



TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Bertlan Inc. v. Canada (Minister of Transport)*, 2022 TATCE 2 (Review)

TATC File No.: MQ-0624-37

Sector: Marine

BETWEEN:

Bertlan Inc., Applicant

- and -

Canada (Minister of Transport), Respondent

[Official English translation]

Heard by: Videoconference on September 8, 2021

Before: Capt. Marc-André Poisson, Member

Rendered: January 17, 2022

REVIEW DETERMINATION AND REASONS

Held: The Minister of Transport has proven, on a balance of probabilities, that the applicant contravened the *Small Vessel Regulations* and section 87 of the *Canada Shipping Act, 2001*. The Minister's decision to impose a monetary penalty is upheld.

The total amount of \$3,250 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of service of this determination.

I. BACKGROUND

[1] On August 17, 2020, Transport Canada (TC), through Inspector Gilbert Gosselin, issued a Notice of Violation (Notice) against Bertlan Inc. for two violations totalling \$3,250. Schedule A of the Notice states the following:

[TRANSLATION]

Violation 1

On or about August 23, 2019, in the Gulf of St. Lawrence at L’Anse-à-Beaufils, in the province of Quebec, BERTLAN INC., being the authorized representative of the Canadian vessel *Azul* (O.N. 823866), failed to ensure that the vessel and its equipment met the requirements of the regulations made under Part 4 of the *Canada Shipping Act, 2001*, thereby contravening paragraph 106(1)(a) of said Act.

In particular, the vessel did not have on board all of the safety equipment required by the *Small Vessel Regulations*, SOR/2010-91, to carry passengers.

BERTLAN INC. is therefore liable to pay the administrative monetary penalty provided for at item 44 of Part I of the Schedule to the *Administrative Monetary Penalties and Notices (CSA 2001) Regulations*.

Penalty: \$1,625

Violation 2

On or about August 23, 2019, in the Gulf of St. Lawrence starting from the port at L’Anse-à-Beaufils, in the province of Quebec, Hubert Langevin was employed on board a Canadian vessel, the *Azul* (O.N. 823866), for which a certificate is required under Part 3 of the *Canada Shipping Act, 2001*, without being in possession of the required certificate, in contravention of section 87 of said Act.

In particular, Hubert Langevin held the position of master on a passenger-carrying voyage without holding the certificate of competency required for that type of voyage.

Pursuant to subsection 238(2) of the *Canada Shipping Act, 2001*, BERTLAN INC., as employer or agent, is liable for the violation committed by the master of the vessel in the course of the master’s employment and is therefore liable for the administrative penalty provided for at item 26 of Part 1 of the Schedule to the *Administrative Monetary Penalties and Notices (CSA 2001) Regulations*, SOR 2008/97.

Penalty: \$1,625

[2] On October 15, 2020, Hubert Langevin, as senior director of Bertlan Inc., filed a request for review of the Notice with the Transportation Appeal Tribunal of Canada.

[3] The review hearing was held by videoconference on September 8, 2021. Mr. Langevin represented the owner, Bertlan Inc., and himself. The Minister of Transport (Minister) was represented by Martin Forget.

II. ANALYSIS

A. Issues

[4] There are two issues to be determined in this case: first, did the applicant fail to ensure that the vessel and its equipment met the requirements of the *Small Vessel Regulations* to carry passengers on or about August 23, 2019? If so, is the amount of the penalty justified?

[5] Second, did Mr. Langevin act as master on a passenger-carrying voyage on or about August 23, 2019, without holding the certificate of competency required for that type of voyage pursuant to section 87 of the *Canada Shipping Act, 2001*? If so, is the amount of the penalty justified?

[6] For both issues, the Minister must first establish that Bertlan Inc. operated a commercial vessel on or about August 23, 2019, as that is a prerequisite for application of the *Small Vessel Regulations* and for requiring a Master Certificate of Competency for the voyage.

B. Legal framework

[7] I have considered the following legal framework to support my argument and render my decision on the two issues.

[8] Pursuant to paragraph 229(1)(b) of the *Canada Shipping Act, 2001 (CSA 2001)*, if the Minister has reasonable grounds to believe that a violation has been committed, the Minister may issue a notice of violation.

