June 5, 2025

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

Commissioner's Decision
KD Truckline Ltd. (CTC Decision No. 16/2025)
(Application for Reconsideration of CTC Decision No. 11/2024)

I. Introduction

1. On September 23, 2024, the Office of the BC Container Trucking Commissioner ("OBCCTC") received an application from KD Truckline Ltd. ("KD") pursuant to section 38 of the *Container Trucking Act* ("*Act*") seeking reconsideration of an August 23, 2024, Decision Notice (CTC Decision No. 11/2024) ("Decision Notice") and underlying June 25, 2024, Commissioner's Decision (CTC Decision No. 11/2024) (the "Decision").

II. Commissioner's Decision and Decision Notice

2. In the Decision I found that KD failed to comply with section 23 of the *Act* when it underpaid some of its drivers up to $5.40 per hour while performing off-dock container trucking services 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) in amounts totaling $48,852.30. I also found KD breached its CTS licence by failing to maintain accurate payroll records as required under Appendix D s. 4(f) of its container trucking services licence. 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 established in the Rate Order. I ordered KD, per section 9 of the *Act*, to comply with the orders set out in paragraph 124(a)-(d) of the Decision by August 15, 2024. I proposed an administrative penalty of $20,000.00. KD was provided with the prescribed seven days to respond.[1]

3. On August 23, 2024, I considered KD's response and issued a $20,000 administrative fine by way of a Decision Notice, which advised that KD could request a reconsideration within 30 days.

4. The Commissioner's Decision and the Decision Notice were published on or around August 24, 2024.

[1] KD's counsel requested and was granted four separate extensions to respond, with the final deadline being July 31, 2024.

5. On September 3, 2024, KD's owner requested materials including prior correspondence and emails between auditors and former Commissioner Crawford and a copy of KD's 2019 Audit Report.

6. On September 13, 2024, I invited KD's legal counsel to particularize the document requests and provide a submission on their relevance.

7. On September 23, 2024, the OBCCTC received KD's application for reconsideration from its counsel. Included in the submission was an 82-page submission from KD's owner along with nearly 100 exhibits.

8. On September 24, 2024, KD's counsel sought and was granted an extension to October 1, 2024 to allow his client to provide additional submissions and documents.

9. On October 1, 2024, KD's counsel made additional submissions and attached six additional exhibits.

10. On February 19, March 21, March 22, March 30, April 2, April 3, 2025, April 4, April 8, April 10, April 11, April 14, April 16, and April 21, 2025, I received further submissions and materials from KD's owner, some of which were copied to KD's legal counsel.

III. Reconsideration

11. This request for reconsideration is unusual in the sense that some of the submissions and exhibits were prepared by KD's legal counsel and some by KD's owner, and materials were exchanged and submissions made until as late as April 21, 2025. I have considered all the submissions and materials received between September 23, 2024 and April 21, 2025 (collectively the "KD reconsideration submissions") and have summarized them below.

12. KD's reconsideration submissions restate many of its initial arguments that the Disputed Containers are not covered by the *Act*, *Regulation*, and the CTS licence. KD also raises a procedural fairness argument and alleges bias.

Meaning of "container"

13. According to KD, the Commissioner erred in the Decision by determining that certain indices were paramount in determining whether the definition of "container" had been met and should have considered only the "nature of the move." Specifically, KD says that the containers used in what KD calls the Clarke, CN and CP "domestic repositioning program" (or "DRP") were neither "furnished" nor "approved" for the marine transportation of goods because they are "railway owned" or "leased or used by railways" and the moves in question did not involve the "marine transportation of goods" but rather "domestic goods."[2] Furthermore, KD maintains that Clarke Transport does not participate in ocean shipping but moves cargo from east to west in Canada. KD says that "at no time were the containers moved

[2] KD counsel submission, September 23, 2024, page 8.

for Clarke Transport supplied or approved by a shipping line for the marine transportation of goods" and therefore it is not reasonable to include the "Clarke" containers as "containers."[3]

14. KD states that in order for the *Act* to apply to a "container" it must be "used for the marine transportation of goods" and must access a marine terminal "as part of the move itself." Unless both conditions are met, the *Act* does not cover the containers in question. KD argues that the Commissioner's interpretation effectively makes every container that has been on a ship "approved" by an ocean carrier for the marine transport of goods and that such interpretation is too broad.

15. KD submits that there is a logical, clear and consistent distinction between "marine" and "domestic" goods and that the definition of "container" requires that the container is used for "the marine transportation of goods." KD concedes that presence of a CSC plate on the Disputed Containers may be a necessary condition for determining that a container is "approved" by an ocean carrier for the marine transport of goods but says that it is not a sufficient condition as the CSC plate is not generated by the "ocean carrier" and the container must be periodically reinspected. It says that the presence of a "booking number" is a more appropriate indicator of whether a container is involved in the "marine transportation of goods" as that number is assigned by an "ocean carrier" and is extinguished when the container is outside the ocean carrier's control.

16. KD submits a number of emails from shipping companies and a master mariner, which it says describe when an "ocean carrier" will deem a container "approved" for the marine transportation of goods.

17. KD's September 23, 2024 submission includes an email dated September 13, 2024 from Mr. Bob Kirk at Clarke Transport Ltd. that provides some additional information about the "Clarke" work.[4] Mr. Kirk states that Clarke owns 53-foot containers, and each are identified with the prefix CTDC, CTHU, QXTU and do not have a CSC Safety Plate. Furthermore, Mr. Kirk states these containers are not used for the marine transportation of goods and never go on an ocean carrier. Mr. Kirk continues on to say that KD moves 40-foot containers that are rented or "on-hire" but that Mr. Kirk does not have any details about those containers as they are not owned by Clarke. Mr. Kirk maintains the 40-foot containers are not used for the marine transportation of goods when used by Clarke.

