



May 6, 2016

Smart Choice Transport Ltd.  
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Original to follow via mail

## Commissioner's Decision Smart Choice Transport Ltd. (CTC Decision No. 03/2016)

### Introduction

1. Smart Choice Transport Ltd. ("Smart Choice") is a licensee within the meaning of the *Container Trucking Act* (the "Act"). Under Sections 22 and 23 of the Act, minimum rates that licensees must pay to truckers who provide container trucking services are established by regulation, and a licensee must comply with those statutorily established rates. In particular, Section 23(2) states:

A licensee who employs or retains a trucker to provide container trucking services must pay the trucker a rate and a fuel surcharge that is not less than the rate and fuel surcharge established under section 22 for those container trucking services.

2. On November 16, 2015 the then Acting Commissioner communicated the following to the TLS community"

"As previously stated, licence holders who voluntarily bring themselves into compliance in a timely way to the satisfaction of the Commissioner are far less likely to incur penalties for non-compliance than those who fail to do so. Please see section 34 of the Act, which sets out the penalties that can be imposed for the failure to comply."

3. On December 11, 2015 the Acting Commissioner followed up with a further communication wherein she informed the TLS community that:

"On the issue of retroactive pay, we once again ask for immediate voluntary compliance of that legislation. While we have not yet exercised our discretion as Commissioners to impose penalties for non-compliance for retroactive pay to date, we are putting the industry on notice that the Office expects all retroactive pay owing to drivers can be fully paid by licence holders prior to Friday, January 22, 2016 at the very latest. Companies that come into compliance between now and January 22, 2016 may still be subject to penalties pursuant to the Act. Each case will be assessed on a case by case basis and the reasons for non-compliance will be assessed on that basis. It will not be acceptable for a TLS licence holder to simply wait until January 21, 2016 to come into compliance.

It is expected that all companies pay the retroactive pay owing to drivers immediately, and that the industry will be in full compliance of retroactive pay owing by January 22, 2016 at the latest. After January 22, 2016, the imposition of a penalty pursuant to s. 34 of the Act will be highly likely for any company found in non-compliance with the retroactive provisions of the legislation."

4. Under Section 26 of the *Act*, any person may make a complaint to the British Columbia Container Trucking Commissioner (the “Commissioner”) that a licensee has contravened a provision of the *Act*. Under Section 29, the Commissioner reviews such complaints and, under Section 31, may conduct an audit or investigation to ensure compliance with the *Act*, the *Container Trucking Regulation* (the “*Regulation*”) or a licence. (I note the Commissioner has authority under Section 31 to conduct such audits and investigations whether or not the Commissioner has received a complaint).
5. Section 27 of the *Act* provides, in essence, that complaints may be made confidentially to the Commissioner. That is, if a complaint is made on a confidential basis, the Commissioner “must make best efforts to avoid disclosing any identifying information respecting the complainant” unless disclosure becomes necessary for purposes of the *Act*.

#### Facts

6. The *Act* and the *Regulation* came into effect on December 22, 2014, and a Commissioner was appointed on February 16, 2015. In November of 2015 the Commissioner’s office received a confidential complaint alleging that Smart Choice was paying less than the required minimum rates of remuneration required under the *Act* to employee drivers.
7. On November 17, 2015 the then Acting Commissioner directed Smart Choice Transport Ltd. to provide a compliance letter for employee drivers from a Certified Professional Accountant pursuant to Appendix D to Schedule 1 of the Container Trucking Services Licence. The Certified Professional Accountant was directed to provide a compliance letter for the periods between April 1, 2014 - April 30, 2014 and June 1, 2015 - June 30, 2015.
8. Payroll records for Smart Choice were inspected by Kemp Harvey Hamilton Inc. and the required compliance letter was submitted to the Commissioner’s office.
9. Following receipt of the compliance letter the Acting Commissioner directed an Office of the British Columbia Container Trucking Commissioner (“OBCCTC”) auditor to review the compliance letter and to conduct a spot audit of Smart Choice’s payroll records to confirm compliance with the minimum rates of pay required by the Container Trucking Regulation (the “*Regulation*”).
10. The auditor investigated five drivers for the pay period April 16-30, 2014 and three drivers for the pay period June 1-15, 2015. The auditor reviewed all information requested from and provided by Smart Choice and concluded that Smart Choice was not paying the minimum rates of remuneration required under the *Regulation* to employee drivers.
11. Having been informed that it was not in compliance with the requirements of the *Regulation*, Smart Choice calculated the full amount of retroactive pay owing to its drivers. These calculations which showed that substantial adjustments were required were examined by the auditor. Adjustments for the period April 1, 2014 to January 31, 2015, were paid by cheques dated January 16, 2016. Adjustments of the period February 1, 2015 to November 30, 2015 were paid on December 18, 2015. Pay stubs evidencing the payment of the aforementioned pay adjustments were provided to the auditor.

