



March 30, 2017

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Original to follow via mail

Attention: Mr. Matthew May

## Commissioner's Decision

### Pro West Trucking Ltd. (CTC Decision No. 06/2017)

#### I. Introduction

1. Pro West Trucking Ltd. ("Pro West") 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. The Commissioner may initiate an audit or investigation under Section 31 whether or not a complaint has been received.

#### II. Facts

3. The Office of the Commissioner received a confidential complaint that Pro West was not paying its drivers in accordance with the *Act* and the *Regulation*. I directed that an audit investigation be conducted with respect to the complaint.
4. In addition, under Appendix D to Schedule 1 of the Container Trucking Service Licence, Pro West was directed to provide a compliance letter from a Certified Professional Accountant ("CPA"). A compliance letter was received, and I directed an auditor to conduct a spot check audit of the compliance letter.
5. The spot check audit indicated Pro West was not in compliance with the legislation in its payment of wages to its directly employed operators ("company drivers"). The auditor requested and received from Pro West detailed payroll records for its company drivers for the period April 3, 2014 to April 30, 2016. Records were also requested and received in relation to the complaint.

6. The records revealed that, during this period, Pro West employed 19 company drivers and 51 independent operators. The company's drivers provided container trucking services covered by the legislation, and the company also uses its drivers to provide a local cartage service.
7. An audit was conducted to determine Pro West's compliance with the legislation in relation to both its company drivers and its independent operators. The audit process revealed the following information.

### Company Drivers

8. Pro West pays its 19 company drivers on an hourly wage rate basis. For the period April 3, 2014 to December 31, 2015, they were paid a base rate of \$17 per hour and a \$2 per hour premium when the work performed was container trucking. In addition, there was a \$1 per hour safety and compliance incentive (the "Incentive"), and a benefit package which Pro West valued at \$1.81 per hour,<sup>1</sup> for a total claimed hourly wage rate of \$21.81 per hour. Pro West acknowledged this hourly wage rate was less than the minimum hourly wage rates of \$25.13/26.28 per hour required by Section 13 of the *Regulation*.
9. Pro West initially took the position that it was nonetheless in compliance with the legislation, on the basis that the total amounts received by its company drivers in hourly wages exceeded the total amounts they would have received had they been paid for the same work on a trip rate basis of \$40 per container. Forty dollars was the minimum trip rate mandated by the legislation from December 22, 2014, when the *Act* and the *Regulation* came into effect, to May 13, 2015, when the legislation was amended to eliminate the \$40 per hour trip rate payment option.
10. After the Office of the Commissioner advised Pro West that this comparison did not establish compliance, Pro West accepted this advice and increased its container trucking premium, effective January 1, 2016, with the intention of bringing the total wage rates paid into compliance with the minimum wages rates set out in Section 13 of the *Regulation* (\$25.13 per hours for drivers with less than 2,340 industry experience and \$26.28 per hour for those with 2,340 hour or greater). To that end, Pro West increased its container trucking premium to \$5.32 per hour for drivers below 2,340 hours and \$6.47 per hour for those at or above 2,340 hours.
11. The auditor noted, however, that Pro West continued to include the \$1 per hour Incentive in calculating that it was now paying the required minimum rates. The auditor viewed the Incentive as a discretionary payment to all drivers to encourage good work habits, and concluded it was not

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<sup>1</sup> The benefit package was made up of company paid extended medical and dental benefits valued at \$1.61 per hour and an Education Allowance and Health and Welfare Services Benefit valued at \$0.20 per hour. The auditor did not include the \$0.20 per hour Education Allowance and Health and Welfare Service Benefit in her valuation of benefits. Hence benefits were valued at \$1.61 per hour for audit purposes. Pro West did not take issue with the auditor's conclusion.

part of hourly wages paid for work performed. Pro West disagreed, arguing that the Incentive was received by all drivers. The auditor found an instance during the audit period when a driver did not receive the Incentive payment for one month.

