

CANADA / JUDGMENT

Yellow Cab Company Ltd. v. Passenger Transportation Board

2020 BCSC 162

COURT

Supreme Court of British Columbia

DECIDED

6 February 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 162 Yellow Cab Company Ltd. v. Passenger Transportation Board

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Yellow Cab Company Ltd. v. Passenger Transportation Board,

2020 BCSC 162

Date: 20200206

Docket: S200930

Registry: Vancouver

Between:

Yellow Cab Company Ltd., Black Top Cabs Ltd., Maclure's Cabs (1984) Ltd., Vancouver Taxi Ltd., North Shore Taxi (1966) Ltd., Richmond Cabs Ltd., Bonny's Taxi Ltd., Burnaby Select Metrotown Taxi Ltd., and Queen City Taxi Ltd.

Petitioners

And

Passenger Transportation Board, Uber Canada Inc., and Lyft Canada Inc.

Respondents

Before: The Honourable Madam Justice Jackson

Oral Reasons for Judgment

Counsel for Petitioners:

D. Penner

Counsel for Passenger Transportation Board:

A R. Westmacott, Q.C.

A. Harlinton

Counsel for Uber Canada Inc.:

M. A. Feder, Q.C.

A. Cocks

P. Williams

Counsel for Lyft Canada Inc.:

R. Millen

E. Kassaris

A. Solose

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 4, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 6, 2020

Table of Contents

I. BACKGROUND. 3

II. APPLICABLE LEGAL FRAMEWORK. 5

A. Is there a strong likelihood the petition will succeed?. 9

1. Procedural Fairness Issue. 9

2. Fettering Issue. 12

3. Substantive Issue. 13

B. Have petitioners established they will suffer irreparable harm if the stay is refused?. 15

1. Legal Framework. 15

2. Analysis. 16

C. Where does the balance of convenience lie?. 18

1. Legal Framework. 18
2. Analysis. 18

III. CONCLUSION. 20

THE COURT: This decision was delivered in the form of Oral Reasons. The Reasons have since been edited for publication.

I. BACKGROUND

- [1] In September 2019, the Passenger Transportation Act, S.B.C. 2004, c. 39 (the "Act") was amended to enable the Passenger Transportation Board (the "Board") to make licensing decisions with respect to transportation network services ("TNS"). The Act defines TNS as "services respecting the connection of drivers of passenger directed vehicles with passengers who hail and pay for the services through the use of an online platform". TNS are commonly referred to as ride-hailing or ridesharing. The legislative amendments were preceded by seven years of study and public consultation on the concept of ride hailing and regulation of TNS in British Columbia, including the Board's own consultation with the taxi industry in July 2019.
- [2] Following its consultation, in August 19, 2019, the Board adopted and published a policy on the introduction of TNS which provides transparency and guides the Board in its consideration of applications for TNS licenses.
- [3] On September 3, 2019, TNC Uber Canada Inc. ("Uber") applied to the Board for a passenger transportation license with a special authorization in the form of a TNS authorization (a "TNS License") to allow it operate ride hailing services in the Lower Mainland and Whistler (the "Uber Application").
- [4] On the same date, TNC Lyft Canada Inc. ("Lyft") also applied to the Board for a TNS License (the "Lyft Application"). I will refer to the Uber Application and the Lyft Application collectively as the "Applications".
- [5] Section 26(2) of the Act requires the Board to publish notice of applications it receives. Section 27(2) permits any person to make written submissions to the Board within the time period specified by the Board. The Board published a notice of the Applications and received numerous submissions, including a submission on behalf of the Vancouver Taxi Association (the "VTA"), of which all of the petitioners are members. Under s. 27(5) of the Act, unless the Board directs otherwise, a person making submissions on an application is not entitled to participate any further in the application process or obtain further information or disclosure respecting the application merely because it has made a submission.
- [6] The VTA asked the Board to consider the Applications at an oral hearing. Under s. 17 of the Act, the Board may opt to hold an oral hearing but that decision is at its sole discretion.

