OFFICE OF THE
BRITISH COLUMBIA CONTAINER
TRUCKING COMMISSIONER

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Attention: Patrick G. Yearwood (counsel for TMS Transportation Management Services Ltd.)

Re: TMS Transportation Management Services Ltd., CTC No. 08 /2016 (Application for Reconsideration of CTC No. 06/2016); Penalty Decision Notice (CTC No. 06/2016)

I. Introduction

1. On June 24, 2016 the Office of the British Columbia Container Trucking Commissioner (the "OBCCTC") received an application dated June 23, 2016 filed on behalf of TMS Transportation Management Services Ltd. (the "Applicant" or "TMS") pursuant to Sections 34 and 39 of the *Container Trucking Act (*the *"Act").* The application seeks the following:

    a. A reconsideration of TMS Transportation Management Services Ltd., CTC Decision No. 06/2016, dated June 7, 2016 (the "Original Decision");
    b. An order that the Commissioner's orders set forth in the Original Decision be suspended until the outcome of the reconsideration;
    c. A decision that the Commissioner refrain from imposing the administrative penalty proposed in the Original Decision.

2. At paragraph 21 of the Original Decision I made the following orders:

    a. I order TMS to make the adjustment payments owing to its drivers as calculated by the auditor by no later than June 30th, 2016;
    b. I further order TMS to bring itself into full compliance with the rate requirements of the *Act* going forward from June 1, 2015 and continuing to the date of this decision by no later than June 30th, 2016;
    c. I further order that on or before July 15th, 2016 TMS report to the auditor outlining what steps it has taken to ensure full compliance with the *Act.*

3. In the Original Decision I also gave notice that I proposed to impose an administrative fine against the Applicant in the amount of $6,000.00 (paragraph 30).

4. The application seeks a reconsideration of the Original Decision and responds to the proposed administrative fine of $6,000.00 by setting out reasons why I should refrain from imposing the penalty.

II. General Background

5. The *Container Trucking Act* (the "*Act*") came into force on December 22nd 2014. It was enacted following a 28 day work disruption at Port Metro Vancouver in March 2014, and addressed a number of the issues which were considered to be the root causes of the dispute.

6. Corinn Bell and Vince Ready were retained to conduct and independent review into the issues which caused the drivers to cease work at the Port and to provide recommendations. In their October 16, 2014 *Recommendation Report – British Columbia Lower Mainland Ports*, the authors described the underlying issues as follows:

> **"3) Current Dispute**
>
> With several stakeholder initiatives since 2005 the 2013/2014 trucking industry composition has changed. The numbers of owner operators in the sector dramatically decreased and were replaced by employee drivers. Further, economic pressures had intensified and the rates in the MOA 2005, which were to serve as an initial benchmark actually reduced due to undercutting. Also, economic considerations such as stagnant fuel surcharges, environmental regulations, and licensing fees significantly impacted owner operator revenues.
>
> With mounting economic pressures coupled with significant terminal wait times, a substantial group of unionized and non-unionized container truckers stopped serving PMV in February 2014.
>
> a) **Issues in 2014**
>
> It is integral to BC and Canada's economy, as well as all stakeholders who rely on the port that the current issues be considered to bring stability and certainty to all stakeholders in the industry.
>
> It is apparent that a number of issues that gave rise to the 1999 and 2005 disputes still persist. The main issues facing the current 2014 dispute include:
>
> - Terminal Wait Times
> - Utilization of Night Gates;
> - Terminal Gate Compliance Initiative;
> - Terminal Reservations Policy;
> - Terminal Service Level Agreements;
> - Trip Rates for "on-dock" and "off-dock" Movements;

- Massive Rate Undercutting;
- Enforcement and Audit Process regarding undercutting;
- Container Dispute Resolution Program;
- Moratorium on New Licenses; and
- Governance (Regulatory Framework and PMV's Truck Licensing System).

