TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *David Wayne Thompson v. Canada (Minister of Transport)*, 2022 TATCE 38 (Review)

TATC File No.: MA-0682-33

Sector: Marine

BETWEEN:

David Wayne Thompson, Applicant

- and -

Canada (Minister of Transport), Respondent

Heard by: Videoconference on May 10, 2022

Before: Sandra Attersley, Member

Rendered: July 13, 2022

REVIEW DETERMINATION AND REASONS

Held: The Minister of Transport has proven, on a balance of probabilities, that the applicant contravened subsection 109(2) of the *Canada Shipping Act, 2001*. The monetary penalty is reduced to $1,625.

The total amount of $1,625 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 November 15, 2021, Transport Canada (TC) issued a Notice of Violation – Marine Safety (Notice) to the applicant, David Wayne Thompson, pursuant to section 229 of the *Canada Shipping Act, 2001 (CSA 2001)*. The penalty was assessed at $3,000.

[2] Schedule A to the Notice stated:

> On or about July 7, 2020, at or near Mispec Point in the Port of Saint John, New Brunswick, David Wayne Thompson, as Master of the vessel, QUACO DUCK, failed to take reasonable measures to protect the vessel and the persons on board from the hazard as identified by the defined exclusion zones around the Canaport LNG Marine Terminal, thereby violating Subsection 109(2) of the Canada Shipping Act, 2001.

[3] On November 18, 2021, the applicant requested that the Transportation Appeal Tribunal of Canada review the Notice.

[4] On April 29, 2022, the Minister of Transport (Minister) and the applicant jointly issued an Agreed Statement of Facts as follows:

> 1. David Wayne Thompson is the master of the vessel, the Quaco Duck, and he was operating the Quaco Duck as the master on July 7, 2020 at or near Mispec Bay in the Port of Saint John.
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> 2. On July 7, 2020, David Wayne Thompson was aware of the Port of Saint John exclusion zones restricting vessel traffic from operating near the Saint John Liquified Natural Gas terminal (previously Cannaport [*sic*] LNG), more specifically: the exclusion zone extending 429 metres from the LNG terminal's original flare tower, and the exclusion zone extending 90 metres around the LNG terminal's jetty/pier.
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> 3. David Wayne Thompson has been compensated by the company operating the LNG Terminal for the additional time and operation costs required to deviate around the exclusion zones.
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> 4. On July 7, 2020, David Wayne Thompson, as master of the Quaco Duck, operated that vessel within the 90 metre exclusion zone around the LNG terminal's jetty/pier.

[5] The matter was heard by videoconference on May 10, 2022. Mr. John Lindsay represented the Minister. The Minister introduced three witnesses:

1. Capt. Yusuff Ahmed, Manager, Transport Canada Centre in Saint John, NB.
2. Mr. Martin Ricardo Ugarte, Operations Manager, Saint John LNG Terminal.
3. Mr. Anthony John Smith, Senior Marine Safety Inspector, Transport Canada Saint John Office.

[6] The applicant represented himself and gave evidence on his own behalf.

II. ANALYSIS

A. Issues

[7] The issues to be determined are:

1. Did the applicant contravene subsection 109(2) of the *CSA 2001*?

2. Was the amount of the administrative monetary penalty appropriate?

B. Legal framework

[8] Paragraph 229(1)(b) of the *CSA 2001* states that if the Minister has reasonable grounds to believe that a person or vessel has committed a violation, the Minister may issue a notice of violation.

[9] The Minister alleged that the applicant violated subsection 109(2) of the *CSA 2001* which states:

> **Protection from hazards**
>
> **(2)** If the master of a vessel is informed of a safety hazard, the master shall, unless the master determines that the hazard does not exist, take reasonable measures to protect the vessel and persons on board from the hazard, including eliminating it if feasible. If it is not feasible to eliminate it, the master of a Canadian vessel shall notify the authorized representative.

C. Did the applicant contravene subsection 109(2) of the *CSA 2001*?

[10] The Minister must prove each of the following factual elements of the alleged violation specified in the Notice on a balance of probabilities:

a. The alleged violation took place on or about July 7, 2020.
b. The alleged violation took place at or near Mispec Bay in the Port of Saint John, NB.
c. The applicant was the master of the vessel *Quaco Duck*.
d. The applicant was informed of a safety hazard.
e. The applicant failed to take reasonable measures to protect the vessel and persons on board from the hazard identified in the Notice.

[11] Once the Minister has proven these elements, if the master can demonstrate that he determined that the hazard did not exist, he would not have been required to take reasonable measures to protect the vessel and persons on board.

(1) Factual elements (a), (b) and (c)

[12] Paragraph 1 of the Agreed Statement of Facts states that the applicant was the master of the vessel *Quaco Duck* on July 7, 2020, and was operating the vessel at or near Mispec Bay in the Port of Saint John on that day. I accept this as an admission by the applicant of factual elements (a), (b) and (c) above.

