



August 25, 2023

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

Commissioner's Decision

Simard Westlink Inc. (CTC Decision No 09/2023)

Introduction

1. Simard Westlink Inc. ("Simard") is a licensee within the meaning of the *Container Trucking Act* (the "Act").
2. Section 16(1)(b) of the *Act* states that a licensee must carry out the container trucking service in compliance with:
 - (i) this Act and the regulations,
 - (ii) the license, and
 - (iii) if applicable, an order issued to the person under the Act.
3. 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 via the Rate Order and licensees must comply with those statutorily established rates. 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.
4. Under section 31 of the *Act*, the Commissioner may conduct an audit or investigation to ensure compliance with the *Act*, the *Container Trucking Regulation* (the "*Regulation*") or a licence.
5. Simard has been the subject of three other decisions. In 2016, the Commissioner found that it had underpaid drivers by a total of \$79,989.31; this amount was repaid, and the Commissioner exercised his discretion not to issue a penalty: *Simard Westlink Inc.*, CTC Decision No. 07/2016 ("Simard #1"). In 2020, the Commissioner found that Simard had underpaid its drivers by \$33,596.02. Simard was ordered to compensate the drivers and to pay an administrative fine of \$2,000.00 ("Simard #2"): *Simard Westlink Inc.*, (CTC Decision Notice, No. 01/2020). In 2023, I found

- that Simard had underpaid one of its drivers \$884.83 when it improperly calculated his fuel surcharge amount. I ordered Simard to pay this amount but exercised my discretion and did not issue an administrative penalty (“Simard #3): *Simard Westlink Inc.*, (CTC Decision Notice, No. 05/2023).
6. Simard currently operates under a container trucking services (“CTS”) licence that came into force on December 1, 2022 (“2022 CTS licence”). Section 6.15 of the CTS licence states: “The Licensee must carry out Container Trucking Services using only Truck Tags allocated by the Commissioner on the conditions imposed by the Commissioner.” Section 6.16 requires licensees to assign a truck tag to each truck performing CTS services.
 7. On March 15, 2023, two trucks belonging to Simard were observed performing what appeared to be untagged container trucking services in the Lower Mainland. A truck with licence plate PT2078 was transporting container EMCU8632562451G1 at or near Kennedy Road in Pitt Meadows. Another unit with licence plate RN6207 (Penske vehicle) was transporting container TXGU5853257451G1 at or near Kennedy Road in Pitt Meadows (together, the “Impugned Containers”). Neither truck displayed a truck tag as required by the CTS licence when performing container trucking services.

Background

8. On April 18, 2023, the Office of the BC Container Trucking Commissioner (“OBCCTC”) advised Simard that it had begun an investigation into whether the container movements observed on March 15, 2023 were authorized as the *Act*, *Regulation*, and CTS licence make it an offence to carry out prescribed container trucking services within the Lower Mainland with an untagged truck. Simard was invited to provide a submission. The OBCCTC also requested payroll records and trip sheets for the drivers performing the work on March 15, 2023.
9. On April 26, 2023, Simard provided a submission arguing the Impugned Containers do not fit the definition of a “container” as set out in the *Regulation* because they did not involve a “marine component” and were therefore not covered under the *Act*. Simard did not respond to the request for records.
10. On May 16, 2023, I provided Simard with a copy of an investigation report (Investigation Report #1) and an opportunity to provide a further submission by May 25, 2023. Simard did not provide a submission by May 25, 2023.
11. On May 26, 2023, I issued an order (“Order”) based on my finding that Simard had performed off-dock trips on March 15, 2023 when it moved “containers” as defined in the *Regulation* between two facilities within the Lower Mainland with trucks that were not tagged in accordance with its CTS license and s. 16(1)(b)(ii) of the *Act*. I ordered Simard to provide the payroll records and trip

sheets of each driver who performed the work described on March 15, 2023, and I also ordered Simard to cease and desist from using untagged trucks to perform CTS work in contravention of its CTS license.