18. At paragraph 70 of the Decision, I set out the reasons why I considered that certain indices of a container were paramount in determining if the Disputed Containers were "containers." At paragraphs 73-75, I explained why I did not believe that a "booking number" and an "inspection report" were necessary to establish that an ocean carrier has "furnished" or "approved" a container for the marine transportation of goods. At paragraph 82, I explained

[3] KD owner submission, September 23, 2024, paras 1-4.

[4] As set out in para. 71 of the Decision, Mr. Kirk had explained that containers with the numbers CTHU and CTHC were "dry vans" and I understood this term to describe a thin-walled container with attached wheels that is never used for the marine transportation of goods. I have since heard the term used to describe "containers" as defined by the *Regulation* that are used for non-temperature sensitive cargo. The latter would be a "container" and generally captured by the *Act*.

why a container does not have to immediately transit through a marine terminal to be a "container." KD's argument that a valid CSC plate is not a reliable indicia of a "container" because the plate only applies to containers with cargo and not "empty containers" seems inconsistent with its position that containers are defined by the goods (marine or domestic) they are transporting. In any event, KD's reconsideration submissions are largely restatements of its prior arguments and have not changed my conclusions on these issues.

19. At para 39 of the Simard reconsideration, I noted that terms like "domestic goods," "marine goods" and "domestic moves" that were heavily relied on by Simard are not used or defined in the *Act* or *Regulation.* These terms are also heavily relied upon by KD. In the absence of any regulatory definition, I disagree with KD's submission that there is a "logical, clear and consistent distinction" between the two terms. I also disagree that the "marine transportation of goods" in a "container" is synonymous with the movement of "marine goods." The use of "marine" in the regulatory definition of "container" is an adjective that qualifies "transportation" not "goods." In short, I do not accept that the contents of a container are relevant.

20. At paragraph 73-75 of the Decision, I described why "booking numbers" and "inspection reports" do not affect the ability of the container to be used for the "marine transportation of goods." KD's evidence that containers must have "booking numbers" and "inspection reports" to be "furnished or "approved" for the marine transportation of goods focuses narrowly on an administrative requirement. The Cambridge dictionary[5] defines "approved" as "used to refer to something that is generally or officially accepted as being correct or satisfactory" and "furnished" as "to supply or provide something needed."

21. I find that that the broader meaning of "approved" is consistent with section 8 of the *Interpretation Act* R.S.B.C. 1996 c.238, which provides that "every enactment must be construed as being remedial, and must be given a fair, large and liberal construction and interpretation as best ensures the attainment of its objectives." One challenge with KD's submission is that if a container arrives at its final destination in the Lower Mainland (and therefore without an active "booking number"), and is then moved from one facility to another facility (for example to be repaired) prior to being assigned a new "booking number" and passing an "inspection report," then that container move to the repair facility would not attract the regulated rate because the container would not be "approved." Such an interpretation would be inconsistent with the definition of an "off-dock trip" between a "facility" which expressly includes locations where containers are "repaired" for shipping. I find that the broader definition of "approved" is more consistent with the *Act*'s objectives of ensuring that truckers are paid the regulated rates for moving containers capable of transiting through a marine terminal.

22. Ultimately, KD is arguing that the *Act* allows licensees with tagged trucks that access marine terminals to move containers that can and do transit through marine terminals off-dock within the Lower Mainland without paying the regulated rates. This issue of drivers not being paid a regulated rate for off-dock container moves is exactly what resulted in a race to the bottom

[5] https://dictionary.cambridge.org/dictionary/english/approved and https://dictionary.cambridge.org/dictionary/english/furnish.

and ultimately prevented drivers from receiving proper compensation which in turn contributed to the 2014 labour dispute as identified by the Ready/Bell Report.[6]

23. I am having great difficulty reconciling KD's submission about Clarke Transport's lack of involvement in the "marine transportation of goods" with the documents provided. By way of example, at paragraph 98 of the Decision, I noted that a driver's timesheet identified a container movement (BBUU8010579) from Vanterm to Clarke Transport and there is no dispute that KD paid the regulated rate for the move. Clearly, Clarke has some involvement in the "marine transportation of goods" if it is receiving containers from a marine terminal.

24. At paragraph 71 of the Decision, I noted that the trip sheets provided by KD had container numbers consistent with the indices of "containers" but acknowledged Mr. Kirk's evidence that those containers with the prefixes CTHU and CTHC were "dry vans" and the auditor may not have been made aware of that. I accept that if the containers CTHU and CTHC are thin-walled containers with attached wheels not used for the marine transportation of goods by an ocean carrier at any time they would not be regulated containers.

25. I also noted in paragraph 113 of the Decision that KD had not submitted any evidence that any of the Disputed Containers were 53-foot containers. I accept Mr. Kirk's new evidence that the containers with prefixes CTDC, CTHU, QXTU are in fact 53-foot in dimension and do not have CSC plates and therefore cannot be used in the marine transportation of goods. In the Simard reconsideration,[7] I explained that historically 53-foot containers were used exclusively for rail and truck transport but that recently some 53-foot containers were being "furnished" or "approved" for the marine transportation of goods as evidenced by the presence of a CSC plate and the fact that they can and/or do transit through marine terminals. I accept that 53-foot containers that do not have a CSC plate are not "containers" under the *Act*.

26. However, KD has not demonstrated that any other prefixes associated with containers moved by KD on behalf of Clarke or to or from Clarke or to or from a rail yard are not "furnished" or "approved" for the marine transportation of goods. It is likelier than not, based on my review of the containers moved by KD, that the 40-foot containers Clarke "on-hires" or rents are the same containers that transit through a marine terminal. Clarke may use these "on-hire" and "rental" containers to move goods throughout the Lower Mainland. However, this does not change the fact that these containers are "furnished" or "approved" by an ocean carrier for the marine transportation of goods.

