



February 4, 2020

Simard Westlink Inc.  
16062 Portside Road  
Richmond, BC V6W 1M1

## **Commissioner's Decision Simard Westlink Inc. (CTC Decision No. 01/2020)**

### **Introduction**

1. Simard Westlink Inc. ("Simard") 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 the Commissioner, and a licensee must comply with those 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 31 of the Act, the Commissioner may initiate an audit or investigation to ensure compliance with the "Act, the regulations and a licence" whether or not a complaint has been received by the Commissioner.
3. In March of 2018, the Office of the BC Container Trucking Commissioner ("OBCCTC") received complaints alleging that Simard had not adjusted its payroll practices following a previous audit of Simard by the OBCCTC.
4. On April 5, 2018, the Commissioner directed an auditor to audit Simard's records to determine if its independent operators ("I/Os") and company drivers were being paid the minimum rates required under the *Container Trucking Regulation* (the "Regulation"). In addition, the auditor was directed to ensure that Simard had complied with the Commissioner's direction in Simard Westlink Inc. (CTC Decision No. 07/2016) paragraph 30 as follows:

I direct Simard to revise its payroll stubs ("Income and Deduction Registers") to better and more clearly report driver income (including the Container Trucking Adjustment) and deductions.

5. The auditor was directed to audit the months of February and March 2018 (together, the "Initial Audit Period") to determine compliance.

### **Initial Audit Period**

#### **I/Os**

6. The auditor requested and obtained relevant records from Simard and determined that during the Initial Audit Period, Simard generally paid its I/Os trip rates consistent with the *Act* and *Regulation*. However, the auditor did find some instances of trip splitting where, in the case of delivery to one high volume customer that closed before a driver's last move of the day, Simard paid a full trip rate on the first day and a "quarter move" of \$50.00 for delivery the next day although it should properly have paid a second full trip rate for the move on the second day.

#### **Company Drivers**

7. The auditor also determined that during the Initial Audit Period, the pay statements of Simard company drivers showed payment at a "domestic hourly rate" and a "container adjustment" payment for container trucking services. The drivers' pay statements identified the driver's domestic hourly rate but did not identify the "regulated hourly rate" for container trucking services. In addition, it was found that the "container adjustment" payment for container trucking services was listed on the following weeks' pay statement and that the hourly rate paid by Simard often changed within a work day depending on whether a particular activity or container moved warranted a "container adjustment".

### **Expanded Audit Period**

#### **I/Os**

8. Having established that Simard was trip splitting during the Initial Audit Period, the auditor expanded the scope of the I/O portion of the audit to cover the period from April 3, 2014 to August 2018 (the "Expanded Audit Period").
9. Simard reviewed its records and concluded that \$31,337.01 was owed to ten I/Os for the period covered by the Expanded Audit Period. The auditor confirmed Simard's calculations and advised the OBCCTC that Simard was in the process of distributing the money.

#### **Company Drivers**

10. The auditor also established that Simard had not complied with the Commissioner's previous (June 2016) direction to revise its pay statements. The auditor reported that Simard subsequently provided a "proposed addendum" to be attached to driver pay statements in the future and the auditor concluded that such an addendum would make Simard's pay structure more understandable for its drivers.
11. In the auditor's report, a number of driver activities were outlined as having been identified by Simard as non-container trucking work paid at the "domestic hourly rate" rather than the regulated rate:

1. service bobtail trips to truck repair facilities;
  2. repositioning bobtail trips between Simard's yard in Richmond and the overflow yard in Delta;
  3. trailer repositioning trips from the overflow yard in Delta and a nearby trailer rental company;
  4. movement of CN Rail and CP Rail 53-foot Retail Containers from the railways' intermodal terminals for "domestic repositioning" of marine containers from East to West; and
  5. particular instances during the driver training process.
12. Simard argued that the movements identified in points 1-3 above were not related to the movement of a container and therefore should not be paid at the regulated rate. With respect to point 4, Simard advised the auditor that it considered this work to be "domestic" work also exempt from the regulated rate. Simard outlined its payment practices for training, noting a mix of regulated and un-regulated hourly rates depending on the training scenario.
13. The auditor committed to referring Simard's arguments to the Commissioner for determination and submitted an audit report.

