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Our file 009770.002

Workplace Law  
& Advocacy

Attention: Office of the BC Container Trucking Commissioner

Dear Sirs and Mesdames:

**Re: Submission Concerning the 2023 Rate Review Consultation**

We are counsel for Hap Transportation Group Ltd. (“Hap Transportation”).

Hap Transportation has concerns with the Rate and Review Recommendation Report of February 2023 (the “Report”). In particular, Proposal 2 – overtime rate based on Employment Standards Act, R.S.B.C. 1996, c. 113 (the “ESA”) short haul driver rate for company drivers and indirectly employed operators who work more than 9 hours a day or 45 hours a week (the “Overtime Proposal”).

The Overtime Proposal creates inequity between company drivers and independent operators (“IO”). The necessary result of the Overtime Proposal is that it will disproportionately impact company drivers. Using IOs will be cheaper than company drivers since under the Overtime Proposal, a company does not need to pay them overtime pay. The difference in compensation skews the market in favour of IOs. The Overtime Proposal will result in companies preferring IOs over company drivers.

We believe that to maintain consistency, stability and equality in the industry, the Overtime Proposal should be implemented at one time, which includes IOs, and not piecemeal to avoid any disruption in the container trucking industry. IOs are considered employees and entitled to overtime pay under the *ESA*.

The distinction between an employee and an independent contractor is important because an independent contractor is subject to their communal obligations while employed. Employment is governed by an employment legal framework. For example, the minimum requirements contained in the *ESA*, including overtime pay, apply to most employees in British Columbia. However, *ESA* minimums do not apply to independent contractors.

The common law developed a number of tests for whether a worker is an employee or an independent contractor.

1. The Control Test: This test recognizes that in an employment relationship, the employer controls when, where and how work is performed. The employer sets what work is to be done, which workers will do it, how, when and where the work will be performed. The employer sets the wages or other remuneration to be paid to the worker for their work.
2. The Four-Fold Test: This test examines not only control, but also ownership of tools, chance of profit, and risk of loss. In other words, does the worker have a financial stake in the product of its efforts.
3. The Organization or Integration Test: This test examines whether the work performed is an integral part of the company's business. Also, is the worker economically dependent on the company for his or her livelihood. For example, does the worker perform work for multiple parties.

The Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 observed no one test is determinative: at para. 48. The Court described the issue, at paragraph 47, as:

The central question is whether the person who has been engaged to perform the services is performing them as a person in business of his own account.

Courts, tribunals and government agencies have identified a variety of factors that will influence whether the work is done as part of employment or as an independent contractor. No one factor is determinative. The following factors suggest a worker is an employee:

1. Company determines and schedules hours and days of work, starting and finishing times, lunch and coffee breaks, vacations, etc;
2. Company controls how work is to be performed, and directs and supervises work;
3. Worker works exclusively for the company;
4. Worker may be disciplined for misconduct or unsatisfactory work performance;
5. Worker cannot hire or engage others to perform their work;
6. Company pays all business costs, including supplies;
7. Worker performs work that is integral to the company's business;
8. Worker is economically dependant on company;
9. Worker must comply with the company's rules and policies;
10. Worker is hired for an indefinite term.

In container trucking, an overwhelming number of factors point to IOs being employees.

A company exerts substantial control in the relationship between itself and an IO. The company controls which IO has an owner-operator tag, and what IO can operate under that tag. Once the IO has a tag from a company, that IO must exclusively perform trucking services for that company, and cannot move with the tag to any other competitor company. The tag limits the IO to one company.

Once a company issues a tag to an IO, it is the company that sets the IO's schedule including hours of work. Since the company sets the schedule, from that it necessarily follows the company sets the compensation. The company also determines which customers the IO delivers to. The company directs the IO's employment.

While the truck an IO uses is owned by the IO, it is identified with the company logo. Without the company, an IO would not be able to perform their job.

Further, the company requires an IO to follow its policies, and can discipline an IO for breaching company policies, which includes terminating a contract with an IO.

An IO does not share in the profits of the company. The IO is compensated via the *Container Trucking Act*, S.B.C. 2014 c. 28 (the "Act") based on the work schedule the company sets.

An IO is economically dependant on the company for their work and access to a tag since they can only perform services for the company that issued them a tag. The company can easily find another IO, but the IO cannot easily find a company to provide a tag.

The company controls the IO's work and the manner in which the work is performed, the company determines what work is to be done, which IO will do it, and how, when and where the work will be performed.

The factors and application of the tests outlined above point to IOs as being employees. Therefore, they should be included in the Overtime Proposal alongside company drivers.

The Commissioner's role is to set rates under the *Act*. It is not the Commissioner's role to create policies that preferentially treat one form of organization over another.

The Overtime Proposal will cause instability in the industry by providing one group, company drivers, with a benefit that IOs are unable to access. Thus, it is an incentive to minimize the use of company drivers.

The Commissioner must include IOs, as employees, in the Overtime Proposal to maintain equality and stability across the industry.

It is for the above reasons that Hap Transportation urges the OBCCTC to include IOs in the Overtime Proposal.

Yours very truly,  
Harris & Company LLP

Per:

A handwritten signature in blue ink, appearing to be 'Rodney W. Sieg', with a stylized, flowing script.

Rodney W. Sieg \*  
\* Law Corporation

*RWS/rm*

cc Client