



TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Karla Rothweiler v. Canada (Minister of Transport)*, 2022 TATCE 62 (Review)

TATC File No.: MP-0683-34

Sector: Marine

BETWEEN:

Karla Rothweiler, Applicant

- and -

Canada (Minister of Transport), Respondent

Heard by: Videoconference on September 22, 2022

Before: James Parsons, Member

Rendered: November 23, 2022

REVIEW DETERMINATION AND REASONS

Held: The Minister of Transport has not proven, on a balance of probabilities, that the applicant violated subsection 115(1) of *Canada Shipping Act, 2001*. The monetary penalty is dismissed.

I. BACKGROUND

[1] On November 1, 2021, the Minister of Transport (Minister) issued a Notice of Violation – Marine Safety (Notice) to the applicant pursuant to section 229 of the *Canada Shipping Act, 2001 (CSA 2001)*. The penalty was assessed in the amount of \$1,050 and the Notice stated:

On or about October 17, 2020, at approximately 0845 hours [PDT], you, [...] a passenger on board the vessel, Queen of Oak Bay, en route from Nanaimo, BC, to Horseshoe Bay, BC, failed to obey crew directions given in order to carry out the provisions of the [CSA 2001] or regulations, namely, the requirement to wear a face covering or provide proof a medical exemption in compliance with Interim Order No. 3 Respecting Passenger Vessel Restrictions Due to the Coronavirus Disease 2019 (COVID-19) issued by the Minister of Transport, thereby contravening subsection 115(1) of the CSA 2001.

[2] On December 9, 2021, the applicant requested a review of the Minister’s decision.

II. ANALYSIS

A. Issue

[3] The issues to be determined are:

- Did the applicant contravene subsection 115(1) of the *CSA, 2001*, and if so, was the amount of the penalty justified?

B. Legislative framework

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

[5] The Minister alleges that the applicant violated subsection 115(1) of the *CSA 2001*, which states:

Passengers

Compliance with directions

115 (1) Every passenger on board a vessel shall comply with any direction that is given to them by the master or a crew member to carry out the provisions of this Act or the regulations.

[6] The *Interim Order No. 3 Respecting Passenger Vessel Restrictions Due to the Coronavirus Disease 2019 (COVID-19)* states in part:

Passenger Vessels That Provide Essential Services and Ferry Vessels

Permission

6 (1) Sections 3 and 4¹ do not apply to a passenger vessel that provides essential services if

¹ These sections refer to prohibitions in Canadian and Arctic waters.

(a) the vessel, at all times, carries not more than 50 percent of the maximum number of passengers that it is certified to carry, as indicated on its inspection certificate or Passenger Ship Safety Certificate issued under the Vessel Certificates Regulations or on an equivalent certificate issued by a foreign government; or

(b) its authorized representative implements the measures to reduce transmission risks of COVID-19 set out in the Ship Safety Bulletin entitled Measures to Mitigate the Spread of COVID-19 on Passenger Vessels and Ferries, SSB No. 12/2020, published on April 17, 2020 by the Marine Safety Directorate of Transport Canada, as amended from time to time or as replaced.

[...]

Guidelines

7 The authorized representative and master of a passenger vessel that provides essential services must make reasonable efforts to implement and put in place the measures contained in the guidelines that are set out in the document entitled COVID-19: Guidance Material for Passenger Vessel and Ferry Operators published on April 17, 2020, by the Marine Safety Directorate of Transport Canada, as amended from time to time.

Ferry Vessels

8 The authorized representative and master of a ferry vessel must ensure that at least one of the requirements set out in section 6 is met and comply with the requirement set out in section 7.

[7] *Ship Safety Bulletin No. 12/2020*, which outlines measure to mitigate the spread of COVID-19 on passenger vessels and ferries, states in part:

MEASURES TO REDUCE TRANSMISSION RISK

For all Essential Passenger Vessels who do not reduce passenger load by 50%, the operator will need to demonstrate and confirm with Transport Canada (via email to the CMAC Secretariat at cmac-ccmc@tc.gc.ca) that appropriate mitigation measures are in place, based on the most recent advice provided by the Public Health Agency of Canada, such as:

- requesting that passengers stay in their vehicles on open car decks for the duration of the transit;
- requiring that passengers use a face covering to cover their mouth/nose, for use at times during their journey when they cannot physically distance from others (e.g., in washrooms or other common areas);

[...]

[8] The Transport Canada (TC) publication, *COVID 19 – Guidance Material for Essential Passenger Vessel and Ferry Operators*, states in part:

2. Announcement [to be adopted on local measures]

[...]

During this voyage, you are advised to wear a face covering that covers your mouth and nose when you are outside your vehicle and in situations where you cannot maintain two metres of physical separation. [...]

C. Did the applicant contravene subsection 115(1) of the CSA 2001?

[9] The Minister has not, on the balance of probabilities, proven that the applicant contravened subsection 115(1) of the *CSA 2001*.

