BETWEEN:

NORD-DEUTSCHE VERSICHERUNGS-GESELLSCHAFT, UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION LIMITED and FISCHER BEARINGS MANUFACTURING LIMITED ..... SUPPLIANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT;

AND

KONINKLIJKE NEDERLANDSCHE STOOMBOOT-MAATSCHAPPIJ N.V. (THE ROYAL NETHERLANDS STEAMSHIP COMPANY) ..... THIRD PARTY DEFENDANT

Ottawa
1967
Nov. 27-29, Dec. 4-8, 11-15, 18-21
1968
Jan. 22-26, 29-30, Feb. 1-2, 5-9, 12-16, 19-21, Mar. 12, 15, Apr. 1-5
Sept. 10

Crown—Shipping—Limitation of liability—Interest—Collision of ships in St. Lawrence—Range lights maintained by Transport Minister—Displacement by ice action—Responsibility of Departmental officials—Liability of Crown—Tort, delict—Statutory limitation on liability—"Canal", meaning—Actual fault or privity of Crown—By whom Crown represented—Interest on damages awarded—Rule in Quebec—Crown Liability Act, S. of C. 1952-53, c. 30, s. 3(1)(a) and (b), s. 18—Canada Shipping Act, R.S.C. 1952, c. 29, s. 660—Quebec Civil Code, Arts. 1054, 1056.

On April 10th 1965 the *Hermes* with pilot aboard was proceeding down the St. Lawrence River with its course set by the Pointe du Lac range lights, which were intended to indicate the centre line of a channel 550 feet wide, when she suddenly sheered to port as a result of bank suction and collided with the *Transatlantic* upbound. The front range of the Pointe du Lac lights, the only fixed aid to navigation in use, was set on a concrete pier which had been sunk in the clay river bed in 1935. Under s. 591 of the *Canada Shipping Act* the lights were vested in the Crown and were subject to the control and maintenance of the Minister of Transport, who had delegated this responsibility to officials of his Department. These officials were aware that the pier was subject to enormous ice pressure each year and that it was in a dilapidated state but they did not know that it had been displaced to the south by ice action between 25 and 30 feet by the end of 1964 and an additional 12 feet before the collision, that the light was also displaced 2¾ feet by tilting, and that as a result the line indicated by the lights was some 230 feet south of mid-channel on the day of the collision. No action had ever been taken by these officials to ascertain if the pier had moved, though it would have been simple to do so. While pilots and navigators knew that the line indicated by the lights in 1964 was to the south of mid-channel they also knew that ships could still proceed safely by using them.

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The court found that the sole cause of the collision was the additional displacement of the pier by 12 feet between 1964 and the date of the collision.

Held, the Crown was liable in tort for the accident under s 3(1)(*a*) and (*b*) of the *Crown Liability Act*, both by the common law and by the civil law of Quebec. The Department of Transport officials failed in their obligation to take the action necessary to ensure that the pier had not been displaced by ice action or to give warning of the misalignment of the lights (*The King v Hochelaga Shipping and Towing Co.* [1940] S C R. 153; *Grossman v. The King* [1952] 1 S C R. 571; *Workington Harbour & Dock Board v. Towerfield* (*Owners*) [1951] A C 112; *Indian Towing Co. v. U S.* (*Coast Guard*) [1956] 1 A M C. 27; *The King v. Canada Steamship Lines Ltd.* [1927] S.C.R. 68, applied. *Cleveland Cliffs Steamship Co. v. The Queen* [1957] S C R. 810, distinguished) Under s 3(1)(*a*) and (*b*) of the *Crown Liability Act* the Crown is also subject in Quebec to the delictual and quasi-delictual liability described in Art. 1054 of the *Civil Code* for damage caused by things under the Crown's care, in this case the Pointe du Lac lights, which was the sole cause of the accident within the meaning of the doctrine. *Mazeaud & Tunc*, "Responsabilité Civile", éd. 1957 at pp. 610, 614, 615, 208, 209; *Castel* "The Civil Law System of the Province of Quebec", p 485; *Mazeaud & Tunc*, "Traité et pratique de la responsabilité civile", 5e éd, tome II, no. 1257.

Held also, the Crown's liability was not limited by s. 660 of the *Canada Shipping Act* (1) The Crown failed to establish that the channel where the accident occurred, which had been a natural channel navigable by ocean-going vessels of 10 feet draught before being deepened to 35 feet, was a "canal" within the meaning of s. 660, which word imported the paramountcy of man's ingenuity in the making of the canal. (2) The Crown also failed to establish that the damage occurred without its actual fault or privity within the meaning of s. 660. While the Minister and Deputy Minister of Transport (who it was contended were alone designated by Parliament to represent the Crown in the administration of the Department) had no actual knowledge of the pier's displacement, responsibility for aids to navigation had been delegated to officials in the field (whose fault was not imputable to the Crown) and to officials at Ottawa, who were the directing minds of the Department on aids to navigation and whose failure to set up a proper system of control was therefore a fault imputable to the Crown Such failure also involved a breach of duty attached to the Crown's ownership and control of the pier with a consequent presumption of liability under Art. 1054 of the Quebec *Civil Code*. *The Lady Gwendolyn* [1965] 2 All E R. 283; *The Truculent* [1952] P 1; [1951] 2 Lloyd's Rep. 308; *Lennard's Carrying Co. v. Asiatic Petroleum Co.* [1915] A C. 705; *Paterson Steamships Ltd. v. Canadian Co-operative Wheat Producers Ltd* [1935] S C R. 617; *Hudson v Ridge Mfg Co* [1957] 2 All E R. 229, considered

Held also, having regard to s 3(1)(*a*) and (*b*) of the *Crown Liability Act, viz* that the Crown's liability in tort (delict and quasi delict in Quebec) is that of a private person the damages will in accordance with the provisions of Art. 1056 of the Quebec *Civil Code* bear interest at 5% from the filing of the petition of right. Section 18 of the *Crown Liability Act* which permits the Minister of Finance to pay interest at 4% from the date of a judgment against the Crown

does not affect the rule in Quebec as set forth in Art. 1056 *Civil Code*. *The Queen v. Henderson* 28 S.C.R. 425; *Langlois v. Canadian Commercial Corp.* [1956] S.C.R. 954, referred to.

PETITION OF RIGHT.

A. Stuart Hyndman and with him *Francis Gerity, Q.C., Peter G. Cathcart* and *Bruce Cleven* for suppliants.

Léon Lalande, Q.C., Bernard M. Deschenes, Q.C., Paul M. Ollivier, Q.C. and *Peter M. Troop* for respondent.

Jean Brisset, Q.C. and *Blake Knox* for third party.

NOËL J.:—By petition of right, the suppliants claim damages from Her Majesty the Queen as a result of a collision which took place on April 10, 1965, in a 550 foot channel situated in Lake St. Peter (between Sorel and Three Rivers, P.Q.) in the St. Lawrence River, in the province of Quebec, between the downbound vessel M/V *Hermes* and the upbound vessel M/V *Transatlantic,* allegedly caused by the displacement of a range light which guided the vessel *Hermes* so close to the south bank that it sheered, crossed the channel and collided with the *Transatlantic*. Respondent in turn, by way of third party proceedings taken against the owners of the vessel *Hermes,* asks that the latter be condemned to indemnify her against any damages she may be condemned to pay by judgment to be rendered in the action between her and the suppliants.

The amounts claimed as a result of this accident are in excess of five million dollars and the suppliants are underwriters, insurers and consignees of the cargo laden on board the M/V *Transatlantic.*

Nord-Deutsche-Versicherungs-Gesellschaft, one of the suppliants, a hull and machinery underwriter, is acting herein on its own behalf and for and on behalf of all those underwriters concerned or having an interest in the following policies of insurance which at the relevant time were in effect with respect to the German motor vessel *Transatlantic*:

(a) a hull and machinery policy no. K120, dated October 1, 1961;

(b) increased value policy no. 108, dated October 1, 1964;

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(c) crew personal effects policy no. E-104, dated October 1, 1964;

(d) cargo policy no. 326/64, covering Decca radar equipment, dated October 1, 1964;

(e) cargo policy no. 2579, covering wireless set, dated September 25, 1964.

United Kingdom Mutual Steam Ship Assurance Association Limited, is the protecting and indemnity club in which the said vessel *Transatlantic* was entered at the time of the casualty, hereinafter referred to by and in virtue of certificate of entry No. 11097.

The third suppliants, Fischer Bearings Manufacturing, Limited, is acting herein on its own behalf as a consignee of cargo laden on board the said vessel *Transatlantic* and as well for and on behalf of all those interested as consignors, consignees, or persons subrogated in their rights in the whole of the cargo laden on board the said vessel at the time of the above mentioned casualty.

The group of underwriters, represented by the first suppliant, Nord-Deutsche Verischerungs-Gesellschaft, paid the owners of the German motor vessel, *Transatlantic,* for the total loss of their ship and also paid for any personal effects of the crew, for the Decca radar equipment and for the wireless set. The United Kingdom Mutual Steam Ship Assurance Association is principally concerned with the removal of the wreck of the M/V *Transatlantic* from the bed of Lake St. Peter in accordance with the requirements of the *Navigable Waters Protection Act* and also some minor items of claim with respect to the repatriation of the crew. The cost of the removal of the wreck turned out to be just over a million dollars.

The third suppliant, Fischer Bearings Manufacturing, Limited, is acting in a representative capacity as well as on its own behalf. This name was selected as a matter of convenience out of many interests concerned in the cargo which became virtually a total loss as a result of this casualty.

Paragraphs 24 and 25 of the petition of right deal with the various items claimed by the suppliants and their value and paragraph 26 alleges that "by virtue of the applicable law and by instruments dated as of the 5th day of May, 1965, and as of the 26th day of August, 1966, respectively",

the suppliants "are, and have been, duly subrogated in and have had transferred and assigned to them to the extent paid by each of them respectively all claims and demands, recourse and rights of recovery which the Owners of the said vessel *Transatlantic* had or might be entitled to assert against any party or parties, government person or body with respect to all losses, damages, expenses and costs sustained or incurred in consequence of the said casualty the whole as more fully appears from the originals of the receipts, transfers, subrogations and assignments annexed thereto to form part hereof as if recited at length".

Counsel for the respondent as well as for the third party defendant, admitted during the trial that in all cases the suppliants had in fact been legally subrogated in the rights allegedly assigned.

The respondent, by her defence, contested the suppliants' petition and then instituted third party proceedings against Koninklijke Nederlandsche Stoomboot-Maatschappij N.V. (The Royal Netherlands Steamship Company) the owner of the motor vessel *Hermes*. By the statement of claim filed and served on the third party with the permission of the Court, the respondent alleged that the collision between the M/V *Transatlantic* and the M/V *Hermes* had been caused by the fault, imprudence, neglect, inability and want of care of the third party and its servants, officers and the pilot aboard the *Hermes* for a number of reasons set out in paragraph 4 of such statement of claim which I will mention later. The Crown, by the third party proceedings, seeks judgment that the third party be condemned to indemnify it for any damage it might be condemned to pay by the judgment to be rendered in the action between it and the suppliants in capital, interest and costs.

The third party delivered a statement of defence and a counterclaim praying that the third party proceedings instituted against it by the respondent be dismissed with costs and, alternatively, for a declaration that if it is found liable to indemnify the respondent in respect of any damage which the latter may be condemned to pay to the suppliants, it is entitled to limit its liability under the relevant provisions of the *Canada Shipping Act* (sections 657 to 663, 1934, chapter 44) because the damage or loss

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thus sought to be recovered from it in indemnity is damage or loss to property through the act or omission of those on board the vessel of the third party defendant to wit the *Hermes* in the navigation of such vessel, an event which occurred without the actual fault or privity of the third party defendant.

I should mention here that at the outset of the trial respondent applied for leave to amend subparagraph (1) of paragraph 43 of the statement of defence by deleting the words "qui descendait cette partie de la rivière pour la première fois cet hiver là" as well as for leave to file a cross-demand claiming also the right to limit her responsibility according to the provisions of the *Canada Shipping Act,* section 668, on the basis that the channel where the collision occurred is really a canal of which she was the owner. The amendment was granted and the request to file a cross-demand was taken under advisement to be dealt with at a later date. During the trial, the Crown made a further application for leave to amend its statement of defence by adding the following subparagraph (*e*) to paragraph 49:

> (*e*) Ils (the officers and pilot aboard the *Transatlantic*) ne naviguèrent pas, dans le chenal étroit où l'abordage eut lieu, conformément à la règle 25 des règles pour prévenir les abordages en mer, c'est-à-dire à la droite du chenal ou du milieu du passage;

The application was granted with costs against the Crown in any event of the cause.

I should state before proceeding further, the decisions made as to the manner in which the trial should proceed and as to how the cross-demands of the third party and the Crown for the purpose of limiting their respective responsibilities in the event they are held liable, will be dealt with. After due consideration, the Court concluded that to allow the counterclaims for limitation of responsibility to be heard with the main action would serve no useful purpose and would only confuse matters in that it may be that the burden in the main action is on the suppliants, whereas the burden in the counterclaims is on the respondent and third party respectively in view of the circumstance that under section 657 (3) and 660(1) of the *Canada Shipping Act* the limitation of liability is only available if the owner of the ship or canal, as the case may

be, establishes that the damages occurred without his actual fault or privity. Furthermore, in the event that the main action is dismissed there will be no need to deal with the counterclaims at all.

It was, therefore decided that the parties herein would proceed with the evidence necessary to determine the main action as well as the claim by the respondent against the third party, the latter being restricted to a defence against such an action; and the hearing of the counterclaims was stayed until the Court shall have reached a decision on the question of liability for the collision. It was indicated further that in the event that the suppliants are successful in whole or in part, the reasons for judgment will indicate how the parties are to proceed with reference to the counterclaims. It was also decided by consent that the quantum of damages would not be dealt with during the present trial and that the quantum of any damages awarded would form the subject of a reference. The trial proceeded on the above basis.

I should now revert to the facts of the collision which gave rise to these proceedings.

On April 10, 1965, in the early morning hours, on a fine day, with maximum visibility and little or no wind, the M/V *Transatlantic* (length over-all 407 feet; mean draft 19 feet; beam 54 feet; gross tonnage 5,521 tons; net tonnage 3,215 tons; propelled by a single right-handed propeller connected to an internal diesel combustion engine developing 3,335 B.H.P., and capable of attaining a maximum speed of 13 knots when loaded) was upbound in the navigational channel of Lake St. Peter (550 feet wide and 35 feet deep) from Three Rivers destined for Montreal, P.Q., with a full load of general cargo. There was virtually no ice of any consequence in lake St. Peter and there were only a few winter buoys on the north side of the channel between Pointe du Lac and Yamachiche bend. There were no buoys on the south side of the channel.

On the same day and morning the M/V *Hermes* (length over-all 424 feet; mean draft 18¼ feet; beam 57.6 feet; gross tonnage, 5,708.6 tons; net tonnage, 3,154 tons; propelled by a single right-handed propeller connected to an internal diesel combustion engine developing 4,900 B.H.P. and capable of a maximum sea speed of 16.7 knots when

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loaded) left her anchorage off Sorel, P.Q., around 0516 hours down bound in the same channel, bound for the Continent with a full cargo.

After the *Hermes* was brought onto a down river heading, her engine was put on full speed ahead for river navigation, the revolutions being set at 120 R.P.M., giving her a speed of 15 knots through the water; in addition to the pilot (Belisle) who had the conduct of the vessel, there were on the bridge of the *Hermes* the master, the chief officer and the fourth officer and a seaman who was at the wheel. At 0535 hours, the lower light of the Ile de Grâce leading lights was brought abeam on the port hand and shortly thereafter the *Hermes* entered Lake St. Peter; at 0610 hours, the light pier in the centre of no. 2 curve in Lake St. Peter was brought abeam on the port hand, the bearing being taken on the centre light. The *Hermes* had up to this point guided herself along this course by means of the leading lights known as Rivière du Loup range lights, situated at curve no. 2, as it appears on chart 1337 (Exhibit D-19). These ranges were used to lead the *Hermes* down to curve no. 2 by keeping the vessel in line with them and once these ranges were reached, the same front range light with a different back light, however, were used to guide it further down and beyond this point (by keeping them in line directly astern of the vessel) towards a point in the channel called Yamachiche bend where, at some point in the middle of the bend, other range lights, the Pointe du Lac lights, were available and made use of. Immediately after reaching the curve and whilst steering on the Rivière du Loup downbound ranges, the *Hermes* successively met and passed three inward bound vessels (the *Montcalm,* the *Lundefjell* and the *Thorsriver*) about half a mile to two miles apart from each other without incident; there was no reduction of speed and the ships were passed port to port at a normal and safe meeting distance.

Shortly after entering Yamachiche bend (about 900 feet west of winter buoy 58L) the *Hermes* altered her course to port by the 13 degrees required to bring her into the next leg of the course to come on the Pointe du Lac leading beacons; when the vessel had been steadied on her new course, she then made use of what the pilot and her officers

considered as the only reliable aid to navigation at that point, namely, the range lights at the lower end of the course known as the Pointe du Lac range lights situated some five miles from Yamachiche bend. The chart on board the *Hermes* at the time (Exhibit T-5, British Admiralty chart no. 422) showed that when the Pointe du Lac range lights came in line, they were intended to show a bearing of 056 degrees 13 minutes and indicate the centre line of the channel.

Having brought herself into position with the two range lights, the *Hermes* proceeded downstream with the M/V *Transatlantic* coming upstream some short distance away. Both vessels were proceeding at full manoeuvering speed, the *Hermes* at 15 knots and the *Transatlantic* at some 12 knots. The M/V *Transatlantic* at this time was also making use of the Pointe du Lac range lights but had them astern instead of having them in front as the *Hermes*. Those on board and in charge of the M/V *Transatlantic* claim that they had the lights open to the north in such a way that they could safely navigate the channel, knowing they should be on the starboard side of the channel and meet at a safe and proper distance any ship coming down. Those on board and in charge of the *Hermes* claim they were keeping these lights in line knowing they should be on their side of the fairway by so doing and, thereby, meet safely the M/V *Transatlantic* coming upstream. A red winter buoy, located at the lower end of Yamachiche bend, identified as being in the approximate charted position of buoy 54L, as shown on Canadian chart no. 1337 (Exhibit D-19), was left abeam to port. Very shortly after, and at a time when the vessels were about three ship lengths apart and still shaping courses to pass safely and all clear port to port, the head of the *Hermes* swung to port and despite instant corrective starboard helm actions, as observed by the position of the indicators and the fact that the engine was put full speed astern, the head of the *Hermes* still continued to swing rapidly to port. To those on the *Transatlantic,* this turn to port became increasingly fast until it became obvious that the *Hermes* was out of control and was sheering across the channel and that a collision was inevitable. Instructions were given on the *Transatlantic* to stop the engines, put the engines full astern and put her helm to starboard, but to no avail, as the distance (both

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longitudinal and lateral) between the ships proceeding towards each other was too short for any successful avoiding action to be taken and a collision occurred.

