

TRANSPORTATION APPEAL TRIBUNAL OF CANADA

BETWEEN:

629453 B.C. Ltd., Applicant

- and -

Minister of Transport, Respondent

LEGISLATION:

Canada Shipping Act, 2001, S.C. 2001, c. 26, , para. 106(2)(b)

Review Determination
C. Michael Keefe

Decision: August 31, 2011

Citation: *629453 B.C. Ltd. v. Canada (Minister of Transport)*, 2011 TATCE 22 (Review)

Heard at Vancouver, British Columbia, on August 3, 2011

Held: The Minister did not prove, on a balance of probabilities, the allegation that the Applicant, 629453 B.C. Ltd., violated paragraph 106(2)(b) of the *Canada Shipping Act, 2001*. Consequently, the monetary penalty of \$6 000 set out in the Notice of Violation of February 7, 2011 is dismissed.-

I. BACKGROUND

[1] On February 7, 2011, the Minister of Transport ("Minister") issued a Notice of Violation ("Notice") to the Applicant, 629453 B.C. Ltd., for a violation of paragraph 106(2)(b) of the *Canada Shipping Act, 2001* ("Act"). Schedule A of the Notice states the following:

On or about September 24, 2010, at or near the city of Vancouver in the province of British Columbia, 629453 B.C. Ltd., being the authorized representative of a Canadian vessel, namely the M.V. "Star of Vancouver", failed to ensure that every term or condition attached to a Canadian maritime document issued in respect of the vessel or its machinery or equipment is met as required under Part 4

of the *Canada Shipping Act, 2001*, thereby contravening paragraph 106(2)(b) of that Act.

In particular, the vessel engaged on a voyage without valid portable fire extinguishers and the fixed smothering system (validity of service date expired in April 2010) as required by Section 10 of the *Fire Detection and Extinguishing Equipment Regulations*.

Penalty: \$6 000

[2] On March 15, 2011, James MacMillan, acting on behalf of 629453 B.C. Ltd., filed a request for a review of the Minister's decision with the Transportation Appeal Tribunal of Canada ("Tribunal").

II. STATUTES AND REGULATIONS

[3] Paragraphs 106 (1)(a) to (c) and 106(2)(a) and (b) , paragraphs 120(1)(c) and (g), and paragraph 121(1)(s) of the *Act* provide the following:

106. (1) The authorized representative of a Canadian vessel shall

(a) ensure that the vessel and its machinery and equipment meet the requirements of the regulations made under this Part;

(b) develop procedures for the safe operation of the vessel and for dealing with emergencies; and

(c) ensure that the crew and passengers receive safety training.

(2) The authorized representative of a Canadian vessel shall ensure that

(a) the vessel and its machinery and equipment are inspected for the purpose of obtaining all of the Canadian maritime documents that are required under this Part; and

(b) every term or condition attached to a Canadian maritime document issued in respect of the vessel or its machinery or equipment is met.

120. (1) The Governor in Council may, on the recommendation of the Minister, make regulations respecting the safety of vessels or classes of vessels and of persons on board or loading or unloading a vessel, including regulations

...

(c) respecting the design, construction, manufacture, maintenance, storage, testing, approval, arrangement and use of a vessel's or a class of vessels' machinery, equipment and supplies;

...

(g) respecting inspections and the testing of vessels, or classes of vessels, and their machinery, equipment and supplies;

121. (1) Every person who, or vessel that, contravenes any of the following commits an offence:

...

(s) a provision of the regulations made under this Part.

[4] Subsections 2(1), paragraphs 10(1)(a) and 11(c), (h), (i), (j) and (l) of the *Fire Detection and Extinguishing Equipment Regulations (Fire Regulations)* provide the following:

2. (1) In these Regulations,

"*inspector*" means a steamship inspector appointed under the Act;

...

10. (1) Ships that are

(a) passenger steamships over five tons, gross tonnage,

...

shall undergo annual inspection of fire extinguishing equipment as set forth in section 11.

11. Whenever a ship is inspected, the following procedures apply:

...