[10] The Minister argued that the applicant was among a cluster of approximately 50 passengers that contravened the *CSA 2001* by refusing to wear a mask, or not physically distancing two metres from other passengers, or providing medical proof for not wearing a mask, after being directed to do so by the crew. Three witnesses testified on behalf of the Minister, Mr. Tyler Edwards, Mr. Roberto Chiatto and Mr. Cody Kennedy.

[11] Mr. Edwards is an employee of BC Ferries. He was the chief steward on board the vessel during the incident. The chief steward is the operations manager for the catering department and responsible for passenger control and executing the orders of the captain.

[12] Mr. Chiatto is a TC employee. At the time of the incident, he was the acting manager with the Pacific Regional Enforcement Unit. His job was to review the case, the report, and the recommendations filed by Investigator Kennedy and to concur, or not, with his findings and determine if enforcement action was necessary. Mr. Chiatto was not on board the vessel during the incident.

[13] Mr. Kennedy is a security specialist with the Vancouver Fraser Port Authority. At the time of the incident, he was employed with TC as an enforcement investigator with the Pacific Region Enforcement Unit. His primary responsibility was to investigate offences or alleged offences against TC's program legislation that were referred to the Enforcement Unit by the modal or operational inspectors. Mr. Kennedy was not on board the vessel during the incident.

[14] The Minister's case is built around one photograph of the applicant sitting in her car. The Minister's witness, Mr. Edwards, testified he saw a cluster of approximately 50 people walking around without masks both in person and on video from the vessel's closed-circuit television (CCTV). The Minister is arguing that the applicant was one of the individuals among the cluster of passengers that were contravening the *CSA 2001*.

[15] The applicant, who was self-represented, testified that she remained in her car on the upper car deck throughout the duration of the voyage on board the Queen of Oak Bay from Nanaimo, BC, to Horseshoe Bay, BC, during the morning of October 17, 2020. I find that this confirms that the applicant was on board the vessel on the date in question.

[16] The applicant testified that she did not go upstairs at any time throughout the duration of the voyage, rested in her car, was unaware of anything happening upstairs or that the police were called. She further stated that she did not see any crew during her time on the car deck and did not hear any public address (PA) announcements while in her car about the requirement to wear a mask. She stated that she is a non-confrontational person and intentionally arrived early for boarding to secure a place for her vehicle on car deck four where she would be allowed to remain in her car.

[17] Mr. Edwards testified that in addition to the regular, TC-required, scripted, COVID-19-related passenger announcements over the vessel's PA system, he made approximately 10 impromptu passenger announcements asking passengers to come to his, the chief steward's, office if they had any concerns regarding the masking requirements. These announcements were made subsequent to his confronting the cluster of unmasked passengers near elevator one where he unsuccessfully tried to get their attention requesting them to wear masks.

[18] I find, based on the testimony of Mr. Edwards, that there were announcements made on board the vessel to instruct passengers to wear masks, or to come forward with a medical exemption. This amounts to direction by the crew for the purposes of section 115 of the *CSA 2001*.

[19] The remaining element to be proven is whether the applicant failed to obey crew directions to wear a mask when she was not physically distanced from others.

[20] Mr. Edwards testified that he met with Investigator Kennedy in April 2021 to look at photos taken from the vessel's CCTV. Exhibit 1, Photo 1 shows a person looking out of a car window at a ticket booth at a BC Ferries terminal building. This photo was used to identify the driver as the applicant and the owner of the vehicle stopped by police during disembarkation at Horseshoe Bay. The applicant conceded that it was a photo of her in her car at a BC Ferries terminal ticket booth. Mr. Edwards testified that he recognized the person looking out of the car window from a photo of the vessel's CCTV lounge screen capture on the morning of October 17, 2020, depicting the cluster of unmasked passengers. Mr. Edwards did not recall having a face-to-face encounter with the person in the photograph. The photo from the vessel's CCTV lounge screen was not entered as evidence. Also, Mr. Edwards could not recall assisting the police in identifying the vehicle identified in Exhibit 1, Photo 1.

[21] During cross-examination, Mr. Edwards testified that he did not have a photo of the CCTV lounge screen but recalled identifying the applicant from a live CCTV feed. He did not know of any photo of the applicant and could not identify the applicant in any photos shown to him that were taken from the vessel's CCTV. He identified the applicant in the car (Exhibit 1, Photo 1) from recollection of memory of what he recalled seeing on live CCTV footage approximately six months earlier. In consideration of the contradiction of Mr. Edwards' testimony about the CCTV video and considering that no photo of the CCTV lounge screen capture was presented as evidence, I do not find this testimony convincing and do not find that Mr. Edwards' testimony places the applicant in the cluster of unmasked passengers.

[22] During cross-examination, the Minister's witness, Investigator Chiatto, stated that all of the elements of the case were proven and that, with respect to identification of the applicant, this was based on other witness testimony, which was never introduced in the hearing, and one very granular photo of the applicant sitting in her car in the terminal building (Exhibit 1, Photo 1).