12. In addition to increasing the container trucking premium paid to its company drivers effective January 1, 2016, Pro West also conducted a self-audit to determine what it owed those drivers for the underpayment of their hourly wages from April 3, 2014 to December 31, 2015. After making initial calculations, it issued two batches of retroactive adjustment pay cheques totaling \$100,425.22 in January 2016 to its company drivers.
13. When the auditor reviewed the company's records, she determined and advised the company that a total pay adjustment of \$417,554.79 was owed to the 19 company drivers for this period (\$317,129.57 more than \$100,425.22 paid in January 2016). Pro West then conducted a second self-audit, during which for the first time it took the position that not all trucking work associated with the movement of marine containers should be considered "regulated" work ("container trucking services" within the meaning of the legislation).
14. On the basis of its own calculations, including its new position regarding what constituted regulated work, Pro West calculated and paid an additional \$42,052.34 on December 16, 2016 and \$30,411.32 on January 25, 2017 to its company drivers as retroactive wage adjustment payments.
15. Having paid a total of \$172,888.88 to its company drivers, Pro West then took the position that it had paid all retroactive amounts owing.
16. The auditor, however, calculates Pro West owes an additional \$244,665.91 in adjustment payments to its company drivers. This amount is comprised of an additional \$69,762.75 if the Incentive is not counted as part of the wage rate, and an additional \$174,903.16 if the regulated rates apply to work which Pro West argues is "non-regulated" (primarily, empty chassis moves and related work within a location.)

### **Independent Operators**

17. After reviewing Pro West's records, the auditor concluded, and Pro West accepted, that the company pays correct rates to its independent operators for on-dock trips, but that from April 3, 2014 to November 30, 2015, it did not pay correct off-dock rates. The auditor was satisfied Pro West implemented correct off-dock trip rates effective December 1, 2015.
18. In December 2015, Pro West paid an initial amount of \$1,200 each to its 51 independent operators, for a total amount of \$61,200, as retroactive adjustment for the failure to pay correct off-dock rates from April 3, 2014 to November 30, 2015. Subsequently, after an exchange of views

and information with the auditor, Pro West paid additional retroactive payments to the 51 independent operators of \$169,432.75 on August 31, 2016, \$122,484.12 on November 15, 2016, and \$123,684.09 on December 15, 2016. This amounted to retroactive pay adjustments to Pro West's 51 independent operators of \$476,800.96.

19. Pro West takes the position it has now fully paid all retroactive pay amounts owing to its independent operators. The auditor, however, calculates the total amount owing to be \$547,098.16, a difference of \$70,297.20 owing to independent operators.
20. The difference is due to Pro West's view that certain trips its independent operators made between April 3 and December 21, 2014 were unregulated "short haul" trips, for which it was not required to pay regulated trip rates. The auditor, however, advised Pro West that the concept of "short haul" trips was applicable only for the period December 22, 2014 to May 13, 2015, when the *Regulation* provided for a short haul rate of \$50 per hour. Other than during that time period when the *Regulation* provided for a short haul rate, the auditor viewed all container moves as regulated trips payable at the applicable on-dock or off-dock rate. Pro West did not accept this interpretation of the legislation.

### III. The Audit Process

21. The auditor noted that Pro West had been co-operative and helpful throughout the audit process, and responded to her questions and requests for additional information. However, she further noted that considerable delays occurred because Pro West took time to review her calculations and to re-calculate pay adjustments to company drivers and independent operators based on its own interpretation of the *Act* and *Regulation*. As a result, payments and other changes to bring Pro West into compliance took place over a lengthy period of time.
22. In addition, while Pro West abandoned its initial positions on a number of compliance issues, on other issues it did not accept the interpretation of the auditor. The result was that, while it paid very large amounts in retroactive pay adjustments to its drivers, it declined to pay further amounts the auditor advised Pro West she considered were owing as adjustment payments to independent operators. Similarly, while Pro West increased its rates of pay to its company drivers (by increasing its container trucking premium), it did not do so to the degree the auditor believed necessary to bring it into full compliance with the legislation.
23. The auditor communicated her views and calculations in writing to Pro West, and the company responded in writing. The tone of Pro West's communication was appropriate and business-like, but Pro West indicated that on some issues it did not agree with the auditor and would not be making the changes she advised were necessary to bring it into compliance. In November 2016, the auditor invited Pro West to make a written submission to the Deputy Commissioner with

respect to the issues in dispute. Pro West did so by letter dated December 12, 2016, and on December 13, 2016, it received a letter in response from the Deputy Commissioner.

