



July 10, 2023

Pro West Trucking Ltd.
1637 Cliveden Avenue
Delta, BC V3M 6V5

Commissioner's Decision

Pro West Trucking Ltd. (CTC Decision No 08/2023)

Introduction

1. Pro West Trucking Ltd. ("Pro West") is a licensee within the meaning of the *Container Trucking Act* (the "Act"). At the time the audit was started, Pro West's license was assigned eleven (11) company driver tags and fifty-nine (59) independent operator ("IO") tags.
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 a "Rate Order"), and a licensee must comply with those 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. Section 24 states that a licensee must not solicit or receive, directly or indirectly, a financial set-off, commission or rebate from a trucker.
5. Under s. 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.
6. Section 9 of the *Act* authorizes the Commissioner to make an order requiring a licensee who has failed to comply with the *Act*, *Regulation* or license to comply. Section 40 requires a person to whom an order under the *Act* applies to comply with the order.
7. Pro West has been the subject of one other decision. In 2017, the Commissioner found that Pro West had underpaid its drivers by more than \$660,000.00 and ordered it to compensate the drivers whose

pay it had not already voluntarily adjusted in the amount of \$174,903.16 and to pay an administrative fine of \$25,000.00 (“Pro West #1”).

8. On November 5, 2020, the Commissioner instructed the auditor to initiate the current audit as a random audit.

Audit Findings – Initial Audit Period

9. On November 12, 2020, the auditor advised Pro West that it was subject to an audit and requested relevant records for the periods of August 2018 and September 2019 (together the “Initial Audit Period”) (the November 12, 2020 letter the “Record Request”). The letter went on to say that Pro West should not dispose of records required to be kept pursuant to Appendix D to Schedule 1 of its license.

Company Drivers

10. The auditor first reviewed Pro West’s records for company drivers and concluded that, during the Initial Audit Period, Pro West had failed to pay company drivers the minimum hourly rate for the month of August 2018 in accordance with the then-applicable Rate Order. The auditor determined the amount owing to eleven (11) company drivers for August 2018 was \$1,739.28. Pro West advised the auditor that the hourly rates were corrected on June 1, 2019 on a go forward basis. The auditor determined that Pro West had paid the correct rate during the month of September 2019 and accepted Pro West’s assertion that it had paid the correct rate since June 1, 2019.
11. On January 27, 2021, the auditor advised Pro West of the Initial Audit Period company driver findings and required Pro West to recalculate the amount owing to all its company drivers who provided container trucking services from June 1, 2018 - the first day of an hourly rate increase - to May 31, 2019 (the “Outstanding Company Drivers Pay Calculations”) by February 22, 2021.
12. Pro West failed to provide the Outstanding Company Drivers Pay Calculations by February 22, 2021 and after the auditor followed up with a Pro West representative an extension was granted until March 5, 2021. Pro West missed the extended deadline but eventually provided the auditor its Outstanding Company Drivers Pay Calculations, showing that \$21,663.21 was owed to eleven (11) company drivers for the period between June 1, 2018 and May 31, 2019.
13. The auditor conducted a spot audit on the Outstanding Company Drivers Pay Calculations and was satisfied the calculations for company drivers were correct.
14. On July 6, 2021, the auditor advised Pro West that no discrepancies were found in the Outstanding Company Drivers Pay Calculations and directed Pro West to provide proof that each company driver had been paid by July 16, 2021. The auditor reports in her January 2022 report that Pro West failed to do so as of the date of the report.

Independent Operators

15. The auditor then reviewed Pro West’s records related to independent operators (“IOs”) using a sample of IO payment records to assess compliance with rates during the Initial Audit Period.
16. The auditor found Pro West failed to pay IOs the regulated rates for certain trips when moving a container using a trip splitting system:
- The unpaid trips identified in the audit were the result of a trip splitting system used by Pro West. The trip splitting system consisted of a driver taking a container from Point A to Point B and then the next day, the driver would deliver the container from Point B to Point C. The trip splitting occurs because the supplier agreement is only to take the container from Point A to Point C, therefore, Pro West only pays the driver for the trip from Point A to Point C, instead of Point A to Point B and then a second trip from Point B to Point C.
17. The auditor also found that some IOs had business costs improperly deducted from their wages. A fee of \$35 was deducted from two (2) IOs in August 2018 and a fee of \$75 was deducted from four (4) IOs in September 2019 to compensate the licensee for administrating its company gas cards. The auditor also noted a \$200 fee was deducted from one (1) IO in August 2018 and a \$50 fee was deducted from one (1) IO in September 2019 for not picking up scheduled reservations. The auditor also identified deductions for Extended Medical Benefits and was able confirm with the driver that benefits were received and the proper amount was deducted from his pay. Finally, the auditor noted deductions from IO pay for fleet insurance and Pro West provided supporting documentation that confirmed the amounts deducted. One driver, Mr. Mander Singh Sidhu, claimed he resigned on June 10, 2021 but that Pro West still deducted insurance payments for the balance of June and July 2021.
18. On July 22, 2021, the auditor advised Pro West of the Initial Audit Period IO findings and asked Pro West to recalculate the amount owing between December 1, 2015 (the end of Pro West’s last audit) and July 31, 2021 (“Outstanding IO Pay Calculations”).
19. On September 3, 2021, Pro West provided the auditor with its Outstanding IO Pay Calculations. It generated a report listing all unpaid trips (“Pro West Unpaid Trip Report”) and then applied the applicable trip rate to the trips listed on that report. This calculation suggested that 69 IOs were owed a total of \$386,978.60 for the period of December 1, 2015 to July 31, 2021.
20. The auditor compared Pro West’s Outstanding IO Pay Calculations with the amounts calculated by the auditor during the Initial Audit Period and found the following discrepancies:

	Aug-18	Sep-19
Pro West Outstanding IO Pay Calculations	5,823.00	3,202.00
OBCCTC Audit Calculations	10,533.26	13,256.92
Difference	- 4,710.26	-10,054.92

21. The auditor provided Pro West with the OBCCTC's Initial Audit Period IO calculations and sought an explanation for the discrepancies.
22. In response, Pro West agreed with the auditor that its Outstanding IO Pay Calculations were incorrect because certain dispatchers failed to enter each container moved into the software system used to track payment to IOs. However, Pro West determined that manually reviewing every driver trip sheet to capture every dispatcher's data entry error would be time consuming and interrupt its efforts to service customers during a pandemic.
23. The OBCCTC advised that Pro West could use a process of extrapolation based on the results of the errors found during the Initial Audit Period to assess amounts owing to IOs. To ensure an accurate baseline for the proposed extrapolation, the auditor identified a list of trips that she felt attracted a trip payment that had not yet been made and sought confirmation from Pro West.

24. On December 13, 2021, Pro West's Manager, Treasury and Accounting, responded by email:

We do not think your numbers are right. Unfortunately, we are not able to provide you with more details due to our current tight manpower resources.

