Submission to the Commission on the Review of Federal Labour Standards

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BACKGROUND

The Canadian Trucking Alliance ("CTA") is a federation of the seven provincial and regional trucking associations, collectively representing over 4,000 motor carriers with aggregate annual revenues approaching $20 billion. These carriers employ over 150,000 people, approximately 90,000 of whom are truck drivers. With its headquarters in Ottawa and provincial association offices in Vancouver, Calgary, Regina, Winnipeg, Toronto, Montreal and Moncton, CTA is the voice of the Canadian trucking industry on policy, legislative and regulatory issues at both the national and international levels.

Trucking as an industry is a very large client of Labour Canada, as any transportation company whose vehicles cross a provincial or international boundary on a regular and continuous basis (hereinafter called "extra-provincial") is within federal jurisdiction for labour purposes. A survey of Labour Affairs Officers administering Canada Labour Code Part III ("CLC Part III") indicated that about 55% of all Part III federally regulated employers were engaged in trucking[1]. Therefore the content and effect of the CLC Part III is of key importance to the CTA.

The trucking industry has developed, over many years, industry standards and modes of operation that are different from the typical industrial establishment. In the vast majority of cases these standards work well, and serve the interests of both the industry and the public. Examples of these differences are:

- Historical and continuous use of owner operators (independent contractors) either instead of, or in combination with, employee drivers;

- Modes of payment differently than for time. Payment is often by the load, per mile/kilometre, or a combination. As well, there may be compensation based on revenue share, and additional pay supplements for waiting time at shipper facilities, border crossings, etc.; therefore, "wages" have to be computed differently in the trucking industry;

- Impracticality of direct supervision of drivers, as they work on their own, sometimes long distances from the work base;

- Hours of work that are around the clock, and are governed by safety (e.g., hours of service rules), not the 8-hour day, or the 40-hour, 5-day work week;

- Overtime is less relevant as pay is often on the basis of loads hauled or miles driven, and time worked is governed by the hours of service rules;

- Seasonal or cyclical impacts on the industry.

A profile of companies comprising the trucking industry shows that:

- Most carriers are small to medium enterprises and do not have dedicated human resource departments. HRSDC Labour Affairs Officers report that their employer contact was most often the owner of the business (43%) or the secretary/ bookkeeper (45%); human resource professionals were the contact in only 5.7% of the cases[2]. Therefore, as most carriers are small to medium enterprises, usually without human resources professionals on staff, the labour standards rules have to be certain and relatively simple to implement;

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[1] Employer Display B1, Evaluation of Federal Labour Standards (Phase I) Government of Canada, Human Resources and Skills Development, http://www11.hrdc-drhc.gc.ca/pls/edd/FEDLABSTAN.shtml Last Modified: 2001-08-08 Appendix C: Selected Survey Responses containing statistical displays summarizing responses for key questions for three surveys conducted as part of the evaluation.

[2] *ibid*

- Trucking company needs in terms of dealing with regulatory matters are legion and complex; take, for example, the current need to comply with safety, hazardous materials and border security laws in both Canada and the United States;

- Industry history of "non-compliance" with the CLC Part III is due, at least in part, to the differences in the way in which the trucking industry must operate in terms of hours of work and modes of payment of, principally, drivers, compared with the small size of the companies[3]; while non-compliance issues are currently being addressed to some extent by education and outreach, with the valuable assistance of Labour Program officers, it is important to ensure that the legislation and regulations fit the industry, and solve problems, instead of creating complexities;

- Carriers, either on a company-by-company basis, or as an industry, are addressing many important social policy issues, such as balancing work and family life. Many companies stress an emphasis on family life as a selling feature to attract drivers[4]. The CTA submits that the trucking industry has proven to be responsible in respect of social policy issues, and no more legislation is needed in that regard.

Therefore, changes to the CLC Part III will have a substantial impact on all federally regulated trucking operations. The CTA trusts that the Commission on the Review of Federal Labour Standards ("the Commission") will consider these submissions very carefully. The following provides commentary on the key issues and implications for the trucking industry.

[3] *Ibid* at http://www11.hrdc-drhc.gc.ca/pls/edd/FEDLABSTAN.lhtml#u55 (between footnotes 51 and 55)
[4] AYR Motor Express (http://www.ayrmotor.com/drivers/index.html); Bison Transport (http://www.bisontransport.com/index.htm); Connors Transfer Ltd. (http://www.connorstransfer.com/ownopjobs.html); Erb Transport Ltd. (http://www.erbgroup.com/careers.asp); Hyndman Transport 1972 Ltd. (http://www.hyndman.ca/careers_drivers.shtml); JP Anderson Employment Consultants (http://www.jpanderson.com/owner_operator.html); Kriska Holdings Ltd. (http://www.kriska.com/en/drivers_overview.asp); Lark Transport Inc. (http://www.larktransport.com/company.html)

SUMMARY OF RECOMMENDATIONS

In this submission, the Canadian Trucking Alliance focuses on the impact of the Canada Labour Code Part III on the trucking industry and its drivers, both employees and independent contractors. The following specific proposals are made:

1. Part III must continue to make the distinction between employees and entrepreneurial actors in the trucking industry; called “independent contractors” or “owner operators” (or sometimes “leased operators”).
2. The designation “dependent contractor” should not be brought into the CLC Part III. It is currently contained in Part I as a safety valve that is not needed in Part III.
3. Independent contractors and trucking companies should be allowed more – not less – scope to determine their own relationship in a written contract.
4. A separate law from the CLC Part III affecting drivers in the trucking industry (which we call, for reference, “Trucking Part III”) should be put into place, setting out certain guidelines which, if followed, will guarantee parties that their selection of independent contractor status will be respected.
5. The overtime thresholds for employee drivers should remain as they currently are – 45 or 60 hours per week, depending on the characteristics of the driving task; the overtime rate should remain at time-and-a-half. However, stakeholders should work together to determine the “bright line” distinction as to which drivers are entitled to overtime after 45 hours versus 60 hours. Whatever industry standard is decided upon must be certain and easily determined in practice, in order to take guess-work and instability out of the determination of driver status and, consequently, hours of operation and overtime determination.
6. In the proposed “Trucking Part III”, driving employees should be subject to workable rules that flow from the payment of wages, from vacation pay or general holiday pay in a manner appropriate to their compensation model. The new law would be characterized by a greater freedom of contract between the employee driver and the company.
7. Hours of work should be greatly simplified and varied to include: a recognition of the 24-hour per day nature of trucking and its relationship to the complex international logistics industry; a recognition of the primacy of the hours of service rules in respect of the definitions and wording of any legislation regarding hours of work in the trucking industry; a clear system of determining eligibility for overtime after 45 or 60 hours, that is agreed to in advance by the stakeholders; overtime language that is simple and easy to follow, with the amount of overtime to be time-and-one-half, not double-time; removal of standard hours of work, averaging and other matters not related to local or city and highway drivers.
8. Annual vacations – While the rate can be set, parties should be able to agree in a written contract how the vacation pay will be handled.
9. General holidays – A provision like the “continuous operation” provision should apply to driving employees, except that there should be no need to translate earnings into “wages” for purposes of calculating time-and-a-half.
10. Deductions – Parties should be free to agree in advance how certain types deduction will be handled, without it being necessary for the employee driver to authorize each deduction after the fact.
11. Changes should be made to Part III that would modernize and streamline the provisions affecting non-driving employees.
12. No changes should be made with respect to driver services organizations and their status as employers.

EMPLOYMENT VS. CONTRACTUAL RELATIONSHIPS:
THE EMPLOYEE VS. OWNER-OPERATOR QUESTION

There are presently about 35,000 owner-operators in the Canadian trucking industry. It is unclear what proportion of those fall under federal jurisdiction, but it is likely the majority. With regard to the status of owner-operators for the purposes of Part III of the CLC, CTA's position is clear: Owner-operators in the trucking industry are small, independent businesses.

CTA Proposal #1

That said, CTA proposes that the Canada Labour Code Part III:

- Must continue to make the distinction between employees and entrepreneurial actors in the trucking industry; called "independent contractors" or "owner operators" (or sometimes "leased operators").

This distinction is crucial in the driving occupations, and less so in other occupations in the trucking industry. Owner operators (independent contractors) should continue to be excluded from the coverage of the Canada Labour Code Part III or similar legislation. This distinction is crucial for historical as well as economic reasons, and to maintain industry stability. Carriers and entrepreneurial owner operators have been organizing themselves using this distinction for over half a century. A vast number of companies in Canada utilize owner operators either exclusively, or in conjunction with company (employee) drivers. To remove that distinction would destabilize the industry.

Further, there is no need to do away with this distinction. The main argument for deeming as employees all persons who have to sell their labour in some capacity is that of oppression by a larger economic entity or unit (such as a large company), and an inequality of bargaining power with that larger entity. This theoretically gives rise to a "democratic deficit" or a dependency imbalance which requires redressing[5]. The CTA is of the view that no such power imbalance exists in the current owner operator trucking scenario for at least four reasons:

1. A truck tractor suitable for use by an owner-operator in an application which would put him or her under the aegis of the CLC Part III (extra-provincial carriage of goods) is valued at approximately $100,000. To purchase or lease and maintain such a piece of equipment requires entrepreneurial commitment;

2. The modern extra-provincial truck operator has to have more and different skills than in the past. He or she has to be able to operate computerized trip, route and communications equipment, and keep track of myriad rules relating to hazardous goods, hours or service and, in many cases, border security;

3. There has for several years been a driver shortage in Canada (and in the US), and this is expected to remain for the foreseeable future. Market forces currently put the balance in favour of the driver, not opposed to him or her;

4. Owner-operators have choices if they do not feel they are being treated or remunerated in a commercially viable manner. Therefore, arguments that owner-operators that choose to contract with one main carrier or client should be classed as employees (or that the dependent contractor status should be imported into CLC Part III)[6] are not correct. To so

[5] The three axes of employment relationships: A characterization of workers in need of protection: Guy Davidov, University of Toronto Law Journal, Volume 52, No. 4, Fall 2002
[6] *ibid*

do would destabilize, for no purpose, an industry critical to Canada's economy and trading relationships in the North American market.

CTA Proposal #2

CTA also proposes that:

- The designation "dependent contractor" not be brought into the CLC Part III[7].

That concept is used in the CLC Part I for a particular reason, to allow contractors that meet certain conditions[8] to avail themselves of the right to organize collectively through a union. These conditions typically amount to a "position of economic dependence on and under an obligation to perform duties" for another company[9]. CTA states that having the dependent contractor provision in the CLC Part I is a safety valve. If non-union owner operators feel that they are not receiving their due in the market place, they have two options: to leave the carrier and form a relationship with another carrier, or to organize collectively through a union. Therefore, there is no need to have the dependent contactor concept imported into the CLC Part III as the owner operators have options – they are not "oppressed" or "trapped".

Further, the trucking industry is well placed to utilize independent contractors, especially in driving positions. It is largely impossible to supervise drivers while they are engaged in the core aspects of their duties, as they are necessarily away from the carrier's base of operations. As well, hours driven are not solely dictated by the carrier: they are dictated by the hours of service rules, by traffic, weather conditions, customer demands and other factors, the majority of which only the driver himself or herself can deal with.

Modern owner operators are similar to other entrepreneurs. They work to benefit from their investment, and their application of skill and enterprise. Carriers are, in the main, small to medium size enterprises that often depend on owner operators to carry goods in an efficient, cost effective manner. It is notable that, in many cases, owner operators become carriers by adding other drivers to their fleet. Many current carriers began as owner operators. With input costs (witness fuel prices) and other costs of operation, neither owner operators nor carriers can afford either more regulation or a more stringent legislative framework deeming owner operators as "employees".

