

February 22, 2024

Mr. Glen MacInnes  
Commissioner  
Office of the BC Container Trucking Commissioner  
1085 Cambie St  
Vancouver BC V6B 5L7

Dar Mr. MacInnes

Thank you for the opportunity to respond to your proposals related to overtime for independent operators.

As we advised your office in May of 2023, both in writing and in discussions, BCTA disagrees with the very premise that the “fairness” plays a role in this discussion. In our view, compensation is paid to employees is based either on time spent working, or work completed. Not both.

In our earlier correspondence, we noted that we did not believe your office had the authority to mix time-based and trip-based remuneration. This is supported by the terms and conditions of license set out in the “2022-CONTAINER-TRUCKING-SERVICES-LICENCE-AMENDED-FINAL.” Specifically, Appendix A Prohibited Practices, items 1. (g), states:

A Licensee must not to any of the following:

(g) pay Truckers by a method of Compensation that is a hybrid of per trip and hourly

In our view, it is incongruous that the commissioner would propose a methodology of compensation that is specifically prohibited in the terms and conditions of the licenses issued by the Commissioner’s office.

This principle is further entrenched by Appendix D in the standard license wherein:

Item A 1. (E) stipulates that “the type of remuneration for the trucker (whether hourly or per trip) is declared.”

Further, Licensees are not permitted to change the methodology of payment from hourly to trip rate for a driver during the term of the license.

Despite the structure of the statutory framework to create different streams of remuneration, despite terms and conditions of Licenses issued which prohibit hybrid payment between hourly

and trip rates, despite the delineation between hourly and trip rated tags, your newest proposal continues to seek to erase those lines. As proposed, your proposal to mix hourly and trip rate remuneration brings into question the consistency of application of law throughout the licensing and tag allocation process.

It appears your January 11, 2024 proposal attempts to address this concern by referring to the evolving discussion of “independence” in the drayage and broader trucking industry, including recent US DOL final rulings for classification of drayage drivers, Employment and Social Development Canada’s enforcement on classification in trucking, and the Canada Revenue Agency’s work in this area. We note on page 3 of your office’s proposal:

“....Going forward, this protection will include ensuring drivers are not misclassified as independent contractors to avoid paying overtime entitlement until the rater Order.”

Implicit in your proposal is a determination that independent operators in the drayage sector are not, in fact, independent contractors within broader labour legislation. While this determination may or may not be correct, it is a significant change in the application of the *Container Trucking Act and Regulation*.

Rather than embedding this decision within a discrete remuneration interpretation, we think it would be more prudent to deeply engage the industry on what this interpretation means. We remain extremely concerned that “independent operators” – trip paid and hourly - do not understand the implications of this determination.

In terms of this proposal, trip rated Licensees have been clear in discussing the proposal. Should this proposal come to pass, the only option they have to manage costs is to limit the moves available to trip-rated drivers. Trip rated and hourly IOs should expect to see fewer turns per day as licensees move work to hourly paid drivers or forgo the work entirely.

We have seen this pattern again and again. When trip rated drivers’ remuneration increases (such as the PMR), work shifts to hourly paid drivers. When hourly rated drivers’ rates are increased (and the cost per container increases), work moves to trip rated drivers. This continuing, see-saw of cost escalation has seen container rates increase of over 100% since the 2014 labour disruption, in the naïve pursuit of buying “labour peace.”

In response to a declining economic background, your office continues to consistently propose increases in costs in an effort to “maintain stability” under a “beneficial legislative” regime. That the organization whose members would “benefit” the most from this proposal (the independent operators represented by the United Truckers Association) oppose this proposal should be a signal that this is a misguided approach to remuneration.

It is disappointing that this proposal comes on the heels of Bulletins, communications and efforts from your office, attempting to mitigate layoffs of I/Os due to lack of work. Making trip-rated I/O movements more unpredictable and costly than other models only serves to make this situation worse. It is a certainty that unpredictable overtime costs that the Licensee cannot mitigate will lead to fewer trip rated moves. Your proposal notes you are not persuaded that "...those companies who use I/Os will suffer disproportionately more than their company driver counterparts." It's an interesting premise but clearly history teaches us that companies who use I/Os will adapt. I/Os will suffer as they become more expensive than company drivers. At which point your office will be pressured to increase compensation for hourly drivers.

Finally, we note that in your proposal's discussion of I/Os paid hourly states:

"I am satisfied that I/Os who meet the definition of employee as set out in the TLS license should receive overtime based on the proposed formula."

Our members have requested clarification of that adjudicative process. Is the commissioner's office now determining if IOs meet the definition of employee? If so, under what statute and with what criteria? Is this process prospective, to be done before or during the license application process? What information will your office be requesting to determine this? Or will this be adjudicated after the fact, based on audit or complaint? If your office is planning to adjudicate on the status of I/Os (as noted at the bottom of page 4) or has made a decision more broadly that I/Os are workers within the meaning of the Employment Standards Act, we suggest the process and/or decision be communicated.

Turning to the conclusion presented that overtime will be paid for I/Os, we appreciate your acknowledgment of the difficulty including wait time payments in any overtime calculation. The first proposal would require a regulatory amendment and is, in our view, unworkable.

The second is a thinly (if at all) veiled step to move the entire sector to hourly rated compensation model, noting that under impending further cost escalation there may be appetite for such a scheme. In our view, appetite for change is rarely stimulated by unilateral decisions.

The third considers an empirical study of rates to pay a new (higher) rate in lieu of overtime. To be clear, once again, these proposals do nothing but continue to escalate rates, whipsawing back and forth between interested elements of the industry. After the implementation of the PMR, operators associated with the UTA experienced a significant and prolonged period of reduced work. We expect the same to happen again. Embedding an "overtime rate" within already established rates that cannot be mitigated by carriers is nothing more than accelerated compensation.

In sum:

- 1) It appears your office has made a determination that I/Os are workers as contemplated by the ESA, a decision that we believe rests with the Director, not your office.
- 2) Regardless if this is correct, we do not believe that this decision has been effectively communicated with those affected.
- 3) It is unclear how you intend to apply that decision for hourly paid I/Os, and/or if that same adjudication will apply to trip-rated I/Os.
- 4) The three models presented, in listed order, require regulatory change, are a proposal to move the entire industry to an hourly paid model, or simply embed another non-competitive cost escalation into the system, de-stabilizing the balance between hourly and trip rated drivers.

In our view, none of these proposals are warranted, nor do any support a stable drayage sector. It appears, once again, the only practical solution is to, again, embed more costs into I/Os, resulting in less work for I/Os until hourly rates are inevitably increased to being “balance” to the system.

Thank you for the opportunity to comment on the proposed changes.

Sincerely,



Dave Earle  
President and CEO  
BC Trucking Association