser Surrey docks in Surrey, the CP Rail yard in Pitt Meadows and the Delco container storage facility in Delta. The BC Labour Relations Board and the Canada Industrial Relations Board both granted orders against members of unions who were refusing to work during the dispute.[10]

[15] Finding a way to end the 2005 work stoppage was hindered by the absence of representatives of drivers and companies who had legitimacy and authority to make agreements binding all members of either group in the sector. There was no legislative framework similar to collective bargaining legislation with certified or accredited bargaining agents. The Vancouver and Fraser River port authorities had separate statutory authority. The provincial and federal governments have overlapping constitutional labour market authority depending on the intra or inter-provincial nature of a company's trucking operation.

[16] An additional factor in the supply chain for exporters and importers moving product through ports is that containers are moved by both rail and road. Some bulk product exporters have the options to containerize product for movement by rail or road or to ship in bulk by rail to tidewater.

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[8] *PRTI Transport Inc. v. Vancouver Port Authority*, [1999] F.C.J. No. 1701, ¶ 30

[9] Vince Ready and Corinn Bell, *Recommendation Report – British Columbia Lower Mainland Ports*, September 25, 2015, Part 2(a) (http://www.tc.gc.ca/eng/policy/acf-acfp-menu-3138.html#e3_a)

[10] Eric John Harris, Q.C., Kenneth Freeman Dobell and Randolph Kerry Morriss (Federal-Provincial Task Force), *Final Report of the Task Force on the Transportation and Industrial Relations Issues Related to the Movement of Containers at British Columbia Lower Mainland Ports*, October 26, 2005 (www.bctruckingforum.bc.ca/Task_Force_Final_Report.pdf), p. 9

[17] The provincial and federal governments collaborated to end the work stoppage and improve stability and efficiency in the sector. They jointly appointed Vince Ready to help facilitate a resolution. On July 29, 2005, he made a report and recommendations. He proposed a Memorandum of Agreement, between the Trucking Companies (Owners/Brokers) and the Vancouver Container Truckers' Association.[11] It included federally regulated benchmark rates for drivers and fuel surcharges; port licensing requirements for companies operating in the container drayage sector; and an auditing and a dispute resolution mechanism provided by the provincial government.

[18] The Memorandum was subject to ratification by a majority of the driver membership of the Vancouver Container Truckers' Association (VCTA) and participation by 75% of the companies and/or companies which dispatched 50% of the drivers, most of whom were owner operators.

[19] The terms of the Memorandum included a new rate schedule effective August 1st, return to work August 2nd and a binding arbitration process under the *Commercial Arbitration Act*, not the federal or provincial collective bargaining statute, with express authority for the arbitrator to make a decision retroactive to the date of return to work. Both the executives of the VCTA and the company collective that agreed to the Memorandum were to appoint a spokesperson for the arbitration. This was an effort to create a decision-making structure with recognized parties given legitimacy to speak and agree for the non-union truckers and their employers.

[20] The Memorandum did not apply to employers or truckers covered by a collective agreement unless the parties to the collective agreement agreed.

[21] The proposed resolution was accepted by the VCTA, but not by the companies.

[22] The work stoppage continued to August 23rd. It ended when the federal cabinet made an order in council requiring the port authorities to regulate port access for container drayage by establishing a truck licensing system which required companies to agree to pay the "Ready Rates" as a condition of obtaining a license.

> The trucking companies argued that the MOA 2005 violated the *Competition Act*. To assist in the resolution of the dispute, in August 2005 the federal government, under its jurisdiction to regulate federal undertakings, issued an Order-in-Council directing the

[11] www.portvancouver.com/wp-content/uploads/2015/06/July-29-2005-memorandum-of-agreement.pdf

> Port Authority to implement the MOA 2005 as a condition of licensing companies wishing to have access to the ports for the purpose of moving containers.
>
> This Order-in-Council also exempted the parties from having to comply with the *Competition Act* and enabled the adoption of an interim licensing system that required the trucking companies to pay their owner-operators the rates stipulated in the MOA 2005. A truck licensing system ("TLS") was adopted which established the issue of licenses for a period of two years and required all trucking companies to sign the MOA 2005 in order to have access to the ports. Thereafter, all short-haul container-trucking companies obtained licenses and drayage operations recommenced.[12]

[23] In 2006, the federal government made a regulation to ensure compliance with a minimum rate floor through minimum conditions in the licenses.[13] The rate floor was the Ready Rates in the July 29th Memorandum or a collective agreement rate. This gave a measure of primacy to collective agreement rates for drivers covered by a collective agreement. It also created a minimum wage for the Metro Vancouver container trucking drayage sector that exceeded minimum wage rates in federal and provincial labour standards legislation.

[24] The truck licensing system limited the number of vehicles and drivers, imposed safety and environmental standards and provided for sanctions on operators whose behaviour did not meet the ports' standards or service requirements. The license term was two years.

[25] There was no work stoppage again until 2014.

3. Federal-Provincial Joint Action Plan Ends 2014 Work Stoppage (March 23)

[26] In August 2005, the federal government established a task force to inquire into the factors that led to the 1999 and 2005 work stoppages and to make recommendations to avoid a recurrence and increase the efficiency of port operations.[14] The Task Force reported in October 2005.[15]

[27] In mid-2006, two licensed trucking companies unsuccessfully argued in the Federal Court of Canada that the Governor General in Council could not impose the licensing system through an amendment to an earlier order in council.[16]

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[12] Vince Ready and Corinn Bell, *Recommendation Report – British Columbia Lower Mainland Ports*, September 25, 2015, Part 2(a) (http://www.tc.gc.ca/eng/policy/acf-acfp-menu-3138.html#e2_b)
[13] *Port Authorities Operations Regulation,* s. 31.1(2)(b) SOR/2000-55
[14] P.C. 2005-1365, August 8, 2005.
[15] Eric John Harris, Q.C., Kenneth Freeman Dobell and Randolph Kerry Morriss (Federal-Provincial Task Force), *Final Report of the Task Force on the Transportation and Industrial Relations Issues Related to the Movement of Containers at British Columbia Lower Mainland Ports*, October 26, 2005 (www.bctruckingforum.bc.ca/Task_Force_Final_Report.pdf
[16] *Pro-West Transport Ltd. v. Canada (Attorney General)* [2006] F.C.J. No. 1129

[28] In 2007, when the two-year licenses were to expire, the port authorities and the federal and provincial governments implemented changes and took initiatives to foster continuing stability and efficiency in the container trucking drayage sector.

> As the MOA 2005 was to expire in August 2007, in response to ongoing concerns regarding system complexity, costs, management, and pressure on rates, in July 2007 the Federal Cabinet amended the *Regulations* to make compliance with the minimum rates of remuneration as set out in the MOA 2005 a requirement to operate in the ports for non-union companies using independent operators. Further, it was these companies that were subject to audit to ensure that the MOA 2005 rates were being paid to drivers.
>
> The 2005 dispute created substantive damage to importers and exporters who depended on the ports to receive and export their goods. It was the hope of all involved that setting benchmark driver and fuel surcharge rates and establishing a TLS would cure many of the issues at the Vancouver ports. After the 2005 dispute, several initiatives were undertaken to address problems in the system. These include:
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> - In 2007, in order to ensure compliance with the minimum MOA 2005 rates, the BC Government established the Container Truck Dispute Resolution Program.
> - PMV became more diligent in its TLS administration (e.g., cancellation of inactive licenses/permits) and worked closely with the BC Government to ensure more rigorous enforcement of licensing provisions flowing from the regulatory framework. Since 2006 a moratorium on the issuance of new licenses or permits to independent owner-operators not operating at the Port within a particular timeframe was put into place. PMV also established a dispute resolution mechanism in July 2007, enhancing investigative/auditing/enforcement measures to help ensure parties providing truck services to the port were operating in a manner consistent with regulatory/licensing requirements.
> - In 2008, a two-tiered licensing system was introduced. The first version of the TLS was developed in 1999; the current version (TLS 4) was implemented on July 7, 2008. TLS 4 introduced a dual system that includes separate licenses for Full Service Operators (FSO's) and permits for Independent Operators (IO's) serving the port.
> - In 2010, the Vancouver Port Container Truck Steering Committee (the "Steering Committee") was created. Its mandate was, and continues to be, to identify, discuss, and attempt to resolve issues relating to the stability and efficiency of the container trucking sector in the ports.
> - In 2010, Transport Canada and the Port Authority decided that the *Regulations*, created in 2006 by the Federal Cabinet (s. 31.1(2)(b)) now only applied to the movement of containers originating or terminating on port lands.
> - Port Authority launched a stakeholder engagement process to develop a long-term vision for the Container Trucking Sector, where general agreement appeared to be based on the minimum rate floor needing to be improved and protected, and a system of compliance needing to be better communicated.[17]

[17] Vince Ready and Corinn Bell, *Recommendation Report – British Columbia Lower Mainland Ports*, September 25, 2015, Part 2(a) (http://www.tc.gc.ca/eng/policy/acf-acfp-menu-3138.html#e2_b)

[29] On January 1, 2008, the Fraser River, North Fraser and Vancouver port authorities were amalgamated as the Vancouver Fraser Port Authority.[18] It does business as Port Metro Vancouver (PMV).

[30] In the decade after 2005, the mix of owner operator and employee drivers had changed.

> Approximately 28% of employees and 55% of owner-operators in the Lower Mainland drayage workforce are unionized. The number of owner-operators in the drayage fleet has declined by almost 60% since 2005, as the majority have exited the drayage sector. It is widely reported that there is an oversupply of drivers in the system and we have been advised that currently there is approximately 2,000 trucks in the system.
>
> … provides data that shows total trips per day falling by 8%, revenue trips falling by 21%, and non-revenue trips increasing by 26%. Non-revenue trips are directly related to congestion in the system, bottlenecks, and increased waiting times at the port. Prior to the work stoppage in 2014, drivers that are paid by the trip (owner-operators) work longer hours and get paid less than drivers that are paid by the hour.
>
> In order to maintain trip efficiency and equality it is necessary to analyze a system on how to improve performance in the terminals and maximize the reservation system. It appears that the root problem is in fact that there are simply too many drivers in the system. To help relieve the negative pressures on the system, it will be necessary to re-deploy drivers currently in the drayage sector.[19]

[31] Some characteristics of the container trucking drayage sector were:

- Highly fragmented and competitive – 150 different companies in the market
- Absent PMV's licensing system there are relatively low financial barriers to entry, however improved National Safety Code rules are raising the standards, effectively increasing the entry requirements
- Wide variations in understanding of costs
- Drivers typically make 4.2 revenue one-way trip legs and 2.4 non-revenue one-way (repositioning) trip legs a day
- Approximately 60% of drivers are unionized and 40% non-unionized[20]

Ownership of the 2,000 trucks was dispersed. The top 10 companies had approximately 34% of the trucks. The top 20 had approximately 52%. And 52% were operated by companies with less than 10 trucks. There was no single company spokesperson.

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[18] P.C. 2007-1885, December 6, 2007 (www.portvancouver.com/wp-content/uploads/2015/07/2008-Letters-Patent.pdf) Its ports are Vanterm, Centerm, Deltaport and Surrey Fraser Docks.
[19] Vince Ready and Corinn Bell, *Recommendation Report – British Columbia Lower Mainland Ports*, September 25, 2015, Part 4(e) (www.tc.gc.ca/eng/policy/acf-acfp-menu-3138.html#e3_a)
[20] Vince Ready and Corinn Bell, *Recommendation Report – British Columbia Lower Mainland Ports*, September 25, 2015, Part 1 (www.tc.gc.ca/eng/policy/acf-acfp-menu-3138.html#e3_a

[32] Despite the changes and initiatives by Port Metro Vancouver, rate undercutting continued. Compensation, lengthy terminal wait times and other issues that triggered the 1999 and 2005 work stoppages led to a 2014 work stoppage by non-union truckers.

> One of the most devastating factors affecting union and non-union drivers is the fact that the majority of these drivers had not received an increase in rates and fuel charges for the past several years. To aggravate matters, most drivers have had their rates decreased since 2006 due to the undercutting of the "Ready Rates" and the lack of industry wide enforcement.
>
> Despite significant efforts from 1999 to present, issues associated with compensation, working conditions, and prolonged wait times continue to undermine the sector, as well as PMV's international reputation as a reliable and competitive service provider.
>
> In summary, the 2014 issues are essentially the same issues that were at the root of the 1999 and 2005 disputes. The similar issues underpinning the 2014 dispute led to 1,200 drivers, both owner-operators and company employees, refusing to service PMV for approximately four weeks.[21]

[33] At the time of the 2014 work stoppage, Unifor National Council 4000 had a collective agreement under the *Canada Labour Code* with Canadian National Transportation Ltd. (CNTL) some of whose drivers do Vancouver container drayage. Unifor, VCTA was bargaining under the *Canada Labour Code* with AG Trucking Inc. and had not been to conciliation.

[34] In the provincial jurisdiction, Unifor, VTCA was in collective bargaining under the *Labour Relations Code* with nine companies, including the two employers in this arbitration, Prudential Transportation Ltd. and Jete's Trucking. There had been pattern bargaining in the past. A collective agreement with one employer became the template for agreement with others with only minor differences to recognize operational differences. The union's goal was sectoral bargaining, but it was not successful in its efforts to have the provincially-regulated drayage sector employers negotiate collectively.

[35] On March 1, 2014, the union held strike votes among the drivers of the two employers in this arbitration and five others. Each employee group unanimously voted to strike. Collectively, 174 drivers employed by the seven employers voted. British Columbia Area Director Gavin McGarrigle testified this was a high percentage of eligible voters. He agreed on cross-examination that the common understanding at that time

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[21] Vince Ready and Corinn Bell, *Recommendation Report – British Columbia Lower Mainland Ports*, September 25, 2015, Part 3(a) (www.tc.gc.ca/eng/policy/acf-acfp-menu-3138.html#e3_a)

was that there were approximately 2,000 trucks, 2,200 drivers and 100 companies operating in the sector.

[36] Then, as now, a large majority of the drivers in the sector were not represented by a trade union. Harman Shergill, on behalf of the United Truckers' Association (UTA), an ad hoc organization, was their public spokesperson.[22] Unlike the trade unions representing drivers in the sector, Unifor National Council 4000, Unifor, VCTA and Teamsters, Local Union No. 31, Mr. Shergill could not make collective or other agreements binding on non-union drivers.

[37] Unifor, VCTA's collective agreements had expired in 2010 and notice to bargain had been given in June 2013. The union gave 72-hour strike notice on March 3, 2014 and the employees of the seven employers joined the work stoppage with legal strikes.

[38] On March 6th, the federal government appointed Vince Ready and Corinn Bell to do an independent review. "The drivers did not return to work as a result of the appointment and most drayage sector drivers refused to return to work. As a result, the federal government requested that Mr. Ready and Ms. Bell issue interim recommendations."[23] Their interim recommendations did not result in a return to work.[24]

[39] This was becoming a familiar scenario. Underlying problems required federal government Ministry of Transport and Port Metro Vancouver solutions. Unions could speak, bargain and make agreements for their members, but most of the drivers refusing to work were not represented by a union. There was no single voice for the companies as employers or licensees. There was no institutional structure for all parties to agree on the problems and solutions. A new factor in the 2014 work stoppage was participation by a union and employees on lawful strikes under the provincial *Labour Relations Code*.

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[22] In an application to the Labour Relations Board employer counsel described the UTU as "a loose association of container truck drivers, both union and non-union drivers as well as employees and owner-operators." (January 21, 2016)

[23] Vince Ready and Corinn Bell, *Recommendation Report – British Columbia Lower Mainland Ports*, September 25, 2015, Part 3(b) (http://www.tc.gc.ca/eng/policy/acf-acfp-menu-3138.html#e3_a)

[24] Vince Ready and Corinn Bell, *Recommendation Report – British Columbia Lower Mainland Ports*, September 25, 2015, Part 3(c) (http://www.tc.gc.ca/eng/policy/acf-acfp-menu-3138.html#e3_a)

[40] Unifor, VCTA continued to attempt to negotiate a collective agreement with the employers. On March 23rd, Mr. McGarrigle and National President Jerry Dias met with some of the employers. No agreement was achieved.

[41] The provincial government decided to act where it could and introduced legislation on March 24th to compel the striking union truckers of the seven employers to return to work for a cooling off period.[25]

[42] The prospect of being legislated back to work in the face of a continuing work stoppage and picketing by the non-union truckers raised concerns. A meeting between the union and some of the employers on March 25th did not achieve any collective agreement. Messrs McGarrigle, Dias and Shergill went to Victoria.

[43] The federal and provincial governments and Port Metro Vancouver had a draft Joint Action Plan (JAP) they intended to announce. The draft, and not the back-to-work legislation, became the focus of discussion and negotiations in Victoria on March 26th. No representative of the seven employers covered by the back-to-work legislation or any other drayage companies participated in the discussions.

[44] A JAP was agreed, initialed by Messrs Dias and Shergill, Premier Clark and Dr. Mike Henderson, Director General of Transportation Canada and announced at the end of the day. The back-to-work legislation was shelved.

[45] The changes to the draft JAP included a federal government agreement to increase trip rates by 12% above the 2006 Ready Rates, not 10% as first proposed. Some of its provisions are:

> 2. The Government of Canada commits to take appropriate measures to increase trip rates by 12% over the 2006 Ready Rates. The rates will take effect within 30 days of the return to work and will apply to all moves of containers (whether full or empty). To make drivers whole for the interim period between 7 days following the return to work and the date the new rates take effect, a temporary rate increment will be put in place.
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> These rates shall be calculated on a round trip basis, and shall apply to all moves. A mechanism will also be established to attach a benchmark minimum rate for all hourly drivers to the federal regulation. The rate is anticipated to be initially instituted at $25.13 on hire and $26.28 after one year of service. Recognizing that per-trip rates for hourly drivers are a concern of all parties, the issue of the

[25] Bill 25, *Port Metro Vancouver Container Trucking Services Continuation Act* (https://www.leg.bc.ca/Pages/BCLASS-Legacy.aspx#%2Fcontent%2Flegacy%2Fweb%2F40th2nd%2F1st_read%2Fgov25-1.htm)

prohibition of such rates shall be reviewed in accordance with paragraph #14. Canada and B.C. further commit to put in place a new mechanism to ensure off dock trips (including within a property or between properties) are remunerated consistent with the revised regulated rates, and the Government of Canada will expedite its 2014 Regulatory Framework Review which will assess the current wage and fuel surcharge rates.

3. The Province of British Columbia commits to engage unions and their certified employer companies on the importance of achieving renewal collective agreements and will ensure access to mediation if both parties agree to its use.
4. As per the current federal regulation, upon return to work the fuel surcharge multiplier will be amended from 1% to 2% which will result in a 14% fuel surcharge immediately upon a return to work. ... This fuel surcharge must be paid to owner operator drivers without exception and this will be enforced through increased and regular provincial audits.
5. The Province of British Columbia will strengthen the scope of the audit function so that all trucking companies registered in the trucking licensing system for local drayage will be subject to regular audits conducted in a transparent manner and penalties for rate violators shall be severe and shall include cancellation of licenses for companies and individual drivers. The scope of the audit program will be expanded to include union and non-union drivers and "off dock" movements. The province and Port Metro Vancouver will work with the industry to define the parameters of the audit program, with full implementation by June 15, 2014.
6. Whistleblower Mechanism: Port Metro Vancouver and the province will work together to provide a mechanism for the reporting of concerns related to compliance with trucking licensing system requirements (including compensation provisions) or incidents of intimidation or harassment related to container drayage activity. The new mechanism will allow for direct input to the provincially delivered audit program and will be in place no later than June 15, 2014.

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13. A steering committee will be formed immediately following the return to work and will consist of representatives from the unionized and non-unionized trucking community, the terminals, Port Metro Vancouver, Transport Canada and the Province of British Columbia to be chaired by Transport Canada. The steering committee will monitor implementation of all commitments in the Joint Action Plan and share the results on a regular basis with all stakeholders.
14. The Province of British Columbia, the Federal Government, and Port Metro Vancouver agree that Vince Ready shall be seized to issue recommendations on all points in this action plan that will be reviewed, finalized and acted upon within ninety (90) days of a return to work.
15. Unifor and the UTA agree to an immediate return to work based upon the above and acceptance by Canada and British Columbia.[26]

[46] Mr. McGarrigle testified it was a challenge to achieve provincial government commitment to a minimum rate for drivers in this sector when there were no comparable rates set by government elsewhere and a lower provincial minimum wage rate. At the time, it was unclear how the hiring and one year's service hourly rates would be enacted

[26] https://news.gov.bc.ca/stories/agreement-to-resume-full-operations-at-port-metro-vancouver

and enforced. The expired 2009-10 collective agreements had various rates for owner-operators and hourly rates for hourly employees.