Based on ongoing conversations and interactions with stakeholders in the dispute, the problems in the industry have caused and continue to cause deep-rooted frustration. The majority of these issues are linked to and cause the inefficient operations of the ports. Stakeholders commonly express that the terminal wait times, reservation policy, rate undercutting, varying degrees to which drivers are paid fuel surcharge, failure to pay for "third leg trips", lack of an industry wide auditing system, and lack of proper enforcement of audit judgements are at the foundation of the present dispute.

One of the most devastating factors affecting union and non-union drivers is the fact that the majority of these drivers had not received an increase in rates and fuel charges for the past several years. To aggravate matters, most drivers have had their rates decreased since 2006 due to the undercutting of the "Ready Rates" and the lack of industry wide enforcement.

Despite significant efforts from 1999 to present, issues associated with compensation, working conditions, and prolonged wait times continue to undermine the sector, as well as PMV's international reputation as a reliable and competitive service provider.

In summary, the 2014 issues are essentially the same issues that were at the root of the 1999 and 2005 disputes. The similar issues underpinning the 2014 dispute led to 1,200 drivers, both owner-operators and company emp0loyees, refusing to service PMV for approximately four weeks." (pp. 7, emphasis added)

7. It is well recognized that the *Act* is beneficial legislation and was intended to address the problems identified in the Ready Bell Report. One of the central purposes of the *Act* is to ensure that container truck drivers are consistently and fairly compensated for their work and paid in a timely way. The legislated rate structure is designed to improve working conditions for drivers so as to bring to an end the previous cycle of labour disruptions by container trucking drivers at the Port noted in the above excerpt from the Ready Bell Report.

8. The legislated rate structure in the *Act* and *Regulation* also promotes fair competition, predictable costs, and therefore operational stability among the trucking companies that employ drivers or utilize their services, by prohibiting undercutting of the prescribed rates for container truck driver remuneration. The rates created by the *Act* are minimum requirements, cannot be waived, and were introduced to achieve these purposes.

III. Application for Reconsideration Re Wages Owing

9. With respect to the determination in the Original Decision that TMS owes wages to its drivers and the order that it pay outstanding wages by June 30, 2016, TMS states in its application for reconsideration that it is "not disputing that it has to meet the $26.28 per hour threshold" ("Issue #1" in the Original Decision). TMS also does not take issue with how the benefits it pays were calculated or valued for wage rate determination ("Issue #3" in the Original Decision). Rather, it disputes the determinations on the two remaining issues. Are the minimum hourly rates established by Section 13 of the *Act* to be interpreted as being inclusive or exclusive of:
    - Vacation pay ("Issue #2");
    - Overtime premiums ("Issue #4").

10. With respect to vacation pay, the Applicant notes the definition of "benefit" in the *Regulation*, and concedes that vacation pay is not a benefit. However, it argues vacation pay "is to be part of the calculation of the hourly rate". It says TMS pays its drivers 4, 6 or 8 per cent of the total amount of regular time and overtime worked "on every cheque", allocated as "wages or other remuneration calculated on the basis of work done". Put otherwise, the Applicant submits that, under Section 13, vacation pay is to be included when calculating the base hourly amount being paid, not as a benefit, but as "wages or other remuneration calculated on the basis of work done".

11. With respect to overtime pay, the Applicant argues that the intent of Part 4 of the *Act* is to create a "level playing field" between the wages paid to directly employed operators ("company drivers") and the amounts payable to owner operators, and that interpreting the hourly rate payable to company drivers under Section 13 in a way which excludes from the calculation overtime premiums creates an imbalance.

12. Additionally, the Applicant claims that former commissioner Smith said in June of 2015 that overtime would be considered in determining whether or not minimum hourly rates were met.