#### **Expanded Audit**

#### **I/Os**

14. On April 2, 2019, I wrote to Simard and advised that I had received the auditor's report and that I was concerned that Simard may not have been paying its company drivers the regulated hourly rate for all container trucking services including training. Simard was advised that the audit would therefore not be concluded at that time and that instead a new auditor was being assigned to undertake further analysis.
15. The new auditor reviewed Simard's records and determined that during the Initial Audit Period, in addition to the practice of trip splitting identified by the previous auditor, a number of trips had not been paid for, some incorrect trip rates had been paid and not all split trip payments had been identified. Simard was found to be owing an additional \$2,075.64 for the Initial Audit Period. The auditor confirmed that Simard had paid the \$31,337.01 it was found to be owing to ten I/Os during the Expanded Audit Period but also found that Simard had not calculated the Fuel Surcharge (FSC) owing on that amount. For the Expanded Audit Period, the auditor calculated that Simard owed an additional \$2,261.01 in unpaid FSC.
16. The new auditor confirms that Simard ceased its trip splitting practice in September 2018.
17. Simard disputed the FSC amount the auditor found owing on the basis that it had been paying its drivers over and above the FSC rates because their drivers were using company fuel cards and receiving their diesel at a discounted rate. Simard asked that the overpayment of FSC be used to offset the underpayment in FSC that resulted from the FSC not being used in the calculation of amounts outstanding to I/Os. I agreed that the overpayment could be offset against the underpayment in this case because both payments related to FSC and it was clear that the FSC

overpayment was not being used to help offset rate underpayments.

18. The auditor adjusted her calculations and concluded that during the Expanded Audit Period, Simard owed seven I/Os an additional \$2,259.01 which the auditor confirms has since been paid.

#### **Company Drivers**

19. The new auditor reviewed company driver payroll records for the Initial Audit Period and confirmed the previous auditor's findings with respect to the payroll records, specifically that:
  - Simard did not differentiate between container trucking services ("CTS") and non-CTS on the drivers' timesheets;
  - Drivers' pay stubs did not show an accurate breakdown of drivers' hours performing CTS and hours performing non-CTS, CTS overtime hours, or non-CTS overtime hours; and
  - Drivers' pay stubs did not show the regulated hourly rates for company drivers.
20. Simard advised the auditor that it had instituted an addendum in August 2018 to be attached to drivers pay stubs as a way of demonstrating what a driver was being paid. The addendum breaks down CTS hours worked, overtime CTS hours worked, non-CTS hours worked, and overtime non-CTS hours worked. The auditor reviewed the addendum and notes that while it has help explain to drivers how they are being paid, it does not illustrate which trips are classified as CTS and which are not, making it difficult for the driver to know which trips attract CTS rates and which do not.
21. The auditor reviewed payroll records for February 2018 as well as November 2018 and determined that Simard owed seven company drivers \$1,229.55 collectively for the first pay period in February 2018 and \$191.17 to one company driver in November 2018 for CTS work that was incorrectly classified as non-CTS.
22. The auditor attributes the small amount of money found to be owing in November 2018 to the infrequency of empty chassis trips, trips to service facilities and training activity in that month, all of which Simard argues does not attract the Commissioner's rate.

#### **CTS vs. Non-CTS Work**

23. Simard has argued since the start of the audit in April 2018 that particular moves are not directly related to, or ancillary to, marine container moves and therefore do not attract the regulated minimum hourly rate. This position, they argue, is supported by the Commissioner's findings in previous decisions.<sup>1</sup> Simard provided a description of these moves to the first auditor (noted in paragraph 11 above) and a more detailed explanation to the second auditor as follows:
  1. Simard has a number of leased trucks in their fleet, and on occasion will have a company driver take a truck over to the leasing company location to have service work done on the vehicle;

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<sup>1</sup> Pro West Trucking Ltd. (CTC Decision No. 06/2017), paras 52-63 and Pro West Trucking Ltd. (CTC Decision No. 13/2017) Reconsideration Decision.

