March 19, 2021

Gulzar Transport Inc.
Unit # 7 – 8760 River Road
Delta, BC V4B 1B5

Jet Speed Transport Ltd.
Unit # 7 – 8760 River Road
Delta, BC V4B 1B5

Commissioner's Decision
Gulzar Transport Inc. and Jet Speed Transport Ltd. (CTC Decision No. 02/2021) (Reconsideration of CTC Decision No. 12/2019)

I. Introduction

1. On January 14, 2020, a judicial review before the Supreme Court of British Columbia respecting the decision set out in Gulzar Transport Inc. and Jet Speed Transport Ltd. (CTC Decision No. 06/2020) to cancel Gulzar Transport Inc. & Jet Speed Transport Ltd.'s (the "Companies") 2018 Container Trucking Services ("CTS") Licences was concluded by Consent Order. The decision was remitted back to me for reconsideration by consent on the basis that the decision to cancel the Companies licences had become moot after the term of the licences had expired.

2. In Gulzar Transport Inc. and Jet Speed Transport Ltd. (CTC Decision No. 12/2019) (the "Original Decision"), I determined that the Companies had failed to comply with the *Container Trucking Act* (the "*Act*"), the *Container Trucking Regulation* (the "*Regulation*"), and the CTS Licence (the "Licence"). The Companies were found to have engaged in deliberate deception in order to appear compliant with minimum rate requirements based upon their payment of hourly rates to company drivers when, in fact, the Companies had misclassified drivers and were using a covert three-pay cheque system, combined with deliberately misleading record keeping practices, to pay less than minimum rates.

3. When the Office of the BC Container Trucking Commissioner ("OBBCTC") began its audit of the Companies in the summer of 2018, the Companies appeared, based on the materials they had provided, to be paying the regulated rates. It was only after the OBCCTC seized records that the Companies had not disclosed to the auditor that the OBCCTC understood that the Companies were manipulating their accounting. The Companies were found to have been using a three-pay cheque system between December 2017 and November 2018 (when the Companies stopped using the three-pay cheque system after being discovered).

4. The OBCCTC made three supplementary information and record requests to the Companies following the record seizure. In each case, the Companies were unable or unwilling to answer all OBCCTC questions and/or provide all information requested. Using the records that were available, the auditor was able to determine that thirteen (13) I/Os were owed a total of $96,879.49 in missing trip payments, incorrect trip rate payments and missing or incorrect fuel surcharge payments for the period between February 2017 and November 2018.

5. Determining the nature and the extent of the Companies' non-compliance was made particularly challenging by the Companies' record keeping practices. The auditor encountered missing records, duplicate log books and timesheets, and payroll reconciliation documents that did not match pay slips. There were handwritten notes on many of the records which appeared to indicate that some method of calculating trip rates but paying hourly rates was being employed.

6. The auditor also determined that the Companies had not correctly paid their company drivers, noting that the company driver records seized by the investigators were inconsistent. Specifically, the drivers' timesheets included total hours, trips rates, or a combination of both, and they were difficult to reconcile with the drivers' pay stubs.

7. Ultimately, in October 2019 I ordered the Companies to calculate money owing to company drivers. The Companies did not comply with the order. As such, other means had to be found to assess the amount of money owing to the company drivers. The OBCCTC auditor calculated the monies owing used an alternate method of calculation based upon the available records only and estimated that Gulzar owed 30 company drivers collectively $125,000.00 per year for the period between April 2014 and April 2019 for a total amount owing of $625,000.00, and that Jet Speed owed 21 company drivers collectively $87,500.00 per year for the period between April 2014 and April 2019 for a total amount owing of $437,500.00.