As I mentioned to you during our last conversation that Bindy has been focusing on resolving the operation issues caused by the recent natural disaster that has led to devastating flooding, mudsliding (sic) and thus extreme terrible highway conditions. Since our transportation group provides over 85% of the trucking services for the grocery stores, such as Superstore, Save On Foods, Canadian Tire etc, Bindy has no option not to prioritize fixing our daily operation problems. He will review the audit details as soon as the highway conditions resume normal.

Thank you for your patience and understanding.

25. In light of Pro West's failure to provide the confirmation requested, the auditor prepared a basic extrapolation calculation based on the limited information that had been provided by Pro West.
26. On January 10, 2022, Pro West was provided a copy of the auditor's report (the "Audit Report") reporting as follows:
 - a. Pro West did not pay Company Drivers the regulated rates during the Initial Audit Period. Pro West completed Outstanding Company Driver Pay Calculations and claims to have paid eleven (11) company drivers \$21,663.21 in amounts owing for June 1, 2018 to May 31, 2019. Pro West did not provide documentation that showed it paid the drivers before the Audit Report was finalized.

- b. Pro West did not pay I/Os during the Initial Audit Period in accordance with the *Regulation* and Rate Order when it failed to pay for certain trips and ineligible deductions were made to I/Os' pay.
- c. Pro West calculated \$386,978.60 was owing to IOs based on its Outstanding IO Calculations but noted its calculation was incomplete after discovering a data entry error was made when entering certain trips into its software system.
- d. Pro West disputed the auditor's Initial Audit Period calculations for IOs without providing specific details and refused to review its own data entry errors due to time constraints.
- e. The auditor completed a simple extrapolation calculation based on the errors identified in the Initial Audit Period only, on the basis of which the licensee was estimated to owe something in the range of \$868,000.00 for the period of December 1, 2015 to December 31, 2021, and identified outstanding materials that would be required to complete the audit.

Response to Audit Report

27. Pro West provided documentation in its February 17, 2022 response to the Audit Report showing that \$21,663.21 had been paid to the eleven (11) Company Drivers on July 15, 2021.
28. Pro West has provided no submissions on the deduction of fees from IO payments for using company gas cards or the payroll deductions for missing reservations. The Audit Report records that Pro West explained that such deductions formed part of its contract(s) with the IOs, but no contracts were provided.
29. Despite acknowledging that a representative of Pro West determined that \$386,978.60 was owing to IOs, Pro West's initial response to the Audit Report was that this amount was incorrect for the following reasons:
 1. The auditor erroneously identified unpaid trips by defining certain container movements as "trip splitting."
 2. The OBCCTC does not have the statutory authority to conduct an audit between December 1, 2016 and December 31, 2021.
 3. The OBCCTC does not have the statutory authority to order a licensee to conduct a full audit of its payroll records.
 4. The OBCCTC does not have the statutory authority to extrapolate payroll errors from one period to another.

2022 Order

30. On March 14, 2022, counsel for Pro West continued to raise several issues related to the Audit Report and correspondence commenced between the then-Commissioner and counsel for Pro West. Among other things, Pro West requested the return of the payroll records provided to the auditor and challenged the auditor's ability to audit for a period of time when it was operating under a prior license.

It also argued licensees are only required to keep payroll records for four years – not the five years of records requested by the auditor.

31. On April 11, 2022, the then-Commissioner returned the payroll records to Pro West and responded to Pro West's objections to the Audit Report. He also agreed to limit the audit period to 4 years prior to the commencement of the audit initiated on November 5, 2020. Acknowledging Pro West had raised several issues with the Initial Audit Report and concerned that Pro West was delaying the audit and had been previously penalized for delay (see Pro West Trucking Ltd. (CTC Decision No. 06/2017), the then-Commissioner issued an Order (the "2022 Order") as follows:

Pro West Trucking Ltd. must review the auditor's calculations of amounts owing to I/Os for August 2018 and September 2019 (where all instances of possible trip splitting were noted), work with the auditor to make any required changes to the auditor's calculations for the August 2018 and September 2019 audit periods, and use the auditor's revised calculations for the August 2018 and September 2019 audit periods to conduct a full audit of its records for the period between December 1, 2016 and December 31, 2021 to determine a total amount owing. This must be completed within 60 days from the date of this letter.

32. On April 18, 2022, Pro West responded to the Commissioner with additional questions and proposed to engage a certified professional accountant ("CPA") if certain conditions were agreed to by the Commissioner (including that the Commissioner agree in advance that he would accept the CPA's conclusions).
33. On April 28, 2022, the then-Commissioner responded to Pro West's questions and advised that he could not agree to the conditions attached to Pro West hiring an auditor, but that Pro West was free to hire its own auditor to comply with the 2022 Order.
34. Pro West then advised it was engaging MNP LLP to conduct the audit without prejudice to its right to challenge the Commissioner's jurisdiction to conduct an audit from December 1, 2016, to require a licensee to "self-audit," and to make the 2022 Order. The then-Commissioner advised the accounting firm was acceptable and should work with the OBCCTC auditor.

Auditor's Revised IO Calculations

35. In accordance with the first step of the 2022 Order, Pro West worked with the OBCCTC auditor to revise certain calculations contained in the Audit Report. Pro West provided the auditor with a list of all instances of potential errors contained in the Audit Report, including the auditor's counting container movements within the same facility at Coast Terminal Inc. ("Coast") as two separate movements.
36. Pro West also advised the auditor that its practice was to allow the IO to pick up a container a day before a trip was dispatched and bring that container to either a Pro West yard or to the driver's home in preparation for the trip the next day to the container's destination. The auditor informed Pro West that such movements constituted two trips and as such Pro West was required to pay the driver for both

trips – not just for one trip. The auditor also noted that movement of damaged containers and dead runs also attracted the regulated rate.

37. Where evidence was provided to the auditor showing that selected trips were paid correctly by Pro West, the auditor adjusted the calculations.
38. On June 14, 2022, the auditor revised her calculations for the Initial Audit Period for IOs based on her acceptance of Pro West’s submissions that some container movements occurred within a facility and therefore did not attract a trip payment. The auditor’s revised calculation for IOs in the Initial Audit Period (“Revised IO Calculations”) are as follows:

Unpaid trips to Driver’s home/Nelson Yard	\$6,292.80
Unpaid damaged container moves	\$144.10
Unpaid dead runs	\$508.10
Total Unpaid Trips August 2018	\$6,862.69
Unpaid trips to Driver’s home/Nelson Yard	\$9,235.30
Unpaid damaged container moves	\$651.04
Unpaid dead runs	\$508.10
Total Unpaid Trips September 2019	\$10,394.44

39. In accordance with the 2022 Order, the auditor also advised Pro West to use the following methodology to complete its review of IO payroll records for the period between December 1, 2016 and December 31, 2021:

Review each drivers’ timesheets and supporting documentation (such as interchanges and waybills) to determine each unpaid container move performed by the driver including each move between a location and a driver’s personal residence or a Pro West yard made in preparation for the next day’s dispatch. Calculate the applicable trip rate for each container movement. Calculate all unpaid moves of damaged containers.