- [7] On October 30, 2019, the Board issued an industry advisory indicating it would conduct a written hearing into the Applications and providing reasons for its decision not to hold an oral hearing. In the same industry advisory, the Board advised it was adopting a modified process for all TNS application hearings and would be sending the applications and supporting documentation to all those who had provided a submission to the Board. The submitters were then provided with the opportunity to make further written submissions within 14 days. Over the course of the Board's proceeding, the petitioners, through the VTA, made numerous submissions.
- [8] In short, the petitioners opposed the Applications.
- [9] On January 23, 2020, the Board issued reasons granting both of the Uber Application and the Lyft Application (collectively the "Decisions").
- [10] On January 24, 2020, Uber began facilitating transportation network services and drivers began transporting riders. Since then, over 800 Uber-affiliated drivers have provided transportation services in BC and over half a million British Columbians have signed up on Uber's platform.
- [11] On the same day, Lyft also began connecting riders and drivers via its platform and has now facilitated thousands of rides in Vancouver.
- [12] On January 27, 2020, the petitioners filed a petition under the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 [JRPA], seeking an order quashing the Decisions, or in the alternative an order directing the Board to rehear, reconsider, and/or vary the Decisions. In their petition, the petitioners advance three grounds for relief:
1. the Board fettered its discretion by adopting and following its policy respecting how it would approach TNS License applications (the "Fettering Issue");
 2. the Board's hearing into the Applications was procedurally unfair (the "Procedural Fairness Issue"); and
 3. the Board failed to consider the impact of granting the Applications on taxi companies (the "Substantive Issue").
- [13] On the same date the petitioners filed a notice of application seeking an interlocutory order staying the Decisions pending the disposition of the petition on its merits. This Court is expressly empowered by s. 10 of the JRPA to grant interlocutory relief it considers appropriate pending the final disposition of a petition for judicial review.
- [14] It is the petitioners' application for a stay of the Decisions that is before me for determination.
- [15] The Board took no position on the relief sought by the petitioners, but made submissions on the statutory framework under which the Board operates.

II. APPLICABLE LEGAL FRAMEWORK

[16] The starting point for an interlocutory injunction analysis is *RJR -- MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334 [*RJR -- MacDonald*], which sets out the general test:

Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interrogatory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

[17] At stage one, the determination of whether there is a serious question to be tried is made "on the basis of common sense and an extremely limited review of the case on the merits": *RJR -- MacDonald* at 348. The burden is on the applicant. This stage of the test is satisfied unless the grounds for review are frivolous or vexatious: *RJR -- MacDonald* at 348.

[18] However, several of the parties advocated for modifications to the *RJR -- MacDonald* test. In their notice of application the petitioners argued that where a stay is sought pursuant to the JRPA there is no requirement for the applicant to establish irreparable harm, relying on *Coast Mountain Bus v. CAW-Canada*, 2008 BCSC 1135. However, at the hearing the petitioners resiled from that position and acknowledged the appropriate analysis involves consideration of whether the applicants have established irreparable harm.

[19] Uber and Lyft also advocate for a modified *RJR -- MacDonald* test. Uber argues the petitioners are seeking a mandatory injunction. They rely on *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 [CBC] at para. 18, in which the Supreme Court of Canada modified the *RJR -- MacDonald* test where the relief sought is a mandatory interlocutory injunction:

[18] In sum, to obtain a mandatory interlocutory injunction, an applicant must meet a modified *RJR -- MacDonald* test, which proceeds as follows:

- (1) The applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails showing a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice;
- (2) The applicant must demonstrate that irreparable harm will result if the relief is not granted; and
- (3) The applicant must show that the balance of convenience favours granting the injunction.

[20] At para. 17, Justice Brown discussed what is required at the first stage of this modified test:

[17] This brings me to just what is entailed by showing a "strong prima facie case". Courts have employed various formulations, requiring the applicant to establish a "strong and clear chance of success"; a "strong and clear" or "unusually strong and clear" case; that he or she is "clearly right" or "clearly in the right"; that he or she enjoys a "high probability" or "great likelihood of success"; a "high degree of assurance" of success; a "significant prospect" of success; or "almost certain" success. Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.

