



TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Tara Macart and Jonathan Macart v. Canada (Minister of Transport)*,
2023 TATCE 25 (Review)

TATC File Nos.: MP-0679-34 and MP-0681-34

Sector: Marine

BETWEEN:

Tara Macart and Jonathan Macart, Applicants

- and -

Canada (Minister of Transport), Respondent

Heard by: Videoconference on September 21, 22 and 29, 2022

Before: Jim Parsons, Member

Rendered: May 19, 2023

REVIEW DETERMINATION AND REASONS

Held: The Minister of Transport has proven, on a balance of probabilities, that the applicant, Tara Macart, violated subsection 115(1) of the *Canada Shipping Act, 2001*. The monetary penalty is upheld.

The total amount of \$1,950 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.

And

The Minister of Transport has proven, on a balance of probabilities, that the applicant, Jonathan Macart, violated subsection 115(1) of the *Canada Shipping Act, 2001*. The monetary penalty is upheld.

The total amount of \$1,950 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 1, 2021, the Minister of Transport (Minister) issued Notices of Violation – Marine Safety to Ms. Tara Macart and Mr. Jonathan Macart. The notices were issued pursuant to section 229 of the *Canada Shipping Act, 2001* (CSA 2001). The penalties were assessed for each applicant in the amount of \$1,950.00 and the notices for each applicant 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 November 14, 2021, both applicants requested a review of the Minister's decision. During a pre-hearing case management conference on March 18, 2022, it was confirmed that the matters would be heard together since the allegation related to the applicants were identical.

II. PRELIMINARY ISSUE

[3] On August 17, 2022, the Transportation Appeal Tribunal of Canada (Tribunal) issued, at the request of the applicants, a summons to compel the attendance as a witness of Mr. Marc Garneau. On September 9, 2022, the Minister submitted a request to quash the summons that had been issued to the former Minister of Transport, and current member of the House of Commons of Canada. He argued that Mr. Garneau was protected from parliamentary privilege and could not be compelled to testify when the House is sitting, and also for a period of time before the House sitting and after it adjourns. He argued the House would be resuming activities on September 19, 2022. The Minister cited the Federal Court decision of *Samson Indian Nation and Band v. Canada*, 2003 FC 975, as support.

[4] The applicants argued that since the charges were laid under the authority of the Minister, they required Mr. Garneau, who had firsthand knowledge of the construction of the Ministerial Order, to be questioned during the hearing. The applicants noted that they would be willing to accept a delegate appointed by Mr. Garneau in his place.

[5] In reply, the Minister noted that once the parliamentary privilege is claimed, the Tribunal is bound to recognize it and strike the summons. The Minister also responded that the Transport Canada (TC) investigators were the only ones who played a role in the decision to impose the monetary penalties, and they would be available during the hearing for cross-examination; Mr. Garneau was not involved in this decision and there is no need or support to appoint a delegate in his place.

[6] After considering the submissions, I granted the request to quash the summons. The House was to resume on September 19, 2022. The hearing was scheduled for September 19 to 21, 2022. Since the House would be in session during the review hearing, according to the Federal Court case referred to by the Minister, parliamentary privilege applied, and the summons must be struck. Further, I agree with the Minister's argument that the former Minister's

testimony would not have been necessary at the review hearing, given that he was not involved in the decision to issue the Notices of Violation. To this end, the TC investigators with knowledge of the incident would be available to testify at the hearing.

A. Issue

[7] The issues to be determined are:

- a. Did the applicants contravene subsection 115(1) of the CSA 2001, and if so, was the amount of the penalties justified?
- b. Did the applicants raise any defences or exemptions?

B. Legislative framework

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

[9] The Minister alleges that both applicants 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.

[10] Section 10.1 of the CSA 2001 provides the authority for the Minister to make an interim order if it is believed that immediate action is required to deal with a direct or indirect risk to marine safety or to the marine environment.

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

(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.

[...]

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

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.

[12] *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);

[...]