The trade-offs herein proposed ultimately benefit the drivers, as well as Canadian society, as they will spawn increased productivity and entrepreneurship, and opportunities for drivers. As businesses, owner operators can take advantage of business tax deductions and treatment. They can benefit from their entrepreneurial choices, and also risk loss. They are supported by organizations through which they can often obtain health benefits, retirement plans, advice and assistance on running their business, and the like. [10] Owner operators can build a business, and also create security for themselves and their families.

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[7] It is currently not incorporated into Part III: *Greyhound Canada Transportation Corp. and Lefler* [1999] C.L.A.D. No. 155 at paragraph 75

[8] *Transport Damaco International Ltée* (1984), 84 di 84; 92 CLLC 16,055; also see *Mackie Moving Systems Corp.* [2002] CIRB No. 156; [2002] C.I.R.B.D. No. 3 at paragraph 213, and cases cited therein, for a current discussion of the tests for "economic dependency" used by the CIRB.

[9] ibid

[10] See, for example, the Owner-Operators' Business Association of Canada (www.obac.ca) and the Owner Operator Independent Drivers Association (www.ooida.com).

CTA Proposal #3

Taking the foregoing into account in respect of the owner operator issue, CTA recommends:

- Allowing the parties more – not less – scope to determine their own relationship in a written contract.

There are valid reasons for this recommendation. First, allowing the parties to state what relationship they wish to create is not inconsistent with current law. In a recent Federal Court of Appeal decision, Wolf v. Canada[11], the judge writing the decision emphasized that in "non-standard" work, characterized by higher profit, mobility and independence, there is more room to claim contractor status[12]. A concurring judge stated clearly that in cases where the traditional factors used to separate employee from independent contractor do not lead to a clear distinction, the parties' designation of their relationship as company and independent contractor should be given more weight[13]. Parties in the trucking industry need more certainty in their relationships. If parties create a written agreement characterizing their relationship as that of carrier and independent contractor, and then govern themselves in that way over time, adjudication under the CLC Part III should be very reluctant to set that relationship aside. Even those arguing the contrary position acknowledge that predictability is lacking in the employee/ independent contractor determination.[14]

CTA Proposal #4

Therefore, CTA recommends that a separate law from the CLC Part III affecting drivers in the trucking industry (which we call, for reference, "Trucking Part III") be put into place, setting out certain guidelines which, if followed, will guarantee parties that their selection of independent contractor status will be respected. The guidelines should require:

- A written contract between the parties, one clause of which clearly states that they have mutually chosen the status of company and independent contractor;

- That the independent contractor own or lease tools or equipment with which he or she fulfills the duties or tasks set out in the written contract;

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[11] 2002 FCA 96; while this was a taxation decision, it is cited generally in contractor status cases; For example: BC Employment Standards Tribunal: Re: *Trigg* [2003] B.C.E.S.T.D. No. 40; *888 Express Ventures Ltd.* [2004] B.C.E.S.T.D. No. 111; *Raif Holdings Ltd.* [2004] B.C.E.S.T.D. No. 136 and others; CLC Part III: *Dynamex Canada Inc. v. Mamona* [2002] F.C.J. No. 534, 2002 FCT 393; Ontario Employer Health Tax: *New Generation Drywall Incorporated* [2004] O.J. No. 465.

[12] Desjardins J.A. at para. [94] "Non-standard employment such as the one of the appellant, which emphasizes higher profit coupled with higher risk, mobility and independence, indicate, in my view, that the appellant correctly claimed the status of contractor …."

[13] Noël J.A at para [122] "…in a close case such as the present one, where the relevant factors point in both directions with equal force, the parties' contractual intent, and in particular their mutual understanding of the relationship cannot be disregarded …" [124] "…It follows that the manner in which the parties viewed their agreement must prevail unless they can be shown to have been mistaken as to the true nature of their relationship. In this respect, the evidence when assessed in the light of the relevant legal tests is at best neutral. As the parties considered that they were engaged in an independent contractor relationship and as they acted in a manner that was consistent with this relationship, I do not believe that it was open to the Tax Court Judge to disregard their understanding…"

[14] The Law Commission of Canada, "The Legal Concept of Employment: Marginalizing Workers**":** J. Fudge, E. Tucker and L. Vosko, Oct 2002 at www.lcc.gc.ca/research_project/02_concept_9-en.asp : "…adjudication [of employee versus independent contractor status], in essence, operates as a system of *ex post* decision-making that in reality will leave the status of a large number of workers highly unpredictable, notwithstanding that the abstract character of the test may produce an illusion of consistency (Davies 1999, 167)"

- That the independent contractor agrees to file its taxes and claim its expenses as a business;

- That the independent contractor invoice the company as a business, whether it be incorporated or not.

It is important that the Commission bring this recommendation forward for the reasons of: certainty of the rules under which all stakeholders in the trucking industry operate; stability of the trucking industry; productivity; entrepreneurship; and avoiding exit from the industry, at a time of driver shortage, by owner operators who wish to see their status maintained.

Independent contractors should continue to be outside the reach of the CLC Part III, or trucking-specific legislation (such as "Trucking Part III"), by reason of their not meeting the definition of "employee".

