



March 26, 2018

Gantry Trucking Ltd. and TSD Holding Inc.  
7453 124 Street  
Surrey, BC V3W 3X2

**Commissioner's Supplemental Decision  
Gantry Trucking Ltd. and TSD Holding Inc. CTC Decision No. 08/2018  
(Application for Reconsideration of CTC Decision No. 14/2017 and  
Penalty Decision Notice No. 14/2017)**

**I. Nature of Application**

1. Gantry Trucking Ltd. ("Gantry") and TSD Holding Inc. ("TSD") (together, "the Companies") apply under section 39 of the Container Trucking Act (the "Act") for a reconsideration of CTC Decision No. 14/2017 (the "Supplemental Decision").

**II. Introduction**

2. On March 6, 2018 the Companies filed an application for an extension of the time required to submit an application for reconsideration of the Supplemental Decision. The Companies were granted until March 15, 2018 to submit a reconsideration application. On March 15, 2018 the Companies submitted a reconsideration application which seeks to have me reconsider the imposition of the administrative penalty. Specifically, the Companies take issue with the size of administrative penalty as it relates to my finding of deficient record keeping practices and argue that its non-payment of retroactive wages was justified given the legal remedy being sought by the Companies.
3. In the Supplemental Decision I found that the Companies did not comply with the Commissioner's order under Gantry Trucking Ltd. and TSD Holding Inc. (CTC Decision No. 14/2017) (the "Original Decision") and that:

The Companies failed to provide satisfactory proof that the monies owed under the Commissioner's July 6th order were paid on or before October 2, 2017; at times misrepresented their compliance and have not satisfied the auditor that they have corrected their record-keeping practices as outlined in paragraph 26 of this Decision.

Moreover, I find that the Companies continue to demonstrate a propensity for non-compliance and delay as it relates to orders of the Commissioner and the requirements of the Act and the Companies' Container Trucking Services Licence. The Companies' actions are occurring to the detriment of their company drivers and to the financial benefit of the

Companies through the retention of money owed to its drivers.

Based on these findings, I proposed that a \$60,000.00 administrative fine be imposed.

4. I assessed the appropriate administrative penalty based on the following facts which I considered to be relevant:
  - a. The Companies did not comply with the Commissioner's July 6th order and ensure that all their drivers found to be owing money under the Decision were paid on or before October 2, 2017;
  - b. The Companies misrepresented cheque distribution dates to the OBCCTC auditor;
  - c. The Companies only provided pay records or proof of payment to the auditor following action by the Deputy Commissioner;
  - d. The Companies did not comply with section 24 (1) of the *Regulation*, which requires company drivers be paid semi-monthly and no later than 8 days after the end of a pay period; and
  - e. The Companies did not demonstrate to the auditor's satisfaction that the necessary steps had been taken to correct their deficient record keeping practices and bring themselves into compliance with their CTS Licenses.
5. On January 30, 2018, I issued a Decision Notice confirming the proposed penalty and ordering the Companies to pay an administrative penalty of \$60,000.00.
6. Although the Companies have paid the administrative penalty as ordered, the Companies invite me to reconsider my decision to impose an administrative penalty and to refund all or part of the penalty paid by the Companies.

### III. Decision

7. The purpose of penalties under the *Act* and the factors which will be considered were outlined in Smart Choice Transportation Ltd. (CTC Decision No. 21/2016) and referenced at paragraph 32 of the Supplemental Decision. The Supplemental Decision also cited Commissioner MacPhail's penalty considerations in the Original Decision, in which Commissioner MacPhail noted that "accurate record-keeping is a fundamentally important obligation of licensees" and expressly found that "the Companies' record-keeping was incomplete, inconsistent, and often inaccurate."
8. In the Supplemental Decision, a penalty of \$60,000.00 was proposed because it had been demonstrated that the previously assessed penalty against the Companies was not sufficient to deter them from their non-compliant practices and that an additional penalty was necessary to correct their non-compliant practices. This decision was arrived at after carefully assessing and considering the Smart Choice factors, the penalty factors outlined in the Original Decision and the findings of the Supplemental Decision. Having carefully considered the Companies' application for reconsideration, I am not persuaded to reconsider my original decision.