12. On June 2, 2023, Simard provided copies of March 15, 2023, payroll records and trip sheets as per my Order and advised that it had not received Investigation Report #1 on May 16, 2023.
13. On June 5, 2023, Simard advised that it continued to disagree with the Commissioner's view of the requirements of the *Act, Regulation*, and CTS licence and intended to seek judicial review of the Order. It requested that the Commissioner suspend enforcement of the Order pending the resolution of the proceeding.
14. On June 14, 2023, I provided Simard with a copy of a supplemental investigation report (Investigation Report #2) and an opportunity to provide further submissions by June 25, 2023.
15. Based on the payroll records provided by Simard and the information collected by the OBCCTC, my preliminary assessment was as follows:
 - a. The Impugned Containers met the definition of "container" for the reasons set out in the Order.
 - b. Additional containers identified in the March 15, 2023, payroll documentation supplied by Simard ("Additional Impugned Containers") also met the definition of "container" in the *Regulation*.
 - c. The Impugned Containers and the Additional Impugned Containers were moved between the following facilities in the Lower Mainland on March 15, 2023, by the following drivers:

Driver	From	To	Container Number
G.Brar	CP Rail Yard	Rolls Right Terminal	EMCU863256
G.Brar	Rolls Right Terminal	CP Rail Yard	EMCU863256
G.Brar	CP Rail Yard	Purolater Richmond	CPPU236082
G.Brar	Purolater Richmond	Western Canada	"Bob tail" (meaning no container or trailer)
G.Brar	Western Canada	TJX Canada	CPPU237220
G.Brar	TJX	CP Rail Yard	CPPU234089
S.Kim	CP Rail Yard	Toys R Us	UACU527276
S.Kim	Toys R Us	CP Rail Yard	Empty
S.Kim	CP Rail Yard	Van Kam	DRYU912237

Driver	From	To	Container Number
S.Kim	Van Kam	CP Rail Yard	TLLU405617
S.Kim	CP Rail Yard	Simard Westlink Yard	TXGU585325
S.Kim	Simard Westlink Yard	CP Rail Yard	EITU138429
S.Kim	CP Rail Yard	Rolls Right Terminal	TCLU888393
S.Kim	Rolls Right Terminal	CP Rail Yard	TCLU888393

- d. The wages paid to the drivers moving the Impugned Containers and the Additional Impugned Containers were not in accordance with the Rate Order as follows:
- i. Mr. Kim, a directly employed operator, was paid \$0.68 an hour less than the minimum rate set out in the Rate Order and worked a total of 9.25 hours.
 - ii. Mr. Brar, an independent operator, was paid \$732.68 less than he should have been based on the trip rates, Position Movement Rate, and Fuel Surcharge set out in the Rate Order.
- e. Another \$445.98 was improperly deducted from Mr. Brar's compensation for an unidentified reason and \$22.30 was improperly deducted for GST.
- f. Simard retained the services of an independent operator (Mr. Brar) who is not on the IO list and does not have a sponsorship agreement as required.
16. Simard provided a submission in response on June 16, 2023 stating as follows:
- a. Simard has responded promptly to the Commissioner's correspondence upon receipt and provided disclosure of documents ordered to be produced;
 - b. The material facts related to Simard's movement of the Impugned Containers and the Additional Impugned Containers are not in dispute;
 - c. The Commissioner erred in his Order when he determined Simard's movement of the Impugned Containers was in breach of Simard's CTS license;
 - d. Simard's movement of the Additional Impugned Containers are authorized for the reasons summarized in its April 26, 2023 submission;
 - e. The calculations in Investigation Report #2 are incorrect and Simard reserves its right to particularize the errors at a later unspecified date; and

- f. Some unidentified containers listed in Investigation Report #2 are not suitable for container ships.
17. Simard maintains that the Impugned Containers and the Additional Impugned Containers are not covered by the *Act* because they were “mostly sourced from intermodal rail destined for a warehouse or intermodal rail” and were not travelling directly to or from a marine terminal. Simard argues that the lack of a container’s connection to the Port of Vancouver means that the *Act* does not apply.
18. In its most recent submission Simard states that this “dispute is over the interpretation of the *Act*, *Regulation*, and Simard’s CTS licence” in respect of what it calls “container domestic moves” and advises again that it intends to seek judicial review. It requests that the Commissioner suspend enforcement of the May 26 Order pending resolution of the judicial review.
19. Simard has since brought an application for judicial review of the Order.

