

CANADA / JUDGMENT

Team Transport Services Ltd. v. Unifor

2020 BCSC 91

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Supreme Court of British Columbia

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2020 BCSC 91 Team Transport Services Ltd. v. Unifor

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Team Transport Services Ltd. v. Unifor,

2020 BCSC 91

Date: 20200124

Docket: S1612017

Registry: Vancouver

Between:

Team Transport Services Ltd. and PTG Transport Ltd.

Petitioners

And

Unifor, Local Union No. VCTA, Teamsters Local Union No. 31

and British Columbia Labour Relations Board

Respondents

Before: The Honourable Mr. Justice Gomery

On judicial review from: An order of the British Columbia Labour Relations Board, dated November 9, 2016 (Re Port Transport, BCLRB No. 146/2016, [2016] B.C.L.R.B.C. No. 146).

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.

November 26-27, 2019

Written submissions received:

January 17, 2020

Place and Date of Judgment:

Vancouver, B.C.

January 24, 2020

Overview

- [1] Team Transport Services Ltd. ("Team") and PTG Transport Ltd. ("PTG") are employers in the trucking business, providing services at the Port of Metro Vancouver ("PMV"). Until January 2016, a third company, Port Transport Services Inc. ("Port") was also an employer providing trucking services at PMV. Port, Team and PTG were all under common control and direction.
- [2] Unifor, Local Union No. VCTA ("Unifor"), held collective bargaining rights over Port's operations at PMV. Another union, Teamsters Local Union No. 31 ("Teamsters"), held collective bargaining rights over PTG's operations at PMV. Team's operations were non-unionized.
- [3] In applications to the British Columbia Labour Relations Board (the "Board") beginning in 2015, Unifor alleged that work that had been performed by Port was being redirected to Team, weakening Unifor's bargaining position on behalf of its members. Unifor sought relief pursuant to s. 38 of the Labour Relations Code, R.S.B.C. 1996, c. 244 [Code]. This kind of application is called a "common employer" application. Section 38 permits the Board to treat several employers operating under common control and direction as constituting a single employer for the purposes of the Code and to grant relief.

- [4] Unifor succeeded in its applications, but not before Port had made an assignment in bankruptcy on January 18, 2016. With the bankruptcy, Port ceased carrying on business and ceased to be an employer, as that term is defined in s. 1 of the Code.
- [5] In June 2016, the Board declared that Port, Team and PTG were common employers within the meaning of s. 38 of the Code. In September 2016, the Board made remedial orders, including an order that Unifor be certified as the bargaining agent for certain employees of Team. On November 9, 2016, the Board dismissed the petitioners' application, made pursuant to s. 141 of the Code, to reconsider these two decisions.
- [6] Team and PTG petition this Court to quash the reconsideration decision. They maintain that Port's bankruptcy and the fact that it ceased carrying on business as an employer made it impossible for the Board to exercise statutory authority under s. 38 of the Code. They contend that the Board's refusal to reconsider its purported exercise of statutory authority was grounded in a wholly untenable interpretation of s. 38 and is, therefore, patently unreasonable.
- [7] Unifor opposes the petitioners' application. The Board attended the hearing before me to make helpful submissions concerning the standard of review and does not take a position concerning the substance of its decisions.
- [8] Teamsters, who participated in the hearings before the Board, filed a petition response indicating that they would consent to the petitioners' application, except insofar as the petitioners seek costs. Teamsters did not otherwise participate in this judicial review proceeding.
- [9] In a nutshell, the issue at hand is whether the petitioners are correct that the Board's reconsideration decision is patently unreasonable in light of s. 38 of the Code. Section 38 is not a complicated provision. The petitioners frame their argument as a narrow point of construction.

Standard and Methodology of Review

- [10] From the beginning of the hearing, it was common ground that the Board is a specialized tribunal protected by a privative clause whose decisions are entitled to considerable deference. Its decisions may only be set aside if they are patently unreasonable. Nevertheless, the parties expended a great deal of argument at the hearing addressing the standard and methodology of review.
- [11] After oral argument was concluded in late November 2019, the Supreme Court of Canada released its decisions in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [Vavilov] and *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67 [Canada Post]. These decisions bear on the methodology of judicial review where deference is to be afforded the tribunal. At the petitioners' request, I granted the parties leave to address Vavilov and Canada Post in written submissions. Those submissions brought the

parties into substantial agreement on these questions and I can now deal with them summarily.

