February 22, 2024

Simard Westlink Inc.
16062 Portside Road
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Commissioner's Decision
Simard Westlink Inc. (CTC Decision No. 04/2024)
(Application for Reconsideration of CTC Decision No.09/2023)

I. Introduction

1. On October 12, 2023, the Office of the BC Container Trucking Commissioner ("OBCCTC") received an application from Simard Westlink Inc. ("Simard") pursuant to section 38 of the Container Trucking Act ("*Act*") seeking reconsideration of the September 15, 2023, Decision Notice (CTC Decision No. 09/2023). Simard asks that the Decision Notice "be cancelled, the Commissioner's orders be vacated, and that the Commissioner confirm there has been no breach of the *Act, Regulation*, or Simard's licence."

II. Original Decision, Original Decision Supplemental and Decision Notice

2. Simard Westlink Inc. ("Simard") is a licensee within the meaning of the *Act*.

3. On March 15, 2023, two trucks belonging to Simard were observed moving two containers (EMCU863256 and TXGU585325) near Kennedy Road in Port Coquitlam ("Impugned Containers") with untagged trucks, apparently in breach of its container trucking services ("CTS") licence. The OBCCTC launched an investigation and sought payroll documents related to the Impugned Containers and invited Simard's response.

4. Simard failed to provide the requested payroll documents by the deadline and submitted that the movement of the Impugned Containers was outside the scope of the *Act* because the moves were between rail facilities and customer locations in the Lower Mainland and did not require access to a marine terminal.

5. On May 16, 2023, I shared a preliminary investigation report with Simard that included reasons for my preliminary finding that the Impugned Containers were captured by the *Act*. The Impugned Containers were owned by companies that either ship containers by ocean or supply other companies who do so, were recently recorded as having traveled overseas, and were affixed with CSC safety plates. On this basis I advised that I considered they met the definition of "container." I also set out why I considered the rail yards involved were "facilities" under the *Act*. Simard was invited to provide a further submission but did not do so at that time (it later became clear that it

had not received my May 16, 2023 correspondence).

6. On May 26, 2023, I determined that the movement of the Impugned Containers was in contravention of section 16(1)(b) of the *Act* and its CTS licence and ordered Simard to cease performing untagged container trucking services in contravention of its CTS licence and the *Act* (the "Order"). Given its failure to provide the requested payroll records, Simard was also ordered to produce the payroll records related to the Impugned Container movements on March 15, 2023.

7. Simard received the Order, and then requested and received the May 16, 2023 preliminary investigation report regarding the Impugned Containers. Simard responded on June 5, 2023. Simard maintained its position and advised that it would be applying for judicial review of the Order.

8. On June 14, 2023, I provided Simard with a supplemental investigation report to which Simard responded on June 16, 2023. The investigation determined that additional containers were moved between the following facilities within the Lower Mainland ("Additional Impugned Containers") on March 15, 2023. The Impugned Containers and the Additional Impugned Containers (together, "Containers") moved on March 15, 2023 by the two drivers were as follows:

Driver	**From**	**To**	**Container Number**
G. Brar	CP Rail Yard	Rolls Right Terminal	EMCU863256
G. Brar	Rolls Right Terminal	CP Rail Yard	EMCU863256
G. Brar	CP Rail Yard	Purolator Richmond	CPPU236082
G. Brar	Purolator Richmond	Western Canada	"Bob tail" (meaning no container or trailer)
G. Brar	Western Canada	TJX Canada	CPPU237220
G. Brar	TJX	CP Rail Yard	CPPU234089
S. Kim	CP Rail Yard	Toys R Us	UACU527276
S. Kim	Toys R Us	CP Rail Yard	Empty
S. Kim	CP Rail Yard	Van Kam	DRYU912237
S. Kim	Van Kam	CP Rail Yard	TLLU405617
S. Kim	CP Rail Yard	Simard Westlink Yard	TXGU585325
S. Kim	Simard Westlink Yard	CP Rail Yard	EITU138429
S. Kim	CP Rail Yard	Rolls Right Terminal	TCLU888393
S. Kim	Rolls Right Terminal	CP Rail Yard	TCLU888393

9. The investigation also compared the wages paid to the two drivers moving the Containers on March 15, 2023 against the regulated rates and determined that independent operator ("IO") Mr. Brar and company driver Mr. Kim were owed $732.68 and $6.29 respectively for work performed

on that day. It also found that Mr. Brar was owed $468.28 in unauthorized deductions and was not an IO registered on the independent operator list ("IO List") as required.

10. Simard disagreed that the movements of the Containers were captured by the *Act* since they did not transit through a marine terminal. Simard also argued some of the Containers were not suitable for the marine transportation of goods and therefore did not meet the definition of "container" in the *Regulation.*

11. On August 25, 2023, I issued a decision (the "Original Decision"), in which I found that the Containers met the definition of "container" and were moved between "facilities" within the Lower Mainland and therefore were covered by the *Act* for substantially the same reasons I had found the Impugned Containers were covered by the *Act*. I determined that Simard had failed to comply with sections 16(1)(b)(i) and (ii) and 23(2) of the *Act* and sections 6.15, 6.16, 6.20 and 6.21 of its licence by using untagged trucks to move containers between facilities in the Lower Mainland, paying two drivers less than the regulated rates, and using the services of an IO not on the IO List. I ordered Simard to pay Mr. Kim $6.29 and Mr. Brar $1,200.96 and to review its payroll records between September 1, 2019, and August 25, 2023 and make the appropriate adjustments to bring itself into compliance with the regulated rates no later than February 28, 2024. An administrative penalty of $12,000.00 was proposed and Simard was provided the statutory seven (7) days to respond. Simard had asked that I suspend the Order requiring it to cease and desist performing container trucking services in contravention of its licence and the *Act* but I did not agree to do so.