40. On June 24, 2022, Pro West requested a temporary stay of the 2022 Order based on the following:
- Compliance with the Order was estimated to take at least six (6) months.
 - The cost to comply with the Order (by retaining external accountants) was estimated at over \$2,000,000.00.

41. In addition, Pro West requested the following from the OBCCTC:
- a. That the auditor provide detailed calculations for August 2018 and September 2019 identifying each trip for which she says payment is owing and reason why it is owing and the amount owing for each trip.
 - b. An opportunity to provide detailed submissions about the reasonable scope of the audit and why a driver choosing to park at his home is not “trip splitting” or contrary to the legislation.
 - c. A new timeframe to conduct a “self-audit.”
42. On July 27, 2022, the then-Commissioner advised that he would not consider additional submissions on the scope of the audit because comprehensive submissions had already been provided, Pro West would also have further opportunities to make submissions, and the audit had already been underway for over 18 months to the prejudice of Pro West’s drivers. The then-Commissioner also said that the auditor and the licensee could discuss both the application of trip splitting to certain scenarios and an approach to extrapolation that might be used to arrive at an accurate assessment of monies owing. He provided Pro West with the revised calculations spreadsheet for August 2018 and September 2019. The spreadsheet included:
- The name of the IO.
 - The Unit truck number the IO was assigned.
 - The dates of each container movement.
 - The container number moved on each date.
 - The origin of the container move.
 - The destination of the container move.
 - The trip rate associated with each move.
 - The fuel surcharge associated with each move.
 - An explanation for the trip rate application.

2022 Amended Order

43. In the same letter, the then-Commissioner granted Pro West an extension until April 27, 2023 to complete its calculations and revised his 2022 Order for clarity (the “2022 Amended Order”) as follows:
- Pro West Trucking Ltd. must review the auditor’s calculations of amounts owing to I/Os for August 2018 and September 2019 (where all instances of possible trip splitting were noted), use the auditor’s revised calculations for the August 2018 and September 2019 audit periods to conduct a full audit of its records for the period between December 1, 2016 and December 31, 2021 to determine a total amount owing. Pro West must disclose this amount by no than April 27, 2023.
44. On August 19, 2022, Pro West responded that the Commissioner did not have the statutory authority to issue the 2022 Amended Order and maintained its objections to the Audit Report. It advised that it would not be following the Order. It also asserted that extrapolation was not reliable or appropriate in the circumstances and appended an email from MNP stating that “the extrapolation method, as

currently suggested, would not achieve a reliable or informative result.” Pro West also requested a meeting with the Commissioner to discuss the Order, noting, in spite of the then-Commissioner’s suggestion that trip splitting could be discussed between the auditor and the licensee, that “the significant issue of trip splitting has not yet been sorted out” and that addressing it “could significantly reduce the scope of the audit.”

45. On September 7, 2022, I was appointed the new Commissioner.
46. On January 6, 2023, I wrote to Pro West and advised that I had reviewed the file, including the correspondence between the licensee and the OBCCTC concerning the audit initiated on November 5, 2020. I advised that as a first step I would issue a decision based on the Initial Audit Period reported in the January 10, 2022 Audit Report and Pro West’s decision not to follow the 2022 Amended Order or, in the alternative, Pro West could follow the 2022 Amended Order. I invited Pro West to make additional submissions concerning the two months covered in the Audit Report and its stated decision not to comply with the 2022 Amended Order.

Pro West Submissions

47. On January 30, 2023, Pro West provided another submission (collectively, along with prior submissions dated February 14, March 14, April 18, May 2, June 24, and August 19, 2022, “the Submissions”).
48. In its August 19, 2022 submission, Pro West had requested an opportunity to make additional submissions about why a driver choosing to park at his home is not “trip splitting.” Despite my January 6, 2023 request for any additional submissions dealing with the audit of August 2018 and September 2019, Pro West did not provide these additional submissions.
49. Regarding the first argument, Pro West states that the term “trip splitting” is not defined or mentioned in the *Act* or *Regulation* and that in March 21, 2016 and October 27, 2021 OBCCTC bulletins (the “OBCCTC Bulletins”) the term refers to trips that are split between two drivers. Pro West maintains the OBCCTC bulletins must be read together with the *Act* and *Regulation* which set trip rates between the starting facility and the end facility. Since all trips identified in the Initial Audit Period involved one driver and the drivers were paid based on the starting and end facility, it paid its IOs the correct trip rates in accordance with the *Act* and *Regulation*.
50. In its argument that the Commissioner is barred from auditing months prior to 2018, Pro West says the following:
 - a. The current audit was commenced during the term of Pro West’s 2018 CTS license and there is no statutory authority for the Commissioner to audit a period prior to the issuance of the 2018 CTS license.
 - b. Pro West is only required to maintain records in accordance with the *Employment Standards Act* and the 2022 Amended Order exceeds these requirements.
 - c. The doctrine of laches applies.

d. The *Limitation Act* time bars a complaint from being pursued after two years of the alleged breach.

51. Additionally, Pro West maintains there is no provision in the *Act* or *Regulation* that provides the Commissioner with the jurisdiction to require a licensee to “self-audit.” Pro West maintains that pursuant to s. 31 of the *Act*, the Commissioner has the authority to conduct an audit and pursuant to Appendix “D” of the CTS license the Commissioner may require a “compliance letter” from a Certified Professional Accountant.
52. Pro West also argues the Commissioner does not have the statutory authority to extrapolate to identify monies owing to drivers and argues extrapolation would not provide a reliable result in this circumstance.
53. Pro West further maintains that the 2022 Amended Order is unreasonable given the time and expense required to follow it.
54. Finally, in its January 30, 2023 submission, Pro West states it can no longer comply with the scope of the 2022 Amended Order as it no longer has access to all the trip sheets prior 2018.
55. Pro West asserts that it has been co-operative throughout the audit process despite the payroll documents for the Initial Audit Period being in the sole possession of the auditor for a period of time and despite the auditor’s improper application of “trip splitting.” In its January 2023 submissions Pro West asks again for a meeting with the Commissioner to discuss the audit and next steps. It says that it will continue to cooperate with an OBCCTC audit “and is prepared to pay any amounts actually and properly owed to drivers” but takes issue with orders that it says are outside of the Commissioner’s statutory power and/or are unreasonable due to the time and cost of compliance.

Analysis and Decision

56. As set out above, given the number of outstanding issues raised by Pro West, I advised the licensee on January 6, 2023 that my first step would be to issue a decision based on the two months audited in the January 10, 2022 Audit Report (August 2018 and September 2019). I also advised that my decision would address Pro West’s failure to comply with the 2022 Amended Order in the event it did not comply by the April 2023 deadline. These are the issues dealt with in this decision.
57. In terms of Pro West’s suggestion of a meeting with the Commissioner, I have reviewed all the correspondence between the OBCCTC and the licensee and I am satisfied that Pro West has been given every opportunity to provide me with its position in writing. I note that Pro West was in direct communication with the auditor throughout the audit process including after the Audit Report and the 2022 Order were issued. It remained open to Pro West to continue to communicate with the OBCCTC auditor following the 2022 Amended Order. I do not consider it necessary in my role as a decision maker to meet directly with Pro West or its counsel following its written submissions. Nor has Pro West suggested why it might be necessary or why it cannot propose a way forward in writing or in

cooperation with the OBBCTC auditor. I also note that neither the legislation nor the Rules of Practice and Procedure contemplate such meetings.