- [12] The Code gives the Board exclusive jurisdiction to hear and determine applications under the Code and to decide questions arising under the Code; ss. 136 and 139. It expressly states that a court must not exercise jurisdiction in respect of a matter that is or may be the subject of an application under the Code; s. 137. Section 138 states that a decision of the Board in respect of which it has jurisdiction under the Code "is final and conclusive and is not open to question or review in a court on any grounds". These are strong examples of what are usually described as privative clauses.
- [13] Privative clauses cannot be taken literally. It is trite law that, for constitutional reasons, this Court's jurisdiction to review and, on occasion, quash decisions of a tribunal protected by a privative clause cannot be wholly excluded; *Vavilov* at para. 24. The standard of review applied by the Court on an application to quash a Board decision is fixed by s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [ATA], made applicable to the Board by s. 115.1 of the Code. Section 58(2)(a) of the ATA states that, in a judicial review proceeding of a Board decision, "a finding of fact or law or an exercise of discretion by the [Board] in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable".
- [14] This statutory standard of patent unreasonableness differs from the generally applicable standard of "reasonableness" applied in Canada since *Dunsmuir v. New Brunswick*, 2008 SCC 9 [Dunsmuir]; *Shamji v. Workers' Compensation Appeal Tribunal*, 2018 BCCA 73 at paras. 36-38. The Dunsmuir standard of reasonableness has been the subject of much judicial consideration. It was recently revised in *Vavilov*. However, at para. 35, the Court in *Vavilov* confirmed that "where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law".
- [15] While it is not always obvious how decisions addressing Dunsmuir reasonableness are to be applied in the context of the statutory standard of patent unreasonableness, to the extent that Dunsmuir reasonableness prescribes a methodology of judicial deference to the reasoning in the decision under review, review on the basis of patent unreasonableness must be at least as methodologically deferential.
- [16] The Supreme Court of Canada provided the following authoritative description of the statutory standard of patent unreasonableness in *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at paras. 28-29 [West Fraser Mills]:
- [28] A legal determination like the interpretation of a statute will be patently unreasonable where it "almost border[s] on the absurd": *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23, [2004] 1 S.C.R. 609, at para. 18. In the workers' compensation context in British Columbia, a patently unreasonable decision is one that is "openly, clearly, evidently unreasonable": *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80, 46 B.C.L.R. (4th) 77, at para. 33; *Vandale v. British*

Columbia (Workers' Compensation Appeal Tribunal), 2013 BCCA 391, 342 B.C.A.C. 112, at para. 42 (emphasis deleted).

- [29] By stipulating the standard of patent unreasonableness, the Legislature has indicated that courts should accord the utmost deference to the Tribunal's interpretation of the legislation and its decision.

[Emphasis added.]

- [17] Judicial review of the decisions of a decision-maker exercising statutory authority - such as the Board - often requires the court to interpret the statute. Did the statute authorize the Board to do what it has done?

- [18] While statutory interpretation is always necessary, Vavilov and Canada Post mandate a "reasons first" approach. Speaking for the majority in Canada Post at para. 41, Rowe J. described a "reasons first" approach as one that "requires the reviewing court to start with how the decision maker arrived at their interpretation, and determine whether it was defensible in light of the interpretative constraints imposed by law". Speaking for the majority in McLean v. British Columbia (Securities Commission), 2013 SCC 67 at para. 33 [McLean], Moldaver J. explained that:

the resolution of unclear language in an administrative decision maker's home statute is usually best left to the decision maker. That is so because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired the administrative decision maker -- not the courts -- to make. Indeed, the exercise of that interpretative discretion is part of an administrative decision maker's "expertise".

- [19] In this light, the following is clear. I must begin with the Board's interpretation of s. 38 of the Code. My task is to evaluate the Board's reasoning in the decision at hand, not look for a "correct" conclusion. At the end of the day, I must accept the Board's reasoning and its interpretation unless it "almost borders on the absurd". In the context of the standard of patent unreasonableness, my reading of the statute should be guided by the Board's reasoning unless it is obviously untenable.