24. In his letter, the Deputy Commissioner supported the interpretations and views expressed by the auditor to Pro West on the issues in dispute. The issues in disputes were: (1) whether the concept of “short trips” has any application outside the period December 22, 2014 to May 13, 2015; (2) whether all hourly paid work associated with container trucking services (such as moving empty chassis and truck inspections) is subject to the minimum required rates; and (3) whether the \$1 per hour Incentive counts toward the pay rate for company drivers.
25. The Deputy Commissioner’s letter concluded:

I recognize that the potential quantum of the monies owed to Pro West drivers is substantial and I appreciate that Pro West continues to support the work of the OBCCTC auditor through this process. As such, I remain committed to ensuring that Pro West is afforded every reasonable opportunity to raise any interpretive or policy issues it has with the OBCCTC.

I have directed the OBCCTC auditor to prepare an audit summary report for the Commissioner’s decision based on my direction. I expect the report will outline the auditor’s calculation of money owed by Pro West to its drivers as well as money already paid. As is the case in previous audits, Pro West is invited to make a written submission to the Commissioner which will be considered and addressed by the Commissioner in his Decision.

26. Pro West accepted the invitation to make a written submission to the Commissioner. It was provided February 20, 2017.

#### **IV. Pro West’s Submission to the Commissioner**

27. In its February 20, 2017 submission, Pro West notes that its January 2 and 15, 2016 adjustment payments to its drivers were made prior to the January 22, 2016 compliance deadline set by former Commissioner Bell. It further submits that, effective January 1, 2016, it made changes to the compensation received by its drivers which was intended, among other things, to compensate them for outstanding retroactive pay. It states that throughout the audit process, as it became aware of areas where the auditor saw non-compliance, adjustment payments were made to its drivers, including in some cases where Pro West did not agree. However, it notes three areas of disagreement where payments were not made in accordance with the auditor’s views. The first disagreement relates to the independent operator audit, and the remaining two relate to the

company driver audit.

#### **Independent Operator Audit: "Short Trip" Issue**

28. With respect to the independent operator audit, Pro West seeks to exclude, from the calculation of adjustment amounts owing, "short trips" performed by its independent operators between April 3, 2014 and December 21, 2014.
29. Pro West notes that in my May 27, 2016 Commissioner's Bulletin, I clarified that the \$40 trip rate for company drivers, which was in effect from December 22, 2014 to May 13, 2015, was not retroactive. Therefore, it says, as I stated in *Hap Enterprises Ltd.*, CTC Decision No. 17/2016 ("*Hap*"): "As trip rates for company drivers were not regulated under the Container Trucking legislation prior to December 22, 2014, there is no finding of non-compliance for the period prior to December 22, 2014". That is, there was no required trip rate for company drivers prior to December 22, 2014.
30. Pro West argues that, similarly, the \$50 "short trip" rate for independent operators was in effect only from December 22, 2014 to May 13, 2015. Therefore, it submits, there was no "short trip" rate in effect for independent operators before December 22, 2014. It submits the auditor erred in applying the off-dock rate to these trips during the period April 3 – December 21, 2014.
31. In support of this position, Pro West notes that Section 19(3) of the *Regulation* indicates that the on-dock and off-dock trip rates applied retroactive to April 3, 2014 but does not provide for retroactive application of the "short trip" rate. Pro West submits: "Short trip rates were not regulated under the Container Trucking legislation before December 22, 2014. The rates that Pro West compensated operators for these moves were excluded from our calculation of adjustment [pay]."

#### **Company Driver Audit: "Non-regulated Work" Issue and Incentive Issues**

32. With respect to the company driver audit, Pro West raises two issues. First, it submits that driving done by company drivers within a facility (as opposed to between facilities), and when the truck chassis is empty (not bearing a container) is "non-regulated work". That is, Pro West submits such work is not the provision of container trucking services within the meaning of the *Act*, and therefore the regulated hourly rates do not apply to such work. Pro West's position is based on the definition of "container trucking services" in the *Act*, which states that container trucking services "means the transportation of a container by means of a truck". Put simply, Pro West argues that the minimum rates established under the *Act* and *Regulation* only apply to time spent by a driver actually moving a container outside of a facility.

33. Second, Pro West submits the auditor erred in not including the \$1 per hour Incentive when calculating whether it was paying the minimum required hourly rates to its company drivers. Pro West says the payment of the Incentive was made “to every driver for every audited hour with one exception which was determined to be a payroll error”.
34. In support of its position that the Incentive should be included as part of the hourly wages rate for company drivers, Pro West notes that in *TMS Transportation Management Services Ltd.*, CTC Decision No. 8/2016, I stated: “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 the minimum hourly rate.”
35. Pro West submits that the Incentive would be considered “wages” within the meaning of the Employment Standards Act, and therefore it should also be considered part of the wage rate under the Act.
36. Pro West submits that, if its arguments on these issues are accepted, it has brought itself into compliance with the legislation through the adjustment payments it has made to date, and no more amounts are owing.