<u>"Specified" container trucking services and "facility"</u>

27. KD's counsel argues that even if "specified container trucking services" (s. 22 of the *Act*) applied to "off-dock trips," such trips require the movement of a container between one "facility" and another "facility" which did not occur for the Disputed Containers. KD argues that "facility" as defined in the *Regulation* captures only those locations where containers are "stored, loaded, unloaded, trans-loaded, repaired, cleaned, maintained or prepared for

[6] Vince Ready and Corrin Bell, Recommendation Report – British Columbia Lower Mainland Ports" (September 25, 2014) section 4(c)(i).
[7] para 82.

shipping" and that "for shipping" means only marine shipping and qualifies each of the words preceding it.

28. According to KD, then, the Commissioner erred by determining that the start and end point of each movement of Disputed Containers was a "facility" since each container was engaged in the "domestic" and not "marine" shipping of goods. KD argues that its interpretation of "facility" supports its argument that the legislative scheme only applies to containers that transit through a Lower Mainland marine terminal.

29. At paragraph 63 of the Decision, I set out my reasons for concluding that "prescribed container trucking services" in section 2 of the *Regulation* means those that require access to a marine terminal and are separate from the "specified container trucking services" set out in section 22 of the *Act.* KD does not appear to challenge that interpretation.

30. I do not agree that the Disputed Containers were not involved in an "off-dock trip" because the locations involved were not "facilities." At paragraphs 58-64 of the Simard reconsideration, I determined that the exclusion of "marine terminal" from the regulatory definition of "facility" supported the broader interpretation of "for shipping" to mean "for transportation" more generally.

31. I adopt the analysis set out in the Simard reconsideration and I find that the Disputed Containers here were "stored, loaded, unloaded, transloaded, repaired, cleaned, maintained or prepared for shipping" – that is to say, "for transportation" – at locations in the Lower Mainland, including at rail yards and warehouses.

Purpose of the *Act*

32. KD's owner restates that the committee debates on the *Act* make clear that the regulatory scheme was intended to apply only to container movements related to movements through the ports. Furthermore, KD submits that I should contact the Minister to seek clarity on the intent.

33. On April 10, 2025 and April 11, 2025, KD's owner provided copies of Hansard transcripts on the *Act* during the committee stage and highlighted certain comments made about containers, the part-time role of the Commissioner and the allocation of truck tags that he argues show that "non-port related" moves are not subject to the off-dock regulated rates.

34. At paragraph 64 of the Decision, I explained how I read section 16 and section 22 of the *Act* as excluding container trucking moves that have "nothing whatsoever with the drayage sector." At paragraph 64 of the Decision, I addressed the Hansard debates cited by KD: the legislative scheme excludes moves that have "nothing whatsoever to do with the drayage sector" by not requiring exclusively off-dock companies to be licensed. KD's submissions do not address the interplay between section 16 and section 22 of the *Act*.

35. I note the Minister's comment regarding section 22 of the *Act*: "We want to make absolutely certain that these regulations do not capture any non-port related or non-drayage related moves." As mentioned above, section 22 of the *Act* only deals with the rates that licensees

have to pay. Moreover, the Minister does not stop his sentence after he says that the regulation will not capture "non-port related" moves. He continues to say that the regulation will not capture "non-drayage-related" moves, which must mean more than "non-port related" moves. I understand the Minister's comment to mean the scheme would require licensees to pay regulated rates for "port-related" moves and "drayage-related" moves – the latter meaning moves that do not transit through the port.

36. I am unclear what I can infer from the Minister's comments about the regulatory definition of "container" being similar to the one used by then-Port Metro Vancouver ("PMV") but it would make sense that the definition captures the "on-dock" moves that typically transit through a marine terminal.

37. I am unclear how KD infers from the Minister's comment that the Commissioner's role would be part-time that the legislature never intended the *Act* to cover "non-port related" work for licensees. While the Minister may have thought the workload would not require a full-time appointment, that could have been for many other reasons. Similarly, I am unclear how the application of truck tags to a CTS license is evidence that the truck tags were only contemplated for trucks that access a marine terminal.

38. Even if I am wrong about the comments made by the Minister in the legislature, the Hansard debates involve the section-by-section review of the *Act* – not the subsequent regulations. It is clear from the Hansards that the *Regulation* was not even fully drafted at this stage. Discussions around regulations take place within the LGIC and are not transcribed and are subject to Cabinet confidentiality. The Minister may have expressed in the House how he intended to craft the *Regulation*, but he is but one member of the LGIC and I am left with the language of the *Regulation* as it was drafted and approved by the LGIC as a whole.

39. KD does not point to anything in the *Act* that prevents or limits the LGIC from passing the *Regulation* as it stands. KD is asking me to limit the scope of the relevant definitions in the *Regulation* (container, facility, off-dock trip) in a manner it says was intended by the Minister based on its reading of the Minister's comments around the *Act*. At the end of the day, I am left with an *Act* that deals broadly with container trucking services within British Columbia, and which enabled the LGIC to narrow the scope of the *Act* through the *Regulation*.

2019 compliance letter & CNTL and April 20, 2020 Letter

40. KD's submissions rely heavily on the CNTL decision and KD's November 2019 audit compliance letter to argue that the former Commissioner found that container movements similar to those involving the Disputed Containers were outside the scope of the *Act*. KD argues that I must or should apply that interpretation in this case. In the alternative, KD also says that it reasonably relied on the CNTL decision and its 2019 audit results and this should go to the retroactive effect of the Decision and the assessment of penalty.

41. KD further maintains that the former Commissioner's April 17, 2020 bulletin did not retreat from the position that containers "not directly related to on-dock moves" were not captured by the *Act.* It maintains that the April 17, 2020 bulletin merely clarified that the former

Commissioner would not accept any further submissions from licensees that total compensation must be considered by the Commissioner when determining if the minimum regulated rates were paid.