[47] Mr. McGarrigle testified having new rates effective shortly after returning to work was an important promise for the union, which it heralded in presenting the JAP to its members.

[48] Mr. McGarrigle, on behalf of the union, was appointed to the Drayage Steering Committee.

[49] Both union and non-union drivers returned to work March 27th, but the union's legal strikes did not end.[27] Both the union and non-union driver groups subsequently accepted the terms of the JAP as a basis to continue working. Seven days "following the return to work and the date the new rates take effect" was April 3, 2014.[28]

[50] Essentially, the governments had negotiated a return to work on behalf of the unionized employers and other companies with promises there would be increased minimum rates effective on return to work payable by the sector employers and companies on driver ratification. There was no retroactivity in the terms of the JAP.

[51] The length of time it took to have all employers and companies in the sector accept responsibility to pay the new rates and fuel surcharge or have one legally imposed by the federal and provincial governments or through collective bargaining would determine the duration of any retroactive period.

[52] New enforceable rates for drivers not covered by the federal government action had to wait for the two governments to take the necessary steps to synchronize action across the constitutional divide in labour relations and employment. A uniform and unified approach was necessary to minimize a recurrence of undercutting.

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[27] See *Sunlover Holding Co.* [2014] B.C.L.R.B.D. No. 160 leave for reconsideration denied [2014] B.C.L.R.B.D. No. 196: "The Original Decision was thus correct in that there is no dispute that Unifor had at one point engaged in full strike activity: Original Decision, para. 5. As well, it cannot be disputed that the collective bargaining dispute has continued. As the Employer notes, the Joint Action Plan referred to in paragraphs 8-10 of the Original Decision did not include the Employer. It thus did not resolve the collective bargaining dispute between the Employer and Unifor. That dispute under the Code continues, as does Unifor's right to engage in specific strike activity given its earlier crystallization of its strike option. In terms of Section 19(3) of the Code, that means that the strike is in effect and the consent of the Board is required in respect to a further certification or raid application." (¶ 9)

[28] JAP, ¶ 2

[53] Because of the lag time, April 3, 2014 and March 27th, the return to work date, became anchor dates for the beginning of the later enacted new level playing field at higher minimum initial rates for all the container trucking drayage sector.

4. Implementing the Joint Action Plan (2014)

(a) Federal Government Regulation and Legal Challenge (April)

[54] On April 3, 2014, the Governor General in Council amended the *Port Authorities Operations Regulations*[29] to increase the Ready Rates by 12% and the fuel surcharge from 1% to 2%. These were minimum conditions for licensing to access the port to move containers. There were no hourly rates in the original or this amended regulation.

[55] The provincial government made no regulations or amendments to the *Employment Standards Act*[30] to enact enforceable hourly or trip rates for drivers whose employment was within provincial employment jurisdiction. The JAP was less precise and actionable than for trip rates in the federal jurisdiction: "A mechanism will also be established to attach a benchmark minimum rate for all hourly drivers to the federal regulation. The rate is anticipated to be initially instituted at $25.13 on hire and $26.28 after one year of service." It is unclear why these initial rates were "anticipated."

[56] Thirty-three provincially regulated companies, including the two employers in this arbitration, commenced an action on April 25, 2014 in the Supreme Court of British Columbia against Port Metro Vancouver and the Attorney General of Canada claiming there was no constitutional authority for the federal government to require them to pay these rates. They argued:

> The legislative jurisdiction of Parliament does not extend to regulating the labour relations of the Plaintiffs as provincially regulated entities nor may Parliament prescribe minimum remuneration that the Plaintiffs must pay the owner-operator with whom they directly contracted with or the provincially-regulated owner-operator bargaining units represented by Unifor-Vancouver [Container Truckers' Association], including the MOA Load Rates and the terms set in the *Operations Regulation*, as amended from time to time.[31]

The claim was discontinued February 3, 2015.

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[29] SOR/2014-86. (www.gazette.gc.ca/rp-pr/p2/2014/2014-04-23/html/sor-dors86-eng.php)
[30] RSBC 1996, c. 113
[31] Amended Notice of Civil Claim, Vancouver BCSC Registry No. S143181, June 17, 2014, Part 3, ¶ 7, p. 17

(b) Joint Action Plan Technical Clarifications (April and June)

[57] On April 29, 2014, the Drayage Steering Committee, chaired by Mr. Henderson, issued a technical clarification of the JAP. The new hourly and trip rates were effective April 3, 2014. The new fuel surcharge was effective March 27, 2014. The hourly rates were as in the JAP and the Ready Rates increased by 12% were attached. The document states:

> **Joint Action Plan – Technical Clarifications**
>
> The Joint Action Plan established by the Governments of Canada and B.C. and Port Metro Vancouver with Unifor and the United Truckers Association is intended to achieve labour stability for the drayage sector as a result of the work stoppage at Port Metro Vancouver. Below are some clarifications of key areas of the *Joint Action Plan*.
>
> *Rates*
>
> The amendment to the federal regulation introduced on April 3, 2014 was a first step toward implementing our commitments in the *Joint Action Plan*. This amendment was done quickly to deliver on the first of our commitments to support the resumption of full operations at the port.
>
> The *Joint Action Plan* is to ensure that the drayage sector is stabilized through the consistent application of one of two rate floors as of April 3, 2014. Employees and owner-operators, both union and non-union, must be paid either hourly or trip rates (*they cannot be compensated using a combination of both methods*). For greater clarity:
>
> - **Hourly Rates** – Minimum rates of $25.13 on hire and $26.28 after one year of service for company employees.
> - **Trip Rates** – Minimum rates are as set out in the amended regulation for owner-operators (see Annex 1), which apply to each leg of a trip for al! full and empty containers. These rates shall be calculated on a round trip basis, and shall apply to all moves.
>
> The federal and provincial governments and Port Metro Vancouver are developing a mechanism to ensure the full rate regime as set out in the *Joint Action Plan* is made binding on the sector. In keeping with the intentions of the *Joint Action Plan*, these rates must be paid, or access to the port will be at risk.
>
> *Fuel Surcharge*
>
> As of March 27, 2014 the fuel surcharge multiplier in the formula outlined in the Memorandum of Agreement has doubled to 2% from 1% which for this quarter of 2014 is calculated to be 16%.
>
> *Wait Times*
>
> Port Metro Vancouver is actively working with Marine Terminals to establish a mechanism that will ensure drivers are paid for excess waiting times as outlined in the *Joint Action Plan*.
>
> Recognizing that implementing a mechanism for all stakeholders consistent with the objectives of the *Joint Action Plan* requires considerable consultation and planning, a contingency plan is under consideration for compensation and PMV expects to finalize a payment model within the next two weeks for review by the Drayage Steering Committee.

[58] While there was no legislated mechanism in place to make all the JAP rates binding in the sector, the clear message was licensees were at risk of losing their license if they did not pay the JAP rates as of April 3rd and fuel surcharge as of March 27th. The April 29th notice was for future payments. In this sense, it was not an imposition of retroactive payments. Mr. McGarrigle recalls technical clarifications were distributed by Port Metro Vancouver through the Truck Licensing System.

[59] The pronouncement of rates enforceable through risk of loss of license was a precursor to what was to become a larger issue in 2015. Drivers were frustrated with having returned to work and not received the promised new rates. As time passed and the new rates were not paid, a company or employer's liability to pay accumulating amounts increased. The opportunity to pass on or to recover the increased amounts from customers was lost.

[60] On June 30th, a technical clarification update was issued in response to various questions that had arisen. Drivers were to be paid the new rates and a whistleblower service had been established. Non-compliance could result in "Licence consequences."[32]

[61] The return to work did not end the legal strikes or the duty to bargain in good faith. Neither employer gave notice to the union it disputed any responsibility to pay the JAP rates or fuel surcharge or that they would not form part of their collective agreement.

[62] On May 28, 2014, the provincial government Minister Responsible for Labour, who had been involved in the JAP negotiations on March 26th, wrote the union and employers encouraging them to achieve a collective agreement.[33] She wrote, in part: "The successful renegotiation of your collective agreement is an important part of achieving stability in the drayage trucking sector servicing Port Metro Vancouver."

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[32] www.portvancouver.com/wp-content/uploads/2015/06/June-30-2014-joint-action-plan-technicalclarification-regarding-terminal-reservation-charges.pdf

[33] JAP, ¶ 3

(c) Ready and Bell Recommendation Report (October)

[63] In June, the 90-day period for Mr. Ready to make recommendations was extended to 180 days.[34] Mr. Ready and Ms Bell's recommendation report was released in October.

[64] They reported a license moratorium since 2007 had affected the ratio between employee and owner operator drivers. The trucking company community favoured lifting the moratorium to allow them to engage more owner operators.

> We understand that the principal objective of this moratorium is to instill greater business discipline on the industry through a direct employer-employee relationship. However, the moratorium has a significant long-term impact on the stability of the local container drayage sector and trucking companies in the sector are calling for an end to what they describe as an artificially imposed cap on owner-operators.[35]

[65] The companies were divided on the hourly rate.

> Most of the companies that responded to the Questionnaire were of the opinion that the Joint Action Plan must be reconsidered by the stakeholders in the drayage sector. Of the trucking companies that responded to the Questionnaire, some were very supportive of the hourly rate concept and some were very adverse to the hourly rate concept and advocated strenuously for per trip rate compensation. Some companies that responded wanted to re-visit the rates and fuel surcharge components of the Joint Action Plan. Some of the companies also suggested that a minimum call out fee of $200 could be required of the participants in the sector to address some of the drivers' wait time concerns. The owner-operator hourly rates described by those in favour of the concept were nowhere near the hourly rates suggested by the UTA and Unifor.[36]

[66] A key recommendation was the establishment of a provincial regulatory agency for the sector.

> There is considerable support for a provincially regulated agency to oversee the many issues in the drayage sector. Government Regulation would be required to establish the agency and its framework. Given that we see it as the role of the Agency to issue licenses in the future, we see it critical that there is a mandatory requirement to belong to the Agency in order to obtain a license to operate to and from PMV. We see the central functions of the agency to include the following:
>
> 1. The licensing of trucks;
> 2. The enforcement and setting of future driver rates (on and off dock), including fuel surcharge rates, in consultation with stakeholders, including representatives of the truck drivers and trucking companies;
> 3. The evaluation of wait time fees;

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[34] Vince Ready and Corinn Bell, *Recommendation Report – British Columbia Lower Mainland Ports*, September 25, 2015, Part 6 (www.tc.gc.ca/eng/policy/acf-acfp-menu-3138.html#e3_a)
[35] Vince Ready and Corinn Bell, *Recommendation Report – British Columbia Lower Mainland Ports*, September 25, 2015, Part 4(d) (www.tc.gc.ca/eng/policy/acf-acfp-menu-3138.html#e3_a)
[36] Vince Ready and Corinn Bell, *Recommendation Report – British Columbia Lower Mainland Ports*, September 25, 2015, Part 5(h) (www.tc.gc.ca/eng/policy/acf-acfp-menu-3138.html#e3_a)

> 4. The container dispute resolution program and any additional dispute resolution process; and,
> 5. Facilitate discussions regarding Service Level Agreements ("SLAs") between terminal operators, and trucking companies with the twin goals of better organizing driver work through the reservation systems as well as increasing the driver trips into PMV and hence increasing driver compensation.
>
> Further, and in addition to the above, the Agency could deal with issues such as:
>
> 6. Facilitate stakeholder discussions regarding terminal reservations policy (including terminal wait time issues and night and weekend rates);
> 7. Facilitate discussions with stakeholders respecting drayage governance and potential changes to the regulatory framework;
> 8. Facilitate stakeholder discussions regarding such issues as:
>
> - how to address any future undercutting of rates,
> - the issue of the required number of trucking companies and drivers,
> - the moratorium on new licenses.
>
> Importantly, the Agency as we see it would also establish a mechanism for ongoing communications with all industry stakeholders, including representatives of the truck drivers. These communications should be regular and ongoing with a view to discussing and addressing issues and implementing corrective measures in the drayage sector in order to avert the shut downs of PMV that have occurred in the past.[37]

[67] Mr. Ready and Ms Bell were aware liability to pay the trip, hourly and other rates and fuel surcharge contemplated by the JAP increased as time passed. They began their recommendations on rates with this statement: “As our starting point, we are of the view that all stakeholders in the industry were aware of the Joint Action Plan and the rates contained therein. We are of the view that any rates not paid in accordance with the Joint Action Plan to date are owed to drivers.”[38]

[68] This is a view shared by the union. Payment of the new initial minimum rates, in the entire context of the return to work, was a debt due, not retroactive imposition of a new obligation. Recovering payment was a union priority. It had the leverage of continuing to be in a legal strike position with the seven employers.

[69] However, there was no collective bargaining in 2014 after the return to work. Mr. McGarrigle testified the union was looking for predictability, finality and enforceability of rates that would and could not be undercut in the sector. During the period from March to September, making submissions to Mr. Ready and Ms Bell took priority for the union

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[37] Vince Ready and Corinn Bell, *Recommendation Report – British Columbia Lower Mainland Ports*, September 25, 2015, Part 6A (www.tc.gc.ca/eng/policy/acf-acfp-menu-3138.html#e3_a)
[38] Vince Ready and Corinn Bell, *Recommendation Report – British Columbia Lower Mainland Ports*, September 25, 2015, Part 6D (www.tc.gc.ca/eng/policy/acf-acfp-menu-3138.html#e3_a)

ahead of negotiating rates and concluding collective agreements. After the report, working toward implementation of the recommendations took priority.

[70] At the same time, there was a number of current and recurring issues identified by Mr. Ready and Ms Bell that required attention and resolution.

> It is integral to BC and Canada's economy, as well as all stakeholders who rely on the port that the current issues be considered to bring stability and certainty to all stakeholders in this industry.
>
> It is apparent that a number of the issues that gave rise to the 1999 and 2005 disputes still persist. The main issues facing the current 2014 dispute include:
>
> - Terminal Wait Times;
> - Utilization of Night Gates;
> - Terminal Gate Compliance Initiative;
> - Terminal Reservations Policy;
> - Terminal Service Level Agreements;
> - Trip Rates for "on-dock" and "off-dock" Movements;
> - Massive Rate Undercutting;
> - Enforcement and Audit Process regarding undercutting;
> - Container Dispute Resolution Program;
> - Moratorium on New Licenses; and
> - Governance (Regulatory Framework and PMV's Truck Licensing System).
>
> Based on ongoing conversations and interactions with stakeholders in this dispute, the problems in the industry have caused and continue to cause deep-rooted frustration. The majority of these issues are linked to and cause the inefficient operations of the ports. Stakeholders commonly express that the terminal wait times, reservation policy, rate undercutting, varying degrees to which drivers are paid fuel surcharge, failure to pay for "third leg trips", lack of an industry-wide auditing system, and lack of proper enforcement of audit judgments are at the foundation of the present dispute.[39]

[71] While the provincial government was preparing legislation and regulations and agreements were being made for the provincial government to exercise authority in areas of federal jurisdiction, Port Metro Vancouver was overhauling its truck licensing system. A new system was to take effect February 1, 2015. The number of licenses would be reduced.

[72] Twenty-eight companies with licenses under the former system did not receive licenses under the new system. In April, they successfully challenged the decisions to

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[39] Vince Ready and Corinn Bell, *Recommendation Report – British Columbia Lower Mainland Ports*, September 25, 2015, Part 3(a) (www.tc.gc.ca/eng/policy/acf-acfp-menu-3138.html#e3_a)

refuse them licenses.[40] Despite the success, one of the companies whose employees were represented by the union, Forward Transportation Ltd., did not apply for a license.

[73] Both employers in this arbitration successfully applied for licenses. As part of the application process, Shinda Aheer and Gurpreet Shoker on behalf of the employers swore statutory declarations in January 2015 that no money was owed to a trucker under the "Container Trucking Legislation" and that the applicant had not engaged in any prohibited activity under the legislation.

[74] Mr. McGarrigle testified he understood these declarations were included by Port Metro Vancouver to ensure the back payments were made. Neither employer had made the payments. Neither informed the union they did not intend to make back payments for any reason. The new licenses were effective February 1, 2015.

(d) *Container Trucking Act* and *Regulation* (December)

[75] The *Container Trucking Act*, introduced October 23, 2014 and in force December 19, 2014, created a governing agency called the British Columbia Container Trucking Commissioner.[41] The Commissioner is the licensing authority for "container trucking services." The authority to set initial minimum hourly, trip and other rates and fuel surcharge is delegated to the Lieutenant Governor in Council. If the initial rates and fuel surcharge are repealed, the Commissioner is authorized to order minimum rates and fuel surcharge.[42]

[76] Initial minimum rates and fuel surcharge were established by the *Container Trucking Regulation*.[43] The JAP rates of $25.13 and $26.28 were included. Regulations 19, 22 and 23 require retroactive payment as a condition of having a license:

> **Back pay**
>
> 19(1) On the date this regulation comes into force, it is a condition of every licence that the licensee pay each trucker who performed an on-dock trip on behalf of the licensee on or after April 3, 2014 any amounts owed under this section.
>
> (2) A trucker is owed the difference, if any, between the following:

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[40] *Goodrich Transport Ltd. v. Vancouver Fraser Port Authority (c.o.b. Port Metro Vancouver)* [2015] F.C.J. No. 572
[41] S.B.C. 2014, c. 28
[42] S.B.C. 2014, c. 28, s. 22
[43] B.C. Reg. 248/2016

(a) the amount the trucker would have been paid for container trucking services performed on behalf of the licensee on or after April 3, 2014 if this regulation had been in force on the date the container trucking services were performed;

(b) the amount the trucker was in fact paid for the container trucking services, not including amounts the trucker was paid as a fuel surcharge.

(3) An independent operator paid per trip is owed the difference, if any, between the following:

(a) the amount the independent operator would have been paid for any on-dock or off-dock trips performed on behalf of the licensee on or after April 3, 2014 if this regulation had been in force on the date the trip was performed;

(b) the amount the independent operator was in fact paid for the on-dock or off-dock trip, not including any amounts the independent operator was paid as wait time remuneration or fuel surcharges.

Back fuel surcharge for independent operators

22 On the date this regulation comes into force, it is a condition of every licence that a licensee pay each independent operator who performed container trucking services on behalf of the licensee on or after March 27, 2014, the difference, if any, between the following:

(a) the amount the licensee would owe the independent operator in fuel surcharge if this regulation had been in force when the independent operator performed the container trucking services on behalf of the licensee;

(b) the amount the licensee paid the independent operator for the fuel surcharge.

Wait time remuneration

23 On the date this regulation comes into force, it is a condition of every licence that a licensee pay each trucker who performed container trucking services on behalf of the licensee on or after April 3, 2014, and is, or was, paid per trip, all amounts paid to the licensee as wait time remuneration.

[77] While these regulated back payments reflected the view of Mr. Ready, Ms Bell, the union and others following the JAP and return to work, some companies and employers had a different perspective, which I sought to capture in an earlier decision.

> Is it out of kilter from either a business or fairness perspective to legislate a license condition that some drayage companies pay drivers an additional amount for past shipments for a nine month period during which the companies set rates for customers who will not pay more for those services? Is this public policy enacted to redress a wrong or demonstrate fairness to drivers to achieve ongoing stability? In the entire scheme, was there any trade-off between future and retroactive payments?[44]

[78] A contrary less transactional and more contextual perspective is that the price of ending the work stoppage and having a resumption of work and establishing ongoing stability was immediate, universal and enduring implementation of the first increases in rates since 2006, which had eroded for many drivers.

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[44] *Aheer Transportation Ltd.* [2016] B.C.C.A.A.A. No. 6 (Dorsey), ¶ 10

[79] What would be the view of the British Columbia Container Trucking Commissioner?

5. Seeking Enforcement of Back Payment by the Commissioner (2015)

[80] The first Commissioner was appointed February 16, 2015.

[81] On July 14, 2015, Mr. McGarrigle met with John Bourbonniere of Harbour Link Container Services Ltd. The union had displaced Canadian Owner Operators Workers Association Local 2001 in June 2014 and was party to an inherited collective agreement, which it was seeking to renew. Mr. Bourbonniere confirmed Harbour Link had not made back payments to its 90 or so bargaining unit members. It was not in compliance with the *Regulation*. Apparently, no other company was either.