## V. Issues

37. I have considered Pro West’s submissions on the outstanding audit issues and I come to the following conclusions.

### ***Independent Operator Audit: “Short Trip Rate” Issue***

38. Pro West submits that the \$50 short trip rate for independent operators was only in effect from December 22, 2014 to May 14, 2015 and argues that “short trips” as originally defined in the *Regulation* were not regulated under the Container Trucking legislation prior to December 22<sup>nd</sup>, 2014. Pro West submits that the auditor erred in applying the off-dock trip rate to short trips made prior to that date.
39. Section 12 of the *Regulation* creates minimum rates per trip for independent operators. When originally enacted on December 22<sup>nd</sup>, 2014, Section 12 included what was then Section 12(2) (subsequently repealed May 15, 2015) which provided for a “short trip” rate:  
  
“(2) A licensee to whom this section applies must pay an independent operator no less than \$50 for each short trip.”
40. At that time, a “short trip” was defined in Section 1 to mean: “one movement of a container a

distance of 5 km or less by a trucker from one facility to a different facility;" and a "trip" was defined to mean "one of the following": an "off-dock trip"; an "on-dock trip"; "a short trip". Each of those terms was defined in Section 1 of the *Regulation*. A "short trip" was, in effect, an off-dock trip of 5 km or less; however, it was expressly excluded from the definition of "off-dock trip":

**"off-dock trip"** means one movement of a container by a trucker from one facility in the Lower Mainland to a different facility in the Lower Mainland, but does not include...

(b) a short trip; ...

41. The May 14, 2015 amendments to the Regulation repealed the Section 12(2) "short trip" rate, the definition of "short trip" in Section 1, and the "short trip" exclusion in the definition of "off dock trip" in Section 1.
42. There is no dispute the effect of these amendments was that, beginning May 15, 2015, there was no longer a "short trip" exception to the definition of "off dock trip", and no longer a "short trip" rate of \$50. Accordingly, from that date onward, the off-dock trip rates applied to all off-dock trips, including those of 5 km or less.
43. There is also no dispute that, under the *Regulation*, the "short trip" rate was not made retroactive and therefore did not apply before December 22, 2014. The rate applied only from December 22, 2014 to May 14, 2015. The issue is, do the off-dock trip rates retroactively apply to short trips made before December 22, 2014? Pro West argues no, and for the reasons that follow I agree.
44. The sections of the Regulation contemplating retroactive effect are Sections 19, 22 and 23. Section 22 applies to fuel surcharges and Section 23 applies to wait time remuneration, neither of which are relevant here. Thus, any retroactive application of trip rates must be found in Section 19.
45. Section 19(3) makes "on dock" and "off dock" trip rates for independent operators retroactive to April 3, 2014:

(3) An independent operator paid per trip is owed the difference, if any, between the following:

(a) the amount the independent operator would have been paid for **any on-dock or off-dock trips** performed on behalf of the licensee on or after April 3, 2014 if this regulation had been in force on the date the trip was performed;

(b) the amount the independent operator was in fact paid for the **on-dock or off-**

**dock trip**, not including any amounts the independent operator was paid as wait time remuneration or fuel surcharges. (Emphasis added)

