



February 24 2020

AMK Carrier Inc.  
12431 Horseshoe Way  
Richmond, BC V7A 4X6

**Commissioner's Decision**  
**AMK Carrier Inc. (CTC Decision No. 03/2020)**

Introduction

1. AMK Carrier Inc., ("AMK") 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 statutorily established rates. In particular, section 23(2) of the *Act* 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 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 also initiate an audit or investigation under section 31 whether or not a complaint has been received.

Complaint

3. In August of 2018, the Commissioner received a complaint alleging that AMK had not paid all the fuel surcharge amounts found to be owing by AMK in AMK Carrier Inc. (CTC Decision No. 14/2018) and had not been paying the fuel surcharge following this decision. The Complainant further alleged that during the period between December 2015 and June 2016, AMK had deducted a percentage from his pay without cause. The Complainant provided documents and one pay cheque to support his allegation.
4. It was also alleged that AMK was not paying the correct hourly rates and that AMK was requiring drivers to give 55% of their fuel surcharge payments back to the company in cash in exchange for more work. Those who did not agree, it was alleged, did not receive as much work as those who agreed.
5. The Complainant was interviewed by an Office of the BC Container Trucking Commissioner ("OBCCTC") investigator on September 26, 2018. The Complainant alleged that AMK had entered into an arrangement with three of its drivers whereby these drivers paid 55% of their fuel surcharge

payments back to the company in cash in exchange for preferential treatment (more work assignments resulting in higher pay). The Complainant alleged that five other AMK drivers, including himself, did not agree to this arrangement and therefore were not receiving as much work as the other three.

6. The Complainant stated that he was aware of the alleged cash back arrangement with the three drivers because it was “something the other drivers had discussed.” The Complainant stated that he had confronted AMK in the past regarding this arrangement and had been told by the dispatcher (“Jenny”) that AMK’s system was “fair” and that he was always welcome to quit if he didn’t like it.
7. The Complainant was not able to provide any documentation to corroborate this allegation and did not think he would be able to provide further evidence of the alleged scheme. The Complainant did provide the name of one other AMK driver whom he believed was experiencing similar issues at AMK. On November 24, 2018, the OBCCTC investigator interviewed this driver (“Complainant 2”) in an effort to corroborate the Complainant’s allegation.
8. Complainant 2 alleged that in June or July 2015 he was approached by the owner of AMK (“James”) who offered to provide more work in exchange for paying back 10% of his wages and fuel surcharge payments to AMK. Complainant 2 states that he refused and consequently he believes that he makes less money than other drivers at AMK. There is no record of this conversation. Complainant 2 states he had no further contact with James but had complained to Jenny about unfair work distribution. Jenny, he states, advised him that he could “always quit if he was unsatisfied.”
9. As there was no corroborating documentary evidence to suggest AMK was receiving cash back from some of its drivers in exchange for preferential treatment and no complaints from drivers who may have been giving cash back to AMK, no further investigative action was taken by the OBCCTC with respect to this issue.
10. However, an OBCCTC auditor was directed to audit AMK’s records to determine if AMK had brought itself into compliance following the previous audit and to audit the months of June 2018 and August 2018 (together, the “Initial Audit Period”) to determine compliance with the established rate and to determine the correctness of any deductions from driver pay.

#### Previous Audit

##### ***Company Drivers***

11. In the previous audit underlying AMK Carrier Inc. (CTC Decision No. 14/2018), AMK was found to not have paid the correct hourly rates and subsequently brought itself into compliance with respect to its company drivers effective September 2016. To confirm AMK’s ongoing compliance following the conclusion of the previous audit, the auditor requested and reviewed records for company drivers in October 2016. A review of these records indicated that AMK was paying its company drivers the required hourly rates in October 2016.