12. After reviewing Simard's submission in response to the proposed penalty, I confirmed the order that Simard review its payroll records for the specified period and make the appropriate adjustments and confirmed the penalty of $12,000.00 by Decision Notice issued September 15, 2023. I suspended my order to pay Mr. Kim and Mr. Brar pending receipt of additional payroll information from Simard.

13. On October 12, 2023, Simard filed its application for reconsideration. On October 13, 2023, Simard requested an extension to the deadline for reviewing its payroll records between September 1, 2019 and August 25, 2023. By letter dated October 19, 2023, I granted a stay until six months following a reconsideration.

14. On November 1, 2023, Simard requested a stay of the application of my orders as they related to 53-foot containers. By letter dated November 6, 2023, I explained why I could not agree to its request and advised Simard that I had not decided on all 53-foot containers but only on those containers identified in the March 15 investigation.

15. On December 18, 2023, I issued a supplement to the Original Decision ("Original Decision – Supplemental") following a review of Simard's submission and payroll records related to Mr. Kim and Mr. Brar. Based on the additional information provided, I found that Mr. Kim was paid the regulated rate on March 15, 2023. I found that Mr. Brar was not entitled to the fuel surcharge and that the payroll deduction made was for the fuel charged by Mr. Brar to Simard's corporate fleet account for diesel fuel and therefore permissible under the *Act*. I also found Mr. Brar was not paid the regulated position movement rate ("PMR") or the minimum trip rates for each move on March 15, 2023 and was owed $377.44.

III. Judicial Review

16. On July 25, 2023, Simard filed a petition for judicial review of my Order.

17. On September 5, 2023, Simard filed an application for a stay of my Order and the application of the Original Decision.

18. On September 29, 2023, the Court dismissed Simard's stay application (*Simard Westlink Inc. v. Office of the BC Container Trucking Commissioner* 2023 BCSC 2007) with reasons ("Reasons").

IV. Request for Reconsideration

19. As mentioned above, Simard's request for reconsideration was made October 12, 2023.

20. As the Original Decision – Supplemental was issued after Simard's request for reconsideration, I provided Simard with an opportunity to respond to it. I also invited Simard to make submissions on the Court's Reasons. Simard provided its response on January 5, 2024.

21. I also invited Simard to provide additional information about the manufacturing date on the Containers with the prefix CPPU. Simard provided its response on January 10, 2024.

22. For the purposes of this reconsideration, I will refer to the October 12, 2023, reconsideration submissions, and the January 5 and 10, 2024 submissions collectively as Simard's "Reconsideration Submissions." In the Reconsideration Submissions Simard states that it "continues to rely on the previous submissions to the Commissioner and relies on its materials filed in the BC Supreme Court" and I have also considered those materials.

23. Simard's Reconsideration Submissions restate many of its initial arguments in support of its position that the Containers are not covered by the *Act*, *Regulation,* and the CTS licence but also raise new arguments and provide additional evidence that was not advanced prior to the Original Decision or Decision Notice.

24. In its Reconsideration Submissions, Simard reiterates its position that the regulatory regime only applies when it is carrying out the "prescribed container trucking services" set out in s. 16 of the *Act* and defined in section 2(1) of the *Regulation.* It argues that because the Containers did not travel to or from a marine terminal on March 15, 2023 they are not "prescribed container trucking services."

25. Simard submits for the first time that "facility" as defined in the *Regulation* only captures locations where containers are "stored, loaded, unloaded, trans-loaded, repaired, cleaned, maintained or prepared <u>for shipping</u>," that "for shipping" qualifies each of the words preceding it, and that "shipping" (which is not defined in the legislation) refers only to the <u>marine</u> transportation of goods.

26. According to Simard, then, the Commissioner erred by determining that the start and end point of each movement of each Container was a "facility" since each Container was on March 15, 2023,

engaged in the "domestic" and not "marine" shipping of goods. Simard 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.

27. In furtherance of its position that the legislative scheme does not capture the movement of the Containers, Simard argues that the reference to "specified" container trucking services restricts the regime to containers transiting through a marine terminal. Simard does not specifically cite s. 22(1) of the *Act*, but I understand it as referring to that section. As I understand Simard's argument, s. 22(1) of the *Act* allows minimum rates to be established only for drivers performing "specified container trucking services" in "specified circumstances" and "specified" is synonymous with and limited to the "prescribed trucking services" defined in s. 2 of the *Regulation*.

28. Simard also argues that the legislative scheme cannot have been meant to capture the Containers because a simple corporate restructuring of the licensee would allow it to avoid the application of the *Act* for "off-dock" moves. A company could restructure itself to have one licensed company perform work that requires access to a marine terminal and another unlicensed company perform work that does not require access to a marine terminal. Simard argues that the legislature, in light of the purpose of the *Act*, could not have set up a regime that would "both punish licensees and reward trivial corporate restructuring."

