TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *David Wayne Thompson v. Canada (Minister of Transport)*, 2023 TATCE 12 (Ruling)

TATC File No.: AM-010-22

Sector: Marine

BETWEEN:

David Wayne Thompson, Appellant

- and -

Canada (Minister of Transport), Respondent

Heard by:	Written submissions
Before:	Jacqueline Penney, K.C., Member (Chairing) Steven Neatt, Member Yves Villemaire, Member
Rendered:	March 14, 2023

RULING

Held: Pursuant to section 14 of the *Transportation Appeal Tribunal of Canada Act*, the appellant's request to consider new evidence is dismissed.

I. BACKGROUND

[1] On November 15, 2021, Transport Canada (TC) issued a Notice of Violation – Marine Safety Notice (Notice) with a penalty of $3,000 to the appellant, David Wayne Thompson, pursuant to section 229 of the *Canada Shipping Act, 2001* (CSA 2001). The Notice read, in part,

> On or about July 7, 2020, […] David Wayne Thompson, as the Master of the vessel, QUACO DUCK, failed to take reasonable measures to protect the vessel and the persons on aboard 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.

[2] On November 18, 2021, the appellant requested a review hearing from the Transportation Appeal Tribunal of Canada (Tribunal), which took place by videoconference on May 10, 2022. In a determination dated July 13, 2022, the review member held that the appellant contravened subsection 109(2) of the CSA 2001 but reduced the monetary penalty from $3,000 to $1,625.

[3] On August 12, 2022, the appellant filed a request for an appeal of the review determination. A case management conference (CMC) was held on October 31, 2022. During the CMC, the parties agreed that they would provide written submissions relating to the admissibility of new evidence not presented at the review hearing.

[4] On December 8, 2022, the appellant provided his written submissions and on December 13, 2022, the appellant submitted the evidence he was seeking to introduce. The Minister of Transport (Minister) provided a written response dated December 16, 2022. On January 5, 2023, the appellant submitted a rebuttal.

[5] The documentary evidence the appellant is seeking to introduce as new evidence during the appeal of the review determination is outlined in his submission dated November 20, 2022. The four documents the appellant is seeking to introduce as new evidence are summarized as:

1. Sections 309 to 314 of New Brunswick General Regulation 91-191 made pursuant to the *Occupational Health and Safety Act*, SNB 1983, c. O-0.2 relating to planning a dive, preparation for a dive and diving hazards (NB *OH&SA Regulation*).[1]
2. A screenshot file containing notes taken by the appellant during a conversation with Chris Kenny in late May of 2023 [*sic*]. Mr. Kenny accompanied the company Dive Shack which was responsible for performing the diving services at the LNG Terminal site on July 7, 2020 (Notes of conversation with C. Kenny).
3. Screenshot file containing notes taken by the appellant during a conversation with Fundy Traffic employee Veronica Stevens on August 8, 2022 (Notes of conversation with V. Stevens).
4. A text message exchange the appellant had with Mark Rogers wherein Mr. Rogers indicates that the *Bayliner* dive support vessel does not shut down once it starts in the morning until it ties up at night (Text message with M. Rogers).

[1] *Occupational Health and Safety Act*, SNB 1983, c. O-0.2, *General Regulation*, NB Reg 91-191.

[6] The appeal panel must consider whether the four documents can be introduced as evidence during the appeal of the review determination.

II. ANALYSIS

A. Legal framework

[7] The appeal panel has the discretion to accept new evidence on appeal proceedings subject to section 14 of the *Transportation Appeal Tribunal of Canada Act* (TATC Act), which states:

> **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.

B. Overview of submissions

(1) NB OH&SA Regulation

(a) Appellant's submissions

Obligations of diving supervisor and employer

[8] The appellant submits that sections 310, 313 and 314 of the NB *OH&SA Regulation* relating to a preparation for a dive and how a dive site is controlled should be introduced at the appeal because it shows how the LNG Terminal was in fact notified when the appellant entered the exclusion zone, at the request of the *Bayliner*, to remove the floating rope and buoy which was creating a hazard to the divers.