Provisions of the Code

- [20] Section 38 of the Code states:

Several businesses treated as one employer

38 If in the board's opinion associated or related activities or businesses are carried on by or through more than one corporation, individual, firm, syndicate or association, or a combination of them under common control or direction, the board may treat them as constituting one employer for the purposes of this Code and grant such relief, by way of declaration or otherwise, as the board considers appropriate.

[21] The following definition in s. 1(1) is also important:

"employer" means a person who employs one or more employees or uses the services of one or more dependent contractors and includes an employers' organization;

[22] Section 2 of the Code is relevant to consideration of the powers granted to the Board under s. 38 because it gives direction as to the manner in which the Board must exercise its powers. Section 2 states:

Duties under this Code

2 The board and other persons who exercise powers and perform duties under this Code must exercise the powers and perform the duties in a manner that

- (a) recognizes the rights and obligations of employees, employers and trade unions under this Code,
- (b) fosters the employment of workers in economically viable businesses,
- (c) encourages the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees,
- (d) encourages cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and developing a workforce and a workplace that promotes productivity,
- (e) promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes,
- (f) minimizes the effects of labour disputes on persons who are not involved in those disputes,
- (g) ensures that the public interest is protected during labour disputes, and
- (h) encourages the use of mediation as a dispute resolution mechanism.

The Petitioners' Argument

[23] With one exception, the petitioners make the same argument as they made to the Board. It provides context for an assessment of the Board's reasoning. The exception is that the argument the petitioners made to the Board included a component - a constitutional argument that the Board's decision led to an operational conflict with provisions of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 - that they are no longer pursuing.

[24] The petitioners submit that the definition of "employer" speaks in the present tense, as does the reference to activities or businesses that are "carried on" s. 38. Section 7(2) of the Interpretation Act, R.S.B.C. 1996, c. 238, provides that, if a provision in an enactment is expressed in the present tense, it applies to the circumstances as they arise. Upon becoming bankrupt, Port ceased to be an employer and it ceased to carry on business. The petitioners submit that Port thereupon ceased to be an entity to which a common employer declaration

under s. 38 could apply.

[25] In their written argument at the hearing, the petitioners submit:

It would make a mockery of Section 7 of the Interpretation Act for the Legislature's use of the present tense in the words "employs" in a definition of "employer" and business which "are carried on by or through " used in Section 38 to be applied to impose obligations on Team related to [Unifor] as "one employer", arising from [Unifor's] relationship with an entity which was bankrupt at the time of the making of the Board's order. In essence, the Board's decision reanimates Port for the purposes of the application of section 38.

[26] The petitioners concede the correctness of Board jurisprudence in which the Board held that it has the power under a predecessor to s. 38 to grant a common employer remedy in respect of a period prior to the Board's order; *Caledonian Lands Ltd. v. United Brotherhood of Carpenters & Joiners of America*, Local No. 1251, [1979] 3 C.L.R.B.R. 12 (B.C.) [*Caledonian Lands*] and *Lorne W. Camozzi Co. v. International Union of Operating Engineers*, Local No. 115 (1985), 68 B.C.L.R. 338 (C.A.) at 343-346 [*Camozzi*]. They say that these were cases in which the subject companies were all carrying on business as an employer at the time of the order. Otherwise, they say, the statutory prerequisites to an order are absent. They say that there is no rational argument that permits the Board to make an order under s. 38 if the subject companies are not still carrying on business as employers at the time of the order.

The Board's Decision

[27] The reconsideration decision under review was made by a Panel of three members of the Board who were asked to reconsider a decision of Vice Chair de Aguayo. Her decision was made in two parts: first, a declaration indexed as BCLRB No. B70/2016; and subsequently, a remedial order indexed at BCLRB No. B117/2016.

[28] Vice Chair de Aguayo framed the declaration in the past tense, referencing the date of Unifor's application to the Board. She stated:

I declare that, as of November 27, 2015, Port Transport, Team and PTG were common employers within the meaning of Section 38 of the Code.

[29] The Vice Chair's remedial order was prospective. She directed that "a certification order shall issue to Unifor".

[30] In the reconsideration decision, the Panel agreed with the decisions under review, in effect adopting and supplementing Vice Chair de Aguayo's reasoning.

