

April 26<sup>th</sup>, 2017

Forfar Enterprises Ltd.  
17471 29 Avenue  
Surrey, B.C. V3Z 0E7

Via email: [goforfar@gmail.com](mailto:goforfar@gmail.com)  
Original via mail

## Commissioner's Supplemental Decision Forfar Enterprises Ltd. (CTC Decision No. 20A/2016)

### Introduction

1. In *Forfar Enterprises Ltd.* (CTC Decision No. 20/2016) (the "Decision") I addressed a number of important issues and ruled as follows:
  - a) Containers which have a 4-letter code identifying them as containers furnished or approved by ocean carriers for the marine transportation of goods will be presumed to be containers for the purpose of the *Act* and *Regulation*. The onus rests with the licensee to rebut the presumption.
  - b) Licensees are required to pay company drivers the minimum hourly rates set out in Section 13 of the *Regulation* for all container trucking services performed by the driver.
  - c) Where a licensee pays monthly global medical benefit premiums on behalf of its company drivers, the presumption is that payment of these premiums applies to all work performed by the drivers, not just CTS driving work. The onus rests with the licensee to rebut the presumption.
  - d) Telephone allowances are not a benefit under the *Regulation*.
2. Having ruled on these issues, I concluded that Forfar was engaging in non-compliant compensation practices, and ordered Forfar to:
  - a) correct its non-compliant behavior;
  - b) take all necessary steps to identify and calculate the monies owing to its drivers as a result of its failure to comply with the *Act* and *Regulation*;
  - c) pay its drivers the monies found to be owing; and
  - d) report to the auditor with regards to these matters by no later than January 6<sup>th</sup>, 2017.
3. In the Decision I reserved on the matter of penalty and advised Forfar that upon receiving the auditor's report, I would make a decision on whether or not an administrative penalty is appropriate in the circumstances and if so, I will give notice of the amount of the proposed penalty.
4. This Supplemental Decision addresses the penalty issue.

**Facts**

5. In the original decision I made the following order:

**I hereby order Forfar 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. More specifically, Forfar must do the following:
    - i. undertake an internal audit of its payments to its drivers, applying the principles set forth in this decision, for the purpose of identifying and calculating unpaid amounts owing under the legislation to its company drivers for the period from April 3<sup>rd</sup>, 2014 to the date of this decision;
    - ii. provide to the auditor a spreadsheet of its calculations of adjustment amounts owing to its drivers further to this internal audit, and pay the amounts the auditor advises are owing on or before January 6, 2017.
    - iii. make any changes necessary to its payroll and administrative practices to ensure that it will be in compliance with the legislation from the date of this decision
  - b) immediately pay the \$707.64 adjustment amount found to be owing by the auditor for the months of April and October, 2015.
  - c) meet with an auditor by no later than January 6<sup>th</sup>, 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 arising from or relating to its past non-compliant practices.
6. As ordered, Forfar complied with the requirement to pay the \$707.64 adjustment amount found to be owing by the auditor to three of its six company drivers for the audit period months of April and October, 2015.
7. Forfar applied for and was granted extensions to the date by which it was required to meet its obligations under parts (a) and (c) of my order.
8. It was determined through the post-Decision internal audit process and auditor review that, as a result of Forfar's failure to comply with the *Act* and *Regulation*, Forfar owed an additional \$8,352.99 to its six company drivers.
9. Forfar acknowledged that it owed its drivers the aforementioned amount, and as part of its request for an extension, committed to paying the adjustment amount found to be owing by no later than April 5<sup>th</sup>, 2017.
10. Forfar paid the \$8,352.99 adjustment payment owing to its drivers on March 27<sup>th</sup>, 2017.

11. By making the aforementioned adjustment payment Forfar has brought itself into compliance with the minimum rates of pay required under the *Act* and *Regulation*

#### Administrative Penalty Decision

12. 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.
13. 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.
14. 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.
15. As I have made clear in previous decisions the obligation to become and remain compliant falls on licensees. As stated in *Olympia Transportation Ltd.* (CTC Decision No. 2/2016):

It must be emphasized that **the onus to become and remain compliant with the requirements of the Act rest entirely with the Licensee**. Licensees should not rely on Commission auditors to determine whether or not they are compliant, nor should they wait until a Commission audit process is undertaken before taking steps to ensure compliance; (para. 25)

16. In the present case, Forfar failed, over a lengthy period of time, to comply with the minimum compensation requirements set out in the *Act* and *Regulation*. The audit process disclosed that Forfar owed a total of \$9,060.63 to its drivers. As a result I find it is appropriate to impose a penalty on Forfar for its non-compliance.
17. 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)

18. Taking into account all of the relevant *Smart Choice Transportation* I find an administrative penalty of \$1,500.00 to be appropriate. In coming to this view I considered all relevant factors including the following:

- a) Although the amount owing is relatively small, Forfar's six drivers have suffered underpayment of wages and Forfar has been enriched as a result of the non-compliance for a very lengthy period of time, spanning April 3, 2014 to March 27, 2017;
- b) The Decision notes that "Forfar has refused to pay the adjustments calculated to be owing and has thus far refused to conduct a self-audit or take any steps necessary to bring itself into compliance with the Act" (para. 49). It is important that Forfar specifically, and the industry more generally, clearly understand that non-compliance will result in consequences, particularly where it is prolonged and a licensee refuses to bring itself into compliance at the earliest opportunity; and
- c) The penalty, although relatively small, is needed to serve a deterrent purpose by sending a clear and unambiguous message to Forfar that non-compliant practices will not be tolerated.

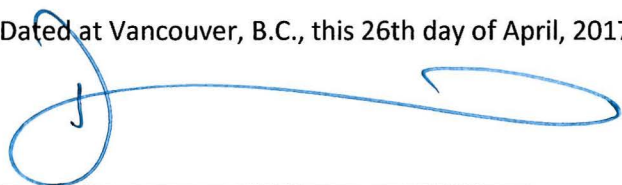
19. In the result, and in accordance with Section 34(2) of the *Act*, I hereby give notice as follows:

- i. I propose to impose an administrative penalty against Forfar in the amount of \$1,500.00;
- ii. Should it wish to do so, Forfar 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 Forfar provides a written response in accordance with the above, I will consider it and advise Forfar whether I will refrain from imposing any or all of the penalty.

20. Finally, as Forfar has paid the amounts owing to its company drivers owing under the legislation and corrected its no-compliant payment practices, I find there is no need to issue an order pursuant to Section 9 of the *Act* requiring the company to pay its company drivers in compliance with the legislation.

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

Dated at Vancouver, B.C., this 26th day of April, 2017.



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Duncan MacPhail, Commissioner