



October 12, 2023

Gantry Trucking Ltd.  
11634 130 Street  
Surrey, BC V3R 2Y3

TSD Holdings Inc.  
11634 130 Street  
Surrey, BC V3R 2Y3

## **Commissioner's Decision**

### **Gantry Trucking Ltd. and TSD Holding Inc. (CTC Decision No. 13/2023)**

#### **Introduction**

1. Gantry Trucking Ltd. ("Gantry") and TSD Holding Inc. ("TSD") (together the "Companies") are each licensee within the meaning of the *Container Trucking Act* (the "Act").
2. 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 ("Rate Order"), and a licensee must comply with those rates. In particular, 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.
3. Under section 31 of the *Act*, the Commissioner may initiate an audit or investigation to ensure compliance with the *Act*, the *Container Trucking Regulation* ("Regulation") and the Container Trucking Services ("CTS") license whether or not a complaint has been received by the Commissioner.
4. As part of the random audits initiated by the Commissioner, an auditor was directed to audit Gantry and TSD records to determine if their directly employed operators ("Company Drivers") were being paid the required minimum rates. Since the Companies have an integrated fleet and share employees, the auditor combined the audits of Gantry and TSD even though each is a separate licensee.
5. In Gantry Trucking Ltd. and TSD Holding Inc. (CTC Decision No.14/2017) dated July 6, 2017 (Decision Notice dated July 25, 2017) ("First Decision"), the Companies were found to be in violation of the *Act*, the *Regulation* and their CTS licenses. The Companies were issued an administrative penalty of \$30,000.00 for failure to pay drivers regulated hourly rates when performing CTS work. The Companies were found to owe \$328,019.68 for the period April 3, 2014, to January 15, 2017. The First Decision also included an order that Gantry and TSD:

correct their deficient record keeping practices and bring themselves into compliance with

paragraph 3, of Appendix D to Schedule 1, and paragraph (g) of Schedule 2 of their CTS Licenses, including by introducing, keeping and maintaining payroll records which properly report and track hours worked, rates of remuneration for drivers, trips completed each day by drivers on their behalf, total compensation before taxes and any other deductions are paid, and any deduction made from the drivers compensation and the reason for the deduction

6. In a subsequent decision, Gantry Trucking Ltd. and TSD Holding Inc. (CTC Supplemental Decision No.14/2017) (upheld in Reconsideration Decision No. 08/2018) (“Second Decision”), the Companies were found to be in violation of the *Act* when they failed to pay money to their drivers as ordered, misrepresented cheque distribution dates to the auditor, delayed providing payroll records, failed to pay drivers in accordance with s. 24(1) of the *Act*, and failed to correct their deficient record-keeping practices. The Companies were issued an administrative fine of \$60,000.00 as a result.

### **Audit**

7. On September 27, 2022, the auditor requested that the Companies provide payroll records in accordance with their CTS licenses. The auditor requested driver records for the pay periods in August 2018, October 2019, October 2020, and November 2021 (the “Audit Period”).
8. Upon receipt of the requested records, the auditor noted the following:
  - Thirty-one (31) instances where drivers did not write in their daily Start Time/Finish Time and/or total hours worked (“Incomplete Timesheets”)
  - Nineteen (19) instances where cancelled cheque numbers did not match the corresponding cheque number recorded on the driver’s pay statement (“Mismatched Cheque Numbers”)
  - Twenty-four (24) drivers were paid the legislated rates paid to drivers who have worked less than 2,340 hours (“Lower Regulated Rate”)
9. The auditor asked the Companies for explanations of the Incomplete Timesheets and the Mismatched Cheque Numbers and for any documents to support paying the 24 drivers the Lower Regulated Rate.
10. In response to the Incomplete Timesheets, the Companies advised the auditor that their accounting department relies on a dispatcher-created document that tracks the daily start time and end of each driver. The Companies further advised that the dispatcher keeps the record until the end of the pay period.
11. The Companies advised that the Mismatched Cheque Numbers were result of an accounting error but that the amounts on the cheques correspond with the amount on the drivers’ pay statements.
12. In response to the Lower Regulated Rate, the Companies explained that each of the 24 drivers verbally explained in their interview that they had not previously performed container trucking services. The Companies also said that, to the best of their knowledge, the Companies had to apply for each of those drivers to have their first port pass.