[9] The appellant argues that Mr. Martin Ugarte, Operations Manager of the Saint John LNG Terminal, gave evidence at the review hearing that the LNG Terminal periodically allows workboats to enter the permanent exclusion zones to conduct maintenance on underwater components. Mr. Ugarte also stated that in these circumstances, LNG Terminal uses a "permit to work" system to mitigate the risk associated with introducing a heat source from a vessel into the exclusion zone. The appellant further submitted that Mr. Ugarte stated that this system includes providing safety screening and orientation training and conducting job safety analysis.

[10] The appellant contends that during his testimony, Mr. Ugarte failed to disclose the regulatory obligations of the "employer" and "diving supervisor" relating to the preparation for a dive site as contained in the NB *OH&SA Regulation* and that this regulation is critical to his defence.

[11] The appellant submits in late May 2023 [*sic*], after the hearing had concluded, he spoke to a representative of the company that performed the dive at the LNG Terminal on July 7, 2020. The appellant asserts that it was only through his conversation with the Dive Shack representative Chris Kenny that he learned about the rules associated with a preparation for a dive as referenced in the NB *OH&SA Regulation.*

[12] The appellant refers to section 313 of the NB *OH&SA Regulation* which states:

> **Preparation for a dive**
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> **313**(1) An employer and a diving supervisor shall each ensure that when an underwater diving operation is in progress, warning devices such as buoys, diver's flags, lights, lamps or flares are displayed to define the limits to be kept clear of by any equipment other than that connected with the operation.
>
> **313**(2) A diving supervisor shall take precautions to prevent a hazard to a diver from a barge, scow or vessel in or near the diving area.

[13] The appellant submits that the LNG Terminal is the "employer" referenced in subsection 313(1) and the master of the *Bayliner* is the "diving supervisor" referenced in section 313. The appellant argues that when a diving operation is in progress warning devices used to define the limits of the diving area must be kept clear of any equipment not connected with the dive operation. The appellant submits that when he notified the master of the *Bayliner* of a floating rope and buoy hazard, the master of the *Bayliner* as the "diving supervisor" and the LNG Terminal as the "employer" were required under the NB *OH&SA Regulation* to remove this equipment from the diving area.

[14] The appellant further submits that the obligations of the employer and the diving supervisor referenced in the NB *OH&SA Regulation* explain why the master of the *Bayliner* requested that the appellant remove the floating rope and buoy hazard. The appellant argues that after the request was made by the dive supervisor (master of the *Bayliner*) to the appellant to remove the hazard in the dive site area, the LNG Terminal as the "employer" was also implicitly notified that the appellant's vessel was entering the permanent exclusion zone. As a consequence of the circumstances surrounding the dive site as prescribed in the NB *OH&SA Regulation*, the appellant states that the LNG Terminal was informed that his vessel was entering the permanent exclusion zone.

CSA 2001, subsection 109(2) "authorized representative"

[15] The appellant also seeks to enter the NB *OH&SA Regulation* to demonstrate his compliance with subsection 109(2) of the CSA 2001. The appellant admits that he entered the permanent exclusion zone but argues that he had contacted Mark Rogers, the master of the *Bayliner* dive support vessel, who was granted permission by the LNG Terminal to be inside the exclusion zone on July 7, 2020, for the purposes of assisting with the diving operation.

[16] The appellant submits that when he contacted the master of the *Bayliner* on July 7, 2020, he complied with subsection 109(2) of the CSA 2001 because he notified the "authorized representative" as referenced in that subsection.