[31] The Board referred to the petitioners' argument that "the bankruptcy of Port precluded s. 38 relief because Port was no longer an 'employer' with 'employees' as of the date of the bankruptcy". It stated:

16 It has long been established that a Board decision under Section 38 of the Code need not speak merely from the date of the decision, rather it can be effective from a date reflecting the particular circumstances in the case: *Caledonian Lands Ltd.*, BCLRB No. 52/79 [1979] 3 Can LRBR 12; *Re Lorne W. Camozzi Co. Ltd. et al.* and *International Union of Operating Engineers, Local No. 115 et al.*, (1985), 24 DLR (4th) 266 (BCCA).

17 In the present matter, the Union's replacement worker and common employer application was filed with the Board on November 27, 2015. That application noted the changed circumstances in respect to the operations at issue following upon the Union's November 2015 job action. It is those changed circumstances which ultimately led to the Board's replacement worker decision in B6/2016 and common employer decision in the Original Decision. The common employer remedy ordered in B70 was made effective as of the date of the Union's application (November 27, 2015). That was clearly appropriate in light of the circumstances in the case, the remedial purpose of Section 38 of the Code, and the authorities just noted.

18 The bankruptcy of Port occurred on January 18, 2016. The Board's common employer remedy against Port is thus effective from November 27, 2015 at least until the date of Port's bankruptcy on January 18, 2016. We do not understand the Applicants to be arguing that the bankruptcy order should have a retroactive effect prior to January 18, 2016. If we are wrong in that, we would find no merit in the argument.

19 As referenced above, the Board's common employer relief in the Original Decision protects the Union's bargaining rights in respect to the circumstances at issue in the case. For the reasons articulated by the Ontario Labour Relations Board in *MGI Packers Inc.*, August 2, 2011 (2091-03-R), we find this preservation of the Union's bargaining rights under Section 38 of the Code is not in operational conflict with the bankruptcy order in respect to Port.

20 The Applicants' argument proceeding from the definition of "employer" is not supported by the language of Section 38 or the nature of that provision (as described above) and is inconsistent with the reasoning in *MGI Packers Inc.* and the cases cited therein. We find it is without merit.

[Emphasis added.]

[32] The essential elements of the Board's reasoning in these passages may be summarized as follows. The Board relied on the reasoning in *Caledonian Lands* and *Camozzi*. It emphasized that the remedy was granted effective as of the date of Unifor's application for common employer relief, prior to Port's bankruptcy. It had reference to the remedial purpose of s. 38.

[33] It will be recalled that the petitioners concede that *Caledonian Lands* and *Camozzi* establish that the Board may make an order under s. 38 in respect of a period preceding the order. When both cases were decided, the predecessor section was numbered 37; its wording was not materially different. In *Caledonian Lands*, Vice-Chair Germaine reasoned that s. 37 must be understood as permitting the Board to make common employer declarations effective at an earlier date because, otherwise, the protections for unionized employees envisaged by the provision would be too easily avoided. This would undermine the purposes of the Code.

He stated at 17-19:

Clearly, the effectiveness of a Section 37 determination in serving this purpose would be radically reduced if the determination were to have no effect prior to the date upon which it is made. To say that such a determination is effective only upon and after the date it is made would be to effectively establish a route by which an employer could wholly avoid collective bargaining obligations for a significant period of time. That is because, to begin with, the Board is not able to respond overnight to Section 37 applications. The procedures of this Board, like those of any other judicial or quasi-judicial tribunal, require a period of time within which to function. While this Board is making every effort to minimize that period of time in a manner consistent with the principles of natural justice, there is nevertheless an unavoidable period of time which must elapse following an application made under Section 37 or any other section of the Code before the Board can properly adjudicate and dispose of the application. That means, even assuming the application is well founded, that unless a common employer determination under Section 37 in relation to a collective agreement does have effect prior to the date upon which it is made, an employer could defeat the purposes of the determination for at least the period of time consumed by the Board's adjudicative procedures.

Even if the Board could perform the supernatural task of instant adjudication, there would still be room for an avoidance of collective bargaining obligations if a common employer determination in relation to a collective agreement were to have no effect prior to the date upon which it is made. The fact is that in the construction industry it is possible for an employer to commence a project through the vehicle of a new corporate entity in a manner which is not likely to catch the early attention of the union that is party to a collective agreement with that employer. Without being unduly pessimistic, it is inconceivable that the real world will ever be free of employers who are unwilling to recognize the force of collective bargaining rights and who will seek to defeat those rights in this manner. Trade-unions, on the other hand, are not in the business, nor should they be encouraged to enter the business, of maintaining a police force intended and equipped to detect every such attempt by unscrupulous employers.

