



August 23, 2024

KD Truckline Ltd.  
669 Derwent Way  
Delta, B.C. V3M 5P7

## **KD Truckline Ltd. (CTC Decision No. 11/2024) – Decision Notice**

### **Introduction**

1. In [KD Truckline Ltd.](#) (CTC Decision No. 11/2024) (“Commissioner’s Decision”), I found that KD Truckline Ltd. (“KD”) failed to comply with section 23 of the *Container Trucking Act* (“Act”) when it underpaid some of its drivers up to \$5.40 per hour while performing off-dock container trucking services using the “Disputed Containers” during the “Audit Period” (May and October of 2019, March and October of 2020, June and December of 2021, April and October 2022 and May 2023). I also found KD breached its CTS licence by producing inaccurate records and failing to maintain accurate payroll records as required under Appendix D s. 4(f). I further found that KD failed to properly calculate the hours of container trucking services work performed by some of its drivers in order to properly determine when those drivers were entitled to the higher rate of pay. An administrative penalty of \$20,000 was proposed.
2. Consistent with s. 34(2) of the *Act*, KD was given seven (7) days to provide written response setting out why the proposed penalty should not be imposed.
3. On June 27, 2024, KD sought an extension and requested that the names of the drivers, customers and customer’s employee be redacted in the published version of the Commissioner’s Decision. KD’s request for an extension was granted as were two subsequent extension requests. On July 23, 2024, counsel for KD requested an additional extension to August 26, 2024, but I only agreed to extend the deadline to July 31, 2024, for the reasons set out in my July 24, 2024 correspondence. On July 31, 2024, counsel for KD provided a response to the proposed penalty and indicated KD would send a separate submission to be read in conjunction. On August 6, 2024, counsel for KD advised that KD no longer intended to provide a separate submission.
4. I have considered KD’s responses to the Commissioner’s Decision and provide the following Decision Notice.

### **KD Response**

5. KD asks that the names of its drivers, customers and a customer’s employee be redacted in the published version of the Commissioner’s Decision (and presumably in any subsequent related decisions) on the basis that publication would be an “improper disclosure of sensitive and confidential business information.”

6. Regarding the proposed penalty, KD acknowledges that administrative penalties are intended to encourage compliance but does not agree that the proposed penalty is appropriate in this case based on the following:
  - a. KD has been the subject of two previous audits and was found to be compliant in one and only received a modest administrative penalty in the other, and at a time when the company was owned by another person.
  - b. The proposed penalty is based in part on the premise that containers with “CSC plates” are “containers” which KD disagrees with and intends to have reconsidered and which has not been fully and finally decided by the Court.
  - c. The proposed penalty improperly presupposes that KD failed to comply with sections 6.7 and 6.10 of the CTS licence as referenced in paragraph 105 and 119-120 of the Commissioner’s Decision.
  - d. An administrative penalty is not required to encourage compliance because KD’s interpretation of the *Act* is a widespread interpretation in the industry.
7. KD maintains that the defense of officially induced error was implicitly applied in Simard Westlink Inc. (CTC Decision No. 04/2024) – Reconsideration (“Simard Reconsideration”) to 53-foot containers and should be applied in this case as KD was under a misapprehension about the application of the *Act* to the Disputed Containers.
8. In the alternative, KD requests an interim and limited stay of the Commissioner’s Decision as it relates to the Disputed Containers pending a reconsideration decision. In support of its application for a stay, KD submits it has raised a serious question which it says is widespread in the drayage sector about whether the Disputed Containers are in fact “containers.” It also says that the difficulty of recovering any payments to drivers qualifies as “irreparable harm” and that, overall, it meets the test set out in *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199.

### **Consideration of Licensee’s Response**

#### Redaction

9. In HAP Enterprises Ltd. (CTC Decision No. 07/2024), I gave the licensee the benefit of the doubt in the absence of evidence to the contrary and agreed to redact customer names which it asserted were highly confidential and commercially important.
10. Here, the Commissioner’s Decision addresses KD’s argument and evidence that the Disputed

Containers are not “containers” either because of their destinations within the Lower Mainland or their incidental use by certain customers. Redacting the names of certain destinations such as those at paragraph 98 of the Commissioner’s Decision (which clearly identify the customers) or the identity of Mr. Kirk or his employer would limit the public’s ability to review and understand the evidence and analysis.

