



OFFICE OF THE
BRITISH COLUMBIA CONTAINER
TRUCKING COMMISSIONER



2024 CTS LICENCE CRITERIA CONSULTATION REPORT

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Background

In 2014, the provincial government enacted the *Container Trucking Act* (“Act”) and *Container Trucking Regulation* (“Regulation”) to oversee the drayage sector following three successive labour disruptions at the Vancouver Fraser Port Authority (“VFPA”). As part of its mandate to ensure stability in the drayage sector, the Office of the BC Container Trucking Commissioner (“OBCCTC”) was tasked with introducing a licensing and truck tag management system to match the number of trucks and trucking companies to the amount of container work available.

The limitation on the number of trucking companies is accomplished through the licensing system and the limitation on the number of trucks is accomplished through the truck tag system. A company who has a Container Trucking Services (“CTS”) licence is assigned a certain number of truck tags that allow the licensee to move the containers.

Prior to the introduction of the Act in 2014, the then Port Metro Vancouver managed the Trucking Licence System (“TLS”) that governed access and responsibilities when moving containers to and from Lower Mainland marine terminals. At that time, Independent Operators (“I/Os”) were granted their own permit from the Port Metro Vancouver and companies were granted access agreements.

The OBCCTC modelled its licensing and tag allocation system on the TLS, with one key difference – truck tags are now designated as either I/O tags or company tags and both are assigned by the Commissioner to the licensee – not to the I/O. I/Os are now required to sign a sponsorship agreement with the licensee in order to be assigned to an I/O truck tag.

A decade has passed since the introduction of the Act and a number of themes have arisen every time a licence application period is opened. Companies who have held a CTS licence have argued that they are entitled to a new licence based on their participation in the drayage sector and should have priority over new entrants who are trying to access a lucrative and exclusive market. Drivers feel powerless against licensees who can determine their fate by selecting one type of truck tag over another. This sentiment is particularly strong amongst I/Os who are no longer able to apply for their own truck tag but have invested in their own trucks.

The current CTS licence expires on November 30, 2024. Anticipating that many of the same themes would arise again with the new licence application, I made a series of recommendations that I believed would contribute to stability in the industry and address some of the underlying concerns of applicants and drivers.

On May 10 2024, the OBCCTC published the “2024 CTS Licence - Proposed Criteria” consultation paper setting out the proposed mandatory criteria for a Licence and the proposed process, based on specified criteria, for the allocation of truck tags.

Stakeholders, including current licensees, driver associations and unions, and prospective applicants made written submissions. In addition, I held a meeting with the BC Trucking Association to discuss some issues raised in their submission. I also invited the Port Transportation Association through their legal counsel to have a similar meeting but did not receive a response.

Many of the previous themes permeate the submissions received by the OBCCTC and I have attempted to address those issues in this consultation summary report.

The information received from the stakeholders helped inform the licence and truck tag allocation process and are detailed in this consultation summary report.

Consideration of applicants with previous CTS history continues

The starting point of the licence issued under the *Act*, along with the allocation of truck tags, is that neither are a vested right to which a company is entitled in perpetuity. This principle was confirmed in *Port Transportation Association (“PTA”) v The Office of the British Columbia Container Trucking Commissioner*, 2022 BCSC 387 following the PTA’s unsuccessful judicial review of the 2020 CTS Licence process. At paragraph 108 of his decision, Justice Crerar cited Sara Blake’s *Administrative Law in Canada* as follows (emphasis added):

4.23 A licence is issued for a fixed term, typically one year, so that suitability may be periodically reassessed in accordance with licensing purposes, including the licensee’s compliance with regulatory requirements. **There is no right to a renewal of a licence....**

4.24 Though licences are sometimes bought and sold, **a licence does not vest any interest or property right in the licensee** beyond the profits earned or a property right in natural resources acquired pursuant to a licence....

4.25 A power to grant a licence includes a power to amend or revoke any licence previously granted.

Like the 2020 CTS licence application process, the proposed process for 2024 is based on the purposes of the *Act* including demonstrated compliance and “suitability may be periodically reassessed in accordance with the licensing purposes.” During the 2020 truck tag application process, the Commissioner prioritized previous CTS licence holders and then considered new applicants. He then awarded truck tags based on criteria including compliance history. In 2024 the truck tag application process also considers an applicant’s previous CTS licence time, along with its compliance history and truck readiness.