58. Although Pro West says that it is open to making its drivers whole, it has not, to date, made any suggestions about how the amounts owing to drivers might be properly calculated, short of the OBBCTC reviewing its records applying Pro West's view of trip-splitting and restricting itself to the time frame Pro West says is allowed and the documents Pro West still has available. It has challenged the Commissioner's jurisdiction to order it to bring itself into compliance with the minimum rates and rejected extrapolation outright as a more efficient way of calculating monies owing (despite MNP's more nuanced comments). Pro West's positions on the Commissioner's statutory authority and the 2022 Order/2022 Amended Order are clear. I do not accept its submissions in this regard and must proceed accordingly.

Company Drivers

59. As set out above, the auditor found that Pro West had underpaid eleven (11) of its company drivers when it failed to increase their hourly rate following the June 1, 2018 Rate Order and owed them \$21,663.21 as a result. On July 6, 2021, the auditor provided specific instructions to Pro West on how the payments were to be issued. In particular, the auditor required Pro West to provide proof of payment by July 16, 2021. However, Pro West failed to demonstrate to the auditor that payment had been made prior to the release of the Audit Report in January 2022.
60. Pro West did not dispute that it underpaid its company drivers or the amount owing. However, it was not until February 17, 2022 – seven months after the deadline set by the auditor -- that it provided documentation showing that \$21,663.21 had been paid to the eleven (11) Company Drivers.
61. I find that Pro West was in violation of s. 23(2) of the Act when it paid the eleven (11) company drivers less than the rate established under s. 22 between June 1, 2018 and May 31, 2019. Although Pro West paid the company drivers the outstanding amounts by the deadline set by the auditor, it failed to provide the required confirmation sought by the auditor by the deadline.

IO Payments

62. Turning to Pro West's IO payroll deductions for missed reservations and administrative fees for using its gas card, s. 24 of the Act prohibits a licensee from receiving a financial set-off, rate deduction or rebate from a trucker. Section 2 of Appendix E to Schedule 1 of the Container Trucking Services license ("CTS License") prohibits a licensee from deducting a Business Cost (as defined in the CTS License) from driver compensation. The object of these provisions is to prevent licensees from seeking contributions from drivers to the costs of doing business "for which the Licensee is responsible" as per the definition of "Business Costs" in the CTS License. A licensee may be motivated to improve its operational efficiency by limiting or eliminating missed container reservations. However, it cannot seek a financial set off from a driver where there has been a failure to meet that efficiency – regardless of who is at fault. A missed

reservation is a cost of doing business and has not been permitted as a deduction in the past – see *Prudential Transportation Ltd.* (CTC Decision No. 21/2017).

63. Similarly, there may be fees charged to the employer for administrating a company gas card but those are costs for which the licensee is responsible; those costs – or portions of those costs -- cannot be borne by the driver. In *Gur-ish Trucking Ltd* (CTC Decision 7/2020), a payroll deduction to recover the employer’s insurance cost while the driver was using the company vehicle for personal use was not permitted because it was considered a Business Cost. In this case, I find that Pro West is responsible for the company credit card fees and cannot off-set the administrative fees because it permits an IO to use the company credit card. Like the insurance fees in *Gur-ish*, I find that credit card fees in these circumstances are part of the licensee’s cost of doing business and cannot be recovered from a driver.
64. I find the payroll deductions for missed reservations and company credit card use were financial set-offs for Business Costs for which the licensee is responsible and as such these were in violation of s. 24 of the *Act* and s. 2 of Appendix E to Schedule 1 of the license.
65. I accept the auditor’s finding that the deductions for extended medical benefits were allowable. I am unable to decide if insurance payments were improperly deducted from Mr. Sidhu’s compensation for the period of June 11, 2021 to July 31, 2021 as the auditor did not request records from Pro West after she was advised it was too busy to continue the audit.

2022 Order/Amended Order

66. I will first address Pro West’s arguments that the Commissioner does not have the authority to issue the 2022 Order/Amended Order and that the Order/Amended Order is unclear and inconsistent with the *Act*.
67. Section 9 of the *Act* sets out the authority of the Commissioner to make orders and s. 40 requires a licensee to comply with the orders.
68. In this case, the then-Commissioner’s reasons for issuing the 2022 Order are found in the April 11, 2022 correspondence to Pro West. After the Commissioner provided his interpretation of the *Act*, including the interpretation of “trip splitting,” he agreed with the auditor that Pro West was in contravention of s. 23 of the *Act* (“compliance with established rates”) when it engaged in “trip spitting.”

Trip Splitting

69. While the 2022 Order/Amended Order do not specifically use the term “trip splitting” or reference a requirement to recalculate IO trips based on nonpayment for certain trips, the Auditor’s Report and the correspondence between the then-Commissioner and Pro West make clear that the order required identifying any trips that went unpaid because of “trip splitting.”

70. Pro West disagreed with the OBCCTC's position on "trip splitting" and took the position – in part -- that it could not comply with the 2022 Order/ Amended Order. I find that the Audit Report and the Commissioner's correspondence clearly and correctly identifies the errors in Pro West's calculation for IOs and that a reasonable person would understand what those issues were based on the following.

71. The term "trip splitting" is used by the auditor in the Audit Report and the licensee correctly points out that this term is not used in the *Act* or *Regulation*. The auditor does expand on the term in the Audit Report:

The unpaid trips identified in the audit were the result of a trip splitting system used by Pro West. The trip splitting system consisted of a driver taking a container from Point A to Point B and then the next day, the driver would deliver the container from Point B to Point C. The trip splitting occurs because the supplier agreement is only to take the container from Point A to Point C, therefore, Pro West only pays the driver for the trip from Point A to Point C, instead of Point A to Point B and then a second trip from Point B to Point C.

72. Upon receiving Pro West's requests for clarification on the meaning of "trip splitting," the then-Commissioner clarified that that word "point" and "facility" were being used interchangeably by the auditor. Therefore, the auditor's definition of trip splitting can be read as:

The unpaid trips identified in the audit were the result of a trip splitting system used by Pro West. The trip splitting system consisted of a driver taking a container from **facility A** to **facility B** and then the next day, the driver would deliver the container from **facility B** to **facility C**. The trip splitting occurs because the supplier agreement is only to take the container from **facility A** to **facility C**, therefore, Pro West only pays the driver for the trip from Facility A to Facility C, instead of Facility A to Facility B and then a second trip from **facility B** to **facility C**.

73. Regardless of what the container movement example outlined in the Audit Report is called, the requirement for paying drivers a certain rate for certain trips within the Lower Mainland is set out in the *Act* and the *Regulation* and the Rate Order.