EMPLOYEE DRIVERS AND THE CLC PART III

The genesis of CLC Part III, and of most employment standards legislation, was the alleviation of sweatshop conditions in factories. Labour standards legislation in Canada can be traced back to the Federal Factory Acts of the 1880's[15]. As HRSDC's evaluation of CLC Part III states in further discussing its evolution:

> *"During the early 1900's, the legislation was consolidated and extended in a variety of ways. It was consolidated into separate legislation dealing with specific labour standards. It was extended to the general industrial workforce and to encompass most of the standards that prevail today in such areas as minimum wages, hours of work and overtime, and wage protection. Issues pertaining to vacations and holidays were added in the 1940's, and provisions on termination of employment were added in the 1970's."*[16]

And further, at paragraph 1.2.2:

> *"While originally designed to "protect" women and children, [the labour standards] have been extended to a workforce that could be characterised as industrial, male-dominated, blue-collar and often employed in large fixed worksites."*[17]

So it is clear that the historical context of CLC Part III was the factory, and that it evolved with standards relevant to the industrial workplace. However, labour standards legislation did not evolve to be relevant to much of the trucking industry. Its modes of operation in terms of use of contractors, hours of work, compensation and general practices make the trucking industry very different from the factory or the industrial workplace. As has been discussed to some extent above, the trucking industry is characterized by the following, even in relation to employee drivers:

- Modes of payment are often different than for time (by the load, per mile/kilometre or in combination, etc.);

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[15] Evaluation of Federal Labour Standards (Phase I) Government of Canada, Human Resources and Skills Development, http://www11.hrdc-drhc.gc.ca/pls/edd/FEDLABSTAN.shtml Last Modified: 2001-08-08

[16] *ibid*
[17] *ibid*

- "Wages" have to be computed differently even in relation to employee drivers;

- Virtual impossibility of direct supervision of drivers as they work on their own, sometimes long distances from the work base; they have to be honest, and be trusted with the company's reputation;

- Hours of work that are around the clock, and are governed by safety (e.g., hours of service rules), not the 8-hour day, or the 40-hour, 5-day work week;

- Overtime being less relevant, as pay is often on the basis on loads hauled or miles driven, and time worked is governed by the hours of service rules;

- Seasonal or cyclical impacts on the industry.

As a result, much of the CLC Part III is too complex to facilitate compliance (general holiday pay, for example), or is hard to fit into the historical and current practices of the trucking industry in relation to employee drivers. The following highlights the key issues.

Regulation of Hours of Work, Related to Hours of Service Rules

Trucking, especially in today's global marketplace, is a 24-hour per day operation. Both Canada[18] and the United States[19] have rules, based on safety considerations, as to how many hours over a day or a week truck drivers can perform their duties. These rules are the primary guideposts as to the hours of work of drivers, including employee drivers. This reality has given rise to the Motor Vehicle Operators Hours of Work Regulations which modify sections 169 and 171 of CLC Part III. Those regulations set out a regime where the regular hours of work for *"city motor vehicle operators"* ("city drivers") are 45 hours per week instead of 40, those of *"highway motor vehicle operators"* ("highway drivers") are 60 hours per week. Bus operators and "mixed employment" employees are also dealt with in those regulations. There are severe difficulties in interpreting the "city motor vehicle operator" versus the "highway motor vehicle operator", especially with regard to the part of the definition referring to the "prevailing industry practice in the geographical area where he/she is employed". The interpretive struggle which has plagued the industry can easily be seen through the cases.

For example, in Actton Transport Ltd. [1994] C.L.A.D. No. 929 at paragraphs 71 and 72 the Referee works his way through the procedure to be followed:

> *"The question remains: how should prevailing industry practice be determined and what should be done if someone is in disagreement with Labour Canada's view of what prevailing industry practice is?... There appear to be certain steps which, logically, must be followed before the third part of the definition may be determined. First, the relevant geographical area must be determined. The Regulations give no hint as to how that is to be done. However, assuming that has been done, the Regulations contemplate that within that geographical area the prevailing industry practice as to who is and is not a city driver will be determined. Again the Regulations do not state how that is to be done."*

The referee in that case went on to chide Labour Canada for the manner in which it went about making this determination (even in view of the regulations being unhelpful), and to indicate how it should be done:

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[18] See the regulations at http://www.tc.gc.ca/acts-regulations/GENERAL/M/mvta/regulations/mvta001/mvta1.html

[19] See the new U.S. hours of service rules as at October 1, 2005 at http://www.fmcsa.dot.gov/rules-regulations/truck/driver/hos/brochure2005.htm

> *"It is also my view that in determining what the prevailing industry practice is as regards who is or is not a city driver, Labour Canada should not first look at criteria such as keeping a log book or reporting back to home base every night, or loading or unloading product, and then, based on those criteria, determine who should be paid overtime at 45 hours and who at 60. It is clear from the Regulations that the only difference between being a city and a highway driver is that one is paid overtime at 45 hours and the other at 60. … [T]herefore, the correct process would be to start with the majority of employees who are in fact getting paid overtime at 45 hours and ask what criteria, if any, are common to them. Only then can it be determined for any particular employee, by looking to see if he/she has these criteria in common, whether he/she is within the industry practice for a city or highway driver. The method followed by Labour Canada in this case effectively puts the cart before the horse by defining city drivers as those who meet certain criteria without determining whether those criteria are common to those employees who are getting paid overtime at 45 hours. This method in effect appears to let Labour Canada determine who, in its view, should be paid overtime at 45 hours. This is contrary to the Regulations, which require that it is the prevailing practice in the industry that determines who will get paid overtime at 45 hours."*

This sample quote demonstrates two points clearly. First, it is a complex and counter-intuitive process that must be followed to define a city driver. When the above decision is closely read, it shows that the affected company is required to define a group by those that are already in it, as opposed to first determining the criteria of membership of the group to be defined and then placing members in it that meet the criteria. That is an illogical way to have to proceed. Second, if a company wishes to put forward its own evidence as to what constitutes a city driver, it is difficult to imagine how it would do it. In fact, the referee said (at paragraph 76), in terms of that issue:

> *"Lastly, what happens if an employer or employee disagrees with Labour Canada's view of the prevailing industry practice in a specified geographical region? Again, consistent with my view that the third part of the definition does not delegate to anyone, including Labour Canada, the task of determining the prevailing industry practice, but rather speaks of "prevailing industry practice" as an objective fact to be, as it were, "discovered", the complainant will have the right to appeal, to ask a referee to review Labour Canada's determination. As the prevailing industry practice is a question of fact, not law, no special deference will be paid to Labour Canada's determination: rather, the referee must determine, based on the evidence presented, what the prevailing industry practice is. Obviously, however, if Labour Canada can persuade the referee that its determination was made by following the procedure set out above, a complainant may have a difficult time proving that the prevailing industry practice is other than that determined by Labour Canada."*

In Denice Transport Co. Inc. [1998] C.L.A.D. No. 288 the referee determined that an industry practice was a 40 mile radius out of Ancaster, Ontario. However, in Active-Ultrahaul, a division of Sandstone Transport Ltd. v. Nantais [2000] C.L.A.D. No. 340 a different referee found that the industry practice was 100 miles out from Hamilton: *"Ancaster and Hamilton are both part of the new City of Hamilton, so it is difficult to reconcile these two results*".[20] We note that the referee in Active-Ultrahaul was given a chance to reconsider his 2000 decision in Active-Ultrahaul [2001] C.L.A.D. No. 59, but refused to do so.

Actton Transport Ltd. continued the fight over the city driver definition again, this time all the way to the Federal Court of Appeal[21]. While Actton lost at both levels, the Federal Court Trial

[20] This analysis is of Referee Stephens in Sager Transport Ltd. July, 27, 2004

[21] *Actton Transport Ltd.* [2003] F.C. 816 (Fed.Ct.T.D.); [2004] FCA 182

Division made it clear that fairness (in the form of full disclosure of information) must be afforded to the company when an inspector makes a decision as to what constitutes an industry practice. This meant that finally, in 2003, the company had to be privy to the information upon which the inspector based the industry practice. This principle was picked up in Al's Cartage Ltd. [2005] C.L.A.D. No. 321, which found that due process was not afforded to the company. Not all of the information (surveys, questionnaires, names of companies contacted) used by the inspector to find the industry practice was provided to the company. The referee in Al's Cartage used the fairness principle to revisit the issue discussed at paragraph 76 (above) in the original Actton decision, regarding the company's ability to appeal the decision of the inspector. The principle which emerges is that the company cannot intelligently discuss or counter the information used by the inspector, if the company has not been made privy to it. Now companies have to be given that information, so they may now have a chance on appeal.

It can be seen that there is an inherent difficulty in trying to reconcile two regimes in terms of driver hours and, secondarily, overtime determination. The dominant regime is that of the hours of service rules, propounded by the Canadian and US governments to ensure safe operation of commercial motor vehicles on the highways. Compounding this difficulty is the old fashioned wording and structure of the Motor Vehicle Operators Hours of Work Regulations, not the least of which is the "city driver" versus "highway driver" controversy. Obviously, drivers have to ensure they adhere to and comply with the hours of service rules. However, even with some tribunal decisions clarifying the rules relating to the city driver/ highway driver distinction, the utility of that distinction is in question.

CTA Proposal #5

Therefore, the CTA proposes that:

- Government and industry stakeholders work together to determine the proper overtime distinction for driving employees – What should be the "bright line" distinction as to which drivers are entitled to overtime after 45 hours versus 60? Is the "city driver" versus "highway driver" nomenclature still viable? Experience has shown that there are many distinctions and categories to take into account: geographical distance, time distance and types of carrier (LTL, TL, or container), for example.

- The Commission, HRSDC or other appropriate agency consult with stakeholders (including this organization and its constituent member associations) to determine an appropriate industry standard for the determination of overtime in commercial driving – Whatever industry standard is decided upon must be certain and easily determined in practice, in order to take guess-work and instability out of determination of driver status and, consequently, hours of operation and overtime determination.

- If it is determined that the current Labour Canada practice of conducting surveys to determine an industry standard should continue, a transparent and standardized set of survey rules that the industry has agreed to must be promulgated and used by LAOs, and the results disclosed to the affected carrier.

- Overtime be maintained as it is now – payable after 60 hours for highway drivers, and after 45 hours for city drivers, both at time and a half, and that there be no double overtime rate.

- The language in the "Trucking Part III" be simplified generally with regard to hours of work and overtime. (The sections of CLC Part III and the Motor Vehicle Operators Hours of Work Regulations dealing with hours of work cause the reader to have to refer to a number of other sections to figure out the rule. The new code should clearly state the rule, while keeping the number of sections to which the reader has to refer to a minimum).

- As far as possible, wording in the "Trucking Part III" referring to hours of work use the same defined terms and general wording as the Commercial Vehicle Drivers Hours of Service Regulations (or successor regulation).

Compensation Based on Mileage, Revenue; Other Than Dollars-Per-Hour

As discussed above, labour standards were based on an industrial or plant model, where workers put in fairly standard hours, and were paid per hour. Deductions and premiums for statutory benefits were crafted on this model. In the trucking industry, pay is often based on revenue, distance, per load or some combination of those modes. Part of the problem with a perceived lack of compliance in the trucking industry emanates from the difficulty of grafting industrial labour standards onto the trucking industry's payment models. The other part of the problem, as discussed above, flows from the SME nature of many trucking enterprises, the lack of human resources professionals in those enterprises, and the complexity of the regulations themselves. A snapshot example of some common cases dealt with under the CLC Part III shows the following:

- Leon Lozowchuk Trucking v. Koroll [2005] C.L.A.D. No. 5: a wage recovery appeal where the driver was paid a percentage of gross revenue; the issues were whether overtime and safety bonus was payable, and how to calculate vacation pay; also whether cell phone charges, damages and fines were to be deducted from the driver's pay, and the calculation of GST;