The impact occurred between the port bow of the *Hermes* and the port side of the *Transatlantic* in way of her midship housing. The *Transatlantic* immediately burst into flames, the bridge was destroyed and two members of the crew and one passenger were killed. The *Hermes* disengaged herself from the *Transatlantic* and the latter floated across the channel alongside the south bank of the channel where she remained with her bow upstream and the *Hermes* followed and came alongside her also with her bow upstream where she assisted the crew and attempted to extinguish the fire on board the *Transatlantic*. Later, around 11 a.m., the *Transatlantic* started drifting downstream and her bow swung to starboard and her starboard side came to rest against the south bank.

The collision occurred at 0628 hours and about two cables down river from the eastern end of Yamachiche bend. Around 11 a.m. some tugs arrived with pumps aboard and proceeded to fight the fire. They in fact, held the *Transatlantic* against the south bank at a place where summer buoy 49L would usually be while fire fighting operations went on. The *Hermes* assisted in these operations during a good part of the day. As the day proceeded, it became obvious that the *Transatlantic* could not be saved and at about seven o'clock in the evening of the day of the collision, April 10, 1965, while still ablaze, she capsized and sank in the channel a short distance below Yamachiche bend.

The most westerly of the Pointe du Lac leading lights (known as the "front range") situated on a pier in the water which the suppliants and the third party claim was displaced and out of alignment to the extent of some 40 feet, is described in paragraph 13 of the petition of right as consisting:

> ...at the relevant time of a steel skeleton tower some 28 feet in height, resting on a concrete platform measuring some 60′ x 60′, which in turn rested on wooden cribwork embedded into the bed of Lake St. Peter. The cribwork and the concrete platform had been constructed in about the year 1935; the other Pointe du Lac leading light is located on shore some 7,552 feet to the east of the front range and is more fully described in the "List of Lights and Fog Signals, Atlantic Coast including the Gulf of St. Lawrence to Montreal" issued by the Department of Transport.

In paragraph 14 of the petition, the suppliants allege that:

> 14. The leading lights or ranges are the primary aids to navigation on which vessels navigating the St. Lawrence River must and do rely. Navigational buoys are installed for summer navigation but at the relevant time and place only a series of winter spar buoys marked the north side of the channel and in this connection, as happens in the fall of every year, the Director of Marine Works of the Department of Transport had issued on the 13th November, 1964, a Notice to Mariners (No. 932) which reads:
>
> > "Commercial shipping using the St. Lawrence River Ship Channel between Montreal and Quebec is hereby warned that floating aids to navigation cannot be depended upon after November 30th owing to possible ice conditions."

The third party in a similar allegation has also taken the position that "until official navigational buoys are laid along the dredged channel for summer navigation the leading lights are the only official and reliable aids to navigation leading vessels with safety through that leg of Lake St. Peter in which the *Hermes* and the *Transatlantic* were navigating shortly before the collision. . .".

There is also in the petition of right an allegation in paragraph 15 (and a similar one in paragraph 18 of the statement of defence of the third party) that leading lights "and the whole of the improvements to the navigation of Lake St. Peter (comprising the channel itself and its ancillary aids to navigation) are constructed, repaired, maintained, improved, erected, placed or laid down for the greater security and facility of navigation at the expense of the Government of Canada, and together with all buildings and other works belonging thereto are vested in Her Majesty and are under the direct control and management of the Minister of Transport under section 591 of Part IX of the *Canada Shipping Act*".

The allegation on which the suppliants base their claim is contained in paragraph 18 of the petition of right which concerns the displacement of the front range and reads as follows:

> 18. The sudden sheer to port taken by the *Hermes* occurred at a time when she apparently was being navigated with the Pointe du Lac leading lights in line and in such a position that she should have been in about mid-channel. In fact, the front range of the Pointe du Lac leading lights were displaced and out of alignment to the extent of approximately 40 feet in a southerly direction, which meant that for a vessel in the position of the *Hermes* immediately before the collision, instead of being in mid-channel, she was some 235 feet to the south thereof.

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Substantially the same facts are alleged in the defence to the third party proceedings.

The suppliants then in paragraph 19 of the petition of right state that this alleged misalignment, (and the third party has a similar allegation (paragraph 22)) was "the immediate and sole cause of the collision between the *Transatlantic* and the *Hermes*".

According to both the suppliants and the third party, the Crown is liable because of a number of breaches of duty committed by it and its employees or servants (as alleged in paragraphs 20, 21 and 22 of the petition of right and paragraphs 23, 24 and 25 of the third party's defence) attaching to the ownership, possession, occupation or control of property, namely the front pier and light of Rivière du Loup and Pointe du Lac each of which was out of line with its rear light and in that the officers and servants of the Crown failed to ascertain such misalignment and to give warning that the lights were no longer serving the purposes advertised.

The particulars of the negligent acts allegedly committed by employees of the respondent on which the suppliants rely, will be considered later when the matter of liability of the respondent is dealt with. The employees in question are the District Marine Agent of the Department of Transport in Sorel, Noël Paquette, the Superintendent of Pilotage in Ottawa, Captain David Jones, the District Superintendent of Pilots in Montreal, Claude Melançon, and the Chief of Aids to Navigation Branch of the Department of Transport, A. K. Laing.

This collision, according to the suppliants and the third party, was caused by the displacement of the Pointe du Lac Range of which the servants of the Crown knew or should have known. The suppliants contended that the servants of the Crown should have corrected the displacement or should have warned mariners that the range was no longer serving its intended purpose.

The Crown contends that the only allegation it has to meet here is a failure on the part of its employees or servants to ascertain and give warning. It denies that the misalignment of the Pointe du Lac leading lights was the immediate and sole cause of the collision. It alleges on the contrary that the collision was caused by the negligence of

the pilot and officers on board the *Hermes,* as well as the pilot and officers on board the *Transatlantic,* which negligence consisted, according to the Crown, in a number of faulty manoeuvers which are enumerated in paragraphs 43, 45, 46 and 47 of the defence, and did not result from any breach of duty on the part of the Crown or its servants.

The Crown's position is that if there was a displacement in the ranges, it was known to the pilots and that, in any event, range lights are not instruments of absolute precision. It also asserted that the horizontal sensitivity of the Pointe du Lac range lights, due to special physical and geographical conditions, was below normal and this was known to navigators and pilots who travel in that part of Lake St. Peter; the distance of six miles between the beginning of the course and the lower light tended to decrease further its value of indication; the Crown had, in 1963, required a specialized engineer to examine the pier who reported that it was in good condition, had been displaced only slightly over the years and should give respondent no concern; for the first time in 1965, the respondent experimented by leaving the steel tower on the base to assist navigators. In any event, according to the Crown, the total displacement, or a substantial part thereof, took place after the collision and between the 14th and 20th of April 1965 and at no time did it receive a report from pilots, as required by law, that the range lights were not at their proper place. That finally whatever displacement existed, was caused by "force majeure" and that it could not have been foreseen nor could the Crown have prevented it.

With respect to the matter of damages, the respondent, in its pleadings (paragraph 70) states that it cannot be held liable for expenses resulting from the capsizing of the *Transatlantic* and its subsequent refloating as these damages were caused by the fault, neglect and inability of the captain and officers of the *Transatlantic* and the persons in charge of the salvage operations for which the Crown alleges the suppliants must bear the consequences (paragraph 70) and more particularly because the captain of the *Transatlantic* and its officers did not take the necessary means to prevent the capsizing of the vessel in the channel by having it towed as they could have done, out of the narrow part of the channel. There is also an allegation that

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the captain and officers failed to fight the fire on board their vessel in accordance with the ordinary rules of the art and of prudence.

In the proceedings taken by the Crown against the third party, the respondent merely repeated that the collision and damage had been caused by the fault, imprudence, neglect, inability and want of care of the third party (the *Hermes*) and its servants, officers and employees, and its pilot reiterating the allegations contained in paragraph 43 of its defence.

The third party, on the other hand, after describing its vessel, the *Hermes,* states (in paragraph 6 of its defence) that, being in a pilotage district within the meaning of Part VI of the *Canada Shipping Act,* she was assigned by the pilotage authority, for her passage between Montreal and Three Rivers, a duly licensed pilot, namely pilot Cyrille Belisle, who had the conduct of the vessel as she was proceeding down river, and then described the circumstances leading up to the collision.

The position taken by the third party, as well as that taken by the suppliants, is that the purpose of the Pointe du Lac leading lights and beacons is to lead mariners by their alignment from Yamachiche bend to curve number 3 in Lake St. Peter either in a down river or up river course that they indicate to navigators that their vessel is in the centre of the navigable channel when the leading lights at night, or the beacons during the day, are kept in line; that until the official navigational buoys are laid along the dredged channel for summer navigation, the leading lights or beacons of Pointe du Lac and Rivière du Loup are the only official and reliable aids to navigation leading vessels with safety through that leg of Lake St. Peter in which the *Hermes* and the *Transatlantic* were navigating shortly before the collision and, in fact, before the end of the navigation season the Department of Transport issues a Notice to Mariners warning them that floating aids to navigation, namely buoys, cannot be depended upon during winter navigation (cf. P-63, notice issued November 13, 1964, weekly edition, No. 46, notice no. 932). This warning was still in full force at the time of the collision and there was only a limited number of winter buoys laid in this leg of the channel through Lake St. Peter to mark the north side of the dredged channel.

The third party and the suppliants both described by their pleadings how aids to navigation are constructed and maintained by Her Majesty and are vested in Her Majesty and under the direct control and management of her Minister of Transport under section 591, Part IX of the *Canada Shipping Act*, the said Minister having delegated his powers and responsibilities with respect to the maintenance, repair, etc., of these aids to navigation to the district and marine agent of the Department of Transport for the district of Sorel, which district extends from Beauharnois canal to Portneuf.

Paragraph 19 of the third party's defence, deals with the duties of the district marine agent (a civil engineer by the name of Noël Paquette, located at Sorel, P.Q.) as follows:

> 19 In the ordinary discharge of his duties, the said District Marine Agent is charged with the obligation of ascertaining that the said aids to navigation always serve the purpose for which they are intended and as may be necessary of maintaining and repairing them and of warning mariners of any defect in them which could create a danger or hazard to navigation until such defect has been corrected, such warnings being issued by way of periodic daily radio broadcasts followed by written Notices to Shipping or to Mariners, the said District Marine Agent, having accepted such duties, being always fully aware of the reliance by the navigators of vessels passing through his District on the performance of his duties;

The position taken by the third party, and the suppliants have taken a similar stand, is that as of the date of this collision, no Notice to Mariners, Notice to Shipping, broadcast or information of any kind, had been published or circulated by the District Marine Agent or by any other agency, official or employee of the Department of Transport or other departments of the Government of Canada to indicate that the Pointe du Lac leading lights or beacons, or any of the other leading lights and beacons in Lake St. Peter, could not be relied upon and were not fulfilling their intended and publicized purposes.

Nothing had indeed been done to indicate that the lights could not be relied upon, although on April 10, 1965, the date of the collision, and for some considerable time prior thereto, the front range of the Pointe du Lac leading lights or beacons was out of alignment having been displaced in a southerly direction to the extent of approximately 40 feet which meant that a vessel in the position of the *Hermes* at

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the entrance of the channel below Yamachiche bend, keeping the beacons in line, would find herself some 235 feet to the south of the physical centre of the dredged channel instead of being in its centre with her navigators having no reliable means to observe such a deviation.

Furthermore, according to the third party, the collision and its consequences were the result of delicts and quasi-delicts committed by servants of the Crown (of which I will say more later when dealing with the question of liability), namely the district marine agent of the Department of Transport in Sorel (Noël Paquette) in charge of aids to navigation, the Superintendent of Pilotage in Ottawa (Captain David Russell Jones), the District Superintendent of Pilots in the District of Montreal (Claude Melançon) and the Chief of Aids to Navigation of the Department of Transport (A. K. Laing).

It is against the above background, and as a result of the above circumstances, that a long and protracted trial ensued involving the hearing of not only those involved in the collision, but also a number of navigational experts, engineers, naval architects and tank testing technicians. The latter were brought in as a result of a tank test made in Holland in the fall of 1967 which was attended by representatives of all parties.

The first question to be determined is whether there was a displacement of the lower range of the Pointe du Lac beacons before or on April 10, 1965, the extent of such a displacement, if any, and did any such displacement cause (or contribute to) the sheer and consequential collision.

The Crown, in its written proceedings, does not admit that the Pointe du Lac front leading lights had been displaced or misaligned. It, however, says that even had there been a gradual displacement thereof, it was known to the pilots, and particularly to those of the *Hermes* and the *Transatlantic,* that these leading lights (as all such lights) depend upon a number of physical and geographical factors for their value as indicators and that the Pointe du Lac leading lights were known to the pilots and navigators as having a horizontal sensitivity below normal, which together with the distance of six miles between the front light and the beginning of the course in Yamachiche bend, reduced considerably their value as indicators.

There is no question, and the evidence of both the suppliants and the respondent so discloses, that the Pointe du Lac front light had been displaced gradually up to at least the year 1964, the only matter which requires some elucidation is as to whether the total displacement, as established by triangulation after the collision around the end of April 1965 of between 38 and 43 feet towards the south, had taken place prior to April 10, 1965, or whether some part of it was effected subsequent thereto.

There is also no question that an investigation that was conducted by a number of engineers and land surveyors some time after the collision, indicated that the pier on which the front light of Pointe du Lac was located had, at the time of the investigation, been displaced between 37.9 feet and 60.5 feet when using the bearing given by ship channel co-ordinates at P.I. (point of intersection) Yamachiche, and that such displacement would result in a corresponding displacement at the beginning of the course of between 205 and 357 feet. The displacement of the front light of Pointe du Lac, when using the bearing given by the hydrographic chart no. 1337, however, varied between 60.5 feet and 72.5 feet with a corresponding displacement at the head of the course of between 363 feet and 427 feet.

Appendix "B" produced by James Haase, professional engineer, as part of Exhibit P-45, reflects this situation and it will be helpful to reduce it hereunder:[1]

The above table[1] also contains the displacement of the Rivière du Loup range as established by Messrs. Duplessis and Poulin on April 30, 1965, which, as shown, indicates a displacement of the low light of 12.1 feet with a corresponding displacement at P.I. (point of intersection) Yamachiche of 152 feet when using the ship channel co-ordinates and a displacement of 18.6 feet with a corresponding displacement of 234 feet at P.I. Yamachiche when using the bearing given by the hydrographic chart.

There is also no question that in addition to whatever displacement existed on April 10, 1965, an additional displacement of a few feet of the front light of Pointe du Lac existed as a result of the light steel structure tilting towards the south. In a memo dated May 17, 1965, the District Marine Agent of Sorel, Mr. Paquette, reported

[1] Not reproduced in this report—ED.

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that the error caused by this tilt was a maximum of 30 feet. This error due to tilt was, however, corrected prior to the surveys of April 28, 1965, as well as those that took place afterwards, and must, therefore, be added to the displacement of the range found by the three surveys, i.e., of Messrs. Duplessis and Poulin, of April 28, 1965, conducted on behalf of the Association of Pilots, the D.O.T. survey of May 1965 and the International Underwriter Contractors' survey of August 1965, conducted on behalf of the Department of Transport.

Mr. James Haase (the suppliants' engineer) adopted as being likely to be more accurate the results obtained when using the ship channel co-ordinates (which are the co-ordinates adopted by those who built the channel as opposed to the hydrographic co-ordinates adopted by the hydrographic chart service) and there is no question that these co-ordinates are preferable to those given by using the bearing of the hydrographic chart for the reasons given by Haase at p. 1035 of the transcript:

> Q Why do you consider that to be a more accurate result?
> A. Well, what we are really interested in is the centre line of the dredged channel and I feel certain that engineers who established this dredged channel in the first place and maintained it thereafter would be controlling the work from their own system of survey points, and survey system, and survey data.
>
> There is incidentally another point, that if the chart bearings are correct, I think an awful lot of ships would be aground in Lake St. Peter now, because as you can see the displacements are in the order of 360, 390 feet, and I don't think many ships can absorb this kind of deviation, so it is rather unlikely, in fact I think it is impossible that the chart bearings are correct.

We may, therefore, take it, and there appears to be no disagreement between the parties on this point, that whatever displacements had taken place, either prior to April 10, 1965, or some days thereafter, are in the order of those established by the surveys based on the ship channel coordinates.

The important question at this point in my enquiry here, therefore, is: When exactly did the displacement or displacements of the front pier of Pointe du Lac take place?

In order to answer this question, it is, in my view, necessary to consider the evidence as to what happened in the year 1935, when this pier was erected and sunk, to

examine a survey carried out in 1941 by the Hydrographic Section of the Department of Energy, Mines and Resources, and to evaluate a number of photogrammetric studies conducted by Dr. A. J. Brandenberger and Dr. Zarzycki.

(His lordship reviewed the evidence described and proceeded.)

The above, in my view, taken with the evidence of Dr. Brandenberger and Dr. Zarzycki established conclusively that there was a movement of the front pier of Pointe du Lac between 1935 and 1941 and between 1941 to 1959 of several feet and that although it is not possible to establish such movement exactly, it is reasonable to conclude that a displacement between two and six feet occurred prior to the year 1941 and, therefore, in 1959, this pier had already started to move. One must also conclude that the displacement had reached between 25 and 30 feet by the year 1964. Furthermore, the various surveys and investigations conducted after the collision on behalf of the suppliant, the third party and the respondent establish also, in my view, that a final total displacement of between 37 and 43 feet had taken place at the time of the surveys and it is not unreasonable to assume that the actual movement by the time of the surveys was the average of these two figures, or some 40 feet. If the further displacement caused by the tilting of the light which must, I believe, be taken, as suggested by counsel for the Crown (cf. p. 5728 of the transcript), as being less than the $5\frac{1}{2}$ feet mentioned by Mr. Paquette, is accepted as one half of this figure, we still obtain a further displacement which added to the 40 feet, gives a displacement of some $42\frac{3}{4}$ feet. If to this, a further possible displacement of 20 feet at 51L is added for the sensitivity of the ranges (as alleged by the respondent) we end up with a total corresponding displacement of the front range somewhat in excess of $42\frac{3}{4}$ feet which happens to be very close to the figure alleged by the suppliants in their petition of right, and which, if multiplied by the 5.4 factor (admitted by the parties) to obtain the displacement at the beginning of the course, gives a figure somewhat in excess of 229.50 feet which would bring a vessel with a beam of 57.6' dangerously close to the south bank in a fairway 275 feet wide.

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The only question now remaining with respect to the matter of displacement of this pier is whether the final displacement occurred prior to the collision or, as urged by the Crown, at a date subsequent thereto. A conclusion in this regard can be reached only by an assessment of the evidence and a drawing of the proper inferences therefrom.

That the *Hermes* sheered because of bank suction on April 10, 1965, is beyond question and all parties, of course, agree that this is what happened. If, however, the displacement that occurred subsequent to the year 1964 did not occur until after the accident, there would be less justification for the *Hermes* to come as close as she did to the south bank where bank suction took place and her navigational manoeuvers in such an event would also be subject to closer scrutiny and more serious criticism. The suppliants had the burden of establishing their allegation that the front pier of the Pointe du Lac lights had been displaced by at least 40 feet at the time of the collision and they attempted to do so by expert evidence (Mr. Haase at p. 967 *et seq.* of the transcript) and also by a number of events which took place during the period under investigation.

(His Lordship reviewed the evidence and proceeded).

