

Federal Court



Cour fédérale

Date: 20180713

Docket: T-1720-17

Citation: 2018 FC 728

Ottawa, Ontario, July 13, 2018

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

HUGH MACKENZIE

Applicant

and

**TRANSPORTATION SAFETY
BOARD OF CANADA**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Mr Hugh Mackenzie, is the General Manager of Kingston and the Islands Boatlines Ltd (KIB), which operates tour boats in the area of the 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 Transportation Safety Board of Canada investigated and issued a notice to obtain information from the owners and operators of the

vessel, particularly, information about the passengers on board at the time, the crew list, and a report taken from one passenger who claimed to have experienced shock. (The latter has already been disclosed and is no longer in issue). The Board relied on its powers under the *Canadian Transportation Accident Investigation and Safety Board Act*, SC 1989, c 3, s 19 (see Annex for provisions cited).

[2] Mr Mackenzie brought this application for judicial review challenging the Board's notice on the grounds that it is overbroad and violates the protection against unreasonable search and seizure in s 8 of the *Canadian Charter of Rights and Freedoms*. He asks me to strike parts of the notice or compel the Board to disclose the basis for its contention that the requested information is relevant to its investigation. He also asks me to strike an affidavit on which the Board relies.

[3] I cannot grant Mr Mackenzie the relief he seeks. The Board reasonably exercised its statutory authority, and did not offend s 8 of the Charter in doing so. I must, therefore, dismiss this application for judicial review.

[4] After the hearing of this application, Mr Mackenzie filed a motion to introduce fresh evidence. The Board opposes the motion.

[5] There are four issues:

1. Should Mr Mackenzie's fresh evidence be admitted?
2. Was the decision of the investigator to issue a notice unreasonable?
3. Did the investigator's decision comply with the Charter?

4. Should the Laporte affidavit be struck?

II. Issue One – Should Mr Mackenzie’s fresh evidence be admitted?

[6] In support of his general position that the Board has engaged in an unduly broad investigation and overstepped its statutory powers, Mr Mackenzie seeks to introduce evidence about other recent Board activities. He claims that the Board has carried out illegal warrantless searches of other companies’ tour vessels as revealed in so-called “advisory letters” recently sent out by the Board. The letters set out some of the Board’s safety concerns arising from its investigation into the Island Queen III incident.

[7] Mr Mackenzie also wants to file evidence relating to an interview the Board conducted with Captain Stephen Steels, Senior Master for KIB, which took place several weeks after the hearing. Mr Mackenzie suggests that the interview was conducted under threat of prosecution for obstruction of the investigation, which supports his characterization of the Board’s actions as excessive.

[8] In my view, this fresh evidence is not admissible. To be admitted, the evidence would have to be so significant that it would likely change the result of the application: *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 104, at para 19. (The case also lays out two other criteria that I need not consider, given that the evidence here does not satisfy the first).

[9] For two reasons, that criterion is not met here. First, the evidence does not, in fact, support Mr Mackenzie's characterization of the Board's conduct. Second, it is irrelevant to the issues on this application for judicial review.

[10] The evidence Mr Mackenzie points to as proof that the Board has conducted illegal, warrantless searches shows that Board investigators bought tickets for tours on other boats and made some observations while on board. The investigators identified some safety issues that they brought to the attention of the tour operators and Transport Canada by way of the "advisory letters." This evidence does not indicate that the Board's conduct amounted to an intrusion on any reasonable expectation of privacy for which a warrant would normally be required. Nor does it suggest that that the Board had exceeded its statutory mandate, discussed below.

[11] With respect to the Steels interview, the evidence shows that the interview was entirely voluntary. Captain Steels does not refer to any coercion in his affidavit. He simply states that he was asked to attend an interview, and he did so on May 18, 2018. The series of emails attached to his affidavit show that representatives of the Board requested an interview, provided a list of topics to be explored, and made clear that it was up to Captain Steels to decide whether to participate. The reference to the offence of obstruction was not contained in any email to Captain Steels; it was cited in an email to Mr Mackenzie who had questioned the purpose of the interview.

[12] Accordingly, Mr Mackenzie has not characterized the proposed evidence accurately. The evidence does not support his contention that the Board was exceeding its powers.

[13] It follows that the evidence is also irrelevant. The main issue on this application is whether the notice issued by the Board is valid. That requires an interpretation of the Board's statutory mandate and authority as granted by Parliament. The proposed fresh evidence seeks to assign oblique motives to the Board. Not only does the evidence miss its mark, it does not assist in determining the proper scope of the Board's powers. It is irrelevant.