46. Thus, under Section 19, licensees must pay truck drivers for services performed on or after April 3, 2014 as if the Regulation was in force back to that point in time. Importantly, however, for independent operators paid on a trip basis, Section 19(3) only makes “on dock” and “off dock” trip rates retroactive. Therefore unless a “short trip” falls within the definition of either “on dock” or “off dock” trips, the retroactive rate requirements of Section 19(3) do not apply to “short trips”. Put otherwise, if “short trips” are not captured within the definitions of either “on dock” or “off dock” trips, the regulated rates do not apply retroactively to short trips performed by independent operators paid on a trip basis prior to December 22<sup>nd</sup>, 2014.
47. As a “short trip” was defined as a trip “from one facility to a different facility” whereas an “on-dock trip” was defined as a trip between a marine terminal and another location (and the definition of “facility” in Section 1 expressly “does not include a marine terminal”), a “short trip” by definition cannot fall within the definition of “on-dock trip”.
48. As noted earlier, a “short trip” was, in effect, an off-dock trip of 5 km. or less. However, as also noted earlier, when the legislation came into effect on December 21, 2014, the definition of “off-dock trip” at that time expressly excluded a “short trip”. Consequently, I find, the off-dock trip rates did not retroactively apply to a “short trip” performed by independent operators paid on a trip basis.
49. In my view, the May 14, 2015 amendments to the *Regulation* did not alter this result. The amendments were clearly intended to prospectively eliminate the \$50 short trip rate and apply the off-dock trip rate to all off-dock trips, including trips of 5 km or less. However, I do not accept that the legislature intended to retroactively expand the scope of these rates to apply to short trips undertaken by independent operators paid on a trip basis prior to December 22, 2014. A much clearer expression of such intent to have the May 15, 2015 amendments apply retroactively to trips made prior to December 22, 2014 would, in my view, be required to give effect to such a result.
50. In conclusion, I find there was no regulated rate in effect for “short trips” made by independent operators paid on a trip basis before December 22, 2014. I accept Pro West’s argument that the auditor erred in applying the off-dock rate to these trips during the period April 3 – December 21, 2014.
51. In the result I must reject the auditor’s conclusion that Pro West owes an additional \$70,297.20 to its independent operators.

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**Company Driver Audit: “Non-regulated Work” Issue**

52. Pro West notes that the *Act* states that “container trucking services” “means the transportation of a container by means of a truck”. Accordingly, it defines the “regulated work” to which the legislated rates apply narrowly, excluding driving work within a facility and where the truck chassis is empty (not carrying a container). It submits this is “non-regulated work” to which the regulated rates do not apply.
53. I note, however, that the container trucking legislative regime was intended to be beneficial legislation, remedying the chronic underpayment by licensees of truckers who provide container trucking services. As noted in the 2014 Ready Bell Recommendation Report which set out the circumstances the legislation was intended to address and made recommendations in that regard:

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.

54. It is well established that legislation should be interpreted purposively and practically. As stated by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, “...statutory interpretation cannot be founded on the wording of the legislation alone...”; rather, the “...words of the Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, and the intention of Parliament” (para. 21). Furthermore, as the Court notes in the next paragraph, every Act is “deemed to be remedial” and must receive “such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act, according to its true intent, meaning and spirit” (para. 22).
55. Applying that approach to interpreting the *Container Trucking Act* and *Regulation*, and recognizing the mischief at which the legislation was aimed, as identified in the Ready Bell Report, I reject Pro West’s argument and find that the regulated rates do not apply only to the time company drivers spent actually moving a container between locations.
56. As noted above, I am required to give the legislation, “such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act, according to its true intent, meaning and spirit”. The legislation is to be interpreted purposively and practically. In my view the interpretation advanced by Pro West is inconsistent with these principles of statutory interpretation. To accept Pro West’s argument requires me to ignore the purpose and objects of the *Act* and to give Section 13 of the *Regulation* and the term “container trucking services” a narrow construction rather than the fair large and liberal construction required to give effect to the intent and spirit of the Container Trucking legislation.

57. The central purpose of the *Act* generally and Section 13 of the *Regulation* more specifically is to bring stability to the drayage industry by establishing a fair, consistent and stable minimum hourly rate payable to company drivers who perform container trucking services. In TMS Transportation Management Services Ltd. (CTC No. 08/2016) I commented at length on the *Act's* overarching purpose (at paras. 5-8):

The *Container Trucking Act* (the "*Act*") came into force on December 22<sup>nd</sup> 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.

Corinn Bell and Vince Ready were retained to conduct an 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 employees, refusing to service PMV for approximately four weeks." (pp. 7, emphasis added)

**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.**

**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. (emphasis added).**

58. In my view, the narrow construction advocated by Pro West would undermine this purpose and destabilize the industry. I find that a broader, more purposeful interpretative approach is necessary to ensure that the remedial purposes of the legislation are achieved.