13. I have reviewed the auditor's spreadsheet of the 24 drivers who were paid the Lower Regulated Rate. It includes each driver's name, hire date, port pass number, and the date the port pass was issued. Eight of the 24 drivers had port passes that were issued prior to their hire date with the Companies as follows:

Driver	Port Pass Issued	Hire Date	Lower Regulated Rate last paid during Audit Period
1	March 7, 2017	Not provided	August 2018
2	June 26, 2017	July 7, 2018	August 2018
3	May 19, 2017	June 1, 2017	August 2018
4	October 11, 2016	November 1, 2016	August 2018
5	April 18, 2013	July 29, 2019	October 2019
6	September 6, 2018	March 10, 2020	October 2019
7	September 30, 2019	October 11, 2019	October 2020
8	November 19, 2008	September 1, 2021	November 2021

14. I note the Companies failed to provide the auditor with hire dates for three of the 24 drivers.
15. The auditor then asked the Companies to provide documentation demonstrating how they track and determine when a driver reaches 2,340 hours of CTS work. The Companies responded that they will normally review the driver's pay statements after 9 or 10 months of full-time employment and manually calculate the hours of work on each pay statement issued and then add the hours of each subsequent pay statement and change the rate once the driver reaches 2,340 hours of work. The Companies confirmed to the auditor that they do not track the drivers' cumulative hours in any database (e.g., Excel).
16. The auditor found the Companies' responses concerning how they determine a driver has met the 2,340-hour threshold to be inconsistent. Specifically, the auditor found the Companies' first response about relying on information from the driver in the interview and the fact they had to apply for a port pass on behalf of the new driver inconsistent with the Companies' second response that they simply check a new employee's payroll records around the nine- or ten-month mark and then monitor the hours until the driver hits the 2,340-hour threshold. Based on this inconsistency and absent sufficient evidence to determine when all the 24 drivers started, she determined that the 24 drivers were entitled to the regulated rate paid to drivers who have worked 2,340 hours or more. The auditor determined the 24 drivers were owed the following amounts for the Audit Period:

Aug-18	1,256.35
Oct-19	1,665.42
Oct-20	1,795.14
Nov-21	1,073.84
	<b>5,790.74</b>

17. On June 15, 2023, the auditor submitted an audit report (“Audit Report”) based on her review of the Audit Period which concluded the following:
- a) The Companies failed to provide all the documentation required by s. 6.11 and s. B(4)(f)(iii) of Appendix D of their CTS licenses when they were unable to provide their drivers’ hours of work in 31 instances during the Audit Period.
  - b) The Mismatched Cheque Numbers were the result of an accounting error and were not clearly in violation of the *Act*.
  - c) The Companies failed to provide satisfactory evidence that twenty-four (24) drivers did not have 2,340 hours of container trucking services experience; these drivers were therefore entitled to be paid the higher rate and were owed a total of \$5,790.94 during the Audit Period.
18. A copy of the Audit Report was provided to the Companies on June 19, 2023, and the Companies were invited to provide a response by July 19, 2023.

### **Companies’ Response**

19. On July 19, 2023, the Companies asked how to distribute the funds identified in the Audit Report as owing but provide no other substantial submission.
20. On July 20, 2023, the auditor provided the Companies with direction on distributing the funds and required the Companies to complete and return a form confirming the funds had been distributed to each driver.

