



January 11, 2024

## **Addendum II to 2023 Rate Review Consultation Report – Overtime Calculation for Independent Operators**

### **Background**

On February 2, 2023, the Office of the BC Container Trucking Commissioner (“OBCCTC”) published a Rate Review Recommendation Report (“Recommendation Report”) summarizing proposed rate changes for drivers in the Lower Mainland drayage sector. One proposal included the introduction of an overtime rate for drivers mirroring the *Employment Standards Act* (“ESA”) and *Employment Standards Regulation* (“ESR”) rate for short haul drivers. The Recommendation Report recommended an overtime rate for Directly Employed Operators (“Company Drivers”) and Indirectly Employed Operators (“IEOs”) but noted that the more complex compensation structure for Independent Operators (“I/Os”) made it difficult to come up with a formula to calculate overtime rates for I/Os. The OBCCTC invited submissions on the recommendations.

In the Rate Review Consultation Report published in April 2023 (“Consultation Report”), the proposed overtime rate for Company Drivers and IEOs was adopted. Some feedback had been received around possible ways of calculating the overtime rate for I/Os and the Consultation Report noted that further proposals would be presented for consideration and feedback.

On April 25, 2023, an addendum to the Consultation Report was published (“Addendum”) outlining possible overtime formulas for I/Os paid a trip or hourly rate. The OBCCTC received several submissions on both the calculations and the appropriateness of overtime applying to I/Os.

### **Appropriateness of Overtime for I/Os**

The Recommendation Report proposed an overtime rate mirroring that in the ESR for drivers so that the minimum regulated rates set out in the Rate Order would not be devalued by comparison – the premise being that if a driver were entitled to overtime rates under the ESA, the driver should be receiving similar compensation under the Rate Order and without having to claim through the Employment Standards Branch (“ESB”).

The entitlement to overtime for I/Os was supported in some submissions and challenged in others. I/Os, Unifor, Teamsters and the Port Transportation Association (“PTA”) submitted that I/Os should be compensated like Company Drivers since I/Os perform similar work. Others, particularly by the BC Trucking Association (“BCTA”) and the United Trucking Association (“UTA”), asserted that I/Os are not employees but rather independent contractors in business for themselves and self-employed; therefore, I/Os are exempt from ESA overtime rates

and should also be exempt from overtime in the Rate Order. Both the BCTA and the UTA suggested that the additional costs of overtime for I/Os would be detrimental to the future employment of I/Os and the drayage sector.

The Recommendation Report notes that “many drivers who work for licensees regulated under the *Container Trucking Act* are entitled to be paid overtime rates after 9 hours a day or 45 hours a week as set out in the ESA and [*Employment Standards*] *Regulation*.” In other words, the Recommendation Report recognizes that many but not all I/Os are entitled to overtime under the ESA –specifically, I/Os who are not employees under the ESA are not entitled to overtime under the ESA.

The recommended overtime rate for I/Os was not intended to expand overtime to those drivers who would not be entitled to overtime under the ESA. Rather, the purpose of the recommended overtime rate was to ensure that licensees were not devaluing the minimum rates set out in the Rate Order by avoiding paying the overtime guaranteed by the ESA. The proposed change to the Rate Order for I/O overtime would only allow the Commissioner to ensure drivers are receiving the overtime to which they would otherwise be entitled under the ESA.

The difficulty in the position advanced by the BCTA and the UTA is the assertion that all I/Os are independent contractors under the ESA and therefore not entitled to overtime. I was provided no evidence that this is the case. Furthermore, this assertion is countered by other submissions that suggest I/Os are like Company Drivers and therefore entitled to similar overtime rates.

To ensure that the Rate Order dealing with overtime does not capture those I/Os who are independent contractors, a determination must be made on a case-by-case basis. Simply asserting all I/Os are independent contractors would be as unfair as simply asserting all I/Os are employees. There are a variety of employment and retention arrangements in the drayage sector between licensees and I/Os and determining whether an I/O is an independent contractor will depend on the specific facts.

Common law tests have been established by the courts that are useful in determining whether a person is an independent contractor or an employee. In addition, many government agencies – including the ESB - are called upon to determine this same question. It is important to understand that a determination of employment status under one regulatory scheme does not mean it applies to other regulatory bodies. Each agency determines the nature of the employment relationship.