2. Repositioning a bare chassis between our two chassis storage locations (16062 Portside Rd., Richmond and 8662 River Rd, Delta - also known as the "Gulzar" yard). These types of moves are coordinated when Simard has an imbalance of bare chassis at either location; and
  3. Pulling a 53' trailer (loaded or empty). The origins/destinations are usually within the Lower Mainland and are between Simard warehouses and customer locations. These containers are owned by the railyard and therefore would not attract CTS rates. These trips are generally referred to as domestic repositioning of marine containers from eastern to western Canada;
24. The auditor raised Simard's position with me, and, on November 5, 2019, I responded to the auditor outlining my position on each of the issues raised by Simard. On November 27, 2019, the auditor wrote to Simard and provided them with my view that the bare chassis repositioning moves and trips to chassis repair facilities were CTS, attracting the Commissioner's rate. Simard was instructed to calculate the amounts outstanding to all of its company drivers who provided CTS from June 1, 2015 to November 30, 2019.<sup>2</sup> Simard was requested to deliver calculations pertaining to all drivers to the auditor by Friday, December 13, 2019.
25. Simard replied to the auditor on December 3, 2019, informing her that they did not agree with this and that they were not prepared to calculate amounts outstanding to company drivers in this way.
26. The audit report concludes by noting that:
- Effective August 2018, Simard has sufficiently addressed the Commissioner's direction in Simard Westlink Inc. (CTC Decision No. 07/2016), para 33 although the auditor does note that Simard's addendum does not illustrate which trips are classified as CTS and which are not, making it difficult for the driver to know which trips attract CTS rates and which do not;
  - Simard was cooperative during the audit process; however, the complexity of the company drivers' pay stubs and the fact that the paperwork is completed in Montreal made explanations difficult to gather;
  - Simard was able to provide all requested payroll records during the course of the audit except for the breakdown of CTS vs. non-CTS for the Initial Audit Period; and
  - Simard refused to calculate amounts outstanding to company drivers because it does not accept the Commissioner's views on what is considered CTS.
27. The auditor determined that Simard owed I/Os an additional \$2,259.01 for the Initial Audit Period and that Simard had brought itself into compliance by paying its I/Os this amount on October 23, 2019. The auditor confirmed that effective September 1, 2018, Simard is paying compliant rates to its I/Os.
28. The auditor notes that Simard has not brought itself into compliance for company drivers as it has

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<sup>2</sup> In Simard Westlink Inc. (CTC Decision No. 07/2016) Simard calculated money owing during the Audit Period ending on May 31, 2015 and then subsequently calculated money owing between June 1, 2015 and October 31, 2015 because this was the period between the Audit Period calculations and the date (November 2015) when Simard stated that it had updated its payroll systems. The auditor determined June 1, 2015 to be the beginning date of this audit's calculations as the auditor was concerned that Simard's payroll system updates were not compliant.

not calculated amounts outstanding to company drivers for those trips which it does not consider to be CTS.

29. Simard's legal counsel provided a submission on December 4, 2019 ("Submission 1"). The OBCCTC replied on December 10, 2019. Simard was also provided a copy of the auditor's report for review and further opportunity to respond. Simard responded on December 20, 2019 ("Submission 2").

### **Simard's Submissions**

30. In Submission 1, Simard argues that:

1. The OBCCTC has twice advised Simard that it is in substantial compliance with respect to the compensation of drivers and that this explicitly included the distinction in payment between CTS and non-CTS work. Simard says that the second auditor's November 2019 audit report should therefore be set aside;
2. The second auditor's November 2019 audit findings should not be retroactive because Simard has relied on previous OBCCTC decisions as to the propriety of its payment to drivers, which has not changed since 2015; and
3. The second auditor, in applying the Commissioner's ruling on CTS vs. non-CTS work in this case, did not consider the proportion of CTS vs. non-CTS work Simard drivers perform when calculating the CTS rate on truck maintenance and chassis storage movements.