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

[13] The Minister has, on the balance of probabilities, proven that the applicants contravened subsection 115(1) of the CSA 2001. The Minister must prove that:

- a. the applicants were on board the vessel on the date in question;
- b. there was direction by crew to wear a mask when not physically distanced from others; and
- c. the applicants failed to obey crew direction.

[14] The Minister argued that the applicants were among a cluster of approximately 50 passengers that contravened the CSA 2001 by refusing to wear a mask, to physically distance two metres from other passengers, or to provide medical proof for not wearing a mask, after being directed to do so by the crew. Five witnesses testified on behalf of the Minister, Mr. Tyler Edwards, Ms. O'Shea Arrieta, Mr. Roberto Chiatto, Ms. Christine Churches, and Mr. Cody Kennedy.

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

[16] Ms. Arrieta is an employee of BC Ferries. She started working with BC Ferries on April 1, 2014, and was undergoing refresher training on the day of the incident.

[17] 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.

[18] Ms. Churches is an employee of BC Ferries. She started working with BC Ferries in June 1994. On the day of the incident, Ms. Churches was the sea trainer and was carrying out safety refresher training with Ms. Arrieta

[19] 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.

[20] The applicants were self-represented with co-representative, Mr. Matthew Andrew Tartal. The applicants did not testify. They argued that the penalties should be dropped entirely as they were "taking the rap" for an incident that happened around them. They also argued that they "have their reasons to not wear a mask" and that "the mask policy does not apply to them."

[21] Two witnesses testified on behalf of the applicants, Dr. Kathryn Gemmell and Ms. Carrie Watson. Dr. Gemmell testified as a character witness for the applicants. She has known the applicants for at least twelve years. Ms. Watson testified as the Manager of Corporate Security for BC Ferries. She has been in this position for seven years. Neither of the applicants' witnesses were on board the vessel during the time of the incident.

(1) *Were the applicants on board the ferry on the date in question?*

[22] The applicants acknowledged and did not dispute that they were on board during the voyage of the Queen of Oak Bay from Nanaimo, BC, to Horseshoe Bay, BC, during the morning of October 17, 2020. This is also confirmed by photo identification, discussed below. Therefore, I find that the applicants were on board the ferry on the date in question.

(2) *Was there a direction by crew to wear a mask or physically distance?*

[23] Mr. Edwards testified that passenger announcements with respect to the requirements for masking and physical distancing were made in the BC Ferries terminal building. Signage was also placed throughout BC Ferries terminal buildings and vessels to inform passengers of the mask and physical distancing requirements.

[24] He testified that he made announcements pursuant to the TC publication, *COVID-19: Guidance Material for Essential Passenger Vessel and Ferry Operators*, which states in part (Exhibit 5):

2. Announcement [to be adopted based 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. If you can't wear a mask due to medical reasons, you may be asked to provide a medical certificate to confirm your exemption from wearing one.

[25] In addition to the regular, TC-required, scripted, COVID-19-related passenger announcements over the vessel's public address (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 or go up on the outside sundeck and stay away from other passengers. He also testified that his announcements did mention physical distancing.

[26] He also testified that during one of his announcements where he was reminding passengers to wear a mask, he also reminded passengers of the conditions of carriage they agreed to upon purchase of their ferry ticket.

[27] These conditions of carriage were explained by Ms. Churches, when she testified that as part of the process in purchasing a ticket to travel on board the vessel, passengers were asked if they had a mask and would wear it on the vessel (Exhibit 5). If the answer was no, you would not get a ticket. If the answer was yes, you would get a ticket. If the applicants had gotten on the vessel, then they would have agreed to wear a mask (or physically distance).

[28] The applicants argued that Mr. Edwards' contradiction in identifying the applicants in the photos (below) reduces the credibility of Mr. Edwards' testimony. I do not believe it discredits the witness with his testimony about making of public announcements requiring passengers to wear a mask or come to the chief steward's office if they had some form of exemption or required special accommodation whilst on board. In any event, Mr. Edwards' testimony is corroborated by other witnesses.

