

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

2145850 ONTARIO LIMITED, o/a Highland Bus Services, BARR BUS LINES LIMITED, CLARK BUS & MARINA LIMITED, HEALEY TRANSPORTATION LIMITED, PREMIER BUS LINES INC., VALLEY BUS LINES LIMITED and WHITTEKER BUS LINES LIMITED

Plaintiffs
(Moving Parties)

and

STUDENT TRANSPORTATION OF EASTERN ONTARIO (STEO)

Defendant

and

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Intervener

NOTICE OF MOTION

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The Plaintiffs will make a Motion to Justice Tranmer, on a date and at a time to be determined by the case management judge, Justice Tranmer, at the court house, 5 Court Street, Kingston, Ontario, K7L 2N4.

PROPOSED METHOD OF HEARING: The Motion is to be heard

orally.

THE MOTION IS FOR

- (a) An order granting the Plaintiffs leave to amend the Statement of Claim, as indicated in the Fresh as Amended Statement of Claim attached hereto as Schedule “A”;
- (b) An order that:
 - (i) the Ministry must serve and file a Statement of Defence within 30 days of the date leave is granted to amend the Statement of Claim;
 - (ii) the Plaintiffs may serve and file a Reply to the Ministry’s Statement of Defence;
 - (iii) the parties, including the Ministry, produce all documents relevant to the issues disclosed by the Fresh as Amended Statement of Claim that have not already been produced; and
 - (iv) additional examinations for discovery be conducted, if required, on the issues disclosed by the Fresh as Amended Statement of Claim, on a schedule to be agreed to by the parties or set by the court;
- (c) An order that the Ministry indemnify the Plaintiffs for the costs of this action, including paying costs incurred to date plus costs going forward on an ongoing basis, as determined by the Court;
- (d) In addition or in the alternative, an order amending the February 8, 2013 order of Justice Tranmer requiring the Ministry to respond in its pleading to allegations that

RFPs are not an appropriate method to procure student transportation in rural markets with small and medium sized operators;

- (e) The costs of this Motion on a substantial indemnity basis; and,
- (f) Such further and other relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE

- (a) This action was originally brought against the defendant Student Transportation of Eastern Ontario (“STEO”) in relation to its procurement process. After an attempt to strike the plaintiffs’ claim failed, the Ministry sought to intervene as a party;
- (b) The plaintiffs consented to the Ministry’s intervention and it was ordered to produce documents, and a witness to be examined, on two issues (the “Intervention Order”):
 - (i) Allegations that the Ministry directed or influenced school boards or consortia that RFP’s are the “approved” or “preferred” approach to the procurement of student transportation contracts to the exclusion of other procurement methods; and
 - (ii) Allegations that the Ministry ignored or failed to properly respond to the Task Force report;
- (c) As a result of Ministry documents obtained through Freedom of Information Requests (FOI Documents) in the Fall of 2013, Ministry’s productions, STEO’s productions, and the examinations for discovery of Ms Hayward and Mr. Cotnam, a

significant body of evidence has come to light subsequent to the Intervention Order. This evidence demonstrates that the Ministry has been much more intimately involved in designing and directing the use of unfair and illegal RFPs issued by consortia across the province and in STEO's RFP than it has previously represented;

- (d) The FOI documents and discovery evidence demonstrate extensive involvement of the Ministry in transportation consortia procurement processes. Many of the FOI Documents fall within the scope of the Intervention Order but were not produced by the Ministry in this action;
- (e) The FOI Documents and evidence obtained in the discovery process demonstrates that the STEO RFP is essentially a template RFP developed by the Ministry and which it has directed consortia across the province to use knowing that it will cause harm to small and medium sized operators. The FOI Documents, and documents obtained in companion proceedings across the province involving the Ministry's template RFP demonstrate that the Ministry has been actively involved in STEO's response to the plaintiffs' claims from the inception of these proceedings, including directing the litigation strategy, paying costs ordered against STEO, and funding STEO's defence;
- (f) Documents and testimony obtained in related proceedings demonstrate that the Ministry's has been involved in every action brought by school bus operators across the province, even when it was not itself a party to those actions.

- (g) In the STS injunction proceedings in St. Thomas, Ontario, the Ministry intervened and argued every aspect of the motion. When the plaintiffs were successful and STS's RFP was enjoined, the Ministry indemnified STS's costs;
- (h) Documents produced and testimony given in this and other actions, combined with the FOI Documents, demonstrate that the Ministry ignored the findings of its own consultants, the Auditor General, and the Task Force it established. It designed a flawed and discriminatory template RFP and directed consortia across the province to use that template, knowing that it would harm small, rural operators, and breached representations the Ministry had made to those operators on numerous occasions. When small operators identified unfairness with the template RFP, the Ministry directed consortia to ignore their concerns and proceed with the RFP and when proceedings were commenced to enjoin the RFPs the Ministry directed and underwrote the consortia's response;
- (i) In total, five actions have been brought by small, rural school bus operators in different areas of the province. Each of those actions raises common issues concerning the design and implementation of the Ministry's template RFP and all will benefit from an early resolution of the allegations against the Ministry in the Fresh as Amended Statement of Claim. None of those actions is as advanced as this litigation, making the STEO action ideal as a test case for the Ministry's role in the RFP process;
- (j) Consortia across the province have suspended their procurement processes to await the outcome of these proceedings and in light of the involvement of the Ministry in

designing and directing the use of RFPs, contrary to its representations, it is in the interests of justice to determine the nature and extent of the Ministry's involvement in transportation consortias use of the template RFP across the province;

- (k) The Ministry has undertaken a review of the Template RFP process it has been directing consortia to use but has refused to advise or direct consortia around the province to suspend the use of the Template RFP;
- (l) In these circumstances, the Ministry is a necessary and proper party to these proceedings, the interests of justice, judicial economy, and fairness, require that the plaintiffs be given leave to amend their claim to seek declaratory relief against the Ministry and/or to amend the Intervention Order. This will allow issues of importance across the province to be efficiently resolved. There can be no prejudice to the Ministry in responding to facts of which it is by now, and indeed always has been, well aware;
- (m) The Ministry is a necessary and proper party in order for the court to adjudicate effectively and completely on the issues in this proceeding;
- (n) Sections 97, 131 and 138 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43;
- (o) Rules 3.02(1), 5.03, 26.01, 57 and 59.06 of the *Rules of Civil Procedure*; and
- (p) Such further and other grounds as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

- (a) The Fresh as Amended Statement of Claim, attached hereto as Schedule "A";

- (b) The affidavit of Jessica Zhi, to be sworn, together with exhibits attached thereto;
- (c) February 8, 2013 Order of Justice Tranmer; and
- (d) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

February 25, 2014

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Defendant

Court File No. 842/12

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SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT
PERTH

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