8. I proposed to cancel the Companies' licenses, and the Companies were given time to make submissions setting out why the proposed penalty should not be imposed. After carefully considering the Companies' submissions, I remained of the opinion that the licences should be cancelled. My reasons were set out in Gulzar Transport Inc. and Jet Speed Transport Ltd. (CTC Decision No. 12/2019) – Decision Notice (the "Decision Notice"), where the licence cancellations were ordered. Specifically, I noted that:

   > My findings that the Companies intentionally misclassified drivers and used a three-pay cheque system to pay non-compliant rates are central to, and have the most bearing on, the audit results and the proposed penalty. To date, no other company found to have not paid compliant rates has also been found to have employed improper accounting and record keeping practices designed to falsely demonstrate compliance and deceive the OBCCTC.
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   > …the effectiveness of OBCCTC audits increase when licensees cooperate with auditors and follow their direction in a timely manner. This is also considered when assessing penalties. In this case, the Companies did not follow the direction of the auditor or the order of the Commissioner. The audit timeline was therefore unduly extended, and drivers remain unpaid because of the Companies' failure to follow the auditor's direction and correctly calculate money owing.
   >
   > …the Companies' record keeping practices were such that the OBCCTC auditor was not able to determine with certainty the amount owed to each driver and was required to use a methodology based upon the available records to estimate amounts owing. The Companies, in response to the proposed cancellation of their licences, have now calculated driver hours in 2017 through 2019 and used the 2017 calculation to estimate specific amounts owing in 2014, 2015 and 2016 to sixty-seven drivers. This methodology was not approved by the OBCCTC, but it does result in a calculation of specific amounts owed to drivers. Given the OBCCTC's

> challenges in determining exact amounts owing to each driver using available records, I will base my order on the Companies' calculations so that that the drivers will each be, at a minimum, awarded some compensation. This is necessary because the Companies' failure to keep proper records has impacted my ability to make an accurate award.[1]

9. The Companies were ordered to immediately pay the total amount calculated by the Companies as owing to the sixty-seven drivers identified in the Companies' calculations for the period from 2014 to 2019 ($262,944.12 between both Companies) and provide proof to the auditor that payment of the money has been made to each driver.

10. The Companies applied for reconsideration of the Decision Notice and in Gulzar Transport Inc. and Jet Speed Transport Ltd. (CTC Decision No. 06/2020) (the "2020 Reconsideration Decision") the Companies' application for reconsideration was dismissed and the licence cancellation penalties imposed. My reasons were set out in the 2020 Reconsideration Decision, issued May 21, 2020. Specifically, I stated that:

> …the gravamen of the decision to cancel the Companies' licences are the particular facts and circumstances of the case, namely the Companies' deliberate deception intended to hide a number of non-compliant activities, foremost of which was their non-compliant rate payments.

11. The Companies' licences were ordered cancelled but not until two (2) weeks after the date on which the last extension of the declaration of a state of emergency made March 18, 2020 under section 9(1) of the *Emergency Program Act* expired or was cancelled. This was in recognition of the fact that the Government of British Columbia considers trucking to be an essential service and the cancellation of the Companies' licences during the state of emergency, at least at the beginning of the Covid-19 pandemic, could have negatively impacted container trucking services in the Lower Mainland.

12. As set out above, the Companies applied for a stay of the licence cancellation order pending their judicial review of the 2020 Reconsideration Decision. Because the provincial state of emergency had not yet expired, and because of the court-ordered stay of the 2020 Reconsideration Decision, the licences were not cancelled before they expired on November 30, 2020. As the decision to cancel the Companies' licences appeared to have become moot, I agreed to have the 2020 Reconsideration Decision remitted back to me for reconsideration.

13. On January 28, 2021, I wrote to the Companies and provided them an opportunity to make additional submissions before issuing this reconsideration decision. The Companies confirmed that they continued to rely on their previous submissions and evidence, and provided additional submissions on penalty, as set out below.

II. Decision

14. As set out above, the continuing Covid-19 state of emergency and the court-ordered stay meant that the Companies' 2018 licences expired before the licence cancellation order came into effect. The decision to cancel the Companies' 2018 licences has been set aside by consent on account of

[1] Decision Notice page 10.

mootness. The 2018 licences no longer exist, with the result that neither cancellation nor suspension of the 2018 licences are available penalties in this case.