(2) Factual element (d)

[13] Paragraph 2 of the Agreed Statement of Facts states that the applicant was aware of the Port of Saint John exclusion zones restricting vessel traffic from operating near the Saint John LNG Terminal (LNG Terminal). These exclusion zones are highlighted in Saint John Port Authority – Practices and Procedures (June 2017) (Exhibit 6), specifically Section 4.8 and Appendix D, and are marked on Canadian Hydrographic Service (CHS) Chart 4117 – Saint John Harbour and Approaches (Exhibit 7).

[14] One of the exclusion zones extends 620 metres from the centre of the LNG Terminal and is in effect only when there is an LNG tanker alongside the terminal jetty. The other exclusion zones of 90 metres around the LNG Terminal jetty and 429 metres extending from the original LNG Terminal flare tower are in effect at all times and are permanent exclusion zones. CHS Chart 4117 contains a note stating that navigation in the exclusion zones is restricted and that mariners proposing to transit must contact the operator on VHF Channel 16 and comply with instructions while transiting the exclusion zones.

[15] Testimony from two of the Minister's witnesses, Capt. Ahmed and Mr. Ugarte, described the purpose of the permanent exclusion zones as being to mitigate the risk of a catastrophic explosion in the event of a release of liquified natural gas (LNG) into the atmosphere within the permanent exclusion zones.

[16] Capt. Ahmed, who was part of the government review process in 2008-2009 when the LNG Terminal was entering operation, testified that the permanent exclusion zones were established based on a risk assessment study.

[17] This study was done in 2006 by Det Norske Veritas (see Exhibit 13). The main concern was when a ship was at the jetty discharging LNG; however, the report proposed establishing what became the permanent exclusion zones to address possible land-based discharges of LNG.

[18] Mr. Ugarte gave evidence as to the nature of the hazard posed by the LNG Terminal requiring the permanent exclusion zones in the Port of Saint John. Referring to a PowerPoint presentation by Saint John LNG entitled "Process Overview" (Exhibit 12), Mr. Ugarte described the presence of impounding basins located at three critical areas of the LNG Terminal to mitigate the risk of a catastrophic Loss of Primary Containment (LOPC) of the LNG. If an LOPC were to occur, LNG would collect in the impounding basin and be allowed to boil off and dissipate into the atmosphere. If this were to occur, the resultant vapour could create an explosive environment and vessels operating in the vicinity would present a possible heat source for ignition of the vapour leading to a catastrophic explosion.

[19] I find that the testimony of Capt. Ahmed and Mr. Ugarte and the creation of the permanent exclusion zones by the Port of Saint John demonstrate the existence of a safety hazard surrounding the LNG Terminal within the permanent exclusion zones.

[20] Paragraph 2 of the Agreed Statement of Facts states that the applicant was aware of the permanent exclusion zones and that vessel traffic was restricted in those areas. As stated in paragraph 19 above, the permanent exclusion zones indicate the existence of a safety hazard; therefore, I accept that factual element (d), that the applicant was informed of a safety hazard, has been proven.

(3) Factual element (e)

[21] Factual element (e) of the Notice states that the applicant failed to take reasonable measures to protect the vessel and persons on board from the hazard identified in the Notice. Paragraph 4 of the Agreed Statement of Facts states that the applicant operated the *Quaco Duck* within the 90-metre exclusion zone around the LNG Terminal's jetty. By entering the 90-metre permanent exclusion zone, the Minister alleges that the applicant failed to take reasonable

measures to protect the vessel and persons on board from a hazard, thereby contravening subsection 109(2) of the *CSA 2001*.

[22] Mr. Ugarte's testimony described the nature of the safety hazard presented by the LNG Terminal and the systems developed to prevent catastrophic explosion in the event of equipment malfunction or other mishap. The main system applicable to mariners operating in the vicinity of the facility is the requirement to contact the LNG Terminal and comply with instructions when transiting the permanent exclusion zones.

[23] Mr. Ugarte testified that workboats periodically enter the permanent exclusion zones on behalf of the LNG Terminal to conduct maintenance on underwater components. This creates a risk by introducing a possible heat source into the permanent exclusion zones. In these circumstances, the LNG Terminal uses a "Permit to Work" system for the workboats and crews as a means to mitigate the risk. This system includes providing safety screening and orientation training, conducting a job safety analysis, having a communication plan using explosion-proof UHF radios, and having defined work schedules.

[24] Mr. Ugarte stated that fishing vessels are sometimes granted permission to enter the permanent exclusion zones for brief periods of time to retrieve fishing gear that has drifted into the zones, usually due to storm activity. Such permission is granted by contacting the LNG Terminal.

