



TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Magic Spirit and Fly Ylf v. Canada (Minister of Transport)*, 2023 TATCE 9 (Appeal)

TATC File No.: AM-004-22 and AM-005-22

Sector: Marine

BETWEEN:

Magic Spirit and Fly Ylf, Appellants

- and -

Canada (Minister of Transport), Respondent

Heard by: Videoconference on December 6, 2022

Before: Jim Parsons, Member (chairing)

Yves Villemaire, Member

Steven Neatt, Member

Rendered: February 28, 2023

APPEAL DECISION AND REASONS

Held: The appeal is dismissed. The appeal panel upholds the review determination and dismisses the appellants' appeal.

In the case of the *Magic Spirit*, the total amount of \$6,000 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 decision.

In the case of *Fly Ylf*, the total amount of \$1,250 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 decision.

I. BACKGROUND

[1] On August 2, 2019, the Minister of Transport (Minister) issued a Notice of Violation (Notice) to Adventures Aboard World Wide Travel Limited, as the authorized representative of the vessel *Magic Spirit*, pursuant to section 229 of the *Canada Shipping Act, 2001* (CSA 2001). On the same date, the Minister also issued a Notice of Violation to the alleged master of the *Magic Spirit*, Fly Ylf (Mr. Fly). The penalties were assessed at \$6,000 and \$1,250, respectively.

[2] A joint review of both notices took place via videoconference on May 20, 2021, and November 15, 2021. A determination was rendered on April 5, 2022. In that determination, the member found that the Minister had proven, on a balance of probabilities, that the *Magic Spirit*, violated section 201 of the *Marine Personnel Regulations* (MPRs) and that Mr. Fly, violated section 87 of the CSA 2001.

[3] In her review determination, the member found that Mr. Fly, as the master of the *Magic Spirit*, was required to hold a Master 500 Gross Tonnage, Domestic Certificate of Competency, as required by the Minimum Safe Manning Documents 2018-05107-502 and 2018-05108-502, and paragraph 202(3)(b) of the MPRs. Because Mr. Fly did not hold the required certificate, the member found that on July 14, 2019, the *Magic Spirit* navigated without meeting the Safe Manning Requirements contained in Part 2 of the MPRs.

[4] On April 28, 2022, the appellants filed a request for appeal of the review determination dated April 5, 2022. The appeal was heard by videoconference on December 6, 2022.

II. ANALYSIS

A. Standard of review

[5] The parties did not discuss, or come to any agreement on, the standard of review applicable for any of the grounds of appeal.

[6] The appropriate standard of review for an appeal panel of this tribunal was established by the Federal Court in *Billings Family Enterprises Ltd. v. Canada (Transport)*, 2008 FC 17, and more recently in *Canada (Attorney General) v. Friesen*, 2017 FC 567. The standard of reasonableness applies to findings of credibility, fact, and mixed fact and law, and an appeal panel must give considerable deference to the review member. On questions of law, the standard is one of correctness, and an appeal panel is entitled to take its own view.

B. Purpose of appeal

[7] The basis for an appeal hearing is set out in section 14 of the *Transportation Appeal Tribunal of Canada Act* as follows:

14 An appeal shall be on the merits based on the record of the proceedings before the member from whose determination the appeal is taken, but the appeal panel shall allow oral argument and, if it considers it necessary for the purposes of the appeal, shall hear evidence not previously available.

[8] This means that the appeal panel must reach its decision based on the evidence that was before the review member at the initial hearing, and that generally no additional evidence will be considered.

[9] Additionally, as properly stated by the Tribunal in *Canada (Minister of Transport) v. Yves Généreux*, 2021 TATCE 4 (Appeal):

[11] ... as appeal panel members, our role is framed by limiting our analysis specifically to the alleged errors in the review member's determination, i.e., the alleged errors as submitted by the appellant. In other words, the appeal panel members' role is not to review (again) the violation as a whole (i.e., the appeal hearing is not a *de novo* hearing), as it is not our role to act as the review member. In summary, the appeal panel will review the alleged errors, as submitted by the appellant.

C. Grounds for appeal

[10] The appellants set out the following grounds in the request for appeal:

1. Ground 1: The review member's decision is neither reasonable nor fair based on to the evidence presented.
2. Ground 2: The decision is based on ambiguity. The letter of the law is contradictory to the purpose of the law and the MPRs pursuant to the CSA 2001.
3. Ground 3: It does not make sense to get a smaller ticket, Master, Limited for a vessel of 60 gross tonnage or more (60 GRT ticket), to drive a bigger boat when the bigger ticket, Master 150 Gross Tonnage, Domestic (150 GRT ticket), requires more qualifications to obtain. Mr. Fly obtained the 60 GRT ticket with the *Magic Spirit* endorsed on it, after the alleged infraction date.
4. Ground 4: Mr. Fly and Magic Yacht Charters are held fully accountable and liable even though there was full awareness **and** acceptance of Mr. Fly's Certificate of Competency, without objection, notice, corrective measures or any recourse for a period of almost 10 years by Transport Canada (TC) Marine Safety, Bureau Veritas and the Vancouver Police Department (VPD).
5. Ground 5: The investigation by the TC inspector was biased and dismal. The inspector:
 - a. failed to obtain a proper crew list;
 - b. failed to obtain the most recent training records (as required by the MPRs);
 - c. singled out Mr. Fly as the sole master on board and ignored the fact that there was a master mariner on board and on active duty who was receiving onboard training on the vessel;
 - d. stated a (false) opinion that Mr. Fly could jeopardize the safety of the vessel contrary to the authorized representative (expert) opinion that Mr. Fly was the most experienced Master;
 - e. failed to admit or state that his office has accepted Mr. Fly as Master on the vessel for almost 10 years under their jurisdiction and area of operation (see ground 4);