[29] Ms. Arrieta testified that there were barriers in place on board the vessel to help support physical distancing. She also testified that in addition to PA announcements on board, there was signage throughout the vessel and information posted on the BC Ferries website, informing that masking was mandatory on board BC Ferries. She witnessed a lot of people not wearing masks and heard the chief steward, Tyler Edwards, making multiple announcements asking passengers to wear a mask as they were mandatory, and it was a TC requirement. Similarly, Ms. Churches testified that Mr. Edwards had made announcements on board the vessel to instruct passengers to wear masks or to come to the chief steward's office.

[30] I find, based on the testimony of Mr. Edwards, Ms. Arrieta and Ms. Churches, that there were announcements made on board the vessel to instruct passengers to wear masks, physically distance, or to come forward with a medical exemption. There were also directions and notices provided to the applicants of the requirement to wear a mask on board through signs and when purchasing a ticket. On a balance of probabilities, this amounts to direction by the crew to mask or physically distance for the purposes of section 115 of the CSA 2001.

(3) *Did the applicants fail to obey crew direction to wear a mask when not physically distanced from others?*

[31] Mr. Kennedy testified in detail how he identified the applicants as unmasked passengers violating crew orders on board the vessel on the date of the incident and how he built the Minister's case against them (Exhibits 18 and 19).

[32] Mr. Edwards testified that he could not force passengers to wear a face mask and that if any passengers had reservations about wearing a face mask, the staff on board the vessel would accommodate them by finding a place to physically distance and be safe from other passengers and crew during the sailing. Mr. Edwards testified that the applicants did not come to his office to discuss accommodations and did not practise physical distancing.

[33] Ms. Churches testified that approximately 30 minutes after the vessel departed Nanaimo, several people came to the chief steward's office informing that there were a lot of people walking around without a mask. The unmasked passengers were calling the other passengers "sheep," they were coughing in the direction of other passengers, and they were blocking aisles to prevent other passengers from passing. Mr. Edwards testified that during the disruption, which lasted approximately 30 minutes, the unmasked passengers were chanting that they knew their rights and were calling the masked passengers "sheep." Ms. Arrieta testified that the applicants were part of this group of unmasked passengers. This was also stated by Mr. Kennedy and supported in the Marine Safety Enforcement Case Reports of Mr. Macart and Ms. Macart (Exhibits 18 and 19).

[34] Ms. Churches testified that she had stopped in front of Ms. Macart near the chief steward's office and asked her to put on a face mask, Ms. Macart refused and called her husband, Mr. Macart, over.

[35] During cross-examination the applicants argued that the approximate six-month time span between the incident and the time Ms. Churches was interviewed by TC Investigator Kennedy would contaminate the witness's credibility, consistency, and dependability in recollection of the facts; allow for contamination of the witness, and that Ms. Churches' testimony should be regarded as inadmissible. I acknowledge this argument but after hearing all the testimony and weighing the evidence, I have considered Ms. Churches' testimony to be largely corroborated by other witness testimony.

[36] Ms. Arrieta testified she witnessed her co-worker, Christine Churches, near the chief steward's office asking Ms. Macart, who was walking sort of by herself, to please put on a mask. Ms. Macart replied saying that masks weren't mandatory and then called out to her husband, Mr. Macart, who came to her side with another unknown man. Ms. Arrieta testified that she remembered Ms. Macart saying masks were not mandatory.

[37] Ms. Churches identified the applicants in pictures 8, 11, 12, 13, and 16 of the Minister's Exhibit 1.

[38] Mr. Edwards and Ms. Arrieta testified that they identified the applicants in Exhibit 1 (namely in pictures 7, 8, 9, 10, 11, 12, 13 and 16). Mr. Edwards did testify that he recalled the image of Mr. Macart at his office window.

[39] The applicants argued that Ms. Arrieta misidentified Ms. Macart in picture 1; Ms. Churches could not properly identify the person in picture 8, and that Mr. Edwards was unable to properly identify the people in pictures 10, 11, and 12 of Exhibit 1 (Exhibit 22). As a result, the applicants argue that their credibility had been reduced.