(b) Respondent's reply

[17] The respondent relies upon the authorities of *Kokoska v. Canada (Minister of Transport)*[2] and *Makarowski v. Canada (Minister of Transport)*[3] in arguing that the evidence cannot be introduced at the appeal level unless: 1) the evidence was not available at the review hearing and 2) the evidence is deemed necessary for the purposes of the appeal. The respondent further relies

[2] *Kokoska v. Canada (Minister of Transport)*, [1989] C.A.T.D. No. 45.
[3] *Makarowski v. Canada (Minister of Transport)*, 2012 TATCE 27 (Appeal).

upon *Beauregard v. Canada (Minister of Transport)*[4] as authority for the premise that the new evidence shall not be used to fill in gaps in the evidence produced at the review hearing and cannot cause prejudice to the respondent who may not have any witnesses to provide counter-evidence.

[18] The respondent submits that the NB *OH&SA Regulation* should not be admitted as evidence at the appeal because it was available at the time of the review hearing. The respondent further argues that the evidence is not relevant since it relates to the diving operation of the *Bayliner* dive support vessel and dive crew of that vessel whereas the matter before the review member related to the appellant's vessel entering a restricted zone creating a risk of hazard to the appellant's vessel and the vessel crew.

(2) Notes of conversation with C. Kenny

(a) Appellant's submissions

[19] The appellant argues that the notes he took during his conversation with C. Kenny following the hearing should be introduced because the notes show that the dive operation followed the NB *OH&SA Regulation* and that divers take priority. In addition, the appellant contends that the evidence contained in his notes question the truthfulness of Mr. Ugarte's testimony relating to LNG Terminal's "permit to work" process and the orientation and safety training provided to the crew of the *Bayliner* dive support vessel.

(b) Respondent's reply

[20] The respondent argues that this evidence is unreliable because the notes are undated, and the author is not identified. The respondent submits the notes were taken after the date of the hearing. The respondent further argues that Mr. Kenny could have been called as a witness at the hearing and an introduction of the evidence at this time could cause prejudice to the respondent if the respondent is unable to call a witness to provide counter-evidence.

(3) Notes of conversation with V. Stevens

(a) Appellant's submissions

[21] The appellant submits that the review member made an incorrect finding of fact at paragraph 49 of the determination when she stated: "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." The appellant argues that notes of the conversation he had with V. Stevens should be introduced at the appeal because it shows that the review member was mistaken about her conclusion that the appellant could have contacted the LNG Terminal through Fundy Traffic using his VHF radio. The appellant submits that this information was provided at the time of the hearing but was used incorrectly by the review member in the determination.

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[4] *Beauregard v. Canada (Minister of Transport)*, 2015 TATCE 12 (Appeal).

[22] The appellant argues that the notes of his conversation with V. Stevens corroborates his evidence given at the hearing that Fundy Traffic does not support phone services with the LNG Terminal which meant he could not have contacted the LNG Terminal through Fundy Traffic using his VHF radio. Therefore, the appellant submits the review member made an incorrect finding of fact.

(b) Respondent's reply

[23] The respondent reiterated and relied upon the respondent's previous submission put forth in relation to the Notes of conversation with C. Kenny. The respondent argued the evidence was unreliable, available at the time of the hearing and could potentially prejudice the respondent if the evidence is introduced at the appeal.

(4) Text message with M. Rogers

(a) Appellant's submissions

[24] The appellant is seeking to introduce the text message from M. Rogers, the master of the *Bayliner* dive support vessel, to discredit the testimony of Mr. Ugarte. The appellant submits that Mr. Ugarte provided evidence at the hearing that the *Bayliner* vessel was tied to the pier and turned off. The appellant submits that the text message of M. Rogers contradicts the testimony of Mr. Ugarte. The appellant submits that this evidence was not available at the time of the hearing since he first learned of the information only after speaking with Mr. Rogers about the testimony of Mr. Ugarte once the hearing had concluded.

[25] The appellant submits that the text message of the master of the *Bayliner* dive vessel confirms that the *Bayliner* does not shut down until it returns to port, which meant the *Bayliner* could have been a "possible heat source" and "source of ignition" on the day in issue which contradicts the testimony of Mr. Ugarte. He further argues that this incorrect fact was used against him by the review member at paragraphs 22, 23 and 31 of the determination.

