June 26, 2017

Pro West Trucking Ltd.
9900 River Drive
Richmond, B.C. V6X 3S3

Attention: Mr. Matthew May

Pro West Trucking Ltd., CTC Decision No. 13 /2017 (Application for Reconsideration of CTC No. 06/2017)

I. Nature of Application

1. Pro West Trucking Ltd. ("Pro West") applies under Section 39 of the *Container Trucking Act* (the "*Act")* for a reconsideration of CTC Decision No. 06/2017 ("the "Original Decision"). More specifically, Pro West takes issue with the interpretation of Section 13 of the *Container Trucking Regulation* (the "*Regulation*") found in the Original Decision.

II. Background

2. Following receipt of a confidential complaint that Pro West was not paying its drivers in accordance with the *Act* and the *Regulation* the Commissioner directed that an audit investigation be conducted with respect to the complaint. Initial audit results indicated that Pro West was not in compliance with the legislation. Consequently the audit was expanded to include all directly employed operators ("company drivers") and independent operators.

3. Over the course of the audit Pro West raised and advanced a number of arguments relating to compliance issues which were considered and addressed by the auditor. Pro West accepted some but not all of the auditor's conclusions with respect to these issues.

4. Amongst the issues raised by Pro West was the scope and application of Section 13 of the *Regulation.* Section 13 establishes the minimum hourly rate which must be paid to company drivers for the performance of "container trucking services".

5. The auditor maintained the view that the Section 13 rates apply to all work associated with container trucking services. This includes the relocation or movement of empty chassis which will be used or which have been used to move a container, pre and post trip truck inspections, "bob tail" moves to or from marine terminals or container facilities in the Lower Mainland, and the movement of containers by truck within a yard or facility.

6. Pro West disagreed with the auditor's interpretation. Pro West argued that the term "container trucking services" as defined in Section 1 of the *Act* meant that company drivers were only performing "container trucking services" when they were engaged in the actual movement of a container. Thus it argued that company drivers were only entitled to the rate protection

afforded by Section 13 rates when they were engaged in the actual physical movement of a container. Pro West argued that the legislated minimum rates required by Section 13 did not apply to empty chassis moves, or work within a facility.

7. In November of 2016 the auditor wrote to Pro West inviting Pro West to make a written submission to the Deputy Commissioner with respect to the issues in dispute, including the above referenced Section 13 issue.

8. On December 12, 2016 Pro West filed a written submission with the Deputy Commissioner. Amongst other issues, Pro West's submission raised the Section 13 interpretation issue. On December 13, 2016 the Deputy Commissioner wrote to Pro West advising that he supported the auditor's interpretation. He further advised Pro West that when the auditor submitted her audit report Pro West would be given an opportunity to, make a written submission to the Commissioner.

9. On February 20th, 2017 Pro West filed a written submission with the Commissioner's office. In that submission Pro West argued that work performed within a facility and empty chassis moves fell outside the scope of Section 13 and thus do not attract the Section 13 rate protection. Pro West argued that the minimum rates established under the *Act* and *Regulation* only apply to time spent by company drivers actually moving a container outside of a facility.

10. After carefully considering Pro West's arguments I rejected its position for the reasons articulated at paragraphs 52 to 63 of the Original Decision, concluding at paragraph 64:

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

III. Application for Reconsideration

11. Pro West requests reconsideration of the Original Decision; specifically, it seeks to have me reconsider my interpretation of Section 13 of the *Regulation*. It submits the definition of container trucking services in the *Act* is clear and "therefore should not be subject to interpretation".

12. With respect to my reliance on the 2014 Ready Bell Recommendation Report and the "mischief at which the legislation was aimed" in interpreting the legislation, Pro West submits that "the issues around underpayment were purported and founded in the Independent Operator classification group and not the directly employed operators".

13. With respect to the statement in the Original Decision (at para. 54) that the legislation should be interpreted "purposively and practically", Pro West submits that the interpretation set out in the Original Decision "has now brought inconsistency to the definition of 'container trucking services' as in certain contexts within the legislation the definition as written still applies". Pro West submits the definition is "explicit" and "purposeful as many aspects apply to activities that are literal to the definition as stated".