I am not privy to the weight that was given to compliance history in the 2020 tag allocation, but it appears from *Port Transportation Association v The Office of the British Columbia Container Trucking Commissioner*, that the then-Commissioner did weigh an applicant’s previous compliance history and some applicants were not awarded the same number of truck tags as they had requested.

While current licensees are not automatically entitled to another licence, there is merit in considering both an applicant’s time as a CTS licence holder as well as its compliance history when awarding tags as these are relevant to a key mandate of the Commissioner – ensuring compliance. Respectfully, there are many companies who have the equipment and the infrastructure and customer base to move containers to and from the Lower Mainland. However, the award of a licence does not grant the licensee a vested interest beyond the term of the licence. The value added to an application is demonstrated compliance within a regulated environment and, in particular, compliance with the *Act*. The statutory declaration prescribed in section 8 of the *Regulation* speaks not to ability or efficiency or profitability of an applicant, but to compliance. That is not to say that those other issues are not relevant in assessing whether an applicant will have the funds or the trucks or the infrastructure to run a successful business that will contribute to paying the regulated rate, but I think the emphasis on compliance in the *Regulation* signals that this is a major consideration.

New applicants may feel that an advantage has been bestowed on a previous licence holder under the proposed criteria. However, weighing a CTS licence holder's time against its compliance history will mean that new applicants will still have the opportunity to obtain a licence. It will also ensure that applicants with demonstrated compliance will have the ability to continue to contribute to the stability of the drayage sector. Applicants with a poorer compliance history may feel that they are at a disadvantage because they may be at risk receiving fewer truck tags, but considering an applicant's compliance history is consistent with the mandate of the OBCCTC.

Compliance with the *Act* is important and if compliance were not considered when assessing truck tags, applicants who have repeatedly and/or egregiously breached the *Act* could be awarded truck tags to the exclusion of an applicant with no previous administrative penalties. Such a result would run counter to the purposes of the *Act*.

I also note that an applicant with a satisfactory compliance history, but a poor or substandard business case, will likely not be given some or all the truck tags requested. Additionally, there is a cap on the number of truck tags beyond its prior allotment it can ask for. The only advantage a higher ranked applicant gets is the first opportunity to increase its number of truck tags if it can demonstrate such a need.

The proposed process in 2024 is based on the same distributive principles as the process in 2020, when existing licensees had first opportunity to be considered for an increase in truck tags, and if their business cases along with their compliance history did not warrant the number of truck tags requested, new applicants were then considered for any tags that remained. While the ranking in 2020 prioritized prior CTS licence holders and then their compliance history, – it was still a ranking system. The process proposed for 2024 simply builds on that ranking system, while continuing to work towards the objective of ensuring compliance by using compliance history in assessing tag allocation. Given the limited number of truck tags, it is reasonable and consistent with the purposes of the *Act* that compliance history be given significant weight when deciding tag allocation.

There were a number of issues related to the mechanics and fairness of the ranking system and the rest of the proposed criteria which are addressed below.

CTS licence term beyond two years

Many applicants took the opportunity to argue for longer licensing terms (beyond the current two-year limit). Current licensees stress that two-year licensing terms prevent companies from making long-term investments because they do not know if they will be successful in their application for a new licence. On the other side, I have heard from some drivers' associations and unions that two-year terms should not be extended as some licensees will be less motivated to adhere to the *Act* if they are not regularly held accountable.

In 2018, the OBCCTC moved from one-year licences to two-year licences. In 2020, the OBCCTC stated that it would consider longer term licensees once overall compliance rates increased.

I understand the call for longer-term licences for those companies that have demonstrated compliance but there are number of issues that need to be addressed beyond compliance that licensees and drivers may not be aware of. One example is that a longer-term licence would prevent licensees from making any

changes to the makeup of their tagged fleet for a longer period of time. Another example that should be addressed prior to longer licences is the consolidation of licences held by the same ownership.