(b) Respondent's reply

[26] The respondent argues that the text message from M. Rogers concerns the diving operation of the *Bayliner* vessel that was on site the day the appellant entered the permanent exclusion zone and is not related to the present matter of the appellant entering a restricted zone with his own vessel, the *Quaco Duck* which created a risk of hazard to his own vessel and the persons on board *Quaco Duck*.

[27] The respondent further submits that this document was available at the time of the review hearing and is not necessary for the purposes of the appeal.

C. Admissibility of the four documents as new evidence at the appeal level

[28] Section 14 of the TATC Act requires that both of the following requirements must be considered to determine if the four documents the appellant is seeking to introduce as new evidence can be admitted at the appeal stage:

1. Was the evidence available at the time of the hearing?

2. Is the evidence necessary for the purposes of the appeal?

[29] In determining whether the four documents the appellant is seeking to introduce as new evidence should be introduced at the appeal level, the appeal panel has considered the test set out in the Supreme Court of Canada (SCC) decision *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*,[5] which confirmed the traditional test for the admission of fresh evidence on appeal as stated in *Palmer v. The Queen*, [1980] 1 SCR 759, at p. 775:

1. The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial […].
2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
3. The evidence must be credible in the sense that it is reasonably capable of belief, and
4. It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

(1) NB OH&SA Regulation

(a) Was the evidence available at the time of the hearing?

[30] The appellant argues that the NB *OH&SA Regulation* was not submitted at the time of the review hearing because he was not aware of its relevance to his defence until after he spoke with Mr. Kenny after the hearing. The appellant asserts that he learned of the NB *OH&SA Regulation* when he spoke with Mr. Kenny in May 2023 [*sic*] when he contacted Mr. Kenny to discuss Mr. Ugarte's testimony relating to the "permit to work" system of the LNG Terminal.

[31] The New Brunswick *Occupational Health and Safety Act, General Regulation*, O-0.2, 91-191 were enacted in 1991. Part XX, sections 309 to 314 of the regulations apply to underwater diving operations and the present wording has been included in the NB *OH&SA Regulation* since at least 2001. The sections of the NB *OH&SA Regulation* the appellant is seeking to introduce were available for production by the appellant the time of the hearing.

(b) Is the evidence necessary for the purposes of the appeal?

Obligations of diving supervisor and employer

[32] The panel finds that the provincial NB *OH&SA Regulation* is not relevant to this matter which involves whether the appellant, as the master of the *Quaco Duck*, took reasonable measures to protect his vessel and persons on board his vessel from the hazard created by the LNG Terminal permanent exclusion zone.

[33] The panel cannot accept the appellant's argument that sections 310, 313 and 314 of the NB *OH&SA Regulation* relating to a preparation for a dive and how a dive site is controlled between the "employer" and the "diving supervisor" demonstrate that the appellant obtained

[5] *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 2, at para. 6.

implicit authorization from the LNG Terminal to enter the exclusion zone because the *Bayliner's* master requested that the appellant remove equipment that was not part of the dive operation.

[34] It cannot be said that the provincial regulations relating to the dive site obligations of an "employer" and a "diving supervisor" as referenced in the regulations bear any relevance upon a decisive or potentially decisive issue in this matter. An admission of this evidence would not have changed the outcome of the review determination.

CSA 2001, subsection 109(2) "authorized representative"

[35] The panel cannot accept the appellant's argument that reliance on the NB *OH&SA Regulation* demonstrates that the appellant fulfilled his obligations under section 109(2) of the CSA 2001 by contacting the "authorized representative" referenced in that subsection.

[36] The review member held that the appellant violated section 109(2) of the CSA 2001, in part, because he was aware of the permanent exclusion zone in the vicinity of the LNG Terminal and had sought permission to enter the zone from the LNG Terminal in the past but had not obtained prior authorization from the LNG Terminal on July 7, 2020.