[82] The union made a written complaint to the Commissioner dated July 17, 2015. Mr. McGarrigle's references included the statutory declaration in the licensing process. He wrote:

> The Union is concerned that Harbour Link and other companies have not complied with requirements for retroactive pay that are payable by law under the Act and Regulations. Nowhere in the Act or Regulations does it state that payment of these monies can be deferred or deferred indefinitely. The ongoing failure to pay retroactive amounts is at the direct expense of drivers and owner operators who are owed this money as a matter of law.
>
> The Union Is further concerned that monies owing to drivers and owner operators are being withheld, contrary to the law, while efforts are made to try to change the law. Any cancellation or change regarding retroactive pay owing would be in complete and flagrant violation of the spirit and letter of the Joint Action Plan. We are very concerned, additionally, that discussions and representations on this subject matter may be occurring which may impact our members and we have not had notice of such discussions, we have not been invited to participate, and we have not had any involvement in any such discussions. This raises two issues, one of which is a straight forward matter of enforcement, and one of fairness.

[83] Mr. McGarrigle quoted a statement the Minister of Transportation made during debate of the *Act*. The full statement in context is:

> Hon. T. Stone: Again, our number one priority here is to fulfil the commitments that have been made in good faith to the truckers. The rates — hourly and trip — and fuel surcharges are all well known, well understood, have been in the public domain for the better part of this year and were reinforced through the recommendations that came out of the Ready-Bell report. Those rates will form the starting point of this regulation.[45]

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[45] *Debates of the Legislative Assembly*, Vol. 17 No. 10, November 18, 2014 (A.M.), p. 5371. The union achieved recovery through the Office of the Commissioner and grievance-arbitration. See *Harbour Link Container Services Inc.* [2016] B.C.C.A.A.A. No. 57 (Dorsey)

[84] The union received reports from upset members that the two employers in this arbitration had not made back payments. Mr. McGarrigle wrote Messrs Aheer and Shoker on July 20, 2015 about "Back Pay Owing to Drivers" quoting the statutory declaration, referring to the *Regulation* and asking for confirmation payment had been made. Neither employer replied.

[85] At the same time, the website of the British Columbia Container Trucking Commissioner gave some companies solace that back payments might not be enforced. The History and Mandate page describing the JAP expressly disagreed with the union's view. It stated:

> Labour's interpretation of the AP is that all rates will be retroactively applied (including off-dock and hourly rates). However, the AP is not prescriptive with respect to retroactively applying to all rates – for example, the off-dock rates the AP states that "a mechanism will be put in place" to pay off-dock rates.

[86] On the provincial rate regulations, the website stated: "Provincial regulations only apply a requirement for retroactive payment to on-dock moves for Independent Contractors paid by the trip and the fuel surcharge."

[87] A website section on "Provincial Rate Changes" stated:

> On January 28th, the Province announced it would make changes to the rates. The Province agreed to remove the $50 rate for moves within five kilometers and the $40 trip rate for employee drivers and the hourly rate provision for owner operators.
>
> On May 13, 2015, an Order of the Lieutenant Governor in Council amended the Container Trucking Regulation, B.C. Reg 248/2014 (the "Regulation").
>
> Section 22 (3 & 4) of the Act stipulates that, in the event the Lieutenant Governor in Council repeals the initial minimum rates, the Commissioner may establish new rates. It is envisioned that the Lieutenant Governor in Council would repeal all or some of the rates at the recommendation of the Commissioner.
>
> Before undertaking any further rate changes, the Commissioner will discuss/canvass labour and industry ~~and~~ [on] proposed rate changes and communicate any changes.

[88] At the same time, in response to a confidential complaint against AC Transport Ltd., the Commissioner concluded a payroll audit back to April 2014 and determined amounts were to be paid to drivers for the movements and rates accepted to have been retroactive.

> In an interim audit report that the Commissioner's auditor sent to AC Transport on August 14, 2015, the auditor noted she had no information that would cause her to apply the lesser hourly rate, and accordingly <u>she had audited to a benchmark of $26.28 per hour</u> for the 37 drivers who had not been paid that rate throughout the audit period. The audit report attached a detailed spreadsheet of calculations for each company driver, a summary table which showed the total owed to each driver, and the grand total owing,

> which was $36,373.54. The adjustment amount was entirely attributable to the difference between the two rates of pay for the 37 drivers.
>
> AC Transport did not dispute the auditor's calculations, and the next day provided the auditor with copies of adjustment cheques for company drivers in the amounts specified in the interim report, totaling the correct amount ($36,373.54). The cheques were dated August 15, 2015.[46] (emphasis added)

[89] Perhaps due to the website postings, there were issues about the scope of retroactivity or back payments in mid-2015. In the Petition judgment, the court wrote:

> Such was the degree of vagueness and ambiguity in the language of s. 22(2) that well into 2015 the Commissioner himself was interpreting the Act in the way that is now being argued by the petitioners. They have provided copies of pages from the Commissioner's website that, according to the affidavit of Mr. Aheer, the proprietor of the first-named petitioner, were printed in November of 2015. Under the heading "Joint Action Plan" in the "History & Mandate" section of the site, the page states that the Plan "is not prescriptive with respect to retroactivity applying to all rates". In the same section, under "Provincial Rate Regulations" it states:
>
> > Provincial regulations only apply a requirement for retroactive payment to ondock moves for Independent Operations paid by the trip and the fuel surcharge
>
> (Those were of course the changes created by the Plan that were reflected in the federal regulation.)
>
> It was only after the first commissioner resigned in September of 2015 and Mr. Ready and Ms. Bell were appointed as acting commissioners in October that an interpretation that imposed retroactivity across the board for the rates in the Act was applied.[47]

[90] The Commissioner resigned September 15, 2015.

[91] On September 30th, Mr. McGarrigle wrote Mr. Shoker about back payment. Mr. Shoker replied October 13th: "Sorry for the late reply. Audit is ongoing for our company and commissioner office asked for drivers and owner operators paperwork from April 3, 2014. We will pay back once audit is completed." There was no stated reservation about making the back payment or issue of ambiguity about what was to be paid.

[92] Ms Bell and Mr. Ready were appointed October 6, 2015 as Acting Commissioner and Acting Deputy Commissioner. Enforcement of back pay was a priority for them.

[93] On November 5, 2015, they wrote a Compliance Memo to all licensees underscoring the need for compliance with retroactive payments. They wrote: "At our Advisory Committee meeting on November 4, 2015 we advised the participants that an

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[46] *AC Transport Ltd.* (CTC Decision No. 3/2015), ¶ 6 - 7 (http://obcctc.ca/wp-content/uploads/2016/12/CTC-Decision-No.-3-2015-AC-Transport-Audit-Decn-FINAL.pdf)

[47] *Aheer Transportation Ltd. v. Office of the British Columbia Container Trucking Commissioner,* [2017] B.C.J. No. 1287, ¶ 47-48

issue requiring immediate attention in the industry is the issue of retroactive pay. Our office continues to receive complaints on the non-payment of wages." Messrs. McGarrigle and Bourbonniere were members of the 17-person industry advisory committee on November 4th.

[94] The Compliance Memo includes reference to declarations made to obtain a new license and administrative penalties:

> It is therefore in the interests of all licence holders to ensure that, consistent with the statutory declaration they signed for the purpose of obtaining their licence, they are in full compliance with the Act, the Regulation and their licence, including payment of retroactive pay back to April 3, 2014.
>
> Licence holders who voluntarily bring themselves into compliance in a timely way to the satisfaction of the Commissioner are far less likely to incur penalties for non-compliance than those who fail to do so. Licence holders who do not voluntarily bring themselves into compliance are far more likely to incur penalties for non-compliance, consistent with the language and purpose of the Act. [48]

[95] License suspension or cancellation and administrative fines up to $500,000 could be imposed if the payments were not made. Regulation 28 states:

> The maximum administrative fine the commissioner may impose on a licensee under section 34 (1) (c) of the Act is the following:
>
> (a) in the case of a contravention of the Act, regulations or terms and conditions of the licensee's licence relating to the payment of remuneration, wait time remuneration or fuel surcharge, $500,000;
>
> (b) in any other case, $10,000.[49]

[96] The union considered the Compliance Memo was crystal clear. Mr. McGarrigle believed the resolve of the Acting Commissioners to enforce back payments ended a threat that a sectoral work stoppage could recur if the promise made to end the 2014 work stoppage was not fulfilled. He understood the total back payment, including hourly rates, increased on-dock Ready Rates and payment for off-dock or non-port container movements, was approximately $2m.

[97] On November 6th, Mr. McGarrigle emailed a copy of the Compliance Memo to Messrs Aheer and Shoker and representatives of the other employers whose employees the union represented.

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[48] Office of the British Columbia Container Trucking Commissioner (http://bc-ctc.ca/wp-content/uploads/2015/11/2015-11-05-Compliance-Memo.pdf)
[49] *Container Trucking Regulation*, B.C. Reg. 248/2014, s. 28

> You have been saying that you will take direction from the Commissioner on retro pay. That direction is now crystal clear as discussed in the Drayage Advisory Committee meeting and with the attached memo from the Commissioners.
>
> Please advise when the Company will pay the retro and provide a summary list of all funds owed to our members without any further delay. We are not prepared to take no for an answer again and will take the appropriate action if that is your position.
>
> We also request that the Company provide dates that you are available for the continuation of bargaining.

[98] Mr. Shoker replied November 9th: "We are calculating the amount on our end and also waiting to hear [from] the auditors' calculation on retro. I left voice mail today for the auditor waiting for his call. After figuring out we will start paying retro pay soon. Update you once I get all info."

[99] By November 16th, some companies had made the back payments and the Acting Commissioners were pursuing compliance by all.

> Further to our message on November 5, 2015, we write for two reasons.
>
> First, we would like to thank those in the industry who have already voluntarily paid the retroactive fee owing to drivers in their organizations. We would also like to acknowledge those who have contacted the Office since November 5, 2015 to advise that they intend to voluntarily pay what is owing to drivers in the very near future. For those who have contacted the Office to request that the retroactive pay be waived or that alternate solutions be canvassed to off-set the retroactive payments, please be advised that the Office has ~~being audited~~ [been auditing] to the Container Trucking Act and Regulation as written and, in fairness to those in the industry who have complied with the retroactive payment, will continue to do so in the future. As previously stated, license holders who voluntarily bring themselves into compliance <u>in a timely way</u> to the satisfaction of the Commissioner are far less likely to incur penalties for non-compliance than those who fail to do so. Please see section 34 of the Act, which sets out the penalties that can be imposed for the failure to comply.
>
> Second, we write to advise that the Office will continue to perform audits. As part of the audit process, the Office will be directing a number of firms pursuant to s. 31 of the Act to provide a compliance letter for employee drivers from a Certified Professional Accountant pursuant to Appendix D to Schedule 1 of the Container Trucking Services License. In the coming weeks and months, a number of companies will be asked to retain a Certified Professional Accountant from an established accounting firm to provide a compliance letter confirming that companies have:
>
> (a) duly made all source deductions and WCB submissions respecting a Trucker who is an Employee of the Licensee within the meaning of the meaning of the Employment Standards Act, RSBC, chapter 113;
>
> (b) not set off or deducted Business Costs from Wait Time Remuneration or Compensation owed to a Trucker pursuant to the Container Trucking Legislation;
>
> (c) not received, directly or indirectly, a financial set-off, commission or rate deduction or rebate from a Trucker employed or retained by the Licensee; and,
>
> (d) paid all Truckers employed or retained by the Licensee in accordance with the covenants in this Licence and the Container Trucking Legislation

> Please note that the auditors will continue to conduct audits in conjunction with the above and will be performing spot checks to verify the information contained in the compliance letters provided. Failure to comply with the direction to provide such compliance letters, will result in penalties pursuant to the Act.[50]

[100] There were payment questions about the scope of "container trucking services" and whether trips in specific circumstances were included and required payment of minimum rates and fuel surcharge before or after the *Regulation* was made. These involved interpretations of the *Act* and *Regulation*. Mr. McGarrigle characterized the issues as more unhappiness by the companies and less about ambiguities. He did acknowledge there might be ambiguity about whether benefit costs are included in the rates. This and other issues were addressed in the auditing process.

[101] If there were ambiguities, they were not acknowledged by the Acting Commissioners and they were not an impediment to payment by many companies. None was raised by Aheer Transportation Ltd. and Sunlover Holding Co. Ltd. in communications with the union or later in collective bargaining.

6. Union Strengthens Back Payment in Collective Bargaining (November)

[102] Mr. McGarrigle considered the situation was finally appropriate to resume negotiations for a pattern agreement that gave no concession to any employer delinquent in its back payments and achieved enforcement of the JAP.

[103] He testified the Acting Commissioners' commitment and resolve to enforcement was what the union wanted before proceeding with collective bargaining. If the union negotiated enforceable rates without Commissioner resolve to enforce back payments and rates paid by non-union companies, the employers with whom it entered into collective agreements would be at a competitive disadvantage. Mr. McGarrigle wanted to demonstrate collective bargaining could work in this sector and not be a detriment to a licensee.

[104] The union held a meeting of bargaining unit employees on Sunday, November 22nd. There was a decision to resume strikes if necessary. On Monday, there was a legal strike at Port Transport Inc. On Tuesday, Mr. McGarrigle sent proposals for a new collective agreement to each employer. The covering email states:

> Please find attached the Union's proposals for a new collective agreement ….

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[50] http://obcctc.ca/wp-content/uploads/2016/12/2015-11-16-Message-to-Industry.pdf

> These proposals contain significant changes to our original proposals and would result in a collective agreement that expires in July 2018.
>
> As you may know, at a general meeting last Sunday, our members confirmed their willingness to stop work and begin picketing if an agreement cannot be reached. We are now entering our second day of a work stoppage at Port Transport and will escalate at other firms in the very near future if required.
>
> These terms are being offered today to all VCTA-certified companies and are based on reaching an agreement without a work stoppage. We hope to avoid a dispute with your Company and reach an agreement without any further delay whatsoever.
>
> We are therefore available to meet to answer any questions you have tomorrow, November 24 or 25 beginning at 10:00 a.m. at our offices in New Westminster.
>
> Please advise if you will attend as soon as possible.

[105] On Thursday, November 26th, the negotiator for Aheer Transportation Ltd. sent a lengthy email to Mr. McGarrigle. The message was that a rollover of the existing agreement with the imposed rates was preferable to what the union was proposing.

> On behalf of our owner, Shinda Aheer, I want to open by reporting that, like the Union, our company would prefer that we not be operating under an expired Collective Agreement. Our old agreement (and all its clauses and conditions), thanks to the BC Labour Code, has remained in effect, protecting us with stability and the drivers with protection, even though it was expired. Nevertheless, Aheer Transportation Ltd. is certainly supportive of sitting down with the Union, and renewing our existing Collective Agreement at this juncture.
>
> … In short, our Company feels that the last Collective Agreement which we signed with UNIFOR was a good one. It was good for the Company as we were free to Manage our Business, grow the Company, and provide more work to our increasing group of drivers. And our expired Collective Agreement was also good for our drivers as there were few, if any, grievances.....and moreover, there was a minimum of driver complaints at Aheer Transportation Ltd. …
>
> As stated above, the Company feels that the old Collective Agreement worked well for our drivers and for management. After it expired, it continued to work well for both sides. While it was expired, it should be noted that the new BC Government Laws pertaining to Driver Rates of Pay, the Vince Ready Report, and finally the new Office of the BC Container Truck Commissioner, have all ushered in new strict regulations regarding how rigorously driver jobs are protected by Government, and most importantly, how much Container drivers get paid for their work.
>
> It would be Aheer Transportation's position to keep the existing language in our expired Collective Agreement, and add the New Government Rates of Pay as Appendices attached to our New Collective Agreement going forward. The Company feels this is the best way forward for us and our drivers, as we move into an unstable and fragile economic reality. … By keeping the renewal of our UNIFOR Collective Agreement simple and uncomplicated, we also keep it out of the hands of lawyers, which tends to save time and money for all involved.
>
> That is our position at this time, and we are prepared to sit down with UNIFOR at our mutual convenience, to work out and negotiate our new Collective Agreement. …

[106] There was no expressed reservation about paying the new rates or compliance with the "new strict regulations." There was no mention of retroactivity or the scope or

interpretation of the back payment under the regulations. There was no mention of a legal challenge. Mr. McGarrigle interpreted the "New Government Rates of Pay" to include back payments – a new collective agreement with a retroactive payment.

[107] The next day, Friday, November 27th, the union and Prudential Transportation Ltd. reached a collective agreement. They had a good working relationship and Mr. McGarrigle trusted it's principal, a fellow member of the Industry Advisory Committee.

[108] However, despite the relationship and the recent enforcement resolve of the Acting Commissioners, the union was not willing to rely on continuing or future Commissioner enforcement. It wanted a mechanism for enforcement through expedited arbitration under the collective agreement. The Prudential agreement contains the following article on compliance with the *Act* and *Regulation*.

> **ARTICLE 20 - COMPLIANCE WITH CONTAINER TRUCKING ACT AND REGULATIONS**
>
> **20.01 Container Trucking Act and Regulation as Minimum Standards**
>
> As minimum standards, and by no later than fourteen (14) days after ratification of this Agreement, each Company and all drivers covered under this agreement will fully comply with all provisions of the British Columbia *Container Trucking Act* and its Regulations and with any term of any license issued pursuant to the *Container Trucking Act* or Regulations as they existed on November 24, 2015.
>
> **20.02 Requirement for Automatic Increases**
>
> Any increases to hourly rates, trips rates and/or fuel surcharges issued by the Office of the Container Trucking Commissioner pursuant to the *Container Trucking Act* and Regulations during the term of this Agreement shall immediately become applicable and payable to all drivers covered under this Agreement.
>
> **20.03 No Decreases in Rates and/or Fuel Surcharges**
>
> Any decreases to rates and/or fuel surcharges issued by the Office of the Container Trucking Commissioner pursuant to the *Container Trucking Act* and Regulations during the term of this Agreement shall not negatively affect the compensation of any owner operator or employee covered under this Agreement.
>
> **20.04 Payment of Retroactive Pay**
>
> It is agreed that any owner operator or employee who has not been paid the full amount of remuneration owed based on the *Container Trucking Act* including fuel surcharge payments from March 27, 2014 and applicable payments for on dock and off dock trips or for hours worked from April 3, 2014 pursuant to Article 20.01 shall be paid in full by no later than thirty (30) days after ratification of this Agreement without any holdback or deduction in any manner.
>
> **20.05 Supporting Documentation**
>
> The Company shall provide the Union a summary list of all retroactive payments paid and/or payable under this Article along with the necessary documents to confirm and authenticate correct payment to each owner operator and

> employee. This may include but not be limited to providing copies of the cheques after they have been processed (with original processed cheques made available for inspection upon request).
>
> **20.06 Expedited Arbitration**
>
> Arbitrator Jim Dorsey shall be seized to deal with any dispute arising out of alleged violations of Article 20 and the Parties agree that such disputes should be heard on an expedited basis.

[109] These provisions are comprehensively prescriptive terms incorporating time lines and licensing terms. Article 20.01 anchors future obligations at November 24, 2015 in the event there is legislative or administrative change. Articles 20.02 and 20.03 provide for increases and protect against decreases. There is an agreed back payment period for all rates (on and off dock) in Article 20.04. The provisions seek to capture everything from the JAP and afterwards that was not captured until the *Act* and *Regulation* came into force.

[110] After 5:00 p.m. on Friday, November 27th, Mr. McGarrigle emailed a copy of the agreement to Mr. Shoker. Consistent with past pattern bargaining, he offered to enter into the Prudential six paragraph Memorandum of Agreement and other collective agreement terms when they met the next day at 1:00 p.m. Moments later, he sent a similar email and offer to Aheer Transportation Ltd.

[111] While the union was negotiating with Prudential Transportation Ltd. what it hoped would be a pattern agreement bolstering the enforcement of back payments and the statutory and regulatory regime to maintain stability, some licensees had other plans. Earlier in the year, these licensees established a committee to "assess the merits of commencing a legal challenge against the requirement to settle retroactive pay for non port [or off dock] container moves back to April 3rd, 2014."[51] The Acting Commissioners' November 16th communication had prompted committee meetings on "numerous occasions."

[112] On November 24th, Amrik Sangha, on behalf of the committee that had reached a consensus, sent an email to many licensees giving notice a meeting with lawyers was scheduled for 10:00 a.m. on Friday, November 27th. The 73 persons to whom the email was addressed include a representative of Prudential, Messrs Aheer and Shoker and representatives of other employers with which the union was engaged in collective

[51] Amrik Sangha (Gantry Trucking Ltd.) email dated November 24, 2015

bargaining. It is not apparent from the list that Burton Delivery Service Ltd. and Triangle Transportation Ltd., two companies for which Mr. Aheer was President, are included.