59. Section 13 of the *Regulation* obligates licensees to pay the minimum rates for “container trucking services.” Section 1 of the *Act* defines “container trucking services” to mean:

“the transportation of a container by means of a truck”

60. Pro West would have me give the narrowest possible meaning to Section 13. Such a construction, in my view, is inconsistent with the underlying purpose of the *Act*, which is to ensure industrial stability through fair compensation and predictable costs. In my view, it is necessary to give Section 13 a broader more purposeful meaning; one which includes driver work integral to, or ancillary to, “the transportation of containers by means of truck”. In the context of this industry, I find this includes empty chassis moves, pre-trip inspections, and the movement of containers by truck within a facility.
61. To interpret “container trucking services” in the narrow fashion advocated by Pro West, permits the payment of different and presumably lower hourly rates for any work performed by company drivers in the course of providing container trucking services which goes beyond the actual physical movement of a container by truck between locations. If I accept Pro West’s argument, then work performed which relates to, or is ancillary to, the movement of these containers by truck between locations, such as pre-trip inspections, empty chassis moves, bob tail moves and within-facility moves, would not attract the regulated rate. This would mean that licensees would be permitted to adopt multi-tiered compensation schemes which would allow for the payment of lower hourly rates for related work performed by their company drivers beyond the mere transportation of containers by truck between locations. In my view such an interpretation would result in the erosion of the fair and stable rate structure contemplated by the *Act*. Licensees would be able to drive down the average hourly rates payable to their company drivers to levels below those contemplated by *Act* by paying lesser rates for empty chassis moves and other work related or integral to the movement of containers by truck between locations. This, in my view, is not what the legislature intended.
62. Additionally, allowing licensees to adopt multi-tiered wage structures (part regulated and part unregulated) would likely lead to a return to the rate undercutting and instability in the drayage industry recognized in the Ready Bell Report, as licensees seek to obtain a competitive advantage by reducing compensation levels payable to company drivers for related but non-regulated drayage work. This could well result in a return to the very type of undercutting behaviour which existed prior to the creation of the *Act*.
63. Finally, but importantly, the type of multi-tiered rate structure contemplated by Pro West would significantly impair the effectiveness of OBCCTC audits. If adopted, auditors will face a plethora of potentially complex multi-level compensation schemes, only parts of which falls within the scope of the Commissioner’s jurisdiction. As noted in previous decisions, the OBCCTC’s audit mandate is critical to rate compliance and the successful implementation of the legislation. It is important

that this audit mandate not be impaired by a narrow and impractical interpretation of the legislation which undermines the intention of the legislation to fairly and effectively regulate the payment of drivers who provide container trucking services.

64. For all of these reasons I find that the *Regulation* and in particular Section 13, is to be interpreted and applied as follows:

The the application of Section 13 hourly rates is not limited to just the time a company driver spends actually transporting a container by a truck. Rather, “container trucking services” for purposes of Section 13 also includes services directly relating to, or ancillary to, the transportation of a container by a truck, such as:

- Pre and Post trip inspections
- The relocation or movement of empty chassis which have been used or will be used to move a container as defined in the *Regulation*<sup>2</sup> (a “container”);
- “Bob Tail” moves to or from marine terminals or container facilities in the lower mainland;
- The movement of containers by truck within a yard or facility.

Section 13 requires licensees to pay company drivers the regulated rates for all such “container trucking services”.

65. In summary therefore, I reject Pro West’s argument on this point and find that Pro West owes its company drivers an additional \$174,903.16 as a result.

#### ***Company Driver Audit: Incentive Issue***

66. Pro West pays a \$1.00 per hour Safety and Compliance Incentive. It argues that this should be included as a component part of the rate paid by Pro West to its company drivers. The auditor rejected Pro West’s argument, concluding that the payment was discretionary and should therefore not be included.
67. Pro West submits that the payment is not discretionary and notes that since April 3, 2014, with one small exception, the incentive payment has been made to every driver for every hour worked. The only exception relates to a payroll an error occurring back in July of 2014. I am satisfied that the records support Pro Wests position that the only exception was a payroll error, and not an intentional exercise of discretion to refuse payment.
68. I record as well the auditor’s finding that, unless manually overridden, Pro West’s payroll system automatically includes the premium in driver compensation.

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<sup>2</sup> Section 1 of the *Regulation* defines “container” to mean “a metal box furnished or approved by an ocean carrier for the marine transportation of goods”.

69. In the result, while I agree with the auditor's view that a discretionary Safety and Compliance Incentive is not properly to be included as a part of the rate payable to a driver, I find on the evidence here that Pro West has demonstrated that the \$1.00 premium paid is not in fact discretionary or incentive based as its name would suggest. Rather it is paid as part of a driver's regular remuneration regardless of the driver's safety and compliance record. I am satisfied that the premium is always paid and as a result should be counted as part of the rates being paid to company drivers.
70. On these unique facts, accepting as I do that for all intents and purposes the premium has always paid for every hour worked, and accepting Pro West's submission that it forms an unconditional component part of the hourly rate payable to its drivers, I find that the \$1.00 premium should be included in the rate calculation.
71. In summary I do not accept the auditor's conclusion that the payments should not be included as part of the wage rate because it is discretionary, and therefore reject the auditor's conclusion that an additional \$69,762.75 is owing to company drivers as a result.