[37] The appellant submits that he did not have to contact the LNG Terminal because in contacting the master of the *Bayliner* dive support vessel, he also satisfied subsection 109(2) since he had notified the "authorized representative." Section 109 of the CSA 2001 states:

> **Safety of persons**
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> **109 (1)** The master of a vessel shall take all reasonable steps to ensure the safety of the vessel and of persons who are on board or are loading or unloading it while using equipment on it.
>
> **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**. [emphasis added]

[38] The CSA 2001 defines the "authorized representative" in section 14 to mean:

> **Authorized representative**
>
> **14 (1)** Every Canadian vessel must have a person — the authorized representative — who is responsible under this Act for acting with respect to all matters relating to the vessel that are not otherwise assigned by this Act to any other person.
>
> **Authorized representative**
>
> **(2)** Subject to subsections (3) and (4), the authorized representative of a Canadian vessel is the owner of the vessel or, in the case of a vessel described in section 48 (a bare-boat chartered vessel), the bare-boat charterer.
>
> **Representative if more than one owner**
>
> **(3)** In the case of a Canadian vessel that is owned by more than one person, the owners must appoint one of themselves as the authorized representative.

[39] Based on a plain reading of subsection 109(2) of the CSA 2001, it is clear that the obligations imposed upon the master of a vessel faced with a safety hazard are to either eliminate

the safety hazard or take reasonable measures to protect the vessel and the vessel crew from the safety hazard. In circumstances where it is not feasible to eliminate the safety hazard, the master is required to notify the "authorized representative" of the vessel.

[40] The appellant stated that he contacted the *Bayliner*'s master, which he considered sufficient permission to enter the permanent restricted zone. In the present case, if it was not feasible to eliminate the hazard, the appellant, as the master of the *Quaco Duck*, was required to notify the "authorized representative" of the *Quaco Duck*. The authorized representative of the appellant's vessel is the owner of the *Quaco Duck* vessel. Contacting the master of the *Bayliner* vessel could not have satisfied subsection 109(2).

[41] There seems to be some confusion by the appellant on the CSA 2001 definition of the "authorized representative" and who to contact to obtain permission to enter the permanent restricted zone. The panel does not accept the argument that contacting the master of the *Bayliner* is the same as contacting the "authorized representative" referenced in subsection 109(2) of the CSA 2001.

[42] In summary, the panel further finds that the provincial NB *OH&SA Regulation* is not relevant to this matter which involves whether the appellant, as the master of the *Quaco Duck*, took reasonable measures to protect his vessel and persons on board his vessel from the hazard created by the LNG permanent exclusion zone. It cannot be said that the regulations relating to the dive site obligations of the *Bayliner* crew bear any relevance upon a decisive or potentially decisive issue in this matter.

[43] The introduction of the NB *OH&SA Regulation* at the time of the review hearing would not have affected the result in the review proceeding and is therefore not necessary for the purposes of the appeal.

[44] The panel finds that the NB *OH&SA Regulation* was available at the time of the hearing and also does not consider this evidence necessary for the purposes of the appeal; therefore, the panel finds this evidence inadmissible.

(2) Notes of conversation with C. Kenny

(a) Was the evidence available at the time of the hearing?

[45] The hearing before the review member occurred on May 10, 2022. The notes the appellant took of the conversations he had with C. Kenny taken in May 2023 [*sic*], clearly follow the date of the hearing. To determine whether the evidence was available at the time of the hearing, the panel considers the SCC decision *Public School Boards' Assn. of Alberta v. Alberta.* According to jurisprudence, the question that the panel must consider is whether the evidence the appellant is now seeking to introduce could have been obtained if the appellant had exercised reasonable diligence before the conclusion of the hearing on May 10, 2022.

[46] In *Beauregard v. Canada (Minister of Transport)*, the Tribunal appeal panel emphasized that the appeal hearing does not aim to fill any gaps in the evidence that was available at the review hearing and must not introduce the evidence at the appeal stage if the evidence could prejudice the respondent who may no longer have a witness to produce counter-evidence.