I must, therefore, conclude from the above that whatever force was brought to bear by ice movement on this pier sufficient to move it southwards must have occurred prior to April 10, 1965.

A recital of the events which took place prior to the collision appear also, in my view, to sustain this proposition.

Two other vessels, the *Manchester Commerce,* on April 3, 1965, and the *Carinthia,* on April 9, 1965 (the day preceding the collision) sheered also approximately at the same place where the *Hermes* sheered on April 10, 1965. Both of these vessels were at the time guided by two experienced pilots; the *Manchester Commerce* by pilot Richard Barrett, a class A pilot who happens to have also a master's foreign going Canadian certificate, and the *Carinthia,* by pilot Adélard Tremblay, who holds a master home trade, and a second mate (foreign going) certificate. The *Carinthia* is a rather large vessel, 640 feet in length, 85 feet in beam with a draught of 26 feet. Tremblay was

coming downstream on April 9, 1965, at 14 knots, when after meeting the *London Splendour,* a vessel of a tonnage similar to the *Carinthia* (25,000 to 30,000 tons) his vessel sheered to port and he barely managed to prevent an accident by putting the rudder to starboard and because his vessel had two propellers. Pilot Tremblay immediately concluded that a sheering had taken place and his first thought was that his vessel had gone over a part of the channel where the water was low.

His vessel was at the time at a lateral distance of some 125 feet from the *London Splendour* and this also would indicate that the sheering of the *Carinthia* was due to bank suction and not to interaction which, admittedly, is much less when a vessel meets a vessel than when it overtakes it. The assessor, here, is of a similar view, but informed me that "at the moment of the sheer, the *Carinthia* was entering the channel leaving the wider part used for anchoring vessels. It appears that the sheer was caused by the pressure of the bow (bow cushion) on the corner of the south bank of the channel. Such sheer, due mainly to the ship being very close to the bank, was possibly increased very slightly by the interaction between the two vessels".

With regard to the *Manchester Commerce,* there can be no question of interaction as there was no ship in sight when pilot Barrett, on April 3, 1965, states his vessel sheered violently somewhere in the general vicinity of where the other two sheerings took place after entering the channel from the anchorage at a distance of about two ship lengths from the position of summer buoy 51L. Both Barrett and Tremblay are experienced and able pilots who had been piloting ships down this part of the river 150 times a year for a good many years. They, therefore, knew the area well.

The *Manchester Commerce* was, according to Barrett, proceeding at full speed, approximately 14 knots not counting the current, and he states he was taking the Pointe du Lac ranges in line. Pilot Tremblay, on the *Carinthia,* stated that he had reduced his speed from 18 knots to 14 knots and was taking the lights "craqué au nord" which he explains (at p. 1655) by saying that one half of the upper light target would be moved towards the north as indicated by two pieces of carton attached together (Exhibit P-59).

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There is also the evidence of pilot Belisle and of the captain of the *Hermes* who both stated that the lights were taken in line prior to the collision.

Now, all of these pilots state that the taking of the Pointe du Lac lights in line in 1964 would bring them down safely on their side of the fairway. Belisle's experience in 1964 was that with the ranges in line, a downbound vessel would be 100 to 125 feet from buoy 51L, although he did admit that he could go as close as 50 feet with a small ship such as the *Black River*, but then he added the ranges would be open to the north. Both Tremblay and Barrett stated that in 1964, the taking of the Pointe du Lac lights in line, would place a vessel somewhere on the south side of the channel. Barrett (at p. 1233 of the transcript) states "Well, in 1964 when the buoys were in place on both sides of the channel, if you were going down the Pointe du Lac course with the lights in line you would be closer to the black buoys than the middle" and added that he had had no sheering in 1964. He was asked in cross-examination by counsel for the Crown whether a ship in 1964 would be led 50 to 75 feet to the south summer buoys and answered that he did not think it would bring a ship that close. Pilot Tremblay, on the other hand, in cross-examination, merely says that in 1964, the Pointe du Lac lights may be a little to the south (pp. 1633-1634). He added that he was more familiar with the Rivière du Loup lights leading to the south than the Pointe du Lac lights. As far as the Pointe du Lac lights were concerned, he even stated (at p. 1634) "Dans le numéro 3 je n'étais pas au courant du tout ...".

Pilot Vallée of the vessel *Transatlantic* also dealt with the situation in 1964 and stated (p. 2223) that with the ranges in line, a vessel going downstream would be on the south side of the channel. He then added:

> R. On passait à peu près demi-distance entre le centre et le côté sud Mettons, par exemple, une centaine de pieds, cent (100) pieds, cela dépend du côté où vous êtes, du bateau.

In view of the experience of these pilots who by lining up the lights could navigate safely down this channel in 1964 and in the face of the three sheerings which occurred between April 3 and 10, 1965, to vessels conducted by three experienced pilots who knew this course thoroughly and

who had lined up their vessels on the Pointe du Lac leading lights as they had done in 1964 and by so doing had brought their vessels so close to the south bank that they sheered, the conclusion appears to be inescapable that the fatal displacement or at least a displacement greater than whatever existed in 1964 had already taken place at that time. As a matter of fact, Dr. Corlett's evidence was to the effect that the *Hermes,* upon sheering, had reached an offset of some 10 feet from the south bank, this means that the 40 feet final total displacement adopted as a good approximation is not too far off when the sensitivity of these ranges is taken into consideration as well as the fact (as indicated by Exhibit P-64 the soundings taken in 1941) that the line of the range was somewhat to the south at the beginning of the course.

There is also, moreover, the evidence of pilot Vallée of the *Transatlantic* when both he and pilot Belisle were on board the *Hermes* alongside the *Transatlantic* after the collision, alongside the south bank of the channel.

Raymond Vallée (at p. 2266 of the transcript) states that from the south side of the channel, standing on the port side of the *Hermes,* looking backwards, he pointed out to Belisle that there must be something wrong as the ranges are slanted to the north.

> . . . Puis je me suis aperçu, j'ai dit à M Belisle, il y a quelque chose qui ne va pas; nos «ranges» sont cantés au nord. Bien, il dit: cela n'a pas de bon sens, le bout du «hook» est à terre . . .

If these lights were slanted to the north for one viewing them from the south side of the channel, it can indicate only, in my view, that they had been displaced at that time, i.e., prior to the collision, to their maximum displacement and, of course, this is further convincing evidence that the total displacement had already taken place before the collision on April 10, 1965.

The Crown attempted to establish by means of A. Brochu, a Department of Transport maintenance man in the Ship Channel Branch (agence maritime), located at Sorel, and Arthur Lemoyne, an electrician who maintained the lights in the river, that the last part of the displacement of the pier really took place between the 20th and 23rd of April on the basis that on April 17th, the basic structure of the steel tower of the light was in good condition and on

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the 20th of April it was not as the legs of the structure were buckled (c'était tordu). On the 17th, when crossing on the ferry from Three Rivers to St. Angèle, Arthur Lemoyne states that he saw a lot of ice coming down the river on both sides (p. 2432, 2433, 2434). He reported this the same night to his superior, Mr. Lequin, by phone because he was worried he says for the light at Pointe du Lac. When he went back on the 20th, the steel structure had been moved to one side and was looking towards the north and the light was out.

Now, although there appears to be no doubt if one relies on the evidence of these men, that something happened to the structure between the 17th and 20th of April 1965 and that some ice came downstream, this ice could not have brought sufficient pressure upon this pier to move it, bearing in mind the height of the water at the time (there was about 5 feet more water on that date than at the end of March, 1965, (Exhibit D-53)). There was not even sufficient pressure to remove the steel structure which, although damaged was merely displaced and still remained in an upright position on the pier. This ice, indeed, with the pier submerged by water as described by both Lemoyne and Brochu, could not have been at a sufficient depth to exert the pressure required (as established by Haase) to move this pier even with the piles broken as they had to be after the date of the collision.

It therefore follows that on the basis of the evidence, I can only conclude that the total displacement of the pier found after the collision existed at the time of the collision and the liability herein must be determined on this basis.

I now turn to the attacks made by the Crown on the manner in which both vessels, the *Hermes* and the *Transatlantic* were navigated immediately prior to the collision. The position taken by the Crown here is that if the total displacement is found to have existed prior to the collision, such displacement can only be the indirect cause of the accident, as the errors of navigation committed by those in charge of the respective vessels are the direct cause thereof.

According to the Crown, the *Hermes* was at fault because it (a) entered a narrow part of the channel at full speed; (b) doing so during winter navigation; (c) doing so when a meeting with the *Transatlantic* was imminent, in-

stead of reducing the speed of the vessel and meeting in the Yamachiche anchorage; (d) those in charge of the *Hermes* were navigating in Lake St. Peter with one marine chart only which was incomplete; (e) they did not use their radio-telephone to communicate with the *Transatlantic* in order to arrange for an easier and safer meeting; (f) they did not pay any attention to the buoys and did not use them as an aid to navigation; pilot Belisle relied only as a guide on the range lights of Pointe du Lac when he had directly facing him a rising sun and when he knew that these lights were inexact and imprecise; (g) they did not use their gyrocompass and the other instruments of navigation at their disposal.

The officers and pilot of the *Transatlantic* were also at fault according to the respondent in that pilot Vallée at a distance of some three miles noticed that the *Hermes* was too far south in the anchorage thereby creating a situation of imminent danger and noticing that the *Hermes* could not bring herself back in time to enter the narrow part of the channel which he pointed out to the first officer of the *Transatlantic,* they continued, nevertheless, upstream at full speed. They were also at fault because (a) having noted the danger of an imminent collision, they did not reduce their speed; (b) they gave no signal; (c) they did not use the radio-telephone; (d) they effected no manoeuver to prevent the collision and (e) they did not navigate in the narrow channel where the collision occurred in accordance with Rule 25 of the *Rules to Prevent Collisions at Sea,* i.e., at the right of the channel or in the middle of the fairway; (f) the Crown also took the position that even if there had been a displacement or a misalignment of the Pointe du Lac lights, it was known to the pilots and particularly to those of the *Hermes* and the *Transatlantic.*

In order to understand the navigational manoeuvers prior to the collision, it will be useful to mention here in some detail what action was taken on board each of the vessels immediately prior to the collision. The chief officer of the *Hermes,* Pieter Floris Vos, describes what took place on board his vessel as follows (p. 487 of the transcript): As his vessel came into Yamachiche bend at some 800-900 feet from buoy 54L, i.e., 900 feet before the intersection of the lines of the two ranges, an alteration of course was made of 13 degrees and 45 minutes (this information was obtained

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from chart 422, Exhibit T-5). The first order given by the pilot because of this change of course was 60 degrees. The helmsman then gave 10 degrees port rudder and the ship started swinging to port. As the helmsman was steadying up the ship, and just before she came on 60 degrees, the pilot ordered 58 degrees so the helmsman applied a little port rudder again and steadied the ship on 58 which gave a true compass course of 57 degrees. Vos states (p. 488) that when the vessel was on the 58 degree course "we had the Pointe du Lac ranges exactly in line". The ship was kept on this 58 degree course for some time until Vos, from the rudder indicator, saw that the helmsman had applied 5 degrees starboard rudder. The compass at this time was on 57 degrees. He saw the bow of the ship moving slightly to port. The ship at this point was not steadying up and looking at the compass again, he saw it was moving to 056 and the helmsman applied another 5 degrees starboard rudder, but the bow of the ship still went to port. The vessel went to port even faster after the 10 degree starboard rudder, and then the order came from the captain and pilot "hard to starboard and full astern". When the full 5 degrees to starboard was applied and the ship was starting to move slightly to port, the *Transatlantic* was about three ship lengths away, i.e., some 1,200 feet and the latter was bearing a few degrees over the port bow. With the telegraph on full astern, the *Hermes* still kept moving to port even faster than before and sheered at increased speed. It then collided with the *Transatlantic* at an angle which, according to the witnesses, could vary from 16 to 17 degrees leading aft (Ven Eyk, p. 126) 50 degrees (Peterson, p. 81) and 70 degrees (Vos, p. 491). Vos stated that the approximate interval between the time when the *Hermes* first started to go to port and the moment of collision, was less than a minute (p. 491), from 25 to 30 seconds according to Belisle (p. 725) and from a half minute to 40 seconds according to Peterson (p. 89). If one calculates the speed of both vessels taking into consideration the distance mentioned as separating them, it would appear that this interval was between 30 and 40 seconds and the 32 mean seconds adopted by Dr. Corlett in his evidence could well be a proper estimate here.

The *Transatlantic* on the other hand was proceeding upstream with, according to pilot Vallée and its first officer

Peterson, the Pointe du Lac ranges open to the north, at a speed of between 12 and 13 knots over the ground. Both Dietz, the helmsman of the *Transatlantic* and Vos, of the *Hermes*, stated that immediately prior to the collision, the *Transatlantic* turned 30 degrees or more starboard and surprisingly at the speed she was going at the time she did not run ashore on the northern bank or have any bank effect and, of course, this can only indicate that she was not as far northward as pilot Vallée stated. As a matter of fact, she was probably towards the centre of the channel or even somewhat to the south of this centre. There can, in my view, be no other explanation. The *Transatlantic* indeed is a ship some 406 feet in length and at a 30 degree angle would, if she was on the northern part of the channel when struck amidship as she was by the *Hermes*, necessarily hit the north bank. That such an occurrence did not happen establishes conclusively, in my view, that she was not as close to the north buoys as Vallée would want us to believe. This, of course, would not be too surprising having regard to the evidence of H. Peterson, the chief officer of the *Transatlantic* that that ship was being guided by means of the Pointe du Lac lights. If the front light was displaced at the time to the extent already established, it is not too surprising that the *Transatlantic* was, prior to the collision, navigating on the centre line or even on a line south thereof and this, of course, would explain the fact that both Vallée and Peterson saw the wash of the *Hermes* aft on its starboard side a few seconds prior to the collision.

Having thus established the navigational manoeuvers and the position of both vessels immediately prior to the accident, it is now possible to look at the navigational failures of the officers and pilots of both vessels as alleged by the Crown, to determine firstly whether such manoeuvers are faults and if so, whether they had anything to do with causing the collision.

Before going into this matter, however, I should explain that with regard to the navigational matters involved here, I have had during the course of this trial, the able advice and assistance of an assessor appointed by the Court, Captain Jean-Paul Turcotte, Director of Marine Education, Department of Education, Province of Quebec. This gentleman has a master foreign-going certificate (1957) and

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prior to directing the Marine Education Section of the Department of Education, was in charge of a vessel which navigated between the Maritime Provinces, Quebec and Montreal. During the months of June to August in each of the years 1961 to 1964, he served an apprenticeship with the Quebec District Pilotage Services. Because of the variety of his experience as a captain, a pilot and a lecturer, he was invaluable to this Court during the trial as well as in the course of preparing these reasons for judgment. He not only attended the trial and heard all the witnesses but also attended the tank tests conducted in Holland in December 1967.

Because an assessor had been appointed in this case, the suppliants and the third party submitted at the outset of the trial that having regard to the practice followed in the United Kingdom and in the Admiralty Division of this Court, no expert evidence should be heard on navigational matters. There is no doubt, as pointed out by counsel for the third party that in admiralty cases, assessors are not only technical advisers, but are also sources of evidence as to facts. The practice is that a court assisted by nautical assessors, obtains its information regarding questions of nautical science and skill relating to the management and movement of ships from them and not from sworn witnesses called by the parties and can direct them to inform themselves by a view or even by experiments and then report thereon. Assessors, however, only give advice and the judge does not have to accept it. He must, in all cases, come to a decision himself and bear the responsibility for such a decision. While it is clear that the judge is not bound by the opinion of the assessor, great weight must, nevertheless, be given to the assessor's nautical experience and his opinion should ordinarily be accepted if there is no ground to question it. The responsibility of the decision, notwithstanding the evidence given, however, always rests with the judge who must not surrender his own judgment to that of the assessor who merely assists the court with his nautical skill. As pointed out by Lord Justice Scott, at p. 612, in *The Queen Mary*[2] collision:

> ... The function of the assessors is only to give to the Court expert evidence on technical questions of seamanship or navigation, such as would be admissible in evidence if given by an independent expert witness.

[2] 80 Ll.L.Rep. 609.

It seems that the reason behind the appointment of assessors is to dispense with nautical evidence as to the management of ships and prevent "the inundation with the opinions of nautical men on one side and opposite opinions on the other, to the great expense of suitors and a great delay in the hearing of the cause and with no benefit whatever" (cf. Dunlop J. in *Harbour Commissioners of Montreal v. The S.S. Universe*[3]).

Although the hearing of expert witnesses contradicting themselves may be a loss of time and money in some trials, this is not always the case and although the appointment of an assessor who alone advises the Court on matters of navigation, may have its advantages, it also, however, has its disadvantages in that most of the time the appeal court knows little of what has transpired between the judge and the assessor and, in most cases, does not even know what questions were asked and what answers were given. Furthermore, as there is no cross-examination of the assessor, that possibility of testing the accuracy of his opinions is missing. There are, therefore, advantages in having only assessors to deal with technical matters, but there are also some disadvantages. In view of the particular features of the present case, the Court decided, although an assessor had been appointed under the provisions of section 40 of the *Exchequer Court Act* (which authorizes the Court "to call in the aid of one or more assessors specially qualified, and try and hear the cause, matter or petition, wholly or partially, with the assistance of such assessor or assessors") that there was no necessity to adopt entirely the procedure ordinarily followed in an admiralty case. The present case, of course, is not a claim under the admiralty jurisdiction of the Court even if it does involve two vessels, but is one in damages against the Crown. The thought was that there could be some advantage here in having not only an assessor who could be called upon to answer questions and give answers which, if accepted by the Court, could be incorporated in the reasons for judgment, but also navigational experts for such assistance as they are properly qualified and competent to give to the Court. I have dealt at length with the question of admitting evidence from experts because a very strong objection was taken by

[3] 10 Ex. C.R. 305.

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counsel for the suppliants and for the third party to the evidence of certain English captains and Suez Canal pilots, as well as two Canadian captains, who were called by the Crown to testify on the navigational conduct of those in charge of the *Hermes* and the *Transatlantic*. These witnesses were Captain Atkinson, and Captain Lionnet, both former pilots in the Suez Canal, and two Canadian captains, Captain Irvine and Captain Goulet. I should say here that with regard to matters of navigation, I should have thought that more persuasive evidence would have come from pilots who had piloted the part of the St. Lawrence River where the collision occurred and who had navigated such waters immediately prior to or on April 10, 1965, when the casualty took place than what was given to the Court in this case. The foreign captains had navigated the Suez Canal where there was a speed limit of 7 knots, where vessels were conducted in convoys and where the navigational aspects were entirely different from those prevailing in the St. Lawrence River and particularly in Lake St. Peter. One of the Canadian captains, Captain Irvine, obtained most of his experience in the Great Lakes and in canals, and the other, Captain Goulet, admitted that, as far as navigating Lake St. Peter on the leading lights was concerned, he always used a pilot or pilots. By the evidence of pilots with relevant experience, it might have been possible to check in some manner whether the practice adopted by the pilots of the district of Montreal to Three Rivers, for instance, of going downstream in the channel at full speed on a clear day was one peculiar to the pilots heard in this case, including Captain Goulet, or a general one followed by all those pilots who navigated the channel in question at the relevant time. It is interesting to note, however, that even Goulet, when coming down Lake St. Peter on a clear day, would do so at 185 revolutions, i.e., 13.8 knots and, therefore, at full speed.