[Footnotes omitted.]

[21] Stages two and three of the test remain unchanged by CBC. At stage two, the applicant must show irreparable harm if the injunction is not granted. At stage three, the applicant must show the balance of convenience favours granting the injunction: RJR -- MacDonald at 334; CBC at para. 18. The fundamental question is whether granting the stay is just and equitable in the circumstances: Google Inc. v. Equustek Solutions Inc., 2017 SCC 34 at para. 25.

[22] Uber characterizes the nature of the relief sought by the petitioners as a mandatory injunction, and therefore argues the petitioners must establish there is a strong likelihood, based on the law and the evidence presented on this hearing, they will ultimately succeed in their petition.

[23] Lyft also submits the petitioners must satisfy the court of the higher threshold with respect to the merits of its petition, but for different reasons than those advanced by Uber. Section 22 of the Act is a privative clause which grants the Board the exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact, law, and discretion arising or required to be determined under the Act.

[24] Lyft points out that by virtue of s. 6(3)(o) of the Act, which incorporates s. 58 of the Administrative Tribunals Act, S.B.C 2004, c. 45 [ATA], judicial review of any such findings or determinations of the Board must be undertaken by applying the standard of patent unreasonableness, the most highly deferential standard of review that can be applied by any court in Canada. Relying on Community Social Services Employers' Association of B.C. (Re), 2014 BCSC 1719 at para. 11, Lyft argues the effect of being required to establish a "serious question" (i.e., the RJR -- MacDonald standard) that the Board's decision is patently unreasonable, effectively places the petitioners on the same footing as being required to show a strong likelihood of success.

- [25] However, as counsel for the petitioners points out, the patently unreasonable standard of review does not apply to all three grounds raised by the petitioners. While it applies to the Substantive Issue, and perhaps to the Fettering Issue[1], it does not apply to the Procedural Fairness Issue. Questions about the application of common law rules of procedural fairness are to be decided having regard to whether, in all of the circumstances, the tribunal "acted fairly". This is a much less deferential standard of review.
- [26] The petitioners disagree with Uber's characterization that it seeks a mandatory injunction. They submit they are clearly seeking to prohibit action by the Board, Uber, and Lyft.
- [27] Distinguishing between mandatory and prohibitive injunctions can be difficult and the language used to describe the relief sought is not determinative. Instead, I am required to look past the form and the language and identify the substance of what is being sought and what the practical consequences of the injunction are likely to be: CBC at para. 16. In this case, the Board's Decisions have been implemented and the TNS licenses issued. Uber and Lyft have commenced operation under TNS licenses. In order to "undo" that implementation, action would be required. The petitioners acknowledge the order they seek would require Uber and Lyft to take steps to "turn off the app". In my view that is analogous to the situation before the Supreme Court of Canada in the CBC case, where the Court noted that ceasing to transmit the victim's identifying information would require an employee of CBC to take action to remove that information from its website: CBC at para. 16. Similarly, the order sought by the petitioners would require the Board to take action to rescind or suspend, in some administrative form, the licenses issued to Uber and Lyft. In substance, the petitioners are asking me to order the Board, Uber, and Lyft to undertake that action.
- [28] I find that the nature of the remedy being sought by the petitioners is a mandatory injunction. Accordingly, the applicable threshold with respect to a consideration of the merits of the petitioners' underlying proceeding is a strong likelihood of success. Because of the potentially severe consequences of a mandatory injunction, including the effective final determination of the proceeding in favour of the applicant, a more extensive review of the merits is required at the interlocutory stage: CBC at para. 15.