74. Section 1 of the *Regulation* sets out the relevant definitions:

"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;

"off-dock trip" means one movement of one or more containers by a trucker from one facility in the Lower Mainland to a different facility in the Lower Mainland, but does not include

(a) an on-dock trip, or

(b) a movement of a container from one location in a facility to a different location in the same facility;

"on-dock trip" means one movement of one or more containers by a trucker from

- (a) a marine terminal to a location in the Lower Mainland, or
- (b) a location in the Lower Mainland to a marine terminal;

"trip", in relation to container trucking services, means an off-dock trip or an on-dock trip.

75. The *Regulation* does not define the term "location," but I rely on the Merriam-Webster's definition: "a position or site occupied or available for occupancy or marked by some distinguishing feature."
76. I find that if a container's origin or destination – whether intermediary or final – meets the definition of a "facility" or "location" or "marine terminal" then that container movement is considered a "trip" and attracts a trip payment based on the Rate Order. My interpretation is consistent with s. 1 of the *Regulation* which says that a trip occurs when a container is moved between one facility to a different facility in the Lower Mainland ("off-dock trip") or from a marine terminal to a location in the Lower Mainland ("on-dock trip").
77. I do not agree with Pro West that the identification of a container movement origin or destination as a location, marine terminal or facility attracting a separate trip rate is inconsistent with the OBCCTC Bulletins. The OBCCTC Bulletins advise that "trip splitting" occurs when a movement between a starting point of container trucking services and the end point of container trucking services "is split between one or more trip rate drivers" (emphasis added). However, both Bulletins continue:
- A container movement between its starting point and an intermediary point within the Lower Mainland is considered one "trip." . . . A further movement of the same container(s) from the intermediary point to its end point within the Lower Mainland is a separate trip....
78. I find that the OBCCTC Bulletins are consistent with the approach adopted by the auditor in applying the appropriate trips rates for container movements she identified as "trip splitting."
79. I do not accept Pro West's argument that the auditor should only consider the "starting" and ultimate "end" facility when determining when a trip attracts a rate payment -- that any intermediary movements to a facility should not be considered separate trips. The on-dock and off-dock trip definitions are not isolated to a starting location/facility/marine terminal and a final location/facility/marine terminal. Moreover, the definition of "facility" includes intermediary locations for a container including locations where container is "stored," "trans loaded," "repaired" and "cleaned." In my view it would be absurd to interpret the *Regulation* as excluding certain container movements between certain locations that fall within the definition of "location," "facility" or "marine terminal" while including other container movements between certain locations that fall within these definitions.
80. Reviewing the Revised IO Calculations and the Revised IO Calculations Spreadsheet provided to Pro West, I find that the auditor correctly assessed when a container trip attracts a rate. Each container move dealt with in the calculations identifies a Lower Mainland marine terminal or facility where

containers are stored, loaded, unloaded, trans-loaded, repaired, cleaned, maintained, or prepared for shipping as an origin or destination.

81. In some instances, the Revised IO Calculations Spreadsheet identifies a driver's home as a container's origin or destination in the Lower Mainland; this is consistent with Pro West's practice of allowing IOs to take containers home in preparation for a trip the next day to the container's final destination. I find the driver's home qualifies as a location in the Lower Mainland used to "store" a container until it is ready to be delivered to the next facility – thus the driver's home is a "facility" as defined in s. 1 of the *Regulation* and for the purposes of determining an off-dock trip. If the container was moved between a driver's home in the Lower Mainland and a marine terminal, the driver's home is a location for the purposes of an on-dock trip. While Pro West submits that IOs occasionally store containers at their homes overnight to save themselves fuel and time by avoiding travel back to the yard the next day at their own expense, this practice also appears to allow Pro West to avoid paying an intermediary trip as set out below. In any event, there are many instances where a driver may benefit in some way from action that is contrary to the *Act, Regulation*, or the CTS License but the action is still not permitted.
82. While on the surface it may appear strange to consider a driver's home a "facility" and require a licensee to pay for a trip when overnighing at the driver's home may be a convenience for the driver, the OBCCTC would have considerable difficulty distinguishing a trip that should not be paid because it benefits a driver from a trip that should be paid because it is required by the licensee. It would also be difficult to parse out the value of any purported benefit to the driver against the benefit to the licensee. This would make the rate scheme more susceptible to undercutting. In the precursor to the regulatory scheme currently administered by the OBCCTC, the Vince Ready and Corinn Bell's *Recommendation Report Lower Mainland Ports* report urged the creation of a clear and fixed rate structure that would properly compensate drivers and would leave little opportunity for abuse:

We sincerely remain concerned that undercutting and gamesmanship will continue in this industry. In particular, we are concerned that, based on some of the scenarios presented to us over the course of the previous four months, companies and drivers will seek to find loopholes in the proposed wage system.¹
83. The auditor found Pro West was only paying its driver for one trip between the starting facility and the end facility and was not paying for the intermediary trips performed by the same driver. In other words, Pro West was trip splitting a container movement and as per the practice identified in the OBCCTC Bulletins. Trip rates are established based on one driver moving a container between one facility and another facility. If a driver travels to an intermediate facility before the container's final destination, then there are additional costs (e.g., fuel and vehicle wear and tear) that are not accounted for in the single trip compensation rate, position movement rate ("PMR") or the fuel surcharge ("FSC").
84. Similarly, if one driver moves a container from its origin point to the intermediate facility and another driver moves a container to its final destination, splitting the trip rate set for the origin to the final

¹ Vince Ready and Corinn Bell, Recommendation Report – [British Columbia Lower Mainland Ports](#) September 25, 2014.

destination between the two drivers would not fully compensate both drivers for the additional container movement and they would have to split the trip rate (and the associated Fuel Surcharge and Position Movement Rate) between themselves. The *Regulation* does not account for the splitting of trip rates or FSC or PMR between one or more IOs as there is no mechanism to assess what percentage of the trip rate any driver would receive if such a practice were permitted.

85. I find that the auditor correctly applied the trip rates for each container movement identified in the Revised IO Calculations. Furthermore, while I understand Pro West does not agree with the auditor's or the then-Commissioner's assessments underlying the 2022 Order/Amended Order, I do agree with them. Additionally, I find the auditor and then-Commissioner clearly identified Pro West's practice of underpaying drivers for certain portions of their trips and set out how the trips should be calculated according to the *Act*.

Scope of Audit

86. Pro West's submissions raise several objections to the Commissioner's 2022 Order/Amended Order which required Pro West to conduct a "self-audit" of its payroll records prior to 2018.