42. In emails dated April 4 and 11, 2025, KD's owner made submissions on an April 20, 2020 letter to KD from the former Commissioner advising that its rate structure was deemed compliant "for the purpose of its last [2019] audit." KD did not include this letter in its submissions at any stage. I became aware of it while reviewing another licensee's file in late 2024 and it was sent to KD in April 2025. KD does not appear to consider this letter important but explains that it was written at KD's request because KD wanted to ensure that it was compliant after it had reviewed the April 17, 2020 bulletin. KD asserts that the April 20, 2020 letter confirmed the former Commissioner's verbal commitment not to seek retroactive payments and provided KD with assurance that its "operation was compliant." KD suggests that the former Commissioner's statement in the April 2020 letter that, going forward, the auditors would be conducing audits based on the April 17, 2020 bulletin and KD should "adjust its pay structure accordingly" meant only that KD should alter its "practice to reflect any container associated with Port moves to and from CN and CP are considered CTS." KD says that after it received the April 2020 letter it "was satisfied that our company would be protected and assured that our operations were compliant." KD argues that the former Commissioner's subsequent email to KD on May 5, 2020 clarified that he was not retreating from his position that containers not directly related to "on-dock moves" (e.g. those without a booking number) are not covered by the *Act.*

43. As set out below, I do not accept that the former Commissioner found in CNTL, on an application of the legislation to the facts, that the container moves in question were not captured by the regulatory regime. However, I agree in part with KD as to how the CNTL decision and its 2019 audit clearance letter should inform KD's liability for retroactive wages and penalty.

CNTL

44. The former Commissioner deals with the relationship between certain off-dock and on-dock moves in CNTL, but I do not agree that he confirmed that such off-dock moves are outside of the *Act.* Instead, he instructed his auditor to exclude certain marine[8] container moves "for the purposes of the audit" as follows:

> The movement of empty overseas containers was not considered to be container trucking services for the purpose of the audit because it was determined that these moves were associated with a movement of a container by rail and therefore were not off-dock moves directly related to regulated on-dock moves;[9]

45. It seems to me that the former Commissioner would not have excluded these types of container movements "for the purpose of the audit" if they were already excluded by virtue of

[8] Based on paragraphs 7 and 13 of the CNTL decision, I understand the Commissioner was using the terms "marine" and "overseas" containers to mean the same thing.
[9] CNTL, para. 13.

his reading of the *Act* or *Regulation.* As the CNTL decision does not include any analysis of why the former Commissioner determined that the "movement of empty overseas containers" were not "off-dock moves" if they were not directly associated with on-dock moves, I am not convinced that the former Commissioner came to that conclusion based on an application of the *Act* or *Regulation*. However, the April 17, 2020 bulletin clarifies that rail yards are "facilities" and the *Act* and *Regulation* treat "any move to or from these facilities . . . as an off-dock move" (emphasis added). The bulletin's reference of the regulatory definition "facility" and the application of "any move," along with the absence of any mention that the off-dock move needs to "directly related" to the on-dock move, is telling. Reading CNTL and the April 17, 2020 bulletin together, I think it most likely that the former Commissioner gave the instructions in the CNTL audit for the sake of expediency in a case where the drivers were on the whole better compensated than they would have been under a more conventional compensation scheme.

46. KD does not argue that it was compliant in 2019 because its compensation package as a whole met or exceeded the minimum regulated rates. Rather, KD argues that it was compliant despite paying less than the regulated rate for moving the Disputed Containers to and from the railyards.[10] KD explains that during its audit in 2019, the former Commissioner directed the auditor to rely on the CNTL decision when determining how the rates apply to certain container movements. KD deduces that since the container movements in the 2019 KD audit are similar to those involving the Disputed Containers now, it remains compliant. I cannot accept that argument for the reasons explained above.

Reliance

47. However, I do accept, to a point, that KD's reliance should inform how far back I require it to recalculate monies owning and penalty. In paragraphs 76-89 of the Decision, I concluded that any alleged reliance on any decision or correspondence from the former Commissioner that KD had put before me would not have been reasonable. I also found that any confusion on the part of KD would or should have been cleared up by the April 17, 2020 bulletin. KD has not said anything to change my mind on this, and the former Commissioner's April 20, 2020 letter to KD further confirms my view that KD was or should have been aware of the off-dock requirements by April 2020. However, I do note the former Commissioner's commitment in the April 20, 2020 letter not to revisit KD's last audit and his clarification about the circumstances of that audit:

> The Office of the British Columbia Container Trucking Commissioner ("OBCCTC") issued an "Off-Dock Rates and Truck Tag Requirements" bulletin on April 17, 2020. In that bulletin, licence holders are advised that any driver at a licenced company who is paid by the hour and who is performing off-dock container trucking services as defined in the Container Trucking Act and the Container Trucking Regulation (the "Act" and the "Regulation" respectively) must be paid the required hourly rate. Licensees are also advised that they must pay the required off-dock trip rates for moves to and from the CN and CP intermodal facilities and must also pay the PMR on off-dock trip-rate moves. My auditors will be

[10] KD owner's September 23, 2024 submission, pg 4.

> instructed to conduct audits based on the bulletin going forward.
>
> KD Trucklines Ltd. ("KD") was recently audited by the OBCCTC. KD's rate structure was deemed compliant for the purpose of its last audit and I do not intend to revisit the findings of that audit, nor require KD to pay drivers retroactively. I am, however, writing to advise KD of the OBCCTC's recent off-dock bulletin and remind KD of its requirement to adjust its pay structure accordingly.
>
> (Emphasis added)

48. The April 20, 2020 letter supports KD's position that its 2019 audit found its payment of less than the regulated rates for container movements similar to those involving the Disputed Containers was compliant. However, the former Commissioner directly advised KD in the April 2020 letter that it had been deemed compliant for the purposes of its last audit only and that it should adjust its payments going forward. I find KD was expressly advised that it must pay the required off-dock trip rates for moves to and from the CN and CP intermodal facilities and that the OBCCTC auditors would base future audits on the 2020 bulletin.