A. Is there a strong likelihood the petition will succeed?

1. Procedural Fairness Issue

- [29] What constitutes a fair procedure will depend on the context in which the question arises. As noted by the Court of Appeal in *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2014 BCCA 329 at para. 54:
- [54] What procedures are "fair" depends very much on context. The Supreme Court of Canada has indicated that assessing the requirements of procedural fairness in any given situation requires a consideration of myriad factors. In *Canada v. Mavi*, 2011 SCC 30, the Court said:

- [41] Once the duty of procedural fairness has been found to exist, the particular legislative and administrative context is crucial to determining its content....
- [42] A number of factors help to determine the content of procedural fairness in a particular legislative and administrative context. Some of these were discussed in *Cardinal* [*Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643], a case involving an inmate's challenge to prison discipline which stressed the need to respect the requirements of effective and sound public administration while giving effect to the overarching requirement of fairness. The duty of fairness is not a "one-size-fits-all" doctrine. Some of the elements to be considered were set out in a non-exhaustive list in *Baker* [*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817] to include (i) "the nature of the decision being made and the process followed in making it" (para. 23); (ii) "the nature of the statutory scheme and the 'terms of the statute pursuant to which the body operates'" (para. 24); (iii) "the importance of the decision to the individual or individuals affected" (para. 25); (iv) "the legitimate expectations of the person challenging the decision" (para. 26); and (v) "the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances" (para. 27). Other cases helpfully provide additional elements for courts to consider but the obvious point is that the requirements of the duty in particular cases are driven by their particular circumstances. The simple overarching requirement is fairness, and this "central" notion of the "just exercise of power" should not be diluted or obscured by jurisprudential lists developed to be helpful but not exhaustive.
- [30] The petitioners argue the Board's procedure was unfair because no oral hearing was held, information about the business models of Uber and Lyft was redacted from the disclosure provided to the petitioners, and the petitioners were given insufficient time to review the voluminous disclosure which was provided to them as part of the Board's expanded participation process. At the hearing counsel for the petitioners also argued the Board failed to give reasons for not holding an oral hearing but did not press the point, reasonably in my view given the procedural order of the Board explains the Board's view on why an oral hearing was not necessary.
- [31] For the purposes of this application, I will assume, without deciding, the Board owes a duty of procedural fairness to persons other than license applicants.
- [32] The Act gives the Board the power to control its own process, and expressly bestows sole discretion on the Board to determine whether its hearings will be conducted in writing, electronically, orally, or any combination: Act, ss. 12 and 17. The petitioners did not take me to any conflicts in the evidence that demonstrated there were credibility issues that needed to be resolved through cross-examination at an oral hearing.

- [33] With respect to the redacted information, the petitioners, along with all other submitters, were provided with full disclosure of Uber and Lyft's application material other than information that was commercially sensitive. The Board had the unredacted information. The petitioners' requested the unredacted information, which was commercial information of their competitors. In response, the Board explained it did not require the petitioners' assistance to understand the business model information provided by Uber and Lyft. The Board is not a quasi-judicial body; the Board is a licensing body that is deemed to be an expert tribunal in matters within its jurisdiction. Its process is inquisitorial.
- [34] With respect to the petitioners intended argument that they were given insufficient time to consider the voluminous material they were provided, I note that at the hearing before me I was not taken to any evidence indicating the petitioners had asked the Board for more time to consider the disclosure.
- [35] Given that the petitioners, along with the other submitters, were provided with full disclosure of the application material other than information that was commercially sensitive, that I was not taken to any evidence indicating the petitioners asked the Board for more than 14 days to make their submissions, and several lengthy submissions being provided to the Board on behalf of the petitioners, it is difficult to see how the petitioners' argument that they were denied procedural fairness because they did not have adequate opportunity to respond, could succeed. This is particularly so when one considers the Baker factors.
- [36] The Board was making a licensing decision, and the process was modified to provide the petitioners with a broader level of participation than the Board normally affords. Without any intention of minimizing the feelings of those involved in the taxi industry, the nature of the impact is a commercial one and not one affecting personal health, safety, or security and so any duty of procedural fairness would be on the low end.
- [37] While my assessment involves only a preliminary examination of the evidence, in my view the petitioners have not established there is a serious question to be tried with respect to their allegations regarding procedural unfairness, much less that there is a strong likelihood their petition will succeed on this ground.