[40] The applicants argued there was a “cacophony of witness mistakes” including “misidentification, misremembering, misconstruing, mischaracterization, misattribution and misunderstanding.” The applicants also argued that “almost all” of the testimony was coloured, reconstructed with bias and embellished inconsistencies between the testimonies. “Almost all” is not all. While there may have been inconsistencies noted in the testimony of the witnesses, mostly with respect to identifying the applicants, there was enough consistency in the testimony related to the identification of the applicants on the ferry to tip the balance of probabilities in favour of the Minister.

[41] Exhibit 1, pictures 11 and 12 show Ms. Macart standing without a face mask and very close to another passenger. Positive identification of the applicants was, overall, corroborated by witnesses Edwards, Arrieta, and Churches in Exhibit 1, namely pictures 8, 11, 12, 13 and 16.

[42] I am satisfied, based on the identification of the applicants and the witness testimony, that they were asked to mask or physically distance, on more than one occasion, and that they refused to do so. The evidence also establishes that the applicants were standing, unmasked, in the lounge or other areas where other passengers attempting to distance would be unable to do so.

[43] I am convinced, on the balance of probabilities, that the applicants were identified as two of the unmasked passengers on board the vessel who failed to adhere to crew direction in carrying out the provisions of the Act or regulations on the date in question.

(4) *Did the applicants have a valid defence or exemption for not complying with the direction of crew?*

[44] The applicants did not raise a defence of due diligence, or any other defence. They did make several arguments in an attempt to support their position that they were not required to wear a mask. However, as neither of the applicants testified, and since the burden to prove a defence or exemption would be on the applicants, I am not convinced that any of these arguments have merit. They are nonetheless explored below.

(a) Medical exemption

[45] The applicants stated that they were exempt from wearing a mask because it was harmful to their health and their “underlying health conditions.”

[46] They argued that they were exercising their medical mask exemptions by distancing themselves from others in lieu of masking during the voyage. However, pictures in Exhibit 1 show the applicants standing close to other passengers, less than two metres apart, without wearing masks. Further, there was evidence to suggest that they were standing in corridors or common areas where it would have been difficult for others to avoid them. They were asked to mask and did not heed that direction. They further did not present to the chief steward’s office to inquire about exemptions or accommodations.

[47] During cross-examination of Mr. Edwards, the applicants also argued that in light of the *BC Personal Information Protection Act*, Chapter 63 (Exhibit 8), they were not required by law to disclose any medical information to anyone on board the vessel. I find this argument to be without merit. There is no evidence that the applicants were asked to disclose any medical information. Even a request to provide a doctor's note stating that you are unable to wear a face mask would not necessitate the disclosure of personal medical information.

[48] Regardless, Ms. Watson testified that a crew member would not direct a person to wear a mask if there was a legitimate reason for a passenger not to do so and that the passenger provided supporting documentation. The documentation does not have to be specific about the medical situation.

[49] I am satisfied that the staff on board the vessel were willing to make alternate arrangements or accommodations for passengers who had supporting documentation. If the applicants wished to be exempt from the masking policy due to underlying health conditions, they only needed to present themselves to the chief steward's office and explain their situation; the testimony of witnesses suggests that they would not have been required to disclose any personal medical information.

[50] The applicants claimed, during their closing statement, that both Mr. Kennedy and Mr. Chiatto knew that Ms. Macart was a trained and licensed physician who was qualified to give mask exemptions and that this blatant disregard of Ms. Macart's qualifications was insulting and brought about a time-consuming review hearing. The applicants have not provided any evidence to support these claims. However, even if this was the case, I fail to see how it is connected with the events that took place on board the vessel and whether the applicants violated the CSA 2001; neither Mr. Kennedy nor Mr. Chiatto were on board during the voyage.

[51] The applicants argued that they had an underlying medical condition. If the applicants believed that wearing a face mask was harmful to their health, they were advised to, and could have raised their concerns with the chief steward who would have made alternate arrangements for them during the voyage.