Generally, when it comes to beneficial legislation like the ESA and the *Container Trucking Act*, the determination of whether an I/O is an independent contractor requires weighing the facts against the beneficial nature of the legislation. This includes looking at an I/O's:

- Control over the work
- Ownership of tools
- Chance of profit and risk of loss
- Integration into licensees' business

The *Container Trucking Act* is beneficial legislation intended to ensure that drivers are compensated appropriately and protected from practices that lead to instability in the industry. This protection has historically included ensuring that licensees do not misclassify drivers as Company Drivers or I/Os in order to avoid paying certain entitlements afforded to each under the *Act*. Going forward, this protection will include ensuring drivers are not misclassified as independent contractors to avoid paying overtime entitlements under the Rate Order.

To ensure that overtime rates benefit those I/Os who have an employment relationship with the licensee and do not apply to I/Os who are independent contractors, licensees will need to evaluate the working relationship. In audits and investigations, the Commissioner will determine whether a driver is an employee or independent contractor after a thorough review of the facts as each case is unique.

Regarding the UTA and BCTA's concerns about the costs of applying overtime to I/Os, the *Container Trucking Act* does not exempt I/Os from overtime under the ESA. If the ESB determined that an I/O was an employee under the ESA, then that I/O would be entitled to overtime. This proposed change to the OBCCTC Rate Order only ensures that I/Os are paid the overtime to which they are already entitled. If licensees were avoiding paying overtime by misclassifying employees as independent contractors under the ESA regime, they were still vulnerable to a determination from the ESB that they must pay the driver overtime.

In other words, the proposed OBCCTC overtime rate for I/Os who are employees is not a new cost to licensees. It merely allows the Commissioner to ensure that drivers receive the remuneration to which they are entitled for the work they perform. This may mean that licensees are subject to another level of scrutiny to ensure that they pay the minimum rates to their drivers, and this may increase their payroll costs, but it can hardly be described as a new cost. It is, rather, ensuring there is a level playing field between those employee drivers who are currently being paid overtime pay and other employee drivers who happen to also be independent operators who are similarly entitled to overtime pay.

In summary, the proposed overtime rates for I/Os only capture those I/Os who are employees and not those who are independent contractors.

### **Calculation of Overtime Rates for I/Os**

Most submissions that were supportive of the proposed overtime rates for I/Os agreed with the formula advanced for those I/Os paid hourly.

There was general agreement that establishing an overtime rate based on the trip rate, position movement rate, and wait time was challenging. The PTA, some licensees and Teamsters supported requiring all I/Os to be paid hourly so that the simpler overtime rate for hourly drivers could be applied. One union maintains that a conversion to an hourly rate would simplify the overtime proposal.

In terms of the proposed calculation of overtime for I/Os who receive the trip rate, the UTA suggests that wait time should not be included. The BCTA notes the cumbersome nature of calculating the overtime rate based on trip rates and how it interferes with the certainty licensees get when there is a fixed cost associated with a container movement. The BCTA also notes that the proposed overtime calculation may violate the hybrid

payment prohibited by the CTS licence.

Another licensee invites the Commissioner to create a percentage to be added to the trip rates in lieu of overtime rates. This would have the added benefit of certainty for licensees when they price out costs to their customers and ease the burden of calculating overtime for trip rate I/Os.

I understand the attractiveness to licensees of the fixed costs associated with trip rates when quoting a container move to customers and their concern that the quoted price may not be enough if the container movement takes longer than expected and results in overtime. I also understand the frustration of I/Os who are forced to wait at the side of the road or highway with no compensation for their time or lost opportunity to move other containers. Ultimately, the risk of unexpected costs when quoting a container movement currently exists for licensees who employ hourly paid drivers, and I am not persuaded that those companies who use I/Os will suffer disproportionately more than their company driver competitors.

Similarly, wait time is part of the compensation for I/Os paid by the trip and it is in place to compensate I/Os who miss out on other work. I am not persuaded that wait time should not be included when calculating overtime because wait time forms part of a trip rate I/O's income.