### ***I/Os***

12. AMK was also found in the previous audit to have not paid eight I/Os a fuel surcharge during the period between September 1, 2015 and December 31, 2017. These eight I/Os were collectively owed \$69,452.55 for the period. A subsequent self-audit by AMK found that the I/Os were owed a further \$11,241.34 in fuel surcharge payments for the period between January 1, 2018 and February 28, 2018 (including money owed to the Complainant).
13. To confirm that AMK's I/Os had received the cheques AMK claimed it issued after the last audit, the auditor sought copies of the cancelled cheques from AMK. In response, AMK advised the OBCCTC that one I/O had not received a cheque for the period between September 1, 2015 and December 31, 2017 (total owing \$8,384.42) and all eight I/Os had not received their cheques for the period between January 1, 2018 and February 28, 2018 (total owing \$16,797.84).
14. AMK stated that it did not know why the cheques were not issued but noted that there had been a change in ownership following the previous audit. AMK committed to paying the outstanding fuel surcharge payments owing by December 13, 2018.
15. AMK was also asked by the auditor to provide records demonstrating that its payroll practices had been rectified and that its I/Os were being paid the fuel surcharge in March and April 2018. Records for May 2018 were not requested as the auditor confirmed that a fuel surcharge had been paid for this period.
16. In response, AMK confirmed that it had also failed to pay a fuel surcharge in March 2018 and committed to adding the amounts owing to the other payments being made on December 13, 2018. The auditor reports that the total amount owing to eight I/Os for the period September 2015 to March 2018 was \$25,182.26 (including money owed to the Complainant). The auditor confirms that AMK made full payment to all eight I/Os on December 10, 2018.

### **Initial Audit Period**

17. Records for all drivers in the Initial Audit Period were requested on October 10, 2018 for delivery to the OBCCTC by no later than October 22, 2018. AMK did not supply all the requested records by the deadline (no time sheets for company drivers and I/Os were supplied). AMK then sought a one-week extension which was granted. AMK supplied some, but not all, records by the extended deadline (no I/O time sheets were supplied). AMK sought another extension which was not granted and AMK supplied the remaining records (I/O time sheets) that day.

### ***Company Drivers***

18. The auditor reviewed AMK's company driver records during the Initial Audit Period and determined that AMK did not pay its company drivers the correct hourly rate. Specifically, the auditor found that in June 2018, the gross pay amount for each driver reported on their pay stubs had been divided by the correct hourly rate to reach the number of reported hours worked. On the driver's time sheet, AMK had whited out the hours the driver had recorded and changed the hours reported to make the time sheets correspond to the pay stub.

19. This change resulted in records which appear to show that AMK's drivers were being paid the correct hourly rate when, in fact, the drivers were being paid the rate applicable prior to June of 2018 (\$26.28 per hour). The auditor determined that AMK owed two company drivers \$232.56 collectively for the June 2018 period. A review of AMK's company driver records for August 2018 indicated that AMK had changed its hourly rate and was paying its drivers correctly.

***I/Os***

20. AMK employed nine I/Os in the Initial Audit Period. The auditor reviewed AMK's records and found that in June 2018 and August 2018 there were a number of trips recorded on the driver's timesheets that were not recorded on AMK's electronic trip report and therefore not paid to the drivers.
21. AMK was asked to provide an explanation for these missing trips. AMK responded that their drivers aren't paid until the job is done and can be invoiced. Further, AMK did not provide sufficient evidence that these trips were actually paid in the subsequent month and, in fact, the auditor reports that AMK paid the missing trips to its drivers only after the auditor had brought the issue to AMK's attention.
22. Trip rates were reviewed to determine if AMK paid its drivers correctly. The auditor reports that during the Initial Audit Period, AMK did not pay the correct trip rate on all occasions. AMK was asked to provide an explanation for the incorrect rates. AMK was able to provide sufficient explanations for some of the incorrect trip rate payments but not all. The auditor determined that during the Initial Audit Period, AMK owed nine I/Os \$1,448.12 collectively.

**Expanded Audit Period**

23. Having established that AMK did not pay its company drivers the correct hourly rate and did not pay its I/Os for all trips or at the correct trip rates during the Initial Audit Period, the auditor expanded the scope of the audit to cover the period from March 1, 2018 to November 30, 2018 (the "Expanded Audit Period").