Decision

20. As described above, the circumstances of this case are:
 - a. Two Simard trucks were observed on March 15, 2023 moving the Impugned Containers and leaving the CP Rail yard on Kennedy Road in Port Coquitlam. The Simard trucks delivered the Impugned Containers to other facilities within the Lower Mainland.
 - b. The Simard trucks are owned/or operated by Simard and they were untagged and were driven by Mr. Kim and Mr. Brar.
 - c. On May 26, 2023, after an investigation, I found that the Impugned Containers met the definition of “container” in the *Regulation* and had been moved by Simard trucks. I ordered Simard to provide payroll records and trip sheets for the drivers associated with the Impugned Containers and to cease and desist from using untagged trucks to perform CTS work in contravention of its CTS license.
 - d. On June 2, 2023, Simard provided copies of records associated with the Impugned Containers which also identified the Additional Impugned Containers moved on March 15, 2023 by the two Simard trucks between facilities located within the Lower Mainland.
 - e. On June 14, 2023, after further investigation, the OBCCTC provided Simard with a supplementary investigation report (Investigation Report #2) which included preliminary findings that the Additional Impugned Containers were also “containers” under the *Act* and

Regulation and that the drivers of the Simard trucks were not paid in accordance with the Rate Order for the container movements on March 15, 2023. One driver was also found to have had monies improperly deducted from his pay. It also determined that Mr. Gurpreet Brar, an independent operator who moved one of the Impugned Containers on March 15, 2023, is not on the IO List and does not have a valid sponsorship agreement with Simard as required by the CTS License.

- f. On June 16, 2023, Simard submitted it did not dispute the material facts regarding the events of March 15, 2023, but that some unidentified containers are not suitable for container ships and the calculation of underpayment of drivers contains unidentified errors. Simard's position is that since the movements of the Impugned Containers and the Additional Impugned Containers did not have a marine component or involve marine access to a terminal within the Port of Vancouver, they fall outside the scope of the *Act*.
21. The question here is whether the movements of the Impugned Containers and Additional Impugned Containers between a rail facility and another Lower Mainland facility are captured under the *Act*?
22. Simard says that these movements are not captured by the *Act* because they involve "containers originating in Canada, destined within Canada, and not touching a port." It says that since the Impugned Containers and the Additional Impugned Containers were delivered by CP Rail to its intermodal yard in the Lower Mainland, loaded onto trucks operated by Simard, and transported to a Lower Mainland location other than a marine terminal for unloading, their movement is not within the scope of the *Act*.
23. For the following reasons, I am not persuaded that the movements of containers with the Lower Mainland that are not directly to or from a marine terminal within the Port of Vancouver are outside of the *Act*.
24. Simard does not understand that the fact that it has a license to access a marine terminal in the Lower Mainland also requires it to pay the rates set out in the Rate Order even when it is not accessing a marine terminal. I find Simard's suggestion that the only CTS work captured by the *Act* is work directly associated with the reason a company requires a license (i.e., to access a marine terminal) is inconsistent with the legislative scheme.
25. One of the main principles of statutory interpretation was recently cited in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 117:

the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the

intention of Parliament.

26. It is important to understand the historical context that gave rise to the current legislative scheme covering container trucking in the Lower Mainland in order to better understand the intention of the legislature regarding off-dock work (i.e. work that does not require direct access to a marine terminal).
27. After a number of work stoppages in the Lower Mainland drayage sector due to undercutting of wages by drayage companies, a Joint Action Plan (“JAP”) between the Government of Canada and British Columbia and recognized representatives of container truck drivers was signed in 2014. The JAP contained the following commitment:

Canada and B.C. further commit to put in place a new mechanism to ensure off dock trips (including within a property or between properties) are remunerated consistent with the revised regulated rates, and the Government of Canada will expedite its 2014 Regulatory Framework Review which will assess the current wage and fuel surcharge rates. (emphasis added)