[113] Mr. Sangha's email states, in part:

> The committee believes that a legal challenge will be successful, but the initiation of legal proceedings must be supported by a majority of the Truck tags issued to the TLS Licensee's by PMV. …
>
> Subject to achieving a majority agreement, a legal fund will need to be established, with contributions to the legal fund to be prorated on the basis of truck tags held by each carrier. Once the necessary legal fund is established, Mr. Chafetz will be engaged forthwith to initiate the legal challenge.
>
> Time is of the essence. The Commissioner's Office has refused to listen to us and has issued a final edict – the retroactivity component of the Container Trucking Act and Regulation if we do not take action.
>
> We must achieve consensus now and commence legal action without delay or it will be too late.

[114] Mr. McGarrigle learned about the companies' committee meeting with lawyers before the scheduled meeting with the employers at 1:00 p.m. on November 28th. He regarded the licensees' meeting with lawyers as an "alarm bell." The union needed to act quickly to forestall a legal challenge that might undermine the system put in place since the return to work in March 2014. Perhaps, if the union could keep the 400 or so truck tags in the union's bargaining units from participating and funding then a legal challenge might not proceed. He testified he hoped that with 400 truck tags of the total 2,000 tags held by all carriers taken out of the equation, it would make it more difficult for the committee to gain a majority and fund a legal challenge.

[115] The union could not change the agreement with Prudential, but Mr. McGarrigle was not concerned Prudential would sit on the Industry Advisory Committee and challenge the legislation or Acting Commissioners. The union was on strike against Port Transport Inc. Collective bargaining with Harbour Link was under the *Canada Labour Code*. This left the two employers in this arbitration and four others that were struck in March 2014 and against which the strikes could be resumed. One had not obtained a new license.

[116] On Saturday morning, November 28th, the full union negotiating committee discussed the situation and decided the union need an enforceable commitment from each employer not to challenge the *Act* and *Regulation* and the union would take strike action to obtain the commitment.

[117] The union drafted two additions to the six paragraphs in the Memorandum of Agreement it had signed with Prudential.

> 7. In signing this Memorandum of Agreement, the Company agrees that it will not, in any way, participate in and/or fund any legal challenge to the *Container Trucking Act* and/or its Regulations.
> 8. The Company agrees that it shall not cooperate with and/or perform the work of any customers from another Company certified with Unifor VCTA if there is a strike in effect.

[118] The proposed collective agreements with the expanded Memorandum of Agreement were printed, presented and explained to the employers. Mr. McGarrigle explained these additions to the agreement with Prudential proposed in his emails the evening before. There were caucuses and discussions over several hours. There were employer questions and discussions with the union about weekend and call out rates, but none about paragraph 7 of the Memorandum of Agreement.

[119] At the end of the day, the employers signed collective agreements. Messrs Aheer and Shoker signed for the two employers in this arbitration. Each contained Article 20 and an eight paragraph Memorandum of Agreement. Each collective agreement was ratified within a day. The union issued a press release on Sunday, November 29th announcing the new collective agreements.

[120] The strike at Harbour Link Container Services Ltd. resumed on Monday. A collective agreement, reached in January, includes paragraph 7 of the Memorandum of Agreement.

7. Commissioner and Union Claims for Back Payment (December - January)

[121] The Acting Commissioners issued a "final bulletin" on the retroactive payment on December 11, 2015. All payments were to be made no later than January 22, 2016.[52]

[122] Under the terms of Article 20.04 of the collective agreements, retroactive payment was to be made before the end of 2015.

[123] The union wrote both employers on December 16th asking for supporting documentation in accordance with Article 20.5 of retroactive payments by December

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[52] Last Call for Voluntary Compliance, December 11, 2015 (http://obcctc.ca/wp-content/uploads/2016/12/2015-12-11-Compliance-deadline-Memo.pdf)

22nd. There were no replies. The union grieved under each collective agreement on January 5, 2016.[53]

[124] As he had twice before, Mr. Shoker emailed on January 12th: "We are almost in the final stage to finish paying the Retro to our owner operators. Our audit is about to be done this week and we will pay it by next week." The back payment was not made the following week.

[125] On January 14th, Aheer Transportation Ltd. replied, in part: "… we are making the payments to our drivers. Arrangements have been made. As you know the BC Government is involved in this matter."

[126] The Office of British Columbia Container Trucking Commissioner was pressing for back payment as announced in the December 11th bulletin. Acting Deputy Commissioner Ready made an order on January 28th for Aheer Transportation Ltd. to pay.

> **Re: Notice of Payment Order against Aheer Transportation Ltd. ("Aheer") to Comply with the Container Trucking Act (the "Act") and the Container Trucking Regulation (the "Regulation")**
>
> As you are aware, the Office of the BC Container Trucking Commissioner is conducting an audit of your company following receipt of complaints alleging Aheer has failed to pay the correct wages rates, including especially retroactive wage amounts owing under the Act to its company drivers and owner operators.
>
> I have now received an interim report from our auditor. The report indicates the auditor has made interim audit findings and has discussed these findings with Aheer and has specified the amount of certain adjustment payments to drivers required pursuant to the Act on the basis of her audit to date. Aheer indicated to the auditor that it accepted her findings, and would pay the adjustment amounts required to bring it into compliance with the Act, but Aheer also indicated to the auditor that it would not make full payments in full accordance with the requirements of the Act. In particular, Aheer indicated to the auditor that it would not pay retroactive wages to drivers it no longer employs.
>
> Further, Aheer also indicated to the auditor that it would pay retroactive wages to independent operators and company drivers currently employed by Aheer, but only on a payment schedule of its own design, which commenced in December 2015 and continues for the necessary number of months into 2016. These indications by Aheer are unacceptable and are against both the provisions of the Act, and the related industry memos and decisions that have been issued by the Office of the BC Container Trucking Commissioner in 2015 and 2016.
>
> Section 9 of the Act provides that, if a licensee fails to comply with the Act or the Regulation, the Commissioner may order the licensee to comply promptly or within a period that the Commissioner specifies. In the circumstances, I find it is appropriate to order that Aheer pay the retroactive wage amounts found by the auditor to be owing to drivers pursuant to her audit to date. Specifically, I order that Aheer pay the following

[53] *Aheer Transportation Ltd.* [2016] B.C.C.A.A.A. No. 6 (Dorsey)

> amounts which are the auditor's calculations as of today's date: $82,545.92 for owner operators for the period between April 3, 2014-December 31, 2014 and $59,223.31 for company drivers for the period of April 3, 2014 – July 31, 2015.
>
> The amounts noted above must be paid by no later than 4 p.m. on February 8, 2016. I trust Aheer will begin to take immediate steps to comply with this Order.
>
> Failure to comply with this Order will be viewed as serious non-compliance with the Act, and available penalties under the Act include suspension or cancellation of Aheer's license and the imposition of an administrative fine of up to $500,000. This Order will be published as required by Section 11 of the Act. This Order does not constitute notice of penalty pursuant to section 34 of the Act. However, if there is not compliance with this Order, subsequent notice of penalty will be issued to Aheer.[54]

[127] The next day, Aheer Transportation Ltd. asked if the amount of back payments to former drivers could be paid in trust "pending the outcome of the Petition." The request was denied on February 1st. Aheer Transportation Ltd. paid. Acting Deputy Commissioner Ready issued a compliance letter on February 3rd.

[128] On January 27th, I ordered Sunlover Holding Co. Ltd. to disclose supporting documentation in accordance with Article 20.05 of its collective agreement. The order was amended February 18th and disclosure was made that day. A total of $16,493 had been paid on February 1st and 12th to 11 drivers.

[129] The back pay expedited arbitrations were adjourned April 11th.

> The adjournment is granted because the union's claim on behalf of the employees has been substantially satisfied and the scope of any residual entitlement issues will be able to be arbitrated more expeditiously with less cost for both the union and employer after the Office of the Commissioner has completed its audit and the Petition has been finally decided by the British Columbia Supreme Court, but not a decision on any subsequent appeal.[55]

[130] Since the Petition was dismissed June 30, 2017, the union has brought a further application in the retroactive payment grievances.

8. Employer Unsuccessfully Argues Agreement is Illegal (2016-17)

[131] On January 14, 2016, counsel for Aheer Transportation Ltd. wrote the union, in part:

> Under pressure of collective bargaining your Union insisted and got an agreement that prohibits Aheer Transportation from participating, funding or challenging the Container Trucking Legislation (para. 7). We consider this to be an illegal bargaining proposal and/or too vague to be enforceable. Aheer does not consider itself bound by such a prohibition and will conduct itself accordingly.

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[54] http://obcctc.ca/wp-content/uploads/2016/12/2016-01-28-Aheer-Order-to-Comply.pdf

[55] *Sunlover Holding Co. (Retroactive Pay Grievance)* [2016] B.C.C.A.A.A. No. 24 (Dorsey), ¶ 59

[132] The union grieved the next day informing Mr. Aheer it would be seeking remedies that include damages and referred the back payment grievances against both employers to arbitration.

[133] On January 21st, Sunlover Holding Co. Ltd. applied to the Labour Relations Board for a declaration that paragraph 7 of the Memorandum of Agreement is "void for all purposes." On the same day, it informed it would be among the petitioners in a petition to be filed in the Supreme Court of British Columbia shortly. The union grieved under its collective agreement with Sunlover Holding Co. Ltd. on January 25th.

[134] The two grievances were referred to arbitration on January 27, 2016, but delayed pending a decision by the Labour Relations Board.

[135] Both employers were among the ten petitioners in a Petition filed January 29, 2016.

[136] Mr. Shoker swore an affidavit in support of the Petition on January 22nd. Mr. Aheer swore an affidavit on January 25th in which he deposes he is the President of three petitioners – Aheer Transportation Ltd., Burton Delivery Service Ltd. and Triangle Transportation Ltd. Six other affidavits were filed on behalf of the other six petitioners.

[137] There is no evidence on the number of truck tags held by each of the ten petitioners; whether it constitutes a majority; the portion held by Aheer Transportation Ltd. or Sunlover Holding Co. Ltd.; or whether there was a majority or sufficient funding without their participation.

[138] On April 18, 2016, the Labour Relations Board dismissed the application by Sunlover Holding Co. Ltd.[56] The employer's application for leave for reconsideration was dismissed on May 9, 2016[57] and its application for judicial review of that decision was dismissed March 10, 2017.[58]

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[56] *Sunlover Holding Co. Ltd.* [2016] B.C.L.R.B.D. No. 53
[57] *Sunlover Holding Co. Ltd.* [2016] B.C.L.R.B.D. No. 65
[58] *Sunlover Holding Co*. v. Unifor [2017] B.C.J. No. 500

9. Supreme Court of British Columbia Petition Dismissed (June 2017)

[139] The Petition named the Commissioner and the Attorney General as respondents. No union was named and none was served with the Petition. The Petition was originally schedule to be heard June 27, 2016. The orders sought include:

> 1. A declaration that, upon the true construction of the Container Trucking Act S.B.C. 2014, c. 28, the Container Trucking Act does not authorize the establishment, by regulation, of initial minimum rates that apply retroactively to container trucking services provided before the Container Trucking Act came into force;
> 2. A declaration that sections 19, 22, and 23 of the Container Trucking Regulation, B.C. Reg. 248/2014 are void because they are each ultra vires the Lieutenant Governor in Council;
> 3. If this Court finds that the Container Trucking Act does authorize the establishment by regulation, of initial minimum rates that apply retroactively to container trucking services provided before the Container Trucking Act came into force, a declaration that the obligation upon licensees to pay retroactive rates for off-dock trips under s. 1g(3) of the Container Trucking Regulation, B.C. Reg. 248/2014 is limited to only:
>   a. independent operators;
>   b. paid per trip;
>   c. for off-dock trips performed on or behalf of licensees on or after April 3, 2014;
>   d. in respect only of the first movement of the container or containers that is neither an on-dock trip nor a movement of a container from one location in a facility to a different location in the same facility;
> 4. An order quashing the notices issued by the Commissioner dated December 11, 2015 and January 20, 2016 to the Petitioners requiring compliance with the retroactive pay provisions of the Container Trucking Regulation, B.C. Reg. 248l/2014 by January 22, 2016;

[140] The union applied to be added as a respondent or intervenor. The petitioners applied for direction on whether they had to give notice to each trucker performing services during the back pay period and, if so, how notice should be given.

[141] When these applications were heard in May 2016, the union's certifications to represent employees of Aheer Transportation Ltd. and Sunlover Holding Co. Ltd. had been cancelled in February and March 2016.[59]

> As stated above, Unifor previously represented unionized Truckers under a collective agreement with two of the petitioners in this proceeding, Aheer and Sunlover. It takes the position that, despite being recently decertified and no longer representing Aheer's and Sunlover's drivers, the rights and duties under the collective agreements in place prior to its decertification continue to be enforceable against Aheer and Sunlover. Those collective agreements provide, *inter alia*, for increased rates of pay for Truckers in accordance with the JAP.

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[59] Aheer Transportation Ltd. (www.lrb.bc.ca/reports/2016FEBRUARY_D.htm); Sunlover Holding Co. Ltd. (www.lrb.bc.ca/reports/2016MARCH_D.htm)

> Unifor has filed a grievance pursuant to those collective agreements, which is currently before Arbitrator James Dorsey in related proceedings ("Related Proceedings"). On April 11, 2016, submissions were made in the Related Proceedings. Arbitrator Dorsey adopted Sunlover's position and adjourned the Related Proceedings pending the outcome of this petition on the basis that the grievance may become moot if the petition is successful. …
>
> Even though Unifor's position before Arbitrator Dorsey is that the terms of the collective agreement regarding pay rates for truckers apply regardless of the outcome of this petition, Unifor argues it has a direct interest in the outcome of these proceedings and ought to be joined as a party.
>
> The petitioners take the position that the issues involved in this petition are narrow in scope and simply require the Court to interpret the Act to determine if its wording allows the *Regulation* to require retroactive payments to the Truckers. The purpose of notice under s. 8 of the *Constitutional Questions Act* is to allow the AGBC to argue these sorts of issues on behalf of all British Columbians who may be affected by the outcome of the petition. Adding Unifor as a respondent will add nothing to the legal argument.[60]

[142] The union was added as a respondent.

> Firstly, the outcome of the petition may be determinative of the outcome of the Related Proceedings. In his reasons for adjourning the hearing, Arbitrator Dorsey correctly confirmed that it remains his role to interpret the language of the collective agreement between Unifor and Sunlover. Nonetheless, the outcome of this petition could have a significant impact on the Related Proceedings. I find it significant that they have been adjourned until this petition has concluded. At the very least, I anticipate that if the petitioners are successful on this petition, they will argue that it ought to be determinative of the Related Proceedings. Therefore, an issue exists between Unifor and the petitioners that is intimately connected with the subject matter and the relief claimed in the petition. On this basis alone, Unifor ought to be added as a party to this petition.
>
> Secondly, Unifor argues that bringing the petition violates agreements between itself and two of the petitioners (Sunlover and Aheer). The collective agreements executed on November 28, 2015, committed Sunlover and Aheer not to engage in any legal challenges to the *Act* and/or its regulations. I understand that counsel for the petitioners takes the position that this clause was agreed to in bad faith and has brought a complaint to the BCLRB to have it declared unenforceable. The complaint was dismissed in *Sunlover Holding Co. Ltd. and Unifor, Local Union No. VCTA*, [2016] BCLRB No B53/2016. However, Sunlover has applied for reconsideration of that decision. This is an issue that may have an impact on Sunlover's and Aheer's ability to challenge the *Regulation* and Unifor should have the ability to argue the point at the hearing of the petition.
>
> Finally, I note Unifor's argument that the core purpose of the petition is the "non-payment and/or recovery of retroactive pay that was payable to Unifor truckers, including Unifor truckers employed at Sunlover and Aheer." While it is not necessary at this stage to comment on the petitioners' motives for bringing this petition, the evidence before me does not rule out this scenario. It is possible that if the petition is allowed, the petitioners will seek reimbursement of the already paid retroactive fees from the Truckers, some of whom are represented by Unifor. This could involve significant sums of money having to be repaid by Truckers and could have serious financial consequences to them.
>
> **********

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[60] *Aheer Transportation Ltd. v. British Columbia (Container Trucking Commissioner)* [2016] B.C.J. No. 1035, ¶ 25 - 28

> … Although Unifor does not represent the Truckers as a whole, it represents a sufficient number of them that their interests will be heard and, I have no doubt, ably represented.
>
> Accordingly, even though the Truckers' interests *may* be affected by the outcome of this petition, I am satisfied that their interests will be protected by Unifor and the respondents' involvement. I exercise my discretion and order that the petitioners are not required to personally serve the Truckers with the petition or the supporting material.
>
> **********
>
> Regarding Application #2, I order that the petitioners do not have to serve the petition or supporting affidavits on the Truckers. However, within seven days, the petitioners must give notice of this proceeding to UTA by emailing a copy of the petition, response and these reasons to its offices and must apply for an order for substitutional service on the Truckers.[61]

[143] The union's subsequent Response to the Petition concludes as follows:

> **Other**
>
> 59. Finally, on the issue of the jurisdiction of this court, Unifor submits that two of the Petitioners, Sunlover and Aheer, are not properly before the court. Both companies expressly agreed as a condition of their new collective agreements with Unifor that they would "not, in any way, participate in and/or fund any legal challenge to the Container Trucking Act and/or Regulations".
>
> 60. Furthermore, Unifor's position in live arbitration proceedings before Arbitrator James Dorsey Q.C. is that the retroactive pay provisions under the CTA and Regulation have been agreed to and are locked into the collective agreements reached between Unifor and those companies, and as a result, the outcome of this Petition will not affect Sunlover and Aheer's liability for retroactive pay.
>
> 61. All of this litigation arises from collective agreements and involves the interpretation and application of collective agreements and accordingly, falls outside the jurisdiction of this Court to determine. It is important, however, that this Court be aware that Unifor does not concede that Sunlover and Aheer properly have standing in these proceedings and that the jurisdiction of this Court over their dispute is contested.[62]

[144] The Petition hearing did not proceed in June 2016 because there was no judge available to hear it. The hearing was held September 20 and 21, 2016. In the June 30, 2017 judgment dismissing the Petition, the court did not address the issue of its jurisdiction or the standing of the two employers. On costs, the court decided:

> Unifor seeks its costs of both this hearing and its successful application to be added as a party. There is no reason in principle why Unifor, having been added as a party and then participating fully in the hearing, would not be entitled to receive its costs, but if the petitioners wish to be heard on that issue then they and Unifor should arrange to make submissions, either orally or in writing as they prefer. In the absence of such submissions Unifor will receive its costs of both hearings, at the ordinary scale of difficulty.[63]

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[61] *Aheer Transportation Ltd. v. British Columbia (Container Trucking Commissioner)* [2016] B.C.J. No. 1035, ¶ 44 – 46; 61 – 62; 67

[62] Unifor Response to Petition, June 22, 2016, Vancouver Registry No. S-161081

[63] *Aheer Transportation Ltd. v. Office of the British Columbia Container Trucking Commissioner,* [2017] B.C.J. No. 1287, ¶ 116

[145] The petitioners did not appeal the dismissal of the Petition.[64]

10. Union and Employers' Submissions

(a) Union Submissions

[146] The union submits each employer participated in a legal challenge in contravention of paragraph 7 of its Memorandum of Agreement settling the collective agreements for the purpose of avoiding back payments to which it agreed.

[147] Aheer Transportation Ltd. gave the union notice through counsel on January 14, 2016 it was not going to comply with paragraph 7 of its Memorandum of Agreement and would "conduct itself accordingly."

[148] Sunlover Holding Co. Ltd. sought to have the agreement nullified to shelter it from its contravention.

> The companies were raising this issue as to the legality of MOA para. 7 not as some general and abstract complaint which had occurred to them *a propos* of nothing in January 2016, but because they knew their actions in preparing for the CTA Petition at that time were contrary to the language of the collective agreements they just entered into. They were asserting a legal justification for what was a clear violation of the contract language: that the language was an illegal proposal. They knew what the contract language said. If the contract language did not prohibit their launching the CTA Petition, there would have been no point to Aheer disputing the legality of MOA para. 7 in its letter to Unifor, and no point to Sunlover challenging the legality of MOA para. 7 at the BCLRB.[65]

[149] Both employers participated in a legal challenge by being a party to and supporting the Petition seeking to have sections of the *Container Trucking Regulation* declared void and beyond the authority of the Lieutenant Governor in Council.