9. The Companies argue two points:

1. Section 28 of the *Container Trucking Regulation* (“the *Regulation*”) should be interpreted to mean that the maximum administrative fine which can be imposed on a licensee for failure to keep proper records and/or correct deficient record keeping is \$10,000.00; and
2. A penalty should not have been assessed based on the Companies’ failure to comply with an order because the finding of non-compliance and subsequent penalty was based on non-payment of retroactive wages which was justified on the basis that the Companies’ are challenging the validity of the retroactive wage provisions in the *Act*.

Companies’ argument under section 28, *Container Trucking Regulation*

10. Section 28 states the maximum administrative fine the commissioner may impose on a licensee under section 34 (1) (c) [*imposition of administrative fines*] of the *Act* is the following:

- a) in the case of a contravention of the *Act*, regulations or terms and conditions of the licensee’s licence relating to the payment of remuneration, wait time remuneration or fuel surcharge, \$500 000;
- b) in any other case, \$10 000.

11. Section 28 references section 34 of the *Act* which states that if the Commissioner is satisfied that a licensee has failed to comply with the *Act* or the terms and conditions of the licensee’s licence, an administrative fine may be imposed. It is a requirement of the *Act* for a licensee to keep records as required by the Commissioner (section 25). The Commissioner’s record keeping requirements are established in the licensee’s licence (Appendix D to Schedule 1). Therefore, deficient record keeping is a failure to comply with the *Act* and the terms and conditions of a licensee’s licence. Having established that deficient record keeping is a contravention of the *Act* and a licensee’s licence, the imposition of an administrative fine in excess of \$10,000 is warranted if the contravention relates to payment of remuneration, wait time remuneration or fuel surcharge.

12. In this case, and contrary to the Companies’ submission, I find that the Companies’ failure to correct its deficient record keeping practices is a contravention relating to the payment of remuneration. The Original Decision noted complaints by the Companies’ drivers regarding non-payment for all hours worked<sup>1</sup> and records reviewed by the auditor which showed “discrepancies between the hours worked as recorded by the Companies on time sheets compared with the hours worked as recorded by the truckers on their driver trip sheets and truck logs.”<sup>2</sup> The auditor concluded that “the Companies have not shown they have implemented a system for accurately recording and paying wages to their drivers for all CTS hours worked.”<sup>3</sup> The Commissioner concluded by finding that the Companies’ record-keeping was incomplete, inconsistent, and often inaccurate. His finding was based on the Companies’ non-payment of remuneration

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<sup>1</sup> Gantry Trucking Ltd. and TSD Holding Inc. (CTC Decision No. 14/2017), p. 4.

<sup>2</sup> Gantry Trucking Ltd. and TSD Holding Inc. (CTC Decision No. 14/2017), pp. 5 & 7.

<sup>3</sup> Gantry Trucking Ltd. and TSD Holding Inc. (CTC Decision No. 14/2017), p. 8.

reflected in deficient record keeping and, as such, a penalty was issued, in part for this reason, under section 34 (c) of the *Act* and section 28 (a) of the *Regulation*. The Commissioner also ordered the Companies to correct their record keeping practices, specifically citing required changes which included reporting and tracking hours worked and trips completed each day<sup>4</sup> in order to establish that drivers were being remunerated for all hours worked.

13. The subsequent spot audit (referenced in the Supplemental Decision) of the Companies' records was undertaken by the auditor to ensure that the Companies had complied with the Commissioner's order to correct their deficient record keeping practices. In doing so, the auditor sought to ensure that the Companies had made corrections to their record keeping practices which resulted in an accurate reflection of the hours worked by their drivers. The auditor found that:
- a. two drivers were likely short paid because their trucks were active at port terminals outside of the hours recorded on their trip sheets and truck logs;
  - b. the Companies initially failed to provide records for all drivers during the September 1 – 15, 2017 audit period;
  - c. records for three drivers were provided after the fact to support previously unaccounted for truck activity at port terminals;
  - d. supplemental records provided indicate that one driver was paid later than 8 days after the end of a pay period in contravention of section 24(1) of the *Container Trucking Act* ("the Act");
  - e. supplemental records provided do not account for all truck activity; and
  - f. in two instances, the records provided do not provide evidence to show who drove specific trucks on specific days the trucks were active.
14. The auditor's findings demonstrated that the Companies' failure to correct their deficient record keeping practices continued to led to instances where their drivers were being incorrectly remunerated. As such, a subsequent penalty was proposed, once again, under section 34 (c) of the *Act* and section 28 (a) of the *Regulation*, in part due to the Companies' non-payment of remuneration as reflected in deficient record keeping practices.