31. In Submission 2, Simard argues that:

1. The second auditor should not have assumed that all chassis moves between marshalling yards should attract the Commissioner's rate because no one can identify if that move (chassis) will be used for container trucking services;
2. Not all of the second auditor's calculations are correct; and
3. A calculation for each driver of the gross pay plus benefits divided by the hours worked demonstrates in almost all cases that Simard company drivers are paid more than the Commissioner's hourly rate.

### **Decision**

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

1. On April 5, 2018 the Commissioner ordered an audit of Simard's I/Os and company drivers;
2. The first auditor found, and Simard accepted, that between April 3, 2014 and August 2018, Simard owed ten I/Os \$31,337.01 for trip splitting as well as missing and incorrect trip payments;
3. The second auditor also found, and Simard accepted, that for February and March 2018, Simard owed seven I/Os an additional \$2,259.01 in unpaid and incorrectly paid trip rates and FSC;
4. Simard owed seven company drivers \$1,229.55 collectively for the first pay period in February 2018 and owed \$191.17 to one company driver in November 2018;
5. Simard only complied with the Commissioner's direction in Simard Westlink Inc.

- (CTC Decision No. 07/2016), para 30 to change its payroll practices effective August 2018;
6. Simard contests the Commissioner's ruling on the applicability of the Commissioner's company driver hourly rates to particular moves; and
  7. Simard has not performed calculations as directed by the auditor to determine monies owing to company drivers based upon the Commissioner's ruling.
33. I have considered the two separate auditor reports and Simard's submissions (Submission 1 & 2) and for the reasons set out below, I find Simard to be in violation of the *Act* and the Commissioner's Rate Order for failure to pay its I/Os correct trip rates, for trip splitting and for its failure to pay its company drivers for all CTS work performed.
34. On March 21, 2016, the then-Commissioner and Deputy Commissioner issued a Bulletin regarding the practice of trip splitting. The Bulletin spoke to whether the practice of trip splitting (splitting the movement between the starting point of container trucking services and the end point of container trucking services between one or more truckers and also splitting the amount payable under the *Regulation* for a single trip between the truckers) complied with the *Act* and *Regulation*. The Bulletin concluded by stating that:
- The OBCCTC considers the practice of trip splitting to be a contravention of the *Act* and the *Regulation*. The OBCCTC has instructed its auditors to investigate instances of trip splitting. A determination of such a contravention could result in a penalty, fine or any orders the Commissioner may impose as per Sections 9, 34 and 35 of the *Act*.
35. This was reiterated in Can-American Enterprises Ltd. (CTC Decision No. 01/2018) and a fine was imposed in that case, in part for failure to alter trip splitting practices following the release of the March 21, 2016 Bulletin. In this case, Simard also was found to have continued its trip splitting practices following the March 21, 2016 Bulletin.
36. Simard's failure to pay correct hourly rates to its company drivers results from Simard's view of which moves are either CTS or non-CTS moves. Where Simard has determined that a move is a CTS move, it pays the correct hourly rate.
37. Simard argues that it is not required to pay the Commissioner's rate when its company drivers are moving CN Rail and CP Rail 53-foot retail containers from the railways' intermodal terminals for "domestic repositioning" of marine containers from East to West. The auditor advised Simard that the OBCCTC was in agreement (see Canadian National Transportation Ltd. (CTC Decision No. 02/2019)).
38. However, Simard has not been paying the Commissioner's hourly rate for bare chassis repositioning moves or for trips to repair facilities. Simard was advised in writing on November 27, 2019 that these moves were to be considered container trucking services which attract the Commissioner's rate. A full citation of the analysis which underpins this direction follows for the benefit of readers (bold added for emphasis):

In Pro West Trucking Ltd. (CTC Decision No. 06/2017), the Commissioner found (para 64) that the application of hourly rates for company drivers applies to container trucking services that include services that are directly related to, or ancillary to, the transportation of a container by a truck. The decision provided examples which included:

- 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; and
- The movement of containers by truck within a yard or facility.