(c) in the case of ships fitted, in machinery or cargo spaces, with fixed gas fire smothering installations,

(i) the operating gear, gas distribution system and every audible alarm fitted to warn of the imminent release of gas shall be examined and tested,

(ii) the quantity of gas in every gas cylinder in such installation shall be determined

(A) by weighing, or

(B) where the temperature of the gas cylinder and its contents does not exceed 28°C, by weighing or by a liquid level detector,

...

(h) in the case of portable and non-portable fluid fire extinguishers, that is to say, those discharging water or foam, the operating mechanism and hose shall be examined and the extinguishers shall be emptied and recharged; and where the inspector has reason to doubt the condition of an extinguisher it shall be tested by hydraulic pressure to 2 068 kPa, and the date this test was carried out shall be marked on the extinguisher;

(i) every gas extinguisher shall

(i) be weighed to determine the quantity of gas in the extinguisher,

(ii) where it contains less than 90 per cent of its rated full capacity of gas, be recharged to its rated full capacity, and

(iii) where it is to be recharged and, according to the markings on the extinguisher, five or more years have elapsed since the date of the last hydraulic test, be emptied and hydraulically tested and the date of the test shall be stamped on the extinguisher;

(j) dry chemical extinguishers shall be examined to ensure that they contain the specified weight of dry chemical and that they are in good operating condition; the cartridge shall be removed and weighed, and shall be renewed if it weighs 14 g less than the amount stamped on the cartridge;

...

(l) in lieu of examining or witnessing tests of fire extinguishing equipment an inspector may, at his discretion, accept as proof of such an examination or test,

(i) in the case of a fixed fire-smothering installation or a fire extinguisher in which the extinguishing medium is stored under pressure, a certificate that attests to the examination or test issued by a company engaged in the manufacture or testing of fire-extinguishing equipment, and

(ii) in the case of a fire extinguisher of a type other than those described in subparagraph (i), a written statement that attests to the examination or test signed by the person who was in charge of the examination or test;

[5] Subsections 2(1) and 10(1) of the *Vessel Certificates Regulations* ("VCRs"), provide the following:

2. (1) These Regulations apply in respect of Canadian vessels everywhere and foreign vessels in Canadian waters.

10. (1) No vessel shall engage on a voyage unless it holds a certificate issued under subsection (2).

III. ELEMENTS TO BE PROVEN

[6] Based on the Notice, I identified the following elements to be proven by the Minister:

1. On or about September 24, 2010, the vessel M.V. *Star of Vancouver* ("*Star of Vancouver*") was engaged in service.
2. During the above service, the vessel failed to meet a term or condition attached to one of its Canadian maritime documents.

IV. PRELIMINARY MATTERS

[7] The Minister's representative raised two preliminary matters. Firstly, he stated that the Canadian maritime document mentioned in Schedule "A" of the Notice is the vessel's Inspection Certificate. Secondly, he stated that Transport Canada Marine Safety ("TCMS") takes the position that the phrase "a term or condition attached to a Canadian maritime document" means "... all of the requirements that are required to be followed for the issuance of that certificate..."

[8] The Applicant expressed concern over the Minister's second submission, stating that he had only recently been informed of this matter and he was unsure if that information was grounds for dismissal or if he should retain counsel.

V. EVIDENCE

A. Minister of Transport

(1) Abdulla Omar Siddique

[9] At the time of the alleged violation, Abdulla Omar Siddique was employed by TCMS as a Senior Marine Safety Inspector in Vancouver, B.C. He testified that on September 24, 2010, while conducting an inspection on board the *Star of Vancouver*, he noticed that the tags on the fire extinguishers did not have valid dates. Four photographs taken by Mr. Siddique, showing those tags, were entered as evidence (Exhibits M1-1, M1-2, M1-3 and M1-4).

[10] Mr. Siddique explained that Exhibit M1-1 shows a fire extinguisher having a tag on it that indicates its next inspection date to be April 2010. He explained that Exhibit M1-2 shows part of the engine room fixed fire smothering system and that Exhibits M1-3 and M1-4 were

photographs of other fire extinguishers. He testified that all tags had inspection due dates of April 2010.