III. Issue Two – Was the decision of the investigator to issue a notice unreasonable?

[14] Mr Mackenzie argues that the Board's powers under the Act are limited to investigating transportation occurrences and identifying safety deficiencies. He maintains that an investigator can issue a notice requiring a person to produce information, but only information relevant to an actual investigation into a transportation occurrence. Mr Mackenzie asserts that the investigator here sought information not related to an occurrence but to support a broad industry-wide audit, and a study of KIB's overall operations.

[15] I disagree.

[16] The information being sought relates, first, to the passengers on board at the time of the occurrence. These people witnessed the incident and may have useful information that would assist the investigation, including photos or videos. Second, the investigator sought information about the crew on board that day, as well as other crew members who may have useful information about qualifications, training, procedures, and other aspects of KIB's operations. The latter request is obviously quite broad. However, it falls within the Board's statutory powers.

[17] The Board has the authority to investigate transportation occurrences for purposes of carrying out its mandate (s 14). The Board's mandate includes advancing transportation safety through investigations into transportation occurrences "in order to make findings as to their causes and contributing factors." However, the Board's objects also include broader tasks, such as identifying safety problems, making recommendations, and reporting publicly on its findings (s 7(1)).

[18] Mr Mackenzie asserts that the Act makes clear that the Board's powers to investigate transportation occurrences relate solely to identifying their causes and contributing factors. That is not how I read the statute. The Board can investigate transportation occurrences to further any of its statutory objects, including making findings about the causes and contributing factors of occurrences, but those objects also extend to identifying "safety deficiencies as evidenced by transportation occurrences," making recommendations to eliminate or reduce safety problems, and reporting on investigations and findings.

[19] Accordingly, the Board's interest in speaking to passengers and crew members can readily be seen as a means of determining whether there are any safety issues arising from the occurrence itself, or more systemic safety problems that merit its attention. I can see nothing unreasonable about the investigator's request for information that would permit the Board to pursue its broad statutory mandate.

IV. Issue Three – Did the investigator’s decision comply with the Charter?

[20] Mr Mackenzie argues that the notice intrudes on a reasonable expectation of privacy in respect of KIB’s business records.

[21] While privacy interests can certainly arise in respect of business records, here the Board was seeking information about passengers and crew members, not the business of KIB *per se*. KIB, as the custodian of that information, may have an obligation not to disclose it unless required to do so. But here, as discussed above, the Board acted within its statutory powers in requesting the information. Any impact on anyone’s privacy is minor and outweighed by the public safety concerns underlying the statutory grant of those powers. Short of a challenge to the constitutionality of those powers, no s 8 issue arises.

V. Issue Four – Should the Laporte affidavit be struck?

[22] Mr Mackenzie maintains that an affidavit sworn by the Chief Operating Officer of the Board, Mr Jean Laporte, should be struck because it contains hearsay, and is from a person who has no experience in investigations.

[23] I disagree.

[24] The persons involved in the investigation into the transportation occurrence are not competent or compellable witnesses, so no one with direct knowledge could author an affidavit. Accordingly, by necessity, the affidavit had to be from a person relying on hearsay. In any case,

however, Mr Laporte states that he does, in fact, have extensive experience in investigations over the course of his more than 30 years of employment at the Board. Further, the affidavit is largely devoted to describing the Board's mandate and operations, and contains general statements about the nature of the investigation and the rationale for issuing the notice in issue here. A person in Mr Laporte's position would appear to be a reliable source for that kind of information.

Accordingly, any hearsay in the affidavit is admissible because it satisfies the criteria of necessity and reliability under the principled approach.

VI. Conclusion and Disposition

[25] The notice issued to KIB represented a reasonable use of the statutory powers available to the Board to discharge its legal mandate. Further, it did not amount to an unreasonable intrusion on privacy. Finally, there is no basis on which to strike the Laporte affidavit. Therefore, I must dismiss this application for judicial review, with costs.

JUDGMENT IN T-1720-17

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed
with costs.