[9] Pursuant to subsection 232.1(3) of the *CSA 2001*, in the case of a request for review on the facts of a violation, the burden is on the Minister to establish that the person or vessel committed the violation.

[10] Pursuant to subsection 232.1(4) of the *CSA 2001*, the member may either confirm the Minister's decision or, subject to any regulations made under paragraph 244(h), substitute the Minister's own determination.

[11] Pursuant to subsection 252(1) of the *CSA 2001*, in the prosecution of an offence, it is sufficient proof that the act or omission that constitutes the offence was committed by the master or any person on board.

[12] As stipulated in subsection 232.1(3) of the *CSA 2001*, the burden is on the Minister to establish all elements of the alleged violations. In this case, three elements must be proven:

- a. First, it must be established that the sailing ship *Azul* (O.N. 823866) was operated by Bertlan Inc. as a commercial vessel and not a pleasure craft.
- b. The Minister must subsequently prove that the vessel did not carry on board all of the safety equipment required pursuant to the *Small Vessel Regulations*.

- c. Finally, the Minister must prove that Mr. Langevin held the position of master on a commercial vessel, in this case the *Azul*, without holding a certificate of competency as required under section 87 of the *CSA 2001*.

[13] I will address the first two items under the first violation and the last one under the second violation.

C. Violation 1 – The Minister has established that the vessel did not carry all the safety equipment required pursuant to the *Small Vessel Regulations*

(1) The respondent presented the following legal framework

[14] If a vessel is used for pleasure, it is defined as a “pleasure craft” under section 2 of the *CSA 2001* if it does not carry passengers within the meaning of the *Act*.

[15] Pursuant to section 2 of the *CSA 2001*, “the master, a member of the crew or a person employed or engaged in any capacity on board the vessel on the business of that vessel” is not considered a passenger. Subparagraph 2(b)(ii) stipulates that a person not be considered a passenger “if the vessel is used exclusively for pleasure and the guest is carried on it without remuneration or any object of profit”.

[16] Pursuant to subsection 106(1) of the *CSA 2001*, the authorized representative of a Canadian vessel must ensure that the vessel and its machinery and equipment meet the requirements of the *Small Vessel Regulations*. As stated in paragraph 2(1)(b) of the *Small Vessel Regulations*, the owner of a sailing ship of not more than 15 gross tonnage that carries not more than 12 passengers must consider the vessel to be a passenger-carrying vessel and must comply with those regulations.

[17] Pursuant to section 3 of the *Small Vessel Regulations*, when an authorized representative permits a vessel to be used for carrying passengers, the authorized representative must ensure that the safety equipment is carried on board and that this equipment meets the requirements of the *Small Vessel Regulations*. The required equipment is described in section 740 and subsections 413(1), 414(1), 736(1) and 740(1) of the *Small Vessel Regulations*, and includes a sound-signalling appliance, a fire axe, a fire bucket and an automatic high bilge-water alarm.

[18] In addition, pursuant to subsection 401(1) of the *Small Vessel Regulations*, the operator of a passenger-carrying vessel of not more than 15 gross tonnage (subsection 400(1) of the regulations) must, “before the vessel leaves a place where passengers embark, ensure that all passengers are briefed in either or both official languages, according to their needs, on the safety and emergency procedures relevant to the type of vessel and its length”.

[19] The respondent also referred to section 403 of the *Small Vessel Regulations*, which states that a person who operates a passenger-carrying vessel must ensure that “equipment is carried on board the vessel or that procedures are established to protect all persons on board from the effects of hypothermia or cold shock resulting from swamping, capsizing or falling overboard.”

(2) Evidence and submissions

[20] The Minister's first witness was Inspector Hugues Thibault of TC Marine Safety. In his testimony, Mr. Thibault stated that he contacted Mr. Langevin on August 22, 2019, and confirmed with him that he could go out to sea the next day on the sailing ship *Azul*, which is owned by Bertlan Inc. The voyage began at approximately 7:00 a.m. on August 23, 2019, in L'Anse-à-Beaufils.