## **VI. Decision**

72. As described above, the circumstances of this case are:
- a. Pro West provided records as requested by the auditor and was cooperative and helpful throughout the audit process.
  - b. Nonetheless, Pro West caused delay in the audit process by not accepting some of the auditor's interpretations and calculations and by taking considerable time to recalculate amounts owing in accordance with its own interpretations.
  - c. Pro West was not in compliance with respect to paying wages to its company drivers for the period April 3, 2014 to December 31, 2015. It accepted this was the case and increased its wage rates effective January 1, 2016 to bring them into compliance.
  - d. With respect to the amount Pro West owed its company drivers in unpaid wages for the period April 3, 2014 to December 31, 2015, Pro West made two initial retroactive adjustment payment in January 2016, and two further payments, one in December 2016 and the other in January 2017. The total amount paid to its company drivers was \$172,888.88, which Pro West argued was all the retroactive pay it owed.
  - e. Pro West refused to pay an additional \$244,665.91 in adjustment payments that the auditor found owing to its company drivers, relying on its different interpretation of the legislation. After considering the arguments advanced by Pro West, I have accepted its argument that the \$1.00 per hour Incentive should be included as part of the compensation payable to company drivers. However, I have decided Pro West owes an additional \$174,903.16 in adjustment payments as I do not accept its arguments with respect to "non-regulated work".
  - f. With respect to rates paid to its independent operators, Pro West paid correct on-dock trip rates; however, it did not pay correct off-dock trip rates until it implemented correct off-dock rates effective December 1, 2015.
  - g. Pro West paid an initial amount of \$1,200 to each of its 51 independent operators in December 2015 as retroactive adjustment payments. After discussions with the auditor, it

then paid further amounts in August 2016, November 2016 and December 2016. The total amount paid in retroactive adjustment payments to its independent operators was \$476,800.96.

- h. I have accepted Pro West's argument that there is no regulated rate for short trips performed by trip paid independent operators prior to December 22<sup>nd</sup>, 2014, the date the *Act* and *Regulation* came into force, and as a result have rejected the auditor's conclusion that a further \$70,297.20 is owing to independent operators.

73. As set out above, Pro West has not paid the full amount determined to be owing under the legislation. As a result I hereby issue the following orders pursuant to Section 9 of the *Act*:

**I hereby order Pro West to:**

- a) immediately take all necessary steps to bring itself into compliance with the requirements of the *Act* and *Regulation* as interpreted in this decision.
- b) immediately pay its company drivers the \$174,903.16 adjustment amount found to be owing to its company drivers,
- c) meet with an auditor by no later than the 5<sup>th</sup> day of May, 2017 and demonstrate to the auditor's satisfaction that it has taken all necessary steps to bring itself into compliance with the legislation and that it has properly calculated and paid all adjustment amounts owing to its company drivers for the period following April 30, 2016.

74. 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.

75. 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. 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.

76. 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. These can include where a licensee does not cooperate fully with an audit or investigation; does not comply with orders or directions given by the Commissioner or the auditor; delays unreasonably in paying amounts found to be owing; or engages in any form of fraudulent, deceptive, dishonest or bad faith behavior with respect to compliance with the legislation.

77. In the present case, I find it is appropriate to impose a penalty on Pro West for its non-compliance. The audit discloses that over an extended period of time Pro West failed to pay compliant rates to

its company drivers and its owner operators. The audit disclosed that company drivers and owner operators were owed additional compensation in excess of \$660,000.00. Although Pro West has now paid a substantial portion of what it owed, there remains an outstanding adjustment amount of \$174,903.16 still owing to its company drivers.

78. In *Smart Choice Transportation Ltd.* CTC Decision No. 21/2016, I outlined the purpose of the penalties under the *Act* and the factors that would be considered when assessing the appropriate administrative penalty to be imposed:

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.

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.