[11] Mr. Siddique testified that at the time of his inspection, on September 24, 2010, the vessel's Inspection Certificate was valid, having been issued on October 30, 2009, by Gulshan Puri, a Steamship Inspector. A photocopy of that Inspection Certificate was entered as Exhibit M-2. On the reverse side of the Inspection Certificate is a Note (5) that Mr. Siddique read into the record:

The validity of this certificate shall be contingent on the log card of each inflatable life raft carried being endorsed annually by the supplier's accredited serviceman and the servicing of all firefighting equipment and the replacement of pyrotechnics by the prescribed dates.

[12] Mr. Siddique testified that he contacted the Marine Communications and Traffic Services ("MCTS") requesting information on the *Star of Vancouver's* movements for September 23, 2010. This information was provided to him via an e-mail message from Bruce Ricketts, Supervisor, Vancouver MCTS (Exhibit M-3). Mr. Siddique explained that the fifth last entry in the list received from Mr. Ricketts, is a record of the *Star of Vancouver's* departure from False Creek at 19:41 hours on September 23, 2010.

[13] There was no cross examination of this witness.

B. Applicant

(1) James MacMillan

[14] James MacMillan testified that the ship had sailed "...without the tags being... reading correctly." He explained that it was his previous understanding that the tags were current and that there might have been confusion on the part of the company hired to perform the inspections. Mr. MacMillan referred to an e-mail message he had received from David Craig, Safety Service Manager of Wilhelmsen Ships Service, the company hired to perform inspections on his firefighting equipment (Exhibit A-1). He also testified that a Wilhelmsen service technician verbally indicated that the fire extinguishing equipment inspection on the *Star of Vancouver* had been completed in the spring of 2010.

[15] Mr. MacMillan testified that his company owns two ships, the *Pride of Vancouver* and the *Star of Vancouver*. The TCMS Inspection Certificate for the *Pride of Vancouver* expires in the spring of each year while the TCMS Inspection Certificate for the *Star of Vancouver* expires in the fall of each year. Since 2003, he has arranged for the fire extinguishing equipment on both ships to be inspected in the spring of each year around the time that TCMS is inspecting the *Pride of Vancouver*. He testified that when the TCMS inspector attends on board the *Pride of Vancouver* in the spring he would also pick up the fire equipment inspection certificate for the *Star of Vancouver*. For some reason this certificate was not asked for by, nor offered to, the TCMS Inspector in the spring of 2010.

[16] Mr. MacMillan testified that the crew on the *Star of Vancouver* advised him they believed the fire extinguishing equipment had been inspected in the spring of 2010 and this is why they believed the date of April 2010 on the tags was the date of inspection.

[17] Mr. MacMillan testified there is a pre-departure checklist the crew uses prior to each sailing and an inspection of the gauge on the fire extinguishing equipment is one of the items on that checklist.

VI. ARGUMENTS

A. Minister of Transport

[18] The Minister's representative submits that the defence of due diligence has not been established. He submits that if the Applicant was relying on someone to check the fire extinguishing equipment and it was not checked, that the Applicant should realize this. As well, the tags on the equipment indicate an expiry date of April 2010 and not an inspection completed date.

[19] With reference to Note (5) on the reverse of the Inspection Certificate, the Minister's representative submits that the "prescribed date" is April 2010 while the offence took place in September 2010 and therefore "...that note – that condition was violated."

[20] He submits "...that a condition attached to a Canadian maritime document doesn't necessarily mean the words written upon it. In other words, there are other conditions that are attached to a Canadian maritime document other than the words on it."

[21] In this particular case, he submits that compliance with the *Fire Regulations* is a condition attached to the Inspection Certificate. And within the *Fire Regulations* at subsection 10(1) is a requirement for passenger ships to undergo an annual inspection of their fire extinguishing equipment.

[22] With regard to the amount of the sanction, the Minister's representative stated that it was set at \$6,000 on the basis of TCMS policy, which is the policy minimum for a company's first offence.

B. Applicant

(1) James MacMillan

[23] James MacMillan submits that he believed the inspection was complete and current. Two technicians had attended on board ship and they left him with the impression that the inspection had been completed. He explained that there were three aspects to the monitoring of the fire extinguishing equipment scheduling; his partner monitoring contractor scheduling, the ship's staff performing regular checks, and the practice of passing over the *Star of Vancouver's* equipment certificates to TCMS while the *Pride of Vancouver* undergoes its annual inspection.

