

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20190304**

**Docket: A-254-18**

**Citation: 2019 FCA 39**

**CORAM: WEBB J.A.  
NEAR J.A.  
LASKIN J.A.**

**BETWEEN:**

**HUGH MACKENZIE**

**Appellant**

**and**

**TRANSPORTATION SAFETY BOARD OF  
CANADA**

**Respondent**

Heard at Toronto, Ontario, on February 11, 2019.

Judgment delivered at Ottawa, Ontario, on March 4, 2019.

**REASONS FOR JUDGMENT BY:**

**NEAR J.A.**

**CONCURRED IN BY:**

**WEBB J.A.  
LASKIN J.A.**

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**REASONS FOR JUDGMENT**

**NEAR J.A.**

[1] The Appellant, Hugh Mackenzie, appeals from the July 13, 2018 decision of the Federal Court (2018 FC 728) dismissing his application for judicial review of a notice (the Notice) issued by the Respondent, Transportation Safety Board of Canada under subsection 19(9) of the *Canadian Transportation Accident Investigation and Safety Board Act*, S.C. 1989, c. 3 (the Act) compelling the production of certain information.

[2] The Appellant is the General Manager of Kingston and the Islands Boatlines Ltd. (KIB), which operates tour boats in the area of Thousand Islands near Kingston, Ontario. On August 8, 2017, one of KIB's vessels, the *Island Queen III*, touched bottom near Whisky Island and took on some water (the Marine Occurrence). There is no dispute that this constituted a marine occurrence as defined under the Act. The Respondent investigated the Marine Occurrence and, as part of that investigation, sought witness contact information from the Appellant. The Appellant refused to provide this information. As a result, the Respondent issued the Notice requiring the Appellant to provide it with certain information concerning the passengers on board at the time of the Marine Occurrence and the crew list for vessels operated by KIB.

[3] Before the Federal Court, the Appellant unsuccessfully argued that the Notice was overbroad and violated the protection against unreasonable search and seizure under section 8 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c. 11*. He asked the Federal Court to strike parts of the Notice or compel the Respondent to disclose how the requested information was relevant to the investigation. He further sought to introduce fresh evidence about other investigations that the Respondent had allegedly carried out as part of an industry-wide audit, and requested that the Court strike an affidavit sworn by the Respondent's Chief Operating Officer, Mr. Jean Laporte, on grounds that it contained hearsay evidence and was from a person with no experience conducting investigations.

[4] The Appellant raises some of the same arguments before this Court. He states that the Federal Court erred in finding that the information requested in the Notice was relevant to the investigation. In addition, the Appellant says that the Federal Court erred in failing to find that subsection 19(9) of the Act required the Notice to be authorized by an investigator who was “actually investigating” the Marine Occurrence, instead of by Captain Steven Neatt, an investigator based in Quebec City who signed the Notice. The Appellant further says that the Federal Court erred in finding that the Respondent or Captain Neatt in particular had reasonable grounds to believe the Appellant possessed relevant information to the investigation. He repeats that the Federal Court should have struck Mr. Laporte’s affidavit.

[5] On appeal from an application for judicial review, this Court is required to decide whether the Federal Court identified the appropriate standard of review and applied it properly, “step[ping] into the shoes” of the Federal Court and focusing on the administrative decision at issue (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47, [2013] 2 S.C.R. 559). As the Respondent exercised its discretionary power to issue the Notice under its home statute, the Federal Court properly applied the reasonableness standard.

[6] I see no merit to the appeal. Subsection 19(9) of the Act expressly provides that an investigator employed by the Respondent who is investigating a transportation occurrence may issue a Notice requiring the production of information relevant to an investigation. This power furthers the Respondent’s broad mandate under paragraph 7(1)(a) of the Act to advance transportation safety by “conducting independent investigations [...] into selected transportation

occurrences in order to make findings as to their causes and contributing factors [...]” The requested information concerning the passengers on board at the time of the Marine Occurrence and the crew list for vessels operated by KIB is relevant to the Respondent’s investigation. The Notice formed part of a legitimate effort to obtain pertinent information from witnesses who either were present at the time of the Marine Occurrence or had experience with KIB’s operations. Accordingly, the Federal Court properly concluded that the Notice represented a reasonable use of the statutory powers available to the Respondent as part of its duty to discharge its legal mandate. There is no basis for this Court to intervene.

[7] Similarly, I find that there is no merit to the Appellant’s arguments that Captain Neatt was unauthorized to sign the Notice or that he lacked reasonable grounds to believe the Appellant possessed relevant information. There is nothing under subsection 19(9) of the Act requiring the investigator who issues a notice to be physically located where a given transportation occurrence under investigation took place, or to have conducted the “on the ground” component of the investigation. Captain Neatt was the co-lead of the team of investigators assigned to the Marine Occurrence, and it was entirely appropriate that he signed the Notice.

[8] The Appellant, as the General Manager of KIB, would be expected to have the information that was being sought in this case, which was the contact information for the passengers who were on board the *Island Queen III* on August 8, 2017 and the contact information for other individuals who worked as part of the crew on other KIB vessels.

Therefore, there is no basis for this Court to intervene in relation to the Notice that was served on the Appellant.

[9] Finally, the Federal Court properly declined to strike Mr. Laporte's affidavit, having determined that Mr. Laporte did, in fact, have extensive experience with investigations, and that any hearsay evidence was admissible on grounds of necessity and reliability under the principled approach described in *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787. Again, there is no reason to intervene.

[10] I would dismiss the appeal with costs awarded to the Respondent in the amount of \$4,000.00, all inclusive, as agreed to by the parties.

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"D. G. Near"  
J.A.

"I agree  
Wyman W. Webb J.A."

"I agree  
J.B. Laskin J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE O'REILLY  
OF THE FEDERAL COURT DATED JULY 13, 2018, CITATION NO. 2018 FC 728,  
IN FILE NO. T-1720-17**

**DOCKET:** A-254-18

**STYLE OF CAUSE:** HUGH MACKENZIE v.  
TRANSPORTATION SAFETY  
BOARD OF CANADA

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** FEBRUARY 11, 2019

**REASONS FOR JUDGMENT BY:** NEAR J.A.

**CONCURRED IN BY:** WEBB J.A.  
LASKIN J.A.

**DATED:** MARCH 4, 2019

**APPEARANCES:**

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