15. The nature and severity of the Companies' non-compliance is not in dispute. The Companies do not dispute my findings in this regard, and they did not ask the BC Supreme Court to consider them on judicial review. However, as a result of special circumstances, including the Covid-19 pandemic, the Companies have not been sanctioned for their non-compliance. As licence cancellation and suspension are no longer available penalties, I am obliged to consider an appropriate financial penalty.

16. The Companies submit that a financial penalty of $65,000.00 is appropriate in the circumstances because it would be proportionate to the findings of non-compliance, consistent with other penalties levied in what they characterize as similar circumstances, and would account for the Companies' "rehabilitation efforts and accomplishments." The Companies also ask that I consider the legal fees they have incurred in assessing an appropriate penalty.

17. I do not accept that a penalty in the amount proposed by the Companies would be appropriate. I believe the maximum penalty available under the *Act* ($500,000.00) is appropriate.

Proportionality

18. The Companies cite two BC Court of Appeal cases, noting that the Court of Appeal has "established a clear duty on the part of administrative decision makers to apply principles of proportionality in making penalty decisions."[2] In *Davis*, the Court of Appeal noted that proportionality requires consideration of things such as the individual circumstances of the offenders, the harms suffered (here, by the drivers), as well as the degree by which the offenders were enriched.

19. Several considerations are relevant when assessing the Companies' individual circumstances, some of which are addressed under other subheadings in this decision. Others include the Companies' previous history of non-compliance, the duration of the non-compliance, the systematic and deliberately deceptive nature of the underpayments and manipulation of accounting, the Companies' falsification of two statutory declarations attesting that they had not engaged in any activity prohibited by the *Act*, their lack of cooperation during the audit, their pre-emptive and unapproved self-audits, and their refusal to comply with an order of the Commissioner.

20. The degree to which the Companies' drivers were financially harmed was never properly established because of the Companies' conduct, including their failure to maintain accurate records. It is clear, however, that the Companies' actions, including their refusal to comply with an OBCCTC order and their failure to keep comprehensive and accurate records meant that the employee drivers received less money than they were entitled to receive, to the benefit of the Companies. Ultimately, the Companies' employee drivers received $262,944.12 between them, for the period between 2014 and 2019. As I have already said, this was an amount calculated by the Companies themselves based on a method that was not approved by the OBCCTC auditor. The OBCCTC auditor estimated, based on averages taken from the records that the OBCCTC was able to obtain, that the Companies' employee drivers were owed an amount in the range of $1,159,379.49 in unpaid remuneration for

[2] *Davis v. British Columbia (Securities Commission)*, 2018 BCCA 149 & *Cooper v. British Columbia (Liquor Control and Licensing Branch)*, 2017 BCCA 451.

the same time period. The maximum penalty of $500,000.00 is still considerably smaller than the amount by which the Companies appear to have been enriched.

21. These considerations were all taken into account when I decided to cancel the Companies' licences. Ultimately, I determined that licence cancellation, the harshest penalty available under the *Act*, was appropriate and consistent with the objectives of the *Act*, the need to denounce the Companies' particularly egregious conduct, and the need for both specific and general deterrence. All these considerations remain relevant.

22. The Companies suggest that a $65,000.00 penalty, as the highest levied to date, would be commensurate with the seriousness of their misconduct. I have already determined that their conduct warrants the imposition of the most severe penalty available (licence cancellation). The facts underpinning the previous decisions have not changed. Nor have my reasons for imposing the licence cancellations, despite the unique circumstances that have resulted in the decisions being remitted back to me for reconsideration. Licence cancellation is no longer an available penalty. Nor is licence suspension. Accordingly, the appropriate fine in this case is the maximum available.