14. With respect to the observation in the Original Decision (at para. 60) that Pro West in its previous submission to me "would have me give the narrowest possible meaning to Section 13", Pro West submits it has "not contemplated scope in its reading, should the definition be anything but what is contained in Section 13 of the Act then it should have been described that way".

15. Pro West further submits that "should the definition be anything other than what is contained in the Act, the Commissioner had the opportunity to provide that interpretation in Decision 07/2016, where in numerous paragraphs the issue of Regulated Work is touched upon with the acceptance of both container trucking services and non-regulated work being performed in the same shift". Pro West alleges that in *Simard Westlink Inc.*, CTC Decision No. 07/2016 ("*Simard*"), I endorsed a "multi-tiered" payment schedule whereas in the Original Decision I stated that "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..." (para. 62).

16. Pro West noted that in *Simard* I stated that it is "not well understood that the rates required by the *Regulation* only apply to TLS container trucking services. Rates for non-TLS container trucking are not regulated under the *Act* or *Regulation*".

17. Finally, Pro West notes that in its February 20, 2017 submission to me prior to the issuance of the Original Decision, it relied on an email a CTC auditor sent to another licensee. Pro West says: "in no case was there any indication provided that container trucking services were defined as anything other than that stated in the act".

18. Pro West concludes its application by submitting that the legislation clearly defines container trucking services and "no further interpretation should be required"; that the definition of container trucking services "was written purposively as it applies to many aspects of the legislation as written"; that previous decisions "support the segregation of Regulated and Non-Regulated work both being applied in driver compensation schemes and audited accordingly; and that "there must be commonality amongst the interpretation of the Act for all whom administer and are affected by it". It asks that I rescind the order that Pro West "immediately pay its company drivers the $174,903.16 adjustment amount found to be owing to its company drivers".

IV. Decision

19. Section 39(3) of the *Act* provides that on reconsideration, the Commissioner must, after considering the information provided by the licensee, either rescind or confirm the decision for which reconsideration is sought. In this case, for the reasons which follow, having considered Pro West's submission, I confirm the Original Decision. In particular, I confirm the interpretation of Section 13 of the *Regulation* set out in that decision.

20. Pro West submits that Section 13 of the *Regulation* is "clear" and "explicit" and therefore "should not be subject to interpretation". In fact, however, all legislation needs to be interpreted in order to be applied. In this case, when the auditor applied the legislation to Pro West, Pro West disagreed with her interpretation; it had a different interpretation of the scope and application of Section 13 of the *Regulation*. It argued its interpretation first to the auditor, then to the Deputy Commissioner, and then to me in its February 20, 2017 submission which I considered before issuing the Original Decision. It continues to press its interpretation of Section 13 in its application for reconsideration of the Original Decision. While Pro West is entitled to advance the interpretation of Section 13 that it favors, there is no doubt that this is a question of statutory interpretation, to which the rules of statutory interpretation apply.

21. In that regard, in the Original Decision (para. 54) I adopted the interpretative approach mandated by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27, which is that legislation cannot be interpreted by considering only the words used in isolation. 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, quoted in para. 54 of the Original Decision). I then proceeded to apply this approach to the interpretation issue regarding Section 13 of the *Regulation* and the definition of container trucking services raised by Pro West.

22. I am not persuaded by the submissions of Pro West in its reconsideration application that I erred in my interpretation of Section 13 of the *Regulation*. With respect to Pro West's submission that the issues with respect to underpayment were in regard to independent operators, not company drivers, the fact is the legislature chose to set minimum wage rates in the legislation for both company drivers and independent operators. Accordingly, the protective and stabilizing purposes of the legislation were clearly intended to apply not just to independent operators but also to company drivers. As explained in the Original Decision, the narrow interpretation of the scope of Section 13 espoused by Pro West is not consistent with a purposive interpretation of the legislation.