[25] The applicant testified that fishing gear sometimes drifts inside the permanent exclusion zones and that he has sought and received permission from the LNG Terminal to retrieve gear on numerous occasions since the LNG Terminal began operating. However, he expressed frustration at the absence of a timely way to obtain permission, especially given the nature of tides in the Bay of Fundy. Notwithstanding the note on CHS Chart 4117, it seems in recent years the LNG Terminal no longer monitors VHF Channel 16 but relies on telephone communication for mariners seeking permission to transit the permanent exclusion zones (Exhibit 28).

[26] Given the applicant's experience operating in the vicinity of the LNG Terminal and his knowledge of the requirement and past practice to obtain permission to enter the permanent exclusion zones, I find that reasonable measures to protect the vessel and persons on board from the safety hazard presented by the LNG Terminal would be to not enter the permanent exclusion zones without prior authorization from the LNG Terminal.

[27] The applicant admits he entered the 90-metre permanent exclusion zone on July 7, 2020, in paragraph 4 of the Agreed Statement of Facts. He testified that he did not contact the LNG Terminal for permission. Accordingly, I find that the applicant did not take reasonable measures to protect the vessel and persons on board from the hazard, therefore factual element (e) is proven.

(4) Could the applicant determine the hazard did not exist?

[28] The applicant's testimony and evidence, specifically his Statement of Facts of the July 7, 2020 event (Exhibit 25), state that at the time of his entry into the 90-metre permanent exclusion zone, he determined there was no hazard because there was another fishing vessel alongside the jetty inside the 90-metre permanent exclusion zone (see the photograph in Exhibit 5).

[29] The applicant communicated by radio with the master of the other vessel and determined it was a dive support vessel, the *Bayliner*. The divers had underwater work to do on the jetty but were not in the water at the time. The applicant believed that if the dive vessel and divers were authorized to be working inside the 90-metre permanent exclusion zone, there was no hazard at that time.

[30] The applicant stated that he noted that the buoy from one of his lobster traps appeared to be inside the 90-metre permanent exclusion zone, although the actual trap was not. In light of the dive operation, he was concerned the rope between the buoy and the trap could interfere with the divers. Accordingly, upon discussion with the master of the *Bayliner*, he decided to take the *Quaco Duck* into the exclusion zone to retrieve his fishing gear. In an email to a manager at LNG Terminal dated July 16, 2021 (Exhibit 28), the applicant admitted that he should have called LNG Terminal security as opposed to the *Bayliner* for permission.

[31] I do not accept the applicant's belief that the presence of the dive support vessel and the divers within the 90-metre permanent exclusion zone around the LNG Terminal jetty meant there was no hazard at the time. The nature of the safety hazard associated with the LNG Terminal as described by Mr. Ugarte is complex and mariners are not able to independently assess the associated risk. That is why the permanent exclusion zones were established and why mariners must obtain permission before transiting these zones. Accordingly, I find that the applicant was not able to determine the hazard did not exist.

[32] Based on the foregoing, I find that, on a balance of probabilities, the Minister has proven factual elements (a), (b), (c), (d) and (e) and that the applicant was not able to determine that the hazard did not exist.

[33] No other defence was presented by the applicant.

[34] Therefore, the Notice of Violation is confirmed.

D. Was the amount of the administrative monetary penalty appropriate?

[35] A monetary penalty of $3,000 was assessed against the applicant in the Notice.

[36] According to Item 51 of Part 1 of the Schedule to the *Administrative Monetary Penalties and Notices (CSA 2001) Regulations*, a violation of subsection 109(2) of the *CSA 2001* attracts a penalty ranging from a minimum of $1,250 to a maximum of $25,000. Aggravating and mitigating factors may be reviewed to determine the applicable penalty.

[37] The Minister's witness, Mr. Smith, gave testimony on how the penalty of $3,000 was calculated. At the time of the investigation related to the Notice, Mr. Smith was on assignment with the regional enforcement unit as an enforcement investigator. From information in the Marine Enforcement Case Report prepared by Mr. Smith dated September 23, 2021 (Exhibit 13), it appears he was assigned the case in early September 2020 following the initial compliance investigation by Capt. Ahmed (Exhibit 17).

[38] The investigator's recommendations under section 4.4 of Exhibit 13 note that the "recommended sanction is based upon more recent draft policy for sanction determination."

[39] Exhibit 15 is a Determination of Enforcement Response dated October 19, 2020, prepared by Mr. Smith. Paragraph 4 of this document is entitled "Consistency in Application." It notes that according to the Marine Enforcement Management System (MEMS) database, there have been only two cases of enforcement of subsection 109(2), both of which were warning letters, one of which was issued to the applicant (Exhibit 8). Accordingly, this matter is the first time a monetary penalty has been assessed for a violation of subsection 109(2) of *CSA 2001*.