[34] In *Camozzi*, at 343, cited by the Board in its reasoning quoted above, the Court of Appeal quoted these paragraphs and held that this reasoning does not engage a patently unreasonable interpretation of the statute.

Analysis

[35] The Board interpreted s. 38 as permitting it to make a declaration at the date of Unifor's application to the Board, preceding Port's bankruptcy, based on facts in existence at the date of the application, and order prospective remedies, effective after the bankruptcy. It considered that it could rely on the facts in existence at the date of the application, even if they were no longer in existence by the time it came to make an order.

- [36] The Board adopted this interpretation of s. 38 having regard to the language of s. 38 and its purpose. Its interpretation of s. 38 was informed by its own jurisprudence stressing the adverse practical consequences of an interpretation that would prevent the Board from looking into the past and attaching present and future consequences to past events.
- [37] In having regard to the text, context and purpose of the statute, the Board applied an approach repeatedly advocated by the Supreme Court of Canada, most recently in *Vavilov* at para. 121. The Board's attention to the practical consequences of alternative interpretations was mandated by the Supreme Court of Canada in *West Fraser Mills* at para. 41, where the Chief Justice stated:
- [41] Courts reviewing administrative decisions are obliged to consider, not only the text of the law and how its internal provisions fit together, but also the consequences of interpreting a provision one way or the other and the reality of how the statutory scheme operates on the ground: see e.g. *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 61. This is particularly the case where the standard of review is patent unreasonableness. Practical justifications and the avoidance of impacts that would undermine the objects of the statute may

close the door to a conclusion that a particular interpretation "border[s] on the absurd" or is "openly, clearly [and] evidently unreasonable".

[Emphasis added.]

- [38] *McLean* and *West Fraser Mills* were cases in which the Court found more than one possible reasonable interpretation of the statute. The crux of the petitioners' argument in this case is that s. 38 cannot reasonably be interpreted in more than one way. They submit that s. 38 cannot possibly be construed as permitting the Board to attach future consequences to the fact that Port, Team and PTG were carrying on business as common employers when that was no longer the case by the time the Board made its decision.
- [39] I do not think that s. 38 must be read so narrowly. While it is framed in the present tense and applies to circumstances as they arise, this aspect of the drafting does not logically preclude the Board from notionally situating itself at the date of the application for the purpose of exercising its powers under s. 38. Having done so, it is reasonable for the Board to consider whether prospective relief is required, even if one of the employers is no longer carrying on business as an employer. The practical considerations favouring this approach were rehearsed by the Board in *Caledonian Lands* and endorsed by the Court of Appeal in *Camozzi*. They are compelling. *Camozzi* is the starting point of the Board's reasoning in this case.

[40] The petitioners accept that s. 38 authorizes the Board to look backwards to the date of the application and make an order effective from that time forward. This amounts to a concession that the Board may situate itself at the date of the application for the purpose of exercising its powers under s. 38. The petitioners' argument that they cannot continue to do so in the teeth of an intervening bankruptcy amounts to an assertion that the Board must ask itself two questions:

1. were the subject companies carrying on business under common control and direction? - and,
2. are they still doing so?

[41] There is nothing in the text of s. 38 to require such a formulaic approach. To the contrary, s. 38 is drafted in broad and general terms. As the Court observed in Vavilov at para. 110, the use of broad, open-ended or highly qualitative language "clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language". On its face, s. 38 is applicable to a wide range of circumstances. The Board's remedial powers under s. 38 are open-ended. They must be exercised in light of the very broadly formulated list of objectives found in s. 2. The Board's duties under s. 2 permit, and perhaps require, the Board to read s. 38 generously and not in the rigid manner proposed by the petitioners.

[42] For these reasons, in my opinion, the Board's decision in this case is grounded in a reasonable interpretation of s. 38. It is certainly not a decision that is patently unreasonable in that it almost borders on the absurd.

Disposition

[43] The petition is dismissed, with costs to Unifor against the petitioners only. The Board and the Teamsters will bear their own costs.

"Gomery J."

The Honourable Mr. Justice Gomery

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