***Company Drivers***

24. The auditor reviewed AMK's records and concluded that during the Expanded Audit Period, AMK collectively owed two company drivers \$530.50 as a result of incorrect hourly payments in July 2018.

***I/Os***

25. Nine I/Os were found to be collectively owed \$3,506.13 (including money owed to the Complainant) during the Expanded Audit Period as a result of missing or incorrect trip rate payments.
26. AMK reviewed and confirmed the auditor's calculations and paid out all the required adjustment payments calculated to be owing and provided copies of records confirming that the adjustment payments were in fact made as represented.
27. The auditor reports that AMK has corrected its pay structure and is paying its company drivers and I/Os the correct rates.

### Auditor's Conclusion

28. The auditor concluded by noting that:

Throughout the audit, AMK did not provide the information and records requested on a timely basis. When records or information was requested an extension was always requested and records would arrive with missing documents. Information or explanations would be sent without adequate proof or there would be no explanations at all for questions that were asked. It wasn't until AMK was given an amount that they would have to pay their drivers that they would review the calculations in detail and adequately answer questions. These practices by AMK delayed the audit significantly.

### Initial Audit Report

29. An initial audit report, detailing the auditor's findings with respect to the Initial and Expanded Audit periods was shared with AMK on July 17, 2019. AMK responded to that audit report on July 24, 2019, providing explanations for the various findings in the audit report, noting remedies that AMK had put in place to correct past practices and assuming full responsibility for past record keeping and payroll practice errors. The following four issues were canvassed specifically in AMK's letter:

1. Failure to provide trip sheets for I/Os

AMK stated that its failure to provide trip sheets for I/Os upon request was the result of their Operations Manager not reading the request properly. In response, AMK demoted the Operations Manager and hired a replacement.

2. Alteration of June and July 2018 time sheet hours for company drivers

AMK stated that the alteration of the time sheets was done independently by the since demoted Operations Manager.

3. Missing trips and incorrect trip rate payments for I/Os

AMK explained that the business practices and requirements of certain customers resulted in delays and, as a result, drivers would not always get paid until the full transaction was invoiced to the customer (despite the auditor's report that AMK paid the missing trips to its drivers only after the auditor had brought the issue to AMK's attention). With respect to incorrect trip rate payments, AMK explained that these resulted from instances where drivers were selecting and performing different trips (due to delays at the location a driver was dispatched to) but the original trip remained on the trip sheet. AMK stated that they have altered their dispatch practices to rectify the problem.

4. Delays in providing records and proof of payment

AMK states that its operational software was not linked to its accounting and payroll software requiring complicated and laborious processes to meet the OBCCTC's deadlines. AMK states that effective May 2019 a new, customized software system has been implemented.



### Deductions

30. The initial audit report did not address the Complainant's allegation that AMK had deducted a percentage from his pay without cause between December 2015 and June 2016. As such, the Deputy Commissioner wrote to AMK on August 21, 2019 and advised AMK that the audit would not be concluded until such time as the auditor had reviewed records for all AMK drivers between December 1, 2015 and June 30, 2016.
31. AMK was required to deliver to the OBCCTC by no later than September 20, 2019 records for each I/O that worked from AMK between December 2015 and June 2016. Once again, AMK missed the September 20, 2019 deadline and eventually supplied all the records requested on October 25, 2019.

### ***Company Drivers***

32. The auditor reviewed AMK's company driver records for the period. No improper deductions or discrepancies were noted.