No Statutory Authority to Audit an Expired Licence

87. I do not accept Pro West's argument that the Commissioner has no statutory authority to audit a licensee for the period of time when it was operating under a licence that has since expired. I find that, when read as a whole, the *Act* authorizes the Commissioner to do so.
88. It bears repeating that the *Act* is beneficial legislation intended to ensure that drivers are paid legislated rates in a timely manner. Licensees must comply with the legislation, as well as the terms and conditions of their licenses, and the Commissioner is tasked under the *Act* with investigating and enforcing compliance. The regulatory scheme was created to preserve stability in the drayage sector by addressing chronic rate undercutting and driver compensation issues through a system of minimum rates, audits, licensing, and enforcement.²
89. Section 31 of the *Act* empowers the Commissioner to conduct audits or investigations to ensure compliance with the *Act*, *Regulation*, and the license – whether or not the Commissioner has received a complaint. Section 31 does not restrict or impose any parameters on the period of time that can be audited or investigated. Nor does the definition of "licence" in s. 1 of the *Act* exclude a previous license. Even if I agreed that the definition of "license" was restricted to the current license, which I do not, s. 31 also contemplates audits and investigations to ensure compliance with the *Act* and the *Regulation* and there is no time limit involved under the legislation.
90. Similarly, s. 29 requires the Commissioner to accept and review complaints and sets out specific circumstances under which the Commissioner may refuse to accept or review a complaint. Section 29

² *Can. American Enterprises Ltd. v. British Columbia Container Trucking Commissioner*, 2020 BCSC 2156 at para. 10.

does not permit the Commissioner to stop investigating a complaint simply because it is outside a specific period of time.

91. Pro West's interpretation would effectively confine the Commissioner to investigating and remedying only infractions occurring during the term of a licence (which is generally 2 years) while prohibiting him/her from dealing with "chronic" offences. By way of example, if a licence expired on October 31, 2021, and a new two-year licence was granted on November 1, 2021, an audit started on November 30, 2021 could only consider the licensee's activities for 30 days. Such an approach would seriously compromise the remedial purpose of the *Act*, including the amount by which drivers could be made whole for longer-term breaches of the minimum rates. The Commissioner would be unable to resolve a complaint made at the beginning of a license period regarding the months before the issuance of the new licence yet perfectly capable of resolving a two-month-old complaint made near the end of the license period. This would not make sense and would be unfair and contrary to the purpose of the *Act* which is to ensure that drivers are properly remunerated for container trucking services.
92. Based on the foregoing, I find that the ability of the Commissioner to audit a licensee is not restricted to the term of the current license.

Limitation Act two-year time bar

93. I do not agree with Pro West's submission that the time limits set out in the *Limitation Act* apply in this case. Pro West argues that sections 6 or 27 of that legislation apply.
94. Section 6 of the *Limitation Act* only applies to "court proceedings" – not administrative decision-making bodies like the OBCCTC. Section 6 says that "a court proceeding in respect of a claim must not be commenced more than 2 years after the date on which the claim has been discovered." Section 8 of the *Limitation Act* sets out all the requirements to establish the upon which a claim can be said to have been "discovered" as including all of the following:
 - (a) That injury, loss or damage had occurred;
 - (b) That the injury, loss or damage was caused by or contributed to by an act or omission;
 - (c) That the act or omission was that of the person against whom the claim is made;
 - (d) That, having regard to the nature of the injury, loss, or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage. [Emphasis added]
95. Section 12(1) of the *Act* establishes the exclusive jurisdiction of the Commissioner in all cases and for all matters in which jurisdiction is conferred on the Commissioner by the *Act*, including the setting and enforcement of trip rates. The decision-making process of the Commissioner is not a "court proceeding" and the requirements for "discovering" a claim under s. 8 of the *Limitation Act* do not apply.
96. Section 27 of the *Limitation Act* does not apply for similar reasons. It only prevents a claimant from pursuing a non-judicial remedy if the claimant was prevented from commencing a court proceeding "as

a result of the expiry of a limitation period under this Act.” Again, since a “court proceeding” is not the appropriate forum, s. 27 cannot apply.

Employment Standards Act payroll record retention requirement

97. I also reject Pro West’s argument that the payroll record retention requirements set out in s. 28 of the *Employment Standards Act* and incorporated into the licence bars the Commissioner from requiring Pro West to produce payroll records prior to 2018 and/or from auditing periods prior to 2018.
98. Pro West argues that the 4-year record keeping requirement means that “as of today’s date (March 14, 2022), licensees are not required to maintain payroll records from prior to March 14, 2018. Clearly, the Commissioner cannot audit records that no longer exist.” Pro West appears to be arguing that the auditor (and later the then-Commissioner) cannot ask for or audit payroll records prior to 2018 because the Order was issued in 2022 and Pro West is not required to retain records beyond four years from the date of the Order. Pro West also advises that some of its records prior to 2018 no longer exist. It is true that licensees are required to keep records for 4 years after the date they are made. It is also true that if an audit were commenced in 2022 a licensee would only be required to produce records going back to 2018. However, that is not what has happened here. This audit was started in December of 2020.
99. Once an audit has started, licensees may not dispose of records within 4 years of the audit start date. If records could be disposed of on a “rolling” basis, then every audit would be compromised. Audits take time, and the more time an audit took, the fewer months could be reviewed, because a licensee would be disposing of its records on a “rolling” basis. Common sense dictates that a licensee under audit cannot dispose of payroll records once the audit has started because the exercise is intended to investigate past compliance and only preservation of a licensee’s records will allow for this.
100. Pro West was also advised that it was not to dispose of its payroll records upon receipt of the Record Request in December of 2020. The Request Record stated that Pro West should not dispose of payroll records required to be kept in compliance with its license. At that point, therefore, Pro West was required to maintain records back to November 12, 2016. As the audit is still underway, Pro West should not have disposed of any records from that date onwards.
101. Even if I accept that Pro West was unclear about this upon receipt of the Record Request, which I do not, it was abundantly clear in the auditor’s July 22, 2021 correspondence that Pro West was being audited for a period at least as far back as December 1, 2015 (later amended to December 1, 2016). This is still another reason Pro West should have retained its records going back to at least December 2016.
102. Although it is not clear at this stage what records Pro West does or does not have, I note that Pro West did not indicate that earlier records were unavailable during the audit process or immediately following the issuance of the Audit Report, which clearly contemplated review of the period of time between December 1, 2015 (later amended to December 1, 2016) and December 31, 2021. In fact, at one point in the audit Pro West calculated that \$320,403.60 was owing to drivers for the period between December 1, 2015 and July 31, 2021. It is reasonable to assume that Pro West had access to records

back to 2015 to determine the outstanding amount. On December 13, 2021, Pro West argued that it did not have the time to review each driver timesheet between December 1, 2015 and December 31, 2021, also suggesting that the records were available at that point.

103. Regardless of whether it currently has payroll documents going back as far as 2016 or only as far back as 2018, Pro West chose not to comply with the 2022 Order/Amended Order using the payroll documents that are in its possession. It could at least have identified the amount owing for 2018-2021. I find that Pro West's failure to comply with the 2022 Order/Amended Order even based only on the records it says it has back to 2018 has further undermined the audit process and the Commissioner's ability to ensure Pro West's drivers have been properly compensated.

Doctrine of Laches

104. Pro West submits that the then-Commissioner failed to consider the doctrine of laches in issuing the 2022 Order/Amended Order.
105. The Supreme Court of Canada explained in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at paras. 145-146 that the doctrine of laches is designed to address injustice stemming from undue delay in prosecuting a claim where there has been acquiescence by the claimant, or where it would be unreasonable to allow the claim to proceed.
106. Pro West's submissions do not develop its reliance on the doctrine of laches but it cannot claim to be prejudiced by delays in the process for which it was responsible. I fail to see how Pro West has been prejudiced by any delay by the OBCCTC or how it has reasonably relied on any delay to its detriment.