The Decision also commented on multi-tiered compensation schemes and their impact on OBCCTC audits (para 61-63):

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.**

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.**

In Pro West Trucking Ltd. (CTC Decision No. 13/2017 – Application for Reconsideration), the Commissioner reconsidered Pro West Trucking Ltd. (CTC Decision No. 06/2017) and did not change his opinion.



In this case, Simard argues that taking trucks for servicing is not service directly related to container trucking services and the movement of chassis between two storage locations is for the purpose of equipment inventory management and therefore these movements are also not directly related to, or ancillary to, the transport of a container by a truck. I do not agree. If a truck is used to perform container trucking services, it must be maintained in order to do so. Therefore, making a move to a service station is an ancillary move and the time spent performing this move attracts the rate.

Simard's chassis are stored at one or more locations so that the chassis can be used, when required, for container trucking services (I also note that chassis are vital to the movement of containers by truck). The movement of these chassis between locations is done in support of an equipment management program which is an ancillary service that supports the performance of container trucking services because the equipment has been used or will be used for the performance of container trucking services. I also note that Simard is arguing in support of multi-tiered rate structures which the OBCCTC has already ruled to be non-compliant and of negative impact to the effectiveness of OBCCTC audits.

39. Despite the above, Simard has refused to calculate monies owing to its company drivers.
40. Simard argues that on two occasions the OBCCTC has advised Simard that it is in substantial compliance and, as such, the second auditor's findings in the current audit with respect to company drivers should be set aside.
41. The first occasion referenced by Simard was the audit and subsequent decision issued by the OBCCTC on June 9, 2016 (CTC Decision No. 07/2016). In this case, it is Simard's position that the first audit and decision, because they considered hourly paid company drivers and because Simard was found to be in compliance, preclude the current auditor from reviewing the periods covered by the previous audit.
42. Further, Simard relies on the outcome of the audit informing the 2016 decision in defending its current pay structure, including its definition of CTS vs. non-CTS work. It appears to be suggesting that it is entitled to rely on the 2016 decision such that it should not be required to pay for work that I have concluded is properly characterized as CTS after that decision (for the period between that 2016 decision and present).
43. In terms of Simard's first argument, neither the audit underlying the 2016 decision or the decision itself looked closely at the distinctions between CTS and non-CTS work being made by Simard in this audit. However, Simard was found in the 2016 decision to be in substantial compliance with respect to its company driver hourly pay structure and, for this reason, the current audit calculations can begin November, 2015, the month after the final month of the previous audit's calculations and also the month when the Commissioner accepted that Simard had updated its payroll systems.
44. The second reference to a finding of the OBCCTC relates to the first auditor's report supplied to Simard by the OBCCTC on April 2, 2019. In this report, the auditor concluded by stating that:

Based on the Company payroll records supplied and audited for February 2018 and March 2018 (as well as the successful completion of the self-audit process), and the adjustments paid by the Company, it appears the payments received by the Independent Operators met or exceeded the regulated rates. Therefore, I conclude Simard Westlink is in substantial compliance with the legislation.