### ***I/Os***

33. AMK provided summaries of payment discrepancies (differences between the trip summary totals and cancelled cheques) for all I/Os in the period and explained that the discrepancies were the result of slow work periods where the drivers had agreed to take a deduction in their pay in exchange for more work.<sup>1</sup>
34. AMK acknowledged that this was non-compliant and performed their own calculations to determine how much they owed their I/Os. The auditor compared the trip summaries to the cancelled cheques for each I/O and then matched the discrepancies with the amounts that AMK had reported. No discrepancies were noted.
35. AMK also provided the auditor with records for November 2015 to demonstrate that the improper deductions had started in December 2015. The auditor confirms that the trip summaries for November 2015 matched the cancelled cheques for each I/O. Further, the trip summaries for June 2016 matched the cancelled cheques for each driver, demonstrating that the improper deductions ended in June 2016.
36. Nine I/Os were found to be collectively owed \$16,368.17 (including money owed to the Complainant) as a result of incorrect deductions. AMK reviewed and confirmed the auditor's calculations and paid out all the required adjustment payments calculated to be owing and provided copies of records confirming that the adjustment payments were in fact made as represented.

### Final Audit Report

37. A final audit report comprised of the initial audit report findings and the auditor's I/O deductions audit findings was supplied to AMK for response on January 20, 2020. AMK was given one week to respond. AMK retained legal counsel who sought an extension, which was granted. AMK was given

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<sup>1</sup> Note: these deductions were not related to the Complainant's allegation that AMK was requiring drivers to give 55% of their fuel surcharge payments back to the company in cash in exchange for more work.

until February 5, 2020 to respond. AMK met the deadline.

38. AMK's legal counsel does not dispute the Audit Report findings.
39. AMK's legal counsel begins the submission by stating that the OBCCTC auditor assessed AMK a \$10,000.00 penalty in the initial audit report for non-compliance which was not changed in the final audit report.
40. This is not the case. Auditors do not assess penalties nor are penalties referenced in audit reports. It would appear that AMK's legal counsel has confused the findings in AMK Carrier Inc. (CTC Decision No. 14/2018) and the imposition of a \$10,000.00 penalty (which was paid by AMK) in that case with the current audit, the results of which are the subject of the auditor's initial and final audit reports.
41. AMK's legal counsel then summarizes the findings of the current audit and argues that the \$10,000.00 penalty ought not to have been imposed (which it wasn't) on the basis that section 34(1) of the *Act* restricts the Commissioner to issuing penalties within 6 months after becoming aware of the licensee's failure to comply and that in this case, the Commissioner was aware of AMK's non-compliance for over 6 months (since May 16, 2019).
42. AMK then states that in the event the Commissioner disagrees with its interpretation of section 34(1) of the *Act*, the Commissioner should consider AMK's conduct in rectifying issues when identified by the auditor, paying drivers as required by the auditor, complying with auditor deadlines to the best of its ability and its admitting responsibility for its non-compliance.
43. AMK also argues that the proposed penalty (which hasn't been proposed) is disproportionate to the severity of AMK's conduct and raises concerns that the issuance of a penalty will impact AMK's ability to obtain a future licence under the Commissioner's proposed licence reform plan.

#### Decision

44. As described above, the circumstances of this case are:
  - a. The Commissioner ordered an investigation into an alleged fuel surcharge cash back scheme at AMK. The investigation was not pursued on the basis that there was no reasonable prospect that the complaint would succeed;
  - b. The Commissioner ordered an audit of AMK's company drivers and I/Os which disclosed the following:
    - AMK failed to pay all monies found to be owing to its drivers during a previous audit;
    - AMK did not pay a fuel surcharge to its I/Os in March 2018;
    - AMK failed to pay two company drivers \$530.50 collectively between March 1, 2018 and November 30, 2018 as a result of incorrect hourly payments;
    - AMK failed to pay nine I/Os \$3,506.13 collectively between March 1, 2018 and November 30, 2018 as a result of missing or incorrect trip rate payments;