29. Simard also reiterates that the Containers do not meet the regulatory definition of "container" because they were not used for the marine transportation of goods on March 15, 2023. It has now submitted manifests of the contents of some of the Containers which indicate they were used by Canadian companies to ship goods by rail from eastern Canada to the Lower Mainland. It argues that because the some of the Containers contained "domestic goods" and because they were moved within Canada, they are not "containers" under the *Act*.

30. Simard argues there is "no evidence or irrelevant evidence" supporting the Commissioner's findings that some or all of the Containers were furnished or approved by an ocean carrier for the marine transport of goods. Simard disputes that a CSC plate indicates a container is "furnished or approved by an ocean carrier for the marine transportation of goods." Citing the *Safe Containers Convention Act,* Simard says there is a requirement that containers beyond those defined in the *Regulation* be affixed with a CSC safety plate and that the plate is only indicative that a container is safe to transport on ships – not that the container is furnished or approved by an ocean carrier for the marine transportation of goods. Simard argues that while "the presence of a CSC plate may be a necessary condition for" approval by an ocean carrier for the marine transportation of goods "it is not a sufficient condition." Simard also maintains that the fact that a container may have recently travelled on the ocean does not indicate that it is furnished or approved by an ocean carrier for the marine transport of goods.

31. Simard's alternative argument is that even if some of the Containers are "containers" under the legislation, "53-foot containers cannot be among them." Simard identifies containers with the prefixes CPPU, CDAU and EMHU as 53-foot containers owned or used by CP Rail. Simard submits emails from representatives of local marine terminals, retail companies and CP Rail that it says support its proposition that 53-foot containers are generally manufactured overseas and travel over the ocean to North America only once when they are delivered to their retail and rail owners.

Mr. Brady Erno, Senior Commercial Manager at DP World, acknowledges that 53-foot containers supply the domestic markets but have been "on occasion, laden with cargo for import," and Mr. Colin Parker, Director of Operations at GCT Deltaport, advises that 53-foot containers have been used in the past as marine containers and that a "very limited number of 53-foot containers are shipped in Deltaport as the business needs and handling constraints restrict the terminal." Mr. Rui Teixeira, Senior Director Intermodal Maintenance, CP Rail, advises that its 53-foot containers are sourced from overseas and "the CSC plate was only required for the move on the ship, in case we wanted to put cargo in them." Mr. Matthew Beaton from Canadian Tire states that it only uses the CSC plate on its 53-foot containers to move the containers "laden out of China" and they "do not keep the certification valid" after it arrives in North America.

32. Simard also submits a photo of a CSC plate along with a manufacturer's plate labelled "Domestic Container" for a CP Rail container with an identification number of QDCM22G12064 that it says indicates the container is for non-marine use. Furthermore, CP Rail states that its CSC plates are required to be renewed within 30 months of the container's manufacturing date and its practice is to not renew those CSC plates. The manufacturing dates for the three Containers with the prefix CPPU are as follows:

    a. CPPU236082 – March 2018
    b. CPPU237220 – October 2021
    c. CPPU234089 – May 2017

33. Simard argues that a November 15, 2019, email from the former Commissioner regarding the audit preceding Simard Westlink Inc. (CTC Decision No. 01/2020) ("Simard 2020") suggests that the former Commissioner "did not interpret the Statutory Scheme as including domestic repositioning of marine containers and containers owned by railways." Alternatively, Simard argues this email shows "at least" that the "Commissioner's office has not been consistent in the interpretation and application" of the *Act* and this should reduce any penalty.

34. It also argues, citing to *R. v. Jorgensen* [1995] 4 SCR 55 and other cases, that it is entitled to rely on the defence of officially induced error to limit its liability and should only be liable after April 18, 2023 for what it calls "domestic repositioning" moves as that was the date it first received notice that 40-foot containers to and from rail terminals are captured under the *Act*. Simard further submits that it first became aware that 53-foot containers are captured under the *Act* on June 14, 2023, so it should not owe money to drivers before this date for 53-foot container moves.

35. Simard also states that the calculations in the Original Decision – Supplemental incorrectly added a trip rate and PMR for the "bobtail" movement performed by Mr. Brar on March 15, 2023. Simard states that the PMR does not apply to bobtail movements for IOs paid by the trip.

V. Reconsideration

Regulation of off-dock moves

36. The key question is whether the *Act* requires licensees to pay a regulated rate only for movements of containers to or from a marine terminal or also for movements of containers that can and do move through a marine terminal.

37. I am not persuaded by Simard's argument that the Commissioner lacks jurisdiction over the "domestic" repositioning of containers or for moves involving the transportation of "domestic goods" based on some implicit concept of "domestic moves" or based on Simard's interpretation of "container" and "facility."

38. I have addressed in the Original Decision at para 37 the absurdity of Simard's interpretation that only container movements to or from a marine terminal are regulated considering that off-dock container movements, which do not transit through a marine terminal, are regulated.

39. I must also address the use of the terms "domestic repositioning" and "domestic move" and "domestic goods" and "marine goods" upon which Simard so heavily relies. These are not used or defined in the *Act* or the *Regulation* and I cannot find the terms in the Joint Action Plan ("JAP") or the Ready/Bell Report. Nor do the terms factor into the explicit exclusions used in the definitions. I note that that the regulatory definition of "off-dock trip" provides for only two exemptions to container movements between facilities: "off-dock trips" do not include on-dock moves or container movements within a facility. There is no exemption for "domestic" moves. The fact that these terms advanced by Simard are not contemplated or accounted for in any of these documents or the legislation – including alongside other exclusions -- is in my opinion telling.