2. Fettering Issue

- [38] The petitioners submit the Board improperly fettered its discretion by adopting and following its policy with respect to its consideration of TNS applications.
- [39] This court addressed the question of fettering in *British Columbia Nurses' Union v. Health Sciences Association of British Columbia*, 2017 BCSC 1758 at para. 47:

[47] Clearly a tribunal cannot fetter its discretion, by the blind application of its own or any policies: *Maple Lodge Farms v. Canada*, [1982] 2 S.C.R. 2 at 6-7, 137 D.L.R. (3d) 558. However, I agree with the view expressed by Associate Chief Justice Scott, as he then was, in *Manitoba Paramedical Association v. St. Boniface General Hospital* (1986), 46 Man. R. (2d) 194 at 198 (Q.B.), that:

The authorities are clear that so long as the panel addresses its minds to the merits of the case before it, no jurisdictional error is committed in following guidelines or precedents previously adopted....

It is not for this court to say whether the Board's guidelines or policy is the preferred one or not.... The Board must have policy issues in mind at all times, and so long as it considers each case before it on the merits and facts of that particular case, it does not commit jurisdictional error by ultimately deciding that the facts do not warrant a deviation from its normal stated policy. For the review panel to adhere to previous practice, where the existing unit was *prima facie* an appropriate unit, is not patently unreasonable.

[40] In order to succeed on this issue at the ultimate hearing of their petition, the petitioners will need to satisfy the chambers judge the Board blindly applied its own policy and did not consider the merits of the Applications.

[41] However, the Board's policy in part states as follows:

When making decisions on applications, the board will refer to this policy. Each assessment and decision on a TNS application will be based on the evidence before the Board, including the application, materials, submissions from others on the application, and the applicant's response.

[Emphasis added]

[42] If the Board followed its policy, it would have undertaken its consideration of the applications based on the evidence before it, including the application, materials, and submissions it received, including those provided by the petitioners.

[43] On my preliminary review of the merits of this aspect of the petitioners' allegations, I find it does not represent a serious question to be tried, much less carry a strong likelihood of success.

3. Substantive Issue

[44] As noted earlier in these reasons, the applicable standard of review for the Board's decisions on issues within its exclusive jurisdiction is patent unreasonableness. The patently unreasonable standard is the most deferential standard of review that can be applied. According to s. 58(3) of the ATA:

58(3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion

- (a) is exercised arbitrarily or in bad faith,
- (b) is exercised for an improper purpose,
- (c) is based entirely or predominantly on irrelevant factors, or
- (d) fails to take statutory requirements into account.

[45] Patently unreasonable has also been described as meaning openly, clearly, evidently unreasonable: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

[46] The petitioners argue the petition is sufficiently meritorious to meet the standard necessary for granting the stay. They argue the Board failed to consider the impact granting the Applications would have on the financial viability of taxis, and thereby "failed to take the statutory conditions into account, namely, the requirement to promote sound economic conditions in the passenger transportation business in B.C.". However, as pointed out by counsel for both Uber and Lyft, the Board's decisions are replete with references that appear to demonstrate consideration of that issue, including the following finding captured in both decisions:

The board considers [the issue of whether the application, if granted, would promote sound economic conditions in the passenger transportation business in BC] from a wide-ranging perspective, which includes consideration of the harm to other industry participants such as taxi companies. It is the board's view that, generally speaking, the economic interests of the transportation business over all way more heavily than the economic and financial interests of any particular applicant or submitter.

[47] Further, while s. 28 of the Act requires the Board to consider the promotion of sound economic conditions in the passenger transportation business in British Columbia, I do not interpret it to be a "requirement" for a TNS License to be granted.

[48] The petitioners further intend to argue that several of the Board's findings were patently unreasonable, including the following finding reflected in both Decisions:

We live in a market economy and competition is the norm in marketplaces. The prospect of taxis losing market share to TNS and experiencing declines in absolute levels of ridership can occur as a natural consequence of marketplace adjustment. While the Board is sympathetic to the prospect that taxi licence holders may experience a drop in their licence-share value, it has never sanctioned the market for such shares, nor does it have the authority to do so. Taxi licensees created the market and invested in licence shares or used them as collateral. As with any investments, there are associated risks and impacts. The introduction of ride hailing has been a point of public discussion and consultation for approximately seven years. As a consequence, there has been ample notice regarding the possible introduction of ride hailing in this province.