As I stated in the “2024 CTS Licence Reform – Consultation Report”, the current term is effective December 1, 2024 and expires on November 30, 2026. The OBCCTC will review with the industry the term of the licence in early 2025 and provide a full opportunity to canvass the issues related to longer-term licences.

Mandatory criteria

There was general support for the mandatory criteria for the 2024 CTS licence.

Limitations on new applicants with no previous CTS experience

Perhaps not surprisingly, some companies who currently hold licenses suggested additional restrictions on new applicants, including that they not be allowed to take existing customers away from licence holders, while others proposed an outright ban on new applicants until an upturn in the economy at some later date.

I am not persuaded that the *Act* permits the Commissioner to set up such a monopoly after an open call for licence applications per section 16 of the *Act*. I understand that companies would like automatic renewal of their licences, but this is not consistent with the nature of a licence issued by a regulatory body.

I am not unsympathetic to the investments made by licensees, but if that is to be addressed at all, it must be through longer– not indefinite -- licensing periods.

I am satisfied that the proposed process for tag selection is fair and meets the goal of ensuring stability in the drayage sector by considering an applicant’s years of service as a CTS licensee, compliance history, and truck readiness. While the process does not prohibit new applicants, consideration of an applicant’s CTS licence time alongside its compliance history and truck readiness will likely mean that applicants with previous CTS experience and good compliance history will be considered before applicants with no history in the Lower Mainland drayage sector. Furthermore, the limit on the number of truck tags each applicant can apply for above their prior allocation should ensure that each applicant will be given a fair opportunity to be considered for a licence.

There was some feedback that new applicants should be limited to 3 truck tags, similar to applicants with a previous CTS licence. In fact, small licensees who had 2 tags previously can apply for up to 3 more, for a total of 5 truck tags. Both can apply for the same number of tags.

The limitation of new applicants to 5 truck tags is in recognition that they are new to the regulated drayage sector and the two-year licence period is an opportunity for them to demonstrate compliance with the regulatory system.

Tag ratio ensures stability

Some of the submissions misunderstood that the tag ratio would require each applicant to apply for half company tags and half I/O tags and thereby be forced to change their business model. The ratio was an overall ratio, not a per licence ratio. Applicants are free to apply for the types of tags they find suitable.

Over the last 10 years, the industry has stabilized at around 1,500 truck tags split relatively equally between I/O and company tags. The proposed overall ratio of 50% I/O tags and 50% company tags is consistent with this historic distribution, which has contributed to the stability of the drayage sector. Given the historic compromise of I/Os foregoing direct permits with the then Port Metro Vancouver and the inability of one truck operations to apply for a licence (current minimum is two trucks), it is necessary and fair for there to continue to be I/O tags available for the more than 750 I/Os on the I/O List. Given the general acknowledgement in the submissions that this ratio is reflective of the status quo, I do not anticipate any significant change in the ratio of I/O to company tags sought.

I understand some licensees fear they may have to modify their application based on speculation that the type of truck tags they would like to have may not be available when their applications are being considered. No applicant is guaranteed the number of truck tags requested or previously held, but this concern is probably unwarranted, because not all licensees reapply for a licence or meet the mandatory requirements for a licence thereby having more tags available and because the ratio of tags allocated has been historically stable.

Small and medium sized businesses provided opportunities for growth

One of the concerns I heard when I became Commissioner was that there was little opportunity for small and medium businesses to grow, both as a result of the previous tag allocation systems and the previous minimum thresholds for a licence.

I have not changed the minimum threshold of two truck tags for the 2024 licence application. Furthermore, I have provided growth opportunities for small business licensees by allowing them to apply for up to 3 additional truck tags or 110% of their existing allotment – whichever is higher. In other words, an applicant who previously only had two truck tags can apply for a total of 5 truck tags.

Compliance assessment method

As previously mentioned, compliance has always been a consideration in truck tag allocation and one of the directed questions asked if the penalties should be considered based on frequency or size or both.