> … these violations were clear, flagrant, and constituted a repudiation of a key provision of the collective agreements whose purpose was to bring certainty, finality and stability to a collective bargaining process, a process which had extended over a lengthy period of time and in addition to the efforts of Unifor, called for an unprecedented level of intervention from the federal and provincial authorities to stabilize the labour relations environment following a major Port shutdown.
>
> [The employers] …were not, as they have argued without success, exercising some inalienable right to challenge legislation they disagreed with. They were seeking to capitalize on a newly reached collective agreement that assured they would not be crippled and disadvantaged *vis a vis* their competitors with strike action, while at the

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[64] Among the remedies the union seeks in this arbitration, heard before the judgment dismissing the Petition, is an order the employers not fund or participate in any further proceedings, including an appeal of the judgment. Because there has not been an appeal from the judgment dismissing the Petition and the union's certification for each employer has been cancelled, I have concluded such an order is not appropriate. For this reason, this remedial request is not addressed later in this decision.

[65] Union Final Argument, ¶ 141

> same time engaging in a collateral attack on key terms incorporated into that bargain with the intent of undoing them.
>
> In doing so, Aheer and Sunlover acted in breach of a significant term of their collective agreements, with industry-wide implications, they acted contrary to the broader public interest in rational collective bargaining with final and binding agreements, in an important sector plagued with undercutting and impunity, and they acted in bad faith.
>
> … the conduct of Aheer and Sunlover in supporting a legal attack intended to undo a bargain they freely and fully entered into, and contrary to the terms of that very bargain which says they would not, calls for redress that will restore credibility to collective bargaining, and send a denunciatory message to an industry which has long suffered the depredations of employers who do not honour agreements or regulatory requirements.[66]

[150] The union submits the meaning and intent of the agreement was clear and unequivocal in the circumstances of the ongoing events in which it and the provisions of Article 20 were agreed. With the passage of time since the return to work after the high-profile JAP, back payment had become a momentous issue for the union, the drivers and the Office of the British Columbia Container Trucking Commissioner. It was not to be subject to exemptions or private deals, which had been a cause of the recurring unrest in the container trucking drayage sector. Back payment was an especially prominent issue at the time of the appointment of the Acting Commissioners in September 2015.

[151] In this context, with knowledge drivers were frustrated they had not been paid and employers discussing a legal challenge to back payment, the union proposed and each employer agreed in November that: “In signing this Memorandum of Agreement, the Company agrees it will not, in any way, participate in and/or fund any legal challenges to the *Container Trucking Act* and/or its Regulations.”

[152] The intention, the union submits, was to prevent collateral attacks by employers with whom the union had collective agreements on the regulatory scheme on which the collective agreements were built and included Article 20.04 – Payment of Retroactive Pay. The 30-day period would finally bring to an end the employers’ delayed implicit promises since March 2014 and more recent express promises and deliver payment to the drivers.

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[66] Union Final Argument, ¶ 2 - 5

[153] The agreement not to participate in or fund a legal challenge was to provide finality to a longstanding issue and avoid further delay in making back payments. Delayed or non-payment is, in effect, a form of undercutting.

[154] The union submits there was no indication from either employer during collective bargaining that it would not or did not intend to comply or that it understood the language to allow some, but not other, challenges. There was no communication from either employer it believed the back payments under the *Act* and *Regulation* and to which it agreed in Article 20 were illegal for some reason.

[155] To the contrary, Mr. Shoker on behalf of Sunlover Holding Co. Ltd. had said earlier in the month that payment was delayed because it was calculating the amount and payment would be made soon. The union accepted the employers' express and implicit promises and agreement to the terms of the new collective agreement. It did not resume the lawful strike with either employer. The employees ratified the agreements.

[156] The union submits the challenge to the *Act* and *Regulation* brought by the employers was a challenge to the minimum rates for the period to be paid by all licensees and had been paid by many licensees. It was an effort by the employers to undercut the minimum rates. The effort by Aheer Transportation Ltd. to have the back payment amount held in trust and returned if the Petition was successful was consistent with its undercutting intention.

[157] The union submits both employers participated in and funded the legal challenge. Each is a named petitioner and swore an affidavit in support of the Petition. Although access to the complete facts is protected by solicitor-client privilege, it is reasonable to infer each employer funded the challenge and that the cost of the challenge was not paid by only the other petitioners or none of them.

> … the facts reasonably demonstrate, on the balance of probabilities, that in launching the CTA Petition and participating in it as parties, Aheer and Sunlover "funded" a legal challenge to the Regulations, contrary to MOA para. 7. This is not public interest litigation that they have launched. They are not acting on behalf of a charitable cause. They want to avoid or nullify an obligation under the Regulation to pay back pay to drivers for the specific period covered under sections 19, 22 and 23 of the Regulation. The panel can reasonably presume that they have agreed to fund this challenge, and that presumption is also supported by evidence of the arrangement to fund it set out in the email [of November 24, 2015 from Amrik Sangha].[67]

[67] Unifor Final Argument, ¶ 139

[158] The union submits there was no action it could take in the court or at arbitration to enjoin the employers' participation and funding. The court had no jurisdiction to interpret and enforce the collective agreement and an arbitrator was unlikely to strike or enjoin a party from participating in a civil proceeding. Further, there were preliminary objections and applications by the employer to be decided. The union's only remedy is damages for breach of an important provision of the collective agreement; damages for employer bad faith in administration of the collective agreement; and punitive damages.

[159] The union submits the strikes were suspended and the employees worked on the expectation the JAP would be implemented and they would be paid from their return to work. The employer failed at any time to state anything to the contrary from March 2014 to November 2015 and remained silent during collective bargaining when they expressly agreed to make the back payments and not challenge the *Act* or *Regulation*.

[160] During the tenure of the first Commissioner, because enforcement of back payment was slow and uncertain the union delayed collective bargaining to ensure collective agreements were built on sectoral stability and rate certainty. It could not conclude collective agreements with some employers unsure minimum rates would be consistently enforced in the sector.

> Then, in early November 2015, the Commissioner's office indicated its commitment to enforcing the retroactive pay provisions and was now moving forward with audits, with a view to enforcement.
>
> It was in this context that bargaining between Unifor and the Employers went forward in earnest that month. Drivers had had enough of the delay in paying out retroactive pay, they wanted collective agreements, the Province had indicated the importance as a matter of labour relations stability in the sector of concluding agreements, and the Regulator had shown a commitment to ending the delay around enforcement, and had indicated an unwillingness to cut deals with companies over the retroactive pay issue. Retroactive pay was going to be enforced and it was to be enforced consistently, it appeared.
>
> Unifor for its part, was aiming to achieve a pattern bargain and to demonstrate a commitment to consistent enforcement. Such conditions would encourage settlement. It would deprive Unifor certified companies of the ability to undercut one another, and enhance Unifor's credibility as a bargaining agent among newly certified companies, and long standing Unifor certified companies. Unifor remained in a position, as the Employers were well aware, to back its demands by withdrawing labour at any time.[68]

[68] Unifor Opening Statement, ¶ 28 - 29

[161] During this time, the union submits, each employer led both the union and Office of the British Columbia Container Trucking Commissioner to believe the back payments would be made. Throughout this time, each employer received the benefit of a belief they created that they would be compliant. They swore declarations in support of licensing in a more restricted competitive sector that they would comply with the *Act* and *Regulation*. Mr. McGarrigle quoted this commitment in his July 20, 2015 letter to each employer.

[162] After the employers entered into collective agreements ending the strike threat that their silence had averted, they persisted in delay beyond the agreed 30 days to make payment. Only then did they end their silence and declare their intention not to pay and to participate in and fund the legal challenge. By this time, the union could not strike and its only recourse was grievance-arbitration. This was prolonged deception and bad faith in dealing with the union and in the administration of the newly negotiated collective agreement.

[163] The union submits the employers' deception was deliberate. They knew they were in violation of the collective agreement and sought to avoid their commitment by asking the Labour Relations Board to declare the agreement void. "If the language was simply too vague to be understood or fairly enforced, as they appear to assert, there would be no need for them to attempt to have it removed from the collective agreement by order of the BCLRB."[69] In contrast, other employers who made the same agreement did not participate in the legal challenge and abided by the choice they made when they signed their collective agreements. These two employers simply sought a financial gain and competitive advantage over other employers in the sector.

[164] The union submits the violation of the collective agreement was also an attack on the credibility of the union as a bargaining agent. The employers ignored the collective agreements and accused the union of bad faith before the Labour Relations Board while delaying and attempting to defer making the back payments. "Moreover, the manner in which the Employers bargained with Unifor and then turned around and undertook a

[69] Unifor Opening Statement, ¶ 39

collateral attack on retroactive pay obligations, was an attack on the other compliant Employers in the sector and on the stability of the sector at large."[70]

> Again, it is not that Aheer and Sunlover were deprived of some rightful legal option. They had that option open to them. Rather, the appropriate time for them to exercise that option, given their obligations under the Code to bargain in good faith and adhere to a collective agreement entered into, was NOT after concluding final and binding agreements saying they would not, it was NOT after enjoying months of labour peace under the pretext that they took no issue with their statutory obligations, it was NOT after having made in bargaining assurances to the Union that they would be compliant and pay these monies.
>
> The time for exercising this option was NOT after having sworn statutory declarations and entered into licensing agreements representing that they were compliant and would be compliant. The time for exercising this option to challenge the CTA Regulation on retroactive pay was abundant, the Employers had months to consider their options, but rather than exercise this option in a manner consistent with their obligations of good faith to the Union, they instead removed a lawful strike threat and then completely disavowed the promises they made as a condition for that threat's removal.
>
> The behavior at issue in this case by the Employers in breaching MOA para. 7 is egregious, it is flagrant, it is continuing, it is unapologetic, it warrants strong and meaningful denunciation. The behavior at issue in this case undermines the scheme of labour relations in an already highly volatile and dysfunctional sector.
>
> Public policy and labour relations considerations warrant that a strong signal is sent to the industry that bargains of this nature must be adhered to or will lead to significant consequences, and this behavior warrants a remedial response that addresses the harm to the Union's lawful role as bargaining agent, the interference that has been caused by this egregious behavior to the collective bargaining relationship between these parties, and these actions warrant a remedial response that sends a strong message of deterrence to the industry: you do not enter into a deal, ignore the deal, and moreover, flagrantly engage in action designed to undermine the very conditions under which the deal was reached, with impunity. Impunity and lack of effective enforcement of agreements have been the central causes of dysfunction in the industry for years, as the Ready Bell Report, among others, chronicles, and the results have been harmful to the public interest.
>
> If there is not this kind of remedial response, what kind of language will ever secure certainty in a bargain in this sector in the future? How can functional collective bargaining occur if one or other party silently reserves some notional, unarticulated right to itself to ignore the terms it agrees to after the bargain is struck? How can functional bargaining occur if the employer makes promises during bargaining to meet certain commitments, whether imposed by statute or not, obtains the forbearance of the union in return, and then completely resiles on those promises? Is every collective agreement to now include both agreed-on articles, plus a release in relation to every agreed-on article, plus even more conditions such as acknowledgement that legal advice has been offered and obtained? The behavior exhibited by the two Employers in this case, in violating MOA para. 7, if not answered with an appropriate remedy, threatens to become a template for even more dysfunctional labour relations in the sector going forward.[71]

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[70] Unifor Opening Statement, ¶ 43
[71] Unifor Opening Statement, ¶ 44 - 48

[165] The union submits the union was denied by any opportunity to obtain a meaningful cease and desist order through the short notice of the Petition; not being named a respondent in the Petition; the bad faith allegation against the union at the Labour Relations Board; and having the grievances subject to delay because of preliminary objections and multiple proceedings in multiple forums.

[166] The union submits a declaration of a contravention is neither an effective nor sufficient remedy for a deliberate contravention intended to undo a fundamental building block of a collective agreement negotiated when the union was in a position to resume a legal strike. The legal challenge was neither trivial nor inconsequential.

> It was an attack on the minimum floor on which Unifor sought to engage in rational collective bargaining, and it was an attack on a grand bargain which had brought a modicum of peace to the Ports and enabled goods to be delivered to and from Canada's largest Port.
>
> In short, the respondents' breach of MOA para. 7 was not some minor event. Having agreed to live with the CTA and Regulations, their turning around and then attacking it, was an attempt to undermine the groundwork on which collective bargaining had finally concluded for a number of Unifor companies, and the groundwork on which relative labour relations peace had been achieved in the Port.
>
> Additionally, … the respondents' challenge to the CTA Regulation, along with its allegations of bad faith on the part of Unifor, were reflective of bad faith on the part of the respondents. [72]

[167] The union submits non-compensatory damages is the only effective remedy for this collective agreement contravention and an appropriate remedial response when other meaningful remedies are not available.[73]

> The *Lilydale* decision is significant in its rejection of the notion that the harm flowing from breach of contract is restricted, in a labour relations context, to strictly quantifiable harm, or the notion, extant in commentary on the common law, that breach of contract accompanied by compensation should in fact be encouraged, as a matter of promoting efficient economic relations.
>
> Labour arbitrators take a different approach, recognizing labour relations realities. They have long recognized that labour contracts are not well or easily analogized to contracts governing commodities, and the area of what *Lilydale* describes as non-compensatory damages in a labour relations context is a classic case in point. Certainty and finality of agreement in labour relations, and public policy considerations flowing from the Code, dictate that the parties should be held to the bargains they strike, and that allowing violations of those bargains to go without adequate redress, even in the absence of specific quantifiable damages, is not conducive to sound labour relations.[74]

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[72] Union Final Argument, ¶ 149-151
[73] *Lilydale Inc.* [2013] B.C.C.A.A.A. No. 152 (Kinsie)
[74] Union Final Argument, ¶ 161-162

And unlike the facts and relationship in *Lilydale*, this is not a circumstance where the employer admits its breach and accepts responsibility and the relationship will be improved with a definitive interpretation and forgiveness.

[168] Instead, the union submits, the employers sought to justify their blatant defiance of the bargain they made by alleging bad faith by the union and casting doubt on the union's credibility. In doing this, they:

> … deliberately avoided a key term of their bargain struck with the Union, caused the union harm. That was moral harm. Unifor put to its members for ratification an agreement with these two companies that said, in its opening section, in no uncertain terms, that these two companies would not be seeking to undo the commitments to pay retroactive pay through collateral legal challenges. Shortly after the drivers ratified the agreement and it took effect, the employers did precisely what they had promised they would not do, contrary to plain and obvious language in the collective agreement.
>
> If there is no price to pay for such an obvious, and flagrant breach, which consisted of action intended to undo a significant benefit that drivers thought they had locked up and would once and for all be paid out, how is anyone in the industry to take collective bargaining seriously?[75]

Injury to the union's right and reputation as an effective bargaining agent in negotiating and administering a collective agreement has intrinsic value warranting compensation for its deprivation.[76]

[169] Further, the union submits there will be no second chance for redemption. There was one chance to join the Petition and each employer did, while other employers respected their agreement with the union. There must be a consequence for these employers who avoided a strike threat, alleged the union acted in bad faith when it was they who did and sought to benefit by avoiding payments they agreed to make and were required to make by the *Regulation*.

[170] The union submits the fact the contravention was wilfully premeditated and not inadvertent; a mere technical contravention; based on a mistaken belief; the result of some operational exigency; or of a marginal or incidental nature reinforces the appropriateness of a damage remedy.[77] The amount of damages should reflect both the harm to the union and to the public interest because it was a continuance of the pattern of avoidance that brought instability to the container trucking drayage sector.

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[75] Union Final Argument, ¶ 173
[76] *West Park Healthcare Centre* [2005] O.L.A.A. No. 780 (Charney)
[77] *Green Grove Foods Corp.* [2012] O.L.A.A. No. 156 (Craven), ¶ 27

[171] The union submits there was a pattern of duplicitous behaviour by each employer amounting to bad faith from the statutory declaration in support of new licenses to filing the Petition and applying to the Labour Relations Board that included refusals to be transparent about what they had or would pay their drivers. At the same time:

> We now know that while Unifor was seeking information from Aheer and Sunlover about their position on retroactive pay obligations, the trucking companies were cooking up a plan to challenge the Regulation.
>
> While this plan was under discussion by the companies, Aheer and Sunlover had an obligation, Unifor submits, to make their intentions clear, or in any event, they had an obligation not to mislead or obfuscate about their intentions. In retrospect, we now know that this is what they did.[78]

[172] An adverse inference must be drawn from the fact no employer representative testified and could not be questioned about the promises and statements made to the union in 2015.

> Aheer and Sunlover, at the time they signed the collective agreements with Unifor, had plenty of time to consider their legal options and disclose their intentions to Unifor. As a matter of good faith they should have disclosed their intentions, or any significant doubt that ought to have been apparent to them about their obligations by that time, and certainly as a matter of good faith they should not have represented that they would comply (without caveats or qualifiers) if there was any question in their mind that they would challenge the retroactive obligations.
>
> In retrospect, by giving vague assurances to the Union of compliance, entering into an agreement with very concrete assurances that they would comply, and then participating in a collateral attack on those obligations, the respondents were not acting in a manner consistent with their duty to bargain in good faith; they were engaging in behaviour, to paraphrase George Adams in *DeVilbiss*, supra, contrary to the interests of rational, informed discussion minimizing the potential for unnecessary industrial conflict.[79]

[173] The union submits the bad faith of each employer is established in the evidence:

- their duplicity with the Regulator around their obligations to pay retroactive monies under the law at the time they applied for and were granted licenses;
- evasiveness and lack of disclosure around retroactive pay obligations prior to signing off the collective agreements with Unifor, those payments being a significant issue between the parties and in the industry as a whole;
- Aheer and Sunlover's apparent knowledge of and involvement in a widely circulated plan by the companies to challenge the retroactive pay provisions, a plan that was in motion months prior to the collective agreements being signed, and was outlined in an email sent to Aheer and Sunlover before they signed off on the collective agreements;

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[78] Union Final Argument, ¶ 191-192
[79] Union Final Argument, ¶ 196-197

- the failure of the respondents to say anything about the MOA paragraph 7 language when the purpose of it was explained to them in the final day of bargaining by Mr. McGarrigle;
- the proximity of the filing of the CTA Petition with the conclusion of the collective agreements and the absence of any intervening and legally relevant change of circumstances that might excuse the conduct of the respondents in launching the CTA Petition having just agreed not to;
- the pre-emptive attack launched by the respondents against MOA paragraph 7 as being unlawful, such an attack being among other things, an admission that what they were doing contravened the terms of that agreement;
- the failure of the respondents to testify or call evidence to explain what their intentions were at the time that they entered into the collective agreements with Unifor.[80]

[174] The union submits there was a marked departure from the ordinary standards of decent behaviour in adhering to a recently negotiated collective agreement. The rationally required response to each employer's reprehensible high handed, arbitrary and capricious conduct is punitive damages to punish each employer for the objectives of retribution, deterrence and denunciation.[81] The amount of punitive damages should be more than a "modest level of deterrence" ($35,000 in that case for an illegal strike).[82]

> In considering the quantum of punitive damages appropriate to this case, the panel may also take some direction from the industry standards for fines for non-compliance under the CTA and Regulation. Such is the importance of eliminating undercutting in the industry, that policy-makers have empowered the Commissioner to impose fines accompanying awards for non-compliance of up to $500,000. The seriousness of the available penalty reflects the public policy concern in this sector around undercutting and reneging on agreements such as the licensing agreements that reinforce the obligations to pay under the Regulation.[83]

[175] The union submits the employers' breach was "on the high end of seriousness" with no mitigating factors.

> It was an intentional and flagrant breach aimed at undermining the heart of the bargain these companies struck with the Union. The Union was harmed by having its authority and integrity as bargaining agent undermined, and drivers were harmed in that they had given up a highly effective strike threat in exchange for these terms. The industry as a whole is damaged by this behavior as it renders collective bargaining meaningless if not redressed. The employers got a significant benefit: no strike and avoidance of key, substantial retroactive pay obligations under the guise of a legal challenge.[84]

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[80] Union Final Argument, ¶ 198
[81] *Morison v. Ergo-Industrial Seating Systems Inc.* [2016] O.J. No. 5706, ¶ 49-52
[82] *Canada Post Corporation* [2011] C.L.A.D. No. 31 (Picher)
[83] Union Final Argument, ¶ 207. See also *Smart Choice Transportation Ltd*., CTC Decision No. 21/2016; http://obcctc.ca/wp-content/uploads/2016/12/CTC-Decision-No.21-2016-Smart-Choice-Transportation-Decn-FINAL.pdf
[84] Union Final Argument, ¶ 209

[176] In a 2013 judgment the BC Supreme Court awarded $100,000 punitive damages in a wrongful dismissal suit for bad faith conduct by making unsubstantiated allegations of unlawful conduct in the form of fraud and persisting in the allegations in the trial.[85]

(b) Employers' Submissions

[177] The employers submit the language on which the union relies lacks mutuality. The union wrote the language and the employers disagree it means what the union says it means. The union's ascribed meaning makes the language redundant with Article 20 in the collective agreement. Therefore, the language must have another meaning.