None of these practices picked up on the fact that the inspection tags indicated that the fire extinguishing equipment was overdue for inspection.

[24] He submits that the ship was not sailing without fire protection and referred to three of the photographs (Exhibits M1-1, M1-3, M1-4) that show the extinguisher content gauge pointers indicating in the green section of the gauge.

[25] As regards to sanction, he indicates that his operation has had over 20 years of safe operation, the violation was accidental as opposed to intentional, and there was no financial reason for not having it done as the cost to inspect the systems was only 60 dollars. Mr. MacMillan further submits his operation is very small, restricted to short harbour cruises totalling less than 100 cruises per year.

VII. ANALYSIS

[26] The e-mail message from MCTS with attached record of the movements of the *Star of Vancouver* on September 23, 2010, indicates to me that the ship was engaged in service on that date (Exhibit M-3). Therefore the first element of the violation is proven.

[27] The Applicant did not object, and I accept, that the Canadian maritime document referred to in the Notice, and as brought forward by the Minister's representative as a preliminary matter, is the Inspection Certificate for the *Star of Vancouver*.

[28] I note that the vessel Inspection Certificate (Exhibit M-2) is for a passenger vessel. It states the vessel's name as M.V. *Star of Vancouver*, its gross tonnage as 136.00. The Inspection Certificate was issued in Vancouver on October 30, 2009, and is valid until October 29, 2010.

[29] As the *Star of Vancouver* is a passenger ship of over five tons, gross tonnage, it is, pursuant to subsection 10(1) of the *Fire Regulations*, subject to an annual inspection. As the testimony of Mr. Siddique indicates that the vessel had a fixed gas smothering system in the engine room and portable dry chemical extinguishers elsewhere, the annual inspection had to have included, among other things, the requirements of paragraphs 11(c), (h), (i) and (j) of the *Fire Regulations*.

[30] The Applicant has testified that members of his crew inspect the fire extinguishing equipment prior to each departure. It appears that those inspections were limited to a viewing of the gauge on each of the portable fire extinguishers. My experience is that there is much more to the inspection of a portable fire extinguisher than what was described by the Applicant. There was no testimony from the Applicant that the vessel's staff ever inspected the fixed fire smothering equipment.

[31] The inspection described by the Applicant does not qualify as being adequate to meet the above referenced sections of the *Fire Regulations*. Paragraph 11(1)(i) specifically requires the testing of the fixed system to be done by a company engaged in such testing.

[32] Exhibits M1-1, M1-3 and M1-4 all show by way of punch holes in the appropriate boxes on the tags, that those portable extinguishers were inspected in April 2009. Exhibit M1-2 shows part

of the fixed fire fighting gas cylinders having the same inspection date of April 2009. The tags on Exhibits M1-1, M1-3 and M1-4 show a "next inspection" date of April 2010.

[33] The following quote is taken from the e-mail message from Wilhelmsen Ships Service to Mr. MacMillan (Exhibit A-1):

During the last visit to the vessels we used two different technicians, one tech was to return and complete the work.

A different tech returned and was mistakenly informed that it was not required on the vessel because the other tech did it. There was confusion regarding the dates on the service tags.

[34] This clearly indicates to me that the inspection was not completely carried out. The tags shown in Exhibit M-1 are further proof of this.

[35] The Minister's representative has proven that the *Star of Vancouver* failed to meet the requirement of having an annual inspection of its fire extinguishing equipment as per subsection 10(1) of the *Fire Regulations*.

[36] Mr. MacMillan has claimed that he and his employees exercised due diligence in attempting to ensure compliance with the *Fire Regulations*.

[37] Subsection 254(1) of the *Act* states:

254.(1) No person may be found guilty of an offence under this Act if the person establishes that they exercised due diligence to prevent its commission.

[38] A person who seeks the benefit of the defence provided by subsection 254(1) of the *Act* must prove, on a balance of probabilities, that all due diligence had been exercised to prevent the contravention. In order to avoid liability, it must be shown that the Applicant or others acting on his behalf, took all reasonable care to avoid the commission of the offence.