Captain Goulet was asked by counsel for the third party in cross-examination, the following questions and gave the following answers (cf. p. 3798 of transcript):

> Q. Quelle est la vitesse, la pleine vitesse du *Edouard Simard*?
>
> R. La pleine vitesse du *Edouard Simard* est de cent quatre vingt-cinq (185) révolutions, qui est notre vitesse normale, le «cruising speed» qu'on appelle, et la vitesse ordinaire est d'environ 13.8 nœuds.

Q. Par temps clair, et lorsque la glace ne nuisait pas à la navigation, à quelle vitesse descendiez-vous, par exemple dans le Lac St-Pierre, normalement?

R. Je descendais dans le Lac St-Pierre à une vitesse de cent quatre vingt-cingt (185) révolutions, ce qui donne 13.8 variable, 13.7—tout dépend des conditions du vent, ou du courant cette journée-là; le courant est assez variable sur le Lac St-Pierre, un peu.

I should add that I would also have great difficulty in accepting the evidence of Captain Irvine (whose nickname is "Sputnik" because he has a reputation for not losing any time in navigating vessels) that a vessel should reduce speed in order to meet in the anchorage a ship coming upstream. Furthermore, such a course of action is, I am told by the assessor, not the practice followed in the channel and would unduly delay navigation.

The evidence of these foreign captains or pilots and of the two Canadian captains, although critical of the manoeuvers of the *Hermes* and the *Transatlantic,* have not convinced the Court, after taking into account the views of its assessor, that any of the manoeuvers adopted by either vessel on the day of the collision, was of a nature such that it constituted a fault which caused the collision, particularly in view of the overwhelming evidence given by all the Canadian pilots and navigators who were experienced in navigating the waters in question, that they were accustomed to proceed in a manner no different from that adopted by both ships.

I should also mention that prior to the hearing of these expert witnesses on navigation, a very strong objection was also taken to their testimony being received on the basis that (with the exception of Captain Goulet and also possibly Captain Irvine) not being experts in navigating the St. Lawrence River, they could not be heard on the question of any practice prevalent in that navigational sector or of what a reasonable prudent and competent mariner would have done under similar circumstances. There was also an objection to any of these witnesses making evaluations of evidence. In particular, there were objections to such witnesses as Dr. Corlett expressing opinions as to the conclusion that should be reached on contested questions of fact for the purpose of relating the conclusions from tests thereto.

These expert witnesses were finally permitted to testify on the basis of specific facts being hypothetically put to

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them on which they were allowed to give an opinion. Furthermore, although they were allowed to testify as to what was the proper course to pursue under whatever circumstances were admitted or proved, they did not, nor were they allowed to state what their own conduct would have been under such circumstances. I am satisfied that generally speaking, the evidence of these witnesses was given in accordance with such rulings and although there was some conflict among the witnesses on some points, on no occasion did an expert's opinion depend on his view of the credibility of the witnesses. In all cases, I believe the witnesses clearly stated the hypothesis on which they were basing their opinions. The only question now is whether this evidence established that the navigators of either ship had committed any breach or breaches of navigation such as to have caused this collision.

Before going into the alleged faults of navigation committed by those on board the *Hermes,* I can deal very briefly with two of the items mentioned by respondent in paragraph 43 of its defence. With reference to the allegation that they were navigating in Lake St. Peter with an incomplete British chart (Exhibit T-5) and did not have a Canadian chart that contained an indication of the buoys, it is sufficient to say that no matter what chart had been on board the *Hermes,* it would not have prevented the collision. As Captain Atkinson, an expert witness called by the Crown (at pp. 3936 and 3944) agreed, the chart had nothing to do with the fact of the collision. It is true that the chart that they had did not contain an indication of the buoys but these buoys in winter navigation, because of the movement of ice, were unreliable. This is made clear by the Notice to Mariners of November 13, 1964 (Exhibit P-63). There was, therefore, good reason not to rely on them even if some sort of an alignment of these buoys had been made prior to the collision. The assessor has confirmed my view on this matter and this allegation must, therefore, be rejected.

I can also deal rapidly with the allegation that they did not use their radio-telephone. Prior to the collision, both ships were navigating the river on a clear day preparing for a normal port to port passing similar, as far as the

Hermes was concerned, to the passing effected with the three ships she had just met in the Rivière du Loup course and with which there had been no communication nor any need therefor. There was, of course, no signal whatsoever given prior to the collision for the simple reason that both ships were too close by the time the danger became apparent. The collision by that time was inevitable. Furthermore, although the pilot of the *Hermes* knew that in 1964 the lining up of the lights of Pointe du Lac did not take a vessel along the centre of the channel but somewhat south thereof, he did know, as did all the other pilots who have given evidence with regard thereto, that in 1964 those lights would take his vessel safely down his side of the fairway. He was, therefore, in 1965, in no position that would cause him to anticipate any danger (unless he was blessed with the gift of foresight, of prescience or foreknowledge and could have anticipated beforehand something which it took at least 18 days for the parties to find out from Poulin's survey). Unless they should have anticipated danger, there was no reason why, sometime prior to the sheering, the navigators of the *Hermes* should have used the radio-telephone. In any event, no suggestion has been made on how (when the sheering started) with the short period of time that elapsed before the collision occurred, they could have used the radio-telephone or in what manner any such use would have prevented the collision. It did not occur to the pilot of the *Transatlantic* to use this instrument, to warn the appellant of the apprehensions he says he had as a result of his observations and I cannot see how it should, under the circumstances of this accident, have occurred to those on board the *Hermes* to do so. This allegation must, therefore, also be rejected and I may add that I am fortified in this conclusion by the considered opinion of my assessor who, on this matter, has expressed the view that the radio-telephone is an instrument to be used only when arrangements have to be made for overtaking vessels or meeting with restricted visibility or, in cases of urgency or strict necessity and that under the circumstances of the present case, coming down the river on a clear day with no traffic going downstream ahead and with no overtaking involved, the *Hermes* had no obligation to communicate by radio-telephone with the

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Transatlantic. It, therefore, follows that the fact the *Hermes* did not use this instrument can have no causal connection with this collision.

Pilot Belisle, of course, did not use the buoys on the north side of the channel (as the Crown contends that he should have, having regard to the fact that these buoys had been verified a few days before the accident, that this information was available at the pilotage offices and that all pilots should have availed themselves of it) but only the leading lights of Pointe du Lac and in view of the Notice to Mariners, (P-63) already mentioned, I am of the view (and the assessor so advises) that it was the only thing to do. Had he used the buoys and gone astray because they were not properly located, he would have clearly been guilty of negligence. While the respondent supplied some evidence that these buoys had been verified a few days before the accident (on April 6, 1965), nevertheless, on April 10, 1965, it was still winter navigation and some ice was still coming downstream. That being so, having regard to the admonition of November 13, 1964, contained in the Notice to Mariners, to the effect that buoys were unreliable because of ice, those navigating the river could not rely on them to any greater extent at that time than they could have relied on them prior to the date when they were checked, particularly when, according to the evidence (if one refers to the course navigated by the ship and the crew who carried out this task) this verification was apparently carried out in some haste. It also appears that with a ship coming upstream on the northern side of the channel, the use of buoys, if at all visible, would be of little assistance. According to Captain Atkinson, these buoys could only have been of some assistance to the *Hermes* had they been lined up and this was possible at one spot only, i.e., when the ship came off Rivière du Loup downbound lights to come up to the Pointe du Lac lights. This would have, therefore, been possible for a few fleeting seconds only and at about 900 feet from buoy 54L, at a time when the *Hermes* was guiding herself on another defective light, the downward Rivière du Loup beacon (which the evidence established guided her some one hundred feet south of her proper position) and when her navigators were looking towards the Pointe du Lac lights,

as they had to, according to the information available to them, to guide them safely down the next leg of the course. It is difficult to see how, under those circumstances, the navigators of the *Hermes* could be taken to task for not using an aid to navigation (the buoys in question which happened to have been spar buoys and, therefore smaller than summer buoys) which they had been warned were unreliable and, which, under the conditions prevailing at the time, were difficult to use and of doubtful assistance. In this respect also, the conduct of the navigators of the *Hermes* (and here again I am confirmed by the assessor's opinion) can hardly be considered as faulty or as having caused or even contributed to this collision. This allegation is therefore also rejected.

There is also the allegation by the Crown that pilot Belisle relied only on the range lights of Pointe du Lac when he had directly facing him a rising sun and when he knew that these range lights were "inexact and unprecise".

There was, I should say immediately, no evidence whatsoever that Belisle had a rising sun in front of him which prevented him from seeing the range lights on the morning of April 10, 1965. His evidence, as well as that of Vos, is that the Pointe du Lac range lights, which they lined up and followed, were clearly visible. This part of the allegation is, therefore, groundless. Belisle knew that these range lights taken in line did not lead one on the central part of the channel. Incidentally, it would be surprising if he did not know that, as the evidence adduced for the respondent established that as far back as the year 1935 and in the year 1941, the lights would, at the beginning of the Pointe du Lac course, lead a ship some 25 to 50 feet southwards. He knew, as did all the other pilots plying this course, that a downbound vessel taking the lights in line, would be led some 100 feet north of the south buoys. He also knew, however, as did all the other pilots, that this would still allow him to go safely down the south side of the channel. This, indeed, seems to have been the extent of the knowledge of the pilots in these waters in 1964 and I may add that none of them could know whether such a result was caused by the buoys being misplaced, the lights being defective or even by some change in the configuration of

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the channel. Paquette, in his evidence, even states (at p. 2009) that such a displacement could not have been discovered:

> R. Je n'ai reçu aucun rapport de qui que ce soit que la base avait été déplacée, parce que ce n'était pas perceptible d'une façon ou d'une autre.

If the crew of the ship assigned to the maintenance of the aids to navigation in the area who navigate continuously in these waters and whose duty it was to maintain aids to navigation in the river, did not discover the displacement, or if neither the ships of the ship channel section of the Department of Transport, nor their ice breakers, discovered the 28 feet displacement of the front light of Pointe du Lac in 1964, there would seem to be no basis for holding that the pilots were at fault for not realizing that the leading of these lights to the south was caused by a displacement of the pier rather than by a misplacement of the buoys, or even a change in the channel. Furthermore, in these circumstances, I can find no basis for holding that the pilots were guilty, as the respondent alleges that they were, of not complying with section 12(4) of the Montreal General Pilotage By-laws in not reporting the displacement of the range when it was not perceptible. My conclusion is that, while pilots navigating in that part of the St. Lawrence in 1964, realized that the lights in line did not indicate the centre of the channel, they knew that a downbound ship taking them in line in 1964 would be safely conducted through the channel on that course and there was no reason for them to anticipate any danger in proceeding in the same manner early in 1965. (The assessor herein is of the same view.) There is, therefore, no validity in the Crown's allegation of fault under this heading.

I now come to the allegation by the Crown that the navigators of the *Hermes* did not adequately use their gyrocompass and other instruments of navigation at their disposal. The other instruments referred to are probably the ship's radar, a chart and the fixing of positions by means of a sextant. I have inquired from my assessor as to whether there is any validity to this allegation and he has given the following answer with which I am in full agreement: "There was no reason in the present case for Belisle or the master to make use of a chart or to use radar when

they could clearly see the leading lights ahead, which are more precise than any observation, that can be made by radar. As far as the gyrocompass is concerned, Belisle was using it and had it at 57 degrees when he should have been on a bearing of 56 degrees. A ship cannot be navigated on a quarter or even a half degree. It is possible, for instance, for a vessel in a particular course to be navigated one degree or a half degree off which, however, from time to time, is corrected by the alignment with the ranges. The *Hermes* here, should have been steering 56½° and the fact she was being navigated at 57° was not unusual and could not indicate that she was not properly aligned especially if Belisle was following the range lights. Furthermore, the current could have possibly caused this difference of ¾ of a degree the *Hermes* was steering prior to entering the cut at the east end of Yamachiche bend."

I come now to the main criticism levelled at the navigators of the *Hermes*. It is that they entered a narrow part of the channel at full speed during winter navigation when a meeting with the *Transatlantic* was imminent, instead of reducing the speed of the vessel and meeting in the Yamachiche anchorage. I have already mentioned the practice followed by navigators in this channel as well as Captain Irvine's opinion in this regard.

I should, before dealing with this matter more fully, comment on what the respondent describes as entering a narrow part of the channel. The Lake St. Peter channel starts for a downbound vessel, somewhere downstream from Sorel, P.Q., and ends somewhere prior to attaining the city of Three Rivers, a distance of some 15⅔ miles. The lake this channel traverses is some 14 miles long and 6 miles wide and its approximate centre lies somewhere along its centre line. This channel is 550 feet wide and, therefore, allows vessels navigating its length downbound and upbound some 275 feet to travel in when meeting or passing each other. Now, although the *Hermes* prior to the collision was entering a part of the channel, that at this point was narrower than it had been in Yamachiche bend (where it was some 2,000 feet wide) it was not changing from another part of the lake to the channel but was still proceeding through the same channel as it had done since leaving Sorel, where en route, it had many times passed from a wider part of the channel to a narrower part the

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width at the five curves, indeed, varying from 800 to 900 feet (cf. St. Lawrence River Pilot, 1966, p. 185). This narrower part of the channel, which the *Hermes* was entering prior to the collision, was still, however, of a breadth of 550 feet, which allowed ample room for navigation having regard to the size of the ships involved. Indeed, the beam of the *Hermes* was 57.6 feet and that of the *Transatlantic* was 54 feet and there, therefore, remained 439 feet to meet in. There is no doubt, and the evidence so discloses, always a possibility of interaction between ships meeting in narrow channels (although such danger is greater when one ship overtakes another) as well as of bank effect if a ship navigates too close to a bank. The navigators of the *Hermes* (and in particular the master and officers) however, had no way of knowing at the time, and there is no reason why they should have apprehended that they were being led astray by the range lights into an area in proximity to the bank (the latter being covered with water and not perceptible in any manner) where there was danger of bank effect. Under these circumstances, it is difficult to see how they can be faulted for the speed at which their vessel was operated at the time (15 knots) even if such speed would increase the unforseeable bank effect on their vessel. Had the *Hermes* been on the course on which the lights would have guided her in 1964, as the pilot was entitled to assume that she was, with the ranges in line, there was no imprudence in entering the cut at the east end of the anchorage at full manoeuvering speed and there would have been no accident had this been the case.

Captain Turcotte has advised me that he is also in full agreement with my conclusion on that point and has added that it is not necessary to reduce speed to enter a narrower part or to emerge from one as long, of course, as the ship is in the channel. He added, however, that after listening to the evidence in this case, he thought it would be a good thing for the authorities to regulate the speed of vessels during winter navigation in this channel.

The attack made on the speed of the *Hermes* at the time of the collision by the respondent was, however, pressed further by the evidence of the captains brought in by the respondent as navigational experts as well as by the evidence of Dr. Christian Brew Corlett, a doctor of philosophy in naval architecture, on the basis that even if one

assumes that the front leading light of the ranges was displaced by some 40 feet, giving a vessel at the chartered position of 51L (some 200 feet downstream from the eastern cut of Yamachiche anchorage) a displacement of 225 feet, this would still place a vessel drawing 20 feet passing position 51L in a safe position (although if one adds to this displacement that caused by the sensitivity of the ranges, the original southern displacement at the commencement of the course as determined by the 1941 survey and the tilt of the upper structure, this statement appears to be most doubtful) *if the vessel was proceeding at a speed which would allow sufficient reserve power for an emergency.* The *Hermes,* as already mentioned, went full astern when she was in a sheer caused by bank pressure and suction and this removed all rudder power and ability to break the suction. According to the above captains and Dr. Corlett, (and the tests made in Holland in December 1967 confirmed this) had the engine of the *Hermes* been kept full ahead with increased speed (instead of being fully reversed) the ship, as the stern left the bank, would have responded very quickly to her rudder and the collision might well have been avoided. This manoeuver, according to Captain Atkinson, of London, England, a former Suez Canal pilot, is an action which would take a cool mind and technical knowledge of the causes and effects of bank suction, which he says, he would expect all pilots in narrow submerged channels to have.

This, in my view, points up again the difficulty encountered when foreign captains are brought in as experts to give evidence on navigational problems involving the conduct of ships in waters which are foreign to them. The evidence here, of course, is that none of the pilots heard at the trial knew very much about bank effect or had, until the spring of 1965, ever navigated a ship which had sheered. Captain Goulet, of course, stated that in navigating the Lake St. Peter channel he had experienced sheering many times but he explains this by saying that it occurred while his ship was assisting the ice breakers and at a time when his vessel was presumably pushing ice away from the bank. As for Captain Irvine, his experience with bank suction was in the canals situated on the Great Lakes. The pilots heard at the trial and involved in this accident had, of course, from time to time, while navigating

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in the St. Lawrence River, felt some pressure effect on the conduct of their ship, which, however, they could and would correct merely by pressing on the rudder, but they had never experienced a sheering prior to April 3, 1965, when for the first time the *Manchester Commerce* sheered in the Lake St. Peter channel and more precisely in the beginning of the Pointe du Lac course.

Now, although Captain Atkinson states that he would expect all pilots to have complete knowledge of bank suction, his evidence in this regard when cross-examined by counsel for the suppliants is of interest (cf. p. 3904):

BY MR. GERITY:

Q. You said that young men, I presume young officers, would learn about these matters from some standard text. Could you name one or two?
A. Well, the Admiralty Manual of Navigation.
Q. Deals with bank suction? Which volume?
A. Admiralty Manual of Seamanship, sorry.
Q Do you have one with you?
A. I haven't got one here, no.
Q. What other books deal with it?
A. Offhand, I can't think of any particular one.
Q. Have my learned friends showed to you any Canadian publication that deals with it?
A. Well, not Canadian, American.
Q. Which one was that?
A. He has shown me an American book by two American naval officers on shiphandling.
Q. Marine, Plummer's book?
A. Yes.
Q. Is that the only one you have been shown?
A. No, I was shown another one, a small red one.
Q. By whom?
A. Plummer was one and the other one was by two American naval officers.

Although most ship handling books deal in a summary fashion with bank suction, there is very little written which really goes into the subject in any detail and which gives the relationship of offset from banks with the speed of vessels nor were there many tests that had been made in this regard before April 10, 1965. It is, therefore, not too surprising that the pilots involved in this casualty had heard very little about this subject. Nor does it appear that at any time pilots plying their trade in the District of Montreal, or even elsewhere in Canada, were ever educated

or even informed of the dangers of bank suction, although all the pilots of the District of Montreal are under the authority of the Minister of Transport (the same department involved in supplying aids to navigation or in maintaining the channel) who as the pilotage authority under the *Canada Shipping Act* (R.S.C. 1952, c. 29, secs. 322 *et seq.*) through the Superintendent of Pilotage of Canada (Mr. Jones) in Ottawa and the District Superintendent in Montreal (at the time, a Mr. Melançon) had the duty to ensure that the pilots conning vessels in Canadian waters are properly qualified and categorized. It is not entirely irrelevant to add that, under the controlled pilotage system which now operates in this country, vessels cannot select their pilots. The pilotage authorities indeed provide pilots through a roster system and the vessel has no say in the matter; and, because of this, one may well say that the original position of the pilot as an independent contractor has now become in fact that of an employee of the public authority who sets down the procedure by which pilots now operate in Canada and the manner in which vessels must make use of them. One may even ask whether under such circumstances, the respondent can now complain of the manoeuvers effected by the pilot herein even if theoretically the captain of a ship always remains liable for the conduct of his vessel.