13. TMS further says it "has been asking for confirmation of this since the audit process began" but the auditor did not give "clarification" on this issue. It further says that in January 4, 2016 it asked for a meeting with the Commissioner but this request was not granted, and that if TMS had known "at the onset in 2014, or had it been told by the Commissioner when the audit process began in June 2015, that overtime was not going to be considered in the hourly rates", it would have decided not to continue in the container trucking service sector

"because the prescribed hourly rates are not competitive with rates being paid in the majority of its business outside of container work".

IV. Decision on Application for Reconsideration re Wages Owing

14. I have carefully considered the Applicant's arguments and am not persuaded to reconsider my original decision on wages owing and for the reasons which follow the application for reconsideration is dismissed.

15. I agree with the Applicant's submission that any interpretative exercise requires a search for legislative intent and remedial purpose. However, I reject its argument that the guiding legislative intention with respect to the minimum wage provisions of the *Act* and *Regulation* is to "create a level playing field so that leased operators are paid a wage for their labour which is equivalent with what the Company drivers are paid."

16. While I have no doubt that the legislature intended that the *Act* and *Regulation* be, fair and even handed, that in my view is not the overarching and guiding purpose of this legislation. In particular, the driving force behind the legislation was not a concern about whether company drivers and independent operators received equivalent rates of remuneration.

17. As noted earlier in this decision, the legislation is remedial minimum rate legislation drafted for the purpose of creating fair compensation for container truckers and ensuring that they are paid in a timely fashion. The Commissioner is charged with the responsibility under the *Act* to interpret its provisions to give full effect to this purpose and to exercise his compliance authority to ensure that these objectives are met and the requirements of the legislation are not contravened. The importance of this responsibility is reflected in part in the significant enforcement powers granted to the Commissioner, including the power to impose administrative penalties up to a maximum of $500,000 (Section 28 of the *Regulation)* and the authority to suspend or cancel a licence (Section 34(1) of *Act*).

18. The clear legislative purpose is to benefit truckers by increasing compensation levels, such that labour disruptions by truckers unable to make a fair living wage, of the kind seen in 1999, 2005 and 2014, do not recur. It would be inconsistent with this intention to interpret the legislation in general, and Section 13 in particular, in a way which undermines this purpose by resulting in a reduction of the clearly stated minimum hourly rate levels set out in Section 13 of the *Regulation*.

19. Simply put, if there exists ambiguity in the language used in Section 13 (and I am not necessarily persuaded there is any such ambiguity), the purpose of the legislation favours an interpretation which results in robust rate protection for drivers' rates of pay.

20. Section 13 of the Regulation sets out minimum wage rates of $25.13 per hour and $26.28 per hour which are stated to be "inclusive of benefits". Section 1(1.1) of the *Regulation* defines "benefit". TMS concedes that vacation pay is not a benefit and does not expressly argue that overtime is a benefit. Rather, it argues that both should be considered to be part of the base wage rate for purposes of determining whether the minimum hourly wage rate ($25.13 or $26.28 per hour) is met.

21. I find that, had the legislature intended that vacation pay and overtime premiums be included in the Section 13 minimum wage rates, it would have expressly stated this to be the case, as it did with the inclusion of "benefits". The absence of such express language indicates the legislature did not intend to include these types of compensation in the calculation of the required hourly rate.

22. I find as well that the minimum hourly wage rates established by Section 13 are analogous to the minimum hourly wage rate found in the *Employment Standards Act.* Under the *Employment Standards Act*, vacation pay and overtime premiums are not included in the calculation of this minimum hourly rate.

23. Both legislative schemes have a similar purpose. Both are intended to benefit employees by protecting minimum hourly compensation levels. Absent a clear expression of legislative intent to the contrary, (i.e. the express inclusion of vacation pay and overtime in either "benefits" under Section 1(1.1) or the hourly rates in Section 13), I cannot conclude the legislature intended the calculation of minimum hourly rates in the *Employment Standards Act* be materially different than the calculation of hourly rates in the *Container Trucking Act.* Nothing in the container trucking legislation indicates that these two similarly situated and purposed pieces of legislation were intended to be interpreted differently with respect to vacation pay and overtime.