#### Companies' argument that the penalty was unfair and punitive

15. It is the Companies' position that the fine imposed was unfair and punitive because it was directed at the Companies for availing themselves of their right to pursue legal remedies. The Companies also argue that it was unfair because it was based on non-compliance with an order which is under legal challenge. I do not agree with the Companies' position.
16. The pursuit of legal remedy does not exempt licensees from meeting the requirements of the *Act* and the licence and, in this case, the Commissioner's enforcement of the legislation did not impede the Companies' ability to challenge the validity of the retroactive provisions in the *Act* and *Regulation*. Indeed, several licensees originally challenged the retroactive provisions of the legislation but, in each case, the same licensees (like all others) were also required to

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<sup>4</sup> Gantry Trucking Ltd. and TSD Holding Inc. (CTC Decision No. 14/2017), p. 16.

demonstrate that their drivers were remunerated according to the *Act* and *Regulation* while the challenge was ongoing.

17. In the Original Decision, the Companies were found to be owing a significant amount of money to their drivers, much of which dated back to the retroactive period.<sup>5</sup> Prior to the Commissioner issuing an order to the Companies to pay their drivers, the Companies were informed that “awaiting the outcome of litigation will not be accepted as an excuse for non-compliance or delay in making payments.”<sup>6</sup> On August 8, 2017, the Companies were reminded by the Commissioner that “most Licensees have brought themselves into substantial compliance and have paid their drivers the minimum rates required under the Container Trucking legislation.” The Commissioner stated that he expected the Companies “to comply with the terms of my orders.”<sup>7</sup>
18. Nevertheless, the Companies chose not to comply with the Commissioner’s order, in contravention of section 40 of the *Act* and with the knowledge that they risked facing penalties for non-compliance. They challenged the legislation in the Supreme Court and then before the Court of Appeal, as they were entitled to do, and their application to the Court of Appeal for short leave and an interim stay was heard on October 2, 2017. The Companies now argue that they should not be penalized on the basis that their short leave application was heard, and refused, on the day of the Commissioner’s deadline and, once short leave was not allowed, the payments were made.
19. This argument is consistent with a previous argument made by the Companies, which was dismissed in the Decision Notice:

Request to post monies owed in trust

The Companies argue that the auditor wrongly insinuated that the Companies strategically delayed making payment. It is the Companies’ position that their intent to comply is evidenced by the bank draft brought to the Court of Appeal on October 2, 2017 as part of their request for short notice to bring an application for stay of the order.

I do not accept this argument. I note that the pattern of behavior demonstrated by the Companies has been one of waiting until the final day of an order deadline to seek an extension or comply (or in the case of the Commissioner’s July 6, 2017 order to pay by August 4, 2017, to miss a deadline altogether). This is a form of delay and, at the least, demonstrates that the Companies were not intent on following the Commissioner’s order which sought to ensure that drivers were paid “forthwith” and in no event later than the specified date.<sup>8</sup>

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<sup>5</sup> Gantry Trucking Ltd. and TSD Holding Inc. (CTC Decision No. 14/2017), p. 14.

<sup>6</sup> Acting Commissioner Bell, letter to the Companies, January 26, 2016.

<sup>7</sup> Commissioner MacPhail, letter to the Companies, August 8, 2017.

<sup>8</sup> Gantry Trucking Ltd. and TSD Holding Inc. (CTC Decision No. 14/2017) – Decision Notice, p. 5.

20. For these reasons, an additional penalty was levied against the Companies in the Commissioner's Supplemental Decision. The penalty for non-compliance with the order does not, as the Companies argue, represent unfair treatment or punishment for pursuing a legal remedy and to find otherwise would not be treating all licence holders equally.

**IV. Conclusion**

21. For these reasons, I confirm my decision to impose a \$60,000.00 administrative penalty and hereby dismiss the Companies' application for reconsideration.

Dated at Vancouver, B.C., this 26<sup>th</sup> day of March, 2018.



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Michael Crawford, Commissioner