TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Canada (Minister of Transport) v. Océan Remorquage Trois-Rivières Inc.*, 2021 TATCE 16 (Ruling)

TATC File No.: MQ-0364-37

Sector: Marine

BETWEEN:

Canada (Minister of Transport), Appellant

- and -

Océan Remorquage Trois-Rivières Inc., Respondent

[Official English translation]

Heard in:	Written submissions
Before:	Gavin Wyllie, Member (chairing) Caroline Desbiens, Member Patrick Vermette, Member
Rendered:	June 7, 2021

RULING ON A PRELIMINARY MOTION

Held: The respondent's preliminary motion is denied. The parties' written submissions in this appeal case must be submitted in accordance with the schedule established at the January 13, 2021, case management conference.

I. BACKGROUND

[1] This is an appeal of a determination by the Transportation Appeal Tribunal of Canada (Tribunal) rendered on August 3, 2016, regarding a Notice of Violation (Notice) issued by Transport Canada on July 9, 2014, containing two administrative penalties imposed on Océan Remorquage Trois-Rivières Inc. The two penalties are each in the amount of $7,800, for a total amount of $15,600.

[2] The two alleged violations are as follows (from Schedule A of the Notice):

> Violation no. 1
>
> On or around December 15, 2013, on the St. Lawrence River in the province of Quebec, the master of the vessel "André H" (O.N. 318301), Clea Chiasson, (CDN 7340X) failed to take all reasonable steps to ensure the safety of the vessel and of persons on board, in violation of subsection 109(1) of the Canada Shipping Act, 2001.
>
> Specifically, he failed to ensure that its voyage was planned properly, which caused two barges that it was towing to run aground.
>
> Under subsection 238(2) of the Canada Shipping Act, 2001 action is being taken against the O/N "André H" (O.N. 318301) as employer or agent of the master of the vessel in regard to this violation and is liable for the prescribed penalty.
>
> Violation no. 2
>
> On or around December 15, 2013, on the St. Lawrence River in the province of Quebec, Océan Remorquage Trois-Rivières Inc., being the authorized representative of the vessel "André H" (O.N. 318301), failed to develop procedures for the safe operation of the vessel and for dealing with emergencies, in violation of paragraph 106(1)(b) of the Canada Shipping Act, 2001.
>
> Specifically, during the towage operation, the vessel lost two of three barges, which caused these two barges to run aground on the north shore of the Gaspé Peninsula.

[3] In his review determination, the member dismissed both alleged violations, concluding that the Minister of Transport (Minister) had not proven, on a balance of probabilities, that Océan Remorquage Trois-Rivières Inc. contravened section 109 and paragraph 106(1)(b) of the *Canada Shipping Act, 2001 (CSA 2001)* on or about December 15, 2013, and, as a result, the penalties were cancelled.

[4] On September 1, 2016, the Minister (the appellant) appealed this determination with respect to the first violation. The Minister alleges that the member erred in law in his interpretation of section 109 of the *CSA 2001*.

[5] At a case management conference held on January 13, 2021, the appellant stated that the alleged error was in interpreting section 109 of the *CSA 2001* as requiring proof that the master of the vessel endangered both the vessel and the persons on board, thus requiring a cumulative endangerment of the vessel and the persons on board instead of one or the other.

[6] On September 2, 2016, Océan Remorquage Trois-Rivières Inc. (the respondent) filed a cross-appeal to the appeal of the member's review determination. It alleges that the member erred in fact and in law by not recognizing that the master of the vessel must first be the one responsible for the alleged offence in order for the employer to be responsible, by deciding that

the term "vessel" in section 109 includes the barges of a tug even though each of those barges constitutes a "vessel" within the meaning of the *CSA 2001* with separate registration certificates and/or by misunderstanding the establishment and extent of the causal link required between the alleged break by the master and the safety of the vessel and crew under the master's command.

[7] At the case management conference on January 13, 2021, the respondent submitted a motion to dismiss the appeal. The Tribunal established a schedule of written submissions by the parties to address this preliminary motion by the respondent.

A. Motion to dismiss the appeal

[8] On January 25, 2021, the respondent filed its motion. It requested the following with respect to the Minister's appeal of the first violation:

1. the striking out of the Minister of Transport's notice of appeal; or
2. the dismissal of the appeal; and
3. costs.

[9] In support of its motion to dismiss the appeal, the respondent relied on the following statutory provisions:

a. Rules 4 and 10 of the Transportation Appeal Tribunal of Canada Rules (TATC Rules);
b. sections 109, 229(1)(b), 232(1)(b) and 232.1(3) of the CSA 2001;
c. Rules 4 and 221 of the Federal Courts Rules; and
d. article 365 of the Code of Civil Procedure of Quebec, CQLR c C-25.01.

[10] In response to this motion, the appellant filed written submissions on February 4, 2021. In its reply, the respondent filed its final written submissions on February 11, 2021.

[11] In its motion to dismiss the appeal, the respondent argues that the appeal is certain to fail because even if the appellant were correct about its interpretation of section 109 of the *CSA 2001*, it would not overturn the Tribunal's determination since it deals with the alleged actions as set out in the Notice. In summary, the respondent contends that it was the appellant who decided to accuse the respondent of something that was not proven, namely that its employee, the master, had not taken all the necessary measures to ensure the safety of the persons on board the vessel. The respondent adds that the appellant had the opportunity to amend the Notice and drop this allegation if it felt that this element was not necessary to establish the violation or was not supported by the evidence.