23. The Court of Appeal in *Davis* notes that the full range of possible penalties should be considered and the harshest of penalties should be reserved for circumstances where lesser measures would be inadequate to protect the public interest.[3] The *Act* includes significant penalties (cancellation, suspension, large fines) because of the impacts non-compliant activity has on the public interest. The public interest will only be served once there is labour stability in the sector, which cannot occur so long as licensees engage in the very serious kinds of non-compliant activities at issue here. The Companies' conduct must be denounced in the strongest possible terms and I do not believe that any financial penalty less than the maximum allowed under the *Act* would deter the Companies, or other licensees, from similar non-compliant activity.

Parity

24. It is the Companies' position that a "penalty should be similar to penalties imposed on similar offenders for similar conduct in similar circumstances." The Companies cite three other decisions which they suggest are similar to the circumstances here and argue that the penalty here should therefore be commensurate with the penalties levied in those cases.

25. The decisions cited by the Companies are relevant only in so far as they were issued to CTS Licence holders and concerned violations of the *Act*, *Regulation* and CTS Licence. The Companies are simply wrong to suggest that the systematic and deliberate deception they were engaged in, along with their subsequent conduct during the course of the audit, bears any resemblance to the other decisions they cite such that a similar penalty would be appropriate in this case.

26. In making these comparisons, the Companies omit particular facts surrounding their actions -- specifically, that they failed to demonstrate to the auditor that they corrected their payroll practices, were in violation of an OBCCTC order, conducted pre-emptive and unapproved self-audits and issued driver payments impacting my ability to make an accurate award. They also fail to mention that they only demonstrated a willingness to ensure that the violations noted in the

[3] *Davis v. British Columbia (Securities Commission),* 2018 BCCA 149, paras. 77-87.

Original Decision were addressed on an ongoing basis once they were caught and a licence cancellation penalty proposed.

27. Penalties imposed by the Commissioner should in most cases be relatively consistent ***where the circumstances of a case are the same***. The circumstances in this case are not the same as those in any other Container Trucking Commissioner decision to date, including the decisions cited by the Companies in their submission on this reconsideration.

28. In the Decision Notice, I discussed the "Roadstar" decision (CTC Decision No. 20/2018) and noted that the Companies' conduct here was very different from, and far more egregious than, Roadstar's conduct. Roadstar altered copies of four cancelled cheques on one occasion during an audit. Roadstar did so to make it appear as if it had paid money to drivers within the time period set out in section 24(2) of the *Regulation*. There is a distinction between not paying drivers on time (but paying accurate rates) and attempting to cover up late payments when audited, as was the case in Roadstar, and not paying drivers the correct rates over a period of many years and consistently and deliberately falsifying records in anticipation of being audited, as was the case here.[4] I also note that Roadstar's licence was ultimately cancelled as a result of further contraventions.[5]

29. The findings of non-compliance in Gantry Trucking Ltd. & TSD Holdings Inc. (CTC Decision No. 14/2017) were also discussed in the Decision Notice where I outlined the differences between the two cases and noted that the circumstances in that case did not compare to those in this case.[6] The Companies now cite a different but related "Gantry Trucking" decision (CTC Decision No. 08/2018) where the licensees further argued that the penalty imposed was unfair and represented punishment for the licensees' decision to pursue a legal remedy.

30. One of the fundamental differences between the circumstances in Gantry Trucking Ltd. & TSD Holdings Inc. and those here is the nature of the non-compliance. Gantry Trucking Ltd. & TSD Holdings Inc. did not pay the correct rates and took issue with the requirement to make retroactive rate payments; however, they did not construct and keep secret from the OBCCTC an elaborate method of bookkeeping for the purpose of paying non-compliant rates. It was clear to the auditor from the onset of the audit that Gantry Trucking Ltd. & TSD Holdings Inc. were not paying the correct rates. In other words, no subterfuge was involved.

31. In the Sandhar Trucking decision (CTC Decision No. 28/2018), the licensee demanded that a driver give cash back after paying the driver money the OBCCTC determined was owing. While egregious, the licensee's conduct occurred only once and involved only one driver. No pattern of behaviour was established. In the present case, the Companies' actions were systematic, involved many drivers and a considerable amount of money, and occurred over an extended period of time.