- AMK falsified June 2018 records supplied to the OBCCTC; and
  - Between December 2015 and June 2016, AMK deducted pay from I/Os during slow work periods pay in exchange for more work. AMK owed nine I/Os \$16,368.17 during the period.
- c. AMK did not provide information and records requested by the OBCCTC on a timely basis;
- d. AMK has accepted the audit results and has paid the amounts determined to be owing; and
- e. AMK has reviewed the auditor's findings and report and has provided responses to the OBCCTC for consideration.
45. As AMK has paid the amounts owing to its drivers there is no need to issue an order pursuant to section 9 of the *Act* requiring the company to pay its drivers in compliance with the legislation.
46. I have considered the auditor's report and AMK's submissions (provided on July 24, 2019 and February 5, 2020) and for the reasons set out below, I find AMK in violation of the *Act*, Commissioner's Rate Order and the Licence.
47. Throughout the audit, AMK has taken full responsibility for its non-compliant behavior and the actions of its employees. The CEO, James Xu, wrote to the OBCCTC on several occasions during the audit outlining actions that AMK had taken in response to the auditors' findings. These included payment of fuel surcharge back pay to I/Os owed from a previous audit as well as payment of all other money found to be owing and corrections to the company's payroll and dispatch systems and employee practices.
48. In outlining actions taken, Mr. Xu stated that part of the reason for the company's difficulties was the actions of past owners and staff of the company. I recognize AMK's efforts and while it is important that licensees accept and take action to rectify non-compliance, the OBCCTC considers the actions of licensees not the owners and employees of a company under licence when assessing penalties. In Hutchison Cargo Terminal Inc. (CTC Decision No. 27/2018) – Decision Notice I stated that:
- A company is its own person. A licensed company must comply with the terms and conditions of the Licence, *Act* and *Regulation* and may be penalized if it does not. This is regardless of who owned or managed the company under licence during the period under audit. The penalty is directed at the company.
49. Further, Mr. Xu was a director of AMK prior to his taking control of the company. Mr. Xu should have been aware that AMK had not satisfied the requirements of its previous audit (by paying the fuel surcharge owing to its I/Os) when he sought approval for a change in control of AMK's licence as it is a criteria of a change in control application that the applicant state whether or not the licensee or proposed beneficial owner or directing mind has any history of non-compliance in the industry.
50. It is also unlikely that Mr. Xu, as a director of AMK, was not aware of AMK's historic business practices with respect to compliance with the *Act*. Upon assuming control of AMK, Mr. Xu did not take action to become aware of or rectify these practices until a driver complaint was lodged and an OBCCTC audit commenced.



51. Of particular concern here is AMK's deductions in driver pay in exchange for more work and its altering of records to demonstrate compliance. The legislation and regulatory regime, including the available penalties under the *Act*, were introduced in order to prevent rate undercutting and its concealment.
52. AMK's missing trip payments have been explained as simply the result of the business practices and requirements of certain customers. This is not a satisfactory explanation. Previous decisions have established that drivers are entitled to be paid all monies owed to them within the legislated time frames set out in section 24 of the *Regulation* regardless of when a licensee is paid by a customer for container trucking services.<sup>2</sup> Further, the auditor reports that AMK did not provide sufficient evidence that the missing trip payments were actually paid in subsequent months, noting that the payments were only made after the auditor brought them to AMK's attention.
53. AMK explains that its operational software was not linked to its accounting and payroll software and, as such, it was difficult to meet the OBCCTC's audit deadlines. AMK's legal counsel argues that AMK's failure to meet deadlines was justifiable, particularly given that the audit was conducted during business hours.
54. I recognize that the audit process can, at times, be demanding of a licensee's time. It is also true that the OBCCTC audits can expose inadequacies in a licensee's payroll and dispatch systems and it is inadequacies such as these which brought about section 25 of the *Act* and the record keeping requirements of the Licence. The importance of proper record keeping (including supporting systems) has been canvassed extensively in past decisions.<sup>3</sup>
55. The OBCCTC has also encountered instances where licensees have intentionally delayed the audit process in order to mitigate potential damages. While I am not prepared to find that AMK intentionally delayed the audit process for its benefit, I note that its legal counsel has argued that a penalty should not be assessed in this case on the basis that section 34(1) of the *Act* restricts the Commissioner to issuing penalties within 6 months after becoming aware of the licensee's failure to comply and that in this case, the Commissioner was aware of AMK's non-compliance for over 6 months (since May 16, 2019). Were I to agree with this argument, which I do not, AMK's failure to meet deadlines would be of particular benefit to it.
56. Section 34(1) of the *Act* is worded as such to give licensees some assurance that they will not have to wait indefinitely for the Commissioner to take action. However, the six-month provision in section 34(1) is not intended to be a tool used to avoid penalization. A Commissioner only becomes aware of a licensee's failure to comply after he/she has reviewed all applicable audit and investigative reports, reviewed the licensee's submission/response to them, and come to his/her conclusions as to whether there has been a failure to comply.

