May 21, 2020

Gulzar Transport Inc.
Unit # 7 – 8760 River Road
Delta, BC V4B 1B5

Jet Speed Transport Inc.
Unit # 7 – 8760 River Road
Delta, BC V4B 1B5

Commissioner's Decision
Gulzar Transport Inc. and Jet Speed Transport Inc. (CTC Decision No. 06/2020) (Application for Reconsideration of CTC Decision No. 12/2019)

I. Introduction

1. On March 3, 2020, the Office of the British Columbia Container Trucking Commissioner ("OBCCTC") received an application on behalf of Gulzar Transport Inc. and Jet Speed Transport Inc. (the "Companies") pursuant to sections 38 and 39 of the *Container Trucking Act* (the "*Act*"). The application seeks reconsideration of the administrative penalty proposed in Gulzar Transport Inc. and Jet Speed Transport Inc. (CTC Decision No. 12/2019) (the "Original Decision") and ordered in the subsequent Decision Notice.

2. In the Original Decision, I determined that the Companies had failed to comply with the *Act*, the *Container Trucking Regulation* (the "*Regulation*"), and the Container Trucking Services Licence (the "Licence"). Specifically, the Companies were found to have engaged in a deliberate deception in order to appear compliant with minimum rate requirements based upon their payment of hourly rates to company drivers when, in fact, the Companies had misclassified drivers and were using a covert three-pay cheque system, combined with deliberately misleading record keeping practices, to pay less than minimum rates.

3. When the OBBCTC began the audit in the summer of 2018, the Companies appeared, based on the materials they had provided, to be paying the regulated rates. It was only after the OBCCTC seized records that the Companies had not disclosed to the auditor that the OBCCTC understood that the Companies were manipulating their accounting. The Companies were found to have been using a three-pay cheque system between December 2017 and November 2018 (when the Companies stopped using the three-pay cheque system after being discovered).

4. In the Original Decision, I also found that the Companies had failed to demonstrate to the auditor that they had corrected their payroll practices and that the Companies were in violation of an OBCCTC order (issued October 2019) to calculate money owing to company drivers. The cancellation of the Companies' licences was proposed, and the Companies were given time to make submissions setting out why the proposed penalty should not be imposed.

5. After carefully considering the Companies' submissions against licence cancellation, I remained of the opinion that the licences should be cancelled. My reasons were set out in Gulzar Transport Inc. and Jet Speed Transport Inc. (CTC Decision No. 12/2019) – Decision Notice (the "Decision Notice"), where the licence cancellations were ordered.

6. The Companies now seek a reconsideration and submit that I should not cancel their licences and should instead impose an administrative fine. In their March 3, 2020 submission, the Companies state that the process undertaken in reaching the decision to cancel the Companies' licences failed to meet the appropriate standard of procedural fairness. Specifically, they argue that the Commissioner rejected evidence, made findings of credibility and arrived at conclusions in the Decision Notice based upon evidence which was not before him or on the record and did not provide the Companies an opportunity to be heard on those matters. Further, they argue that the Commissioner did not consider the Companies' willingness to ensure that the violations noted in the Original Decision are addressed on an ongoing basis.

7. The Companies also assert that the essence or gravamen of the Original Decision is their failure to demonstrate that they have corrected their non-compliant practices and paid their drivers all money owing. The Commissioner's findings of non-compliance in the Original Decision, it is argued, are not "directly relevant" to the question of penalty.

8. In their March 3, 2020 reconsideration request, the Companies sought to provide new evidence in the form of payroll audit procedures prepared by MNP Ltd. It was proposed that upon the Commissioner's approval of proposed audit procedures, MNP Ltd. would conduct an audit of the Companies' August 2019 and January 2020 payroll records to demonstrate that the Companies have brought themselves in compliance with the legislation. The Companies also stated that if their reconsideration was successful and their licences were not cancelled, the Companies would be prepared to fund future compliance audits by MNP Ltd. To permit MNP Ltd. a reasonable time to conduct the audit, the Companies submitted that the Commissioner's licence cancellation order be suspended until at least June 30, 2020.

9. The Companies also sought, as part of the reconsideration process, the opportunity for their principals to meet with the Commissioner to "permit the parties to speak to the past conduct of this matter and to allow the Companies to answer any questions the Commissioner may have arising out of the various decisions and submissions that have been exchanged." It was suggested that a meeting would also allow the principals of the Companies to respond to questions of credibility raised in the Original Decision but not "previously put directly to the principals of the Companies" and would also allow them to convey their sincerity of regret and desire to change past practices.