24. With respect to the submission that the Applicant pays vacation pay calculated as percentage of wages, and characterizes it as "wages or other remuneration calculated on the basis of work done", the issue here is not how pay vacation is calculated or characterized by the Applicant. How the Applicant calculates or characterizes vacation pay does not determine the proper interpretation to be given to Section 13. If it did, the

interpretation of Section 13 would vary from licensee to licensee depending on how vacation pay is calculated or recorded in their internal records.

25. With respect to overtime pay and the "level playing field argument" I simply do not agree with the position advanced on this point or as previously pointed out the underlying premise that a level playing field is the overriding legislative purpose which must be protected here.

26. As to the submission respecting what the former Commissioner is alleged to have said regarding overtime, I find that the Applicants brief submission on this point lacks any specificity or context, and provides no underlying evidentiary support. Simply put, the Applicant's submission fails to demonstrate that some form of binding commitment was given to the Applicant by the former Commissioner which fetters my discretion, and obligation to properly interpret and apply the *Container Trucking Act.*

27. I note the Applicant states it sought confirmation or clarification of the alleged statement by former Commissioner Smith from the auditor and did not receive it. This indicates the Applicant recognized that any verbal comment the former Commissioner may have made in June 2015 did not constitute a definitive ruling on this issue. Furthermore, the auditor communicated she did not accept that vacation pay and overtime were included, and she made this clear to TMS long before the January 22, 2016 deadline for compliance. As I stated in the Original Decision, TMS took a calculated risk when it failed to accept the auditor's calculation of wages owing and refused to pay by the compliance deadline. This point is not disputed in the application for reconsideration.

28. It is worth noting that the auditor did in fact consider overtime hours when she prepared her calculations of wages owing. What she did not do was include overtime premiums in her calculation of the regular wage rate being paid. I find she was correct in this respect. Neither vacation pay nor overtime premiums are included in calculating whether the Section 13 hourly wage rate requirement is met.

29. Finally, with respect to the claim that the OBCCTC failed to communicate with TMS in a timely way, I will address this point as it relates to penalty, as I find it does not have relevance with respect to the issue of statutory interpretation raised in the application for reconsideration with respect to wages owing.

30. For all of these reasons, the application for reconsideration regarding the finding of wages owing is dismissed.

V. Penalty

31. The Applicant opposes the imposition of a penalty and seeks to have me refrain from imposing the $6,000.00 administrative fine proposed in the Original Decision.

32. The Applicant's position with respect to the proposed penalty is summarized in the final paragraph of its submissions:

> "It is submitted that in this uncertain legislative environment where in good faith, matters being disputed with the auditor are not clarified by the Commissioner, it is not unreasonable for the licensee to expect there to be a dialogue directly with the Commissioner about matters of principle which clearly these are."

33. As previously noted, The *Act* is beneficial legislation, its purpose being to bring stability to the port by ensuring that truckers who service the port receive fair and timely compensation. The legislation must be interpreted and applied in a way which best gives effect to this remedial purpose.

34. The Commissioner is responsible for ensuring that drivers are paid the rates to which they are entitled in a timely way. Consistent with this mandate, in late 2015 and early 2016 the former Acting Commissioner demanded of the industry that all licensees bring themselves into compliance by January 22nd, 2016 and warned that those who failed to meet this deadline faced substantial penalties.