- [49] The petitioners say they will ultimately argue this finding is patently unreasonable because "there has never been a market economy in the BC passenger transportation industry". However, my preliminary interpretation of the Board's finding on this point is that it was not referring to BC's passenger transportation industry, but rather the broader market economy within which people live and operate every day in BC.
- [50] The petitioners also intend to argue it was patently unreasonable for the Board to find it never sanctioned the market for taxi license shares. However, the Board's mere awareness that participants in the taxi industry have developed business models that, as a by-product, have created a market for taxi shares, does not equate to the Board sanctioning, much less creating, the market for that commodity.
- [51] Section 28 of the Act mandates the Board to consider whether to approve applications for TNS licenses, in whole or in part. In carrying out that core function, the Legislature has required the Board to consider, in its role as an expert tribunal in the field of the passenger transportation business in BC, whether:
- (a) there is a public need for the service the applicant proposes to provide under any special authorization,
 - (b) the applicant is a fit and proper person to provide that service and is capable of providing that service, and
 - (c) the application, if granted, would promote sound economic conditions in the passenger transportation business in British Columbia.
- [52] As the Supreme Court of Canada noted in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 110:
- where the legislature chooses to use broad, open ended or highly qualitative language--for example, "in the public interest"--it clearly contemplates that the decision-maker is to have greater flexibility in interpreting the meaning of such language.
- [53] In considering whether the Board's findings of fact or law were patently unreasonable, the chambers judge hearing the ultimate petition may interpret the phrases "public need" and "fit and proper" as signalling a legislative intent to convey that same level of flexibility on the Board. Such flexibility would augment the degree of deference owed to the Board's decisions even further.
- [54] While my view is of course only preliminary, given the deferential standard of review that will apply to this aspect of the petition, I am not satisfied the petitioners have established there serious question to be tried or a strong likelihood its petition will succeed on this point.

B. Have petitioners established they will suffer irreparable harm if the stay is refused?

1. Legal Framework

- [55] At stage two, irreparable harm "refers to the nature of the harm rather than its magnitude": RJR -- MacDonald at 341. Irreparable harm includes harm that cannot be quantified in monetary terms or where it will be difficult to obtain monetary redress: RJR -- MacDonald at 341. There must be a sound evidentiary foundation, beyond mere speculation, to establish irreparable harm: *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 at para. 60.
- [56] In order to satisfy this stage of the RJR -- MacDonald test, the petitioners must prove, based on admissible evidence, that if the stay is not granted they will suffer irreparable harm in the months leading up to the hearing of their petition. They must also prove the stay will prevent that harm from occurring.
- [57] Supreme Court Civil Rule 22-2 governs affidavit evidence. It permits the tendering of hearsay evidence on applications that do not seek a final order, provided the source of the information is identified and a statement of belief in the information is given: R. 22-2(13). In the context of an interlocutory injunction, the limited scope of the hearsay exception carved out in Rule 22-2(13) is to be strictly enforced. This was described by Justice Saunders at para. 7 of *Premium Weatherstripping Inc. v. Ghassemi*, 2016 BCCA 20:

And interlocutory injunction is well understood to be a special sort of non-final order in that, by its very nature, it restricts the freedom of the party against whom it is made, without the applicant having had to prove any allegation beyond the standard of an arguable case. An interlocutory injunction often becomes the entire remedy in an action, and can endure for a very long time unless temporal limits are placed upon it. For that reason, assiduous care in preparation of the application is the standard, including strict compliance with the requirements for all hearsay evidence that would not be permitted to be stated at trial to be on information and belief, with the source identified. There is no room in interlocutory injunction practice for relaxation of that requirement, in my view.