10. I replied to the Companies on March 5, 2020 and agreed to suspend the order to cancel the licences pending the outcome of this reconsideration. Although the Companies had not been able to demonstrate compliance to the OBCCTC auditor in advance of the Original Decision or by way of a CPA audit submitted in response to my Original Decision, I agreed to consider evidence around the Companies' compliance in August 2019 and January 2020 by appointing an OBCCTC auditor. I was of the view that the OBCCTC auditor had the necessary skills and background, including a comprehensive understanding of the legislation and the provisions of the container trucking licence, to conduct the audit.

11. I did not agree to meet with the principals of the Companies in person because I accept that they are remorseful, and I considered that their written submissions and the accompanying compliance audit results would be sufficient to demonstrate their desire to change their practices.[1] However, I did grant the Companies additional time to provide any further submissions in writing. The Companies provided a supplemental submission on March 27, 2020.

12. The March 27, 2020 submission states that the owners of the Companies "acknowledge that mistakes were made in their past management of payroll and records management" and that they regret and have rectified "those problems" and are "committed to not allowing any of this [to] occur in the future and pledge to operate the Companies in future in full compliance." The Companies also confirm the payment of monies owing to drivers.

13. The Companies further state that their revenue has declined by 30% as a result of the publication of the Decision Notice such that "to the extent the Decision seeks to penalize the Companies financially, that objective has been achieved." The Companies also submit that their licences should not be cancelled because of the current pandemic and the fact that trucking is an essential service. They suggest that cancelling their licences will add to the uncertainty in the industry caused by the pandemic, increase unemployment, further burden government resources and create unnecessary difficulties and uncertainty for their customers. They say that "the Commissioner ought to do all possible to assist government and health authorities in reducing risk, uncertainty and confusion in the market and supply chain."

14. The OBCCTC compliance audit to which I agreed in response to the Companies' March 3, 2020 submission has been completed. The records were supplied by the deadline and the auditor reviewed them and advised that in the months of August 2019 and January 2020, the Companies utilized an amended payroll process and were paying the required rates to company drivers and Independent Operators. On April 20, 2020 the Companies were provided a copy of the auditor's report and granted two weeks to provide a response.

15. On May 4, 2020 the Companies responded, noting some minor corrections of the facts set out in the audit report and clarifying that the Companies ceased use of the three-pay cheque system identified in the Original Decision in November 2018. The Companies also stated that they would be paying amounts described by the auditor as "immaterial discrepancies" and repeated that their "ongoing compliance," their rehabilitation, the "independent interests" of their drivers, suppliers, and customers, and the current state of emergency coupled with trucking as an essential service should all weigh against the cancellation of their licences. The Companies also submitted that any administrative fine imposed should be reduced by 30% owing to the decline revenue the Companies have experienced as a result of the COVID-19 pandemic and "the principle of sentencing that the offender's ability to pay should be considered when imposing a fine."

[1] I also did not agree to meet with the Companies' drivers who by email of February 15, 2020 had requested a meeting in response to my Decision Notice. In response to their request, I advised them that I was aware of their concerns and had responded to them in the Decision Notice. I also suggested that any other new or relevant issues they wished to raise could be done through the Companies in a reconsideration request. The drivers were further advised that in the event the Companies' licences were cancelled, I would meet with them to discuss the reallocation of truck tags.

II. Decision

Licence cancellation as an available penalty

16. Before turning to the Companies' submissions on reconsideration, I think it is important to provide some further historical context on the purpose of the licence cancellation penalty available under the *Act* and the circumstances which precipitated its introduction.

17. The 2014 work stoppage, which I discussed in some detail in the Decision Notice, ended upon the signing of the Joint Action Plan ("JAP") by the Government of Canada, the Province of British Columbia, Port Metro Vancouver, Unifor and the United Truckers Association. Point 5 of the JAP committed government to strengthening the scope of the existing audit program so that:

> …all trucking companies registered in the trucking licensing system for local drayage will be subject to regular audits conducted in a transparent manner and **penalties for rate violators shall be severe and shall include cancellation of licenses for companies** and individual drivers. (emphasis added)

18. Parties to the JAP understood that future enforcement programs would need to be buttressed by the availability of strong penalties, including licence cancellation, because industry participants would not change their behaviour unless the penalties available under statue were sufficiently deterrent to ensure that rate undercutting, in particular, did not continue.