- f. was aware with the resource available to him that Mr. Fly “wrote the book” on the *Magic Spirit* and that multiple “CSI” inspections by his office, including spot checks, were conducted with Mr. Fly as Master of the Vessel;
 - g. ignored Mr. Fly’s history working with multiple commercial vessel operators and TC Marine Safety, the coast guard, the Transportation Safety Board and the VPD;
 - h. documented that the vessel was properly crewed in terms of having a Master but failed to realize that the vessel was actually not properly crewed for the voyage; and
 - i. submitted evidence of the ship’s log entry for that day which was not signed or authorized by the Master as required under the MPRs.
6. Ground 6: The TC Marine Safety representative incorrectly interpreted the renewal requirements of a vessel’s inspection certificate, in particular the requirement for crew to be on board during inspection.
 7. Ground 7: The TC Marine Safety inspector and Marine Safety’s office assumed that the fact that an individual holds a certificate of competency means that the holder “safe.” This is outright dangerous – a piece of paper does not make for a safe captain.
 8. Ground 8: Mr. Fly provided a solution to resolve the confusion in the interpretation of the MPRs which was ignored by TC, the VPD, Bureau Veritas and Vancouver Cruises for close a decade.

[11] The appeal panel reviewed each of the grounds submitted based on the information available. The panel notes, however, that no additional substantiating information was provided by the appellants to identify errors made by the review member, as requested of them during the case management conference held prior to the appeal hearing.

[12] Because the appellants did not provide relevant information explaining what errors the review member made, the appeal panel does not need to consider grounds 1, 2, 5 and 7. The issue which the appeal panel must decide is whether the appellants established that the review member erred on the remaining grounds of appeal, grounds 3, 4, 6 and 8.

D. Remaining grounds for appeal

- (1) ***Ground 3: It does not make sense to get a smaller ticket (60 GRT ticket) to drive a bigger boat when the bigger ticket (150 GRT ticket) demands more qualifications to obtain***

[13] While the appellants raised the issue of the 60 GRT ticket, they did not explain how the review member erred in her determination. The appellants simply suggested that a 60 GRT ticket, such as the one obtained later by Mr. Fly, should not take precedence over his 150 GRT ticket. The appeal panel notes that in paragraph 47 of the review determination, the member addressed the 60 GRT ticket and gave it no weight since it was acquired after the Notice was issued. The panel concludes that no error was made by the review member in her determination. Paragraph 47 of the review determination reads as follows:

[47] The Minister objected to the admission of this document. The Minister argued that the certificate was obtained after the alleged violation date and could not be relied upon by the Tribunal to determine if Fly held the required certificate on the date the Notice was issued. At the hearing, I allowed the entry of the document into evidence on the basis that the certificates held by Fly was the key issue before me and relevant to the matter I had to decide. I stated that I would determine its relevance and weight in my written determination. Based upon my review of the document, it is apparent that the certificate was issued on February 5, 2020, several months after the alleged violation date of July 14, 2019. In rendering my determination, I may only rely upon the certificates that Fly held at the time the Notice was issued. Due to the date the certificate was issued, I give the document no weight to support Fly's position that he held the required certificate of competency on July 14, 2019.

[14] The appeal panel notes that this ground could have been one of due diligence. However, as stated by the review member at paragraph 65, the defence of due diligence was not raised at the review stage and the purpose of the appeal is not to afford appellants another opportunity to make their arguments. Nonetheless, the review member took it upon herself to consider whether Mr. Fly established a defence of due diligence. The appeal panel finds that the review member did not err in finding, at paragraph 74, that Mr. Fly did not meet the test required to establish a defence of due diligence.

(2) ***Ground 4: Mr. Fly and Magic Yacht Charters are held fully accountable and liable even though there was full awareness and acceptance of Mr. Fly's Certificate of Competency, without objection, notice, corrective measures or any recourse for a period of almost 10 years by TC Marine Safety, Bureau Veritas and the VPD***

[15] The appellants raised the issue of accountability on the part of TC inspectors to ensure proper enforcement of regulations. The appellants referenced section 22 of the *Criminal Code* of Canada in raising the issue of accountability:

Person counselling offence

22 (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

Idem

(2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

Definition of counsel

(3) For the purposes of this Act, *counsel* includes procure, solicit or incite.

[16] As this was an appeal hearing, the Tribunal member chairing the hearing reminded the appellants that the *Criminal Code* of Canada was readily available to them prior to the review hearing and that they should have argued this ground at the review. More importantly, the appellants did not specifically identify how the review member erred on this ground. As such, the appeal panel was unable to find a basis for the appellants' argument.