23. For greater clarity and ease of application by licensees and truckers, the Original Decision sets out at paragraph 64 (repeated at para. 83) specific work to which the legislation applies. The Original Decision thus explains the scope of "regulated work" (work to which Section 13 of the *Regulation* applies). That does not mean, however, there is no such a thing as unregulated work. To give an obvious example, sometimes a company driver will drive a dump truck, tow truck or vehicle which does not transport a shipping container for a licensee. That is clearly not the performance of container trucking services, and that work would therefore not attract the regulated rates, notwithstanding it is performed by a company driver for a licensee. The auditors take this into account when auditing licensees.

24. The interpretive issue in this case is not whether there is work which is not captured by the scope of Section 13; clearly there is. The issue is defining the scope of Section 13; what work it captures. In the Original Decision I interpreted Section 13 and provided the answer to that question. While Pro West does not agree with my interpretation, I am not persuaded its narrower interpretation is correct, for the reasons set out in the Original Decision.

25. I do not agree that the conclusions reached and views expressed in the Original Decision are inconsistent with those found in *Simard*. A reading of *Simard* makes clear that it does not address the scope, application or interpretation of Section 13 of the *Regulation*. In *Simard*, there was no dispute that drivers performed both regulated and unregulated work; the issue was that prior to November 1, 2015, Simard's payroll system "was unable to recognize container trucking services and drivers were paid the same hourly rate for all work performed" (para. 8). After that date, Simard updated its payroll system to identify and separate out container trucking services and added a container trucking adjustment for all hours worked performing container trucking services. The decision states that this method of payment "when taken together with less than clear payroll stubs and the mixture of container trucking services and non-regulated trucking work, has resulted in some level of confusion around the rates being paid" (para. 9). Nonetheless, it was determined through the audit that the container trucking adjustment brought Simard into compliance with the legislation. Thus, the issues in *Simard* were simply whether the company's revised pay structure brought it into compliance, whether it had correctly calculated what it owed for its non-compliance prior to November 1, 2015 and whether the company's revised payroll practices were causing some confusion. There was no issue with respect to the scope of Section 13 (what constituted regulated versus unregulated work).

26. Similarly, I find Pro West's argument premised upon an auditor email communication sent during another audit proceeding involving another licensee is also not relevant to the interpretation of Section 13 of the *Regulation*. The email addressed Section 10 of the *Regulation*, which created a trip rate for directly employed operators (company drivers) and which was repealed on May 14th, 2015. I further note that, in any event, communications by auditors to licensees during the course of an audit are not binding on me as Commissioner, and do not determine or restrict my interpretation of the legislation. The auditors address issues raised by licensees during the course of their audits. Once the Commissioner has ruled on an issue and indicated how the legislation is to be interpreted, the auditors apply that interpretation.

27. Finally, I agree with Pro West that there must be consistency in how the legislation is interpreted and applied. In that regard, I note that after the Original Decision was issued, another licensee advanced a similar "empty chassis" and "within facility movements" argument, urging the same narrow scope interpretation of Section 13, during its audit. Applying my ruling in the Original Decision to that case, I rejected these arguments. My reasons for doing so begin at paragraph 25 of that decision[1]:

> ***"b) Container Trucking Services rates do not apply to empty chassis or within facility movements made by Company Drivers Argument***
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> 25. In a recent decision, Pro West Trucking Ltd. (CTC Decision No. 06/2017) I rejected the

[1] *Sunlover Holdings Co. Ltd.*, CTC Decision No. 10/2017 (May 4, 2017) at page 5

argument that rates payable to Company Drivers under Section 13 of the Regulation do not extend to empty chassis or within facility moves. In that decision I explained the rational for my interpretation of the legislation and concluded:

"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 (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". (At Paragraph 64)

26. Sunlover advances the same argument as that before me in Pro West, and for the same reasons as articulated in Pro West I reject the argument. I find that the Section 13 minimum hourly rates apply to both empty chassis moves by Company Drivers and to the movement of containers by truck within a yard or facility by Company Drivers. In the result, I accept the auditor's calculations." (emphasis added)

V. Conclusion

28. In summary, the application for reconsideration of CTC Decision No. 06/2017 is dismissed and the results of the Original Decision are confirmed.

Yours truly

OFFICE OF THE BC CONTAINER TRUCKING COMMISSIONER

Duncan MacPhail
Commissioner