49. I also do not accept KD's assertion that the that the April 20, 2020 letter confirmed the former Commissioner's verbal commitment that it was compliant. The April 20, 2020 letter makes no mention of a previous conversation with KD and warns KD that the Commissioner will apply a different approach in the future and that it needs to "adjust it payments" going forward. The letter references the April 17, 2020 bulletin, which made clear that the CNTL decision was based on unique facts and that off-dock moves between intermodal terminals had historically attracted the regulated rates. The April 20, 2020 letter clearly indicates that the disapplication of the *Act* to container moves to and from the railway in the CNTL decision and KD's 2019 audit will not continue. I am not convinced that KD was "assured" that nothing needed to be changed. In fact, I find the opposite is true.

50. The April 20, 2020 letter is instructive and in its submissions on it KD admits for the first time that the April 2020 bulletin caused it some concern – reasonably so on my reading – that its payment for container moves to and from the railway may not be complaint. Although KD suggests otherwise, I find the April 17, 2020 bulletin and the April 20, 2020 letter provided reasonable notice to KD that its practices were not compliant, and KD must "adjust its pay structure accordingly." Both documents state that moves to and from the railway are to be paid the regulated rates and neither document mentions "port-related moves," "domestic repositioning," "domestic goods" or "marine goods."

51. KD suggests the former Commissioner's May 5, 2020 email is evidence that the former Commissioner was not retreating from his position that container moves such as those involving the Disputed Containers were outside the scope of the *Act.* However, if the May 5, 2020 email expressed the Commissioner's position on container movements and his feeling that KD had been compliant all along, then he would not have taken the time to write the April 20, 2020 letter expressly putting KD on notice not to rely on the compliance letter for the 2019 audit in the future.

52. At paragraph 87 of the Decision, I determined that the May 5, 2020 email did not provide any substantive response to KD's questions. I did not consider the April 20, 2020 letter in the Decision and the May 5, 2020 email does not reference the April 20, 2020 letter. However, KD asks me to consider the May 5, 2020 email as evidence that the Commissioner retreated from his position that the 2019 audit was not to be relied on in the future and that he was not going to direct the auditors to apply the 2020 bulletin in any future audits. The May 5, 2020 email does not allow me to draw that conclusion.

53. Although the former Commissioner did not apply the interpretation in the April 17, 2020 bulletin retroactively, he applied it consistently going forward. On March 21, 2022 he agreed that a number of scenarios that did not directly involve transit through a marine terminal - similar to the movements of the Disputed Containers-- attracted the regulated rates.[11] He then issued the May 18, 2022 industry advisory referenced at paragraph 83 of the Decision. If KD were correct that the former Commissioner never considered that off-dock container movements were subject to the *Act*, then he would not have accepted that any of these scenarios attracted the regulated rate. Instead, he found these scenarios did attract the regulated rate and thereafter sent out an industry advisory reiterating that containers that transit to and from a railyard are to be paid the regulated rates.

54. Based on my review of the CNTL decision, the former Commissioner's 2019 emails directing the auditor to apply CNTL when auditing KD, KD's 2019 audit compliance letter, the April 2020 bulletin and letter and the May 2022 industry advisory, it appears that for a brief period of time after the CNTL decision the former Commissioner exempted containers similar to the Disputed Containers from the regulated rates for the purposes of particular audits. The close proximity of KD's 2019 audit to the CNTL decision is likely why the former Commissioner adopted a similar approach.

55. However, the former Commissioner soon after put industry generally, and KD specifically, on notice that, going forward, he would require the auditors to ensure container moves to and from CN and CP were paid the regulated rates.

56. As set out above, the April 20, 2020 letter includes a commitment from the former Commissioner not to seek retroactive pay. In addition, the April 20, 2020 letter addresses the circumstances surrounding the 2019 audit that potentially caused the misunderstanding that KD was compliant with the *Act* instead of compliant for the purposes of the audit. I will not require KD to repay its drivers prior to April 20, 2020. In my opinion KD is entitled to rely on this commitment, and it provides a reasonable explanation as to why KD misapprehended the meaning of the 2019 audit letter until April 2020.

Forfar Decision

57. KD's owner argues the Decision did not consider all the factors set out Forfar Enterprises Ltd. (CTC Decision No. 20/2016). KD explains that the Forfar decision does not explicitly state that container moves between railyards and other facilities in the Lower Mainland are required to

[11] See November 29, 2024 Notice of Order Against Canada Drayage Inc., paras 8 to 10.

be paid at the regulated rates and says that Forfar did not provide evidence that the container moves were not "direct Marine moves." KD speculates that if Forfar had been able to demonstrate that the moves were not "directly connected to a shipping line and a movement to the Port" the former Commissioner would have determined that they did not attract the regulated rates.[12]

58. At paragraph 76 of the Decision, I rejected KD's argument that a new interpretation had been applied, and KD's reconsideration submissions have not changed my mind.

59. On my reading of the 2016 Forfar decision as a whole, the former Commissioner accepted that the licensee was moving containers to and from a railyard and a customer's location and those containers did not transit through a marine terminal. At paragraphs 25 and 36 of Forfar, the former Commissioner rejected the licensee's argument that containers that do not transit through a marine terminal but transit from "CN, CP and Delco" are exempt from the *Act* and *Regulation.*

60. KD's submission that evidence of a "booking number" or an "inspection report" in Forfar would have given the former Commissioner additional information to determine if the regulated rate applied simply does not make sense. The presence or absence of a "booking number" or an "inspection report," would, according to KD, establish that the containers came through a marine terminal, but the former Commissioner rejected the idea that a "container" is required to come through a marine terminal as part of his off-dock move analysis.

61. In the Forfar case, the licensee was unable to establish any containers were "railway owned" or "marine non-approved containers" despite indices to the contrary.

62. In this case, I apply the test set out in the Forfar decision. Where KD has established that some of the Disputed Containers do not have the indices of a "container," I accept that the regulated rate does not apply. It does not matter whether the container has immediately transited through a marine terminal, but rather whether the container has the indices of a "container."

<u>Absurd interpretation</u>

63. KD submits, for the first time, that the ability of licensees to involve affiliated non-licensees to move containers within the Lower Mainland without paying the regulated rates by a simple corporate restructuring is more than a mere "loophole" but rather evidence that the legislature did not intend to regulate containers that "do not transit through a marine terminal."