19. Vince Ready and Corinn Bell, who were commissioned to provide recommendations on all points in the JAP (Point 14), also understood the necessity of the licence cancellation penalty. The Ready/Bell report raised concern that future licensees would find loopholes in the regulatory scheme and continue to undercut rates and participate in what Ready/Bell described as "gamesmanship." Ready/Bell identified five examples where trucking companies had effectively undercut rates and recommended that these activities be prohibited in the future (these activities are now identified as "Prohibited Practices" in Appendix A to Schedule 1 of the Container Trucking Services Licence).[2] Ready/Bell also recommended that licences should be cancelled in the event these violations were proven.[3]

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[2] 1. A Licensee must not do any of the following:
- (a) require an Employee to have an ownership interest or a leasehold interest in Equipment in which the Licensee has an ownership interest or leasehold interest;
- (b) require an Employee to assume an interest in or obligation to the Licensee;
- (c) require an Independent Operator to sell his or her Equipment to the Licensee;
- (d) require an Independent Operator or Indirectly Employed Operator to become an Employee of the Licensee;
- (e) require an Employee to become an Independent Operator or Indirectly Employed Operator;
- (f) require or allow a Trucker to misrepresent the time worked, the distance travelled or monies paid to the Trucker;
- (g) pay Truckers by a method of Compensation that is a hybrid of per trip and hourly; or
- (h) threaten, harass, coerce, or attempt to influence a Trucker in any way, either directly or indirectly, regarding a Trucker's right to retain his or her Compensation.

[3] Vince Ready and Corinn Bell, Recommendation Report – British Columbia Lower Mainland Ports, pages 31 & 32.

20. The seriousness of the available penalties under the *Act* reflect the intent of the JAP agreement and Ready/Bell's recommendations. Past Commissioners understood and considered this context when assessing the appropriate penalty, noting that it is important that licensees receive an appropriately deterrent message and that the assessed penalty be sufficiently significant to deter non-compliance and to "ensure that administrative fines are not seen by licensees as merely another cost of doing business or part of the licensing costs."[4]

21. Licence cancellation is an available penalty in part because it is the most effective means of ensuring that licensees do not view penalties as just another cost of doing business. It also ensures that licensees engaged in rate undercutting, the primary mischief that the *Act* and *Regulation* were enacted to address, are prevented from operating in the industry where their conduct has been particularly egregious. The *Act* does not require, nor should licensees expect, that a licence cancellation will only occur after a series of graduated fines. If the circumstances of an audit warrant it, licences will be cancelled in order to protect the integrity of the Commissioner's enforcement program and fulfill the purpose of the *Act*.

Procedural fairness

22. The Companies argue that I rejected evidence, made findings of credibility and arrived at conclusions in the Decision Notice based upon evidence which was not before me or on the record and that I did not provide the Companies an opportunity to be heard on those matters.

23. In the Decision Notice, employee letters of support provided by the Companies were considered. The Companies argue that questions regarding the "manner in which the letters were obtained," and a specific concern raised about letters of support from workers whose immigration status in Canada depends on their employment, amount to findings of credibility which required an opportunity for the Companies to respond and required the Commissioner to question the employees and/or hold a hearing on the matter. I do not agree.

24. Confirmation from the employees or the Companies that the employees had not been asked or coerced into writing the letters would not have had any bearing on my treatment of the letters because the question of the authors' credibility was not the primary consideration. As set out in the Decision Notice, the letters were not relevant to the licensees' history of compliance or their specific breaches of the *Act.* Additionally, in the Decision Notice I concluded that "the Commissioner's enforcement responsibility cannot be waived in cases where employees are complicit or say that they are generally satisfied." I remain of the opinion that the employees' letters are not sufficient to prevent the cancellation of the licences. Although I accept that the employees who wrote the letters would like to keep their jobs, that does not change my decision.

25. The Companies also cite statements in the Decision Notice regarding CTS Licences, port terminal access and trucking company operations to the effect that cancellation of their licences would not necessarily mean that they would be put out of business and that other businesses would be able to pick up their business if they were. The Companies argue that these statements amount to "impermissible speculation" and assert that the first was made despite "uncontested evidence" from the Companies to the contrary.

[4] Smart Choice Transportation Ltd. (CTC Decision No. 21/2016), paragraph 26.

26. My comments in the Decision Notice around whether the cancellation of the Companies licences would necessarily put them out of business are based on statements of commonly known facts about the fundamental structure of the Lower Mainland drayage industry and the regulatory regime. Similarly, the capacity of other licensees to service the Companies' existing on-dock business is supported by commonly known facts about the capacity of the licenced drayage fleet (number of truck tags and average on-dock trips per day) and the number of TEUs (twenty-foot equivalent units) moving through the Lower Mainland container terminals.