2. Analysis

- [58] The petitioners argue they will suffer two types of irreparable harm if the injunction is not granted. The first is a decline in revenues. The evidence with respect to decline in revenues by the taxi companies was scant at best. While I agree with counsel for the petitioners that the Saini affidavit is proper reply evidence and I have therefore considered it, the affidavit is anecdotal evidence from one taxi driver about a decrease in earnings over the course of six days, with a marked lack of detail, including a failure to indicate how many hours he worked on those days compared to "normal" days. The Saini affidavit does not establish a causal link between the activity the petitioners seek to prevent, namely the operation of TNS by Uber and Lyft pursuant to their licenses, and a decrease in revenue. While counsel for the petitioners urges me to draw the inference that Uber and Lyft's operations were the cause for the decrease in revenue, something more than inference or speculation is necessary to ground a finding of irreparable harm.

- [59] The Bauer affidavit was similarly flawed. While Ms. Bauer deposed in her affidavit that she was "very concerned about the harm" to petitioners' revenues, she did not provide any foundation for that concern. I would have expected that if there was cogent, direct, and persuasive evidence available with respect to the decline in revenues, it would have been tendered.
- [60] The second harm the petitioners identify is a decrease in the value of taxi shares. Again, the evidence in the Bauer affidavit on this point is insufficient to establish irreparable harm. Not only does Ms. Bauer fail to identify the particular sources of information upon which she relies, which renders those portions of her affidavit inadmissible, she fails to identify how the harm she asserts with respect to the decrease in share value would be alleviated by the granting of the injunction. I find it unlikely that concerns about the potential vulnerability of share values would be assuaged by a temporary injunction.
- [61] In my view the Saini and Bauer affidavits suffer from the same frailties as those identified in *Abdullah v. Naziri*, 2016 ONSC 2168 at para. 51. Considered in its best light, their evidence is speculative with respect to any causal link between the harm alleged by the petitioners and the introduction of TNS by Uber and/or Lyft.
- [62] Further, any decline in share values, which I find was not established by the evidence, would be a harm suffered by shareholders, and not the petitioner taxi companies which have separate legal personalities.
- [63] Finally, the launch of Uber and Lyft in Vancouver did not arrive unannounced. There has been extensive study and consultation undertaken for the past seven years. Persons who are invested in taxi shares have had notice for some time of the potential risk to their investment.
- [64] In summary, I find that the petitioners have failed to establish they will suffer irreparable harm if the injunction is not granted.

C. Where does the balance of convenience lie?

1. Legal Framework

- [65] At the final stage the court considers whether the applicants or the respondents will suffer greater harm from the granting or refusal on the interlocutory injunction: *RJR -- MacDonald* at 342. While the factors to consider vary in each individual case (*RJR -- MacDonald* at 342), *Canadian Broadcasting Corp. v. CKPG Television Ltd.*, (1992) 64 B.C.L.R. (2d) 96 (BCCA) at 102; 1992 CanLII 560 [CKPG], lists the following factors:

the adequacy of damages as a remedy for the applicant if the injunction is not granted, and for the respondent if an injunction is granted; the likelihood that if damages are finally awarded they will be paid; the preservation of contested property; other factors affecting whether harm from the granting or refusal the injunction would be irreparable; which of the parties has acted to alter the balance their relationship and so affect the status quo; the strength the applicant's case; any

factors affecting the public interest; and any other factors affecting the balance of justice and convenience..

[66] These factors are not to be regarded as a "checklist", but rather are to be considered in a unified context: CKPG at 103.

2. Analysis

[67] The petitioners seek a stay in order to return to the status quo ante. In doing so they recognize a stay would alter the current status quo. Nonetheless the petitioners argue the balance of convenience strongly favours granting a stay of the decisions because: the irreparable harm they allege will continue to accrue pending the hearing of the petition and cannot be remedied by the ultimate judicial review; Uber and Lyft will not suffer harm; and it is in the public interest for there to be a "level playing field" between taxis and TNS because there is no valid reason to treat them differently.