40. Simard's suggestion that the container movements to and from a rail yard on March 15, 2023 are not regulated is contrary to the explicit inclusion of rail yards in both the JAP and the Ready/Bell Report. Both the JAP and the subsequent Ready/Bell Report contemplate the inclusion of rail yards in the regulated off-dock container moves. The JAP specifically includes CP Rail and CN Rail's intermodal yards as terminals attracting wait time payments and broadly defines the drayage sector as including "the overland transport of cargo to/from barges or rail yards . . . It is also known as truck container pickup from or delivery to a seaport or off-dock terminal (e.g., warehouses, transload centers, rail yards, container storage yards) with both the trip origin and destination in the Greater Vancouver Area" (emphasis added). It is clear from both the JAP and the Ready/Bell Report that container traffic to and from a rail yard needed to be included in the off-dock rates to ensure stability at the ports.

41. The connection between off-dock movements and the stability of operations at marine terminals is addressed in the Ready/Bell Report cited at para. 28 of the Original Decision. The reality is that truckers who work for licensees do not just travel to and from marine terminals all day – they also "spend considerable time moving containers at off-dock facilities."[1] The application of regulated off-dock rates to container movements within the Lower Mainland was meant to ensure that drivers were paid for off-dock container trucking services performed by licensees.

42. In so far as Simard maintains that the Containers themselves do not meet the regulatory definition of "container" and/or the start and end points of each location do not meet the definition of

[1] Ready/Bell Report, found at Part 4 - Major Issues, c) Rates of Pay ii) off dock

"facility" (both necessary to meet the definition of "off-dock trip"), I have addressed each issue below.

Meaning of "container"

43. I set out my reasons for why a container that does not directly or immediately transit through a marine terminal is caught by the *Act* at paras. 24-41 of the Original Decision. Among other things I pointed out that Simard's interpretation would effectively make the off-dock rates initially set by the LGIC and now by the Commissioner meaningless. I outlined why a container's immediate use is not necessarily determinative of whether a container fits the regulatory definition at paras. 43-45. Nothing in Simard's additional submissions has changed my analysis.

44. One of Simard's main arguments is that "implicit in the definition of 'container' is that containers are used for the marine transportation of goods." I do not find the fact that the Containers were not used for marine transportation on March 15, 2023 determinative of whether they meet the definition of "container" or whether a driver is performing "container trucking services." The fact that a container is not immediately or imminently on the ocean does not on its own change the fact that the container is "furnished or approved by an ocean carrier for the marine transportation of goods." Nor does the fact that its contents on any given trip originate from a company in Ontario (what Simard calls "domestic goods").

45. I note in the Original Decision (para. 28) that the scope of off-dock work also includes empty containers. Simard's premise that the Commissioner's jurisdiction only extends to containers "where the goods in question are marine goods" – however "marine goods" might be defined – would eliminate empty containers. Such a proposition would be directly contrary to empty containers being considered off-dock moves in the Ready/Bell report (see Original Decision, para 28).

46. A container can be furnished by an ocean carrier for the marine transportation of goods or approved by an ocean carrier for the marine transportation of goods and the decision of the owner to use the container almost exclusively on land or for "domestic goods" or to move it without goods inside of it does not automatically change the nature of the container. The container is still capable of circulation through marine terminals.

47. Simard's position would mean that containers that are "furnished or approved by an ocean carrier for the marine transportation of goods" and are moved by licensees between facilities in the Lower Mainland would be in or out of the regulatory scheme depending on their immediate use (whether they are being used for on or off-dock trips at any given time). This would require determining when exactly each metal box furnished or approved by an ocean carrier for the marine transport of goods becomes a "container" ("turns into a pumpkin") and vice versa at every stage of its journey in the Lower Mainland.

48. The result of such an approach would be a multi-tiered (regulated and unregulated) rate structure and a perpetual battle to determine if each off-dock container movement is captured under the *Act* based on each container's travel route and the purpose of each movement. Auditors would be required to evaluate the travel route and purpose of each of the thousands of containers moved

throughout the Lower Mainland each day and this would make off-dock enforcement impossibly complex

49. I do not agree that the definition of "container" should depend on how the container is being used at any given time. If the LGIC intended "container" to be defined based solely on its immediate use, it could have easily defined "container" as "a metal box in use for the marine transportation of goods." I note s. 7(1) of the *Interpretation Act* states that an enactment must be construed as always speaking and find that this applies to the definition of "container" – in other words, whether a metal box qualifies as a "container" cannot depend on where it is moving (or what it is carrying) at any given time. A metal box is either furnished or approved by an ocean carrier for marine transport or it is not. Its status does not change on a daily basis based on how it is used or what it is carrying or whether it is carrying anything at all.

50. By way of an analogy, if a resident of Coquitlam, BC purchases a vehicle on Vancouver Island and drives it back to her residence using BC Ferries and never brings that vehicle on BC Ferries again, those facts alone do not mean that the vehicle is not furnished or approved to go on a BC Ferries vessel. I find that the same approach should be taken when assessing whether a container is "furnished" or "approved" for the marine transportation of goods. The fact that a container is capable of being transported by an ocean carrier laden with goods means that it is a "container" under the *Act*.