[12] The appellant argues that the respondent does not quote the entire Notice and omits an important part of it, namely the following: "Specifically, he failed to ensure that its voyage was planned properly, which caused two barges that it was towing to run aground." The appellant therefore submits that the Notice, after highlighting the wording of section 109 of the *CSA 2001*, makes it clear that it was the master's failure to properly plan his voyage that caused the barges to run aground.

[13] According to the appellant, it is clear that the Minister has clearly and specifically indicated that it was the master's duty to ensure the safety of the vessel that was at issue and the reason for issuing the contravention of section 109 of the *CSA 2001*. The appellant adds that this issue, combined with the interpretation of section 109, is the main subject of the dispute on appeal, in that the Tribunal must analyze section 109 and mainly evaluate the full scope of the Notice by reading it in its entirety and not by limiting itself to the first paragraph of the said document, as the respondent does, in order to justify its motion to dismiss the appeal. Accordingly, the appellant requests that the respondent's motion to dismiss the appeal be denied and that the appeal panel be allowed to hear arguments and consider the case on appeal.

II. ANALYSIS

[14] This appeal panel has proceeded to consider this preliminary motion and to make its decision on the basis of the following principles:

i. Rules 4 and 10 of the *TATC Rules* which govern the Tribunal provide that the Tribunal may take any action it considers necessary to enable it to settle the matter effectively, **completely and fairly** with regard to any procedural matter not provided for by the *Transportation Appeal Tribunal of Canada Act*, the *TATC Rules* or, in this case, the *CSA 2001* (Rule 4), and to enable this Tribunal to process any application for relief or order brought before the Tribunal under the *CSA 2001* (through section 2(2) of the *Transportation Appeal Tribunal of Canada Act*);

ii. the criteria for striking out pleadings set out in Rule 221(1) of the *Federal Court Rules* on which this panel may rely, which provides that a pleading may be struck out **if it discloses no reasonable cause of action**;

iii. the applicable Canadian jurisprudence on the striking out of pleadings. *Hunt v. Carey Canada Inc*, [1990] 2 SCR 959 (at p. 980), requires the Tribunal to consider whether it is "**plain and obvious**" on the face of the pleadings **that the appeal could not be allowed or produce a useful result**. Thus, it is not for the Tribunal, on a motion to strike, to reach a decision as to the plaintiff's chances of success (p. 961 of the same decision).

[15] The appeal panel denies the motion to dismiss the appeal. The appeal panel is of the view that it is not plain and obvious that the appeal would fail, on its face, since it requires an analysis of the Notice and section 109 of the *CSA 2001*. Moreover, it would not be fair at this stage to dismiss the appeal without a full or complete assessment of the context of the Notice and the parties' arguments.

[16] Indeed, the case on appeal requires an analysis of section 109 of the *CSA 2001* and its application in this case, as well as the meaning to be given to the Notice in order to identify the elements of the offence that were to be proven and to assess the member's position regarding this issue in his review determination.

[17] In particular, the respondent submits that the appeal is certain to fail because only one interpretation of the wording of the Notice would be possible in the circumstances, and that interpretation could lead to only one conclusion, that the Minister had to prove both elements of the wording of section 109 of the *CSA 2001* because of the choice of wording used in the Notice.

After highlighting the wording of section 109, the appellant submits that the Notice makes it clear that it was the master's failure to properly plan his voyage that caused the barges to run aground that is the subject of the alleged offence.

[18] Thus, the debate is over the meaning of the phrase "take all reasonable steps to ensure the safety of the vessel and of persons who are on board" in section 109 of the *CSA 2001* to determine whether both elements had to be proven in this case or whether the presence of only one of the two elements was sufficient to prove an offence within the meaning of section 109 and the Notice.

[19] Two interpretations worthy of analysis are submitted with respect to the Notice and section 109 of the *CSA 2001*. The argument raised by the respondent in its motion to dismiss the appeal relates directly to the merits of the Minister's appeal, which asks the appeal panel to adopt a particular interpretation of section 109 and the contents of the Notice in this case. At this preliminary stage of the appeal process, we are not in a position to determine which of the interpretations offered by the parties with respect to section 109 and the text of the Notice is correct in this case and whether the appeal has merit. The appeal panel therefore rejects the respondent's argument that it is plain and obvious that the appeal fails on the very face of the Notice and concludes that it would be premature to decide that the appeal discloses no reasonable cause of action given the two interpretations submitted that merit analysis.

[20] In its motion to dismiss, the respondent sought an award of costs. Since the respondent's motion to dismiss is denied, this request is no longer justified. It is important to remember that costs are only awarded in specific cases under section 19 of the *Transportation Appeal Tribunal of Canada Act* and that if this panel had granted the respondent's motion to dismiss the appeal, it would have had to show that the appellant's appeal was frivolous or vexatious. Since this panel decided that it was not plain or obvious that the appeal would fail on the face of it, it stands to reason that the appeal could not be considered frivolous.

III. DECISION

[21] The respondent's preliminary motion is denied. The parties' written submissions in this appeal case must be submitted in accordance with the schedule established at the January 13, 2021, case management conference.

June 7, 2021

(Original signed)

Reasons for the ruling: Gavin Wyllie, Member (chairing)

Concurred by: Caroline Desbiens, Member

Patrick Vermette, Member

Appearances

For the Minister:	Martin Forget
For the Respondent:	Richard Desgagnés