[178] The employers submit the Petition was not a "legal challenge to the *Container Trucking Act* and/or its Regulations" and there was no contravention of the collective agreement. The Petition dealt exclusively with the correct or reasonable interpretation of the *Act* and *Regulation*, not the legislated regulatory regime or the amount of the minimum rates, wait time payments or surcharges.

> The starting position for the interpretation of paragraph 7 of the MOA is the plain and ordinary meaning of the language that the parties have chosen to use. In this case, what is prohibited is the Employers participating in and/or funding "any legal challenges to the *Container Trucking Act* and/or its Regulations". That is a narrow and specific prohibition that limits the subject matter of the legal challenges that are prohibited. A particular legal challenge must be "to" the Act and/or Regulation or else it does not fall within the prohibition of paragraph 7. Contrary to what the Union asserts in this arbitration, a legal challenge to actions taken under the Act or Regulation is not the same as a legal challenge to the Act or Regulation itself. The Petition was not a challenge to the existence of the Act. It was a challenge as to the extent of the application of the Act.
>
> If the parties had wished to avoid this dichotomy and to extend the prohibition in paragraph 7 of the MOA beyond legal challenges "to" the Act or Regulation, they could have used inclusive language, such as "involving" or "in connection with", to make that clear. For example, the parties could have chosen to prohibit, "any legal challenges involving the *Container Trucking Act* and/or its Regulations", which would have captured the petition. The parties did not do so. The language they did choose forms the primary evidence of their mutual intention.[86]

[179] The employers submit this interpretation is supported by the factual context in which the language was negotiated, which includes the following:

- Thirty-three provincially regulated companies, including the two employers in this arbitration, commenced an action in April 2014 in the Supreme Court of British

[85] *Kelly v. Norsemount Mining Inc.*, [2013] B.C.J. No. 162
[86] Employers' Argument, ¶ 10-11

Columbia against Port Metro Vancouver and the Attorney General of Canada claiming there was no constitutional authority for the federal government to require them to pay these rates to owner operators;

- In November 2015, it was an "unresolved issue" whether the Act with its breadth could be enacted by the Province and the union wanted provincial authority to prevail; and
- No order had been issued stating the employers were not in compliance with any section of the *Act* or Regulation.

> "Also, it was uncertain how much, if anything, was owed because of the conflicting positions between outgoing and incoming Commissioners and the unsettled variables in calculating retroactivity. Only when the new acting Commissioners clarified how the Regulation was to be applied and issued orders to the Employers requiring compliance with that new approach did the practical consequences of retroactivity for container trucking become evident. As a result, that was followed by the Petition."[87]

[180] The employers submit:

> Paragraph 7 of the MOA insured there would be a Provincial Container Trucking Act that applied to what was once Federal licensing and Provincial trucking. Thus, the Employers could not challenge the new structure as agreed between the Province and Federal Government. It was a recognition of the validity of a system of Provincial rather than Federal regulation of container trucking and minimum standards. It was not a prohibition on legal proceedings addressing interpretations made under that system from time to time.
>
> Based on this analysis, a distinction can properly be drawn between two types of legal proceedings, one of which the language of paragraph 7 purports to prohibit and one of which it does not. Specifically:
>
> a. a legal challenge <u>to the Act or Regulation itself</u> – that is, a proceeding which argues that the Act or Regulation is Constitutionally invalid questioning its very existence, which paragraph 7 purports to prohibit; and
> b. a legal proceeding that challenges <u>the interpretation of the Act or Regulation by an administrative decision-maker</u> – that is, a proceeding which argues that an administrative decision-maker has wrongly interpreted the legislation in exercising their powers under that legislation, which paragraph 7 does not purport to prohibit.[88]

[181] This intended meaning of paragraph 7, the employers submit, is affirmed or clarified when placed in context in the collective agreement where Article 20 creates obligations the union says were insulated from any future change in legalisation or interpretation. On this approach and interpretation, the only legal challenge not covered

[87] Employers' Argument, ¶ 15
[88] Employers' Argument, ¶ 16-17

was a constitutional challenge. "Hence, the language was about "legal challenges to the *Container Trucking Act* …", a challenge to the very existence of the *Act*."[89]

[182] The employers buttress this interpretation by submitting the union's broad interpretation of the language overreaches with absurd results.

> If paragraph 7 were to be interpreted as broadly as the Union suggests, the Employers would be prevented from challenging actions taken under the Act or Regulation that could have negative effects for the Union's members. For example, if the Commissioner revoked the Employers' licenses contrary to the terms of the Act or Regulation, the Union's members would be out of a job. Yet, by the Union's interpretation the Employers would be prohibited from bringing proceedings challenging the Commissioner's actions. It does not make sense for either the Union or the Employers to have intended such a broad meaning be attributed to paragraph 7 of the MOA in light of the other provisions of the Collective Agreement and the consequences which could flow from such a meaning.
>
> It is reasonable to infer that the mutual intention of the parties, as set out in the words of paragraph 7 of the MOA, must be something other than the overly broad interpretation now advocated by the Union. What makes sense, having regard to the language of paragraph 7, the factual context, and the other provisions of the Collective Agreement canvassed above, is that the Union was seeking to prevent through paragraph 7 legal challenges to the existence of the Act and Regulation in passing of authority from Federal to Provincial jurisdiction. Thus, it would prevent a protracted constitutional dispute over whether it was the Federal Parliament or the Provincial Legislative Assembly that had ultimate authority to regulate container trucking both on and off the Port.[90]

[183] The employers submit, in addition to their interpretation being supported by the language, the surrounding context and a harmonious reading of the collective agreement, the union's interpretation is contrary to public policy and unenforceable because it restricts access to the courts and is, therefore, injurious to the justice system.[91] This is because the union's broad interpretation:

- deprives the courts of the evidence necessary to discharge their truth-seeking function by prohibiting the employers from giving evidence in a third-party challenge by affidavit or otherwise. "... a person cannot "contract out" of providing evidence to support the just resolution of legal disputes by the courts brought by third parties and paragraph 7 of the MOA cannot be interpreted to have that effect;"[92]

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[89] Employers' Argument, ¶ 23
[90] Employers' Argument, ¶ 24-25
[91] *Métis National Council Secretariat Inc. et al. v. Dumont*, 2008 MBCA 142, ¶ 11-12
[92] Employers' Argument, ¶ 27; *Kearley v. Thomson and Another* (1890), 24 Q.B.D. 742 (C.A.); *Flexi Coil Ltd. v. Smith Roles Ltd.*, [1980] F.C.J. No. 188

- prevents access to the courts for redress for abuse of government authority by doing such things as the Commissioner revoking an employer's license; and
- impedes the operation of the courts by discouraging the employers from entering the courts and interferes with the court's business.[93]

[184] The employers submit the union "cannot use the legal threat of a strike or grievance to achieve the illegal end of depriving access to the court as a party or a witness."[94]

> Paragraph 7 did not prohibit the Employers from participating in and/or funding a legal proceeding that challenged an interpretation of the Act or the Regulation by an administrative decision-maker exercising powers under that legislation. Alternatively, if the broad interpretation is appropriate then it is void for reasons of public policy.
>
> The petition at the centre of this grievance does not take the position that the Act or Regulation is Constitutionally invalid. It did not advocate that the Legislative Assembly did not have the power to pass the Act or to authorize the Lieutenant Governor in Council to make the Regulation under it. The petition relied upon the language of the Act and the Regulation as the basis for its arguments. What the petition did is argue that:
>
> a. the Lieutenant Governor in Council had wrongly interpreted the Act with the consequence that aspects of three sections of the Regulation had been made *ultra vires* and thus did not properly form part of the Regulation; and
> b. the acting British Columbia Container Trucking Commissioner had wrongly interpreted the meaning of the term "off-dock trip" contained in the Regulation with the consequence that its calculations of amounts owing by the petitioners was inaccurate.
>
> Neither of these arguments is a "legal challenge to the *Container Trucking Act* and/or its Regulations"; each presupposes and relies upon the existence of those enactments and seeks to confirm their true scope and meaning. The petition was a legal proceeding that challenged the interpretation of the Act or Regulation by an administrative decision-maker; not a challenge to the Act, Regulation or status of the Commissioner.
>
> Based on the proper interpretation of paragraph 7 of the MOA, the petition did not fall within the scope of the prohibition. In these circumstances, the grievance must fail.[95]

[185] On the claim for damages, the employers submit back payments were made; there is no financial loss to any employee; no continuing collective agreements; and no claimed impact on the rights of employees covered by the collective agreements. Without the employers' participation, the Petition would have proceeded with the other petitioners and their affidavits.

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[93] *Matter of Access to the Courts of Justice*, 2011 BCSC 1815
[94] Employers' Argument, ¶ 32
[95] Employers' Argument, ¶ 35 - 36

[186] In labour relations, the employers submit damages are to compensate not punish[96] and the union suffered no compensable loss, damage or injury.

> In this case, the Employers were two of ten petitioners. All ten petitioners were represented by the same counsel, adduced similar affidavit evidence, and put forward the same legal argument. The evidence in the proceeding was not contentious. The relevant documentary evidence would have been the same if the Employers had not participated. Whether or not the petition was successful, the commencement of the petition, the conduct of the petition and the outcome of the petition is identical with or without the involvement of the Employers. In and of itself, this is a complete answer to the Union's claim for general damages: even if the Union is correct in their interpretation of paragraph 7 of the MOA and the Employers acted in breach of their obligations. There is no basis for concluding that the Union would have been in any different position but for the alleged breach. As such, there is no basis for concluding that the Union has suffered any loss or damage for which a compensatory remedy should be ordered because of the involvement of the Employers.[97]

[187] The employers submit any breach was not flagrant; did not harm the union's reputation or credibility; and did not result in any clear advantages for the employers.

> The factual context at the time of the Petition was uncertainty as to the requirement, extent and calculation of retroactivity. A difference of opinion does not trigger general damages without evidence of injury or loss resulting from the breach. The Union's confidence in the merits of its interpretation does not make the Employers' view flagrant.
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> **********
>
> Everyone understands that one party or another may wrongly apply collective agreement provisions. A union's reputation and credibility is preserved by the union pursuing and advocating its position through the grievance process. That is what the Union did in this case. A union's reputation or credibility is not diminished by the fact that an employer is found to have acted in breach of its obligations under a collective agreement. Otherwise, every time an employer was unsuccessful in a grievance arbitration, general damages to the Union for loss of reputation or credibility would be warranted. There is no such jurisprudence. The Union's limited role in container trucking cannot be attributed to the petition proceeding. The evidence suggests the Union was always a minor player in container trucking. It represents few companies having a small minority of truckers.
>
> **********
>
> By participating in the petition proceedings, the only "advantage" the Employers gained was an opportunity to argue before the Court that the Act and Regulation had been wrongly interpreted by the Lieutenant-Governor in Council and the BC Container Trucking Commissioner as to the imposition of nine months retroactivity. That is not an "advantage", financial or otherwise, that could operate as a basis for an award of damages to the Union. Also, the petition had no prospective challenge to minimum rates.[98]

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[96] *Canadian Johns Manville Co.* [1971] O.L.A.A. No. 1 (Weiler), ¶ 4; *Good Samaritan Society Canada* (2013), 232 L.A.C. (4th) 424 (Gordon)
[97] Employers' Argument, ¶ 43
[98] Employers' Argument, ¶ 46; 47; 48

[188] The employers submit, while it is common place for arbitrators to find an employer contravened a collective agreement, awards for damages payable to the union are sparse. In this case, there was no interference with the union's representational rights as was found in a 2008 arbitration where the union claimed $100,000 and was awarded $1,000 general damages.[99] Even when the employer's contravention was "conscious, unexplained and apparently unrepentant" general damages payable to the union were not awarded.[100] In the employers' submission this grievance is simply another garden variety dispute over collective agreement interpretation.

[189] The employers submit the union's failure to meaningfully advocate to restrain the employers' participation in the Petition is a failure to discharge its duty to mitigate any loss.

> If the Union alleged it has suffered damages as a result of the Employers' participation in the petition proceedings, the appropriate step to mitigate those damages would have been to advocate to the Court as a preliminary issue to have the Employers removed as parties and exclude the relevant affidavits. It lies ill in the mouth of the Union to suggest that it suffered damages as a result of the petition proceedings, when the Union participated in those proceedings and did not make any application or objection to the Employers' participation as a Petitioner or witness.[101]

[190] The employers submit the three paragraphs in the union's Response to the Petition are the barest assertions unsupported by argument in the union's subsequent written legal argument. They are inadequate to discharge its duty to mitigate. There should have been a separate application to strike the employers or a preliminary challenge to the employers' standing at trial. This is especially so because the union relied on the employers' participation to obtain standing.

> Whether this was because it would have prevented the Union from making submissions on the substance of the petition if the Employers were removed as petitioners is unknown. However, regardless of the Union's motivation, the Union should not be permitted to both approbate and reprobate the Employers' status as petitioners as and when it happens to suit them. The Union should not be awarded damages based on the Employers participation in the petition proceeding when the Union chose not to take any meaningful steps to argue against that participation addressed by the Court. Their minimal advocacy to the Court as to this issue should be noted.[102]

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[99] *Toronto Police Board* [2008] O.L.A.A. No. 479 (Tacon)
[100] *Canada Post Corporation* [2006] C.L.A.D. No. 1 (Ponak)
[101] Employers' Argument, ¶ 53
[102] Employers' Argument, ¶ 56

[191] The employers submit the union has consistently maintained the outcome of the Petition had no possible affect on its members' rights under the collective agreements.

> A written submission of the Union to the Arbitrator dated March 3, 2016 included the following at [93]:
>
> > The *Regulation* requirements regarding retroactive compensation to drivers as they existed on November 24, 2015, at the time the contract was signed and ratified, are locked into the contract. They are payable under the contract. If then, a Court were to determine that sections 19, 22 and 23 of the *Regulation* are of no force and effect, or are void, that determination does not bear on the contract this panel is asked to interpret and apply.
> >
> > [emphasis in original]
>
> Their position was reflected in an earlier interim award issued by the Arbitrator dated January 27, 2016 at [25]:
>
> > The union acknowledges there are theoretical possibilities [that]… a judicial decision could decide the back pay license condition is beyond the authority of the Lieutenant Governor in Council. However, the union's opinion is that… a successful judicial proceeding [is]… irrelevant to the bargain in the relevant articles of the collective agreement. Specifically, it says the license terms as they exist at November 24, 2015 (Article 20.01), not at any later date following a judicial decision, govern the truckers' retroactive payment entitlement.
>
> It defies common sense to award general damages in a case where there is no actual damage; the Union considers the result of the petition is irrelevant in respect to its expired collective agreement yet they sought to participate and it involved two bargaining units and two collective agreements that no longer exist.[103]

[192] Finally, on general damages, the employers submit:

> The alleged harm to the Union's reputation as a result of the Petition is non-existent. There is no evidence of any loss of reputation. General damages are intended to be compensatory in nature. But there is no loss here to compensate. General damages is not a vehicle for Unifor to seek retribution.[104]

[193] The employers submit, to the extent an arbitrator has jurisdiction to award punitive damages, the circumstances when they are awarded are extremely narrow and exceptional. The circumstances permitting punitive damages are succinctly summarized in a 2008 statement by the Supreme Court of Canada:

> [T]his Court has stated that punitive damages should "receive the most careful consideration and the discretion to award them should be most cautiously exercised" ([*Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085], at pp. 1104-5). Courts should only resort to punitive damages in exceptional cases (*Whiten*, at para. 69). The independent actionable wrong requirement is but one of many factors that merit careful consideration by the courts in allocating punitive damages. Another important thing to be considered is that conduct meriting punitive damages awards must

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[103] Employers' Argument, ¶ 57
[104] Employers' Argument, ¶ 58

> be "harsh, vindictive, reprehensible and malicious", as well as "extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment" (*Vorvis*, at p. 1108)…[105]

[194] The employers submit punitive damages have been awarded in only two collective agreement arbitration decisions in British Columbia. In one, a union was ordered to pay $100,000 for behaviour that included an illegal strike, violence and threats of violence, intimidation by the union and its President, contempt of a Board order, malicious conduct and severable actionable wrongs.[106] In the other, an employer was ordered to pay $500 when it disregarded a previous arbitration decision.[107]

[195] The deterrence objective of punitive damages has no application here. There is no ongoing collective bargaining relationship or collective agreement since the cancellation of the union's bargaining rights.[108] There is no independent actionable wrong by either employer and no "harsh, vindictive, reprehensible and malicious" conduct deserving of "full condemnation and punishment."

[196] The employers submit:

> In straining to meet the requirement for an independent actionable wrong, the Union alleges that participating in the petition proceedings constituted a breach of the Employers' "duty of good faith". There are two insurmountable problems with this argument. First, there is no evidence that the Employers acted in bad faith in accordance with a reasonable interpretation of their Collective Agreement obligations, whether or not that interpretation ultimately proves to be correct. Second, the Employers are not subject to some broad "duty of good faith" as constituting a legal wrong if breached in any event. Good faith is an organizing principle of the law of contract under which specific duties relating to contractual performance can be understood. The Supreme Court of Canada was careful to emphasize this point in *Bhasin v. Hrynew*, [2014] 3 SCR 494 ("*Bhasin*") at paras. 63-64 - Tab 18:
>
> > The first step is to recognize that there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance. That organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.
> >
> > As the Court has recognized, an organizing principle states in general terms a requirement of justice from which more specific legal doctrines may be derived. An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations: [citations omitted].
> >
> > [emphasis added]

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[105] *Honda Canada Inc. v. Keays*, [2008] 2 SCR 362, ¶ 68. See the earlier arbitration decision *Berryland Foods* [1987] B.C.C.A.A.A. No. 116 (Hope), ¶ 96 – "[T]he imposition of punitive, or exemplary, damages is a remedy that has an extremely narrow application in the law of contract."
[106] *Limo Jet Gold Express Ltd.* [2008] B.C.C.A.A.A. No. 40 (Larson)
[107] *G.H. Noble Custom Cut Ltd.* [2008] B.C.C.A.A.A No. 129 (Thorne)
[108] *Eurocan Pulp & Paper Co.* [2003] B.C.C.A.A.A. No. 223 (Jackson), ¶ 74

> The specific common law duty identified and applied by the Supreme Court of Canada in *Bhasin* was a duty to act honestly in the performance of contractual obligations: *Bhasin* at para. 33. In our case, there is no evidence that the Employers ever engaged in "active dishonesty" in the sense described in *Bhasin* required to breach that duty: *Bhasin* at paras. 86-87. The Union has not identified any other legal duty that the Employers' participation in the petition proceeding could have breached.[109]

[197] The employers submit these grievances are extraordinary examples of using arbitration to punish employers. Although rejected by the employees, the union intervened in the Petition. Although the back payments have been made, the union seeks an unprecedented amount of damages when it has suffered no financial loss and did not argue against the employers' standing as petitioners as identified by the court when it was added as a respondent. The necessary preconditions for an award of punitive damages do not exist. The union's sole purpose in advancing this arbitration and claim for damages is "unjustified and inappropriate retribution." "There is no justification for any financial remedy and none should be awarded."[110] The employers should be awarded costs.

11. Discussion, Analysis and Decision

> "In signing this Memorandum of Agreement, the Company agrees it will not, in any way, participate in and/or fund any legal challenges to the *Container Trucking Act* and/or its Regulations."

(a) Meaning and Scope of Disputed Language

[198] In a dispute over the interpretation, application and operation of collective agreement language, the arbitrator's role is to determine the mutual intention of the union and employer in negotiating their collective agreement as expressed in the language they agreed by using widely-accepted rules of collective agreement language interpretation. These were enumerated as ten rules in 1995 by Arbitrator Bird who made an accompanying observation intrinsic to the pragmatic world of labour relations and the role arbitrators serve: "Not all rules of interpretation are rigidly binding. Common sense and special circumstances must not be ignored."[111]

[199] The disputed language in these collective agreements is written in direct, non-legal language reflective of communication in the workplace and collective bargaining

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[109] Employers' Argument, ¶ 70-71
[110] Employers' Argument, ¶ 74-75
[111] *Pacific Press* [1995] B.C.C.A.A.A. No. 637 (Bird), ¶ 28

unburdened with nuance infused verbiage. It is a promise by one party – "the Company agrees." It is an unequivocal promise by the employer that it will not "in any way" do something. That something is "participate in and/or fund any legal challenges." The intention is clear. The employer will not support or sponsor "any legal challenges" either by direct participation or by indirect participation through bearing some of the cost of "any legal challenges."

[200] Any legal challenges to what? To 'the *Container Trucking Act* and/or its Regulations."

[201] What type of legal challenges? There is no mention of the type of legal challenges and no qualification or exception to the type of legal challenges. The agreement is "any" legal challenges.