32. There is no parity between the circumstances of this decision and other OBCCTC decisions. This is the first OBCCTC audit with findings of this nature and severity. To date, no other company found to be undercompensating its drivers has also employed improper accounting and record keeping practices designed to falsely demonstrate compliance and deceive the OBCCTC.[7] Nor has any other

[4] Decision Notice page 4.
[5] Roadstar Transport Company Ltd. (CTC Decision No. 01/2019).
[6] Decision Notice page 5.
[7] Decision Notice page 10.

company been found to have engaged in this type of misconduct over such an extended period of time. The Companies' conduct was systematic, consistent, deliberate and deceptive, and my assessment is based upon the facts that are well-established and undisputed in this case.

33. The Companies' conduct represents the worst possible factual scenario underlying a finding of non-compliance with the regulatory regime under the *Act* to date. The harshest penalty available is necessary to denounce the severity of the Companies' misconduct.

Rehabilitation and Deterrence

34. The Companies argue that a relatively small financial penalty of $65,000 (small compared to the maximum available penalty) is appropriate because they have rehabilitated themselves and are remorseful. In making this argument, the Companies misunderstand my response to a request for a meeting with the principals of the Companies to suggest that I am of the view that the Companies are completely rehabilitated such that there is no longer a concern that they will reoffend, when I am not.

35. In the 2020 Reconsideration Decision, I considered whether the results of the payroll compliance audit sufficiently demonstrated that the Companies had been rehabilitated. I found that "the Companies only demonstrated a willingness to work with the Commissioner to ensure that the violations noted in the Original Decision were addressed on an ongoing basis once they were caught and a licence cancellation penalty proposed."[8] I remain of the opinion that the Companies' responses were largely self-serving. I also noted in the 2020 Reconsideration Decision that the manner in which the Companies acknowledged their non-compliance did not suggest that they had in fact been rehabilitated. Instead, their understated characterization of their non-compliance ("mistakes were made") suggested that the Companies were continuing to attempt to mitigate the effects of the audit and resulting penalty rather than take responsibility for their actions.[9]

36. The Companies cite their rehabilitation efforts as demonstrative of the absence of any need for specific deterrence. However, I do not accept that the Companies have rehabilitated themselves such that a significant penalty is unwarranted. Rehabilitation is, in any event, only one consideration. I previously concluded that the Companies' rehabilitation efforts do "not outweigh their previous unwillingness to cooperate, their pre-emptive and unapproved self-audits and payments, or the fact that drivers may have received less money than they were entitled to receive based on those unapproved self-audits, to the financial benefit of the Companies."[10] The Companies' most recent submissions have not changed my mind.

37. The Companies also suggest that I ought to heed the BC Court of Appeal's warning that "the pursuit of general deterrence does not warrant imposing a crushing or unfit sanction."[11] While the potential effect of a licence cancellation on the Companies' businesses was not clear, I do not believe that licence cancellation was an "unfit sanction" given the nature and severity of the misconduct.[12] These are the worst set of facts encountered to date under this regulatory regime.

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[8] 2020 Reconsideration Decision, para. 32ff.
[9] 2020 Reconsideration Decision, para. 37.
[10] 2020 Reconsideration Decision, para. 36; Original Decision, paragraph 105; and Decision Notice, page 11.
[11] Davis v. British Columbia (Securities Commission), 2018 BCCA 149, para. 80.
[12] Decision Notice, page 4.

The Companies' conduct was not an accident -- it was wilful. The Companies did not breach the *Act* on one occasion -- their underpayment was consistent and systematic.