28. Corrine Bell and Vince Ready were then commissioned to provide recommendations (“the Ready/Bell Report”)¹ to implement the JAP, including recommendations around off-dock rates. The Ready/Bell Report noted that off-dock rates were not regulated and that “without adequate compensation (for off-dock movements) this is a significant concern as it directly impacts independent owner-operators, especially those who spend considerable time moving containers at off dock facilities.” The Ready/Bell Report defined the scope of the off-dock work, stating as follows:

There is also significant activity associated with the repositioning of empty containers between off-dock terminals, rail yards, storage yards, and marine terminals, as well as “bob-tail” runs (i.e., tractors without containers) to pick up loaded and/or empty containers. We understand off-dock moves to primarily include the following:

- “trip legs” that do not involve a port terminal; and
- Empty container movements that are subsequently trucked to and stored at empty container terminals while they await export.

29. The Ready/Bell Report set out a “time/distance benchmark matrix” for the movement of containers throughout the Lower Mainland not involving movements directly to or from a marine terminal and emphasized that its recommendations were “limited to those companies that hold a license to service the port but capture such companies for both on and off-dock container movements.”

¹ Vince Ready and Corrine Bell, Recommendation Report – British Columbia Lower Mainland Ports, September 25, 2014.

30. The *Act* was passed by the legislature in 2014 and empowered the Lieutenant Governor in Council (LGIC) to set the initial rates with reference to the starting and end points of the container trucking services, “the geographic area within which the container trucking services are carried out” and the “duration or distance travelled.” The *Regulation* includes a definition of “off-dock trips” and the “time/distance benchmark matrix” for off-dock rates as recommended in the Ready/Bell Report. Initial rates were established, including rates for movements between facilities in the Lower Mainland that are not marine terminals. Initially, s. 12 and Schedule 1 of the *Regulation* set out off-dock trip rates, listing twenty-five geographic areas between West Vancouver and Chilliwack, BC.
31. The Commissioner now sets the rates via the Rate Order based on this framework.
32. The *Act* defines “container trucking services”:

“container trucking services” means the transportation of a container by means of a truck.
33. The *Regulation* defines “off-dock trips” to mean:

“off-dock trip” means one movement of one or more containers by a trucker from one facility to a different facility in the Lower Mainland, but does not include:
an on-dock trip, or
a movement of a container from one location in a facility to a different location in the same facility.
34. The *Regulation* defines “facility” to mean:

“facility” means a location in the Lower Mainland where containers are stored, loaded, unloaded, trans-loaded, repaired, cleaned, maintained or prepared for shipping, but does not include a marine terminal.
35. The definitions of “facility” and “off-dock trips,” along with the inclusion of off-dock trip rates, capture the locations and the geographic areas between which off-dock trips are performed. Off-dock rates apply to licensees not just when they access a Lower Mainland marine terminal, but when they move a container to a “facility” as defined in the *Regulation* and captured in the off-dock rate tables (Appendices II and III) of the Rate Order.
36. As an example, the Additional Impugned Container movement from CP Rail yard in Pitt Meadows directly to Rolls Right terminal in Coquitlam is expressly captured in Appendix II of the current Rate Order as item #17 (“Pitt Meadows”) origin and item #19 (“Tri-Cities South”) destination and Appendix III sets out the rate between the two as \$131.00.