45. Simard is incorrect that this is a finding of compliance around payment of company drivers for CTS work. The auditor's conclusion was based upon the auditor's findings with respect to I/Os, not company drivers. Additionally, earlier in the report, the auditor clearly states that Simard had raised with the auditor a number of questions regarding the applicability of the Commissioner's company driver hourly rate and that the auditor had advised Simard that he would refer Simard's questions to the Commissioner for determination and be ready to "go back to the Company for any clarifications" if directed. As noted, the Commissioner did direct another auditor to go back to Simard and ultimately provided a determination/response to Simard's queries.
46. Simard also argues that the first auditor's report came after the Pro West Trucking Ltd. decision which the current auditor relies upon in making a determination regarding CTS work. Simard relies on the first auditor's reference to "substantial compliance", arguing this nullifies the second auditor's findings. I do not agree. Simard is mistaken when it assumes that the March 2019 audit report, or any audit report, determines compliance and therefore timing of the auditor's report as compared to the Pro West Trucking Ltd. decision is irrelevant. The findings of auditors in audit reports are not conclusive. Indeed, Simard was advised in my April 2, 2019 letter that "I am not required to accept an auditor's conclusions and I will make a final determination as to Simard's compliance with the *Act* and *Regulation* once the audit is complete."
47. As touched upon in paragraph 42, above, Simard's second argument is less clear. Simard appears to be arguing that it should be able to rely on the 2016 decision to avoid paying anything from 2016 to present. Simard appears to suggest that the Commissioner is barred from considering what qualifies as CTS and what does not because Simard has relied on the 2016 decision.
48. I do not accept that Simard should not be responsible for paying for CTS work after the 2016 decision. Simard Westlink Inc. (CTC Decision No. 07/2016) did not involve careful scrutiny of what services qualify as CTS and what services do not qualify as CTS, whereas the second audit, and this decision, do.
49. Additionally, many audits of the Commissioner address new or different issues or facts, requiring new or different interpretations or applications of the legislative regime. The resulting decisions can establish new precedents or methods of assessment which can then be applied to future audits that may cover time periods preceding the establishment of the new precedent or methodology. In this case, a more nuanced interpretation of CTS was put forth by the Commissioner in the Pro West Trucking Ltd. decision and further elaborated, based upon Simard's particular circumstances, in this audit. Simard, like all licensees, is required to ensure that it is compliant with the Commissioner's rate paying requirements. This requires licensees to remain informed of the Commissioner's rulings and bulletins and, as required, adjust their rate paying practices accordingly. Licensees may also be required to calculate money owing retroactively (at least for the period after

the conclusion of a licensee's previous audit).

50. In both submissions Simard argues that the auditor did not consider the proportion of CTS vs. non-CTS work that Simard drivers perform when calculating the CTS rate on truck maintenance and chassis storage movements and notes that the OBCCTC should not assume that all chassis moves between marshalling yards should attract the Commissioner's rate as no one can identify if that move (chassis) will be used for container trucking services.
51. The applicability of the Pro West Trucking Ltd. decision here is predicated upon the assumption that Simard's chassis are stored at one or more locations so that the chassis can be used, when required, for CTS and that the movement of these chassis between locations is done in support of an equipment management program which is an ancillary service that supports the performance of CTS because the equipment has been used or will be used for the performance of CTS.
52. In instances where the chassis have not or will not be used for CTS, then the Commissioner's rate should not apply. Simard is also correct when it states that there is no reasonable way to track and identify when a chassis has or will be used for CTS in order to apply the rate. In the Pro West Trucking Ltd. decision, the Commissioner was concerned that multi-tiered payment structures could allow for the payment of lower hourly rates for related work performed by company drivers, and warned of the impact that these payment structure could have on the OBCCTC audits and how they could "undermine the intention of the legislation to fairly and effectively regulate the payment of drivers who provide container trucking services." However, the work referred to by the Commissioner in his ruling was work clearly "related" to CTS.
53. Simard states that:

This year, 2019, the ratio of CTS to non-CTA work is 40/60. In 2018, that ratio was approximately 45/55. Thus, at the very least the ratio should account for non-CTA work and there should be a recalculation of any CTA related rate shortfall for chassis moves in recognition of non-CTA work for chassis moves.
54. As not all movements of Simard chassis are related to CTS and given that Simard has now articulated a reasonable estimation of the proportion of CTS vs. non-CTS work performed by drivers, I will direct the auditor to assess Simard's ratio estimation and, if confirmed by the auditor, base the audit calculation on a percentage of the chassis movements which attract the Commissioner's hourly rate.
55. Simard disagrees with a number of calculations made by the auditor which it raises in Submission 2 (paragraphs 2 & 3). I have been advised that these calculations were based upon records provided by Simard including spreadsheets prepared by Simard. During the audit process, OBCCTC auditors review their calculations and methodology with licensees. In this case, the auditor spoke with Simard after she sent them her working papers and stated that the calculations were not finalized and that she would work with Simard on the template for outstanding pay calculations when Simard agreed to complete the calculations. Simard was not asked to pay out the drivers for the amount found outstanding until final calculations were prepared. Simard has elected to provide feedback through formal submission and so I will ask the auditor to review Simard's submissions with respect to the spot audit calculations, discuss them with Simard and arrive at an agreed upon calculation

method for the expanded company driver audit.

56. With respect to Simard's arguments (Submission 2, paragraphs 4 & 6) that the auditor did not consider the correct CTA overtime rate, I note that the OBCCTC does not use gross amounts, which could include overtime payments, when calculating whether or not a licensee has been paying the correct base rate.
57. Finally, I have confirmed with the auditor that Simard's argument in Submission 2, paragraph 5 is correct and the calculation methodology will be corrected.
58. As Simard has not calculated the amounts outstanding to all its company drivers who performed CTS between November 1, 2015 and November 30, 2019, I order Simard, pursuant to section 9 of the *Act* and consistent with the auditor's direction of November 27, 2019, to:
- Review, with the auditor, this decision and the audit working papers and deliver to the OBCCTC an electronic spreadsheet showing the calculation for each driver for the period and their respective pay amounts owing by no later than March 4, 2020; and
  - Adjust its pay structure and practices immediately so as to pay drivers in accordance with the *Act*.

The auditor will conduct a spot audit of Simard's calculations to confirm compliance and will submit a supplemental audit report to the OBCCTC. Once a final amount owing to drivers is determined, the auditor will require proof that payment of wages owing to drivers has been made by Simard.

59. 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.
60. In this case it has been determined that between April 3, 2014 and August 31, 2018, Simard failed to comply with the minimum remuneration requirements under the *Act* for I/Os. The audit findings indicate that over this period, Simard failed to pay its I/Os correct trip rates and split trips resulting in adjustments totaling \$33,596.02 owing to ten I/Os. Further, Simard did not pay its company drivers for all CTS work performed.
61. For these reasons, I have concluded that an administrative fine in the amount of \$2,000.00 is appropriate here. Simard is penalized for its trip splitting and not for its misclassification of CTS vs. non-CTS work. I recognize Simard's cooperation and historic findings of compliance and while I note that Simard was not quick to rectify its payroll issues nor was it expeditious in answering and responding to auditor queries, I understand the challenges in auditing a national company with a head office outside of Vancouver. The size of this fine is consistent with previous penalties of the Commissioner levied for trip splitting and other minor non-compliance.

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

- a. I propose to impose an administrative fine against Simard Westlink Inc. in the amount of \$2,000.00;
- b. Should it wish to do so, Simard Westlink Inc. has 7 days from receipt of this notice to provide the Commissioner with a written response setting out why the proposed penalty should not be imposed;
- c. If Simard Westlink Inc. provides a written response in accordance with the above, I will consider its response and I will provide notice to Simard Westlink Inc. of my decision to either:
  - i. Refrain from imposing any or all of the penalty; or
  - ii. Impose any or all of the proposed penalty.

63. This decision will be delivered to Simard Westlink Inc. and may be published on the Commissioner's website ([www.obcctc.ca](http://www.obcctc.ca)) after Simard Westlink Inc.'s response period had closed.

Dated at Vancouver, B.C., this 4<sup>th</sup> day of February, 2020.



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Michael Crawford, Commissioner