[23] The ferry's staff were unable to identify the foot passengers involved in the incident; however, according to the West Vancouver Police Dept. report (Exhibit 6), two associated vehicles were stopped, including the applicant's vehicle. Occupants of the vehicles confirmed they were protesting their right to "shun" mass restrictions and were enroute to Vancouver for a larger, organized protest. The four passengers in the applicant's car refused to identify themselves.

[24] During examination-in-chief, Investigator Kennedy testified that he matched the photo of the applicant in the car with a description of the applicant from the West Vancouver Police Dept. report. He later testified, on cross-examination, that the description in that police report describes ethnicity and gender only. On cross-examination, Mr. Kennedy testified he was not able to positively identify the applicant in any of the video footage given to him by BC Ferries. He also

testified that there was a problem with image quality and that the cameras on BC Ferries are okay but not perfect, and that the camera footage provided to him was not necessarily of very much utility in identifying the applicant. He testified that he had no images from the vessel's CCTV footage that showed the applicant without a mask on the vessel. The only photo of the applicant is the one looking out her car window at the BC Ferries ticket booth (Exhibit 1, Photo 1).

[25] During examination-in-chief, Mr. Kennedy testified that he thought Photo 12 of Exhibit 1 may be "tangentially relevant," since he believed that the person standing on the left may be the applicant but could not say for certain. Mr. Kennedy testified that this photo was discussed with Mr. Edwards during his investigation and interview with him but was not used for identifying the applicant. Mr. Kennedy testified that he did not think Mr. Edwards made a positive mention of the applicant in the photo but cannot recall for certain as it was some time ago. In consideration of the testimony of Mr. Kennedy with respect to this photo, and the fact that a positive ID of the applicant could not be made from the photo, I am not convinced that this photo has identified the applicant. In addition, it could not be seen whether the individual in this photo was wearing a mask.

[26] I am not convinced, on the balance of probabilities, that the applicant was identified as one of the unmasked foot passengers on board the vessel who failed to adhere to crew direction on the date in question.

[27] The Minister's representative argued that the applicant was not cooperative during the investigation of the events that took place on October 17, 2020, on board the vessel Queen of Oak Bay because she did not respond to Mr. Kennedy's follow-up request attempting to gather additional details concerning the incident. To the contrary, the applicant testified that she did respond, via email, to Mr. Kennedy's initial contact inquiring about the event and informed him that she had remained in her car throughout the voyage. However, the applicant did not respond to Mr. Kennedy's follow-up request because she inadvertently followed up with Mr. Chiatto by registered mail. Mr. Kennedy was unaware that the applicant followed up with Mr. Chiatto and consequently took the ignoring of his follow-up request as "fuel" to further investigate the applicant.

[28] Had the applicant not inadvertently followed up with Mr. Chiatto but followed up with Mr. Kennedy to explain her actions at the time of the incident, there may not have been any "fuel" to further the investigation of the applicant. Although I have already found that the Minister has not proven that the applicant contravened the *CSA 2001*, this supports the applicant's argument that she has been mistakenly identified and is being used to establish a deterrence for those who may consider similar actions in the future. Mr. Chiatto testified that notices of violation are issued to promote future compliance of ministerial orders and to contribute to public safety. Mr. Kennedy testified that foot passengers were unable to be identified, and the applicant was being investigated since her name appeared on the West Vancouver Police Dept. report.

D. Conclusion

[29] In consideration of the testimony of the Minister's witnesses and the applicant, it is proven that the applicant was on board the ferry, Queen of Oak Bay, on the morning of October 17, 2020. In consideration of the testimony of the Minister's witness, Mr. Edwards, it is proven that announcements were made over the vessel's PA system for passengers to wear masks or come to the chief steward's counter to provide medical evidence for not wearing a mask.

[30] However, in consideration of the testimony and lack of documentary evidence, it is not proven that the applicant was unmasked near other passengers. I note the contradiction of Mr. Edwards' testimony during examination-in-chief as to identifying the applicant from a photo versus his testimony during cross-examination as to identifying the applicant from live CCTV footage, and that no photo of the applicant on board the vessel was presented as evidence. Additionally, in consideration of the testimony of Mr. Kennedy with respect to the discussion around Photo 12 in Exhibit 1, and that a positive ID of the applicant could not be made from the photo or if the individual in the photo was wearing a mask, I do not find that the violation was proven.

[31] Finally, in consideration of the testimony of the applicant stating that she remained in her vehicle throughout the entire duration of the voyage on the morning of October 17, 2020, on the Queen of Oak Bay, and the lack of evidence placing the applicant with the cluster of approximately fifty people walking around in passenger areas without masks, I am not convinced, on the balance of probabilities, that the Minister has positively identified the applicant as someone who failed to obey crew directions in violation of section 115(1) of the *CSA 2001*.

III. DETERMINATION

[32] The Minister of Transport has not proven, on a balance of probabilities, that the applicant violated subsection 115(1) of *Canada Shipping Act, 2001*. The monetary penalty is dismissed.

November 23, 2022

(Original signed)

James Parsons
Member

Representations

For the Minister: Eric Villemure
For the Applicant: Self-represented