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. (Paras. 25-27)

79. I have assessed the appropriate administrative penalty to be applied here taking into account the following relevant Smart Choice Transportation factors:

- a) Pro West failed to pay compliant rates to both its company drivers and independent operators for an extended period of time. Were it not for the audit, it is likely that these non-compliant practices would not have been discovered, its drivers would not have been paid what they were owed and Pro West would have been unjustly enriched.
  - b) The size of the non-compliance is large. The audit process disclosed that Pro West owed in excess of \$660,000.00 to its drivers. This is a significant sum. The non-compliance uncovered by the audit can only be regarded as being of a very serious nature. I take into account, however, that Pro West voluntarily paid a substantial portion of the monies owing as the audit proceeded.
  - c) While Pro West has voluntarily paid a substantial portion of the monies owing, it still owes its company drivers a further \$174,903.16.
  - d) Pro West had been co-operative and helpful throughout the audit process, and responded to the auditor's questions and requests for additional information. However, delays in the audit occurred because Pro West took considerable time to review the auditor's calculations and to re-calculate pay adjustments to company drivers and independent operators based on its own interpretation of the Act and Regulation. As a result, payments and other changes to bring Pro West into compliance took place over a lengthy period of time.
80. Taking these factors into consideration, I find an administrative penalty of \$25,000.00 is appropriate here and proportionate to the amounts found to be owing. In my view the penalty is sufficiently large to meet the objective of deterring Pro West from engaging in similar types of non-compliant behavior in the future while not being punitive. It also delivers a strong warning to licensees that drivers must be paid the legislated rates in a timely way. The size of the penalty also recognizes that Pro West has made significant efforts to voluntarily pay a large portion of the adjustment amounts found to be owing and that Pro West successfully advanced arguments relating to the proper interpretation and application of the legislation. Were these latter factors not present, the size of the administrative penalty would have been considerably higher.
81. In the result, and in accordance with Section 34(2) of the *Act*, I hereby give notice as follows:
  - i. I propose to impose an administrative penalty against Pro West in the amount of \$25,000.00;
  - ii. Should it wish to do so, Pro West has 7 days from receipt of this notice to provide a written response to me setting out why the proposed penalty should not be imposed;
  - iii. If Pro West provides a written response in accordance with the above, I will consider it and advise Pro West whether I will refrain from imposing any or all of the penalty.
82. Additionally I confirm that I have made the following order pursuant to Section 9 of the *Act*:

**I hereby order Pro West to:**

  - a) immediately take all necessary steps to bring itself into compliance with the requirements of the *Act* and *Regulation* as interpreted in this decision.
  - b) immediately pay its company drivers the \$174,903.16 adjustment amount found to be

owing to its company drivers,

- c) meet with an auditor by no later than the 5<sup>th</sup> day of May, 2017 and demonstrate to the auditor's satisfaction that it has taken all necessary steps to bring itself into compliance with the legislation and that it has properly calculated and paid all adjustment amounts owing to its company drivers for the period following April 30, 2016.

## VII. CONCLUSION

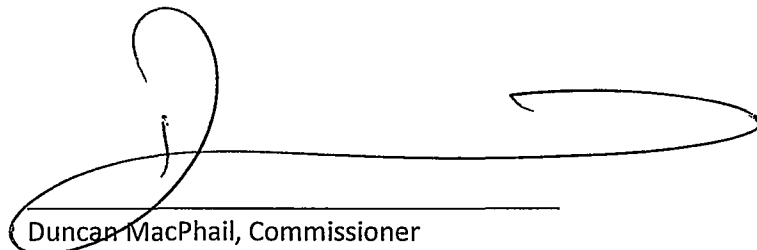
83. This decision addresses two important issues. Firstly I have determined that company drivers are entitled to receive the minimum rate required under Section 13 of the *Regulation* for all container trucking services performed, which includes work relating to or ancillary to the movement of a container such as:

- Pre and Post trip inspections;
- The relocation or movement of empty chassis which have been used or will be used to move a container;
- Bob Tail moves to or from marine terminals or container facilities in the lower mainland;
- The movement by truck of containers within a facility.

84. I have also decided that "short trips" (as defined in the *Regulation* until May 14, 2015) did not attract a retroactively applicable regulated rate under the *Act* and *Regulation*. Put otherwise, the legislation does not impose a rate for "short trips" performed by Independent Operators paid on a trip basis for the period between April 3, 2014 and December 22, 2014.

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

Dated at Vancouver, B.C., this 30 day of March 2017.



Duncan MacPhail, Commissioner