37. Simard's view that a container must be moved to or from a marine terminal in order to attract the off-dock rate would make the inclusion of off-dock rates in the rates first set by the LGIC, and now by the Commissioner, meaningless. By definition, all off-dock trips are between two facilities in the Lower Mainland (excluding marine terminals) and if Simard's interpretation were adopted, no container movement would ever attract an off-dock rate.
38. Both the historical context above and the legislative scheme as a whole make clear that while the *Act* requires companies who perform container trucking services via a marine terminal to be licensed, it also requires licensees to comply with the legislation more broadly, including by paying off-dock rates for containers that move between facilities within the Lower Mainland that do not involve a marine terminal.
39. One of the benefits associated with having a container trucking services licence is access to marine terminals. Non-licensees – presumably the licensees' competitors -- who perform container trucking work in the Lower Mainland do not have such access. Such a restriction elicits many complaints from non-licensees who argue that it is unfair that access to marine terminals is an advantage bestowed on only licensed companies. However, this is how the regime works, for various reasons (including because limiting access to marine terminals relieves congestion and wait times and contributes to the stability of the industry). Paying off-dock regulated rates is one of the "costs" associated with the grant of a license to access a marine terminal.
40. In *Forfar Enterprises Ltd.* (CTC Decision No. 20/2016) Commissioner MacPhail found that the inclusion of off-dock rates in the *Regulation* was consistent with his interpretation of the *Act* as applying to the movement of containers that did not travel directly to or from a marine terminal. There, also, the licensee argued that the movement of containers between railyards and customer locations in the Lower Mainland was not captured by the *Act*. Commissioner MacPhail confirmed that containers moved from rail yards to customers in the Lower Mainland are within the scope of the *Act* because "the legislation makes the payment of the legislated rates a term of the privilege of holding a TLS license. In return for being licensed to perform on-dock container trucking work, the licensed trucking company must comply with the legislation, including required pay rates for all work falling within the scope of the legislation" (para 35). I adopt this analysis.
41. Off-dock rates were included in the *Act* and *Regulation* to address the undercutting of rates experienced by drivers who also performed on-dock work. To ensure stability within the drayage sector – especially at marine terminals – the regulation of off-dock trips secured a minimum income for drivers when they were not performing on-dock work.

42. Identifying whether a licensee is required to pay off-dock rates involves the following analysis:
- a) Is the container a “metal box furnished for the marine transportation of goods or approved by an ocean carrier for the marine transportation of goods”?
 - b) Are the locations between which the container is moved in the Lower Mainland and locations “where containers are stored, loaded, unloaded, trans-loaded, repaired, cleaned, maintained or prepared for shipping” (other than marine terminals)?
43. Turning to whether the Impugned Containers and the Additional Impugned Containers identified in Investigation Report #1 and #2 (collectively the “Investigation Reports”) are containers, Simard argues some of the containers listed in Investigation Report #2 are not “suitable for container ships”; however, it fails to rebut the evidence found in the Investigation Reports regarding each of the Impugned Containers and Additional Impugned Containers, on the basis of which I determined that each were “containers” under the *Regulation*, and is unwilling or unable to articulate how it arrives at its conclusion.
44. In *Forfar Enterprises Ltd.* (CTC Decision No. 20/2016) the then-Commissioner stated that “containers which are identified by a 4 letter identification codes consistent with containers, ‘furnished or approved by an ocean carrier for the marine transportation of goods’ are to be presumed to be ‘containers’ as defined in the *Regulation*.” He went on to say that “where containers are so identified, the onus lies with the licensee to rebut this presumption.” I have adopted that analysis with respect to the containers moved by Simard on March 15, 2023.
45. I previously found that the Impugned Containers were covered under the *Act*; this finding has not been rebutted. I further find the Additional Impugned Containers also fall within the scope of the *Act*. The Additional Impugned Containers are identified with 4 letter identification codes consistent with marine containers. Furthermore, as set out at page 4 of Investigation Report #2 some of those containers have been recorded on shipping tracking websites as having been recently transported on the ocean and similar containers have been photographed on ocean carriers. As also set out at page 5 of Investigation Report #2, containers similar to the Additional Impugned Containers have been affixed with Convention of Safe Containers plate (“CSC Plate”) which authorizes the use of the containers for the marine transportation of goods. Based on the above, and Simard’s failure to provide evidence to the contrary, I am satisfied that the Additional Impugned Containers are each “a metal box furnished or approved by an ocean carrier for the marine transportation of goods” as per the *Regulation*.
46. Simard does not dispute the material facts of its movement of containers on March 15, 2023. I find that the rail yard and the customer to whom the Impugned Containers and the Additional Impugned Containers were delivered were both “facilities” within the Lower Mainland.