[21] Mr. Thibault testified that Mr. Langevin took the helm of the *Azul* as it left the dock for the August 23, 2019, voyage. Mr. Thibault took the helm of the *Azul* during the voyage once the vessel had left the harbour and was in sailing mode. Mr. Langevin took the helm once again to return to port and dock the *Azul*.

[22] Mr. Thibault indicated that he paid Mr. Langevin \$150 (Exhibit M-5) and signed a rental agreement (Exhibit R-2) at the end of the voyage. The amount, agreed upon by the parties prior to the voyage, covered three hours aboard the *Azul* at \$50 per hour.

[23] According to Inspector Thibault, he should be considered a passenger and Mr. Langevin should be considered the master of the *Azul* during the August 23, 2019, trip.

[24] The Minister called a second witness, Inspector Simon Pelletier of TC Marine Safety. Mr. Pelletier indicated that the sailing ship *Azul*, with a tonnage of 9.5, carried a passenger, in this case, Inspector Thibault, on or about August 23, 2019. Mr. Pelletier maintained that Bertlan Inc. was therefore operating a commercial vessel within the meaning of the *Act* given that it meets the criteria of "a passenger-carrying vessel of not more than 15 gross tonnage that carries not more than 12 passengers and is not a human-powered vessel" (paragraph 2(1)(b) of the *Small Vessel Regulations*).

[25] In his testimony, Inspector Pelletier stated that he visited the *Azul* and met with Mr. Langevin a week after the August 23, 2019, voyage. Inspector Pelletier indicated that he advised Mr. Langevin that the owner, Bertlan Inc. had violated the *CSA 2001*. He testified that he had inspected the *Azul* during his visit on board and observed numerous violations of the *Small Vessel Regulations*. Mr. Pelletier listed the flaws that he had reported to Mr. Langevin (Exhibit M-11, Small Vessel Detailed Compliance Report), including the lack of safety procedures and the absence on board of a sound-signalling appliance, properly installed and functioning high bilge-water alarms, and a fire axe and fire bucket.

[26] Inspector Pelletier stated that he explained to Mr. Langevin all the elements leading to the violations and the fact that Bertlan Inc. had contravened sections 3 and 403, subsections 400(1), 401(1), 414(1) and 736(1), and paragraphs 413(1)(a), 740(a) and 741(1)(b) of the *Small Vessel Regulations*.

[27] Mr. Langevin cross-examined inspectors Thibault and Pelletier, made a statement after being sworn in, and was cross-examined by Martin Forget. Mr. Langevin agreed that money had changed hands between Inspector Thibault and himself in the amount of \$150, which is the equivalent of a fee for three hours on board the sailing ship *Azul* off the coast of

L’Anse-à-Beaufils on August 23, 2019. Mr. Langevin agreed that he took the helm to leave and return to dock, and that Mr. Thibault took the helm at sea.

[28] Mr. Langevin agreed that Inspector Pelletier met with him several times—five, six or seven times—prior to the August 23, 2019, trip and that he was aware of the equipment required for the *Azul* to legally carry passengers. However, he claimed that it was impossible to comply with all the equipment requirements of the *CSA 2001*, adding that they are “excessive”.

[29] Mr. Langevin agreed that he had received written notices. However, Mr. Langevin stated that he believes the August 23, 2019, outing should be considered an outing on a pleasure craft among friends. He rents and sails the *Azul* “for pleasure”.

[30] Mr. Langevin testified that he understood Inspector Pelletier’s interpretation of the *CSA 2001* prior to the alleged violation. He indicated, however, that he does not agree with TC’s interpretation. He insisted that the applicant operates the *Azul* as a pleasure craft. He introduced into evidence the *Small Commercial Vessel Safety Guide – TP 14070* (Exhibit R-1) and explained that the following section, in his opinion, supports his contention that Bertlan Inc. was operating a sailing ship (pleasure craft) and not a passenger-carrying vessel as defined in the *CSA 2001*:

If you are the owner, and you rent or charter the vessel without crew to someone else who uses it for pleasure, it is a pleasure craft. If you provide the master, or operate the vessel yourself, it is a commercial vessel.