64. KD restates that the Commissioner's interpretation would result in non-licensed companies who do not require access to a marine terminal having a competitive advantage over licensees because non-licensees are not required to pay the regulated rates. It says that the consequence of the interpretation set out in the Decision will mean KD will not be able to compete in the "domestic container" market because the regulated hourly rates are higher than those paid by non-licensees.

[12] KD owner email, March 22, 2025.

65. Furthermore, KD argues that closing such loopholes in the CTS license is *ultra virus* and evidence that the Commissioner is attempting to expand the scope of the statutory scheme beyond what is permissible.[13]

66. KD submits that neither the police nor Commercial Vehicle Safety Enforcement view "non-CTS container trucking as illegal or in breach of any regulation" but maintains that this appears to be the Commissioner's view.

67. At paragraph 35 of the Forfar decision the former Commissioner provides his rationale for why licensees are required to pay the regulated rates for off-dock trips when non-licensees are not. I made a similar point in the Simard Westlink Inc. (CTC Decision No. 09/2023) --Commissioner Decision (August 25, 2023) at paragraph 40. Licensees have some business advantages that are not afforded to non-licensees through their exclusive access to marine terminals and the cost of that benefit is paying a regulated rate when moving "containers" on-dock and off-dock in the Lower Mainland.

68. The Decision does not find that KD breached the CTS license prohibition against subcontracting out off-dock container work to non-licensees and therefore I need not address KD's "*ultra vires*" argument. I understand KD's argument to be that the terms of the CTS license cannot extend beyond those authorized by the *Act.* Suffice it to say that, given the interplay between section 16 and 22 of the *Act* and the regulatory definitions, I consider the prohibition against licensees subcontracting "off-dock" work to non-licensees to be consistent with the legislation.

69. KD appears to say that the Commissioner views "non-CTS container trucking as illegal" or "in breach" of a regulation but that this is not consistent with the approach of police agencies or Commercial Vehicle Safety Enforcement. I am not clear what KD means by "non-CTS container trucking," and I do not consider the movement of "containers" between off-dock facilities in the Lower Mainland by non-licensees breaches the *Act.* Section 16(1) of the *Act* only requires companies that perform container trucking services that require access to a marine terminal to be licensed. Section 42 makes breach of s. 16 an offence. A company that never access a marine terminal and moves "containers" or performs "container trucking services" in the Lower Mainland does not need a licence and is not in breach of s. 42 of the *Act.*

Procedural Fairness and Bias

70. KD's owner submits that its 2019 audit report "needs to be provided, and a decision should be based on those findings."[14] KD also asks that communication between the auditors and the former Commissioner in relation to "prior audits," any "internal" documents "related to the application of the CNTL Decision" generally, and written communications between the auditors or the Commissioner and KD be shared to assist KD's argument as to the history of the interpretation of the statutory scheme and its defense of officially induced error.[15] KD's counsel says "that the Commissioner should provide the above documents and information to KD and afford KD with an opportunity to make further submissions before deciding the

[13] KD counsel submission, September 23, 2024, page 8.
[14] KD owner submission, September 23, 2024, page 1.
[15] KD counsel submissions, September 23, pages 9-10 and October 1, paras 4-6.

reconsideration application" or "should at least consider the documents and information in deciding the reconsideration application."[16]

71. KD further submits that there is a reasonable apprehension of bias given its understanding that prior to receiving the current Audit Report I instructed an auditor to adjust her approach after she initially accepted KD's assertion that "DRPs" are not captured by the *Act*.[17] KD also expresses concern that my comments in a radio interview conducted on July 19, 2024 mean that I may have predetermined not to accept KD's submissions.[18] KD also raises concerns the OBCCTC may perceive it negatively because of its owner's advocacy within the drayage sector and/or his having brought forward "sensitive issues" and that I may be biased or may predetermine the outcome of this reconsideration as a result.

72. Many of KD's submissions include examples of other licensees that it says are performing container trucking services without a truck tag. KD suggests that either this practice is widespread or the Commissioner is not enforcing the *Act* consistently.

73. KD's concerns around bias or animus are not reasonable. Its concerns ignore the April 17, 2020 bulletin and the April 20, 2020 letter from the former Commissioner that clearly indicate that KD should not rely on its 2019 audit compliance letter. KD continues to rely on the CNTL decision despite being expressly advised not to. However, it is clear on the evidence before me that the OBCCTC has indicated to industry generally and to KD specifically that such reliance is not appropriate.

74. Regarding KD's concern around any instruction to the auditor over the course of the current audit, from time-to-time questions arise during an audit about how certain issues are to be addressed, what information may be relevant, etc. This is what appears to have occurred in the 2019 audit based on the email exchanges supplied by KD and discussed at paragraph 49 of the Decision and this is what happened here. As KD acknowledges, the auditor in this case remained receptive to other reasons the Disputed Containers may not have been "containers."[19] Auditors are not decision-makers; they gather information and may be directed to consider certain information or apply the *Act* and *Regulation* in certain ways. Audit reports and the decisions that follow provide an explanation of why certain issues were assessed the way they were and the licensee has an opportunity to respond at every stage.

75. My recitation of the regulatory definition of "container" during a radio interview was addressed in my July 30, 2024 response to the PTA's complaint regarding same. I was not speaking about the PTA or Mr. Johnson's interpretation of "container." I was addressing the claim -- put to me by the interviewer -- that I did not know what the regulatory definition of "container" was. I do not find my comment reasonably suggests that I lacked objectivity or had closed my mind to anything concerning KD. As I stated in the interview, it is not open to me to change the definition of "container"; that is a decision for government. Of course, as KD's

[16] KD counsel submissions, October 1, para 5.
[17] KD counsel submissions, September 23, page 10.
[18] KD owner submission, March 21, 2025.
[19] KD owner submission, September 23, 2024, page 8, paragraph 1.

owner points out, there may be different interpretations of the definition, but that was not the issue in the interview.