51. "Containers" are built to withstand ocean transport and identification of the container's owner, the presence of 4 letter identification codes consistent with marine containers, a valid CSC plate and the actual presence of these types of containers on an ocean carrier are all good indicators of whether a container is "furnished or approved by an ocean carrier for the marine transportation of goods," as set out in paras. 44-45 of the Original Decision and para. 18 of the Decision Notice.

52. I do not accept Simard's submission that the CSC plate, because it is not issued by ocean carriers but rather by an international regulatory body, is meant only to protect "human life in the transport and handling of containers" and does not speak to whether a container is built to standards allowing it to be used for the marine transport of goods. The CSC plate includes specific details including the container's maximum operating gross weight and allowable stacking weight. In the photograph of the CSC plate for CP container identified as QDCM22G12064, it is explicitly stated that "maximum operating gross mass is "for sea transportation.". The presence of such information suggests that the container is certified to carry goods up to a specified weight while being transported by an ocean carrier. This is supported in Mr. Teixeira and Mr. Beatons' respective emails which expressly state that the CSC plate affixed to the CP Rail and Canadian Tire containers is there in case they want to move cargo in the container while it is being shipped over the ocean. In other words, the CSC plate is necessary to satisfy the ocean carrier that the container can be used to move goods on the ocean carrier. I find that the presence of a plate from an international regulatory body indicating that a container is safe to be loaded on a ship with a certain cargo limit assures ocean carriers that they can safely furnish or approve the container for the marine transport of goods. Simard's Reconsideration Submission largely (with the exception of those containers with expired CSC plates dealt with below) fails to rebut the presumption based on the indices of a container outlined above that that the Containers have been furnished or approved by

ocean carriers for the marine transportation of goods and instead relies heavily on what the customers – generally non-ocean carriers – chose to use the containers for on March 15, 2023.

53. Given the intermodal nature of container movements (between ocean carrier, truck and rail), most metal boxes in the drayage sector meet the regulatory definition of "container." Despite this, the OBCCTC has since its inception received submissions that certain containers are not "containers" and that certain container movements are therefore exempt from the *Act*. By way of example, in Ferndale Transport Ltd. (CTC Decision No. 22/2016), the licensee claimed that its drivers were moving "dry van" and "flat deck" containers outside the scope of the *Act* but upon investigation the then-Commissioner determined that the containers were within the scope of the *Act.*

54. I must address Simard's submissions on 53-foot containers owned or used by CP Rail. My understanding in this case is that railway-owned containers are synonymous with 53- foot containers. I note the only railway-owned (i.e. 53-foot) containers involved on March 15, 2023 were those identified with the prefix CPPU; there were no containers with the prefix CDAU or EMHU identified.

55. A container's dimensions (as long as it is a "box") are not relevant to whether a container is "furnished or approved by an ocean carrier for the marine transportation of goods." I do not find Simard's inclusion of an email from Mr. Parker at Deltaport – the operator of a marine terminal -- that the terminal does not have the ability to load 53-foot containers helpful. I am not prepared to conclude from one marine terminal's infrastructure that 53-foot containers cannot be furnished or approved by an ocean carrier for the marine transportation of goods, and I note that Mr. Parker acknowledges that 53-foot containers – albeit infrequently – do transit through Deltaport.

56. Again, the email from CP Rail openly acknowledges that it sometimes uses 53-foot containers affixed with a CSC plate to transport goods by an ocean carrier on their initial voyage to North America. This also appears to be acknowledged by Mr. Beaton regarding containers from Canadian Tire. Furthermore, Mr. Erno and Mr. Parker acknowledge that 53-foot containers can come through their respective terminals. The presence of a decal labelled "domestic container" may confirm that the container was not "furnished" for the marine transportation of goods, but it does not rule out that the container is "approved" by an ocean carrier for the marine transportation of goods. The presence of the CSC plate alongside a separate "domestic container" tag indicates that it is able to be used for the marine transportation of goods. Furthermore, the "furnished or approved" status of a container does not disappear after its transit through a marine terminal or as a result of its being used for something other than ocean transport.

57. However, I note that the CP Rail representative states that the CSC plates attached to its containers expire 30 months after the manufacturing date of the container and their practice is not to renew them. My review of the manufacturing dates provided by CP Rail of those of the Containers owned by CP Rail shows that only one of the three with the prefix CPPU was manufactured less than 30 months prior to March 15, 2023. An expired CSC plate would mean that the container was no longer capable of being "furnished" or "approved" by an ocean carrier for the marine transport of goods. CPPU237220 was the only one of the Containers with the prefix CPPU with a valid CSC plate and is therefore the only CPPU container that qualifies as a "container" under the *Act.* My logic here is that a container without a valid CSC plate will no longer be capable of circulating

through marine terminals because it cannot be furnished or approved by an ocean carrier for the marine transport of goods.

Meaning of "facility"

58. Simard's argument that "facility" means only a location where a container is dealt with "for [marine] shipping" is not consistent with the language, context or purpose of the *Act*.

59. Applying Simard's argument to a rail yard, a rail yard in the Lower Mainland could simultaneously be a "facility" and not be a "facility" depending on the specific journey of each container that spends time there. If a container arrives at a rail yard from a storage facility and returns to the rail yard without transiting through a marine terminal, this would mean the rail yard would not be a "facility" because that particular container would not have been dealt with (loaded, unloaded, etc.) "for [marine] shipping" during its stay at the rail yard. However, if a container is moved from a rail yard destined for a marine terminal, the rail yard would be considered a "facility" because the container would have been dealt with (loaded) "for [marine] shipping" during its stay at the rail yard.