27. In any event, the Companies' ability to continue operations after loss of licence and the capacity of other licensees to manage demand are not the most important factors in determining the penalty. One of the principal reasons for the penalty is the seriousness of the Companies' misconduct – that is, the intentional non-compliance by the Companies. This consideration, and the others set out below, weigh heavily in favour of licence cancellation regardless of whether the Companies will in fact go entirely out of business.

28. In the Original Decision, I noted that "the importance of addressing non-compliance outweighs the impact of a licence cancellation on the particular drivers who will be required to find work at other licensees"[5] and in the Decision Notice I stated that the "financial impact on the owners does not outweigh the considerations weighing in favour of the cancellation."[6] While I recognize the impact that the licence cancellation will have on the Companies' drivers, I continue to believe that the removal of companies that are so seriously non-compliant from the sector will have a long-term, positive impact on industry stability and the longer-term prospects of all drivers. The Companies' submissions on reconsideration have not changed my views.

29. The Companies had an opportunity to respond to the Decision Notice but did not elect to provide any additional information regarding the employee letters or my statements regarding access to marine terminals and drayage operations, despite an invitation to do so.

Appropriateness of penalty

30. Licence cancellation, rather than a financial penalty, is appropriate in this case in part because the penalty is commensurate with the seriousness of the respondent's conduct. This is the first and only instance where a licensee has been found to have engaged in systematic and deliberate deception in order to appear compliant with minimum rate requirements. The Companies engaged in the very "gamesmanship" addressed by Ready/Bell that precipitated the last work stoppage when they purposefully misclassified drivers and used a three-pay cheque system, combined with deceptive record keeping practices, to pay non-compliant rates.

31. The Companies submit that I overlooked the principles of rehabilitation in levying the penalties by failing to consider their willingness to bring themselves into compliance and to demonstrate compliance on an ongoing basis. The Companies argue that that the essence or gravamen of the Original Decision and the licence cancellation penalty is not their intentional manipulation and falsification of their accounting practices in order to consistently underpay their drivers, but rather their failure to demonstrate that they have corrected their non-compliant practices and have paid their drivers all money owing. It was on this basis that the Companies sought an opportunity to

[5] Original Decision, paragraph 106.
[6] Decision Notice, page 8.

demonstrate that they had corrected their payroll practices and it was on this basis the Companies asked, in their March 27, 2020 and May 4, 2020 submissions, that the outcome of the OBCCTC March/April 2020 payroll compliance audit be considered when reconsidering the penalty.

32. I have considered the results of the additional OBCCTC audit. The Companies have now demonstrated that they have adjusted their payroll practices. However, the Companies only demonstrated a willingness to work with the Commissioner to ensure that the violations noted in the Original Decision were addressed on an ongoing basis once they were caught and a licence cancellation penalty proposed.

33. Prior to the licence cancellation proposal, the Companies did not demonstrate a genuine commitment to rehabilitation. Instead, the Companies initially took the position that no money was owed to their company drivers and they would not perform calculations as directed by the auditor. As a result, I was required to order the Companies to perform those calculations. The Companies then violated that order. They also failed at that time to demonstrate to the auditor that they had corrected their payroll practice.

34. Over the course of the audit, the Companies did admit that some drivers had been misclassified. However, they then made pre-emptive payments to these drivers without consulting the OBCCTC, resulting in payments to drivers that were potentially low and certainly not approved by the OBCCTC auditor. The Companies also answered auditor and OBCCTC questions selectively and claimed missing documents, all of which slowed the audit process.[7]

35. Once the Original Decision was issued, the Companies proposed a third-party audit through KPMG and presented calculations using a methodology that was not approved by the OBCCTC but was ultimately accepted on the basis that some money reclaimed for drivers was better than none. The Companies' failure to keep proper records undermined the OBCCTC audit and impacted the Commissioner's ability to make an accurate award.[8]

36. The Companies' recent demonstration of compliance does not outweigh their previous unwillingness to cooperate, their pre-emptive and unapproved self-audits and payments, or the fact that drivers may have received less money than they were entitled to receive based on those unapproved self-audits, to the financial benefit of the Companies.

37. Further, while the Companies have acknowledged that "mistakes were made" in the past (March 27, 2020 submission), they characterize their mistakes as management failures to "comply with the industry payroll obligations" and to institute "sufficient procedures and oversight" (March 3, 2020 submission) rather than admit to intentional conduct for the purpose of rate undercutting. Such characterizations do not suggest that the Companies have been rehabilitated or have even accepted full responsibility for their actions. Rather their arguments continue to demonstrate an effort to mitigate the effects of the audit and resulting penalty.