Unreasonable resourcing required to comply with 2022 Amended Order

107. I am not persuaded by Pro West's argument that completing the tasks assigned in the 2022 Order/Amended Order would be too costly and time-consuming an exercise. I note that the then-Commissioner offered to address Pro West's concerns about the cost of reviewing its records and bringing itself into compliance with the minimum rate requirements by suggesting he would accept an amount owed to the drivers through a statistical extrapolation exercise. Pro West took the position it would not engage in an extrapolation exercise because it did not feel that Commissioner had the statutory authority to extrapolate and because it did not feel the approach proposed by the auditor would yield an accurate result. As set out above, the MNP email attached to Pro West's correspondence on extrapolation does not say extrapolation is not an acceptable approach, only that the initial approach suggested by the OBCCTC auditor was not likely to achieve a reliable or informative result. In his letter dated July 27, 2022 the then-Commissioner invited the licensee to cooperate on a better methodology. I find the then-Commissioner attempted to address Pro West's concern about costs and accuracy, but that effort was rejected by Pro West, resulting in delays in the process.
-

No Jurisdiction to Order a “Self-Audit”

108. Pro West’s argument here appears to be that the Commissioner has abdicated his responsibility under the *Act* by requiring a licensee to conduct the work that ought to be conducted by the regulator. It argues that there is no section in the *Act* or *Regulation* that empowers the Commissioner to require it to perform an audit.
109. Section 9 of the *Act* empowers the Commissioner to order a licensee to comply with the requirements of any provision of the *Act* or *Regulation* or license if the licensee has failed to do so. Section 40 states that a person to whom an order under the *Act* applies must comply with an order.
110. In this case, the auditor, and the then-Commissioner, accepted that Pro West was in breach of the *Act* and CTS licence. The Commissioner then made the 2022 Order /Amended Order requiring Pro West to calculate amounts owing based on the proper application of rates as identified in cooperation with the auditor.
111. The auditor’s direction and the Commissioner’s 2022 Order/Amended Order are part of the Commissioner’s s. 31 audit powers. The 2022 Order/Amended Order does not suggest that once Pro West completes its payroll record review that the OBCCTC audit is concluded. In fact, the 2022 Order/Amended Order specifically compels Pro West to provide its findings to the OBCCTC within a certain time frame. The order to review its records and adjust for underpayments is not the end of the audit but merely a component of the audit which the Commissioner is responsible for.
112. I acknowledge that some of the correspondence between the OBCCTC and Pro West uses the term “self-audit” – perhaps an unfortunate phrase given the “audit” language in the *Act*. However, the 2022 Order/Amended Order does not actually order the licensee to “self-audit” but rather sets out the process Pro West must follow to bring itself into compliance with the minimum rate requirements under the *Act*. Although the term “self-audit” may have been used as short-hand, what the Commissioner was actually doing was ordering Pro West to comply with the *Act*. The Commissioner has clear jurisdiction to do so.
113. The impugned order is comparable to a student being told to redo his math homework using the correct formula. Pro West was provided with information concerning the proper application of the regulated rates and how to bring itself into compliance by applying a specific approach. The auditor’s direction and the subsequent 2022 Order/Amended Order required Pro West to bring itself into compliance with *the Act, Regulation*, and its licence after the OBBCTC’s discovery of its failure to use the proper approach during the Initial Audit Period.
114. It is notable that Pro West itself took initial steps to review its payroll records to ensure it was compliant. It reviewed its payroll records between June 1, 2018 and May 31, 2019 after it was advised by the auditor that it had failed to pay the correct rates in the Initial Audit Period. At one stage in the audit, Pro West advised the auditor that it owed in excess of \$385,000 to its IOs. Pro West also considered hiring its own auditors to review its records.

115. At some point, however, Pro West changed course and challenged the requirement to assess what was owing in order to bring itself into compliance with the rate requirements. Having Pro West redo its IO payroll after its failure to apply the correct rates is a reasonable request and is consistent with the *Act's* purposes of addressing chronic rate undercutting and proper compensation. Once Pro West completed that task, the auditor would still have been seized with the responsibility to ensure the work was done correctly: the audit would not have ended with Pro West's "self-audit."
116. To carry on with my math homework analogy, it is not the teacher who must correct the student's work. Rather, the student must redo the work using the correct formula and present the results to the teacher. Both the licensee and the student are required to apply the correct approach in order to be compliant with the regulatory regime/to arrive at the correct answer.

Proposed Penalty

117. As decided above, the circumstances of this case are that:
- Pro West underwent an initial audit of the Initial Audit Period (August 2018 and September 2019).
 - The auditor discovered that Pro West had failed to increase the hourly rate for Company Drivers following the June 1, 2018 Rate Order and owed a total sum of \$21,663.21 for the period between June 1, 2018 and May 31, 2019 as a result.
 - Pro West paid the amount owing to Company Drivers by the deadline set out in the July 6, 2021 auditor letter but did not initially supply proof of having done so as required.
 - The auditor also discovered that Pro West improperly deducted \$620.00 in Business Costs from IO wages during the Initial Audit Period and failed to pay IOs for all container trips performed and owed \$17,257.13 for the Initial Audit Period as a result (\$6,862.69 for August 2018 and \$10,394.44 for September 2019).
 - On April 11, 2022 the then-Commissioner ordered Pro West to bring itself into compliance with the minimum rate requirements by engaging with the OBCCTC auditor, identifying any discrepancies in the Audit Report, and reviewing its payroll records against the methodology provided by the auditor.
 - Pro West failed to comply with the 2022 Order/Amended Order's final deadline of April 23, 2023.
118. 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 s. 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 and up to \$10,000.00 in any other case.
119. The seriousness of the available penalties indicates the potential gravity of non-compliance with the *Act*. The *Act* is beneficial legislation intended to ensure that licensees pay their employees and IOs in compliance with established minimum rates. Licensees must comply with the legislation, as well as the terms and conditions of their licenses, and the Commissioner is tasked under the *Act* with investigating

and enforcing compliance.