47. As the Impugned and Additional Impugned Containers meet the definition of “container” in the *Regulation*, and the locations between which Simard was moving those containers are “facilities” in the Lower Mainland, I find Simard was performing container trucking services on March 15, 2023.
48. As the Impugned Containers and the Additional Impugned Containers are covered under the legislative scheme, Simard was required to pay the minimum rates set out in the Rate Order. Despite Simard’s unparticularized submission that the calculations in Investigation Report #2 are incorrect, I have reviewed the calculations alongside the payroll records provided by Simard and I am satisfied they are accurate. I find that Mr. Kim is owed \$6.29 for work performed on March 15, 2023 and Mr. Brar is owed \$732.68 for work performed on March 15, 2023 and is owed an additional \$468.28 (\$445.98 + \$22.30) for improper deductions. Simard is therefore in breach of the minimum rate requirements.
49. Simard does not dispute that Mr. Brar, an independent operator, performed CTS work on March 15, 2023 without a sponsorship agreement and without being on the IO List. Section 6.20 and 6.21 of the 2022 CTS licence require Simard to have sponsorship agreement with each independent operator and the conditions set out in the sponsorship agreement (which forms part of the licence) require Simard to only use independent operators on the IO List. Based on the above, I find that Simard violated section 6.20 and 6.21 of its 2022 CTS licence.
50. Simard does not dispute that the Simard trucks did not have truck tags; I also find that the Simard was in violation of sections 6.15 and 6.16 of its CTS licence on March 15, 2023.

Order

51. Based on the above and pursuant to s. 9 of the *Act*, I order Simard to pay the following amounts and provide proof of its having done so to the OBCCTC within 30 days of the date of this decision for work performed on March 15, 2023:
 - Mr. S. Kim is to be paid \$6.29.
 - Mr. G. Brar is to be paid \$1,200.96.
52. I also order Simard to, no later than February 28, 2024:
 - a. Review its payroll records from September 1, 2019 to the date of this decision and make the appropriate adjustments to bring itself in compliance with the *Act*. In particular, Simard must ensure that it has paid its drivers off-dock rates for all off-dock work from September 1, 2019 to present
 - b. Advise the Commissioner of any adjustments made and provide proof of payment to its drivers of same.

53. As per s. 6.6 of its CTS licence, Simard is not to destroy any payroll records created since September 1, 2019 until it receives written permission from the Commissioner.

Proposed penalty

54. 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.
55. 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 (*Act* and *Regulation*). Licensees must comply with the legislation, as well as the terms and conditions of their licence, and the Commissioner is tasked under the *Act* with investigating and enforcing compliance.
56. In keeping with the above-described purpose of the legislation the factors which will be considered when assessing the appropriate administrative penalty include the following as set out in *Smart Choice Transportation Ltd.* (OBCCTC Decision #21/2016):
- The seriousness of the respondent's conduct;
 - The harm suffered by drivers as a result of the respondent's conduct;
 - The damage done to the integrity of Container Trucking Industry;
 - The extent to which the licensee was enriched;
 - Factors that mitigate the respondent's conduct;
 - The respondent's past conduct;
 - The need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of having a CTS licence;
 - The need to deter licensees from engaging in inappropriate conduct, and
 - Orders made by the Commission in similar circumstances in the past.
57. Taking the relevant Smart Choice factors into consideration, I find that a penalty is appropriate here based on Simard's non-compliant practices that led to the improper payment of wages to two drivers on March 15, 2023. I note that Simard has been the subject of three previous decisions regarding the underpayment of wages, has repaid its drivers in each, and was issued an administrative fine in one of the decisions in the amount of \$2,000.00 and yet the non-compliant activity resulting in underpayment has continued. Clearly the administrative penalty was not sufficient to deter continued underpayment of drivers.