60. Licensees move thousands of containers throughout the Lower Mainland each day and those containers are "stored, loaded, unloaded, transloaded, repaired, cleaned, maintained or prepared for shipping" in hundreds of locations within the Lower Mainland. If the OBCCTC had to confirm whether each container at each location was being "stored, loaded, unloaded, etc." for marine shipping or for another type of shipping in order to determine whether the location is a "facility," its auditors would be bogged down in an endless paper trail.

61. I do not accept that the "shipping" in the definition of "facility" includes only marine shipping. The Miriam Webster dictionary[2] defines shipping as both "to place or receive on board a ship for transportation by water" and "to cause to be transported."

62. Containers used for the marine shipment of goods are intermodal containers that are manufactured such that they can be shipped by ocean vessels, rail carriers, and trucks. Again, the inclusion of CN and CP Rail yards in the JAP and Ready/Bell Report and in the off-dock rate table, and the inclusion of locations in the Lower Mainland only accessible by truck in the off-dock rate table, underscores that "shipping" was not meant to be limited to "marine" shipping.

63. I also find the explicit exclusion of "marine terminal" from the definition of "facility" supports the broader interpretation of "for shipping" as meaning "for transportation" in general. If a "facility" cannot include a "marine terminal," then a facility must include locations where a container can be dealt with for other than marine transport.

64. I also find that broad definition of shipping as "to cause to be transported" to be more consistent with the beneficial purposes of the *Act,* which clearly include compensating truckers while they are performing off-dock container trucking services.

[2] https://www.merriam-webster.com/dictionary/ship

"Specified" container trucking services

65. I cannot agree that "specified container trucking services" or "specified circumstances" in section 22(1)(a) of the *Act* limits the application of the rates to container trucking services that require access to a marine terminal. Section 2 of the *Regulation* defines "prescribed container trucking services" expressly "for the purposes of section 16(1) of the *Act*." Based on a plain reading, the term "specified" in s. 22(1) refers to those items specified by the Commissioner (formerly the LGIC) in s. 21(c). Section 22 does not restrict the Commissioner (formerly LGIC) to setting rates for only one type of container trucking services (e.g. only moves that transit through marine terminals). Section 22(1)(c) contemplates setting rates based on "one or more" of the starting point, the end point, the geographic area, etc., of those container trucking services, which clearly allows for rates for moves that do not transit through a marine terminal. This interpretation is consistent with the initial introduction by the LGIC of the off-dock rates and the inclusion of CN Rail and CP Rail yards in the JAP and Ready/Bell Report as mentioned above and in the Original Decision and Decision Notice. The Commissioner's Rate Order now sets off-dock rates, including for trips involving rail terminals, within the Lower Mainland.

66. To interpret s. 22 of the *Act* in the manner advanced by Simard would have left the LGIC (and subsequently the Commissioner) unable to regulate off-dock rates for container movements outside a marine terminal for the simple reason that off-dock moves do not transit through a marine terminal.

67. To summarize, the "one or more" circumstances and "one or more" container trucking services" in s. 22 are not restricted by the "prescribed services" set out in s. 16. When read together with the rest of the *Act*, s. 22 permits the Commissioner to require licensees to pay regulated rates for a "container" that is transported between two "facilities" in a geographic area that extends beyond the perimeters of a marine terminal.

68. I also reject Simard's argument (in its July 25, 2023 submission to the Court) that truck tags are issued for "prescribed" container trucking services only. Section 18 of the *Act* permits the Commissioner to impose any condition that the Commissioner considers necessary and sections 6.15 and 6.16 of the 2022 CTS licence require that licensees carry out container trucking services using tagged trucks. In other words, the license does not require tags for only those trucks performing "prescribed" (on-dock) CTS work.

Access to marine terminals and corporate restructuring

67. Simard suggests that the legislature could not have meant for the *Act* to extend beyond "prescribed" container trucking services because a simple corporate restructuring would allow licensees to avoid the off-dock rates. First, I cannot accept that the presence of loopholes in any legislation means that the legislature did not intend to capture the very thing a person is trying to avoid by using said loophole. I note that the effort to create a fair and equitable tax scheme is paved with opportunistic loopholes that are then closed.

68. Second, while Simard raises a hypothetical loophole in the way of a hypothetical corporate restructuring, the fact remains that Simard is the licensee, and it was Simard's vehicles that were found performing off-dock untagged work.

Reasons

69. I noted at para. 40 of the Original Decision, citing a decision of Commissioner MacPhail from 2016, that container movements to and from rail yards have been captured by the *Act* since 2016. In its Reasons for dismissing Simard's application for an injunction the Court rejected Simard's argument that the Original Decision was a new interpretation related to the application of the *Act* to "domestic moves" (para. 85).