38. Contrary to the assertion made on the Companies' behalf, the gravamen of the decision to cancel the Companies' licences are the particular facts and circumstances of the case, namely the Companies' deliberate deception intended to hide a number of non-compliant activities, foremost

[7] Original Decision, paragraph 105.
[8] Decision Notice, page 11.

of which was their non-compliant rate payments. The Companies' subsequent efforts to correct their payroll practices once faced with the prospect of licence cancellation does not change my assessment.

39. I am not convinced that any financial penalty will deter these Companies from further non-compliance. In the circumstances, general rather than specific deterrence weighs more heavily. The importance of deterring non-compliance across the industry by demonstrating the consequences of inappropriate conduct is critical in this case. I find here that the Companies' recent attempts to change their accounting system, to the degree that those may be relevant, are outweighed by the other considerations addressed in this decision, including the severity of the Companies' misconduct and the importance of ensuring that an administrative penalty is not seen by other licensees as a cost of doing business. Nor do I believe that the industry as a whole will be sufficiently deterred from the very serious misconduct engaged in by these Companies if penalties are reduced whenever a company argues late in the day and after it has been caught that lessons have been learned or its behavior has been changed.

40. When assessing a penalty, the Commissioner considers the impact that the non-compliant activity has had on the integrity of the industry. This is because a penalty is intended in part to address activity which negatively impacts the whole industry. Rate undercutting is an industry-wide issue; this was identified in the JAP and the Ready/Bell report that precipitated the enactment of the *Act* and *Regulation*. The principle of general deterrence is therefore of particular importance in the application of the penalty regime under the *Act*. A penalty assessed should "demonstrate the consequences of inappropriate conduct" to the industry at large and be sufficient to deter other licensees from engaging in similar non-compliant activity. Licence cancellation, where appropriate, signals to industry the seriousness of non-compliant conduct and ensures that the integrity of the Commissioner's enforcement program is protected, and the purpose of the *Act* fulfilled.

41. In their March 27, 2020 submission, the Companies submit that the posting of the Original Decision has resulted in a 30% reduction in their business and revenue and therefore the Companies have already been financially penalized. In their May 4, 2020 submission, they argue that the COVID-19 pandemic and resulting state of emergency has led to a further 30% loss of revenue which should also be considered when assessing the appropriate size of a fine. While both may be so, I do not consider the publication of a decision or decision notice (and any resulting financial impact) to be tantamount to a penalty under the *Act* nor do I agree that a financial penalty is appropriate in this case.

42. The Companies also note the impact of the COVID-19 pandemic in their March 27, 2020 and May 4, 2020 submissions and argue that the resulting provincial emergency precludes the Commissioner from cancelling the Companies' licences on the basis that the licence cancellations would lead to greater instability in the industry, create further job losses and unnecessary supply chain impediments.

43. I am aware that the Government of British Columbia deems trucking to be an essential service and I agree that the cancellation of the Companies' licences would not be suitable at a time when the movement of goods is a priority. However, the onset of COVID-19 does not absolve the Companies from responsibility or make the decision to cancel the Companies' licences irrelevant. Therefore, pursuant to s. 3 of Ministerial Order No. 98, *Limitation Periods (COVID– 19) Order No. 2,* I will refrain from cancelling the Companies' licences until two (2) weeks after the date on which the last extension of the declaration of a state of emergency made March 18, 2020 under section 9 (1) of the *Emergency Program Act* expires or is cancelled.

III. Conclusion

44. In summary, the application for reconsideration of Gulzar Transport Inc. and Jet Speed Transport Inc. (CTC Decision No. 12/2019) is dismissed and the penalty proposed in the Original Decision is confirmed and imposed.

45. Gulzar Transport Inc. and Jet Speed Transport Inc. requested pursuant to section 39(2) of the *Act* that the Decision Notice order be suspended until the outcome of the reconsideration. That request was granted. I have determined that Gulzar Transport Inc. and Jet Speed Transport Inc.'s licences should not be cancelled until two (2) weeks after the date on which the last extension of the declaration of a state of emergency made March 18, 2020 under section 9 (1) of the *Emergency Program Act* expires or is cancelled. In the result, Gulzar Transport Inc. and Jet Speed Transport Inc.'s Container Trucking Services Licences are cancelled effective two (2) weeks after the date the declaration of a state of emergency order is cancelled or expires.

This order and reconsideration will be published on the Commissioner's website.

Dated at Vancouver, B.C., this 21st day of May, 2020.

Michael Crawford, Commissioner