[39] It is apparent to me that anyone at all familiar with fire extinguishing equipment inspection tags and competent to inspect such equipment would easily see that the equipment in this case was overdue for inspection. I cannot accept that a box labelled "Next Inspection Due" with the date April 2010 written inside it could be mistaken as being the inspection completed date. And further, relying on a contractor with no apparent follow-up as to the sufficiency of his work, speaks against the defence of due diligence.

[40] With regard to Note (5) on the reverse of the Inspection Certificate, I find, in this particular case, that it clearly indicates the Inspection Certificate became invalid upon the lapsing of one year from the date of the last inspection of the fire extinguishing equipment. That is to say, the Inspection Certificate for the *Star of Vancouver* became invalid sometime prior to the end of April 2010. This is an offence under paragraph 106(1)(a) of the *Act* in as much as the vessel was

engaged in service and did not comply with subsection 10(1) of the *Vessel Certificates Regulations* once the ship's Inspection Certificate was no longer valid.

[41] Note (5) is a condition attached to the Inspection Certificate that indicates only that the continued validity of the certificate is contingent upon the servicing, in this case, of the firefighting equipment. Note (5) applies to the Inspection Certificate and not to the ship or its equipment.

[42] I note that, on the face of the Inspection Certificate, there is a box entitled "Limitation(s) on use of certificate" and another box entitled "Additional vessel limitations". The text in both of these boxes indicates that the vessel is restricted in its area of operations. The second box has further text within it that requires the vessel to be manned in accordance with the *Marine Personnel Regulations* and that boat and fire drills are to be carried out as required by the *Boat and Fire Drill and Means of Exit Regulations*.

[43] It is my view that the phrase "terms and conditions" at paragraph 106(2)(b) of the *Act* refers to ship-specific provisions or requirements that, in this case, are not pre-printed on the Inspection Certificate. The basic Inspection Certificate form becomes modified by the introduction of terms and conditions. And, for that reason, I take the text within the above mentioned two boxes to be the "terms and conditions" referred to in paragraph 106(2)(b) of the *Act*. My view is that "terms and conditions" on an inspection certificate limit, restrict or possibly enhance some aspect relating to the ship or its operation.

[44] The Minister's representative, in his second preliminary matter, has put forward the notion that the requirement to comply with all of the requirements of the various regulations is a term and condition of the Inspection Certificate.

[45] I do not accept that interpretation. The requirement to comply with the Regulations arises from paragraph 106(1)(a) of the *Act* which I quote for clarity:

106.(1)(a) The authorized representative of a Canadian vessel shall ensure that the vessel and its machinery and equipment meet the requirements of the regulations made under this part.

[46] Paragraph 106(2)(b) of the *Act* relates to one of the authorized representative's duties regarding maritime documents. For clarity I quote it below:

106.(2)(b) The authorized representative of a Canadian vessel shall ensure that every term or condition attached to a Canadian maritime document issued in respect of the vessel or its machinery or equipment is met.

[47] To suggest that the requirement to meet, in this case, the *Fire Regulations*, falls under paragraph 106(2)(b) is to make paragraph 106(1)(a) repetitive and redundant. I do not believe this is the intended purpose of Parliament. It is my belief that the requirement for the annual inspection of the fire extinguishing equipment falls under paragraph 106(1)(a) and not 106(2)(b).

Similarly, compliance with the requirements of any other regulation made pursuant to Part 4 of the *Act* also falls under paragraph 106(1)(a) and not 106(2)(b).

[48] I believe the Applicant has been somewhat misled by having been charged under paragraph 106(2)(b), a failure in a duty regarding a Canadian maritime document as opposed to paragraph 106(1)(a), a failure in a duty with respect to related regulations, including the *Fire Regulations*. I believe that the alleged offence has not been identified by the relevant part of the *Act*. For these reasons, the second element of the case against the Applicant has not been proven.

VIII. DETERMINATION

[49] The Minister did not prove, on a balance of probabilities, the allegation that the Applicant, 629453 B.C. Ltd., violated paragraph 106(2)(b) of the *Canada Shipping Act, 2001*. Consequently, the monetary penalty of \$6 000 set out in the Notice of Violation of February 7, 2011 is dismissed.

August 31, 2011

C. Michael Keefe

Member