



April 24th, 2017

Pro West Trucking Ltd.  
9900 River Drive  
Richmond, B.C. V6X 3S3

Via email: [matthew.may@bsttransportation.ca](mailto:matthew.may@bsttransportation.ca)  
Original to follow via mail

Attention: Mr. Matthew May

Dear Sir:

## **Pro West Trucking Ltd. (CTC Decision No. 06/2017) - Decision Notice**

### **A. Overview**

In Pro West Trucking Ltd. (CTC Decision No. 06/2017 (the “Original Decision”), I found that the licensee, Pro West Trucking Ltd. (“Pro West”) failed to pay compliant rates to both its company drivers and its owner operators in a timely way. Through the audit process it was discovered that Pro West underpaid its drivers by amounts totaling more than \$824,000. Of this amount more than \$660,000 remained outstanding beyond the January 22<sup>nd</sup>, 2016 deadline imposed by the former Acting Commissioner<sup>1</sup>.

In the Original Decision I concluded that this was an appropriate case to issue a penalty for the reasons set out in paragraphs 72-82 of the Original Decision. In that regard, I proposed to impose an administrative fine against Pro West in the amount of \$25,000.00. Consistent with s. 34(2) of the Act I advised Pro West that I would consider its written response to the proposed penalty if it was received within 7 days.

Pro West has provided a written response within the required time disputing the proposed penalty and providing arguments in support of its position.

### **B. Pro West’s Response**

Pro West advances a number of arguments in support of its position that the proposed penalty should not be imposed. Its arguments can be summarized as follows:

- a. The size of the non-compliance should not be considered.  
Pro West argues that the size or dollar amount of the non-compliance relates to the magnitude of its operation and the volume of its work and therefore should not be considered in assessing the appropriate penalty.

---

<sup>1</sup> On December 11<sup>th</sup>, 2015 former Acting Commissioner Bell informed the industry that those licensees who fail to bring themselves into compliance by January 22<sup>nd</sup>, 2016 face a high risk of having a penalty imposed.

- b. Audit delays should not be a factor.  
Pro West argues that it should not be faulted because it took considerable time to provide the auditor with its views and calculations on various issues which arose during the audit.
- c. It is appropriate for Licensees to use the audit process to obtain clarity around issues arising. It is not reasonable to expect Licensees to predict how the Act will be interpreted by the Commissioner.
- d. Pro West is a responsible and involved member of the drayage community and responded appropriately once issues were clarified. A penalty is not required to ensure future compliant behavior.  
Pro West argues that a penalty is not required to deter it from engaging in future non-compliant behavior.

### C. Consideration Pro West's Response

- a. The size of the non-compliance should not be considered.

In *Smart Choice Transportation Ltd.* CTC Decision No. 21/2016 I identified the purpose of penalties and the factors that would be considered in assessing the appropriate administrative penalty to be imposed. The list of factors which will be considered includes:

- The seriousness of the licensee's conduct;
- The harm suffered by drivers as a result of the licensee's conduct;
- The extent to which the licensee is enriched.

In my view, the size of the non-compliance cannot be ignored when addressing the seriousness of the misconduct, the harm suffered by drivers, and the extent of a licensee's enrichment. It is self-evident that the greater the amounts a licensee owes to its drivers, the more serious the harm to drivers and greater the enrichment of the licensee. Simply put, licensees cannot escape full responsibility for their behaviour simply because of the magnitude or size of their operations.

Moreover, as stated in previous decisions, the large financial penalties available under the *Container Trucking Act* (up to \$500,000) demonstrate an intent to ensure that administrative fines not be seen as merely another cost of doing business. To ignore the size of non-compliance, or to minimize its importance because of a licensee's size or its volume of work, runs contrary to this important principle as such an approach could well result penalties becoming "merely another cost of doing business".

For these reasons, I am not persuaded the size of the non-compliance should not be considered. To the extent Pro West argues that it is not the only relevant factor, and that the nature of the violation is also relevant, I agree, but note that other factors, including the nature of the violation, were considered in the Original Decision.

b. Audit delays should not be a factor.

Pro West does not deny that its conduct in taking “considerable time to review the auditor’s calculations” and in seeking “clarity” with respect to the auditor’s interpretation of the *Act* and *Regulation* caused the audit to be prolonged. However, it argues that this conduct was necessary and reasonable and it should not be penalized for it.

While I do not dispute that licensees are entitled to review the auditor’s calculations and, where they disagree with them, advance reasonable positions during an audit process, it is important that they do so in an expeditious fashion so as not to unnecessarily delay the process. In this case, the audit process was unreasonably prolonged by the time taken by Pro West to provide calculations consistent with the positions it was taking. The delay was prejudicial to its drivers as it extended the time they were harmed by Pro West’s failure to pay them wages owing under the legislation. The delay was also inconsistent with the central purpose of the container trucking legislation, which is to bring stability to the drayage industry by establishing and enforcing fair, consistent and stable payment of required wages to drivers: see paragraph 57 of the Original Decision. For these reasons, I find it is appropriate to take into account licensee conduct which causes excessive delay in the audit process.

c. It is appropriate for Licensees to use the audit process to obtain clarity around issues arising from differing interpretations of the *Act* and *Regulation*. It is not reasonable to expect Licensees to predict how the *Act* will be interpreted by the Commissioner.