"James W. O'Reilly"

Judge

Annex

Canadian Transportation Accident Investigation and Safety Board Act, SC 1989, c 3

Loi sur le Bureau canadien d'enquête sur les accidents de transport et de la sécurité des transports, LC 1989, ch 3

Object of the Board

Mission du Bureau

7 (1) The object of the Board is to advance transportation safety by

7 (1) Le Bureau a pour mission de promouvoir la sécurité des transports :

(a) conducting independent investigations, including, when necessary, public inquiries, into selected transportation occurrences in order to make findings as to their causes and contributing factors;

a) en procédant à des enquêtes indépendantes, y compris des enquêtes publiques au besoin, sur les accidents de transport choisis, afin d'en dégager les causes et les facteurs;

(b) identifying safety deficiencies as evidenced by transportation occurrences;

b) en constatant les manquements à la sécurité mis en évidence par de tels accidents;

(c) making recommendations designed to eliminate or reduce any such safety deficiencies; and

c) en faisant des recommandations sur les moyens d'éliminer ou de réduire ces manquements;

(d) reporting publicly on its investigations and on the findings in relation thereto.

d) en publiant des rapports rendant compte de ses enquêtes et présentant les conclusions qu'il en tire.

Jurisdiction of Board

Compétence du Bureau

14 (1) Notwithstanding any other Act of Parliament but subject to section 18, the Board may, and if so requested by the Governor in Council shall, investigate any transportation occurrence for the purpose of carrying out the object of the Board.

14 (1) Nonobstant toute autre loi fédérale mais sous réserve de l'article 18, le Bureau enquête, de sa propre initiative ou à la demande du gouverneur en conseil, sur les accidents de transport, afin de s'acquitter de sa mission à cet égard.

Request by a department or province.

Demande d'un ministère ou d'une province

(2) Subject to section 18, the Board may investigate a transportation occurrence where a department, the lieutenant governor in council of a province or the Commissioner of the Northwest Territories or Nunavut, or the

(2) Sous la même réserve, le Bureau peut enquêter sur un accident de transport à la demande d'un ministère, du lieutenant-gouverneur en conseil d'une province ou du commissaire des Territoires du Nord-Ouest ou du Nunavut, ou à la demande du

Commissioner of Yukon with the consent of the Executive Council of that territory, requests the Board to investigate and undertakes to be liable to the Board for any reasonable costs incurred by the Board in the investigation

commissaire du Yukon faite avec l'agrément du Conseil exécutif de ce territoire, à condition qu'ils s'engagent à le rembourser des frais entraînés par l'enquête.

Exclusive jurisdiction of Board

Compétence exclusive du Bureau

(3) Notwithstanding any other Act of Parliament,

(3) Par dérogation à toute autre loi fédérale, aucun ministère — à l'exception de celui de la Défense nationale — ne peut, afin d'en dégager les causes et facteurs, enquêter sur un accident de transport assujéti à une enquête en application de la présente loi ou qui pourrait l'être, selon les informations dont il dispose; le ministère — autre que celui de la Défense nationale — qui a entrepris une telle enquête interrompt sur-le-champ, en cas d'ouverture d'une autre enquête sur l'accident en question sous le régime de la présente loi, toute partie de son enquête visant à dégager ces causes et facteurs.

(a) no department, other than the Department of National Defence, may commence an investigation into a transportation occurrence for the purpose of making findings as to its causes and contributing factors if

(i) that transportation occurrence is being or has been investigated by the Board under this Act, or

(ii) the department has been informed that that transportation occurrence is proposed to be investigated by the Board under this Act; and

(b) where an investigation into a transportation occurrence is commenced by the Board under this Act after an investigation into that transportation occurrence has been commenced by a department, other

than the Department of National Defence, the department shall forthwith discontinue its investigation, to the extent that it is an investigation for the purpose of making findings as to the causes and contributing factors of the transportation occurrence.

Saving provision

(4) Nothing in subsection (3)

(a) prevents a department from commencing an investigation into or continuing to investigate a transportation occurrence for any purpose other than that of making findings as to its causes and contributing factors, or from investigating any matter that is related to the transportation occurrence and that is not being investigated by the Board; or

(b) prevents the Royal Canadian Mounted Police from investigating the transportation occurrence for any purpose for which it is empowered to conduct investigations.

Where Board does not investigate

(5) For greater certainty, where the Board does not investigate a transportation occurrence, no department is prevented from investigating any aspect of the transportation occurrence that it is

Compétence préservée

(4) Le paragraphe (3) n'a toutefois pas pour effet d'empêcher un ministère de commencer ou de continuer une enquête sur l'accident si celle-ci ne vise pas à dégager les causes et facteurs de l'accident ou d'enquêter sur toute question liée à celui-ci qui ne fait pas l'objet d'une enquête par le Bureau, ni la Gendarmerie royale du Canada d'enquêter sur celui-ci à toute fin ressortissant à ses pouvoirs d'enquête.