[68] I have already addressed the frailties with respect to the irreparable harm alleged by the petitioners and will not repeat those reasons here except to add one point. In my view the evidence, taking at its best and assuming a causal connection that was not established, indicates there is the potential for an incremental decrease in the revenue earned by taxi drivers. By contrast, if the stay is granted it is certain Lyft and Uber will be unable to generate any revenue at all and drivers will not earn any income. This suggests the balance of convenience favours refusing the injunction.

[69] With respect to the public interest, the petitioners raised the "level playing field" argument at the hearing before the Board and it was rejected:

The VTA argues that just because TNS only provide services through an app, there is no valid reason to treat them differently from taxis. The VTA argues that the TSNA terms and conditions should therefore mirror those imposed on taxis

As noted above, the board rejects the contention that TNS operators and taxis provide the same service. The TNS business model is markedly different from the business model used by taxis, resulting in different responses to market conditions. The TNS business model relies on a large number of drivers and vehicles to supply the service, a large number of consumers to purchase the service, the interaction of supply and demand to set fares, and the information exchange between parties through the use of an app. The TNS business model responds to service availability issues that have arisen in the taxi industry by increasing the supply of vehicles for hire in peak periods and reducing supply in off-peak periods. Street hails and taxi stands remain the exclusive domain of the taxi industry.

[Emphasis added]

[70] The service availability issues referred to in the passage above echo findings from one of the studies undertaken prior to the amendment of the Act, the 2018 Hara Report. The Board quotes the 2018 Hara Report in its Decisions:

Virtually all municipalities identified some service issues, either consistently too few cabs, or distinct service problems at specific times-bar closing, rush hours, major sporting or arts events. Larger cities have service deficiencies resulting from the limitation on the number of taxi licenses in each area. Smaller municipalities often have the opposite problem, a challenge attracting anyone to provide a taxi service, especially in the face of some of the barriers to entry. The availability of TNC's to respond to those service deficiencies, to reduce cost and to improve service levels generally, are all seen as positive.

[71] The Board found there was a public need for the TNS both Uber and Lyft proposed to provide. Based on my review of the petition it does not appear the petitioners intend to allege the Board's finding on that point was patently unreasonable. In fact, the petitioners acknowledge that granting the stay will inconvenience the public but argue this is outweighed by the alleged irreparable harm. In my view, this supports a conclusion that the public interest favours maintaining the status quo.

[72] I also find it relevant that the petitioners' did not offer any undertaking as to damages. As noted by Justice Saunders at para. 9 of *Premium Weatherstripping*:

The requirement that an undertaking as to damages be given by the applicant is of similar importance. Such an undertaking provides an assurance to the Court of proper intention in the obtaining of the injunction, protects to some degree against abuse of the remedy, and provides a commitment to make right any harm done as a result of the granting of the order. In my view, the order ought not to have issued in the form it did without the court formally relieving the applicant of the required undertaking.

[73] For all of these reasons, I find the balance of convenience favours maintaining the current status quo.

III. CONCLUSION

[74] Taking into account all of the admissible evidence before me and the written and oral submissions of all parties, I conclude the petitioners have failed to satisfy the applicable test for the granting of a stay. Accordingly, the petitioners' application for a stay of the Decisions is dismissed.

[75] Costs are payable by the petitioners to all parties except, at its request, the Board.

"Jackson J."

[1] The chambers judge who ultimately hears the petition will likely have to consider the combined effect of the BC Court of Appeal's decisions in *Trinity Western University v. The Law Society of British Columbia*, 2016 BCCA 423 at para. 93; *Minhas v. British Columbia (Superintendent of Motor Vehicles)*, 2017 BCCA 304 at para 22; and *Chandler v. British Columbia (Superintendent of Motor Vehicles)*, 2018 BCCA 300 at para 27, and the Supreme Court of Canada's decision in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, to determine the applicable standard of review on that issue. As it does not affect the outcome of this

application, I have not undertaken the analysis.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/01/2020BCSC0162.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/yellow-cab-company-ltd-v-passenger-transportation-board-2020>

Prepared on 26 October 2026 · Esheria