[202] The employers seek to import into the language a qualification that limits "any legal challenges" to one type of legal challenge, namely the type the employers and others had begun in April 2014 and discontinued in February 2015. They argue the commonly used preposition "to" limits the type of challenge to a constitutional challenge to some or all of the *Act* and Regulations, while ignoring the plural "any legal challenges."

[203] The employers derive this interpretation creating a "narrow and specific prohibition"[112] by selective reference to the broader context within which the language was proposed and accepted. The employers assert:

> The Constitutional validity of the Act and any regulation made under it by the Province was open to challenge at the same time the Collective Agreements were open for negotiation. It is not in dispute that the Union wanted to ensure that the constitutional oversight of the sector would not be left in limbo for an indeterminate period and open to potential challenges in both the Federal and Provincial jurisdictions. The Union wanted the Provincial Container Trucking Act and its administrative tribunal regime to prevail. This was all unchartered waters because it was not part of, or foreseen in, the Joint Action Plan that the Provincial government would assume jurisdiction. In fact, in the Joint Action Plan it was the Federal Government that undertook to establish minimum hourly rates, which it ultimately declined to do.[113]

[204] In effect, the employers argue that on Saturday, November 28, 2015, Mr. McGarrigle and the union negotiating committee were preoccupied and concerned

[112] Employers' Argument, ¶ 10
[113] Employers' Argument, ¶ 14

about the division of constitutional authority over ports and labour relations and how there might be a recurrence of a constitutional challenge by these employers.

[205] However, the evidence is not that Mr. McGarrigle or any member of the union negotiating committee was concerned about the possibility of a recurring constitutional challenge or any "unresolved" constitutional issue. There is no evidence from Mr. Aheer or Mr. Shoker that they or any employer representative believed the union's intention was limited to a revival of a constitutional challenge they and 31 others had discontinued nine months earlier. The employers' construct simply ignores what they and others were planning away from the bargaining table through the licensees' committee.

[206] If the meaning and intention ascribed to the language by the employers was the union's intention in writing the language it proposed, why was paragraph 7 not proposed in collective bargaining with Prudential Transportation Ltd.? Why was it not included in the proposal to Aheer Transportation Ltd. and Sunlover Holding Co. Ltd. and other employers at 5:00 p.m. on Friday, November 27th?

[207] The employers are correct that the union wanted the Act and Regulation "to prevail" across the sector. In proposing paragraph 7 of the Memorandum of Agreement, the concern at the collective bargaining table was not a constitutional legal challenge that had been discontinued months before but a threat, as the union saw it, that had recently become urgent for some licensees.

[208] Unlike the filtered contextual perspective and extrinsic evidence on which the employers rely to limit the meaning and scope of paragraph 7, the union's evidence of the broader context and the specific information it learned in Amrik Sangha's email of November 24th about the meeting on the morning of November 27th to mount a legal challenge to the back payment provisions of the *Regulation* is realistic explanation for the new paragraph 7 and convincing support for Mr. McGarrigle's credible testimony about why paragraph 7, not included in the pattern collective agreement with Prudential Transportation Ltd., was proposed on November 28th.

[209] I conclude the purpose of paragraph 7 was not to fill a gap preventing a constitutional challenge that was unforeseen when Article 20 was negotiated with Prudential Transportation Ltd. the day before it was written and proposed by the union.

Paragraph 7 was to address the new information the union obtained after its first proposal to the employers at 5:00 p.m. on Friday and its second proposal on Saturday afternoon.

[210] The purpose was to have these two and other employers agree not to participate in or fund the legal challenge discussed among some licensees the day before. It was to limit the possibility of a legal challenge mounted to avoid payment that some companies had already made and some drivers had received as reported in the Acting Commissioners' message to the industry on November 16th.

[211] I conclude the ordinary meaning of the preposition "to" in paragraph 7 is to point to the subjects (*Container Trucking Act* and *Regulation*) against which any legal challenges will not be participated in or funded.

[212] The preposition "to" is not used to limit "any legal challenges" to only challenges about the constitutional authority of the provincial Legislative Assembly to enact all or part of the *Container Trucking Act* or its Regulation.

[213] It was to prevent competitively advantaging disparities among carriers in the container trucking drayage sector and to ensure drivers represented by the union received the full benefits of the *Container Trucking Act* and *Regulation*.

[214] This was an important promise for the union, which is clearly and unequivocally expressed in the expansive language agreed. I give the language its plain and ordinary meaning. Not the restricted meaning infused with extrinsic evidence of some of the context as advocated by the employers.

[215] The addition of paragraph 7 to the union's proposal on November 28th was not and is not language redundant to what was proposed in Article 20. The provisions of Article 20 provide benefits and expedited grievance-arbitration by a named arbitrator, who would have jurisdiction (and gain experience) to interpret and apply the *Container Trucking Act* and *Regulation*, which is expressly recognized in section 29(2) of the *Act*. Hopefully, expedited arbitration decisions would receive deference from the Commissioner.[114]

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[114] In *Harbour Link Container Services Inc.* (CTC Decision No. 04 /2016), http://obcctc.ca/wp-content/uploads/2016/12/CTC-Decision-No.04-2016-Harbour-Link-Container-Services-Inc-Decn-FINAL.pdf, the new Commissioner, Duncan MacPhail, wrote:

[216] As the union submits, paragraph 7 reinforces the employers' commitments to use the agreed expedited dispute resolution process and not to make a "collateral attack" on the *Container Trucking Act* and *Regulation* because the union wants the legislation and administrative regime to prevail with expedited arbitration under the collective agreement as the preferred method of dispute resolution. It does not want employers with whom it has a collective agreement participating in or supporting legal challenges in the courts that attack the basis of benefits in the collective agreement or sidestep expedited arbitration.

[217] The promise in paragraph 7 is not redundant or superfluous. It is necessary to impose discipline on some companies in a sector where licensees have acted fiercely independent in pursuit of market advantage and self interest, except when there is a common interest to challenge government regulation. When there is, they act collectively to litigate. Paragraph 7 addresses that historical behaviour that was recurring in the last week of November 2015 when the collective agreements were being negotiated.

(b) Each Employer Contravened a Provision of its Collective Agreement

[218] The civil claim in the Petition was a legal challenge. It was a legal challenge to sections of the *Regulation* seeking to have them declared void. It was a legal challenge to the power of the Lieutenant Governor in Council to make sections of the *Regulation* conferring a financial benefit on drivers and cost on licensees. It was a legal challenge encompassed by paragraph 7.

"Section 29(2) recognizes that the Act does not necessarily require that all complaints be resolved by the OBCCTC. Under the Act complainants or their representatives may pursue complaints using other processes and importantly, where they do the Commissioner has the authority to defer to these proceedings or any resulting decisions or awards. In my view the availability of alternative proceedings to resolve complaints serves a number of useful and beneficial purposes. Firstly, access to expedited arbitration or similar processes may result in complaints being resolved more expeditiously. Secondly, the limited resources of the OBCCTC are augmented by recognizing other legitimate approaches to the resolution of complaints. Finally, in some cases, access to arbitration, mediation or the courts may be viewed as a preferred and more well suited means to resolving complaints. Alternative dispute resolution methods such as arbitration and mediation provide an important extension of the means by which complaints under the Act and the Regulation may be resolved, and I encourage parties to consider using these alternative proceedings where appropriate. Awards and decisions which result are likely to receive deference at the OBCCTC provided that complainants are treated fairly and any outcomes which result are consistent with the principles expressed or implied in the Act and the policies of the OBCCTC. In this case most of the compliance issues have been resolved. To the extent that issues remain outstanding I encourage the parties to use their agreed upon expedited arbitration process before bringing matters to the OBCCTC." (¶ 22)

[219] Aheer Transportation Ltd. and Sunlover Holding Co. Ltd. participated in the legal challenge as petitioners. Their participation was a contravention of paragraph 7 of the Memorandum of Agreement, which is an integral part of both collective agreements.

[220] In addition, the employers presumably funded the legal challenge in proportion to the number of truck tags they held among the ten petitioners. Having found a contravention by participation, it is not necessary to determine conclusively that each funded the legal challenge. If I had to, I would find it is a reasonable inference and proven conclusion that each did.

(c) Agreement is Consistent with Public Policy

[221] Are the contraventions excusable and is paragraph 7 unenforceable because it is contrary to public policy?

[222] Unenforceability of a contract at common law because it is contrary to public policy is infrequent. In 2008, the Manitoba Court of Appeal wrote:

> Generally speaking, the law will allow parties to contract as they wish without interference from the court. The common law has a long history of supporting the right of individuals to contract freely. As Dickson J. (as he then was) stated in *Elsley v. J.G. Collins Ins. Agencies Ltd.*, [1978] 2 S.C.R. 916 "the courts have been disinclined to restrict the right to contract, particularly when that right has been exercised by knowledgeable persons of equal bargaining power" (at p. 923).
>
> However, the law will not involve itself in enforcing contractual terms that are illegal or contrary to public policy. What is contrary to public policy? That is a vague phrase which must be interpreted with care since public policy "is a very unruly horse, and when once you get astride it you never know where it will carry you." See *Richardson v. Mellish*, [1824-34] All E.R. Rep. 258 at 266, as quoted in Brandon Kain & Douglas T. Yoshida, "The Doctrine of Public Policy in Canadian Contract Law" (2007) Ann. Rev. Civ. Lit. 1 at 7.
>
> Consequently, while public policy considerations can invalidate private contracts and render them void and unenforceable, Canadian law has traditionally applied the doctrine in a narrow number of categories. See In *re Estate of Charles Millar, Deceased*, [1938] S.C.R. 1. As indicated by Kain & Yoshida, at p. 44, the doctrine of public policy has been applied to categories which include: 1) statutory and common law illegality; 2) contracts injurious to the state; 3) contracts injurious to the justice system; 4) contracts involving immorality; 5) contracts affecting marriage; and 6) contracts in restraint of trade.[115]

[223] If the categories are narrow at common law, as reflected in the Labour Relations Board decision, they are narrower in labour relations grievance arbitration interpreting agreements made through free collective bargaining. The entire strike-lockout threat

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[115] *Métis National Council Secretariat Inc. et al. v. Dumont*, 2008 MBCA 142, ¶ 10-12

system of free collective bargaining with mandatory recourse to peaceful dispute resolution during the term of a collective agreement provides both freedom to negotiate and assured enforcement of agreements that do not offend any workplace or other legislation.

[224] Although the employers argue for a narrow application of paragraph 7 in discerning the mutual intention and meaning of the language, Sunlover Holding Co. Ltd. unsuccessfully relied on an expansive interpretation before the Labour Relations Board when it claimed paragraph 7 is void and unenforceable for among other reasons “it is inconsistency with public policy.”

> Sunlover says paragraph 7 of the Memorandum of Agreement is void for inconsistency with public policy and is unenforceable. Sunlover says Unifor has improperly used the leverage of a threatened strike to deprive Sunlover of "its unalienable right to challenge a statute or the application of the statute".
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> **********
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> Sunlover says economic pressure cannot be used for an improper purpose, and it cannot be used to set aside the role of the courts in reviewing a statute or to prevent Sunlover from seeking judicial review of any aspect of the CTA.[116]

The union argued the employer did not have an inalienable right to challenge a statute or its application.[117]

[225] The Board dismissed the employer’s argument in the context of a labour relations analysis of good and bad faith bargaining against the background of the public policy fostering free collective bargaining. The practical message was that if a negotiating party accepts an offer without protest it must live with it.

> Like the union in *Radio Shack*, Sunlover did not raise any objection to paragraph 7 of the Memorandum of Agreement, nor did it ask Unifor to withdraw that provision from the Memorandum of Agreement. The first instance in which Unifor learned that Sunlover objected to paragraph 7 was through the filing of the Application. Not only did Sunlover not make any such objection, it also agreed to expressly incorporate the retroactive pay requirements of the CTA and Regulation into Article 20 of the collective agreement. Further, the parties established an expedited arbitration process to resolve disputes regarding those retroactive payments under Article 20 and have indeed commenced utilizing that process, as set out in the facts above. Sunlover waited two months before filing the Application with the Board or providing any notice of its objection to Unifor, while meanwhile benefitting from the continuation of its business without further labour disruption.[118]

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[116] *Sunlover Holding Co. Ltd.* [2016] B.C.L.R.B.D. No. 53, ¶ 24; 32
[117] *Sunlover Holding Co. Ltd.* [2016] B.C.L.R.B.D. No. 53, ¶ 29
[118] *Sunlover Holding Co. Ltd*. [2016] B.C.L.R.B.D. No. 53, ¶ 49

[226] Sunlover Holding Co. Ltd. unsuccessfully sought leave for reconsideration. One ground was:

> The Original Panel did not consider the Employer's argument that the proposal by the Union to prohibit appeals or access to the courts in respect to any aspect of the *Container Trucking Act* or *Container Trucking Regulation* was improper *per se* as distinct from improper only if taken to impasse and constituted a failure by the Union to bargain in good faith.[119]

[227] In denying leave, the Board decided employers regularly bargain away rights in collective agreements. An employer's right to challenge legislation is not exceptional among the many rights employers agree to limit in collective agreements.

> We further find that paragraph 7 of the Memorandum of Agreement and the consequent Article 20 of the collective agreement did not constitute illegal bargaining demands when put forward by the Union. It is simply not illegal for a party to propose as a part of collective bargaining and an overall agreement that the opposing party agree not to pursue certain positions in the Courts or elsewhere it would otherwise be entitled to. In our view, the provisions at issue put forward and ultimately agreed to here were part of the legitimate give and take between the parties in their collective bargaining.
>
> In contrast, an example of an illegal bargaining demand per se would be the discriminatory collective agreement provisions agreed to in the duty of fair representation foundational case Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192 (1944) (U.S.S.C.). A further example would be a wage proposal contrary to wage restraint legislation, as noted in paragraph 36 of the Radio Shack decision referred to in the Original Decision: Radio Shack, [1985] O.L.R.B. Rep. December 1789, 11 C.L.R.B.R. (NS) 160. These proposals and provisions are contrary to legislated or constitutional requirements, whereas the proposals and ultimately provisions at issue in the present matter merely posit agreement to not challenge or assist in the challenge of existing legislation.[120]

Another example might be agreeing to rates and benefits in a collective agreement that are lower than the rates and benefits in *the Container Trucking Act* and *Regulation*.

[228] Before the employer's unsuccessful judicial review application of the Board's decision was heard in January 2017, the Petition had been heard in September 2016 and judgment reserved. In its application for judicial review of the Board's decision:

> Sunlover says the question of whether para. 7 is contrary to public policy is a matter of common law because it purports to restrict access to the courts and therefore interferes with the administration of justice. In addition to denying it the right to challenge the legislation, Sunlover says the provision, as worded, would even prevent Sunlover's representatives from appearing as witnesses in challenges brought by others.[121]

[229] In the judgment on the judicial review application, the court wrote:

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[119] *Sunlover Holding Co. Ltd.* [2016] B.C.L.R.B.D. No. 65, ¶ 3
[120] *Sunlover Holding Co. Ltd.* [2016] B.C.L.R.B.D. No. 65, ¶ 7-8
[121] *Sunlover Holding Co. v. Unifor* [2017] B.C.J. No. 500, ¶ 30

On the question of whether para. 7 is contrary to public policy, Sunlover relies on *Flexi Coil Ltd. v. Smith Roles Ltd.*, [1980] F.C.J. No. 188 (F.C.) [*Flex Coil Ltd.*]. In that case, the plaintiff alleged infringement of a patent. Counsel for the defendant sought to interview, as a potential expert witness, the president of a company that had settled a similar action brought against it by the plaintiff. The settlement agreement included a provision that those defendants would not "give any assistance whatsoever in any manner whatsoever to any party which might become the subject of allegations of infringement of [the patent]": at para. 13. The Federal Court said at para. 22:

> I am in complete agreement with counsel for the defendants when he submits that a contract which has a tendency, however slight, to impede the administration of justice is illegal and void and that it is contempt to interfere with the freedom of a witness to give evidence.

However, the court said at para. 30 it had no jurisdiction to interpret the contract between the parties:

> While I am quite prepared to say that if Mr. Doepker is called as a witness, paragraph 5 of the agreement does not preclude him from testifying and affords him no immunity for refusing to do so if called, I am not prepared to say that for him to discuss the subject matter of the invention in this suit with an alleged infringer with respect to possible defences thereto would not be in breach of the memorandum of agreement. That would be to interpret the contract which, for the reasons I have expressed, is within the sole jurisdiction of the Saskatchewan courts. ...

The court also noted at para. 30 that it was the company, not the proposed individual witness, who was a party to the agreement.

In my view, *Flexi Coil Ltd*. and the general principle it states would have been relevant in the proceedings before Schultes J. if there had been any objection to Sunlover's standing as a petitioner or to the admissibility of its evidence. I understand no such objection was raised.

Further, the LRB was not dealing with Sunlover's hypothetical suggestion that para. 7 would even prevent it giving evidence in a case brought by other parties. The evidence before it was that Sunlover was one of the petitioners directly challenging the CTA.

The interpretation or enforceability of para. 7 was also not before the LRB. That question – including the consequences, if any, that may flow from a breach of para. 7 – has been submitted to the arbitrator, whose ultimate decision may be subject to appeal under ss. 99 or 100 of the Code.

The issue before the LRB was whether Unifor's insistence on including para. 7 in the MOA amounted to bargaining in bad faith. The enforcement of the statutory requirement to bargain in good faith is clearly part of the LRB's specialized jurisdiction and expertise. The question of what does or does not constitute acceptable bargaining is one that it must determine in the context of the particular dispute before it and with regard to the public policy expressed in the Code.

I agree with Sunlover that the Original Decision, in concentrating on the issue of whether the parties were at an impasse, did not address in detail Sunlover's first argument that para. 7 is contrary to public policy. However, that issue was squarely addressed by the review panel, which pointed out there is nothing unusual or illegal about a party, in consideration of benefits received, agreeing not to pursue rights or take legal proceedings that would otherwise be available. (On that point, I would draw an analogy to the settlement of a civil dispute, which invariably includes a provision that a party will not initiate or continue a claim before the court.)

> In this case, Sunlover was asked to waive its right to challenge the *CTA* and the regulations. That was in the context of negotiating an agreement that specifically incorporated certain provisions of the legislation. Those provisions governed the wages Sunlover was to pay to employees represented by Unifor. The validity and continued enforceability of the CTA and the regulations was therefore at the heart of the collective bargaining process and central to the validity of the resulting collective agreement.
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> It was in that context that the reconsideration panel decided at para. 7 that it was part of the "legitimate give and take" of collective bargaining for Unifor to require the inclusion of para. 7 in the MOA. Any issues of public policy raised by para. 7 were limited to and inseparable from the specific collective bargaining process that was before the LRB and, in my view, inseparable from its exclusive jurisdiction over collective bargaining. A correctness standard therefore does not apply and the court can only interfere with the LRB's decision if it is patently unreasonable.
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> **********
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> There is nothing in the LRB's decision that can be characterized as clearly irrational or as meeting any other definition of patently unreasonable and therefore the petition must be dismissed.[122]

[230] The employers underscore that throughout the Board proceeding the interpretation of the meaning and scope of the language in paragraph 7 of the Memorandum of Agreement was not an issue. As the court wrote, the “interpretation and enforceability” and the “consequences, if any, that may flow from a breach” are issues for arbitration.

[231] I begin with the same observation the court made about the Board proceedings. I am not dealing with the hypothetical suggestion that para. 7 would prevent the employers or their principals from giving evidence in a case brought by other parties. Referring to such an apparently unpalatable consequence is a form of *in terrorem* argument that camouflages, rather than highlights, the central facts captured by the court, namely, parties frequently freely contract to limit or abandon their right to pursue a claim in court.

[232] Not only is it common in settlement agreements, but it is common to have mandatory arbitration provisions in commercial and some consumer contracts when the power balance is no different than what the employers confronted during a legal strike period on November 28th.

[233] No employer right was “taken away.” It was bargained away as part of the price to continue business without a strike interruption as happened the previous Monday to Port Transport Inc. It was partial consideration for a substantial benefit.

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[122] *Sunlover Holding Co*. v. Unifor [2017] B.C.J. No. 500, ¶ 35 -44; 49

[234] In the case of Aheer Transportation Ltd., it was unremarkable it did not comment on a proposed agreement that it not participate in or fund any legal challenges to the rates proposed to be incorporated into the collective agreement, which include the ones in the sections of the *Regulation* it subsequently challenged.