70. In its Reasons the Court also found that "the argument that it is patently unreasonable to interpret the *Act* in a way that gives the Commissioner jurisdiction over the movement of containers in circumstances that are wholly unrelated, either directly or indirectly, to the movement of containers and their contents through marine terminals is not a frivolous argument" (emphasis added). The Court also observes at para. 59 that, based on an October 2022 Industry Advisory, the Commissioner appears to have accepted that there had to be some connection between a container movement and a marine terminal because the Advisory states that the *Act* "was intended to regulate on-dock and off-dock container trucking services in the Lower Mainland (container trucking services that require access to marine terminals at some stage)"(emphasis added). The Court notes that this statement could mean that a container movement that is wholly unrelated, directly or indirectly, to the movement of containers through marine terminal is not captured by the *Act.*

71. It is not clear whether Simard accepts that moves "indirectly" or "at some stage" related to a marine terminal are captured by the *Act*.[3] As will be clear from this reconsideration, licensees engaged in container moves that are "indirectly" or "at some stage" related to a marine terminal are caught by the *Act*. As a result, most, if not all, container movements in the Lower Mainland by licensees will be covered by the *Act*.

72. In terms of the possibility of container movements that are "wholly unrelated" to a marine terminal, where a metal box does not have the indices of a "container" outlined in the Original Decision, the movement of that metal box is likely to be "wholly unrelated" to a marine terminal since the metal box cannot and will not travel through a marine terminal.

73. All metal boxes that come through a marine terminal when they arrive in North America have been furnished or approved by an ocean carrier for the marine transport of goods and are therefore "containers" under the *Act*. Their status as "containers" confirms they are "related" to a marine terminal. If that alone did not make them "containers" then the question would become: how many steps removed from a marine terminal does a container have to be before it is no longer

[3] There is one sentence in Simard's October 12, 2023 submissions where it says that the Commissioner has jurisdiction "where the goods in question are marine goods and access to a marine terminal is required at some stage" (emphasis added).

"indirectly related" to a marine terminal? How many trips after, or in advance of, a trip to a marine terminal would be required to make a trip "wholly unrelated" to a marine terminal?

74. Also, parsing out whether container movements are "indirectly related" or instead "wholly unrelated" to marine terminals based on something other than the indices of a "container" would create a hodgepodge of regulated and unregulated rates punctuated by endless interpretative debates about which container moves are "indirectly" or "wholly unrelated" and hinder the ability to effectively enforce off-dock rates – all of which would be contrary to the purposes of the *Act.*

75. In my opinion, the *Act* requires licensees to pay regulated rates for movements of containers that can and/or do travel through a marine terminal, containers that are "furnished or approved by an ocean carrier for the marine transportation of goods." I do not believe that the purpose of the *Act* (ensuring stability in the Lower Mainland drayage industry as a whole) would be served by an interpretation that requires determining whether a container move is directly, indirectly or wholly unrelated to a marine terminal on a case-by-case basis. Rather, such reading would compromise The ability of the OBCCTC to effectively audit and enforce rates. It would also be inconsistent with my interpretations of "container," "facility," and "prescribed" as compared to "specified" container trucking services, set out above.

76. Most of the above may be academic in Simard's case, however. All the Containers on March 15, 2023, with the exception of the containers with the expired CSC plate, were "containers" and therefore related to marine transportation, at least indirectly. All of the Containers, with the exception of those with the expired CSC plate, also had other indices of having been furnished or approved by an ocean carrier for the marine transport of goods.

Alleged prejudice

77. *Jorgensen* sets out six elements that must be met to establish a defence of officially induced error:

- That an error of law or of mixed law and fact was made;
- That the person who committed the act considered the legal consequences of his or her actions;
- That the advice obtained came from an appropriate official;
- That the advice was reasonable.
- That the advice was erroneous; and
- That the person relied on the advice in committing the act.

78. I am also not persuaded that Simard received erroneous advice or has been prejudiced by any previous OBCCTC statements that would lead it to believe it could move containers to and from rail yards without paying the regulated rates. I rejected Simard's reliance on Simard 2020 at para 12 of the Original Decision. The November 15, 2019 email cited by Simard merely states that containers owned by railways are not "containers" and references the CNTL decision (defined below). I do not find that the email assists Simard. I am not aware of the facts in front of the then-Commissioner, but if a container was owned by a railway and did not have a CSC plate, then of course it would not fit the definition of a "container." Furthermore, I point out that the Containers dealt with in the current Simard matter include containers that are not owned by a railway.

79. Even if I am wrong about the email and the Simard 2020 decision, any alleged reliance on Simard's part should have reasonably been cleared up by the many advisories, bulletins and decisions advising licensees of the requirement to use tagged trucks when performing off dock-work, as mentioned in the Original Decision and referenced again in the Decision Notice (para 11) (see *R. v. Eckert*, 2011 ABPC 323). In the April 17, 2020 bulletin –which I note was published after the Simard 2020 decision -- the then-Commissioner warns licensees not to rely on Canadian National Transportation Ltd. (CTC Decision No. 02 2019) ("CNTL") because that decision has unique factors, and its findings were the purposes of that audit only. The bulletin goes on to clarify that container moves to and from CN Rail and CP Rail intermodal facilities have always attracted off dock-rates (both prior to and after the CNTL decision).