35. Additionally, and consistent with the above noted mandate, I have made it clear to industry in published decisions that the onus to become and remain compliant rests with licensees. Licensees will not be permitted to wait until they are audited to bring themselves into compliance. I have also made it clear that there will be consequences for failing to comply with the deadline imposed by the previous acting commissioner. Consistent with this policy, licensees who decide to dispute an auditor's conclusions do so at their peril. As stated in the Original Decision:

> "...companies are entitled and indeed invited by the auditor to review the auditor's calculation, and they may engage in discussions with the auditor about the auditor's audit findings. However, once the auditor has considered a company's arguments and advised that the auditor still considers the company to be non-compliant and owing money to its drivers, a company that fails to comply with the auditor's direction to make the requested pay adjustments takes the risk I may not accept the auditor was incorrect, as happened in this case. In that case, as here, a penalty for non-compliance is highly likely to result. Among

other things, the penalty ensures that companies do not dispute the auditor's findings merely to prolong or complicate the audit process to delay or deny payment of monies owing to their drivers. It must be remembered that a fundamental reason and purpose for the Act and Regulation is to ensure drivers are paid wages owing in a timely manner. Additionally it is consistent with this purpose that, when a deadline is given for payment of retroactive wages owing, companies who voluntarily comply with that deadline are not penalized whereas companies who choose not to comply are highly likely to face a penalty as a consequence." (para. 35)

36. While this approach may be viewed by some, including perhaps the Applicant, as unfairly balanced and harsh, it is an important piece of a broad policy aimed at achieving the objective of ensuring that drivers are properly paid in timely way. It discourages licensees from disputing auditors' findings just to delay payment. It is a bright line policy which and provides clarity and certainty for the industry.

37. In this case the Applicant has known since at least late November of 2015 that the auditor did not consider vacation pay to be part of the minimum hourly rate, and since at least late December of 2015 (when she shared her calculations with the Applicant) that the auditor took the view that the minimum rates established by Section 13 of the *Regulation* are regular or base rates which do not include overtime premiums or vacation pay.

38. The general industry practice has been that, where a company raises an argument with an auditor which the auditor considers but does not accept, companies have generally acquiesced to the auditor's view of how the legislation applies and complied with the auditor's payment request. In this industry, given the large number of licensees and the relatively small number of auditors, this general approach has great value in promoting the objectives and purposes of the *Act* (timely payment of wages owing). I find it is appropriate to encourage compliance in this manner, and to require that companies bear the risk if they choose to act otherwise.

39. Additionally, while I do not find that the Applicant's interpretive positions were advanced in bad faith; I find it should have been evident to the Applicant that there was a reasonable likelihood that that their interpretative arguments would fail. In these circumstances, the responsibility rested squarely with the Applicant to proactively take steps to have these issues resolved prior to the January 22nd, 2016 compliance deadline. The Applicant knew of the looming deadline, knew that it disagreed with the auditor's approach, and yet made no effort to seek to have the issues clarified. Licensees cannot expect to have a private audience with the Commissioner to discuss their views on the proper interpretation of the legislation or its application to them. The Applicant took the risk that its views would not

be sustained, and the resulting risk that it would not meet the compliance deadline and would therefore incur a penalty.

40. I have considered the Applicant's submissions regarding the penalty imposed. Based on the results of the audit, the nature and severity of the violations, the written submissions filed on behalf of the Applicant and the reasons described in the Original Decision and above, I remain satisfied that that the proposed administrative fine of $6,000 is appropriate in the circumstances. I note that when compared to the maximum permissible fine allowable under Section 28(a) of the Regulation ($500,000) the amount of the fine is moderate. The moderate amount of the penalty reflects and is responsive to some of the points raised by the Applicant in its submissions, in particular the good faith nature of its disagreements with the auditor's calculations of wages owing.

41. In the result I hereby order the Applicant to pay an administrative fine in the amount of $6,000.00. 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 $6,000.00 payable to the Minister of Finance.

VI. Application to Stay Commissioner's Orders Pending Ruling on the Reconsideration

42. As I have ruled on the Application for Reconsideration, the application for a stay is moot and therefore dismissed.

VII. Conclusion

43. In summary the application for reconsideration of CTC Decision No. 06/2016 is dismissed and the penalty proposed in the Original Decision is confirmed and the penalty is imposed.

Yours truly,

OFFICE OF THE BC CONTAINER TRUCKING COMMISSIONER

Duncan MacPhail
Commissioner