(3) *Application of the law to the facts*

[31] The Minister demonstrated the following during testimony:

- A. Pursuant to section 105 and paragraph 106(1)(a) of the *CSA 2001*, the owner of a sailing vessel, operated as the *Azul* was on the August 23, 2019, voyage, must ensure that its machinery and equipment meet the requirements of the *Small Vessel Regulations*.
- B. Due to the operating conditions of the *Azul*, Bertlan Inc. cannot permit the use of its “vessel unless the safety equipment required by these Regulations is carried on board the vessel and the equipment meets the requirements of these Regulations”, as per section 3 of the *Small Vessel Regulations*.

[32] According to the respondent, the applicant received financial compensation in the amount of \$150 to carry a passenger on the *Azul* off the coast of L’Anse-à-Beaufils on August 23, 2019. The applicant, Bertlan Inc., was therefore operating a commercial vessel given that it carried a passenger, Inspector Thibault, who covered the cost of the voyage.

[33] The respondent also states that while at sea, the applicant failed to ensure that the vessel and its equipment met the requirements of the *Small Vessel Regulations*. The violations are listed in the Small Vessel Detailed Compliance Report.

[34] Based on his understanding of the *Small Commercial Vessel Safety Guide – TP 14070*, Mr. Langevin maintained that TC should consider the vessel a pleasure craft since it is used for pleasure. However, the guide states that “[i]f you provide the master, or operate the vessel

yourself, it is a commercial vessel”. Moreover, the notion of pleasure derived from one’s activities does not justify considering the *Azul* a pleasure craft under the *CSA 2001*. Rather, in order for the notion of pleasure to apply within the meaning of “pleasure craft” in section 2 of the *CSA 2001*, and for the vessel to be considered a pleasure craft, it must not carry passengers.

[35] I find that, on a balance of probabilities, the applicant, Bertlan Inc., was carrying a passenger within the meaning of the *CSA 2001* and was therefore operating a commercial vessel on or about August 23, 2019. Where a vessel is identified as commercial, the owner must comply with the requirements of the *Small Vessel Regulations*, which the applicant failed to do.

D. Violation 2 – The Minister established that Mr. Langevin held the position of master without holding a certificate of competency as required under section 87 of the *CSA 2001*

(1) The respondent supplemented the legal framework with the following provisions:

[36] Pursuant to section 87 of the *CSA 2001*, “[E]very person who is employed on board a Canadian vessel in a position in respect of which a certificate is required ... shall hold the certificate and comply with its terms and conditions.” Pursuant to paragraph 100(a) of the *CSA 2001*, the Governor in Council may specify “the positions that shall be occupied on board Canadian vessels, ... their minimum number and the types and classes of Canadian maritime documents that persons in those positions shall hold”.

[37] Pursuant to subsections 207(1), 207(3), 212(2) and 212(4) of the *Marine Personnel Regulations*, the authorized representative of a vessel must ensure that the vessel has the minimum validly certified complement, including a master. In the case before this tribunal, subsection 212(5) stipulates the certificate that must be held by the master. Specifically, it states:

212 (5) Every person who holds a certificate set out in column 1 of table 1 to this section may perform the duties of a position referred to in any of columns 2 to 5 on board a vessel that is engaged on a class of voyage set out in the heading of the column that applies to that position, subject to any limitations indicated.

[38] Item 16 of table 1 to section 212 of the *Marine Personnel Regulations* includes the following:

Column 1 Certificate	Column 4 Near Coastal Voyage Class 2	Column 5 Sheltered waters Voyage
Master, Limited for a vessel of less than 60 gross tonnage	Master, on any vessel of less than 60 gross tonnage of a type, tonnage, area and period of operation specified on the certificate	Master, on any vessel of less than 60 gross tonnage of a type, tonnage, area and period of operation specified on the certificate

[39] Finally, pursuant to subsection 238(2) of the *CSA 2001*:

238 (2) A person or vessel is liable for a violation that is committed by an employee or agent of the person or vessel acting in the course of the employee’s employment or within the scope of the agent’s authority

(2) Evidence and submissions

[40] Inspector Thibault testified that Mr. Langevin held the position of master on the *Azul*. He explained the elements of exhibits M-7 and M-8 and demonstrated that the voyage took place on a vessel that was navigating in conditions and in an area requiring a master's certificate. Specifically, the respondent demonstrated the following:

- A. The voyage took place at L'Anse-à-Beaufils, an area of operation that meets the criteria set out in item 16 of the table to section 212 of the *Marine Personnel Regulations*.
- B. Every person who is employed on board a Canadian vessel in a position in respect of which a certificate is required must hold the certificate and comply with its terms and conditions, as stipulated in section 87 of the *CSA 2001*.
- C. The Minister may determine that a vessel owner must have a certified master on board in accordance with paragraph 100(a) of the *CSA 2001* and subsections 207(1), 212(2), 212(4) and 212(5), and paragraph 207(3)(a) of the *Marine Personnel Regulations*. In this case, given the area of operation of the *Azul*, the certificate requirement was for Master Limited, vessel of less than 60 gross tonnage.

[41] Inspector Thibault testified that Mr. Langevin does not hold a Master's certificate (Exhibit M-9).

[42] Mr. Langevin testified that he acted as a crew member and steered the *Azul* in and out of the harbour. He also stated that he has a Pleasure Craft Operator Card (Exhibit M-3) and does not have a Master's certificate. He added that requiring someone to hold a Master's certificate to take passengers on a sailing ship is "too much".

(3) Application of the law to the facts

[43] According to the respondent, the applicant operated the *Azul* for commercial passenger-carrying operations and operated a commercial vessel without a sufficient and competent crew, thereby contravening the requirements of the *CSA 2001*.

[44] In his testimony, Mr. Langevin stated that he operated the vessel. He was therefore engaged on board in duties on the business of the vessel, as stipulated in subparagraph 2(b)(i) of the *CSA 2001*. In my opinion, he held the position of master.

[45] I find that, on a balance of probabilities, on or about August 23, 2019, Bertlan Inc. received financial compensation to carry a passenger on board the sailing ship *Azul* off the coast of L'Anse-à-Beaufils. The applicant was therefore operating a commercial vessel and was required to ensure that it had on board a duly certified master pursuant to subsections 207(1), 207(3), 212(2) and 212(4) of the *Marine Personnel Regulations*. Mr. Langevin held the position of master on the voyage without holding a certificate of competency as required by section 87 of the *CSA 2001*.

[46] I also find that pursuant to subsection 238(2) of the *CSA 2001*, Bertlan Inc. is liable for the violation committed by Mr. Langevin.

E. Amount of penalties – aggravating factors

(1) Evidence and submissions

[47] Inspector Thibault concluded his testimony by explaining the amount of the penalties. He relied on Exhibit M-2, the Notice of Violation issued on August 17, 2020, and Exhibit M-10, the *Administrative Monetary Penalties and Notices (CSA 2001) Regulations*, and stated that TC had given the minimum penalty provided for in the penalty schedule for both violations, which is \$1,250.

[48] Inspector Thibault further testified that TC’s policy suggests increasing the penalty amount by 30 percent for repeat offences and that since Bertlan Inc. and Mr. Langevin had previously been issued notices of violation, 30 per cent was added to the two minimum penalty amounts of \$1,250. TC therefore issued a Notice of Violation for two penalties of \$1,625 each. Mr. Forget argued that the 30 per cent increase should be allowed given that TC considered the numerous notices of violation to be an aggravating factor as per existing policies.

[49] Inspector Pelletier maintained that he had advised Mr. Langevin on numerous occasions prior to the violation alleged in the Notice of Violation that he could not carry passengers within the meaning of the *Act*. In support of this contention, the respondent submitted evidence of an inspection report dated June 27, 2018 (Exhibit M-13); a letter dated June 28, 2018 (Exhibit M-14); and an email dated July 6, 2018 (Exhibit M-15), all of which were sent to Mr. Langevin (Bertlan Inc.).

[50] Inspector Pelletier concluded his testimony by recalling the elements of the Notice of Violation (Exhibit M-2), explaining the administrative penalties (Exhibit M-10) and making reference to **items 44** and **26** of Part I of the Schedule to the *Administrative Monetary Penalties and Notices (CSA 2001) Regulations*. According to the regulations, the penalty ranges from \$1,250 to \$25,000 for a violation of the *Small Vessel Regulations* (**item 44**) and from \$1,250 to \$5,000 for a violation of section 87 of the *CSA 2001* (**item 26**).