120. 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.
121. Taking the relevant *Smart Choice Transportation* factors into consideration, I find that a penalty is appropriate here based on the Pro West's failure to comply with the 2022 Order/Amended Order (its failure to bring itself into compliance with the minimum rate requirements). I find the Order to be consistent with the *Act*, *Regulation*, and with Pro West's CTS licence and I find the 2022 Order/Amended Order and the auditor's June 14, 2022 instructions to Pro West to be clear and concise.
122. While Pro West is entitled to seek clarification regarding interpretation of the legislation and calculation of amounts owing and to submit reasonable arguments about the application of the regulatory scheme, ultimately the onus to become and remain compliant with the *Act* rests with the licensee: Olympia Transportation Ltd. (CTC 02/2016).
123. Pro West's unilateral decision not to comply with the auditor's direction due to alleged resourcing constraints resulted in a review by the then-Commissioner who determined that Pro West was in breach of s. 22 of the *Act* and ordered it to bring itself into compliance. Pro West has since then resisted "self-auditing" on the basis that the Commissioner does not have the jurisdiction to make the order, the passage of time, and its own failure to retain payroll records as required. Pro West submits that bringing itself into compliance via a "self-audit" is too costly and time-consuming, but balks at the offer of extrapolation that would alleviate these concerns. Ultimately, it is the licensee's responsibility to pay the minimum rates. In circumstances where it has failed to do so, it must do the work of bringing itself into compliance (fixing its mistakes) based on the records it is required to create and retain. Pro West is in the best position to reassess its payroll records in accordance with the 2022 Order/Amended Order. Despite having retained MNP, and despite MNP's statement that the *initial* extrapolation approach proposed would not yield reliable or informative results, Pro West has not proposed any other method to arrive at amounts owing.
124. I understand Pro West does not agree with the then-Commissioner's 2022 Order/Amended Order for the reasons outlined above, but this does not entitle it to avoid taking steps – any steps – to comply with

the 2022 Order/ Amended Order by the deadline of April 27, 2023. Section 40 of the *Act* says that a licensee must comply with an order and Part 5 of the *Act* sets out the process for disagreeing with a Decision and/or Decision Notice. Pro West should have complied with the clear directions of the 2022 Order/Amended Order (in cooperation and discussion with the OBCCTC auditor). If it disagreed with the outcome as set out in a Decision Notice, then it could apply for a Reconsideration and ultimately a Judicial Review if necessary. Instead, Pro West failed to comply with the 2022 Order/Amended Order altogether and thereby frustrated the audit process.

125. The April 27, 2023 deadline set out in the 2022 Amended Order has now passed, and I find Pro West has no one to blame but itself for its failure to bring itself into compliance in the more than 12 months it was given to do so.
126. Section 40 of the *Act* requires a licensee to adhere to the Commissioner's orders, but Pro West has engaged in a pattern of behaviour that threatens to undermine and weaken the OBCCTC's powers under s. 31 and s. 9 of the *Act*. Pro West's refusal to comply with the Commissioner's 2022 Order/Amended Order to bring itself into compliance undermines the authority of the OBCCTC and the Commissioner's ability to ensure compliance with the minimum requirements of the *Act* and to hold licensees accountable.
127. As will be clear from the paragraphs above, I find that Pro West's conduct threatens the stability and the integrity of the industry. I further find that this is serious misconduct and that there is a need to demonstrate the consequences of such conduct to those who enjoy the benefits of having a CTS licence. The regulatory framework governing the drayage sector was established to promote stability in the sector. The industry must have confidence that licensees are following the rules and that the Commissioner is enforcing the rules -- in part through orders. If the industry cannot be confident that the Commissioner is serious about enforcement, if non-compliance with orders is seen as acceptable, the drayage sector will be destabilized.
128. While the total quantum of additional outstanding money owed to drivers is unclear at this stage, Pro West's initial estimate of over \$380,000.00 – although later characterized by Pro West as inaccurate – suggests that the funds owing to drivers are substantial, as does the OBCCTC auditor's rough calculation. The total amount of \$17,877.13 (\$6,862.69 for August 2018 and \$10,394.44 for September 2019 in underpayments and \$620.00 in improper deductions) owed to IOs during the Initial Audit Period is a substantial amount of money over a relatively short period of time and the nature of the underpayments appear to be systemic and not isolated to the Initial Audit Period.
129. Pro West has not brought itself into compliance with the minimum rate requirements as instructed. Pro West's failure to comply with the Orders means that the total amount owed to IOs has not been identified and the undercompensated drivers remain undercompensated. Although amounts owing are generally considerations taken into account when they can be identified with some precision, the fact that the amount has not yet been identified is also relevant and also weighs in favour of a significant penalty. The harm caused to the drivers is that the outstanding amount has not yet been calculated or paid to them.
130. This is not Pro West's first violation of this kind. In Pro West #1, the Commissioner imposed a penalty of \$25,000 based in part on lengthy delays caused because "Pro West took considerable time to review the

auditor's calculations and to re-calculated pay adjustments to company drivers and independent operators based on its own interpretation of the *Act* and *Regulation*." While in that case there was no breach of an order, the delays caused by Pro West had the same effect of undermining confidence in the ability of the OBCCTC to offer a timely remedy to drivers' legitimate complaints and/or chronic underpayment.

131. In my view, as stated in previous decisions, the significant penalties available under the *Act* (up to \$500,000 fine, suspensions up to one year and licence cancellation) are intended to ensure that penalties are not merely seen as a cost of doing business. In this case, while the exact quantum of money owing is unknown due to Pro West's failure to comply with the 2022 Order/Amended Order, the amount owed to drivers is clearly significant and to ignore the impact of its breach of the 2022 Order/Amended Order would run contrary to this expressed principle and result in penalties becoming a "cost of doing business."
132. In these circumstances, I have concluded that an administrative penalty of \$50,000, together with a suspension of Pro West's license for a four-week period, is appropriate.
133. In the result and in accordance with s. 9 and s. 34(2) of the *Act*, I hereby give notice that:
 - a) I order Pro West to retain all the records it is required to maintain as described in its CTS licence that are currently in its possession or control for a period of two years from the date of this decision.
 - b) I order Pro West to pay the outstanding amount owed to IOs for the Initial Audit Period identified in the Revised IO Calculations cited at paragraph 38 of this decision and to provide proof of having done so to the OBCCTC no later than 30 days from the date of this decision.
 - c) I order Pro West to reimburse each IO who has had an amount deducted from his compensation during the Initial Audit Period as cited at paragraph 17 of this decision and to provide proof of having done so to the OBCCTC no later than 30 days from the date of this decision.
 - d) I order Pro West to provide a copy of Mr. Mander Singh Sidhu's payroll records and supporting evidence for any non-statutory payroll deductions for June and July 2021 including any evidence of his last day of work to the OBCCTC no later than 30 days from the date of this decision.
 - e) I propose to impose a \$50,000 administrative penalty against Pro West and to suspend its licence for four weeks.
134. Should it wish to do so, Pro West has 7 days from receipt of this notice to provide a written response to me setting out why the proposed penalty should not be imposed.
135. If Pro West provides a written response on the proposed penalty in accordance with the *Act*, I will consider it and advise whether I will refrain from imposing any or all of the penalties.
136. Any failure to pay outstanding monies owed to drivers by the deadlines set in this decision will be paid from the proceeds of Pro West's security in accordance with Part 5 of the *Regulation*.

137. This decision will be delivered to the Company and published on the Commissioner's website (www.obcctc.ca).

Dated at Vancouver, BC, this 10th day of July, 2023

A handwritten signature in blue ink, appearing to read "Glen Madlnes". The signature is fluid and cursive, with the first name "Glen" and last name "Madlnes" clearly distinguishable.

Glen Madlnes
Commissioner

Cc: Nazeer Mitha, MLG Law Corporation (nmitha@mithalawgroup.ca)