76. Regarding KD's requests that I share or at least consider certain materials, given my decision on the former Commissioner's commitment in the April 20, 2020 letter not to revisit KD's 2019 audit or require it to pay retroactive wages before the date of that letter, it is not necessary for me to consider prior audit reports or correspondence between the former Commissioner and OBCCTC auditors surrounding prior audits or the application of the CNTL decision.[20] I accept that KD was entitled to rely on its 2019 audit compliance letter until April 2020.

77. It is unnecessary for me to consider correspondence between OBCCTC auditors and KD or the former Commissioner and KD for the same reason. KD's request is for correspondence to which KD was a party in any event. Although it is open to KD to put this correspondence to me, I do not generally go looking for materials other than the materials involving the audit before me; those materials are not generally relevant and the effort involved would be disproportionate. Here, I have considered the correspondence that KD has submitted or made submissions on, but I have not engaged in a comprehensive search for such correspondence. It was open to KD to request this information under the *Freedom of Information and Protection of Privacy Act,* but it did not.

78. KD's insistence that there are other licensees who are performing container trucking services in breach of the *Act* does not mean the alleged breaches are condoned. It is unclear from some of the photographs and screenshots in KD's submissions if the untagged trucks that appear to be owned by licensees are moving their containers between facilities inside or outside of the Lower Mainland (the second does not require a truck tag or attract the minimum regulated rates). Other photographs show untagged trucks moving 53-foot containers that do not appear to have CSC plates. KD has been encouraged to submit any complaints to the confidence line so that a proper investigation can occur. The OBCCTC has set up a confidence line complaint process and each complaint is investigated pursuant to section 26 of the *Act*.

<u>Payroll Records</u>

79. KD makes a number of submissions about its production of payroll records and takes exception to certain findings made in the Decision about its record-keeping.

80. KD submits that it did not provide inaccurate payroll information about the safety bonus as found in the Decision as the bonus was listed as a separate line item on the wage statements.

81. I did not make a finding against KD for failing to provide electronic records in the Decision and this was confirmed at paragraph 18 of the Decision Notice.

82. At paragraph 102 of the Decision, I found that KD did not accurately report the hourly wage on some of its wage statements. KD's reconsideration submission misunderstands my description

[20] Internal communications between the former Commissioner and his auditors and/or prior audit reports that were not shared with the licensee may also be subject to deliberative privilege. As set out above, I do not ordinarily review these materials in any event.

of this as "erroneous." I was simply summarizing KD's position that it had erroneously broken out a portion of the hourly rate into a separate line item called "safety bonus." Ultimately, and in any event, KD improperly recorded the hourly rate paid to some of its drivers on its wage statements in breach of its CTS license by characterizing some of the wage paid as a "safety bonus."

Underpayment of drivers who worked more than 2,340 hours

83. KD disagrees that it does not have a system to determine the number of hours a driver should be credited upon hiring as found in paragraph 94 of the Decision. In particular, KD argues that it did not improperly credit Mr. Sangha's hours when he was first hired in May 2023. KD submits that it can only rely on the driver's evidence of previous hours of work.

84. On March 21, 2025, KD provided a submission with updated information about Mr. Sangha,[21] a driver who was paid the lower regulated rate as identified at paragraphs 53 and 91 and 92 of the Decision. KD states that it incorrectly identified Mr. Sangha as working for one licensee but has since learned that Mr. Sangha actually worked for a different licensee. KD attaches an undated letter from Mr. Sangha advising that he was unsure about the number of "port hours" and "highway"[22] hours worked with the previous licensee but that he agreed that he had done approximately 500 hours of "port work" and the estimate was appropriately relied upon by KD.

85. KD argues that even if it accepted Mr. Sangha had worked full-time for the full six months (KD states it is not clear when Mr. Sangha started and ended with the previous licensee) and all hours worked between his start date in May 2023 and the Audit Period were "CTS work" (maximum 960 hours), he would not have qualified for the higher regulated rate at the time of the audit in November 2023.

86. At paragraph 92 of the Decision, I stated that I was unable to determine the number of CTS hours worked by Mr. Sangha and nothing in KD's reconsideration submissions provides me with further clarity. I am unclear how KD concludes that a full-time driver working for six months for a previous licensee would work only 960 hours. While I appreciate that KD "estimated" the time worked by Mr. Sangha, I have not been provided any rationale for or break down of its estimate that he had only previously worked 500 hours. It is particularly difficult to understand how this number was arrived at since KD is uncertain of Mr. Sangha's start and end date with the previous licensee and in fact initially identified the wrong licensee. It is incumbent on the licensee to document why it is paying the lower regulated rate to its drivers. If a licensee is unable or unwilling to provide satisfactory proof of how it arrived at the number of previous hours worked, then it should pay the higher regulated rate.[23]

[21] KD provided a submission on September 23, 2024 that indicated Mr. Sangha had worked for a different licensee.
[22] I generally understand that the term "highway work" is used to indicate long haul work or the movement of containers to or from a location in the Lower Mainland to outside the Lower Mainland.
[23] See TMS Transportation Management (CTC Decision No. 06/2016) and Raja Road Rail Services Ltd. & Trans BC Freightways Ltd. (CTC Decision No. 27/2017).

Penalties[24]

87. KD submits that the cases I referenced in determining the size of the administrative penalty proposed in the Decision do not involve "reliance on CNTL." In addition, KD states that it is an upstanding company who pays it drivers according to the *Act* and "written guidance from the OBCCTC" and if I simply disagree with the prior Commissioner I could have written a more positive decision reflecting the facts of the case and my opposition to the prior Commissioner's view. KD says that instead the Decision was predetermined, and the $20,000.00 administrative penalty was targeted to "inflict maximum penalties."[25]

88. On March 30, 2025, KD submitted a redacted invoice dated February 4, 2025 between CN Rail and Clarke Transport for moving container CAIU969164 from Brampton Ontario to Surrey BC. I understand this is meant to show that paying less than the regulated rate to move the container from the Vancouver rail yard to Surrey, BC does not enrich the licensee but only allows the licensee to break even. As I understand the invoice, Clarke received $210.00 plus $44.64 and fuel surcharge to move the container by truck 24 miles.