11. In this case, KD’s assertion that its customer names are “highly confidential” is inconsistent with its willingness to publicly identify that CN and Clarke Transport are its customers.<sup>1</sup> I note that both CN and CP Rail (and possibly Clarke Transport) normally display their corporate names on their containers, and it would be reasonable to infer that they are customers of KD when their containers are being moved by a KD truck. I am not persuaded that KD’s mere assertion of confidentiality in the face of its public disclosure of some of those same customers outweighs the desirability of having the relevant evidence made public.
12. In addition, KD has produced evidence from Mr. Kirk, an employee of Clarke Transport, in response to the Audit Report<sup>2</sup> for my consideration in advance of the Commissioner’s Decision. It is reasonable to assume that Mr. Kirk was aware that his evidence that his containers were not “containers” would be relied upon by a decision-maker.
13. I am unclear how the first initial and surname of each of the drivers named in the Commissioner’s Decision is “highly confidential.” The audit was not the result of employee complaints so there is no issue related to confidentiality under s. 27 of the Act.
14. For the reasons set out above, I will not redact the names of the customers, drivers, or the employee of a customer who provided evidence.

### **Proposed Penalty**

15. In paragraph 120 of the Commissioner’s Decision, I considered KD’s previous administrative penalty and set out my reasons for an escalated penalty. I am not persuaded that a change of ownership mitigates against an increased administrative penalty and note the previous administrative penalty was against KD – not against KD’s owner.
16. KD submits that the penalty, to the extent that it is meant to encourage compliance, should be reconsidered because KD only failed to pay its drivers appropriately if the Commissioner’s conclusions on the Disputed Containers are correct, and KD intends to request a reconsideration on this point. I cannot accept this argument. KD was provided an opportunity to respond to the Audit Report and

---

<sup>1</sup> Derosa, K. Vancouver Sun (May 9, 2024) <https://vancouversun.com/news/local-news/b-c-truckers-say-proposed-changes-to-licensing-system-could-lead-to-job-losses>

<sup>2</sup> KD Submission in response to Audit Report, Tab 12

provided a fulsome submission; the Commissioner's Decision set out the reasons for the findings and for the proposed penalties. While licensees are free to pursue reconsiderations and judicial reviews, this does not mean that Commissioner cannot or should not impose penalties because the licensee asserts that it will be doing so.

17. I also cannot accept that an administrative penalty is not necessary based on KD's assertion of allegedly widespread interpretation in the industry. At paragraphs 81-83 of the Decision, I summarized the previous Commissioner's repeated warnings to the industry about how to calculate off-dock rates to and from the railways, including his statement that "this was understood by licensees and treated as such by the OBCCTC auditors prior to the CNTL decision." KD has not heeded the Commissioner's bulletins, and this is exactly why an administrative penalty is appropriate.
18. The Commissioner's Decision is clear that the penalty proposed does not presuppose a breach of section 6.7 and/or 6.10 of the CTS licence. The reason for an escalating penalty around record-keeping discussed at paragraph 120 relates to the finding at paragraph 102: the erroneous "safety bonus" descriptor which led to an inaccurately reported hourly rate in breach of Appendix D 4(f) of the CTS license.
19. I do not find the reasoning around 53-foot containers in the Simard Reconsideration applicable in this case. First, there has been no evidence submitted that any of the Disputed Containers are 53-foot containers. Second, in the Simard Reconsideration, I did not accept that there was any misapprehension around non-53-foot containers. Similarly, in this case, I do not accept that KD was under any reasonable apprehension that the Disputed Containers were not "containers" for the reasons set out in paras 76-89 of the Commissioner's Decision.

### **Stay Application**

20. Section 39(2) of the *Act* allows the Commissioner, upon request, to suspend an order under reconsideration. As there is no reconsideration before me, I find KD's request at best premature. The *Act* does not contemplate stays at this stage.
21. On August 14, 2024, I advised KD that, per s. 9(3) of the *Act*, I will extend the deadline for the orders set out in paragraph 124(a)-(d) of the Commissioner's Decision from August 15, 2024 until sixty-one (61) days after the date of the letter.

### **Conclusion**

22. I am not persuaded to reduce or refrain from imposing an administrative penalty. Having carefully considered KD's submissions, and for the reasons set out here and in the Commissioner's Decision, I order KD to pay an administrative fine of \$20,000.00.
23. Section 35(2) of the *Act* requires this fine to be paid within 30 days of the issuance of this Decision Notice.

24. KD may request a reconsideration by filing a Notice of Reconsideration with the Commissioner not more than 30 days after its receipt of this Decision Notice. A Notice of Reconsideration must be:
- a) made in writing;
  - b) identify the decision for which a reconsideration is requested;
  - c) state why the decision should be changed;
  - d) state the outcome requested;
  - e) include the name, an address for delivery, and telephone number of the applicant and, if the applicant is represented by counsel, include the full name, address for delivery and telephone number of the applicant's counsel; and
  - f) signed by the applicant or the applicant's counsel.
25. Despite the filing of a Notice of Reconsideration, the above orders remains in effect until the reconsideration application is determined.
26. This Decision Notice along with the Commissioner's Decision will be published on the Commissioner's website.

Dated at Vancouver, B.C., this 23<sup>rd</sup> day of August 2024.

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

Glen MacInnes  
Commissioner