The challenge with the proposed overtime formula for I/Os paid by the trip is that wait time, because it is paid on a quarterly basis by the terminals to the licensees, may not be paid within 30 days after the calendar month in which it was earned as required by the *Regulation*. Therefore, using wait time amounts to calculate overtime will create a situation whereby the licensee will not be able to comply with section 24(2) of the *Regulation* with respect to the payment of remuneration. I cannot place licensees in a position of using an overtime formula that would put them in breach of the *Regulation*.

I acknowledge the difficulty in setting the overtime rate for I/Os who are paid by the trip and indicated as much in the Recommendation Report. It appears unlikely in the short term that wait time payments can be made by the terminals quickly enough to accommodate an overtime rate for trip rate I/Os that will be consistent with the *Regulation*. However, my goal remains to ensure those I/Os who are entitled to overtime based on the *Employment Standards Regulation* receive overtime through the Rate Order. I will address some additional proposals in the next section.

### **Overtime Rate for I/Os paid hourly**

I/Os paid by the hour are not entitled to the wait time payment, so the overtime formula for hourly I/Os is compliant with the *Regulation*. It is also simpler for other reasons. I am satisfied that I/Os who meet the definition of employee as set out in the CTS Licence should receive overtime based on the proposed formula.

Overtime Payment <sup>^</sup>	=	(Company Driver Hourly Rate x 1.5) + (Regular I/O Hourly Rate – Company Driver Hourly Rate)
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<sup>^</sup> More than 9 hours a day or 45 hours in a week. Only the first 9 hours in a workday will be calculated towards the 45 hours in a work week. Week is defined as Sunday to Saturday.

## INDEPENDENT OPERATORS paid by Trip Rate

Given the difficulty with the proposed overtime rate complying with the existing *Regulation*, there are some other proposals that could be pursued to ensure an overtime rate for I/Os paid by the trip.

One approach could be to propose a change in the *Regulation* to accommodate the delay in paying overtime rates to be paid within 90 days to include the current wait time payments paid to I/Os. The formula would be as follows:

The I/O will be paid the greater of (1) the sum of the Trip Rate, PMR, and wait time earned during the same period of time as the wait time payment and (2) the I/O hourly rate for 9 hours plus the hourly overtime rate (as calculated for I/Os paid hourly) that would have been paid during the same period of time as the wait time payment.

Overtime Payment <sup>^</sup>	=	(Trip Rate Payments + PMR + Wait Time)*	OR	(IO Hourly Rate + IO Hourly Overtime Rate)*
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Another proposed approach is to move to an all-hourly model for I/Os. However, I note that such an approach was proposed by the former Commissioner in 2018 as part of the previous rate review and ultimately not adopted because some licensees believed moving to an hourly model would curb driver efficiency and some I/Os felt the hourly rate at the time was too low. However, with the recent hourly rate increase and the prospect of a new overtime rate, there may be a renewed appetite for an all hourly model. The overtime rate would be identical to the hourly paid I/Os:

Overtime Payment <sup>^</sup>	=	(Company Driver Hourly Rate x 1.5) + (Regular IO Hourly Rate – Company Driver Hourly Rate)
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Finally, an option could include setting a new rate in lieu of overtime based on an empirical study of the average overtime for IO's. This could be a fixed amount or percentage based that would be paid to I/O's to compensate for overtime.

I will seek submissions from interested parties on these proposals before making amendments to the Rate Order to address overtime for I/Os paid by the trip.

## Conclusion

I wish to thank everyone for their submissions and feedback regarding the proposed overtime rate for I/Os.

The OBCCTC has now completed the review of the overtime formulae for hourly drivers and clarified its application to I/Os who are in an employment relationship with a licensee.

The proposed overtime formula for I/Os who are paid by the trip would address the inclusion of wait time payments but would require a change to the *Regulation*. The calculation of overtime for hourly drivers is more

straightforward. Applying that overtime rate consistently would require all I/Os who are employees to be paid by the hour.

Once the submissions are received, the OBCCTC will issue the appropriate changes to the Rate Order.

Meanwhile, both hourly and trip rate I/Os who are employees of a licensee can apply to the ESB for overtime entitlements they are not receiving.

### **Next Steps**

Interested parties are invited to submit any feedback on the proposed solutions no later than **no later than 12pm (Noon) on February 23, 2024.**

Sincerely,

**OFFICE OF THE BC CONTAINER TRUCKING COMMISSIONER**

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

Glen MacInnes  
BC Container Trucking Commissioner