12. The auditor satisfied herself that the adjustments calculated and paid by Smart Choice fully compensated its employee drivers for the retroactive amounts owing and that Smart Choice has brought itself into substantial compliance with the *Act* and the *Regulation*.
13. The auditor submitted her report to the Commissioner in April of this year. The Report concludes that as of the date of the Report, Smart Choice is in substantial compliance with the minimum rates of remuneration owing to its employee drivers under the *Regulation* and, with the adjustment payments having been made, is in substantial compliance through to April 3, 2016.

### Decision

14. As described above, the circumstances of this case are that Smart Choice has:
  - undergone an audit, during which it cooperated with the auditor;
  - assisted the auditor by calculating the full retroactive adjustment amounts owing to its drivers;
  - promptly paid the adjustment amounts calculated to be owing to its employee drivers. These adjustments were voluntarily paid in advance of the January 22<sup>nd</sup>, 2016 deadline set by the former Acting Commissioner.
  - brought itself into substantial compliance.
15. As Smart Choice has paid the amount owing under the *Act* and corrected its non-compliant payment practices, I find there is no need for me to issue an order pursuant to Section 9 of the *Act* requiring Smart Choice to comply with the *Act*.
16. Section 34 of the *Act* provides that, if the Commissioner is satisfied that a licensee has failed to comply with the *Act*, the Commissioner may impose a penalty or penalties on the licensee. Available penalties include suspending or cancelling the licensee's licence or imposing an administrative fine. Under Section 28 of the *Regulation*, an administrative fine for a contravention relating to the payment of remuneration, wait time remuneration or fuel surcharge can be an amount up to \$500,000.
17. The seriousness of the available penalties indicates the gravity of non-compliance with the *Act*. The *Act* is beneficial legislation intended to ensure that licensees pay their employees and independent operators in compliance with the rates established by the legislation (*Act* and *Regulation*). Licensees must comply with the legislation, as well as the terms and conditions of their licences, and the Commissioner is tasked under the *Act* with investigating and enforcing compliance.
18. The *Act* does not, however, require penalties to be imposed for non-compliance in all cases. Rather, the Commissioner is granted a discretion to impose penalties in appropriate cases. There are many circumstances in which discretion to impose a penalty or penalties is likely to be exercised. These include, but are not limited to, where a licensee:
  - does not cooperate fully with an audit or investigation;
  - does not comply with orders or directions given by the Commissioner (or a delegate

of the Commissioner, including an auditor);

- engages in meritless dispute of, or delays in paying, amounts found to be owing;
- engages in any form of fraudulent, deceptive, dishonest or bad faith behavior with respect to compliance with the requirements of the *Act*, the *Regulation* or a licence.

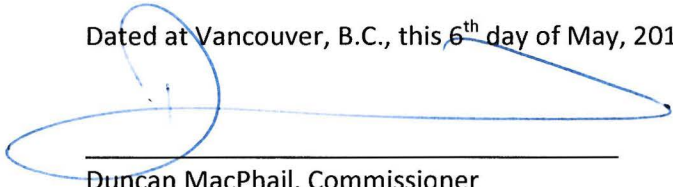
19. In the present case, Smart Choice cooperated fully with the auditor's investigation of the complaint. It complied with the directions given by the auditor, including disclosing records. It assisted with calculating the retroactive adjustment payments owing under the *Act* and *Regulation* and then paid the calculated adjustment to its drivers. Payment was made in advance of the January 22, 2016 deadline fixed by the former Acting Commissioners. Finally, the auditor is satisfied that Smart Choice's payment practices are now in compliance with the legislation

### Conclusion

20. In summary, Smart Choice was found to be owing a total of \$55,175.00 to 14 employee drivers. It cooperated in the audit process and paid the amount found to be owing. In these circumstances, while I record the fact of Smart Choice's non-compliance with the *Act* by way of this decision, as well as Smart Choice's actions to bring itself into compliance, I decline to exercise my discretion to impose a penalty on Smart Choice in this case.

21. This decision will be delivered to Smart Choice and published on the Commissioner's website ([www.bc-ctc.ca](http://www.bc-ctc.ca)).

Dated at Vancouver, B.C., this 6<sup>th</sup> day of May, 2016



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Duncan MacPhail, Commissioner