During the tag application process in 2020, the OBCCTC considered penalties only as follows:

| | |
|------------------------------|---------|
| No Decision Issued | Good |
| Decision Issued No Penalty | Average |
| Decision Issued with Penalty | Poor |

While a valid analysis, my concern with this approach is that it appears to have treated a licensee who may have had one decision notice with a \$1,500.00 administrative penalty the same as a licensee who had one decision notice with \$250,000 administrative penalty. The size of the administrative penalty is usually a good barometer of the egregiousness of the offense.

The proposed approach for the 2024 application process was based on the frequency and size of the penalties using a sliding scale with a higher negative number for a higher penalty as set out in the 2024 proposal:

| Name of Applicant | Years of Service | Compliance History ⁶ | Truck Readiness | Ranking | 2022 CTS Tags | Tag Application |
|--------------------|------------------|---------------------------------|-----------------|---------|---------------|-----------------|
| GHI Inc. | 9 | 0 | 0 | 9 | 40 | 44 I/Os |
| ABC Ltd. | 9 | -3 | 1 | 7 | 30 | 33 Company |
| New Applicant Ltd. | 0 | 0 | 0 | 0 | 0 | 5 I/Os |

⁶ Lower negative score for low penalties, higher negative score for higher penalties.

GHI Inc. has held a CTS licence since 2016 and had 40 tags during the prior term and has no decisions issued against it and is applying for an additional 4 tags, with 40 trucks at the time of application.

ABC Ltd. has held a CTS licence since 2016 and had 30 tags during the prior term. It has two decisions issued against it (one with \$1,000 penalty and one with a \$35,000 penalty). They have applied for 33 truck tags and have 30 tags at the time of application.

New Applicant Ltd. has never held a CTS Licence and is applying for 5 truck tags, but has two trucks at the time of application.

Those submissions that agreed compliance should be a consideration agreed that the sliding scale based on the size of the penalty was more equitable.

There were several submissions that strongly disagreed that compliance should be a consideration when assessing truck tag application priority based on the following reasons:

- Applicants should have been advised ahead of time that their compliance would be considered in tag allocation.
- Not every applicant who had a previous CTS licence has been audited or audited equally.
- The range of penalties has not been consistent since the *Act* was brought into effect.
- Some licensees have changed ownership and therefore should not be accountable for previous owner’s administrative penalties.
- The consideration of a licensee’s compliance when assessing truck tags is unfair and is tantamount to double jeopardy.

I am truly puzzled by the submissions that suggest compliance should not be considered when assessing truck tag applications as this has been a long-standing practice well known in the industry. The statutory declaration required by section 8 of the *Regulation* and the 2020 application process and the OBCCTC's Truck Tag Management policy highlight the importance the OBCCTC places on compliance with determining truck tag allocation and generally. The fact that the consequences of failing to comply with the *Act* may impact an applicant's truck tag assessment is not, in my view, tantamount to double jeopardy. It was well known – or should have been well known – to licensees that non-compliance would be considered when assessing truck tag assessment for the reasons outlined above. Additionally, such an approach is consistent with the Commissioner's mandate of promoting compliance and with the general principles of licensing for a term suitability may be periodically reassessed in accordance with licensing purposes, including the licensee's compliance with regulatory requirements.

I also put no weight on the suggestion that audits have not been fairly administered. Each current licensee has been audited. If a licensee has been audited because of a complaint, that is because the Commissioner has a statutory obligation to investigate each complaint and audits are one tool used to determine whether the complaint has merit.

In terms of the ranges of penalties for similar offenses differing from decision to decision, I do not find this persuasive. Each decision is based on the specific facts before the decision-maker and a penalty is proposed and the licensee is provided an opportunity to respond; it is open to the licensee to argue that the penalty is disproportionate to similar penalties. Furthermore, the decision is ultimately subject to judicial review, where a similar argument can be raised.

One submission sought clarification as to whether an applicant could receive a score less than zero (i.e. whether points for compliance history could exceed points for years of service due to multiple decisions with administrative penalties. The short answer is no. If such an applicant exists, it would be considered with applicants with the same ranking (most likely newer applicants) but would not be placed in a negative position because the applicant could not go below zero.