Inaction du Bureau

(5) Il demeure entendu que, faute d'enquête par le Bureau relativement à un accident de transport, tout ministère peut enquêter sur les aspects de celui-ci ressortissant à ses pouvoirs d'enquête.

empowered to investigate.

Power of investigators

19 (1) Where an investigator believes on reasonable grounds that there is, or may be, at or in any place, anything relevant to the conduct of an investigation of a transportation occurrence, the investigator may, subject to subsection (2), enter and search that place for any such thing, and seize any such thing that is found in the course of that search.

Conditions for exercise of powers under subsection (1)

(2) An investigator shall not exercise the powers referred to in subsection (1) in relation to a particular place without the consent of the person apparently in charge of that place unless

(a) those powers are so exercised in relation to that place under the authority of a warrant, or

(b) by reason of exigent circumstances, it would not be practical for the investigator to obtain a warrant.

Issue of warrant authorizing exercise of powers under subsection (1)

(3) Where a justice of the peace is satisfied by information on oath that an investigator believes on reasonable grounds that there is, or may be, at or in any place, anything relevant to the conduct of an investigation of a transportation occurrence, the justice may, on ex parte application, issue a warrant signed by the justice authorizing the investigator to enter and search that place for any such thing and to seize any such thing found in the

Perquisition et saisie

19 (1) Sous réserve du paragraphe (2), l'enquêteur peut perquisitionner en tout lieu où il a des motifs raisonnables de croire à la présence de tout objet ayant rapport à une enquête sur un accident de transport et y saisir un tel objet.

Conditions

(2) L'enquêteur ne peut toutefois procéder à la perquisition et à la saisie sans le consentement de la personne apparemment responsable du lieu en cause, sauf s'il est muni d'un mandat ou si l'urgence de la situation rend l'obtention de celui-ci difficilement réalisable.

Mandat de perquisition

(3) S'il est convaincu, sur la foi d'une dénonciation sous serment, qu'un enquêteur a des motifs raisonnables de croire à la présence en un lieu d'un objet ayant rapport à une enquête sur un accident de transport, le juge de paix peut, sur demande ex parte, signer un mandat autorisant l'enquêteur à perquisitionner dans ce lieu et à y saisir un tel objet.

course of that search.

...

[...]

Additional powers of investigators

Pouvoirs supplémentaires

(9) An investigator who is investigating a transportation occurrence may

(9) Dans l'exercice de ses fonctions, l'enquêteur peut, après en avoir averti l'intéressé par écrit :

(a) where the investigator believes on reasonable grounds that a person is in possession of information relevant to that investigation,

a) exiger de toute personne qui, à son avis, est en possession de renseignements ayant rapport à son enquête la communication de ceux-ci — notamment pour reproduction totale ou partielle, selon ce qu'il estime nécessaire — ou obliger cette personne à comparaître devant lui et à faire ou remettre la déclaration visée à l'article 30, sous la foi du serment ou d'une déclaration solennelle s'il le demande;

(i) by notice in writing signed by the investigator, require the person to produce the information to the investigator or to attend before the investigator and give a statement referred to in section 30, under oath or solemn affirmation if required by the investigator, and

b) obliger toute personne participant, directement ou non, à l'exploitation d'un aéronef, d'un navire, de matériel roulant ou d'un pipeline à subir un examen médical si, à son avis, celui-ci est utile à son enquête ou susceptible de l'être;

(ii) make such copies of or take such extracts from the information as the investigator deems necessary for the purposes of the investigation;

c) exiger d'un médecin ou autre professionnel de la santé les renseignements, relatifs à leurs patients, qui, à son avis, sont utiles à son enquête ou susceptibles de l'être;

d) requérir de la personne ayant la garde de cadavres ou des restes des corps l'autorisation d'effectuer sur ceux-ci les autopsies ou les examens médicaux qui, à son avis, sont utiles à son enquête ou susceptibles de l'être, et faire pratiquer ces autopsies ou examens.

L'avis de l'enquêteur doit, dans tous les cas, être fondé sur des motifs raisonnables.

*Canadian Charter of Rights and
Freedoms, RS 1982, c. C-00*

*Charte canadienne des droits et libertés,
LR 1982, ch C-00*

Search or Seizure

Fouilles, perquisitions ou saisies

8. Everyone has the right to be secure
against unreasonable search or seizure.

8. Chacun a droit à la protection contre
les fouilles, les perquisitions ou les saisies
abusives.

FEDERAL COURT
SOLICITORS OF RECORD

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