80. I do understand Simard may have been under the misapprehension that 53-foot containers do not meet the regulatory definition of "container" based on the Simard 2020 decision. As I understand it, 53-foot containers have historically been built and used exclusively in North America for the shipment of goods by rail and truck and may therefore not have qualified as "containers" under the *Act*. Overseas manufacturers have more recently began building and selling differently constructed 53-foot containers into the North American market, which containers are capable of ocean transport. This appears to be consistent with the presence on 53-foot containers of a container number consistent with all other marine containers, the presence of a CSC plate consistent with all other marine containers, and the acknowledgment from CP Rail that they can use their 53-foot containers to transport goods over the ocean. In other words, the OBCCTC has not broadened the definition of "container" to include 53-foot containers. Rather, 53-foot containers may now be capable of being furnished or approved by an ocean carrier for the marine transportation of goods and therefore captured by the *Regulation.*

81. Although I can see how these changes may have led to some misapprehension about the applicability of the *Act* to 53-foot containers, the majority of the Containers involved on March 15, 2023(those with prefixes EMCU, UACU, DRYU, TLLU, TXGU, TCLU and EITU) are not 53-foot containers or owned by a railway and had other indicators of being furnished or approved by an ocean carrier for the marine transport of goods.

82. Considering the above, I will not require Simard to pay Mr. Brar the regulated rate for movement of CPPU237220 or to review its payroll records related to 53-foot containers. However, going forward, Simard and industry as a whole should note that the dimensions of a container are not necessarily relevant to whether it qualifies as a "container" and the presence of four letter identification codes consistent with marine containers, the presence of a valid CSC plate, and the actual presence of these types of containers on an ocean carrier are generally sufficient to demonstrate that the container is "furnished or approved by an ocean carrier for the marine transport of goods."

Monies owing to two drivers for March 15, 2023

83. I also accept Simard's submission that the bobtail trip performed by Mr. Brar, an IO, on March 15, 2023, did not attract a trip rate as it was already covered by the PMR.

84. Based on the above, I find Mr. Brar is owed $114.12 for March 15, 2023, as follows:

From	To	Container Number	Trip Rate+ Wait Time Paid	Trip Rate Owed	PMR	Difference Owed
CP Rail Yard	Rolls Right Terminal	EMCU863256	$125.35	$131.00	$25.00	$30.65
Rolls Right Terminal	CP Rail Yard	EMCU863256	$72.53	$131.00	$25.00	$83.47
						$114.12

VI. Conclusion

85. I find that the only time that "off-dock" rates do not apply to licensees moving containers between facilities in the Lower Mainland is when licensees are performing on-dock trips or container movements within a facility. To put it another way, if the licensee is moving a "container" between "facilities" in the Lower Mainland, it is performing an off-dock trip and the regulated rates and conditions of the licence apply.

86. Based on my findings above, I reject Simard's argument that none of the container moves on March 15, 2023 are captured by the *Act*. I find that all of the moves of the Containers on March 15, 2023, with the exception of the moves of those containers with an expired CSC plate, are covered by the *Act*.

87. With this decision, the drayage sector should be fully aware that terminology like "domestic moves" or "domestic repositioning" or "domestic container" or "53-foot containers" or "railway owned containers" are not trump cards that absolve licensees from paying the regulated rates. I will also repeat: containers moving within the Lower Mainland to and from a rail yard also require a trucker to be paid a regulated rate.

88. Given my finding in the Supplemental Decision that Mr. Kim was paid the regulated rate and my current finding that significantly less than the amount determined in the Original Decision is owing to Mr. Brar, I will reduce the penalty.

89. For the purposes of this reconsideration, I am prepared to accept that Simard may have been under a misapprehension that 53-foot containers owned by railways do not meet the definition of "container" and I will not require that Simard include same in its recalculation.

90. I note in response to Simard's question regarding the date range for which it is required to review its payroll records, that the reason for the repayment calculation over a four-year period is

consistent the requirement to maintain payroll records for four years and is the period of time licensees are generally required to review.

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

92. I will vacate the order regarding payment to Mr. Kim for March 15, 2023.

93. I will amend the order regarding Mr. Brar as follows:

> I order Simard to pay Mr. Brar $114.12. for March 15, 2023 and provide proof of having done so to the OBCCTC within 30 days of the date of this reconsideration.

94. Furthermore, I will amend the order requiring Simard to review its payroll records as follows:

> I order Simard, no later than six months after the date of this reconsideration (or, if Simard continues its judicial review, no later than six months after the outcome of the judicial review) to:
>
> a. Review its payroll records from September 1, 2019 to August 25, 2023 and make the appropriate adjustments to bring itself in compliance with the *Act.* In particular, Simard must ensure that it has paid its drivers off-dock rates for all off-dock container trucking services work from September 1, 2019 to August 25, 2023. For the purposes of this order only (but not for future purposes), Simard may exclude 53-foot containers. For the purposes of this order and going forward Simard may exclude containers with an expired CSC plate from its calculations.
>
> b. Advise the Commissioner of any adjustments made and provide proof of payment to its drivers of the same.

95. I will reduce the administrative penalty set out in the Decision Notice to $8,000.00 on the basis that the financial harm suffered by the drivers on March 15, 2023 was less than originally found and because some of the Containers had expired CSC plates. I note that Simard has been the subject of previous decisions for underpayment of wages and I find the amended penalty reflects the need to deter Simard from continued underpayment of drivers and to encourage it to use tagged trucks and truckers from the IO List.

96. As Simard has already paid the penalty originally imposed, $4,000.00 will be repaid to Simard pursuant to s. 35(4) of the *Act*.

97. With the exception of the above, I dismiss Simard's application for reconsideration.

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

Dated at Vancouver, B.C., this 22nd day of February, 2024.

Glen MacInnes
Commissioner