[47] While the notes the appellant took postdate the hearing, the information contained in the notes themselves could have been obtained before the hearing. The appellant argues that he was not aware that Mr. Ugarte would testify about the "permit to work" system followed by the LNG Terminal for vessel operators entering the exclusion zone, which includes safety screening, orientation training and conducting a job safety analysis. He states that he only learned after the hearing that this "permit to work" system was not followed in the case of the *Bayliner* dive support vessel and dive crew when he spoke with Mr. Kenny. The panel finds that the appellant should have exercised reasonable diligence and contacted Mr. Kenny prior to the commencement of the hearing or during the hearing once he had heard the evidence of Mr. Ugarte. Alternatively, if the appellant had been unable to reach Mr. Kenny on the day of the hearing, he could have requested an adjournment at the close of the Minister's evidence on May 10, 2022, to reach out to Mr. Kenny prior to presenting his case to the review member.

[48] In keeping with *Beauregard v. Canada (Minister of Transport)*, the appeal panel concludes that the appeal level is not the place to introduce evidence to fill in any gaps that could have been introduced at the hearing. The appeal is not a "second kick at the can" for the parties and is not an opportunity to present evidence or arguments that could have been presented at the review level. The panel concludes that this evidence was available at the time of the hearing.

(b) Is the evidence necessary for the purposes of the appeal?

[49] The appellant is seeking to introduce the evidence because he asserts that it puts into it question the truthfulness of Mr. Ugarte's testimony involving the safety training and orientation that was provided to the Dive Shack diving crew prior to attending the LNG Terminal site on July 7, 2020.

[50] The panel accepts the respondent's concerns relating to the reliability of the notes the appellant is requesting to enter since they are neither dated nor is the author identified. In any event, even if panel considers the evidence to be both credible and believable and could be used to demonstrate the dive crew of the Dive Shack did not receive safety training and orientation prior to attending the LNG Terminal on July 7, 2020, the panel has concluded that it would not have affected the result of the review proceeding.

[51] The review member found that the appellant violated section 109(2) of the CSA 2001 because the appellant failed to obtain the prior authorization from the LNG Terminal before entering the permanent exclusion zone. The orientation and safety training that may or may not have been provided by the LNG Terminal to the dive crew of the Dive Shack or the *Bayliner* dive support vessel was not relevant to the matter before the review member and would not have been relevant to her analysis.

[52] The panel finds that the information contained in the appellant's notes of his conversation with C. Kenny was available at the time of the hearing. In addition, the panel finds that this evidence is not necessary for the purposes of the appeal. Therefore, the panel concludes that this evidence inadmissible.

(3) Notes of conversation with V. Stevens

(a) Was the evidence available at the time of the hearing?

[53] The notes the appellant took of the conversation he had with V. Stevens, an employee with Fundy Traffic who advised him that Fundy Traffic does not provide phone services with the LNG Terminal, appear to have been taken after the hearing, on August 8, 2022. This date postdates the hearing of May 10, 2022. The panel must determine whether the appellant is now seeking to introduce evidence that could not have been obtained by reasonable diligence before the conclusion of the May 10, 2022, hearing.

[54] The panel finds that while the notes the appellant took postdate the hearing, the information contained in the notes themselves could have been obtained before the hearing. It is noteworthy that the appellant admits this evidence is already on the record. In his submissions, the appellant submits that "[t]his information was available and provided at the time of the hearing but was used incorrectly at the determination. This will reconfirm Fundy Traffic role."

[55] It appears that the appellant is seeking to introduce the evidence of his call with Ms. Stevens to further corroborate the evidence he claims was already on the record before the review member but was not applied correctly in her decision. The panel concludes that the evidence provided by V. Stevens could have been procured from Ms. Stevens prior to the hearing and she could have been called as a witness at the hearing.

(b) Is the evidence necessary for the purposes of the appeal?

[56] The appellant argues that the evidence is necessary because it shows the review member's decision is incorrect when she held at paragraph 49 of the decision that "he could have contacted the LNG Terminal through Fundy Traffic."