### **Decision**

21. As described above, the circumstances of this case are:
- The Companies were the subject of a joint audit given the integration of their drivers and equipment.
  - There were thirty-one (31) instances during the Audit Period where the Companies were unable to provide payroll records documenting daily hours of work performed by their drivers.
  - An administrative error resulted in the cheque number on the pay statement not matching and the cheque number on the cancelled cheques, but the auditor did not believe that the administrative error resulted in non-compliance with the *Act*.
  - The Companies paid twenty-four (24) drivers the Lower Regulated Rate during the Audit Period.
  - The Companies stated that they understood the 24 drivers had not previously performed CTS work for another licensee based on verbal information provided in their interviews along with the fact that the Companies had to apply on their behalf for a port pass when they first started employment.
  - The auditor’s spreadsheet identified eight of the 24 drivers as having a port pass prior to the date they were hired by the Companies and as being paid the Lower Regulated Rate after the date the driver could possibly have met the threshold for a higher rate).
  - The Companies failed to provide the hire dates of three drivers.

- The Companies' stated practice is to review a driver's pay statement after nine to ten months of full-time employment and make changes in accordance with the Rate Order when their records show that the driver meets the 2,340 hours of employment threshold.
  - After reviewing all the records, the auditor determined that the Companies were unable to establish that the 24 drivers had performed less than 2,340 hours of service on behalf of any licensee and calculated that the Companies owed a total of \$5,790.74 to the 24 drivers during the Audit Period.
  - The Companies requested direction on how to pay the drivers monies owing after receiving the Audit Report.
22. As the Companies failed to provide a substantive response to the Audit Report and sought clarification on how to pay the 24 drivers the amount owed, my understanding is that the Companies accept the Audit Report as accurate.
23. In my view, this audit was unnecessarily complicated by the Companies' insufficient record-keeping practices. It was undisputed that the Companies had 31 instances during the Audit Period where they failed to have the daily hours worked by drivers as required by their CTS license. The Companies failed to produce the start date for three drivers. The Companies' records were insufficient for a proper determination of the point at which its drivers had reached the threshold for the higher rate.
24. Commissioner MacPhail stressed the importance of proper record keeping in HAP Enterprises Ltd. (CTC Decision No. 19/2016) as follows:

The requirement to keep complete, accurate and up-to-date records is a fundamentally important obligation flowing from the legislation and the Container Trucking Services License (the "license"). The maintenance of complete, accurate and up-to-date records by licensees is absolutely essential to the OBCCTC's fulfillment of its rate compliance mandate and its ability to properly perform audits in a timely and fulsome way. Failure to keep proper records, including those required under both Paragraph 3 of Appendix D to Schedule 1, and under Schedule 2 of the license, directly interferes with the audit process, will not be tolerated, and will be regarded as a serious violation of licensees' obligations under the legislation and their license.

I adopt this analysis. Failure to maintain proper records is a serious violation and likely to attract a penalty. I accept the auditor's report that the Companies failed to maintain or provide all the hours of work or start dates for all their drivers for the Audit Period.

25. The Companies' failure to keep records of the daily hours of work performed by a driver hinders the ability of the auditor to determine if each driver was paid the appropriate amount for the work they provided. For example, if a driver's pay statement indicated that he worked 80 hours in the pay period but the daily hours in the pay period added to 82 hours, this would be cause for further investigation of an underpayment. While not applicable during the audit period, the record of daily hours is also important in determining if daily or weekly overtime was applicable. In addition, the failure to provide a driver's date of hire also makes it difficult to establish when the driver started work and when they reached the hours needed to be paid the higher regulated rate.

26. I am having difficulty determining whether some or all the 24 drivers were correctly paid the Lower Regulated Rate. Based on my review, the Companies' stated method of determining whether a driver has previous experience with another licensee does not match the port pass data provided to the auditor. While a work application outlining a driver's previous work experience is usually sufficient to establish previous work experience, the Companies have not provided that documentation. Their stated approach of receiving (but not recording) verbal confirmation of prior service from the driver, buttressed by what is to their knowledge a first-time application for a port pass, may in some circumstances be enough to establish that a driver has no previous experience that needs to be accounted for in calculating the threshold hours.
27. However, the auditor's spreadsheet identifies at least four drivers as having a port pass more than a year before their hire dates and it is unclear to me how the Companies determined that those drivers did not have previous container trucking services experience. This is particularly true of Driver #8 who had a port pass issued on November 19, 2008, and was hired by the Companies on September 1, 2020, and was still paid the Lower Regulated Rate more than a year later in November 2021. One would expect that drivers with port passes issued well before their hire date and having worked for more than a year for the Companies would exceed the threshold of 2,340 hours.
28. Based on the information before me, I cannot confirm the total amount owed to the 24 drivers for the Audit Period as outlined in the Audit Report. I am not in a position to agree that a breach of the Rate Order was found during the Audit Period.
29. As a result, I make the following order under s. 9 of the *Act*:

The Companies must review the circumstances of the 24 drivers identified in the Audit Report as receiving the Lower Regulated Rate during the Audit Period, confirm in writing and with documentation the previous work experience of each driver and recalculate the wages owing to each driver based on the actual date those drivers reached the 2,340-hour threshold. The Companies must provide the auditor with this information within three months of the date of this Decision.
30. The breaches I have identified above, and the fact that I cannot at this stage determine monies owing to drivers paid the Lower Rate, necessitate a penalty.
31. 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 license 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. In any other case, an administrative fine can be up to \$10,000.
32. 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 the established rates. Licensees must comply with the legislation, as well as the terms and conditions of their licences, and the Commissioner is tasked under the *Act* with investigating and enforcing compliance.

33. 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 No. 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.

34. This is the Companies' third audit. The Companies were found to be in violation of the *Act* and their CTS license in the First Decision when they failed maintain proper payroll records in accordance with the license and failed to pay the regulated rates. In the Second Decision, the Companies were found to be in violation of the *Act* when they failed to pay money to the drivers as ordered, misrepresented cheque distribution dates to the auditor, delayed providing payroll records, failed to pay drivers in accordance with s. 24(1) of the *Act*, and failed to correct their deficient recordkeeping practices. In this case, I have found that the Companies failed to maintain proper payroll records in accordance with their CTS licenses. The Companies' inadequate record-keeping has also complicated an assessment of whether the Companies are appropriately paying the Lower Rate.

35. Regarding the size of the proposed fine, I have decided that an administrative penalty of \$5,000.00 for each licensee is appropriate. As licensees have been previously warned, failure to maintain proper records will likely attract a penalty for the reasons outlined above. The Companies know – or ought to know – the importance of proper record-keeping given they were assessed two previous administrative penalties in part for maintaining deficient payroll records. In my view, the previous penalties were not sufficient to deter the Companies from being non-compliant with the *Act*. However, I note that my finding of violation of maintaining proper payroll records in this case – while serious -- was not as egregious as the violations found in the First Decision and Second Decision and therefore this is not an appropriate case for an escalating penalty. I am unable to determine if there has been a breach of the Rate Order at this time, but if there is found to be a breach then that will be subject to separate proposed penalty. The proposed fine of \$5,000 to each licensee is consistent with similar administrative penalties against licensees who have repeated the behavior in similar circumstances.

36. In the result and in accordance with section 9 and 34(2) of the *Act*, I hereby order and give notice as follows:

- a. The Companies must review the circumstances of the 24 drivers identified in the Audit Report as receiving the Lower Regulated Rate during the Audit Period, confirm in writing

and with documentation the previous work experience of each driver and recalculate the wages owing to each driver based on the actual date those drivers reached the 2,340-hour threshold. The Companies must provide the auditor with this information within three months of the date of this Decision.

- b. I propose to impose an administrative fine against Gantry in the amount of \$5,000.00.
  - c. I propose to impose an administrative fine against TSD in the amount of \$5,000.00.
37. Should it wish to do so, the Companies have 7 days from receipt of this notice to provide the Commissioner with a written response setting out why the proposed penalty should not be imposed;
- If the Companies provides a written response in accordance with the above, I will consider its response and I will provide notice to the Companies of my decision to either:
    - Refrain from imposing any or all of the penalty; or
    - Impose any or all of the proposed penalty.
38. This decision will be delivered to the Companies and will be published on the Commissioner's website ([www.obcctc.ca](http://www.obcctc.ca)).

Dated at Vancouver, B.C., this 12 day of October 2023.



Glen MacInnes  
Commissioner