Licensees under audit are entitled to ask the auditor clarifying questions regarding their calculations, and, where they disagree with them, to advance timely and reasonable arguments regarding the interpretation or application of the legislation. However, as I stated in *Olympia Transportation Ltd.* (CTC #02/2016):

“It must be emphasized that the onus to become and remain compliant with the requirements of the *Act* rest entirely with the Licensee. Licensees should not rely on Commission auditors to determine whether or not they are compliant, nor should they wait until a Commission audit process is undertaken before taking steps to ensure compliance.”

With regard to the argument concerning my approach to interpreting the *Act*, I note that in paragraph 54 of the Original Decision, I cited the well-established passage from the Supreme Court of Canada’s decision in *Rizzo & Rizzo Shoes* which sets out that statutory interpretation “cannot be founded on the wording of the legislation alone” but rather the language of legislation must be read contextually and in light of the legislative intent. Accordingly, I do not agree that my interpretation of the *Act* and the *Regulation* cannot be anticipated because it takes into account the intent of the legislation and not just the bare words of the statute. It should be anticipated that my approach to interpreting the *Act* and the *Regulation* will be consistent with the directions given by the Supreme Court of Canada.

The arguments advanced by Pro West are inconsistent with this approach and are therefore rejected.

- d. Pro West is a responsible and involved member of the drayage community and responded appropriately once issues were clarified. A penalty is not required to ensure future compliant behavior.

While I acknowledge that Pro West is an active and contributing member of the CTS community, I do not accept that its past and ongoing contributions should allow it to escape responsibility and consequences for its non-compliant behaviors. In my view the imposition of an appropriate administrative penalty here responds to Pro West's past misconduct and sends a clear and unambiguous that it is responsible to remain compliant in the future. It also serves the more general and broad deterrent purpose of protecting drivers and discouraging licensees from engaging in non-compliant behaviours. To refrain from imposing a penalty here because of unrelated positive characteristics of the licensee would, in my view, be to reach a decision on the appropriate penalty based on irrelevant factors, send the wrong message to the CTS community at large, and could well be misconceived as favouritism.

Finally, on a general note and as referenced in the Original Decision, the size of the proposed penalty takes into account, amongst other things, Pro West's cooperation during the audit process, its voluntarily payment of a large portion of the adjustment amounts found to be owing, and the fact that it successfully advanced arguments relating to issues touching upon the proper interpretation of parts of the legislation. As recorded in the Original Decision: "Were these latter factors not present, the size of the administrative penalty would have been considerably higher." (para. 80)

For all of the reasons stated, I continue to be of the view that the penalty proposed in the Original Decision is commensurate with the seriousness and size of the non-compliant behaviour and properly takes into account and balances all of the relevant *Smart Choice Transportation* factors. For this reason I am not persuaded to reduce or refrain from imposing the proposed administrative penalty.

#### **D. Conclusion**

Having considered all of the factors and the submissions advanced by Pro West, I am not persuaded to reduce or refrain from imposing the proposed administrative penalty.

In the result I hereby order Pro West to pay an administrative fine in the amount of \$25,000.00. Section 35(2) of the *Container Trucking Act* requires that this fine be paid within 30 days of the issuance of this Notice. Payment should be made by delivering to the Office of the BC Container Trucking Commissioner ("OBCCTC") a cheque in the amount of \$25,000.00 payable to the Minister of Finance.

Finally, I note that Pro West may request a reconsideration of the Commissioner's Decision by filing a Notice of Reconsideration with the Commissioner not more than 30 days after Pro West's receipt of this Decision Notice. A Notice of Reconsideration must be:

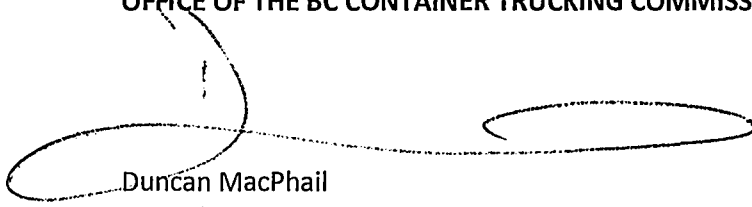
- a. made in writing,
- b. identify the decision for which a reconsideration is requested,
- c. state why the decision should be changed,
- d. state the outcome requested,
- e. include the name, an address for delivery, and telephone number of the applicant and, if the applicant is represented by counsel, include the full name, address for

- delivery and telephone number of the applicant's counsel,
- f. signed by the applicant or the applicant's counsel.

Despite the filing of a Notice of Reconsideration, the above order remains in effect until the reconsideration application is determined. This Order will be published on the Commissioner's website.

Yours truly,

**OFFICE OF THE BC CONTAINER TRUCKING COMMISSIONER**

A handwritten signature in black ink, consisting of a large, sweeping loop on the left side that extends upwards and then curves back down to the left, followed by a horizontal line that ends in a small oval on the right.

Duncan MacPhail  
Commissioner