- Rosetown Express Ltd. v. Keith [2001] C.L.A.D. No. 136: a wage recovery appeal where the driver was paid a per mile rate; at issue was whether the per mile rate included vacation pay and how general holiday pay was to be included in the rate; also at issue were the propriety of certain deductions, including truck expenses which the driver, who leased the truck, had to defray;

- Rock'n A Transport v. Stonehouse [2001] C.L.A.D. No. 129: a wage recovery appeal in which the company and the driver agreed that during a training period the driver would receive no wages but be reimbursed his meals; the referee found that the regulations demanded that the driver be paid at least minimum wage during the training period, but that another regulation allowed the company to deduct $.50 for each meal from this pay; also at issue was the deduction of fine amounts from the driver's pay;

- Klaproth v. Burgess [1999] C.L.A.D. No. 396: a wage recovery appeal where the driver was paid a flat rate up to a certain number of miles, and then per mile after that. A major issue was the calculation of vacation pay and general holiday pay. The referee noted, at paragraph 20*, "Mr. Klaproth was paid on a flat rate plus mileage over the threshold. For trips which were significantly below the threshold he was to be paid on a mileage basis. Such payment calculations are not contemplated directly within the scheme of the Regulations. I have therefore been required to follow the spirit of the calculation of wages without having been guided by the general approach of the Regulations and without having any specific section which could be applied in these circumstances….";*

- Buckingham v. Deschênes [1995] C.L.A.D. No. 651: a wage recovery appeal where the driver was paid a percentage of gross revenue; the issues were whether ferry tolls were deducted from the driver's pay, and if they reduced revenue before the percentage was calculated, and whether damages to the truck and fines were to be deducted from pay.

These cases, though just examples, are from right across the country and over a ten-year period. CTA submits that the following points are demonstrated:

- Current regulations on pay, and their connection to hours of work, statutory deductions and premium determination, do not fit with the consistent, long-standing payment practices of the trucking industry; these cases show that issues arise around ferry tolls, cell phone use, GST application, fuel card deductions, and the like being deducted from performance or productivity-based pay. Then, vacation and general holiday pay are supposed to be calculated on this. This system is inherently flawed;

- The CLC Part III and its regulations are too complex at two stages: when a company hires a driver, to explain what his or her contract will actually contain, and what may or may not be enforceable, given the protective nature of employment standards legislation[22]; and secondly, when the company tries to administer the contract, or when business changes need to be made. "Non-compliance" can occur when the complex interplay of rules is difficult to understand or follow in practice.

CTA Proposal #6

In order to remedy the situation, the CTA proposes that the Commission:

- Recommend the creation of a separate piece of legislation for drivers in the trucking industry (called, for reference, "Trucking Part III"). In it, driving employees would be subject to workable rules that flow from the payment of wages, from vacation pay or general holiday pay in a manner appropriate to their compensation model. "Trucking Part III" would be characterized by a greater freedom of contract between the driver and the company.

The vision that the CTA holds for its industry, in relation to driving employees, flows from the following facts:

- Drivers operate in an environment generally characterized by less structure and direct supervision, and more responsibility to operate on their own, than would be seen in other industries;

- Companies in this age of deregulated trucking, continue to be small and medium enterprises;

- With more computerization and more sophisticated equipment, people with higher levels of education, and more women, will enter the driving force;

- Modes of payment that currently exist are not going to change.

The context that these driving employees, and their employer-carriers, find themselves in is (as is recognized in this Commission's Consultation Paper, in the section, "Changing Nature of the Workplace") a world of "rapid technological change and intense global competition" on a 24/7 basis, especially given the level of North American integration with which carriers must deal. Carriers want to "improve their productivity and competitiveness, to increase their ability to adapt to changing conditions and to attract and retain highly skilled workers".

Employee drivers, too, wish to upgrade their skills and competencies to be able to compete in the marketplace, and to gain recognition for the valuable work that they do. As discussed above, carriers were driven to recognize, perhaps earlier than other employers, the need for

[22] *Rizzo* v. *Rizzo Shoes Ltd.*, [1998] S.C.R. 27; *Machtinger* v. *HOJ Industries Inc.*, [1992] 1 S.C.R. 986

employee drivers to balance work and family life. Carriers and drivers work together to make this a reality.

As a result, the new "Trucking Part III" should enable these drivers and their companies to negotiate and enter enforceable legal relationships that reflect their industry, and are relevant to their ways of compensating drivers and the hours and conditions under which they operate. As is discussed in this submission, labour standards regulation should be as clear and certain as possible, and should dove-tail (or at least not conflict) with other safety regulation, such as hours of service rules. CTA recognizes that a balance is necessary to ensure that the basic labour standards protections for driving employees are not removed, but that the standards free up both drivers and carriers to carry on their work in a progressive, productive manner.

How should this be accomplished? One option may be to allow greater freedom to contract the terms and conditions of the employment, and, in a way that may not be suitable for industrial employees, apportion the risks and rewards of the job. This may mean that deductions from pay would be easier to authorize to reflect the high level of responsibility possessed by the driver. This might free the parties to apportion the risks in a manner appropriate to the industry and act as an incentive for the drivers to maximize their profits. Historical arguments against allowing greater freedom of contract in employment relationships presuppose that the employee has no or little bargaining power. A classical explanation of this notion is as follows:

> *"Freedom of contract disguises the unequal bargaining power between employee and employer. This power imbalance stems from the reality that employers own capital, and in our modern socioeconomic reality employees are dependent on wages for most human functions (Collins 1986, 11–12). Consequently, despite the slogan 'freedom of contract,' most employment contracts are one-sided because employees are unable to negotiate their own terms, there is often no real consensus ad idem, and there is often a wanton disregard for the doctrine of mutuality (Swinton 1980, 362–65)"*[23]

Perhaps there is not the incidence of "worker oppression" or "inequality of bargaining power" in driving employees in the trucking industry. Drivers are employed with little direct supervision, and make largely their own decisions when on the road. They are, in the main, highly skilled professionals. They are charged with much responsibility. If, on an individual basis, a driver feels that she or he is not receiving a market rate, or is not being treated fairly in some way, s/he has the option to go to a different carrier, or to organize under CLC Part I. As a result, the gains in clarity, productivity and compliance should outweigh any potential negatives. Freedom of contract in this context may add clarity to the employer-employee relationship by avoiding the imposition of standards that cannot be adapted to apply to the various driver compensation models. However, that is but one suggestion. It may be that by carefully crafting the standards in "Trucking Part III" the proper balance can be created. Achieving that proper balance between productivity and flexibility on one hand, and driver employment protection on the other is an endeavour which will require the input and hard work of all concerned.