Captain Atkinson was again examined with regard to the matter of bank suction and its effects on vessels, by counsel for the suppliants (at pp. 3905-3906 of the transcript) as follows:

Q. Were you shown any notices or documents from the officer of the Superintendent of Pilots of Canada directed to his pilots about these subjects?

A. No.

Q. Yet in the Suez Canal you were given that information, were you not, when you were a younger pilot?

A. Yes.

Q. In considerable detail?

A. Yes.

Q. I thought so. Have you seen any evidence in this case of any pilot, whether he was a witness, who ever experienced bank suction before these unhappy events?

A. No, but I did read evidence of one pilot who dealt with it on the *Corinthia*.

Q. Did he say he had ever experienced it before that time?

A. Not to my knowledge, no.

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As a matter of fact, pilots in this part of the St. Lawrence were never at any time given any instructions regarding the dangers of bank suction.

A Mr. J. T. Tothill, of the ship section, National Research Council of Canada, conducted tests with model ships some time in the beginning of the year 1967 for the purpose of measuring squat and bank effects and then produced a written report on the subject which could be of great interest and assistance to pilots. There was, at no time, however, any attempt made by anyone, including the Superintendent of Pilotage of Canada, to bring this very important document or its contents to the attention of the pilots, even though it was known at this time that bank effect had caused the sheering of three ships and a most serious collision involving loss of life.

Under these circumstances, it is difficult to see how the pilots involved herein, all experienced men, could have met the situation created in the channel on the fatal morning of April 10, 1965, with any more knowledge than what they had received. The question really is whether a reasonably well trained and reasonably competent pilot would have had any more knowledge on the subject than these pilots had.

In April 1965, the conditions and effects of bank suction, as well as the navigational manoeuvering necessary to get out of a sheer caused by bank suction, were not completely known to even these experts familiar with whatever had been written on the subject. Since then, Mr. J. T. Tothill's paper of 1967 (Exhibit P-81) has disclosed some useful information on the subject and the tests conducted in Holland by Mr. Ter Heide under the supervision of Dr. Corlett have also given a wealth of results which one with hindsight could possibly now use to criticize the action taken by the navigators of the *Hermes* in reversing the course of their vessel once the sheer began instead of pushing the ship at full speed and thereby possibly getting out of it. I say possibly because I am still not certain, although the tests in Holland would seem so to indicate that an increase of pressure on the rudder by increasing the revolutions of the engine will take a ship out of a sheer and bring her back under control and that, had such a forward action been taken at the time, the collision would not have hap-

pened, although, of course, in such an event, it might well have taken place at some spot further down and aft of the *Transatlantic* instead of amidships.

Furthermore, the tests made in Holland were conducted with a model and in conditions which, although close to what existed at the time of the collision, still could not, and did not, reproduce identical conditions. The difficulty of similitude inherent in such tests, as pointed out by Dr. John Doust, is a factor which leaves one somewhat skeptical, particularly with regard to determining whether under the conditions prevalent prior to the collision in question, the navigators of the *Hermes* should have pressed on a head as suggested and even whether they could safely do so. I am also left in some doubt with respect to the conclusion of the tests that below certain speeds at specific offsets from the bank, there can be no sheering and therefore, no possibility of a collision. I say this after reading an American decision cited by counsel for the respondent in *Al Johnson Construction Co. et al v. S.S. Rio Orinoco and Trans-World Carriers Inc.*[4] which indeed leaves me somewhat perplexed. Here a vessel navigating at a reduced speed of 3 knots started to sheer and although the vessel had reserve speed and used it, it did not succeed in avoiding a dredge with which it collided.

There is also the question as to what a pilot or navigator (even an experienced one) would do when faced with a situation where he has but a few seconds (between 30 or 40) in which to take a decision and where he can realize only after the passage of a few of those seconds that the sheering of his vessel is not due to a faulty rudder, as both Barrett on the *Manchester Commerce* and Belisle on the *Hermes* first thought was the cause of their sheering difficulties. In both of these cases, the rudder was, after the sheering, subjected to a thorough examination in order to ensure that such was not the case. Who indeed in what can be termed the agony of collision with a ship out of control going towards an oncoming ship, could be taken to task for reversing the engines as was done on the *Hermes*, after an attempt had been made to straighten its course by means of applying a 10 degree turn on the rudder and where a 5

[4] 249 F. Supp. 182 (1965).

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degree turn, according to several witnesses, is applied regularly to bring a ship back in line when navigating in the St. Lawrence River. Captain Turcotte is fully in agreement with the above and advised me that "because of the short sequence of events we must rely on the experience and judgment of the master and pilot of the *Hermes* and assume that when the engine was reversed, the collision was unavoidable and it then became a matter of attempting to reduce the impact". This is what Barrett with the *Manchester* did and he had no ship coming upstream at the time. It is true that pilot Tremblay on the *Carinthia* pressed on ahead and managed to avoid hitting the northern bank, but he explained this by saying that he had a vessel with two propellers and had he had but one propeller, he would not have been able to get out of the sheer. Furthermore, there was no ship ahead of him and, therefore, he was free to press ahead. It is true that Tremblay had reduced the speed of his vessel from 18 knots to 14 knots in the hope of meeting the *London Splendour* in the anchorage but as he stated, his ship was not, nor was the *London Splendour,* a small ship. He explains this at p. 1622:

> Me DESCHENES:
>
> M. TREMBLAY: Parce que, avec la classe de bateau que j'avais, rencontrer un pétrolier dans 550 pieds, sans aide à la navigation, ce n'est pas la même chose que si j'avais eu deux petits bateaux. Alors, c'était préférable de ne pas jouer avec mes nerfs, de rencontrer dans le 2,000 pieds.

Tremblay then testified (p. 1659) as follows:

> LE PRÉSIDENT: Vous n'avez pas songé à faire machine en arrière?
>
> M. TREMBLAY: Bien là, Votre Honneur, si mon navire a refusé d'obéir exactement à mes désirs, cela aurait été le «step» suivant, arrêter mon engin de droite, et encore il restait arrière tout, sur la droite. J'avais beaucoup à mon avantage pour pouvoir, vous savez, me sauver de la situation.
>
> Me BRISSET: Qu'est-ce que vous appelez «vous aviez beaucoup à votre avantage»? Qu'est-ce qui était à votre avantage?
>
> M. TREMBLAY: Parce que j'avais deux hélices.
>
> Me BRISSET: Et si vous aviez eu une hélice?
>
> M. TREMBLAY: A! «God bless me», là, je ne le sais pas, j'aurais peut-être traversé carré au nord du lac et je serais resté là.

As a matter of fact, Tremblay stated that even with two propellers it took his vessel some 1,800 feet to come back on a normal course (cf. p. 1660).

It, therefore, follows, I believe, that although the tests conducted in Holland under Mr. Ter Heide and Dr. Corlett's evidence, are most interesting and informative with regard to the fact that bank suction effects vary directly as the square of the speed and diminish as the vessel gets away from the bank, such tests and evidence, in my view, point out only that the relationship of the effects of bank suction on vessels to offsets from banks at various speeds were not too well known in April 1965 and in particular that it was not known to those navigating vessels in our waters. Such information can be useful now only if it is passed on to navigators. I must say, however, that it is unfortunate that these tests were not conducted at regular offsets in order to determine more precisely a curve of the effects of bank suction. New and valuable information was nevertheless obtained by the tests as confirmed by Mr. Ter Heide at the end of his evidence after he had explained the various tests conducted. He was indeed asked by the Court the following questions and gave the following answers (cf. p. 4372):

> HIS LORDSHIP: Mr. Ter Heide, as far as you are concerned, did you learn anything as far as the bank effect is concerned on ships; the effect on ships by these tests?
>
> THE WITNESS: Oh, yes, a lot.
>
> HIS LORDSHIP: A lot?
>
> THE WITNESS: Yes, and I think the two parties here did too.

Had I known of the results of the tests at the time they were authorized (although I did suspect that the faster the ship was going, the greater would be the sheering) and had I known also that there was no reason for pilots to anticipate (as I have now held) that the lower light would be displaced to the extent it was on April 10, 1965, and that bank suction could ensue, I would have been reluctant to allow such tests to be carried out.

The main criticism levelled at the navigators of the *Hermes* which is that travelling at 15 knots, they had no reserve speed available to bring her out of a sheer, becomes irrelevant once it is established that, under the circumstances of this collision with the navigators of the *Hermes* in no position to anticipate a sheering, a manoeuver involving the reversing of the engines as adopted by them was perfectly reasonable. My assessor confirms this by stating

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that he would not have "stepped on the gas" here even if he had had reserve speed to play around with once it was obvious that the vessels had reached a point where a collision became unavoidable. It follows that whatever speed the *Hermes* was navigating at had nothing to do with the cause of this accident and should not be considered.

I have already dealt in some respects with the allegations of the respondent with regard to the navigational breaches committed by the navigators of the *Transatlantic* by saying that, as suggested by the Crown, their vessel must have been somewhere near the centre of the channel prior to the collision. I say this notwithstanding Vallée's evidence that the northern buoys were being used as a guide and that the starboard side of the vessel was some 100 to 150 feet away from them. Had this been so, I have no doubt that the impact of the *Hermes*, together with the 30 degree starboard action taken by the *Transatlantic* would have projected the vessel against the north bank. As this did not occur, the only inference that can be drawn is that the *Transatlantic* was not on the northern side of the channel but probably on the centre part or even somewhat to the south thereof if the lateral distance of both vessels, as stated by their navigators, is considered. The vessel was, at the time, lined up on the Pointe du Lac ranges which were opened to the north and, therefore being conducted, as all pilots conducted ships in 1964, on the assumption that so operated they would effect a safe passage. Although the navigators of the *Transatlantic* were closer to the six north buoys which incidentally were at variable distances from each other (some were one half mile, others one mile apart over a total distance of some five miles) than those on board the *Hermes*, and in a better position to use them, they also were subject to the admonition of November 13, 1965, issued by respondent that they should not rely on them during winter navigation, but use instead fixed aids, such as the range lights of Pointe du Lac. Having regard to this advice, the use of these lights in the same manner as they had been using them in 1964 and without any reason to anticipate that circumstances had changed in the meantime, was not, in my opinion, negligence, and cannot be regarded as a cause of the collision. It is true that because of the misalignment of the front light, the *Transatlantic* was led much more to the south then it

should have been and this could well have given the *Hermes* a false sense of security in maintaining the course it was following. The evidence discloses, however, that both ships were being navigated by means of lining up the lights (either in line or slightly opened to the north) and the course of the *Hermes* was, therefore, directed by ranges and not by the position of the *Transatlantic* in the channel. Furthermore, as the navigators on the respective ships did not, at the time, know of the most recent displacement of the range and did not know that it was leading the ships more to the south than in 1964, the position of the *Transatlantic* (even if the lateral distance from the north buoys might have raised some doubt in their minds as to their position) cannot be attributed to negligence of those on the *Transatlantic* that was a cause of this accident.

Pilot Vallée stated that at a distance of some 3 miles he noticed that the *Hermes* was acting strangely and the respondent points out that notwithstanding this, he did not reduce the speed of his vessel. The evidence discloses that although the *Hermes* was led somewhat more to the south of the course because of the displacement of the Rivière du Loup lights, her manoeuvers were not as strange as Vallée stated. His evidence in this regard is indeed contradicted by the navigators on board the *Hermes* and also by the actual course followed by this vessel. Furthermore, and I am supported by the assessor's advice in this regard, it is difficult to see what could have been attained by reducing the speed of the *Transatlantic* when it was some three miles away from the approaching *Hermes*. On the other hand, later when the unforeseeable sheer of the *Hermes* took place, all necessary action appears to have been taken to try to avoid this accident. It is true that no signal was given by the *Transatlantic* prior to the collision but this is not too surprising in view of the fact that there was very little time to give a signal and that any signal given would have been useless. With regard to the suggested use of the radio-telephone, if what pilot Vallée states is true, that he saw the *Hermes* was in difficulty some three miles away, he could and should have used it. Even assuming, however, that such was the case, I could not hold the *Transatlantic* liable on the basis of such evidence which, even if true, would merely be an omission or a refusal of assistance on the part of Vallée which could,

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in no way, constitute a basis for establishing liability or even contributory negligence. I would also be reluctant to accept Vallée's statement with regard to the difficulties he claims the *Hermes* seemed to be in as, in my view, they are not supported by the weight of the evidence.

We are, therefore, left with but one explanation for this collision, i.e., the 40 feet displacement of the Pointe du Lac front light on April 10, 1965, which was rendered still more deceptive by the misalignment of the preceding Rivière du Loup range lights which had also led the *Hermes* more southward than it should have gone in order to take the Pointe du Lac lights and, therefore, closer to the south bank where the sheer took place and, of course, the position of the *Transatlantic* in the channel may well have lulled the *Hermes* into a false sense of security.

Having come to this conclusion, it follows that the sole direct cause of this collision was due to the increased displacement of the light in 1965 as compared with 1964. Although the increase between 1964 and April 10, 1965, was only some 12 feet, nevertheless, it caused the total displacement to reach some 40 feet and thereby created a most dangerous situation for those ships plying those waters in the spring of 1965 when the Pointe du Lac lights were the only means of navigation upon which, according to their training, experience and instructions, they were entitled to rely.

Having thus determined the factual situation, I now turn to what may well be the most difficult part of my task, namely to deal with the question whether the Crown can be held legally liable for this collision caused by the misalignment of the ranges and the consequential damages.

According to both the suppliants and the third party, the liability of the Crown was due to a number of breaches of duty on the part of the Crown and its servants, as alleged in paragraphs 20, 21 and 22 of the petition of right and paragraphs 23, 24 and 25 of the third party's defence. As there is very little difference in the allegations of both the suppliants and third party in this respect, it will suffice to reproduce hereunder paragraphs 20, 21 and 22 of the petition of right and indicate wherever necessary the slight differences involved:

> 20. The collision and the consequent damages sustained by the Suppliants were the result of a breach of duty on the part of the

Crown and its servants, *attaching to the ownership, possession, occupation or control of property,* namely, the structures on which the lights and beacons in Lake St. Peter had been installed and more particularly the lower or front beacon and light of Pointe du Lac and the Rivière du Loup leading lights and beacons downbound with the result that their misalignment caused such leading lights and beacons to be a danger to navigation rather than an aid to navigation, and in that the officers and servants of Her Majesty failed to ascertain such misalignment and to give warning of it to those in charge of the navigation of the vessels *Hermes* and *Transatlantic,* who relied for the safety of their vessels upon being given due warning that such lights and beacons were no longer serving the purposes advertised and published for the information of mariners.

(Emphasis added).

The particulars of the negligent acts allegedly committed by employees of the respondent on which suppliants rely are enumerated in paragraphs 21 and 22 of the petition of right reproduced hereunder:

21. Such collision and the consequent damages sustained by the Suppliants were also the result of delicts and quasi-delicts committed by servants of the Crown, namely, the District Marine Agent of the Department of Transport in Sorel in charge of such aids to navigation, the Superintendent of Pilotage in Ottawa, the District Superintendent of Pilots in the District of Montreal and the Chief of the Aids to Navigation Branch of the Department of Transport, and more particularly:

(a) As to the District Marine Agent of the Department of Transport for the District of Sorel:

i. because of his failure to ascertain and correct the misalignment of the leading lights and beacons of Pointe du Lac which had resulted from the shifting and tilting to the south of the base on which the front range had been installed, which shifting and tilting was known or should have been known to him and which already had become significant and dangerous by the fall of 1964 and by the beginning of April, 1965, had increased to such an extent as to place a downbound vessel, keeping the ranges in line, on the south bank of the dredged channel;

ii. because of his failure to ascertain and correct the misalignment of the downbound Rivière du Loup lights and beacons which also had resulted from the shifting or tilting to the south of the base on which the lower beacon had been installed;

iii. because of his failure at least to warn mariners of such misalignment and of the unreliability of such aids to navigation;

the whole despite his having men, materials and equipment available and despite his knowledge and acceptance of the reliance placed on the due performance of his duties by the navigators passing through Lake St. Peter, in particular the navigators of the *Hermes* and *Transatlantic.*

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The latter part of subparagraph (*a*) of paragraph 24 of the third party's defence is expressed in somewhat different language and appears to go further than the above allegations. It reads as follows:

> (*a*) . . . the whole in spite of his knowledge of the justifiable reliance by the navigators of vessels passing through Lake St. Peter, and in particular by the navigators of the "*Hermes*" and the "*Transatlantic*", on the performance of his duties by the said servant of the Respondent, the Crown, and the acceptance of such duties by such servant, the more so in view of the conditions referred to in Paragraph 17 which still prevailed;)
>
> (*b*) As to the Superintendent of Pilotage in Ottawa, as well as to the District Superintendent of Pilots in Montreal, because of their failure to provide to the Pilots assigned to vessels in the Pilotage District of Montreal the information required by them to competently discharge their duties in the conduct of such vessels.
>
> (*c*) As to the Chief of Aids to Navigation Branch of the Department of Transport, and to the Superintendent referred to in paragraph (*b*) hereof, all of whom were servants of the Crown and subject to the direction and control of the Minister of Transport, because of their failure in their duty to commercial shipping and to the Suppliants and Third Party Defendant in particular—
>
> (i) the said officers and servants failed in their duty to create or maintain any sufficient system for the dissemination of information to mariners so that the said mariners might receive timely warning of dangers to navigation of which the said officers had knowledge or should have had knowledge; and,
>
> (ii) more particularly, in that they knew or ought to have known that other vessels and, more particularly, the downbound cargo vessel "*Manchester Commerce*" and the downbound passenger vessel "*Carinthia*" had previously to the date here in question, namely on the 3rd and 9th days of April, 1965, respectively, encountered difficulties and danger while traversing the dredged channel across Lake St. Peter in exactly the same locality where the "*Hermes*" and "*Transatlantic*" came into collision, which said difficulty and danger were reported or should have been reported to the servants of the Respondent, the Crown, any lack of knowledge on their part being indicative of their failure in their duty as aforesaid to create an effective system for the receipt of such information,
>
> 22. The Officers and servants of the Crown mentioned in the preceding paragraph, although having at all relevant times the equipment, men and funds required, failed in their duty to inspect and ascertain the condition of the said aids to navigation and to warn mariners of defects developing in them and to ensure that navigators, relying upon the performance of the said duty and acting upon the information published and advertised, would not be misled into

navigating in the channels of Lake St. Peter in the belief that they might do so safely in the manner in which they were directed and invited to do by the said information.

Briefly stated, the position taken by the suppliants and the third party herein is that the collision was caused by the displacement of the ranges; that the servants of the Crown knew or should have known that the ranges were displaced; and that they should either have corrected the situation or warned mariners that the ranges were no longer serving their intended purpose.