Finally, I do not agree that applicants who purchased companies should not be accountable for the company's conduct under its previous owners. Purchasers of companies know – or at least should know - that they are responsible for any previous breaches performed by the previous owners. It is not acceptable, for example, for a licensee to suggest that it was the previous owners who failed to pay the regulated rates to its drivers and therefore it is not responsible. When a company is purchased, the new owner accepts the responsibility. As an aside, those same applicants would be granted the service years of the company even if it changed ownership. From a practical perspective, if all a licensee had to do was sell its company to ensure its compliance was no longer a factor, it would leave very little incentive for that licensee to comply with the *Act* and would run counter to the purposes of the *Act*.

Business case assessment

Some submissions indicated that the fleet utilization over a three-month period was too short a timeframe given the fluctuation and seasonal nature of the drayage sector. Most felt that the data should be considered on an annual basis to account for downtimes including vehicle repairs and vacations. On the issue of seasonal fluctuations, I see in 2020 the OBCCTC asked for annual data and I agree it may be appropriate to seek that data as it may give a clearer picture of utilization.

I have previously issued bulletins and decisions advising licensees that underutilization of truck tags due to mechanical issues or long-term absences are not relevant considering the ability to replace trucks through the VFPA's short-term replacement program.

In terms of the period of time to consider when reviewing past performance, applicants who have had previous tags should know that the OBCCTC considers utilization of the truck tag based on whether the applicant has used the tag on a full-time basis. In other words, has the applicant demonstrated that the truck tag generated full-time equivalent work? Indicators of tag underutilization can include lower kilometer usage and/or payroll records that suggest some or all the truck tags are being used on less than full-time basis. Both normally indicate that capacity exists within an applicant's existing tag allotment. Applicants are free to explain why there may be some anomalies in terms of the underutilization of certain or all truck tags and those explanations will be reviewed. However, considering the limited number of truck tags available, the goal remains to ensure that each tag generates full-time equivalent work and is not used simply as a backup.

Other submissions suggested that the OBCCTC should not require customer information to support the case for additional truck tags because such information is proprietary, and some customers were not willing to share information. Customer information provided to the OBCCTC in support of additional truck tags is not published by the OBCCTC. Applicants need to realize that they are seeking truck tags based on the premise they have secured business (i.e. customers) to move containers. While other data may support the presumption that an applicant has used the truck tags, it does not demonstrate additional new work. Whether to include customer information is up to the applicant, but ultimately the absence of such information may work against the applicant.

Conclusion

Any distribution principles adopted for licence and tag allocation is likely to result in—and always has resulted in—some debate considering that there are a limited number of containers that need to be moved.

Applicants always have reasons for going to the head of the line, but at the end of the day, I find that mandatory licence requirements and accounting for an applicant's compliance during tag allocation and maintaining the balanced ratio of available truck tags are essential considerations that meet the continuing objectives and mandate of the *Act* as outlined in this report.

This report should ease the concerns of current licensees as they will continue to be provided an opportunity for consideration over new applicants for 2024 licence based on their compliant history. It is not anticipated that there will be an overall dramatic shift in the truck tag allocation given the limitation an applicant can apply for and the ratio of current truck tags. New applicants have an opportunity to be considered but with a limited number of truck tags.

Some of the key conclusions in the report are as follows:

1. A licence holder will require a minimum of two trucks tags.
2. The ranking system for truck tags will provide an opportunity for current licensees to be considered for truck tags over new applicants based on their compliance history.
3. An applicant's truck tag ranking cannot fall below zero.

4. The limitation on an applicant's ability to increase the number of its current truck tags should ensure an equitable distribution of truck tags. The maintenance of the equitable distribution of truck tags (50% overall Company truck tags and 50% I/O truck tags) will contribute to the stability and fairness in the drayage sector.
5. Small business applicants are able to have a licence with two truck tags and can apply for up to 3 more for a total of 5 truck tags.
6. New applicants are limited to a total of 5 truck tags.
7. Compliance will be based on a fairer system of frequency combined with the size of penalties.
8. Utilization and payroll metrics will be reviewed on an annual basis to better account for seasonal factors.
9. The mandatory licence requirements are as set out in the 2024 CTS Licence - Proposed Criteria.

I wish to thank the parties for the submissions.

THE OFFICE OF THE BC CONTAINER TRUCKING COMMISSIONER



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