



December 8, 2016

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

Attention: Rap Sanghera

Dear Sir:

Commissioner's Decision **Ferndale Transport Ltd. (CTC Decision No. 22/2016)**

Introduction

1. Ferndale Transport Ltd. ("Ferndale") 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. 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).
3. 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*.
4. In May and June of 2016 the Office of the British Columbia Container Trucking Commissioner ("OBCCTC") received two complaints alleging that Ferndale was paying less than the minimum rates of remuneration required under the *Act* to directly employed operators ("company drivers"). The Commissioner directed an auditor to conduct an investigation into the allegations raised in the complaint.

Facts

Audit Findings

5. The auditor began the investigation by directing Ferndale to produce relevant records for the periods April 3-30, 2014 and January 1-May 31, 2015 (the "Original Audit Periods"). Ferndale complied with this request and provided documents including computer generated payroll reports showing hours worked, rate applied , gross pay, deductions and net pay, cancelled cheque images, driver contact information and driver plate numbers. Ferndale was unable to provide driver time sheets, explaining that timesheets were discarded immediately after the timesheet information was transferred onto Ferndale's computer.
6. Upon reviewing the records provided by Ferndale, the auditor discovered 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.
7. 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 and requested additional records relating to the expanded period. . As a result the report submitted by the auditor covers the entire period from April 3, 2014 to June 30, 2016 (the "Expanded Audit Period")
8. The audit report discloses that Ferndale provided the additional records requested. From those records the auditor determined that over the Expanded Audit Period Ferndale paid hourly rates falling below the rates required by the *Regulation*. The auditor calculated the amounts owing to company drivers as a result and provided interim calculations to Ferndale's accountant for a review.
9. Following receipt of the auditor's interim calculations, Ferndale's owner contacted the auditor advising that 5 of the drivers included in the interim calculations did not perform TLS work. The owner represented that these 5 drivers only performed flat deck work, yard shuttling and dry van deliveries. Initially accepting the owner's representations at face value, the auditor removed these drivers from her calculations and revised her calculations. With the removal of these drivers, the auditor calculated that Ferndale owed 12 company drivers a total of \$48,378.21.
10. On September 1, 2016 the auditor emailed her conclusions to Ferndale, following which Ferndale issued cheques to the drivers and provided copies of pay stubs to the auditor confirming payment.
11. Upon receiving the aforementioned paystub copies, the auditor learned that Ferndale had made significant deductions from the amounts found by the auditor to be owing to company drivers. The auditor investigated this discrepancy and learned that Ferndale had unilaterally deducted driver lunch breaks from the auditor's calculations. The auditor advised Ferndale that she did not accept these deductions and Ferndale cancelled the original cheques and issued new ones. On Sept. 14, 2016 copies of the new cheques were provided to the auditor. With the exception of a small accounting error (totaling \$165.00), which was later rectified, the new cheques corresponded with the auditor's calculations. The auditor took steps to confirm that the cheques were received by the

drivers.

12. Following the issuance of the above described adjustment cheques, the auditor made efforts to contact the 5 drivers who were identified by Ferndale as the drivers who did not perform TLS work. The auditor was only able to contact 2 of the 5 drivers. When asked about the type of work they performed, both drivers claimed that they regularly performed TLS work. When given an opportunity to rebut the driver's representations, Ferndale was unable to provide any evidence to contradict or rebut what the auditor had been told. As a result, the auditor concluded that these drivers were in fact performing TLS work and thus entitled to the minimum hourly rates established by Section 13 of the *Regulation*.
13. The auditor then advised Ferndale that unless she was provided with contact information allowing her to make contact with the remaining 3 drivers for the purpose of confirming the type of work they performed, she would presume that they also were performing TLS work. Ferndale did not provide the contact information requested. Nor did Ferndale provide any evidence to rebut the presumption that they were performing TLS work. As a result the auditor revised her preliminary findings and concluded that these drivers were also performing TLS work.
14. In summary, the auditor's final report includes the 5 drivers initially excluded from her calculations based on Ferndale's representation that they were not performing container trucking services. The auditor's report concludes that Ferndale owed these additional 5 drivers a total of \$17,231.52 in adjustment payments. The auditor advised Ferndale on September 27th, 2016 of her view and consistent with her usual practice requested that Ferndale issue adjustment cheques to these drivers.
15. On October 6th, 2016 Ferndale prepared adjustment cheques for the 5 drivers and provided the auditor with copies.
16. On October 20th, 2016 Ferndale delivered the 5 adjustment cheques into the possession of the OBCCTC, claiming that it did not have proper contact information for these drivers. The Registrar of the OBCCTC took steps to obtain current contact information for these drivers from the Port of Vancouver, and made arrangements to have the cheques picked up. Notably, and of concern, the contact information obtained from the Port matched the contact information provided by the drivers to Ferndale in their initial job application documents. It is thus apparent that Ferndale made little or no attempt to get the adjustment cheques into the hands of these drivers.
17. In the final result, the auditor reports that between April 3, 2014 and June 30, 2016 Ferndale failed to pay its company drivers the minimum rates required under the *Regulation*. The amounts found to be owing to company drivers for this period totals \$65,610.03. Of this amount all but \$37.00 was paid out to the drivers by October 31, 2016. The amounts determined to be owing can be broken down as follows:

April 3, 2014 to Dec 15, 2014	\$ 42,292.53
Dec 16, 2014 to Aug 16, 2016	\$ 23,317.50
Total Owing	\$65,610.03

Ferndale has paid these adjustment amounts to its company drivers with the result that Ferndale has brought itself into substantial compliance for the Expanded Audit Period.

18. The final audit report (dated November 23, 2016) further records that since July 1, 2016 Ferndale has been paying its company drivers in accordance with the *Regulation* and *Act*.
19. I accept the findings of the auditor.

Decision

20. As described above, the circumstances of this case are that Ferndale:

- has undergone an audit following receipt of 2 complaints lodged in the summer of 2016 alleging that it was not paying its company drivers the hourly rates required by Section 13 of the *Regulation*;
- failed to pay the minimum hourly rates required by Section 13 of the *Regulation* during the period between April 3rd, 2014 and June 30, 2016;
- failed to bring itself into compliance by the January 22, 2016 deadline established by the former commissioner;
- has now paid the adjustment amounts calculated to be owing to its company drivers;
- delayed delivery of 5 of the adjustment cheques by delivering the cheques into the possession of the OBCCTC for delivery even though it had in its possession the correct contact information and could have directly delivered the cheques;
- asserted, without making any effort to support its position, that 5 of its company drivers were not performing TLS work. When the auditor investigated this claim, it quickly abandoned its position;
- initially, and without consulting with the auditor, prepared adjustment cheques which reduced the adjustment amounts calculated to be owing; and
- is now substantially compliant with its obligations under the *Act* and *Regulation*.

21. As Ferndale 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*.
22. 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.

23. 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.
24. The *Act* does not, however, require penalties to be imposed for non-compliance in all cases. Rather, the Commissioner is granted 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.
25. For the reasons which follow I find that it is appropriate to impose an administrative penalty.
26. Firstly, as demonstrated above Ferndale failed to bring itself into compliance by the January 22, 2016 deadline established by the former commissioner;
27. 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.

28. 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.

29. On January 20, 2016 the OBCCTC issued a further communication to the industry reinforcing its expectation that all licensees be in full compliance of retroactive owing by January 22, 2016:

1. Retroactive Pay

The Office of the BC Container Trucking Commission ("OBCCTC") issued a memo on December 11, 2015 indicating that all companies should come into compliance with respect to retroactive pay on or before January 22, 2016. That date is this Friday. We thank the many stakeholders who have already complied and provided verification of these efforts to the OBCCTC. For those TLS licence holders who have not yet come into voluntary compliance, please be advised that when such non-compliance is identified by the OBCCTC, penalties pursuant to Section 34 of the Container Trucking Act (the "Act") are likely to result after the abovementioned date.