(2) Application of the law to the facts

[51] The Minister had advised Bertlan Inc. not to operate the *Azul* for carrying passengers unless it complied with the *CSA 2001*. The evidence presented (exhibits M-13, M-14 and M-15) by the Minister can be summarized as follows:

- a. Inspector Pelletier presented Mr. Langevin with a Flag State Inspection report (Notice of Defect) dated June 27, 2018, which stated “The vessel is not eligible to carry passengers within the meaning of the *Canada Shipping Act*.”
- b. Inspector Pelletier sent a letter dated June 28, 2018, by “registered mail” to Mr. Langevin of Bertlan Inc., in which he informed the applicant as follows: “This is to notify you that in view of your operations, you are in contravention of the *Canada Shipping Act, 2001* (*CSA 2001*) and the regulations made thereunder.” The applicant was advised that the vessel must have the appropriate equipment for the type of vessel and voyage, and the operator must possess a certificate of competency. The letter informed the applicant that

if he failed to make the necessary corrections to ensure compliance, he could be subject to measures such as:

- a. Detention of the vessel and/or one or more penalties ranging from \$1,250 to \$10,000 for the violation if the vessel is found to be non-compliant while in operation.
- b. A penalty of between \$1,250 and \$25,000 for operating a vessel without sufficient and competent crew.
- c. Inspector Pelletier sent an email to Mr. Langevin on July 6, 2018, in which the respondent indicated that he had met with the applicant at L'Anse-à-Beaufils and had explained how to comply with the *CSA 2001*. The email specifically stated: "If you provide the master, or operate the vessel yourself, it is a commercial vessel."

[52] In *Minister of Transport v. Kurt William M. Wyer*, File No. O-0075-33 (CAT), heard on appeal on December 16, 1988, by the Civil Aviation Tribunal (the predecessor to the Transportation Appeal Tribunal of Canada), a list is provided of factors that may be considered to be aggravating and mitigating. I summarize them here as follows:

Aggravating factors:

- Infractions involving dishonesty
- Planned or premeditated breaches
- Harm to victims of the offence
- Past record of similar offences
- Prevalence of the offence

Mitigating factors:

- No previous offences
- Time since the last infraction
- Degree of remorse
- Whether or not an admission of the offence
- Degree of cooperation with authorities
- Delay between the commission of the offence and the time of the sentence
- Conduct (involvement) of any "victims"
- Restitution
- Category of operation (commercial or private)
- Impact on the transportation community
- Special factual circumstances

- Relevance of the recommendations in the regulations
- Effect of monetary penalty versus suspension on individual
- Occurrence impact on transportation safety
- Manner of proceeding by authorities

[53] While I note that on a balance of probabilities the Minister has not established that there were repeat offences, I find that the evidence presented constitutes aggravating factors (planned or premeditated breaches). The applicant knew that the *Azul* would be considered a commercial vessel if it carried a passenger and if Mr. Langevin acted as a crew member and operated the sailing ship. The applicant also knew that Mr. Langevin was required to have a certificate of competency, specifically, a Master's certificate.

[54] Although the applicant did cooperate with the authorities, I am unable to identify any mitigating factor that would cause me to reduce the amount of the penalties determined by the Minister.

[55] The applicant was aware of his rights and obligations and knowingly chose to substitute his own erroneous interpretation of the law for that of the Minister. That argues for increasing the minimum penalty under the *Administrative Monetary Penalties and Notices (CSA 2001) Regulations* by 30 per cent.

III. DETERMINATION

[56] The Minister of Transport has proven, on a balance of probabilities, that the applicant contravened the *Small Vessel Regulations* and section 87 of the *Canada Shipping Act, 2001*. The Minister's decision to impose a monetary penalty is upheld.

[57] The total amount of \$3,250 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of service of this determination.

January 17, 2022

(Original signed)

Capt. Marc-André Poisson
Member

Appearances

For the Minister: Martin Forget

For the Applicant: Hubert Langevin