The Crown, on the other hand, takes the position that the only case it has to meet here are the various causes of action set out in the pleadings and, of course, there is no question that such is always the case.

Counsel for the Crown contends that paragraph 20 of the petition of right, which deals with the liability of the Crown under section 3(1)(*b*) of the *Crown Liability Act* is limited to a claim that there was a failure on the part of the Crown's servants to ascertain and to give warnings and that as there is no allegation that the Crown had a duty herein to maintain the pier, a cause of action based on failure to maintain is not available to suppliants in this action. While the paragraph is not as easy to read as it might be, I do not think it can be read so narrowly. The first part of the paragraph reads in part as follows:

> 20. The collision and the ... damages ... were the result of a breach of duty on the part of the Crown... attaching to the ownership, possession, occupation or control of... the structures on which the lights and beacons in Lake St. Peter had been installed... with the result that their misalignment caused such... lights and beacons to be a danger to navigation rather than an aid to navigation...

These words are clearly so framed as to rely on a "breach of duty on the part of the Crown" resulting in specified lights being misaligned so as to create a danger to navigation. If the matter had been raised by way of an interlocutory application, it might be that the claimants would have been required to plead the facts from which the Court would be asked to conclude that there had been such "a breach of duty on the part of the Crown". On the other hand, if such an application had been made, I should have thought it possible that the Court would have concluded that the claimants could not be expected to plead any fact other than that the misalignment did exist and that that

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had been adequately pleaded. Lack of care might well be inferred from misalignment unless excluded by an explanation of the misalignment that is consistent with the Crown having discharged such duties as devolve on it from ownership, possession, occupation or control of the lights in question. I find, therefore, that the petition does sufficiently raise a case under section 3(1)(*b*) of the *Crown Liability Act*.

Having thus been raised in the proceedings and having been argued and debated by counsel for all parties, the question of maintenance, therefore, forms part of the issues raised in these proceedings.

The Crown, in its defence, denies that the misalignment of the leading lights was the immediate and sole cause of the collision and alleges that this collision was caused by the fault, neglect, imprudence, inability and want of care of the pilot and officers on board the *Hermes* as well as the pilot and officers on board the *Transatlantic* and that the said collision had in no way resulted from a breach of duty on the part of the Crown and its servants either as the owner or controller of the property and that their servants or officers had not been guilty of any omission which could constitute a cause of action in tort or otherwise against them personally. The Crown took the position that, even if all the facts alleged in the petition of right were admitted, it could not be held legally liable in tort or otherwise for the damages claimed by the suppliants.

The Crown then raised a number of navigational breaches committed by the navigators and pilots of both vessels with which I have already dealt. There is no point dealing with them again here except to summarize the conclusions that I have already reached, namely that none of the manoeuvres of either ship prior to the collision can, under the circumstances of the case, be considered as constituting a fault or negligence that was a proximate cause of the casualty.

The only defences raised by the respondent which remain and may be pertinent to its liability for the displacement are (1) that although it had no obligation to do so, it had, in 1963, required a specialized engineer to examine completely amongst other things, the pier of the Pointe du Lac range and he, by his written report, concluded that it was in good condition, that it had been displaced only

slightly over the years and that it should give respondent no concern; (2) the respondent also alleged that in 1965, for the first time, it experimented by leaving the steel structure on the base of the lower pier of Pointe du Lac in an attempt to assist navigators, and this was known to the pilots and navigators and particularly to the pilots of the *Hermes* and *Transatlantic*; (3) the Crown finally took the position that if the base of the lower light of Pointe du Lac was displaced before the collision this displacement was caused by "force majeure" and that it could not have foreseen nor have prevented it (paragraph 68).

With respect to the matter of damages, the respondent in its pleadings (paragraph 70) claims that it is not liable for expenses resulting from the capsizing of the *Transatlantic* and its subsequent refloating as the captain and officers of the *Transatlantic* and the persons in charge of the salvaging operations were at fault in not properly beaching the vessel at a place situated out of the narrow part of the channel. It is also alleged that the captain and officers failed to fight the fire on board their vessel in accordance with the ordinary rules of the art and of prudence.

The suppliants rely on sections 3(1)(*a*) and 3(1)(*b*) of the *Crown Liability Act* of 1953[5] and contend that they have established a cause of action under both branches of the sub-section. They also contend that the tort referred to in the above Act in respect of any matter arising in the province of Quebec, is any delict or quasi-delict considered as such under the laws of that province.

"The Crown is liable" (under the above Act[6]) "in tort for the damages for which, if it were a private person of full age and capacity, it would be liable". Since the passing of this Act, therefore, the Crown, with very few exceptions, is assimilated to a person of full age and capacity and its liability for torts is that of such a person.

Counsel for the Crown argued that the use of the word tort, even in the French version of section 3(1)(*a*) of the Act, indicates an intent to allow an action in tort against the Crown only in those actions which are accepted as torts under the common law and that article 1054 of the *Civil Code*, for instance, which has no exact counterpart

[5] S. of C. 1952-53, c. 30. [6] *ibid*, s. 3(1).

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under the common law, would not apply against the Crown. This article deals with the recourse given against custodians or owners of things for damage caused by such things when under their care. The law, by this section, establishes a presumption of liability against the person in whose care the thing causing the damage was at the time, which presumption, however, can be rebutted by the owner or guardian establishing that he took all reasonable means to prevent the damage. There is indeed no such legal presumption in the common law and the Crown contends that the *Crown Liability Act,* because of the use of the word tort in the French text has clearly excluded such a resource. There is, I believe, a short answer to this submission in that, firstly, the Act in the definition section, clearly defines the tort contemplated as being a delict or a quasi-delict in Quebec, which must encompass a recourse based on article 1054 of the *Civil Code* and secondly, as the terms of section 3(1)(*a*) as well as of others extending the liability of the Crown in respect of property namely section 3(1)(*b*) appear to resemble, with some modifications, the *Crown Proceedings Act* enacted in the United Kingdom in 1947, there is the noteworthy omission in 3(1)(*b*) of the Canadian Act of the words "at common law" which appear in the English section 2(1)(*c*): "duties attaching at common law to the ownership, occupation, possession or control of property". A number of pronouncements were made by this Court, as well as by the Supreme Court of Canada, under the old section 19 of the *Exchequer Court Act* which gave a special recourse against the Crown for the negligent acts of its servants and it was repeatedly asserted that (although a presumption of fact such as the one covered by the dictum *res ipsa loquitur* could assist a claimant) negligence had to be proved under section 19 and no legal presumption (such as the one contemplated in article 1054 C.C.) could replace such proof. (Cf. *Tremblay v. The King*[7]; *Gauthier & Co. v. The King*[8]). Indeed, the tort of negligence can only be established by positive proof thereof. Under the new Act, however, there is no restriction and as it is stated that the Crown can be held liable as a person of full age and capacity, there would seem to be no reason why the legal

[7] [1944] Ex. C.R. 1 at p. 4.

[8] [1944] Ex. C.R. 17.

presumption of article 1054 of the *Civil Code* should not apply in a proper case to the Crown as it applies to all persons of full age and capacity in Quebec.

The proper interpretation to be given to this statute is, I believe, that the law which applies with regard to the liability of the Crown (unless the Crown is excepted therefrom) for a cause of action originating in Quebec, is that which governs any delict or quasi-delict committed by a private person of full age and capacity in that province including the legal presumption of article 1054 if such an article is found to be applicable to the circumstances of a particular case. I shall have more to say later on this subject when considering the manner in which the servants or officers of the Crown discharged whatever obligations they had to navigation with regard to the particular range lights they had under their control.

I should now, I believe, state here that under section 591 of the *Canada Shipping Act*, R.S.C. 1952, chapter 29:

> 591. All lighthouses, lightships, floating and other lights, lanterns, and other signals, buoys and beacons, radio aids to marine navigation, anchors and land marks acquired, constructed, repaired, maintained, improved, erected, placed or laid down for the greater security and facility of navigation at the expense of any province of Canada before it became a part thereof, or at the expense of the Government of Canada, together with all buildings and other works belonging thereto and in connection therewith, are vested in Her Majesty, and shall be under the *direct control and management of the Minister.*

(Emphasis is mine).

Lake St. Peter, where the collision took place, is a man-made channel, an improvement in navigation of the River St. Lawrence and was vested in the Crown under section 108 of the *British North America Act.*

I believe it can be said that navigators of all countries are welcome to use our navigational rivers and lakes and although they do benefit from such a use the commercial operations of all navigators, Canadian and foreign, benefit also the commerce and industry of Canada. Without the links created by canals, channels and railways, it is, I believe, doubtful that Canada as a nation would have known the industrial and commercial expansion it has now attained. We may, therefore, take it that all ships plying our waterways are invited and encouraged to do so and are entitled to rely on the means supplied to navigate such waters in safety and I would think that the same would

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apply to our Canadian ships navigating in foreign waters who also should be entitled to rely on the means given to navigate safely in such waters. If this is the situation, the Crown would owe an unqualified duty to see that such means are fulfilling their intended purpose to those using our waterways including the channel which leads them to and from the chief port of this country, Montreal.

There has always been a certain reluctance in the United Kingdom as well as in Canada to hold the Crown liable, particularly when the injury resulted from non-repair of a public work or non-feasance. There are, however, a number of pronouncements of the Supreme Court made even prior to the time when the *Crown Liability Act* of 1953 was not fully applicable which it would be helpful, I believe, even at this stage, to set down.

In *The King v. Hochelaga Shipping and Towing Co.*[9], Crocket J. dealing at p. 162 with the situation where there had been a lack of action on the part of the Crown in repairing a public work that had caused damages, stated:

> Dealing with the contention of the respondent that the Crown was not bound to keep in repair any public work and that it could not be held liable for injuries resulting from the unsafe condition thereof, the learned judge, while assenting to this submission and stating that s. 19(*c*) seemed to exclude the case in which the injury was the result of non-repair or non-feasance, added that in some cases non-repair or non-feasance may constitute a hazard or, in other words, create what is called a trap and bring about a condition which renders an accident almost unavoidable. "This", he said, "is what happened in the present case."

In *Grossman and Sun v. The King*[10], where an aircraft came down on an airport and ran into a ditch which had not been sufficiently indicated, Taschereau J. made the following pertinent remarks at p. 602:

> ... There is no obligation sanctioned by law or by common practice to contact any other station called radio range or otherwise, which is not concerned with traffic, but mostly with weather conditions, particularly when there is no danger *reasonably forseeable*, and nothing appears abnormal. It is by virtue of the regulations, the obligation of the airport itself to warn by *clearly marked signs* of any obstructions on the field, and not the duty of the pilot to inquire if any employee has been negligent, and if his life is in peril *by accepting the implied invitation to land.* (Vide International Civil Aviation Conference, 1944, sections 5 and 28). It would otherwise be tantamount to a total reversal of the respective duties and obligations imposed by law to the parties. Of course, it would be more efficient

[9] [1940] S.C.R. 153 at p. 162.

[10] [1952] 1 S.C.R. 571 at 602.

for the pilot to do so, but the law does not require such a high standard of care. Perfection in the actions or behaviour of men is not a condition *sine qua non*, to the right to claim damages. Motorists who drive on public highways, captains who bring their ships into port, are entitled to expect that the road will be in a safe condition, that there will not be any submerged object to obstruct navigation. *King v. Hochelaga Shipping* (1940) S.C.R. 153). Unless he knows of the danger on account of its obviousness or otherwise, the driver of the automobile or the captain of the ship is entitled to be warned of its existence. The right of a pilot of an aircraft, invited to land on a public airfield is identical.

(Underlining is mine.)

There is indeed an obligation to warn the users of ports of a danger which the harbour authority knew or ought to have known as stated by Lord Porter in *Workington Harbour & Dock Board v. Towerfield (Owners)*[11] where a ship went aground on an accumulation of river silt:

> The harbour board's negligence, however, was not confined to a failure to warn the shipowners of facts within their knowledge. They also failed to use due diligence to ascertain the facts with which they should have been acquainted.

The duty of one undertaking a range light service was, I believe, properly described in an American case, *Indian Towing Co., et al v. United States (Coast Guard)*[12] per Frankfurter J. where the Coast Guard was sued for negligence in the operation of the light on a lighthouse (which was allowed to go out) under the *Federal Tort Claims Act*, which is similar to our *Crown Liability Act* in that its purpose is to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable. The alleged negligence in that case was the failure of the Coast Guard personnel to check the electrical system which operated the lights, the failure to make a proper examination of the connections and other apparatus connected with the light and the failure to repair the lights or give notice to vessels that the light was not functioning and at p. 34, Judge Frankfurter stated:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and *engendered reliance on the guidance* afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order, and if the light did become extinguished,

[11] [1951] A.C. 112 at 131.

[12] (1956) 1 A.M.C. 27 at 34.

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then the Coast Guard was further *obligated to use due care to discover this fact* and to repair the light or *give warning* that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.

(Emphasis added.)

As a matter of fact, this same rule was applied in *Grossman and Sun v. The King* (*supra*) by Taschereau J. when he stated at p. 604:

> In these two cases (*The King v. Canada Steamship Lines* [1926] S.C.R. 68 and *The King v. Hochelaga* [1940] S.C.R. 153) as in the present one, the negligence was *the failure to warn of an existing danger* that the employees of the Crown in the performance of their duty, *knew or ought to have known,* bringing into play section 19(c) of the Exchequer Court Act. I would indeed be loath to hold that an employee of the Crown, whose concern it is to maintain an airfield in proper and safe condition, and to indicate by visible marks all dangerous obstructions, would not if he failed to do so, be neglectful of his duty to oncoming pilots whose welcome on Canadian soil has been sanctioned and recognized by an international agreement with foreign countries. It is from him that diligence and alertness is rightly expected. His lack of vigilance is a personal negligence, for which the "Superior" is answerable before the courts.

(Emphasis is mine.)

The front pier of Pointe du Lac was built and sunk in 1935 and for many years since that time the Aids to Navigation Branch, in Ottawa, and in Sorel, were under the supervision of departmental officers who are no longer there. Mr. A. K. Laing and Mr. Paquette, respectively Chief of Aids to Navigation in Ottawa and District Marine Agent at Sorel had, however, been in charge for several years prior to the casualty and in order to determine whether these officers or any others whose duty it was to ensure that these lights were in a proper position and operating in accordance with the purpose for which they were advertised, have properly performed their functions or duties, it will be helpful, I believe, to go over the history of this pier from the time it was built.

An examination of the departmental files by the above two named officers, would obviously have disclosed that the front leading light of Rivière du Loup, as well as the front leading light of Pointe du Lac, had been a subject of considerable concern to the Department of Transport for a period of at least 13 years prior to the casualty and no one

except Mr. Laing (Chief of Aids to Navigation at that time) in his letter of August 15, 1952, had ever indicated the need to fix its position and find out at that date if it had moved from its original position although there was a simple means of doing so by using the ship channel co-ordinates and by triangulation. There is no evidence that Mr. Laing's suggestion in the above letter was ever followed up or that a fixing of the position had taken place. There is no indication that there had been or was, or is even at the present time, a general system of checking from time to time by either the aids to navigation section or the ship channel section or the chart making section, or even the pilotage section, the location of those aids to navigation situated on piers in the water and particularly those of a certain vintage, in order to ensure that they have not shifted from their original position, although it was well known, and is well known, that such piers are repeatedly subjected each year to considerable ice pressure.

This pier had been in existence for 30 years and in that span of time, no one within any of the departmental branches involved had ever fixed its position or even thought of doing so until a serious collision occurred involving loss of life and considerable loss of property although the Aids to Navigation Branch in the district of Sorel had at its disposal a number of ships under its command and several others that it could requisition from time to time from the ship channel section of the Department. It also had a considerable staff of men, technicians and engineers that it could call upon. What is more extraordinary, however, is that even after the casualty of the *Transatlantic* and the sheering of two other vessels at approximately the same place, within the same period of time, no one, including Noël Paquette, the District Chief of Aids to Navigation, ever thought of checking the front range of Pointe du Lac other than merely looking at it from a distance when on board one of the ships and reporting that the pier had not moved or was not misaligned and could not have caused the accident.

It was only much later, on April 28, 1965, when the Association of Pilots took the initiative of engaging the services of Messrs. Poulin and Duplessis, land surveyors, that it was realized for the first time that the pier had moved.

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The conduct of the officers of the Crown even after the casualty does give us some indication as to whether any corrective actions would have been taken if the officers of the Crown had been informed of the displacement of the lights before the collision, as the Crown alleges the pilots had to and should have done, and does supply some information as to what system had been set up for the reporting of casualties and the dissemination of information to navigators, which systems the suppliants claim was defective and inadequate.

I will deal firstly with the history of these lights prior to the collision by reciting the various communications issued between the officers of the Department with regard to the lights and then consider whatever action was taken by the officers of the respondent subsequent thereto.

F. S. Jones, Chief Engineer of the Department of Transport, with regard to the Pointe du Lac range lights, informed the Deputy Minister of Transport, in a letter dated June 26, 1952, that "a permanent light structure is long overdue at this place and notwithstanding the difficulties to be expected regarding foundation for such light".

Whoever were in charge of the aids to navigation at that time were no doubt concerned with solving the problem of maintaining a steel structure on the pier during the spring ice break-up, but this correspondence does also indicate that if there was a serious problem involved at this point caused by ice pressure on the steel structure, some thought was also given to the effect of ice pressure on the pier proper.

On July 9, 1952, a letter (Exhibit P-29) was written by Hector Beauchemin, the then District Marine Agent, to Norman Wilson, the then Chief of Aids to Navigation, stating that "we concur completely with the recommendations of the Chief Engineer and as a matter of fact, a study of the situation was started last fall and we are of the opinion, with the facts now in our hands, that it will be necessary to build a new pier as the present one cannot be improved in such a way as to provide better service in the spring or at the opening of navigation and for the use of the ice-breakers when they start operation".

A further letter from Hector Beauchemin to Norman Wilson was forwarded on July 22, 1952 (Exhibit P-29)

which deals with the steel structure, and also with the pier proper which he reports to be at that time in a condition of disrepair and mentions "the enormous ice pressure in that vicinity":

> As you are aware, the present pier at Pointe-du-Lac front is a cause of considerable trouble, and at each opening of navigation, it is impossible to put in place the structure on the pier owing to the high level of water generally prevailing. *The present pier is also badly in need of major repairs.*

(Emphasis is mine.)

and lower down he adds:

> ... To remediate this situation, it is proposed to build a new pier in the back of the present one which will *have enough height to carry a permanent structure and enough strength to withstand the enormous pressure of ice in that vicinity.*

(Emphasis is mine.)

On August 15, 1952, a letter, (Exhibit P-29) was forwarded to the District Marine Agent in Sorel by A. K. Laing, the Acting Chief of Aids to Navigation, asking the District Marine Agent to make a survey and indicate in what condition the pier is in and approximately what the repairs would cost. He then for the first time, asks the very pertinent question as to whether there has been any movement or shifting of this pier since it was constructed in 1935, to which, however, there appears to have been no answer given at this time.