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<sup>2</sup> See for example Roadstar Transport Company Ltd. (CTC Decision No. 1/2019), paragraph 29.

<sup>3</sup> A licensee's requirement to keep and maintain proper records under Appendix D to Schedule 1 of the Container Trucking Services Licence was addressed in Hutchison Cargo Terminal Inc. (CTC Decision No. 27/2018), Olympia Transportation (CTC Decision No. 02/2016), MDW Express Transport Ltd. (CTC Decision No. 01/2017), and an August 10, 2016 OBCCTC Record Keeping Requirements Bulletin.

57. In this case, the first audit report was drafted on May 16, 2019 and sent to AMK for response on July 17, 2019. AMK was then notified on August 22, 2019 that the audit was not complete, and that Commissioners are not required to accept an auditor's conclusions. On January 20, 2020, AMK was sent a revised audit report for response. A response was received on February 5, 2020 and this decision has issued well within six months of this date.
58. 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.
59. 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.
60. AMK failed to comply with the *Act*, *Regulation*, and Licence when it did not bring itself into compliance following a previous audit, pay its drivers the correct rates and fuel surcharge (including making improper pay deductions) and keep records pursuant to the Licence. AMK also deliberately altered records.
61. AMK was found to be owing \$25,182.26 to eight I/Os in unpaid fuel surcharge which was found to be owing in the previous audit, demonstrating that AMK did not rectify its non-compliant practices following its first audit. AMK owed an additional \$4,036.63 to its I/Os and company drivers for other instances of non-compliant rate payment identified in this audit. Further, and of particular concern, was the additional \$16,368.17 which the auditor determined (and AMK confirmed) was deducted from I/Os in exchange for more work.
62. For these reasons, I have concluded that an administrative fine is appropriate here. Regarding the size of the proposed fine, I have decided that an administrative penalty of \$50,000.00 is appropriate. In Roadstar Transport Company Ltd. (CTC Decision No. 20/2018), a \$50,000.00 penalty was proposed, in part for the falsification of records. In Canaan Shipping Company Ltd. (CTC Decision No. 03/2019) a \$20,000.00 penalty was proposed, in part for non-compliant deductions from driver pay. However, in that case, the deductions were not done in exchange for preferential treatment as was the case here. Finally, I note that this is AMK's second audit and the size of the proposed penalty also reflects AMK's failure to rectify its non-compliant practices following its first audit.
63. In addition, I note that audits and decisions are part of a licensee's record of conduct and compliance with the *Act*, *Container Trucking Regulation* and Container Trucking Services Licence regardless whether or not any penalty is levied. In any event, under the Commissioner's proposed licence reform program, a licensee's compliance history would be considered when assessing truck tag applications, not licence applications.

64. 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 AMK Carrier Inc. in the amount of \$50,000.00;
- b. Should it wish to do so, AMK Carrier 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 AMK Carrier Inc. provides a written response in accordance with the above, I will consider its response, and I will provide notice to AMK Carrier 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.

65. This decision will be delivered to AMK Carrier Inc. and may be published on the Commissioner's website ([www.obcctc.ca](http://www.obcctc.ca)) after AMK Carrier Inc.'s response period has closed.

Dated at Vancouver, B.C., this 24<sup>th</sup> day of February, 2020.



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Michael Crawford, Commissioner