(b) Exemption for drinking

[52] The applicants argued that it would be permissible to be without a mask while drinking. During cross-examination, the applicants asked Ms. Arrieta if drinking is an exemption to the face-covering policy. Ms. Arrieta replied that the rule was if you were actively consuming food or a beverage you could remove your mask. Ms. Arrieta testified that the only places on board where you were not required to wear a mask were in your vehicle on Deck 4 or while actively eating or drinking in the cafeteria.

[53] The applicants then referenced picture 12 of Exhibit 1 which shows Ms. Macart holding a stainless-steel drinking container. However, the applicants did not explicitly argue that they were refusing to wear a mask because they were drinking. Further, the referenced photo does not demonstrate that Ms. Macart was actively drinking, I do not believe that standing around chatting in a close quarters situation whilst holding a drinking container away from one's face, as captured in picture 12, qualifies as an exemption to wearing a face mask. The average person

would interpret this exemption as allowing the lowering of a face mask whilst actively drinking from the container and not as it is captured in picture 12.

(c) Exempt because of passenger load

[54] During cross-examination of Mr. Chiatto, the applicants questioned the passenger load on board the vessel at the time of the incident and argued that if it was below 50% then passengers would be exempt from the requirement to wear a mask.

[55] Mr. Chiatto was not aware of the persons on board (POB) during the time of the incident. Mr. Chiatto testified that, in respect to TC's Interim Order (Exhibit 3), BC Ferries opted to operate on the condition stipulated in paragraph 6(1)(b) of the order, namely that it would operate in accordance with *Ship Safety Bulletin No. 12/2020* (Exhibit 4). And, in light of the consideration that passengers may not be always able to maintain a safe distance apart of two metres, they would conduct on board operations as per the TC publication, *COVID-19: Guidance Material for Essential Passenger Vessel and Ferry Operators* (Exhibit 5).

[56] Mr. Edwards testified that the vessel was reduced to 50% of the maximum carrying capacity.

[57] Notwithstanding the above, *Ship Safety Bulletin No. 12/2020* states that for all essential passenger vessels who do not reduce passenger load by 50%, passengers are required to ensure that appropriate mitigation measures are in place, such as requesting that passengers wear face masks when unable to physically distance. However, there is no suggestion that it would be inappropriate to maintain those mitigation strategies in addition to reducing capacity.

[58] In addition, section 8 of the Interim Order provides that the 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” [emphasis added]. The vessel chose to adhere to both requirements under section 6: to reduce capacity and to implement measures to reduce transmission. This appears to be in accordance with the Interim Order. Therefore, I am not convinced that there was an exemption to wear a mask simply based on the number of passengers on board at the time.

(d) Applicants' arguments and evidence that were not accepted

[59] The applicants made several arguments that will not be considered, as they are not relevant or necessary to decide the case on its merits.

(i) Constitutional challenge

[60] The applicants appeared to challenge the constitutionality of the Interim Order and argued that it was unconstitutional. When specifically asked if they were officially challenging any provisions of the Canadian Constitution or the *Canadian Charter of Rights and Freedoms*, they responded that they were not. However, they did explicitly state that they were invoking the *Canadian Bill of Rights*.

[61] Where the constitutional validity of a provision of legislation or the associated regulations is at issue, pursuant to section 57 of the *Federal Courts Act*, the party raising this argument must serve a notice on the Attorney General of Canada and the attorneys general of

each province at least 10 days prior to the constitutional issue being argued before the Tribunal. This was not done by the applicants and, consequently, I am unable to consider the issues raised by the applicants with respect to constitutional matters.

(ii) Allegation of discrimination

[62] The applicants argued that they had been discriminated against, contrary to section 5 of the *Canadian Human Rights Act* (CHRA). The applicants have the burden to demonstrate a *prima facie* case of discrimination based on an enumerated ground.² However, the argument appears to have been made in passing; the applicants did not testify or present any evidence that would substantiate an allegation of discrimination under the CHRA. The Minister did not speak to this allegation. In addition to the fact that there was no evidence related to this allegation, it is also irrelevant to whether or not the applicants violated the CSA 2001 and will not be considered further.