On September 10, 1952 (Exhibit P-29) a further letter is forwarded to Wilson by Beauchemin which deals with a survey made at the Pointe du Lac front light on September 9, 1952. Beauchemin reports as follows on the results of this survey:

> The present pier is a 60' x 60' x 7 feet high wooden crib made of 8" square timber, rock filled and topped by mass concrete. The wooden crib apparently from the pressure of the mass concrete and from the action of the ice has given way all around the pier and the boulders under the crib are sloping all around the pier. At the north and north west section there is a void under the mass concrete. The pier has tilted at the south corner at a difference of level of a foot and a half with that of the north corner and it is fair to assume that this tilting will increase in the future as the *supporting crib is in such bad condition.*

(Emphasis is mine.)

While the survey was made for the purpose of establishing whether the pier was capable of sustaining a concrete

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mass cap 11 feet high on which to raise the steel structure of the light, it also appears that the crib is, nevertheless, described as being in a very bad condition.

In a memorandum (Exhibit P-29) from Norman Wilson, the then Chief of Aids to Navigation, to the Director of Marine Services, dated October 24, 1952, the replacement of the Pointe du Lac front pier is again discussed and a description of the bottom on which the piles of the pier are embedded is given. The following is stated in paragraph two of this memorandum:

> The present pier is virtually a floating close-faced timber crib, stone filled, with fifty 50 foot 12" to 14" diameter piles which were included in the design, we presume, to withstand lateral ice and wave pressures and not with the idea of their being substantially bearing piles *since the nature of the bottom in which they were driven was soft blue clay.*
>
> That structure has stood since 1935 and though the Agent in his report on file, hereunder, indicates that the pier has tilted and there are voids in places under the concrete, *there is little to indicate that there has been any indication of lateral movement or of deformation in the crib proper...*

(Emphasis is mine.)

He then concludes as follows:

> It is quite possible that due to low lake levels in past years the upper courses of timber may have been subject to alternate drying and wetting and that deterioration, coupled with ice erosion, may have seriously effected the top courses and it is possible that inside timbers subject to wetting and drying may have deteriorated but to my way of thinking the pier is substantially sound and that if such is the case we should make use of it and that we should certainly not consider an entirely new structure until we are satisfied that the present crib is *not usable after repair.* I propose to have Mr. Poland and a diver proceed to Sorel to make a thorough inspection of the condition of the underwater part of the crib before going further with the Agent's proposal.

From a memorandum dated November 1, 1952, of H. V. Anderson to the then Chief of Aids to Navigation, it appears that Mr. Poland made his inspection and Anderson then reported that

> ... I am of the opinion that this pier is far from having served its usefulness.

and at paragraph two of this memorandum, he adds:

> Actually, I believe that the criticism offered by Mr. Jones of the St. Lawrence Ship Channel can be very effectively answered, and certainly at a very much reduced cost by our giving more detailed consideration to the method of exhibiting a light using the existing pier as a base.

Mr. Laing (Acting Chief of Aids to Navigation) then on November 14, 1952, (Exhibit P-29) in a memorandum addressed to the Chief of Aids to Navigation deals with the condition of the pier as reported in Anderson's prior memorandum of November 1, 1952, and emphasizes the necessity of an annual examination thereof. After considering the possibility of removing the back light tower 1½ miles inland and placing the front light on a low structure on the beach at high-water mark, he added at p. 2 of his memorandum that,

> ... (2) If the shore range proves impracticable it is recommended that more rip-rap be placed around the crib, completely around if no interference will be caused to mooring of floating equipment at the pier. *(3) that annual examination of the pier be made essential so that we may be warned of serious deterioration if any* ...

(Emphasis is mine.)

This examination, of course, could mean a mere superficial examination of the pier to see if it was still holding together, but to the engineers and technicians in the various sections of the Department of Transport concerned with such matters, and to competent and careful officers in their position, it should also mean, I believe, something more. The crib could be in one piece and, therefore, appear to be apparently in perfect condition and yet would not be fulfilling its initial purpose. It could, indeed, have been moved several feet in one block and thus create a danger to navigation, particularly at a time when the light erected on it was the sole reliable aid to navigation.

Now all the above correspondence of the Department was written in 1952 at a time prior to when winter navigation came into operation. The conditions of traffic due to winter navigation changed considerably in the following years. More ships navigated the St. Lawrence River during the winter and early spring months and because of this fixed aids to navigation became more and more important with, I believe, a corresponding greater duty on the part of those in charge of such lights to ensure that with this increased traffic on our waterways, such aids were proper and reliable guides.

There was, as already mentioned, a question asked by A. K. Laing in his memorandum of August 16, 1952, as to whether the pier had shifted since 1952, but as far as the

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evidence shows no answer was ever given to this question nor was there any triangulations made to find out, although such an operation for an engineer or a surveyor was a rather simple one. That no one except Mr. Laing was concerned as to whether there had been any shifting of the pier is more surprising in view of the fact that it was well known, as indicated above, that the piles of the pier were embedded in silt and clay with the uppermost deposit consisting of loose silty sand and no bed-rock was encountered to a depth of 85 feet. This is not too solid a base for a pier, even with 50 piles embedded in the bottom, when consideration is given to the well known fact expressed in several memoranda of the Department, that this only partially weighted crib pier was subjected to enormous ice pressure in each winter and spring.

It is not until the year 1963 that further consideration appears to have been given to this pier when an engineer by the name of Huffey was retained to examine it. He was accompanied by two engineers of the Aids to Navigation section and his examination was apparently for the purpose of seeing whether a permanent tower could be placed on the substructure of the Pointe du Lac front pier. Pier No. 2 of the Rivière du Loup light was also examined at that time.

A. W. Huffey and an assistant, the District Engineer of Sorel, J. R. Galarneau, and J. V. Danys, an engineer of the Department of Transport, were taken by tug to the pier which was inspected from the top and by Huffey and his assistant diving and reporting to Danys the condition of the pier under water. In view of the condition of this pier in 1952, it is not too surprising that Danys in his report of March 3, 1963, Exhibit P-33, (which should be May 3, 1963) paragraph 3, describes the condition of the pier as follows:

> 3. *Concrete Slab*
>
> The concrete slab above the water line was in good condition. However, the underwater inspection disclosed that the edges of the concrete under water cap are broken off and completely disintegrated. It appears that on an average in a five-foot strip all around the edge of the crib there is no solid concrete slab anymore. The concrete cap was reinforced and the reinforcing bars are sticking out of the sides.
>
> On the northeast side about 10 feet of concrete slab along the edge is destroyed and on the southwest side the width of the destroyed concrete slab is approximately 5 feet.

4. *Cribwork*

The north corner is surrounded by placed rip-rap.

Northeast side

There is a 4 foot wide hole approximately 20 feet from the north corner. In the middle third, three top logs are missing and stones have fallen out of the crib pockets for some fifteen feet near the east corner of the crib wall is deformed and the bottom has moved outwards.

Southeast side

Three quarters of the length of the crib wall is intact. But at approximately 10 feet from the south corner a break of the timber logs from top to bottom was evident It appears that the south corner was underscoured and this corner settled down causing a break of the crib logs. The bottom of the river at this location has been eroded and at the fracture the cavity is approximately one foot high. At the corner the crib is lying on the eroded river bottom.

Southwest side

This is the most damaged side. For half of the side length (from the south corner towards the west corner) the timbers have fallen out of the crib and they lie on the lake bottom and are covered with a chunk of broken concrete The other half of the crib, the divers could not see because everything was covered with pieces of the broken concrete.

According to the inspection of the west corner, it seems that the southwest side of the crib has been undermined and pulled away as well. The connection of the logs on the northwest side near the corner are pulled out.

I shall only refer here to that part of Mr. Danys' conclusions which are pertinent to the condition of the pier in 1963 and which are found at p. 3 of the report:

> Because of the large dimensions of the original crib, 60 x 60 feet, it appears that there is no immediate danger to the structure. However, it is felt that *a protection of the crib against further damage should be undertaken as soon as practical, if it is wanted to preserve this pier. Also, borings shall be taken to find out if a permanent tower could be built on top of the present pier.*

(Emphasis is mine.)

Here again there is a strong indication that something must be done to this already damaged pier in order to preserve it and there is no indication that anything was done in this regard.

Huffey's report of May 22, 1963, deals with both the front pier of Rivière du Loup and the front pier of Pointe du Lac. He reported that as far as the Rivière du Loup pier was concerned (p. 3, paragraph 3 of Exhibit P-14):

> 3 2 The total lateral movement was not of course directly measurable, but adding the estimated pile displacement to the visible displacement above the pile tops, a total of 15 feet horizontally is estimated by the writer.

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He then concluded at pp. 3 and 4, paragraph 4, 4.1 that:

> 4 1 Much of the incumbent weight of the timber cribs and concrete cap may well be resting on the remaining unbroken piles, and also on the consolidated rip-rap along the side D E. of the crib.
>
> 4.2 The possibility of further movement of the crib is likely as a state of imbalance will be reached after further lateral displacement.

Nothing was done as a result of that report either to repair the pier or even to advise navigators of the displacement that was then well known. Huffey, then, at p. 5 of his report, dealt with the Pointe du Lac crib and explained that "this crib was examined in less detail owing to the lateness of the day", adding that the damage here was considerably less than that at the Rivière du Loup crib. He explained that "the pile foundation could not be examined except in one or two instances where the tops of the piles were visible under water along side A.B. (see drawing No. 2)", and that the pile tops examined were vertical, suggesting that little or no lateral movement had taken place in the foundations. He then, after describing the timber cribs and the concrete cap, concluded as follows:

> 6 1 Actual damage sustained by this crib is relatively superficial consisting largely of the emptying and deterioration of gravity crib pockets on side A B., and also breaking of the tapered extremities of the concrete cap.
>
> 6.2. The slight lateral displacement can be neglected as the crib has lost little in strength and it *can be repaired at* relatively little cost.

(Emphasis is mine.)

Here again, it must be inferred that repairs were necessary yet no action was taken in this regard.

Huffey, in cross-examination, admitted that he had been asked to do an inspection and not an engineering survey. He was, indeed, merely asked to look at the pier and see if from such an underwater inspection he could report on its physical condition. He had not been supplied with any plans, nor did he have any co-ordinates of the initial location of this pier which could have told him by means of triangulation whether it had moved or not since it had been sunk in 1935.

He merely looked, as he says in his report, at the top of a couple of piles and as they appeared to be vertical, concluded that little or no lateral movement had taken place in the foundations, although we now know after this

lengthy trial, that in 1959 this pier had moved laterally between 4 to 13 feet southwards and as a deflection of ½ foot is sufficient to break the piles they must have been broken at that time.

The few pile tops examined by Huffey were, of course, vertical, but as they were bolted to the crib proper this would not be too surprising even if they had been broken at some depth in the soil and this, of course, would not necessarily indicate that there was no lateral displacement. Short of a triangulation to determine whether there had been a displacement of the base or not, Huffey had no way of knowing from his examination whether there had been a movement in any way of the pier base. As a matter of fact, all he or his diver actually did was to creep around underneath it in murky water and by prodding around with their feet, report that there was a certain amount of damage and this examination, he says himself in his report, was carried out "in haste because of the lateness of the day".

Huffey in his evidence tended to minimize the condition of the pier as he says he found it in 1963. I would, however, be inclined to prefer Danys' description of the pier in his report (P-33) as he jotted it down from descriptions given to him by both Huffey and his assistant which should be more accurate than what Huffey described from memory five years later.

Danys' description of the condition of the pier should be much closer to the truth than Huffey's and Danys' admonition in this regard should be repeated here:

> ...it is felt that a protection of the crib against further damage should be undertaken as soon as practical if it is wanted to preserve this pier.

The situation of the Pointe du Lac front pier as described by Beauchemin in 1952 is much worse in 1963 but here again, nothing is done to repair it or, which is more important, to find out by triangulation whether it had moved or not. As a matter of fact, relying on Huffey's hasty examination, which was known to be such by two engineers of the Department, J. Danys and R. Galarneau, and which was also known by them not to be an engineering or a localisation survey, no precautions were taken whatsoever to make sure that the light which would be left

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on that pier as the only fixed aid to navigation during the winter months or even the summer months was fulfilling and would continue to fulfil its purpose. As a matter of fact, when the officers of the Department decided that in the fall of 1964, the light would remain on the pier for the first time in order to assist those vessels plying these waters in the winter and spring of 1965, these officers or men did not know exactly what that light indicated. In view of the history of this pier since 1935, the examinations made of it in 1952 and in 1963, and its condition at that time, there was an urgent need to investigate whether it had moved or not. Had this been done, there is no doubt in my mind that it would have been repaired or replaced and this casualty would not have occurred. The same applies to the situation found at the Rivière du Loup pier which, as already mentioned, by leading the *Hermes* more south than it ought to, may well have contributed to the accident.

Exhibit P-40, a report made by officers of the Department on November 27, 1962, established the disintegrated condition of the front pier of Rivière du Loup which, as already mentioned was also confirmed by Huffey's report of May 1963. A recommendation was made for the construction of a new pier surrounded by a wall of sheet piling. This is the same pier which Jean-Noël Poulin found displaced southwards by some 12½ feet in April 1965. However, after both reports of 1952 and 1963, there is not the slightest reference to any shifting of the pier itself and as to whether or not it was serving a really useful purpose. Furthermore, the indicators on the front pier of Rivière du Loup which, during winter navigation were a makeshift and far from precise affair, were set up in this fashion without any notice being issued to navigators who should have been informed of this situation by those in charge of such aids to navigation.

On April 16, 1964, the vessel *Trein Maersk* reported that it had touched bottom with her starboard bilge while turning a curve and getting into a new course at Yamachiche bend. On April 21, 1964, a letter was written to Mr. H. Land, Chief Engineer, River St. Lawrence Ship Channel, Montreal. In this instance, the Department did not locate a mud bank in Yamachiche bend and the file was closed. Here again, it did not occur to those in charge of aids to

navigation that it might have been a good thing to check the alignment of the lights. As a matter of fact, had the lights been checked at that time in 1964, a displacement of the front Pointe du Lac pier of between 24 to 28 feet southwards would have been found, the necessary steps would have been taken to either correct the situation or warn navigators and the collision between the *Hermes* and the *Transatlantic* would not have occurred. Pilot Beaudet's report (Exhibit P-16) indicates that the *Trein Maersk* was travelling at the time at 22 knots and incidentally, no comment was made by anyone within the Department of Transport with regard to the speed of the vessel. It is true that the pilot reported that he realized that the buoy used as a smallrange light on the front pier was off position at the time on account of high water but there is nothing to show that there was an inspection or survey made to find out whether, in fact, it was off position or not or whether the Pointe du Lac range was in anyway misleading ships rather than leading them safely.

Mr. N. A. Gray, from the Dominion Hydrographer's office, in a letter addressed to the Chief of Aids to Navigation (Exhibit P-19), Mr. Ballinger, on August 10, 1967, says that the only evidence that the range lights were in a correct position when their survey was made (and this was August 1941) was that the line of soundings ran very close to the centre of the channel as shown by the buoys as it appears from paragraph 2 of this letter:

> You will note that one line of soundings was run directly on the range line, a fact that is confirmed by the sounding note-book. As the line of soundings runs very close to the center of the channel as shown by the buoys, this shows that the range was in its correct position on August 15, 1941, when these soundings were taken.

I have already commented on this survey when I dealt with the displacement of the pier and I have no intention of repeating here all I said then other than to reiterate that to check the correct position of a pier in this manner is not a very accurate means of doing so and can, at best, be but an approximation which can in no way establish that the pier has not moved.

Minor displacements of piers and leading lights do not always have to be corrected nor does action in such cases always have to be taken to warn mariners of such displacements. When a minor displacement, however, is followed

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by other displacements such displacements in a narrow fairway may become important and this is what occurred in the present instance.

I now come to a period of time immediately after the collision of the *Hermes* and the *Transatlantic*. I would not have dealt in such detail as I have hereafter with whatever action was taken by the employees or officers of the respondent at this time were it not for the fact that the Crown, as already mentioned, contends that it was up to the pilots or navigators to inform their various departments of the misalignment of the ranges and as they had not done so, the Crown could not be held liable for any misalignment that may have caused the collision. I have already mentioned that it is difficult to see how the pilots or navigators could have informed the Department of this misalignment when, although it was realized in 1964 that the ranges were leading ships closer to the south buoys in the summer time than they should, it still allowed them to navigate safely down or up the channel and when even the ships of the Aids to Navigation section or the ice breakers or those belonging to the ship channel, had not felt that wherever the lights were leading, they were not leading sufficiently astray to warrant a complaint or even a mention.

There is also the possibility that the buoys may have been wrongly placed or have shifted towards the north. But even assuming that the pilots should have informed the Department of whatever misalignment existed, the effect of such a notice would have given little results if one should judge from the procedure followed, not only after the present casualty occurred, but even after two other sheerings had taken place at approximately the same place in the channel, within a very short period of time. Notwithstanding the disaster of the *Transatlantic* and the sheering of both the *Manchester Commerce* and the *Carinthia,* the pilots of which had reported to the Department the details of the manner in which the leading lights of Pointe du Lac had taken them off course, Noël Paquette, the District Marine Agent in Sorel, merely looked at the light from some distance off a ship with binoculars and reported to Ottawa that these accidents could not have occurred because of a misalignment of the

Pointe du Lac low light. The officers located in Ottawa then reported this to the pilots involved and it was only after the Association of Pilots of the District of Quebec had retained Mr. Poulin that he, in two days, by triangulation, reported that the low light of Rivière du Loup had moved southwards by some 12.1 feet and that the low light of Pointe du Lac had moved southwards by some 37.9 feet and both of these displacements tally pretty well with the actual displacement of these piers.

It is helpful in order to appreciate the manner in which the officers of the Department dealt with navigational incidents or casualties to go through the various reports and correspondence exchanged as a result of the complaints of the pilots whose ships had sheered when taking these lights.

On April 14, 1965, Jacques Melanson, District Supervisor of pilots, Montreal, wrote (Exhibit P-17) to the Superintendent of Pilotage in Ottawa, Mr. Jones, informing the latter that he was "in receipt of a letter from pilot Adélard Tremblay, requesting that soundings be taken in the channel on Lake St. Peter at Yamachiche bend lower end of Yamachiche anchorage, as well as a complete check up of Pointe du Lac range lights which, according to him, are not giving the true centre line of the channel". Tremblay is the pilot of the vessel *Carinthia* which, near buoy 51L, after having met the *London Splendour,* took a sheer towards the north bank on April 9, 1965, the day preceding the sheering of the *Hermes.*

Melanson explained in this letter that when Tremblay was in his office, he mentioned that the sheering of the *Hermes* was similar to what had happened to the *Carinthia.* He also states that having contacted several pilots "it was agreed by everyone that the way the Pointe du Lac range lights work when taken in line at the curve near the lower end of Yamachiche anchorage, a vessel is almost on the corner of the south bank" which, of course, could only mean that there was something wrong with the alignment of the lights.

Melanson's letter, which contained some rather urgent information and which Jones, the Superintendent of Pilotage in Ottawa, said should have been received two days later on April 16, or even should have been reported by

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telephone in view of the importance of its content for the safety of navigation in that area, reached Jones only on April 20, 1965, six days later.