30. I find that Ferndale knew or should reasonably have known that its payment practices were non-compliant before January 22, 2016. The hourly rates it was paying some of its drivers were significantly below the required rates for a lengthy period of time before that date.
31. I further find Ferndale advanced a meritless submission that 5 of its drivers were not performing TLS work. When the auditor investigated this allegation, Ferndale made no effort to support its position. As a result the audit was unnecessarily prolonged and payment of adjustment amounts to these 5 drivers was delayed.
32. Next, I find Ferndale further delayed payment to the aforementioned drivers by sending their adjustment cheques to the OBCCTC instead of directly to the drivers. I find that Ferndale had, or reasonably should have had, in its possession the correct contact information for these drivers and should have and could have arranged for the cheques to be picked up or delivered to them directly.
33. Finally, Ferndale attempted, without first informing the auditor and without advancing any evidence to support its position, to reduce the adjustment amounts calculated by the auditor to be owing by deducting lunch breaks from the adjustment cheques. When the auditor discovered what it was doing, she informed Ferndale that she did not accept these deductions. Ferndale immediately abandoned its position and issued cheques in the full amount calculated by the auditor to be owing.
34. These circumstances lead me without difficulty to the conclusion that it is appropriate to impose an administrative penalty for the non-compliance in this case. I turn now to a consideration of the size of the penalty.

35. The administrative penalties made available under Section 34 of the *Act* and Section 28 of the *Regulation* are designed to encourage compliance with the *Act* and *Regulation*. Penalties are intended to have a general and specific deterrence purpose – that is, to protect drivers and to discourage non-compliance with the legislation.
36. To ensure that licensees receive the appropriate deterrent message, the amount of any financial penalty must be sufficiently large to meet the objective of deterring non-compliance. The large financial penalties available under the *Act* and *Regulation* demonstrate an intention to ensure that administrative fines are not seen by licensees as merely another cost of doing business or part of the licensing costs.
37. In keeping with the above described purpose of the legislation the factors which will be considered when assessing the appropriate administrative penalty include the following:
- 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.

This list is not intended to be exhaustive.

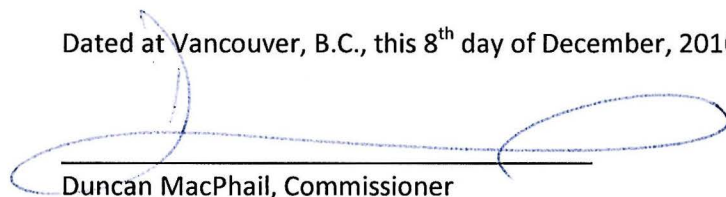
38. Applying these factors to the extent I find each relevant in this case, I have assessed the appropriate administrative penalty to be applied here taking into account the following circumstances:
- a. With respect to the seriousness of Ferndale's conduct, during the audit process Ferndale engaged 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.

39. Taking into account the above referenced circumstances, I find that in order to ensure that drivers are properly paid in a timely way and to deter Ferndale specifically and the industry generally from engaging in these types kind of behaviors, a penalty of \$10,000.00 is warranted. In my view a fine of \$10,000.00 is sufficiently large to meet the objective of deterring the type of serious misconduct demonstrated here and delivers a clear warning to all licensees including Ferndale that this type of conduct will not be tolerated. As stated on many occasions in the past, drivers are entitled to be properly paid the legislated rates in a timely way. Licensees who fail to meet this obligation can expect to be fined.
40. In the result and in accordance with Section 34(2) of the *Act*, I hereby give notice as follows:
- a. I propose to impose an administrative fine against Ferndale in the amount of \$10,000.00 ;
 - b. Should it wish to do so, Ferndale has 7 days from receipt of this notice to provide the Commissioner with a written response setting out why the proposed penalty should not be imposed;
 - c. If Ferndale provides a written response in accordance with the above I will consider its response, and I will provide notice to Ferndale of my decision to either:
 - i. Refrain from imposing any or all of the penalty; or
 - ii. Impose any or all of the proposed penalty.

Conclusion

41. In summary, Ferndale has been found to have violated the *Act*, the *Regulation* and its Container Trucking Services License paying its company drivers non-complaint rates over a lengthy period of time. Additionally, Ferndale has compounded its non-compliant conduct by taking a meritless position during the audit process which delayed the payment of compensation owing to its company drivers. While Ferndale eventually paid the amounts owing to its drivers and brought itself in compliance, I have determined that it is appropriate to propose the imposition of a \$10,000.00 administrative penalty for its non-compliance.
42. This decision will be delivered to Ferndale and published on the Commissioner's website (www.bc-ctc.ca).

Dated at Vancouver, B.C., this 8th day of December, 2016



Duncan MacPhail, Commissioner