38. Additionally, the Companies' under-compensation of their drivers over time, and their conduct during the course of the audit (their intentionally withholding records from the OBCCTC, refusal to calculate amounts owing based on the OBCCTC methodology, inadequate record keeping, and pre-emptive payments to drivers), both resulted in their enrichment at the expense of their drivers (I/Os and company drivers). On the OBCCTC's assessment, based on averages extracted from the Companies' documents that the auditor was able to review, the Companies' employee drivers were owed $1,159,379.49 in unpaid remuneration. The Companies have issued payment to their company drivers based on their own calculations in the amount of $262,944.12. This represents an estimated difference of $896,435.37, significantly more than the maximum $500,000.00 penalty. A $500,000 penalty in these circumstances is not "crushing" or "unfit."

39. In addition to the approximate amount by which the Companies have been enriched, their size is also an important factor to consider. The Companies are collectively the 7th largest licensee, with 68 truck tags assigned to their licences and securities in the combined amount of one million dollars. Given the scale of their operations and the severity of the findings of non-compliance, any fine less than the maximum available under the *Act* is likely to become a cost of doing business and unlikely to deter either of these Companies or other licensees from similar non-compliant activity. The Companies have made a series of submissions upon which they continue to rely, but at no point have they submitted, or established, that they cannot afford a substantial penalty. The Companies have also cited the principle that an offender's ability to pay should be considered, but, again, have not asserted or established that they cannot pay a significant fine.

40. The Companies suggest that the licence cancellation decisions are now "notorious in the drayage industry" and therefore the goal of general deterrence has been achieved but the Companies do not provide any evidence to suggest that the decisions' notoriety has resulted in increased compliance across the sector. Rather, they suggest that a $65,000.00 financial penalty sends a clear message to the industry that non-compliance will be costly. As set out above, I do not consider a $65,000.00 financial penalty to be costly for licensees of this size.

41. I remain of the opinion that my decision to cancel the Companies' 2018 licences was appropriate and therefore any financial penalty levied in this case must be as akin to licence cancellation as possible. It must reflect the severity of the misconduct and be sufficiently high to deter both these Companies, and others, from similar misconduct. This amount is the highest available financial penalty under the *Act*. For these reasons, I have determined that a financial penalty in the amount of $500,000.00 is appropriate.

Relevance of legal fees

42. The Companies argue that I should consider the $84,405.30 in legal fees they have incurred in their application for judicial review resulting in the remittal of the 2020 Reconsideration Decision in determining the size of the penalty. They submit that their legal fees ought not to have been necessary to avoid licence cancellation. I disagree. Their legal costs were incurred as a result of their non-compliant activity and their own decision-making in the circumstances. In any event, legal fees have not been considered by any Commissioner to date, and the Companies have not

supported their suggestion that their legal fees are relevant with any authority from the courts or another administrative decision-making body.

43. The *Act* empowers the OBCCTC to impose administrative penalties for non-compliance in order to achieve the *Act's* overall objective of labour stability in the drayage industry. Considering legal costs when assessing a penalty would not, in my opinion, be consistent with the object of the *Act*, in part because it could incentivize legal challenges to administrative penalties. Additionally, a financial penalty will not have the necessary deterrent effect if it can be reduced in consideration of legal fees incurred in response to findings of non-compliance. It would also complicate a decision-maker's ability to penalize similar offenders similarly if comparable fines for comparable breaches could be adjusted in light of any legal fees incurred. I will not consider legal fees incurred by licensees when determining an appropriate penalty quantum.

III. Conclusion

44. Having carefully reconsidered Gulzar Transport Inc. and Jet Speed Transport Ltd. (CTC Decision No. 06/2020) and for the reasons outlined above, and in my Original Decision, Decision Notice and 2020 Reconsideration Decision, I have decided to impose a financial penalty in the amount of $500,000.00 for the reasons set out above.

45. Section 35(2) of the Act requires that fines be paid within 30 days. Gulzar Transport Inc. and Jet Speed Transport Inc. are required to pay the penalty no later than 30 days from the date of this decision.

This order and reconsideration will be published on the Commissioner's website.

Dated at Vancouver, B.C., this 19th day of March, 2021.

Michael Crawford, Commissioner