[40] Mr. Smith completed a Sanction Calculation (Exhibit 16) to determine that the penalty should be $3,000. The Sanction Calculation includes a table noted as being taken from TC's Marine Compliance Manual. The table outlines the severity of the violation and the range of penalties for first, second and subsequent violations. A violation of subsection 109(2) by an individual attracts a penalty ranging from $1,250 to $5,000.

[41] Mr. Smith testified that the Sanction Calculation is based on a penalty calculation policy being trialed across Canada for different modes of transport (marine, rail, aviation and transportation of dangerous goods), all of which had different policies in place. He also stated that the trial policy takes into consideration previous review determinations.

[42] In calculating the monetary penalty, Mr. Smith testified that the starting point is based on 30% of the maximum penalty and then adjusting up or down based on aggravating and mitigating factors. He stated that in this case, the maximum penalty for an individual is $5,000, therefore the starting point is 30% of this amount, or $1,500.

[43] Mr. Smith then applied aggravating factors of $900 (60% of the starting amount) based on the applicant's history of non-compliance, $150 (10% of the starting amount) based on the applicant's receipt of compensation, and $450 (30% of the starting amount) based on the degree of intent or negligence of the applicant in the area of a safety hazard. No mitigating factors were applied. This sanction calculation resulted in the penalty of $3,000.

[44] No supporting evidence of the penalty calculation policy being trialed nor the "draft policy for sanction determination" in Exhibit 13 was introduced other than Mr. Smith's testimony. In particular, no evidence was introduced to support using 30% of the maximum penalty as the baseline amount for penalty assessment. Therefore, I do not accept this starting point for penalty calculation. I note that the regulations provide that the penalty for a violation of subsection 109(2) ranges from $1,250 to $25,000. I find that where the regulations provide a range of penalties, the baseline penalty should be the low end of the penalty range, or $1,250, to which aggravating and mitigating factors may be applied.

[45] An aggravating factor was applied to the baseline penalty for a history of non-compliance by the applicant. Mr. Smith stated he applied the factor based on the warning letter sent to the applicant by TC on December 9, 2019 (Exhibit 9), for allegedly the same violation. The applicant testified that he did receive the letter.

[46] The warning letter was recorded in the MEMS, but no evidence was presented as to the nature of the investigation which led to the warning letter being issued, whether the applicant signed and returned the letter to TC as requested, nor whether TC followed up with the applicant in this regard. Accordingly, I do not accept this letter as evidence of prior non-compliance.

[47] The Minister also entered as exhibits warning letters from the Port of Saint John regarding alleged incursions into the permanent exclusion zones (Exhibits 8 and 10). These warnings appear to be based solely on reports from the LNG Terminal and none of these allegations were investigated. Therefore, I do not consider these as evidence of prior non-compliance.

[48] Mr. Smith also applied an aggravating factor based on an economic advantage gained by the applicant due to the contravention. The applicant admits in paragraph 3 of the Agreed Statement of Facts that he was compensated by the LNG Terminal for additional time and operational costs required to deviate around the exclusion zones. In this case, the applicant did not enter the 90-metre permanent exclusion zone on the way to or from the fishing grounds. He states that he entered the zone to retrieve fishing gear to mitigate risk to divers about to enter the water, which I accept. No evidence of economic advantage was entered in respect of this specific violation; hence this factor is not considered.

[49] The final aggravating factor applied in the Sanction Calculation was based on the degree of intent or negligence of the applicant. The note to this factor indicated that the applicant was "recklessly negligent." In this case the applicant knew of the permanent exclusion zones and that he needed permission from the LNG Terminal to enter to retrieve fishing gear. Yet, he failed to contact the LNG Terminal before entering. His evidence was that he entered to mitigate the risk to the divers. He was in communication with the master of the dive support boat and advised him of the presence of the fishing gear. While the applicant states that he did not have a phone on board the *Quaco Duck* and therefore could not telephone the LNG Terminal to seek permission, he did have a VHF radio, so he could have contacted the LNG Terminal through Fundy Traffic. In addition, he could have asked the dive boat to communicate with the terminal if there was a serious concern that the fishing gear would interfere with the dive operation. The applicant intentionally entered the 90-metre permanent exclusion zone without permission, and I accept the aggravating factor of 30% of the baseline penalty of $1,250, amounting to $375.

[50] Based on the foregoing, the monetary penalty is reduced to $1,625.

III. DETERMINATION

[51] The Minister of Transport has proven, on a balance of probabilities, that the applicant contravened subsection 109(2) of the *Canada Shipping Act, 2001*. The monetary penalty is reduced to $1,625.

[52] The total amount of $1,625 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.

July 13, 2022

(Original signed)

Sandra Attersley
Member

Appearances

For the Minister:	John Lindsay
For the Applicant:	Self-represented