"Trucking Part III" would examine current best practices in the trucking industry, and create minimum standards around them. Such standards would be relevant to the industry they serve. Driving employees could be treated differently from non-driving employees in this legislation. At a minimum, the following provisions of CLC Part III should be varied in the new (or amended) legislation in the following ways:

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[23] Good Faith in Wrongful Dismissal: Canadian Employment Law after *Wallace* v. *United Grain Growers Ltd*: Simon Heath, Queen's University Industrial Relations Centre; IRC Press © 2000, Industrial Relations Centre, at page 9.

CTA Proposal #7

- **Hours of Work** – Should be greatly simplified and varied as discussed above including:
  - A recognition of the 24-hour per day nature of trucking and its relationship to the complex international logistics industry;
  - A recognition of the primacy of the hours of service rules in respect of the definitions and wording of any legislation regarding hours of work in the trucking industry;
  - A clear system of determining the local or city driver status – if that distinction continues to be used – that is agreed to in advance by the stakeholders;
  - Overtime language that is simple and easy to follow; amount of overtime to be time-and-one-half, not double-time, after 45 and 60 hours for local or city and highway drivers respectively, and that overtime calculation can be simplified by simply multiplying a mileage rate by 1½;
  - Removal of standard hours of work, averaging and other matters not related to local or city and highway drivers.

CTA Proposal #8

- **Annual Vacations** – While the rate can be set, the parties should be authorized to agree in a written contract how the vacation pay will be handled. For example, they should be able to agree that the mileage rate includes vacation pay, or that vacation pay can simply be the mileage multiplied by the appropriate percentage;

CTA Proposal #9

- **General Holidays** – A provision like the "continuous operation" provision (s.198) should apply to driving employees, except that there should be no need to translate earnings into "wages" for the means of calculating time-and-one-half; the parties should be able to negotiate that calculation as is suggested above with vacation pay;

CTA Proposal #10

- **Deductions –** Parties should be free to contract in respect of how risks and rewards are apportioned. For example, employers and employees should be free to agree in advance that certain types of damage caused by an employee will give rise to a deduction, without it being necessary for the employee driver to authorize the deduction after the fact.

NON-DRIVING EMPLOYEES & THE CLC PART III

As set out above, the CTA proposes a separate "Trucking Part III" for drivers in the trucking industry. The CTA is not proposing that non-driving employees be included in it.

CTA Proposal #11

However, the CTA does propose that:

- Changes be made in CLC Part III that would modernize and streamline the provisions affecting non-driving employees.

It is well known that the CLC Part III needs to be modernized and simplified generally. We would expect that non-driving employees that are within federal jurisdiction would benefit from such general modernization, and their treatment in the CLC Part III would reflect that. The focus of CTA in this presentation is the effect of the CLC Part III on drivers and trucking companies. As such, we do not present a detailed list of modernizations necessary, but focus on issues of greatest importance to the trucking industry.

THE EMPLOYER UNDER CLC PART III: DRIVER SERVICES

There has been some discussion in the transportation community as to whether CLC Part III requires changes because of the advent of "driver service" or "driver leasing" companies. Such companies actually employ drivers (and/ or other types of employees) by undertaking the hiring, supervision and administration of such employees. Carriers with whom the employees are placed do not intrude upon these functions, but usually set the standards and parameters that the driver services company must meet in terms of employee performance.

CTA Proposal #12

CTA proposes that:

- No changes are needed to the CLC Part III in respect of driver service organizations.

Section 166 contains, as a definition of "employer", "any person who employs one or more employees". The Motor Vehicle Operators Hours of Work Regulations defines employer as "a person who operates an "industrial establishment" described in section 3", which is: "any industrial establishment engaged in (d) the transportation of goods or passengers by motor vehicle from any point within a province to any point outside that province, or (e) the transportation of mail anywhere in Canada".

The primary focus in the legislation is on the definition of "employee", which is currently accomplished through precedent rather than statutory definition. Case law has also tackled the concept of "employment" in dealing with true employer or real employer issues, as cropped up in City of Pointe-Claire[24]. In that case, the Supreme Court of Canada had to determine if the City became the employer of a temporary employee hired and paid through a temporary employment agency. The SCC found that the City had become the employer because it was fulfilling most of the functions of being an employer. Arguments had been put to the Court that tests such as "control", "legal subordination" or "integration into the business" should be used to determine employment. However, rather than adopt a single approach, the Court found that a trier of fact has to take a comprehensive approach, and examine all factors. At paragraph 48, then Chief Justice Lamer, writing on behalf of the majority, said:

> *"According to this more comprehensive approach, the legal subordination and integration into the business criteria should not be used as exclusive criteria for identifying the real employer. In my view … it is essential that temporary employees be able to bargain with the party that exercises the greatest control over all aspects of their work – and not only over the supervision of their day-to-day work. Moreover, when there is a certain splitting of the employer's identity in the context of a tripartite relationship, the more comprehensive and more flexible approach has the advantage of allowing for a consideration of which party has the most control over all aspects of the work on the specific facts of each case. Without drawing up an exhaustive list of factors pertaining to the employer-employee relationship, I shall mention the following examples: the*

[24] *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, 1997 CanLII 390 (S.C.C.)

selection process, hiring, training, discipline, evaluation, supervision, assignment of duties, remuneration and integration into the business."

