



December 16, 2016

Ferndale Transport Ltd.
2332 Whatcom Road
PO Box 16071 Sumas Mountain
Abbotsford, BC V3G 0C1

Via Email Rap@ferndaletransport.ca
Original to follow via mail

Attention: Rap Sanghera

Dear Sir:

CTC Decision No. 22/2016 - Decision Notice

A. Overview

Following receipt of confidential complaints alleging that Ferndale Transport Ltd. ("Ferndale") was paying less than the required minimum rates of remuneration required under the *Container Trucking Act* to directly employed operators ("company drivers") the Commissioner directed an auditor to audit Ferndale's records to determine if Ferndale was paying its company drivers in compliance with the minimum rates of pay required by the *Container Trucking Regulation* (the "*Regulation*"). The auditor began the audit by directing Ferndale to produce relevant records for the periods April 3 – 30, 2014 and January 1 – May 31, 2015 (the "Original Audit Periods").

The auditor reviewed all information requested provided by Ferndale and determined that during the Original Audit Periods Ferndale was paying hourly rates ranging from \$14.56 per hour (well under the minimum hourly rate required by Section 13 of the *Regulation*) to \$27.18 per hour.

Having discovered that Ferndale was not always paying its company drivers the minimum hourly rates required under the *Regulation* during the Original Audit Periods, the auditor expanded the audit to include the periods May 1, 2014 - December 31, 2014 and June 1, 2015 – June 30, 2016. As a result the report submitted by the auditor covered the entire period from April 3, 2014 to June 30, 2016. The expanded audit process and findings are recorded at paragraphs 5 – 19 of Commissioners Decision No. 22/2016 (the "Decision").

In the Decision, I determined that this was an appropriate case to issue a penalty for the reasons set out in paragraphs 20 - 40. In that regard, I proposed to impose an administrative fine against Ferndale in the amount of \$10,000.00. Consistent with s. 34(2) of the *Act* I advised Ferndale that I would consider its written response to the proposed penalty if it was received within 7 days.

Ferndale has provided a written response within the required time, stating that it disputes the proposed penalty and providing arguments in support of its position.

B. Ferndale's Response

Ferndale advances two arguments in support of its position that the proposed penalty should not be imposed:

a. Lack of Auditor Communication

Ferndale argues that the administrative fine should be eliminated or reduced because the Auditor failed to raise the possibility of an administrative fine with Ferndale. Ferndale submits:

“We have also been dealing with [the auditor] who was in charge of our audit. [The auditor] specifically told us that we only have to pay our current and past drivers who are affected by the retroactive pay. [The auditor] never discussed anything about a fine that Ferndale Transport can receive for not paying their drivers the standard wage.”

b. The Fine is Unfairly High When Compared to Fines Imposed on other Companies

Ferndale argues:

“I know that my company should not have to pay the fee of \$10,000.00 because we paid the back-wages for our drivers and the drivers that currently do not drive for us.....

We also looked online on the BC Container Trucking website and noticed that other trucking companies did not receive a fine as big as ours even though they owed more money to their drivers than us. We also contacted several other companies who have got responses by you and they do not have to pay a fine as large as ours and they also find it outstanding and unfair that we have to pay that much.

The fee of \$10,000.00 that Ferndale Transport has to pay is extremely high even though that Ferndale paid their employees. My company will also have to pay for a TLS Trucking License on January 1, 2017 which is \$10,000.00 and it will be very hard to pay that if we have to pay a fine to you. We need to pay that license so we can keep our company running and still have jobs for our employees including our drivers.”

C. Consideration of Ferndale’s Response

Lack of Auditor Communication

The role of the auditor is to investigate and audit Container Trucking Services (“CTS”) licence holders as directed by the Commissioner. Auditors are not under any duty, or in any way obligated, to remind CTS Licensees that they may be subject to an administrative fine if the Commissioner is satisfied that the licensee has failed to comply with the *Act* or the terms and conditions of the licensee’s CTC licence. The Commissioner’s authority to impose an administrative penalty is clearly set out in the *Act*. The factors which will be considered by the Commissioner when determining whether or not to impose a penalty have been articulated in numerous OBCCTC decisions and are repeated in the Decision. For these reasons I do not accept Ferndale’s submission on this point.

The Fine is Unfairly High When Compared to Fines Imposed on other Companies

At paragraph 37 of the Decision I outlined the factors which will be considered when assessing an appropriate penalty. As noted, those factors include:

- The seriousness of the respondent's conduct;
- The harm suffered by drivers as a result of the respondent's conduct;
- The damage done to the integrity of Container Trucking Industry;
- The extent to which the Licensee was enriched;
- Factors that mitigate the respondent's conduct;
- The respondent's past conduct;
- The need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of having a Container Trucking Services Licence;
- The need to deter those Licensees from engaging in inappropriate conduct, and
- Orders made by the Commission in similar circumstances in the past.

In proposing an administrative fine of \$10,000.00 I considered all of these factors including past orders and the fact that Ferndale ultimately paid the adjustment amounts owing to its drivers. Further I identified in the Decision the specific circumstances which were taken into account in proposing a penalty of \$10,000.00:

"Applying these factors to the extent I find each relevant in this case, I have assessed the appropriate administrative penalty to be applied here taking into account the following circumstances:

- a. With respect to the seriousness of Ferndale's conduct, during the audit process Ferndale engaged in the following behaviours, including taking meritless positions, which have delayed the audit process and the payment of monies owing to its drivers:
 - i. alleging, without any reasonable basis or any effort to support its position, that 5 of its drivers were not performing container trucking services;
 - ii. initially reducing, without any reasonable or supportable justification, adjustment cheques made out to 12 company drivers;
 - iii. unnecessarily delaying the payment of adjustment amounts owing 5 of its drivers by sending the cheques to the OBCCTC.
- b. Ferndale failed to pay its drivers compliant rates for a period of over 2 years (April 3, 2014 – June 30, 2016), and made no effort to correct its behaviour despite clear directions from the former Acting Commissioner in late 2015 and early 2016.
- c. Ferndale's non-compliant conduct harmed its drivers and enriched itself by delaying payment of in excess of \$65,000.00 properly due and owing to its drivers. Had some of these drivers not filed a complaint, this non-compliant behavior may have gone undiscovered and unremedied." (paragraph 38)

Under Section 28 of the *Regulation* I have the authority to impose an administrative fine of up to

\$500,000.00 for contraventions 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." Having carefully considered Ferndale's Response submissions, and taking into account all of the referenced factors and circumstances, I do not accept Ferndale's submission that the imposition of a penalty of \$10,000.00 is unfairly high and remain convinced that a \$10,000.00 fine is appropriate here.

D. Conclusion

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

In the result I hereby order Ferndale to pay an administrative fine in the amount of \$10,000.00. 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 \$10,000.00 payable to the Minister of Finance.

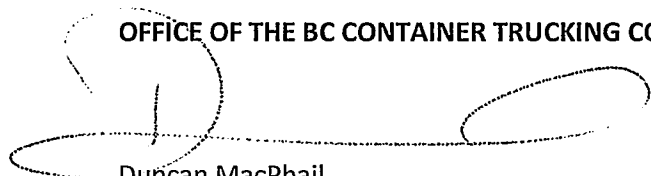
Finally, I note that Ferndale may request a reconsideration of the Commissioner's Decision by filing a Notice of Reconsideration with the Commissioner not more than 30 days after Ferndale receipt of this Decision Notice. A Notice of Reconsideration must be:

- 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, appearing to read 'Duncan MacPhail', is written over a horizontal line. The signature is stylized and somewhat cursive.

Duncan MacPhail
Commissioner