58. The requirement to have tagged trucks to perform CTS work is not new and the OBCCTC has made it clear on several occasions that containers moved from a rail yard in the Lower Mainland are captured under the *Act*. The 2022 CTS licence requires licensees performing container trucking services (on-dock and off-dock) to use only tagged trucks, as have all prior licenses (which Simard has also operated under). On April 17, 2020, the OBCCTC issued a bulletin reminding industry that all trucks performing container trucking services under licence must be tagged. On May 18, 2022, the OBCCTC issued an industry advisory clarifying that containers “furnished” or “approved” for the marine transportation of goods that arrive by rail are within the scope of the *Act*. On October 4, 2022, I issued an industry advisory reminding licensees that “both on and off-dock container trucking services are to be completed by licensed companies using tagged trucks.” There is a clear need to demonstrate to the drayage sector there are consequences for engaging in off-dock untagged CTS work, especially as licensees have been advised repeatedly that such activity is in contravention of the *Act*, *Regulation* and CTS license.
59. In previous decisions, I have stated that using untagged trucks to move containers is a serious concern (see *Goodrich Transport Ltd.* CTC Decision No 06/2023 and *Ferndale Transport Ltd.* CTC Decision No 07/2023). This is not only because licensees using untagged trucks may be avoiding payment of the minimum rates. It is also because the GPS systems installed in all tagged trucks helps the OBCCTC understand what is going on in the industry. Simard’s use of untagged trucks to perform CTS work on March 15, 2023 also resulted in fourteen (14) containers moves of which the OBCCTC would have otherwise been unaware. By using untagged trucks, the licensee is effectively hiding those movements from the OBCCTC auditors and shielding itself from any investigation of whether the drivers were properly compensated. In addition, identifying trucks through a truck tag system allows the OBCCTC to ensure that the drayage sector has the right balance of trucks and container movements in the Lower Mainland. If licensees were permitted to use untagged trucks to move containers, such actions would upset that balance. Too many drivers chasing too few containers has led to the undercutting of wages and destabilization of the drayage sector in the past.
60. In this case, Simard used untagged trucks to perform CTS work and underpaid the drivers performing that work, thus contributing to the very problems the *Act* was established to solve. Given the seriousness of the offence, the purpose of the fine is also one of general deterrence. In other words, it is meant to send a message to the industry that non-compliance will not be tolerated.
61. While the amount of money owed to the drivers is relatively small, the amount was for one workday.

62. I have concluded that an administrative fine of \$12,000.00 is appropriate in this case given Simard's previous contraventions, the multiple infractions arising out of this investigation, and its underpayment of drivers on March 15, 2023.
63. This decision should make clear to all licensees that all container trucking services – including containers that are moved to or from a railyard to a customer in the Lower Mainland – must be performed using tagged trucks and must be paid at the minimum regulated rates. Failure to comply is likely to result in a penalty.
64. Considering all the factors present in this case, and in accordance with s. 34(2) of the Act, I hereby give notice as follows:

I propose to impose an administrative fine against Simard in the amount of \$12,000.00;

Conclusion

65. Simard has asked that I suspend the Order made on May 26, 2023. I will not do so for the following reasons.
66. In granting a stay application, the Courts have applied a three-part test which I have adopted here:
 - a) has the applicant made out a prima facie case that a serious question is to be tried?
 - b) has the applicant demonstrated irreparable harm if the stay is not granted?
 - c) Does the balance of convenience favour granting the stay.
67. The issue of when an off-dock container movement obliges a licensee to pay in accordance with the Rate Order has been the focus of the Commissioner's reports, bulletins, industry advisories and decisions (e.g. Forfar) for some time. The issues here are like those raised in those communications and decisions and have been available to licensees such as Simard for some time. The OBCCTC's application of the Act should be well understood, and my Order is consistent with those previous pronouncements.
68. However, even if I accept that Simard has made out that a serious question has arisen in my Order, Simard's submission did not particularize any irreparable harm if the stay were not granted.
69. Finally, given the mandate of the OBCCTC to maintain stability in the drayage sector by ensuring licensees pay the prescribed rates to drivers who perform CTS work and penalize licensees who employ practices that contribute to the undercutting of those rates, I find that permitting Simard – or any other licensee – to continue to underpay drivers while it challenges the Order in court does not swing the balance of convenience in favour of Simard.

70. Should it wish to do so, Simard has 7 days from the receipt of this notice to provide the Commissioner with a written response setting out why the proposed penalty should not be imposed;
71. If Simard provides a written response in accordance with the above, I will consider its response, and provide notice to Simard 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.
72. This decision and the included orders will be delivered to the licensee and published on the Commissioner's website (www.abcctc.ca)

Dated at Vancouver, B.C. this 25 day of August 2023

A handwritten signature in blue ink, appearing to read "Glen MacInnes". The signature is written in a cursive, flowing style.

Glen MacInnes
Commissioner