Referees and adjudicators under CLC Part III are using this analysis[25], and there does not seem to be a problem with its use. Driver service companies know that they have to actually perform the functions of an employer in order to be afforded that status. If they do not, they risk their clients being deemed to be the employer, which would put the driver service companies in an unenviable position vis à vis their contract with their client.

[25] For example, *Logan v. Moravian of the Thames Indian Band* [2003] C.L.A.D. No. 294; *Au v. Air Canada* [2004]; C.L.A.D. No. 8; *RMS Pope Inc. v. Chaisson* [2004] C.L.A.D. No. 463

APPENDIX A: A LOOK INTO OUR INDUSTRY

We would like to thank the Commission for this opportunity to address this most important matter – the review of federal labour standards. We wish to bring this Commission back to the views that are the most important in this review – those of the drivers and managers who are involved in the trucking industry every single day. What follows is information gleaned and summarized from extensive interviews with a major, extra-provincial trucking company headquartered in Ontario with offices in several Canadian cities. These interviews were conducted and transcribed with the intention of giving Commission members a sense of how truck drivers – company drivers and owner-operators alike – feel about their work and the rules (hours of service, highway safety regulations) that currently govern it. The interviews were conducted at random in the driver's lounge of the company's premises on September 29, 2005, taped with the participants' full permission, and transcribed by the CTA.

Company (Employee) Driver – *I'm a long haul driver dedicated to the same route, but my hours are different from week to week because I do three trips one week and two the next. In my kind of job, there just isn't the opportunity to run on a regular daily schedule. The best you can do is getting a dedicated route. But even then, each load has its idiosyncrasies – a load can get cancelled and a supplementary load can come up. Not every supplier or shipper has loads on a regular schedule. That's why there would be a problem using the same rules for a truck driver as for everyone else – the rules we already have, hours of service and the highway code, are enough. In fact it would be better if we had even more flexibility. Most of us would prefer to drive more hours rather than less. Truck drivers enjoy the allowances they have and sure some companies take advantage but most drivers know how to use that flexibility. If truck drivers could only work eight hours without getting paid overtime, or only work during specific hours you'd have a terrific problem. So much in the relationship between the employee and the employer depends on their attitudes – as long as they run legal there usually aren't any problems … It's not the same as a regular 9-5 office or factory job – we need fewer laws not more to make our jobs easier and our quality of life better. As far as not getting paid for sick days well that's just the kind of job we have – we know it and we choose it. If the freight doesn't move why should you get paid? If the trucking company had to pay for every no-show it would go out of business in no time. The cost of not only paying the person who isn't driving, but the one who is, because they'd have to get it hauled anyway, would be huge. You get paid for what you do in this business and that's why we like it.*

Owner-Operator – *I'm an owner-operator on an annual contract with benefits. That means I get a lower rate per mile but the Company gives me benefits and covers more of my damages. I have a contract on a dedicated run. What I like about being an owner-operator is having my own vehicle and looking after it myself. I don't have to worry about the way someone else takes care of it. I've been an owner-operator for five years now, ever since I came to work for the Company. I worked for another company as a company driver before that and I was happy there but they went belly up. What I like about truck driving is that you take a break when you need to, as long as you drive within the [hours of service] rules. I think the hours of service and the laws of the highway are already enough – in my opinion there are too many rules already. How is being a truck driver or owner/operator different from working 9-5? Well, you're your own boss – there's no one looking over your shoulder and if you want to stop you do. I think that's safer because you get to spread out your hours the way you need to, especially because traffic, weather conditions and the like – a bad rush hour for example – are things you can't predict. I think, when it comes to thinking you're being unfairly or badly treated, it's up to you as your own boss to work things out. You can't apply one set of rules to everybody. You've got to communicate with the company and if you can't work things out then you're the one with the problem. It's not good to jump from job to job. I think the people who are thinking about writing more rules for the trucking industry are people who don't understand how a truck driver works. They have no idea what's going on. I like the way I work and I like the flexibility. And I don't want to work eight hours a day, because if I did, I wouldn't get home.*

Company President and Founder – *Why does this industry need a mix of company drivers and owner-operators? If we look at the geography of Canada, we're looking at a vast space with concentrated populated areas and wide open spaces and big distances to travel between them. We're also a trading nation, so we also have long distances to travel across the border. So from the trucking industry's perspective, we need the kind of flexibility that a mixed workforce can provide. If we were a populated area with short trade routes it would be different, but, for example, we haul newspaper from Quebec down to Memphis, Tennessee and that's a long way. That's how commerce goes and we've got to have the flexibility to keep that system going. Years ago, when the industry was regulated, flexibility wasn't as important. But you have to remember that it was also highly inefficient then, when carriers could only serve certain areas and had to transfer freight to other carriers as soon as they hit their boundaries. Truck transport ended up costing a lot more as a result, because sometimes freight would have to stop and be transferred up to ten times along the way. And that meant it could sometimes take freight two or three days to get somewhere instead of the one day it takes now. The point is, we're a trading nation and we have to compete with the U.S. We can't afford to price ourselves out of the marketplace. The shipper doesn't care why freight is late – he doesn't care if there's a snowstorm or an accident. So we need as much flexibility as we can get. The hours of service regulations and the highway safety rules are already more than sufficient when it comes to protecting drivers and their place of work. And as far as overtime pay goes, if we had to pay [longhaul] drivers overtime we'd just have to drop down the base rate of pay they're getting now and come up with another scheme to pay them the same amount. And they would end up feeling that someone was taking something away from them, because they're happy with the way they're getting paid now. Why reinvent the wheel? There's already a driver shortage – if we don't offer what the drivers want they won't come work for us.*