[57] The panel finds that this evidence is not necessary because, based upon the appellant's submission, the issue relating to the lack of phone service between Fundy Traffic and the LNG Terminal was already before the review member. Furthermore, the assertion that this evidence was incorrectly applied by the review member is more properly an issue that goes to grounds of the appeal.

[58] The panel finds that the information contained in the appellant's notes of his conversation with V. Stevens was available at the time of the hearing. The panel also concludes that this evidence is not necessary for the purposes of the appeal; therefore, the panel finds this new evidence inadmissible.

(4) Text message with M. Rogers

(a) Was the evidence available at the time of the hearing

[59] The appellant submits that the text message from M. Rogers proves that the *Bayliner*'s engine was running on the day in issue. The appellant further submits that he did not present the evidence at the time of the hearing because he was not aware it would become an issue until Mr. Ugarte provided his testimony.

[60] The panel does not agree with the respondent's submission that the text message was available at the hearing since the exchange with Mr. Rogers occurred after the May 10, 2022, hearing. While the text message exchange between the appellant and Mr. Rogers postdates the hearing, the information contained in the exchange could have been obtained before the hearing concluded.

[61] It is noteworthy that the appellant had entered a text message exchange with Mark Rogers at the time of the review hearing (see Exhibit 27). Clearly, the appellant had been in contact with Mr. Rogers prior to the hearing in relation to other evidence he intended to present to the review member. The panel has concluded that the appeal hearing is not an opportunity to present evidence or arguments that could have been presented at the review level. In accordance with the jurisprudence, the panel must consider whether the text message evidence of M. Rogers could have been obtained if the appellant had exercised reasonable diligence before the conclusion of the hearing on May 10, 2022.

[62] The panel finds that with the exercise of due diligence prior to the conclusion of the hearing, the appellant could have reached out to Mr. Rogers to obtain the evidence he is requesting to introduce to contradict the testimony of Mr. Ugarte at the time of the hearing. Alternatively, if the appellant had been unable to reach Mr. Rogers on the day of the hearing, he could have requested an adjournment at the close of the Minister's evidence on May 10, 2022, to reach out to Mr. Rogers prior to presenting his case to the review member. It is noted that the reviewing member offered the option of adjournment to the applicant during the review hearing.

(b) Is the evidence necessary for the purposes of the appeal?

[63] The appellant submits that this evidence is necessary for the purposes of the appeal because it contradicts the testimony of Mr. Ugarte and shows that the *Bayliner* did in fact create a risk by introducing a possible heat source into the permanent exclusion zones. The appellant further submits that this incorrect fact was used against him by the review member at paragraph 31 of the determination. Paragraph 31 of the determination states:

> [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.

[64] As previously outlined above, the panel has concluded that the review member found that the appellant contravened section 109(2) of the CSA 2001 because he did not seek prior authorization from the LNG Terminal before entering the permanent exclusion zone. Paragraph 31 reiterates the review member's finding that the appellant could not rely upon the presence of the *Bayliner* to determine the hazard did not exist and was required to obtain permission from LNG Terminal prior to entering the exclusion zones. Whether the *Bayliner* was shut down at the time the appellant entered the zone was not relevant to the issue of whether the appellant had sought permission to enter the permanent exclusion zone. This evidence would not have affected the result of the previous proceeding and is therefore not necessary for the purposes of the appeal.

[65] The panel finds that the text message exchange with M. Rogers was available at the time of the hearing and also does not consider this evidence necessary for the purposes of the appeal; therefore, the panel finds this evidence inadmissible.

III. RULING

[66] Pursuant to section 14 of the *Transportation Appeal Tribunal of Canada Act*, the appellant's request to consider new evidence is dismissed.

March 14, 2023

(Original signed)

Reasons for the ruling:	Jacqueline Penney, K.C., Member (chairing)
Concurred by:	Steven Neatt, Member
	Yves Villemaire, Member

Representations

For the Minister:	Martin Forget
For the Appellant:	Self-represented