(3) *Ground 6: The TC Marine Safety representative incorrectly interpreted the renewal requirements of a vessel's inspection certificate, in particular the requirement for crew to be on board during inspection*

[17] The appellants argued that Mr. Fly had undergone probably 100 annual “CSI” inspections and was always asked by an inspector for his certificate as the master of the vessel. Consequently, the appellants argued that if Mr. Fly did not have the appropriate ticket during the inspection, it should have been identified as a deficiency. Notwithstanding the above, the appellants failed to explain how this alleged misinterpretation by the TC inspectors, on the requirements for the renewal of a vessel's inspection certificate, led the review member to make an error. The appeal panel was unable to support the appellants' claim. The panel also concludes that the review member did not make an error in her review determination:

[70] He further testified that with Transport Canada, he had been part of many “CSI” inspections in the capacity of master, involving vessels greater than 500 gross tons. He stated that the attending Transport Canada inspectors have always accepted his certificate during these inspections.

[71] With respect to the *Magic Spirit* vessel, Fly provided entries from the vessel's log (Exhibit A-3) to demonstrate examples of when “CSI” inspections had occurred on the *Magic Spirit* and his Master 150 GTD [Gross Tonnage, Domestic] certificate was accepted by Transport Canada.

[72] According to the *R. v. Sault Ste. Marie*¹ case, Fly may avoid liability if he can prove that he reasonably believed in a mistaken set of facts. In the circumstances of this case, Fly would have to show that his mistaken belief that his Master 150 GTD certificate satisfied the requirements of the MSMDs was reasonable because the inspections conducted by Transport Canada in the past demonstrated that it had previously “accepted” his certificate as meeting the requirements of the *Magic Spirit*'s MSMDs [Minimum Safe Manning Documents].

[73] I do accept Fly's testimony that he honestly believed that his Master 150 GTD certificate complied with the MSMDs and that he did not deliberately or flagrantly intend to violate the provisions of the *MPRs*. However, I cannot find that it was reasonable for Fly to assume that because he had operated the *Magic Spirit* and other vessels greater than 500 gross tonnage for eight years without issue from Transport Canada, his certification was acceptable to Transport Canada or complied with the law.

[74] The vessel logs provided by Fly show that he was in the master position when Transport Canada inspections took place, however the documents are silent with respect to the issue of his certification. The vessel logs do not prove that Transport Canada had previously “accepted” Fly's Master 150 GTD certificate as meeting the requirements of the *Magic Spirit*'s MSMDs. Fly has not proven on a balance of probabilities that his belief in a mistaken set of facts was reasonable in the circumstances and he has not met the test required to establish a defence of due diligence.

(4) *Ground 8: Mr. Fly provided a solution to resolve the confusion in the interpretation of the MPRs which was ignored by TC, the VPD, Bureau Veritas and Vancouver Cruises for close a decade*

[18] This ground for appeal is similar to ground 2 above. While the appellants did raise the issue of confusion at the appeal hearing, it was not specifically identified how the review member erred on this ground. The appellants reminded the appeal panel of an informal meeting

¹ *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299

with TC Inspector Selim Ullah where there was confusion over the matter of being a mate on board the *Magic Spirit* with a 150 GRT ticket. As this matter was not the focus of the appeal hearing, it was not connected to the determination of the review. The panel also concludes that the review member did not make an error in her review determination (below):

[50] I cannot accept Fly's submissions that the *MPRs* are unclear or unambiguous. I am not persuaded that the Vancouver Police Department email referenced by Fly supports his argument that his Master 150 GTD certificate met the requirements of the *MPRs*. In fact, the email makes the opposite conclusion. The Vancouver Police Department concluded that his certificate did not meet the requirements of the *MPRs* because the "*Magic Spirit* is over 500 GRT." It is also noteworthy that the email was written by an enforcement agency that expressly admitted it had no power or authority to review the complaint and referred the matter to Transport Canada for potential investigation.

[19] Contrary to the fact that Mr. Fly had previously sailed as Master on board the *Magic Spirit* without any known incident, and that he was apparently capable of safely operating the vessel, the fact remains that at the time of the incident, the Master on board was required to hold a Master 500 Gross Tonnage, Domestic Certificate of Competency. Had Mr. Fly explicitly made the defence of due diligence during the review determination, highlighting the issues surrounding grounds 3, 4, 6 and 8, the review member's determination may have been different and in favour of the appellants.

III. DECISION

[20] The appeal is dismissed. The appeal panel upholds the review determination and dismisses the appellants' appeal.

[21] In the case of the *Magic Spirit*, the amount of \$6,000 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 decision.

[22] In the case of Fly Ylf, the total amount of \$1,250 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 decision.

February 28, 2023

(Original signed)

Reasons for the appeal decision:	Jim Parsons, Member (chairing)
Concurred by:	Yves Villemaire, Member
	Steven Neatt, Member

Representations

For the Minister: Martin Forget

For the Appellants: Fly Ylf
Nicole Boycott