(iii) Applicants' exhibits

[63] Similarly, the applicants entered exhibits either during the cross-examination of witnesses who were not in a position to speak about such matters or without any further explanation or discussion. I also find the following lines of questions and exhibits to be irrelevant to the matter before the Tribunal and were not considered in determining the issues before the Tribunal:

- Evidence about personal experiences when wearing a mask, opinions of the dangers of masking or mask safety (including Exhibits 2, 25, 26, 27 and 28), any discussion of medical ethics or informed consent, or knowledge of the hierarchy of controls illustration on page 2 of Exhibit 7.
- Reference to the *Emergencies Act* (Exhibit 20) and the *Occupational Health and Safety Workers Compensation Act*³ (Exhibit 24) and the *Criminal Code of Canada* and its association with a travel ban (Exhibit 23) issued to the applicants. These acts and regulations are not part of the legislative framework related to this violation and thus are not taken under consideration.

D. Was the amount of the penalties justified?

[64] The range of penalties for a violation of subsection 115(1) of the CSA 2001 may range from \$600 to \$2,400, as per Part 1 of the Schedule to the *Administrative Monetary Penalties and Notices (CSA 2001) Regulations*.

[65] The Minister assessed three aggravating factors. Mr. Kennedy and Mr. Chiatto testified about these factors. The first one was deliberateness, which was scored high as the applicants were educated individuals who were aware of the masking requirements but chose to ignore them. The second factor was harm, which was scored high due to subsequent delay in the next scheduled sailing of the ferry due to the police investigation on arrival at Horseshoe Bay. The third factor was the lack of mitigation on the part of the applicants by not explaining to the chief

² *Moore v. British Columbia (Education)*, 2012 SCC 61, at para 33.

³ The Tribunal notes that this appears to be a reference to the provincial *Occupational Health and Safety Regulations*, created under the BC *Workers Compensation Act*.

steward why they could not wear a mask. Had the applicants explained their situation, the chief steward could have made accommodations for them to isolate somewhere on board the vessel. The Minister's representative argued that the amount was well substantiated.

[66] The applicants acknowledge the process that Mr. Chiatto and Mr. Kennedy used in determining the penalty but argued that they were using subjective assessment based on inaccurate information and that Notices of Violation were inappropriate. However, they did not speak specifically to the amount of the penalties.

[67] In light of witness testimony about the amount of the penalty and the Minister's representative's arguments, I agree that the amount of the penalty is justified based on these aggravating factors.

E. Conclusion

[68] In consideration of the testimony of the Minister's witnesses and the statement of the applicants, it is proven that the applicants were on board the ferry, Queen of Oak Bay, on the morning of October 17, 2020. In consideration of the testimony of the Minister's witnesses, Mr. Edwards, Ms. Arrieta and Ms. Churches, it is proven that direction was given to the applicants to wear masks, physically distance, or come to the chief steward's office if they had concerns about wearing a mask.

[69] In consideration of the testimony and documentary evidence, it is proven that the applicants were unmasked near other passengers, failing to heed the directions of crew to wear a mask or physically distance. There were no valid defences or exemptions for the applicants' failure to follow crew directions.

[70] The Minister has proven that the applicants were on board the vessel on the morning of October 17, 2020, they failed to follow crew directions and are in violation of section 115(1) of the CSA 2001.

III. DETERMINATION

[71] The Minister of Transport has proven, on a balance of probabilities, that the applicant, Tara Macart, violated subsection 115(1) of the *Canada Shipping Act, 2001*. The monetary penalty is upheld.

[72] The total amount of \$1,950 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.

And

[73] The Minister of Transport has proven, on a balance of probabilities, that the applicant, Jonathan Macart, violated subsection 115(1) of the *Canada Shipping Act, 2001*. The monetary penalty is upheld.

[74] The total amount of \$1,950 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.

May 19, 2023

(Original signed)

Jim Parsons
Member

Representations

For the Minister:

For the Applicants:

Eric Villemure

Tara Macart

Jonathan Macart

Matthew Andrew Tartal