89. All of the decisions dealing with the penalty that are cited in the Decision are relevant because they all deal with the issues that are relevant here: the underpayment of drivers, the resulting benefit to licensees and improper record-keeping. While I understand that none of the licensees in those cases asserted reliance on the CNTL decision, I do not accept that KD reasonably relied on CNTL after April 2020 for the reasons set out above and I therefore do not consider the distinction to be relevant to the penalty here.

90. In the Simard reconsideration, I found that the licensee had paid its drivers less than the regulated rate and rejected arguments concerning "domestic repositioning." Initially, I issued a $12,000 administrative fine but reduced that amount to $8,000 in the reconsideration in part because the total amount owed to drivers was determined to be less than previously understood and the licensee was under a misapprehension about 53-foot containers. I will make a similar adjustment for similar reasons here, as set out below.

91. I understand KD's argument that paying the regulated off-dock rates for "containers" may not be profitable or as profitable. I am not too sure what I can discern from the redacted invoice provided by KD, but the container identified on that invoice came into Canada via a marine terminal on January 7, 2025[26] and if KD moved the container between the rail yard and Surrey it would be required to pay the regulated rates. I do not accept that KD's inability to secure a higher rate from its customer means it has not been enriched by paying less than the regulated rate.

92. However, I accept that KD is not required to pay the regulated rate containers that do not have a valid CSC plate or for "dry vans" (defined as thin-walled containers with attached wheels that are not used for marine transportation). I also accept that KD is not required to compensate drivers before April 2020 based on the former Commissioner's April 20, 2020 letter. As a result

[24] KD owner submission, September 23, 2024, pages 68-69.
[25] KD owner submission, September 23, 2024, page 66.
[26] https://webservices.globalterminals.com/tsiWebServiceClient/importContainerStatus.jsp

of both, KD will have benefited less than originally understood. I will consider this in terms of the administrative penalty.

Other

93. KD takes exception to certain paragraphs in the Decision and seeks their removal or rephrasing because it feels they inaccurately capture KD's position or were intended to cause embarrassment.

94. KD states that it stands to lose a substantial amount of business if the Decision is not revised as it was advised by Clarke Transport that it will not be able to increase its payments to KD.

95. In its September 23, 2024 submission, KD's owner says that the Decision unfairly identified one of its customers and I knew or reasonably ought to have known this would jeopardize KD's commercial relationship with that customer. KD included an email from the customer as evidence that KD has lost or will lose the client.

96. KD's owner seeks amendments to, or publication bans on, certain parts of the Decision because he feels it has some inaccuracies and paints KD in a negative light. However, at the end of the day I am called upon to make findings of fact based on the evidence before me.

97. At paragraphs 9 to 13 of the Decision Notice, I explained why I had decided against redacting the names of drivers and customers and their representatives. KD has not established why the names in the Decision or in this reconsideration should be redacted and my reasons in the Decision Notice continue to apply.

IV. Conclusion

98. It is clear from KD's submissions that it feels that the only plausible explanation for the Decision is some sort of animus or predetermination. This is so regardless of the Forfar decision, the April 17, 2020 bulletin and the April 20, 2020 letter written by Commissioner Crawford, the 2022 industry advisory and other bulletins and decisions that predate the Decision. I also note the findings in *Simard Westlink Inc. v. Office of the BC Container Trucking Commissioner* 2023 BCSC 2007 that the application of the *Act* to containers that do not transit through a marine terminal was not new.

99. For the reasons set out above, I reject KD's argument that none of the container moves during the Audit Period are captured by the *Act*. As a result, I reject KD's argument that it was entitled to exclude certain hours towards the calculation of each driver's 2,340 hours of container trucking services. Finally, I reject KD's argument that it provided wage statements in accordance with the requirements set out in Appendix D to Schedule 1 of the CTS license.

100. Given that the former Commissioner advised KD that it would not be required to retroactively pay its drivers prior to April 20, 2020 letter and that 53-foot containers without CSC plates are not captured by the *Act*, KD is likely to owe significantly less than the amount determined in the Decision and I will reduce the penalty as a result.

101. In summary, the application for reconsideration is granted in part.

102. I will amend the order at paragraph 124 of the Decision as follows:

I order KD to do the following not later than August 1, 2025:

a) Determine when each driver who was paid the lower rate after February 22, 2022 was entitled to be paid the higher rate based on the findings set out in the Decision and this Reconsideration.

b) Review its payroll records between April 21, 2020 and June 25, 2024 (excluding the months included in the Audit Period) to determine compensation owed to each driver based on the findings set out in the Decision and this Reconsideration.

c) Provide the OBCCTC with its calculations in (a) and (b).

103. I will reduce the administrative penalty from $20,000.00 to $9,000.00 on the basis that any enrichment enjoyed by KD will be less than originally found and because KD's reliance on the results of its 2019 audit was reasonable up to the time it received the April 2020 letter. I note that KD has been the subject of a previous decision for failing to maintain proper records and I find the amended penalty reflects the need to ensure that KD's payroll records are accurate as well as that it pays its drivers the minimum regulated rates.

104. As KD has not paid the penalty originally imposed, KD is required to pay $9,000.00 within 30 days of the date of this Reconsideration pursuant to s. 35(2) of the *Act*. Payment should be made by delivering to the Office of the BC Container Trucking Commissioner ("OBCCTC") a cheque in the amount of $9,000.00 payable to the Minister of Finance.

105. With the exception of the above, I dismiss KD's application for reconsideration.

This reconsideration will be published on the Commissioner's website.

Dated at Vancouver, B.C., this 5th day of June 2025.

Glen MacInnes
Commissioner