[235] Aheer Transportation Ltd. came to collective bargaining on Saturday, November 28th espousing a preference to maintain a relationship under a collective agreement because of its benefits for the company and drivers. Its negotiator wrote two days before:

> … In short, our Company feels that the last Collective Agreement which we signed with UNIFOR was a good one. It was good for the Company as we were free to Manage our Business, grow the Company, and provide more work to our increasing group of drivers. And our expired Collective Agreement was also good for our drivers as there were few, if any, grievances.....and moreover, there was a minimum of driver complaints at Aheer Transportation Ltd. …

[236] Aheer Transportation Ltd. proposed incorporating the legislated rates without qualification.

> It would be Aheer Transportation's position to keep the existing language in our expired Collective Agreement, and add the New Government Rates of Pay as Appendices attached to our New Collective Agreement going forward. The Company feels this is the best way forward for us and our drivers, as we move into an unstable and fragile economic reality. … By keeping the renewal of our UNIFOR Collective Agreement simple and uncomplicated, we also keep it out of the hands of lawyers, which tends to save time and money for all involved.

There was no suggestion any of the rates were illegal or contrary to public policy or that it was going to put issues in the hands of lawyers to mount legal challenges.

[237] The employers' argument that the reach of the promise proposed by the union could extend to a prohibition against challenging a Commissioner decision revoking a license is also hypothetical and decontextualizes the promise and the natural boundaries placed on it by its inclusion in a collective agreement.

[238] The *Act* is legislation intended to regulate the employment relationship. An arbitrator under a collective agreement has jurisdiction to interpret it and the *Regulation* because they are incorporated into the collective agreement in Article 20 and are legislation an arbitrator is empowered to interpret and apply under section 89(g) of the *Labour Relations Code*.

[239] As in Article 20, the anchor for the interpretation, application, operation and alleged violation of paragraph 7 in a specific factual situation is the collective agreement, as it is when an arbitrator exercises jurisdiction in situations where there might be concurrent or overlapping jurisdiction with the courts or another tribunal. In managing concurrent jurisdiction between grievance arbitration and the courts or other tribunals, the Supreme Court of Canada's recognition of a broad exclusive jurisdiction in grievance arbitration has limits.[123]

[240] If the employers' hypothetical scenario were arbitrated, a threshold question would be whether defending against an administrative revocation of a license is a workplace dispute intended to be encompassed by the collective agreement. This is because the analytical framework for the public policy favouring a broad exclusive jurisdiction in grievance arbitration is rooted in the collective agreement and labour relations. On an issue of license revocation, the analysis would not be framed in common law language or common law public policy considerations. While pay and benefits addressed in Article 20 are at the core of a collective agreement, the employer's licensing or other operating permits are not. The essential character of the dispute might not have the requisite nexus to the collective agreement.

[241] It is not necessary to carry this hypothetical line of reasoning further because the issue does not have to be decided in this arbitration and positing a hypothetical scenario is unhelpful in addressing the facts and resolving a dispute that give rise to an arbitrated grievance. Neither employer raised license revocation or any scenario with the union during collective bargaining. If it had, the union would likely have acknowledged the self interest of the union and its members do not include having the employer lose business.

[242] The employers' assertion paragraph 7 is injurious to the justice system and abrogates their inalienable right to challenge a statute or its application divorces the *Act*, *Regulation* and Petition from their labour relations context. The *Act* and *Regulation* embody public policy designed to provide stability in the container trucking drayage sector and an enforcement mechanism to address rate undercutting. The huge disparity between an administrative fine up to $10,000 for all matters except

[123] See *Weber v. Ontario Hydro* [1995] 2 SCR 929; *New Brunswick v. O'Leary* [1995] 2 SCR 967; See the discussions in the several articles in Elizabeth Shilton and Karen Schucher (eds), One Law For All? *Weber v. Ontario Hydro* and Canadian Labour Law (2017, Irwin Law Inc.)

underpayment, which can attract a fine up to $500,000, is a neon indicator of the mischief sought to be redressed and the public policy favouring sectoral stability.

[243] The argument there has been a loss of an inalienable right to access to the courts ignores the public policy based reality that the entire dispute resolution system in labour relations with expanding jurisdiction to interpret, apply and enforce legislation such as the *Container Trucking Act* and Regulation, is founded on foreclosure of access to the courts. The employers' agreement to expedited arbitration in Article 20 and not to participate in or fund any legal challenges to the *Act* and *Regulation* is simply a concrete and specific reinforcement of the public policy.

[244] The employers' agreement not to undertake a collateral attack on what they agreed in Article 20 is not injurious to the justice system. It is simply a commitment to refrain from using a forum outside the labour relations arena to challenge the validity and continued enforceability of the *Act* and *Regulation*, which was "at the heart of the collective bargaining process and central to the validity of the resulting collective agreement."[124]

[245] Paragraph 7 of the Memorandum of Agreement was a lawful bargaining demand to which the employers agreed without comment or expressed reservation. The union played a central role in 2014 in achieving a bargain to bring interim stability to the sector pending recommendations and legislation. It continued this role in seeking to head off a threat to what had been achieved. Its proposal and the agreements are consistent, not contrary, to the public policy enacted to bring stability to the sector.

[246] I find paragraph 7 of the Memorandum of Agreement is not void because it is contrary to public policy. It is consistent with both labour relations public policy and the public policy sought to be advanced in the *Container Trucking Act* and *Regulation*.

(d) Claim for General Damages Allowed

[247] Is a declaration each employer contravened its collective agreement sufficient in the circumstances or should there be an additional remedy? A brief review of the circumstances instructs it is not.

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[124] *Sunlover Holding Co*. v. Unifor [2017] B.C.J. No. 500, ¶ 49

[248] By November 2015, the regulatory regime of the *Container Trucking Act* and *Regulation* under the strong disciplinary leadership of the Acting Commissioners in the Office of the British Columbia Container Trucking Commissioner held the promise that any continuance of the "history of cutthroat price competition"[125] in the container trucking drayage sector would not be at the cost of driver income through rate undercutting. The threat of destabilizing litigation had passed with the withdrawal of the constitutional challenge in February 2015 and the license litigation judgment in April 2015.[126]

[249] The union's view was that the initial experience with the Office of the British Columbia Container Trucking Commissioner had been unsatisfactory. The union's July 20, 2015 complaints against Aheer Transportation Ltd. and Sunlover Holding Co. Ltd. had not resulted in back payments. There was hope with the Acting Commissioners and the back payment promises from the employers. But no payments had been made.

[250] The union was not content to rely on the current or future administration of the statutory regime under the leadership of an unknown Commissioner for the discipline necessary to prevent recurring rate undercutting. Nor was it content to rely on the Acting Commissioners and Office as the sole mechanism to enforce back payment. The operating environment had not yet achieved what the 2005 Task Force believed was necessary.

> **Operating Environment**
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> The Task Force believes it is necessary to create an operating environment in which the chance of disruption is minimized and effective mechanisms are put in place to deal with disruptions that may occur. There are two complementary approaches to establishing such an environment. The first approach establishes an appropriate minimum rate of compensation; an effective enforcement regime to maintain that compensation for those owner-operators and employee drivers who are not unionized; and appropriate labour relations provisions to ensure that both legal and illegal disruptions are managed appropriately with minimal impact on port operations. The second works to ensure that the overall port operation is efficient, and that such matters as gate open hours, reservation systems, and advanced technology are implemented in a way that

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[125] Eric John Harris, Q.C., Kenneth Freeman Dobell and Randolph Kerry Morriss (Federal-Provincial Task Force), *Final Report of the Task Force on the Transportation and Industrial Relations Issues Related to the Movement of Containers at British Columbia Lower Mainland Ports*, October 26, 2005 (www.bctruckingforum.bc.ca/Task_Force_Final_Report.pdf), p. 23

[126] *Goodrich Transport Ltd. v. Vancouver Fraser Port Authority (c.o.b. Port Metro Vancouver)* [2015] F.C.J. No. 572

> considers the overall operation of the port and the impact of such decisions on all parties.[127]

[251] The union negotiated a collective agreement with Prudential Transportation Ltd. on November 27, 2015 containing an article on compliance with the *Act* and *Regulation*, including back payment, with an expedited arbitration enforcement process in a well-established dispute resolution regime with which it is most familiar. Article 20 was to be the pattern for collective agreements with the other employers in collective bargaining subject to the threat of immediate resumption of the suspended lawful strikes.

[252] Before the union could meet and discuss this pattern agreement with the other employers, it learned of a possible threat of a legal challenge to the *Act* and *Regulation* and specifically the Acting Commissioners' actions to enforce the back payments. Although, back payment was addressed in the union proposed Article 20.04, agreed to by Prudential Transportation Ltd., the union wanted to do what it could to lessen the possibility of the threat.

[253] The union wrote and proposed an unambiguous, plain language, all encompassing promise: "In signing this Memorandum of Agreement, the Company agrees it will not, in any way, participate in and/or fund any legal challenges to the *Container Trucking Act* and/or its Regulations." No employer sought clarification. On November 28th, Aheer Transportation Ltd. and Sunlover Holding Co. Ltd. agreed.

[254] The employers who signed agreements on November 28th did so to avoid the resumption of a legal work stoppage the following week.

[255] Among the employers who agreed that day and later, including Jete's Trucking and Harbour Link Container Services Ltd., only Aheer Transportation Ltd. and Sunlover Holding Co. Ltd. joined the Petition. Mr. Shoker, who signed on behalf of Sunlover Holding Co. Ltd., challenged the legality of the agreement by alleging bad faith by the union. Mr. Aheer, who signed on behalf of Aheer Transportation Ltd., had Aheer Transportation Ltd. join the Petition with two other companies for which he was President. The union was not named as a Respondent to the Petition and neither

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[127] Eric John Harris, Q.C., Kenneth Freeman Dobell and Randolph Kerry Morriss (Federal-Provincial Task Force), *Final Report of the Task Force on the Transportation and Industrial Relations Issues Related to the Movement of Containers at British Columbia Lower Mainland Ports*, October 26, 2005 (www.bctruckingforum.bc.ca/Task_Force_Final_Report.pdf), p. 40

affidavit disclosed the agreement made with the union or that the agreement was the subject of a challenge at the Labour Relations Board.

[256] This compartmentalization forced the union to seek standing in the British Columbia Supreme Court as a Respondent to the Petition; delayed the expedited arbitration process; and caused the union to defend its reputation as a collective bargaining agent at the Labour Relations Board and with its members, the forums in which its reputation is critical for the purposes for which it exists. It also stymied the union from having a single forum to decide a collective agreement interpretation issue.

[257] While arbitrators since the 1950s grappled with their remedial jurisdiction to award damages or otherwise give consequential relief[128] and often spoke of damages in terms of making an employee whole for a loss,[129] experience taught that there are circumstances when collective agreement contraventions that do not cause a monetary loss warrant an award of damages to remedy the wrong. In British Columbia, section 89(a) of the *Labour Relations Code* expressly gives arbitrators authority to "make an order setting the monetary value of an injury or loss suffered by an employer, trade union or other person as a result of a contravention of a collective agreement, and directing a person to pay a person all or part of the amount of that monetary value."

[258] As early as 1982, British Columbia arbitrators concluded a damage remedy for a collective agreement contravention that did not result in a monetary loss was necessary to reinforce the "work now, grieve later" principle during the term of a collective agreement. Without a meaningful remedy responsive to the breach, the collective agreement provision contravened might as well be erased for the agreement.[130]

[259] The circumstances when damages are awarded for non-monetary loss are varied. The award can be payment to affected employees whose workload was impacted by a contravention of a collective agreement.[131] It can be an award to the

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[128] E.g., *Polymer Corp.* [1959] O.L.A.A. No. 1 (Laskin); *Polymer Corporation and Oil, Chemical and Atomic Workers' Union, Local 16-14* [1961] O.R. 176 (H.C.) affirmed [1961 O.R. 438 (C.A.) appeal dismissed *Imbleau v. Laskin* [1962] S.C.R. 338

[129] E.g., *Canadian Johns Manville Co.* [1971] O.L.A.A. No. 1 (Weiler), ¶ 4

[130] See *Tahsis Company Limited* (1982) 3 W.L.A.C. 393 (Bird) discussed in *New Westminster School District No. 40* [1995] B.C.C.A.A.A. No. 628 (Germaine)

[131] E.g., *British Columbia Public School Employers' Association* [1998] B.C.C.A.A.A. No. 88 (Dorsey) (2 days pay)

union.[132] Illegal strikes have often resulted in awards of damages for monetary loss, including legal fees, and punitive damages payable to employers.[133] In some situations, there is an award of damages to both affected employees and the union.[134]

[260] In 2008, Arbitrator Tacon in Ontario summarized the evolution in arbitral remedial authority for non-monetary damages as follows:

> The redress must be commensurate with the wrong and the purpose of relief is remedial not punitive. Monetary damages may be warranted for non-monetary losses if such is appropriate to ensure the breach of the collective agreement is adequately addressed and other remedies are insufficient. In some instances, where there have been persistent breaches of a particular provision of the collective agreement, damages may be suitable as a deterrent against future violations. Damages may be awarded to the union for violation of its rights under the collective agreement, independent of any contravention of the rights accruing to individual employees. A collective agreement is fundamentally different from an ordinary commercial contract or contract of employment and that gives rise to different approaches and policy considerations in addressing remedy.[135]

[261] I have concluded this is a circumstance of collective agreement contravention that warrants a remedial response of an award of damages for non-monetary loss.

[262] On conclusion of the JAP and return to work in 2014, the issue was whether all employers and companies in the container drayage sector would pay their drivers the increased rates and fuel surcharge. There is no doubt these two employers knew what the rates and fuel surcharge were and what was expected under the JAP. They knew the strikes were suspended on the expectation the employer and all others in the sector would pay and adhere to new rates and fuel surcharge. If they all did, there would be no competitive disadvantage. As it unfolded, payment was not made until a real threat of license suspension and large administrative penalties.

[263] The agreement by Aheer Transportation Ltd. and Sunlover Holding Co. Ltd. to conclude a collective agreement and avoid the business loss that a strike resumption would have caused was cavalier if not deceptive. Despite promises to make the back

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[132] E.g., *TFL Forest Ltd. (Elk Falls Lumber Mill) (Damage Claim Grievance)* [2007] B.C.C.A.A.A. No. 145 (Dorsey) ($38,000); See also *Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486* (1975), 8 O.R. (2d) 103 (C.A.)
[133] E.g., *Canada Post Corporation* [2011] C.L.A.D. No. 31 (Picher); *Canada Post Corporation* [2016] C.L.A.D. No. 56 (Burkett) (a total of $120,000 punitive damages)
[134] In *West Park Healthcare Centre* [2005] O.L.A.A. No. 780 (Charney), the chair awarded damages of $10,000 to the union and $1,000 to each employee for denial of representational rights. Both nominees dissented. One decided no damages should be awarded. The other would have awarded more.
[135] *Toronto Police Board* [2008] O.L.A.A. No. 479 (Tacon), ¶ 27

payments, each employer reneged and then broke the promise they made not to challenge the foundation of the obligation to make the back payment.

[264] In entering into collective agreements with the union on November 28th, which the union recommended to its members, each employer chose and promised not to participate in a legal challenge to the *Act* and *Regulation* to gain the benefit of the stability and continuity of business. They chose and promised not to join with other licensees who were preparing a legal challenge. They gained a significant financial benefit by avoiding the loss of a lawful strike resuming.

[265] Within weeks afterwards, consistent with the licensee committee's sense of urgency, the employers chose to ignore their collective agreement obligation and to engage in the defiant behaviour that was at the root of the rate undercutting culture the legislative regime was seeking to weed out of the sector. Sunlover Holding Co. Ltd. sought to claim immunity to support its defiance by accusing the union of not negotiating in good faith. Aheer Transportation Ltd. sought to shelter payments in a trust to reclaim later if the legal challenge was successful.

[266] The course of conduct in support of their contravention of the collective agreement was a complete resiling from the promise each made after each gained the benefit of the agreement. It was behaviour antithetical to collective bargaining and collective agreement administration fostered and encouraged under the *Labour Relations Code*.

[267] It also defied the equilibrium that was being established in the regulatory regime designed to provide fair compensation for drivers and stability and economic prosperity for a reduced sector in which each employer was a licensee.

[268] An award of no or nominal damages is not responsive to the circumstances or the nature of the contravention. No or nominal damages will not reflect or redress the benefit and gain each employer obtained by making the agreement it did when it did or reinforce the public policy purposes of the *Labour Relations Code*. These will only be achieved with an award of substantial damages against each employer.

[269] The contravention by each employer and the appropriateness of an award of substantial damage is not diminished by the unproven, hypothetical submission of the

employers that without their participation, the legal challenge would have been made in any event. The employers say this, but they adduce no evidence of the relative stake or truck tags each of the ten petitioners had in the challenge or who bore how much of the cost or who would have borne what cost without these employers' participation.

[270] I order Aheer Transportation Ltd. to pay the union $45,000 in damages for its deliberate and planned contravention of paragraph 7 of the Memorandum of Agreement in its collective agreement.

[271] I order Sunlover Holding Co. Ltd to pay the union $45,000 in damages for its deliberate and planned contravention of paragraph 7 of the Memorandum of Agreement in its collective agreement.

(e) Union's Duty to Mitigate Fulfilled

[272] Whether an award of damages for a non-monetary loss requires the party claiming damages to mitigate avoidable losses is not a question I need decide. If the union had a duty to mitigate, I find it discharged its duty.

[273] The union grieved promptly and opposed employer applications to delay arbitration. It sought to attenuate the potential effects of the legal challenge by applying and gaining standing as a respondent and making submissions on the merits of the Petition.

[274] The union was caught in a situation where it could not argue in the British Columbia Supreme Court for an interpretation of the collective agreement, the exclusive jurisdiction of a grievance arbitrator. The court was not going to usurp the role of this arbitrator. It expressly recognized "… Arbitrator Dorsey correctly confirmed that it remains his role to interpret the language of the collective agreement between Unifor and Sunlover."[136]

[275] The nub of the employer's argument about the quality of union submissions or lack of applications in the Petition proceedings is that the union was not ably represented. None of what the employers hypothesize about what could or should have

[136] *Aheer Transportation Ltd. v. British Columbia (Container Trucking Commissioner)* [2016] B.C.J. No. 1035, ¶ 44

been done was a condition of being added as a Respondent. It is not my role to review or comment on the adequacy of union legal representation in the Petition proceeding.

[276] I find there was no failure by the union to mitigate its non-monetary losses, if it has a duty to mitigate.

(f) Claim for Punitive Damages Dismissed

[277] I dismiss the union's claim for punitive damages. In making this decision, I agree with Arbitrator Jackson's following statements in 2003:

> First, an arbitrator's remedial authority, found in section 89 of the *Labour Relations Code*, ought generally be used to compensate rather than punish and remedies must bear a relation to the breach: see *School District No. 40 (New Westminster) and New Westminster Teachers' Union* [1995] B.C.C.A.A.A. No. 628 (Germaine).
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> I agree with the reasoning of those arbitrators who accept that they have authority to award punitive damages: see, *inter alia, Vancouver Hospital and Health Sciences Centre and BCNU* [1999] B.C.C.A.A.A. No. 60 (McPhillips); *Berryland Foods and UFCW, Local 430P* (1987) 29 L.A.C. (3d) 311 (Hope). However, I agree, as well, with arbitrator Hope's conclusions in *Berryland Foods*, *supra* at p. 334 that punitive damages have "an extremely narrow application in the law of contract" and must only be exercised in appropriate circumstances such as "to prevent insensitive or unscrupulous employers from continuing to act in breach of the ... agreement".
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> Second, in describing the type of conduct necessary to warrant punitive damages, the Supreme Court of Canada had this to say in *Vorvis v. ICBC* (1989) 58 D.L.R. (4th) 193 as quoted in *Pacifica Papers Inc*., *supra* at para. 84:
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> > " ... punitive damages may only be awarded in respect of conduct which is of such nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature. I do not suggest that I have exhausted the adjectives which could describe the conduct capable of characterizing a punitive award, but in any case, where such an award is made the conduct must be extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment. (p. 208)
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> Third, the purpose of awarding punitive damages in the context of labour relations is to deter a continuing breach of a collective agreement: see *Berryland Foods*, *supra*; *Vancouver Hospital*, *supra*.[137]

[278] I find that, despite the union's genuine sense of outrage about being deceived, each employer's participation in the Petition does not meet the level of behaviour attracting or warranting punitive damages. There are no ongoing collective agreements and no potentially repetitive contraventions to be deterred.

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[137] *Eurocan Pulp and Paper Co.* [2003] B.C.C.A.A.A. No. 233 (Jackson), ¶ 69-70; 72; 74

[279] I reserve and retain jurisdiction over the implementation and interpretation of this decision.

SEPTEMBER 8, 2017, NORTH VANCOVER, BRITISH COLUMBIA.

James E. Dorsey

James E. Dorsey