On April 21, 1965, A. K. Laing, Chief of Aids to Navigation, in a memorandum to the Director of Marine Works, (Exhibit P-62) refers to Melanson's letter of April 14, 1965, and states that: "The District Marine Agent, Sorel, has already checked the Pointe du Lac Range lights. While the tower has been slightly damaged by ice and it may be a few inches off its correct position, there is no reason to believe it could lead a ship onto the south bank. To do this it would mean that the tower is 33 feet off its correct position on the pier. The pier itself is founded on piles driven 40 feet into the lake bed and it is unlikely it could move laterally because of ice shove".

The evidence has now established that there was no check of the range lights made between April 10 (except for Noël Paquette looking at them from some distance on board a vessel) and the date of Laing's memorandum of April 21, 1965.

Furthermore, Laing here, as other officers of the Department, appears to assume that a lateral displacement of this pier is impossible, although they should have known (had they merely examined the correspondence on file) that the piles of this pier are embedded in soft silt and that the pier is subjected to enormous ice pressures every winter and spring and we now know that there was a displacement of between 4 to 12 feet between 1935 and 1941 and a further displacement of between 22 and 25 feet in 1964.

On April 23, 1965, a memorandum (Exhibit P-61) is sent by D. R. Jones, Superintendent of Pilotage, Ottawa, to the District Supervisor of Pilots, Montreal, informing him that sweeping in the area of Yamachiche bend has already commenced and that:

> The second request (of the pilots) for a check of the Pointe du Lac Range Lights has already been carried out and there is no reason to believe that there is anything about these Ranges which could lead a ship onto the south bank.

All that Jones appears to have done after receiving Laing's memorandum of April 21, 1965, is to repeat some of the information contained in it and send it to Melanson in Montreal, adding that a second request for a check of the Pointe du Lac range lights had already, at that

date, been carried out when apparently there had been no second check made. As a matter of fact, had Jones been properly informed, he should have known that the day before the date of his memorandum, on April 22, 1965, the vessel *Montmagny* had found that the light had, in fact been displaced by five feet and possibly more than five feet. Noël Paquette gives this information at pp. 2002 et seq:

LA COUR:

Q. Le 23 avril?
R. Oui, maintenant, entre temps, le 22, j'avais fait faire la vérification de l'alignement par le Montmagnie, nous savions que la tour était déplacée de 5 pieds sur le pilier, par le rapport du Montmagnie, il était évident que le déplacement était plus considérable que 5 pieds.
Q. Est-ce que vous parlez à la suite de votre visite du 20?
R. Oui, on savait que le déplacement était de 5 pieds.
Q. Le 22, vous avez su que ça dépassait?
R. Le 22, nous savions que c'était déplacé de 5 pieds, de beaucoup plus que 5 pieds.
Q. Le 22, c'est à cette date que vous avez su ça?
R. Oui.
Q. Par le Montmagnie?
R. Oui.
Q. Qu'est-ce qu'ils ont fait?
R. Ils se sont rendus au bout de la course, ils n'ont pas été capable de prendre des mesures très précises, c'était presque impossible de prendre des mesures précises avec les éléments que nous avions, ils ont bien vu que c'était déplacé, qu'elle se jetait vers le sud, il n'y avait pas seulement un déplacement de 5 pieds.

On the same date, April 23, 1965, W. J. Manning, Director of Marine Works in a memorandum to Chief of Aids to Navigation (Exhibit P-17) states in paragraph 2 thereof:

> ...Because of the wreck of the "Transatlantic", it seems to me that it would be very important that this range be relocated immediately.

There does not seem to be much doubt in his mind at this date that there was some connection between the Pointe du Lac front range and the collision between the *Hermes* and the *Transatlantic*.

Notwithstanding, however, the above known displacement, of the tower which was well known on April 22, 1965, Jacques Melanson, the Montreal District Superintendent of pilots wrote to Lucien Hémond, the secretary-treasurer of the Corporation of Pilots, in Montreal

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(Exhibit P-18a) on April 27, 1965, repeating the information given him by Jones in his memorandum (Exhibit P-61) of April 23, 1965 that:

> La deuxième demande que vous avez faite, de vérifier les lumières d'enlignement de Pointe-du-Lac a aussi été faite et le Ministère m'informe qu'il n'y a aucune raison de croire que ces lumières peuvent être déplacées à un point et qu'un navire touche la bande sud.

It therefore appears from this correspondence that three people, all in a position of responsibility and relying probably on Paquette's statement that having examined the lights with binoculars from some distance, they did not appear to be displaced, wrote back to the pilots and its corporation stating that the ranges had been checked twice, that everything was in order and that, therefore, it could be inferred that pilots and navigators could keep on using these lights, although, as appears from the evidence of Paquette himself, it was known as early as April 22, 1965, that the tower was displaced by at least 5 feet and even more. D. J. Manning, Director, Marine Works, in a memorandum to the Chief of Aids to Navigation, of April 23, 1965, states in the first paragraph thereof:

> Yesterday, D. M A Sorel telephoned to advise that the Pointe du Lac front light seemed to have been moved five feet east by the ice this spring.

Now although from an inscription in ink on this memorandum, it would appear that this displacement of five feet was corrected on April 24, 1965, all those letters to the pilots and the corporation were still allowed to go out stating that the lights had not been misaligned and were not misaligned, and this appears to be typical of the system whereby casualties are reported, forwarded and acted upon within the various departments concerned.

There is also pilot Barrett's report of the sheering of his vessel which took place on April 3, 1965, which appears to have been received and signed at the Montreal office of pilotage on April 12, 1965 (although pilot Barrett was on a ship on that date) and which was received in Ottawa several days later. There is finally the memorandum of April 1965 received from the *Empress of Canada* (Exhibit P-18) which Mr. Jones, the Superintendent of Pilotage, says he never saw and which shows that the lower range light of Pointe du Lac had shifted seriously enough to be reported by a foreign vessel.

On June 29, 1965, after the casualty and the other two sheerings, Paquette, the District Marine Agent, finally issued a notice saying that the Rivière du Loup range does not define the centre line of the channel and that navigators are now to proceed with caution. Paquette had known of the inaccuracy of this range for years but states that as all the pilots knew about this situation, he saw no necessity of informing them, admitting in cross-examination, however, that it would have been better to inform them and particularly those foreign navigators who did not know of it.

Q. Vous n'avez pas cru bon de donner cet avertissement aux navigateurs?

R. Non, parce que ça fait de mémoire d'hommes que la chose se faisait, il nous fallait prendre pour acquit que les navigateurs sur le St-Laurent sont des professionnels qui connaissent bien le St-Laurent. Alors, les navigateurs qui savent qu'on remplace deux amers par un seul, le même amer ne peut pas être à la même place. s'il y en a un autre qui en remplace deux, ce n'est pas la même chose Ce n'est pas aussi précis.

Q Vous êtes au courant qu'il y a des navires qui remontent le St-Laurent pour la première fois de leur vie?

R. Pas en hiver, pas sans pilote.

LA COUR:

Ils ne sont pas obligés de prendre un pilote?

R. Non, seulement, je crois, que des navires qui remontent le St-Laurent en hiver, avec la glace, et la réduction des aides à la navigation, ils ne prennent pas de chance.

Q. C'est possible?

R. C'est peut-être possible.

Q. Il aurait été mieux de l'indiquer?

R Peut-être, oui. Cela aurait été un surplus de prudence.

Paquette also admits that he had never checked whether the Pointe du Lac front pier or the Rivière du Loup pier had been displaced although this (he also admits could have been easily done by triangulation (cf. p. 2017 of the transcript)):

Q. Est-ce que vous avez pris des mesures pour déterminer s'il n'y avait pas également un déplacement latéral en plus de cet affaissement?

R. Non, je n'ai pas pris de mesures.

LA COUR: Cela aurait pu se faire par triangulation?

R. Oui, cela aurait pu se faire par triangulation, la raison pour laquelle cela n'a pas été fait, lorsque des navires remontent avec les pilotes, je sais, de par de nombreux rapports, je sais que cela ne nuisait pas à la navigation. Les structures d'été qui étaient mises

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en place, lorsque toutes les bouées étaient en place, il n'y avait pas urgence de voir à ce travail, alors qu'il y avait urgence d'en faire ailleurs. C'est une question de priorité.

Paquette knew, or should have known, when a decision was reached in the fall of 1964 to leave the light on the Pointe du Lac pier for the 1965 winter season, of the importance of insuring that that light, as well as the Rivière du Loup one, were properly located as the pilots had complained in the past on numerous occasions of the unsatisfactory condition of both of these ranges because of the unsatisfactory makeshift arrangements adopted by the Aids to Navigation Branch with regard to these lights during the winter seasons which preceded the year 1964 as appears from Paquette's evidence at p. 2018 of the transcript:

Q. Vous rencontriez les pilotes assez souvent?

R. Assez souvent depuis que je suis en fonction, je les ai rencontrés à plusieurs reprises, pour toutes sortes de raisons, presque à chaque fois, il y avait des échanges d'informations ou de demandes, même si cela n'est pas enregistré sur l'agenda.

Me BRISSET:

Q. Quand vous discutiez avec les pilotes en ce qui concerne des amers de Rivière du Loup, est-ce que c'était pour vous dire leur satisfaction à ce sujet?

R. Non, ils n'étaient pas satisfaits pour une raison, c'est que au printemps, il n'y avait rien pour leur indiquer le chenal ni à Rivière du Loup, ni à Pointe du Lac, parce que les amers que nous placions là, les bouées aussi que nous placions là, c'était important, ils connaissaient bien l'endroit mais c'était une situation qui était difficile pour eux.

LA COUR:

Q. Était-ce les deux seuls endroits dont ils se plaignaient?

R. Oui, ce sont les deux endroits dont ils se plaignaient le plus. Ils voulaient aussi avoir des bouées sur le côté sud du chenal, seulement, après avoir donné nos explications à ce sujet, ils ont convenu que ce n'était pas possible.

As a matter of fact, it was only after the Corporation of Pilots took the matter of verifying the ranges in hand by requesting Mr. Poulin to check the Pointe du Lac range by triangulation that a lateral displacement southwards of some 39.7 feet was discovered.

The above correspondence, together with whatever evidence was given by the officers at Sorel, at Montreal or Ottawa, responsible for the leading lights in the channel, leaves one with a feeling that not only was there neglect in ensuring that the lights were fulfilling the purpose for which they were set up and in maintaining them, but that

there definitely was also a lack of due diligence in finding out whether they had been displaced or not from 1935 up to the year 1965 and particularly at the time when the Department decided for the first time in the fall of 1964, to leave the steel structure on the Pointe du Lac pier for the forthcoming winter navigation. The officers who took this decision, and they are not restricted to Paquette, should have ensured that a pier with such a long history and in the dilapidated condition in which it was known to be at the time and on which a light was to remain as the sole and fixed aid to navigation in a channel during the winter season was not only a solid base for the light but also had not been displaced prior thereto. That this duty was not complied with over a long period of time was made clear from the correspondence exchanged between the various officers involved, as well as from the evidence adduced herein.

There is no question, as stated by Crocket J. in *The King v. Hochelaga* (*supra*) at p. 162:

> ...in some cases non-repair or non-feasance may constitute a hazard or, in other words, create what is called a trap and bring about a condition which renders an accident almost unavoidable.

and unfortunately, because of the inactivity of those responsible for these lights, this is exactly what has happened in the present case.

It could also be said in line with the dictum of Taschereau J. (in *Grossman and Sun v. The King* (*supra*) at p. 602) that it was also the obligation of the Department or its officers to warn of any misalignment of the lights and not the duty of the pilot or master of a ship to inquire if any employee has been negligent and if there is any danger of utilizing waterways which navigators are invited to use. As stated by Taschereau J. in the above case:

> ...It is by virtue of the regulations, the obligation of the airport itself to warn by *clearly marked signs* of any obstructions on the field and not the duty of the pilot to enquire if any employee has been negligent and if his life is in peril, by accepting the *implied invitation to land*... captains who bring their ships into port are entitled to expect that the road will be in a safe condition, that there will not be any submerged object to obstruct navigation.

I could add that captains are also entitled to expect that lights that are placed in channels for the purpose of guiding them through the channel will do so safely and that none will lead them so close to the bank that they will

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sheer unless, of course, the captain knows of the danger on account of its obviousness or otherwise. I have already held that there was no valid reason for the pilots and navigators to apprehend that Pointe du Lac ranges in 1965 would lead ships any more south than they did in 1964. I do not intend to repeat here what I have already stated on this subject when dealing with the navigational manœuvres of the ships involved in this casualty other than to say that because of the reasons already given, I can find no substance in counsel for the respondent's submission with respect to the question of the duty to warn. If my understanding of his argument is correct, it is (a) that as the Pointe du Lac leading lights or ranges, when in line, are intended to show the centre line of the channel and indicate a chartered course, when, to the knowledge of pilots, they no longer indicate such course but a different one on the south half of the channel, then they no longer show any known course and become merely a set of private marks such as steeples or towers on shore; (b) the breach of duty alleged against the Crown and its servants is a breach of the duty to warn: that these lights "were no longer serving the purposes advertised and published for the information of mariners", of their "misalignment and unreliability" and finally "of defects developing in them" and (c) that as the pilot of the *Hermes* knew that these ranges were no longer serving the purposes advertised and published for the information of mariners in that they no longer led vessels in the centre as advertised but south thereof and as the Crown had never represented or advertised that the ranges in line led on to a course on the south half of the channel, there was no necessity for the Crown to warn them of something which it had never represented and which, furthermore, had not been reported as the pilots should have to the supervisor of pilots in Montreal.

According to the Crown, the navigators had ceased to rely on the channel authority maintaining the ranges in their chartered position and the only person that the pilot was relying on was himself. He was relying on his personal judgment that:

a) in 1964, when the ranges appeared to him to be in line, they indicated a course which brought his ship according to his own estimate within approximately 50′ to 100′ of buoy 51L;

b) the ranges had not been further displaced since he last used them in line.

There are several answers to the Crown's submission here and I have already dealt with some of them. I will, therefore, merely say here that although the breach of duty to warn is alleged by the suppliants and the third party to be "that these lights were no longer serving the purposes advertised and published for the information of mariners", such a purpose is not confined to leading a ship on a particular course which might, in some cases, bring it down the middle of the channel but the main purpose is to ensure that in a channel where there is upbound and downbound traffic, a ship, by following these ranges, will effect a safe passage and this is what the navigators were relying on. As a matter of fact, until the misalignment and the unreliability of the lights resulting therefrom, or until the defects developing in them become perceptible, there is no duty for pilots to report this, although there is a duty on the part of those who set up such lights to make it their business to know if a pier on which a range light (which is the only reliable fixed aid during winter navigation) is placed is located at its proper place or has been displaced or has tilted to such an extent as to create a danger to navigation and to warn pilots and navigators if any such situation has arisen, and this is the warning that the pilots and navigators were entitled to receive in the present case and did not receive. There was, indeed, no necessity to warn that the lights were leading ships to the south half of the channel; this was well known and still led ships safely up or down it, but there was in the present case, in view of the age and known dilapidated condition of this pier, an urgent necessity to check and find out of any further displacement which could become, and did become, dangerous and this, unfortunately, was not done.

The negligence of the channel authorities and of those in charge of aids to navigation was, therefore, not confined to a failure to warn navigators of facts within their knowledge only, but they also failed, as established by the evidence, to use due diligence to ascertain the facts with which they should have been acquainted. To paraphrase the decision of Frankfurter J. in *Indian Towing Company Inc. et al. v. United States (Coast Guard)* (*supra*) at p. 34, it can also be said here that once the Department operated

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the lights of the ranges and engendered reliance on the guidance afforded by them, it was obligated to use due care and diligence to make certain that they were kept in good working order and if they became displaced, or tilted, then the authorities were further obligated to use due care to discover this fact and to replace them or correct them or give warning that they were not properly functioning. The negligence of the employees of the Crown here was their failure to warn of an existing danger that, in the performance of their duties they knew or ought to have known. That the officers of the Department had such duties appears clearly from the following:

The duties of the District Marine Agent at Sorel are clearly defined in Exhibit P-69 as follows:

> (Position No. T-MAG-401)—Under direction, to be responsible for the direction and administration of all departmental activities pertaining to the construction, operation and maintenance of aids to navigation within the Sorel District; to direct the operations of Canadian Marine Service steamers engaged on this work in supplying and placing aids to navigation; to administer and maintain wharves; to direct and supervise Harbour Masters; to administer the Navigable Waters Protection Act and to act as ex-officio Receiver of Wrecks; to direct the staff including technical personnel engaged on this work; and to perform other related work as required.

Paquette, the marine agent at Sorel described the responsibilities of his agency at p. 1855:

> Q. Alors, l'agent régional est responsable pour la construction et l'entretien et l'opération des aides à la navigation dans le district de Sorel?
> R. Oui, c'est bien ça.

and also at p. 1888 of the corrected copy of the transcript:

> Q. Je comprends que votre agence s'occupe de la pose et de l'entretien des bouées; est-ce que votre agence s'occupe d'autre chose pour les aides à la navigation?
> R. Bien on a l'administration, la responsabilité des phares et de l'administration des quais dans tout le territoire et aussi la responsabilité du port de Sorel et ensuite la responsabilité de l'observation de la loi des eaux navigables dans tout le territoire sous notre juridiction.

J. N. Ballinger, Chief of Aids to Navigation, Ottawa, also confirmed that the responsibility for the aids to navigation in the Sorel area is that of the District Marine Agent (cf. p. 1826 of the transcript):

> A. I would not normally be involved in getting the information, because the responsibility for the Aids to Navigation in this area is that of the District Marine Agent.

HIS LORDSHIP: Who does he come under?

THE WITNESS: For Aids to Navigation he comes under myself, but normally this sort of information would not come to my desk unless there was a problem with it. In other words, the responsibility has been delegated to him to do this job, and until someone proves otherwise we have to assume that he is doing a good job of it. But I, personally, do not get involved in day-to-day checking and location of Aids to Navigation throughout the country. This is the responsibility of the district man, not mine.

Mr. BRISSET: Q. Who comes under your jurisdiction?

A. Yes, this is true, but this is a responsibility that has been delegated to him. I am responsible in the long run, there is no question; but I personally do not get involved in this business of locating.

HIS LORDSHIP: What information would you supply your Marine Agent in that locality in order to enable him to find out whether the light or the base of the light has moved from its original position? Has he any information, or must he just look at it and find out from looking at it?

THE WITNESS: I do not quite know how to answer your question, My Lord. There has been, for many years, very close liaison between the Ship Channel Division and the Marine Agency in Sorel. The Ship Channel Division have the coordinates of all the Aids to Navigation in the lake, to the best of my knowledge—or, at least, I would assume that they have; and, therefore, between the District Marine Agent and the Ship Channel Division, they would, between them, be in a position to pass information back and forth in order to determine the proper location of the aids.

The duties of the Chief of Aids to Navigation in Ottawa are clearly set out in Exhibit P-12 as follows:

> Responsible to the Director, Marine Works for design, construction, maintenance and operation of aids to marine navigation including lightstations and associated buildings and structures, floating aids and unwatched shore-based lights; development of standards for operation of marine aids to navigation; development and/or evaluation of new equipment and techniques; compilation and dissemination of information on the service ability availability, characteristics and location of aids to marine navigation; co-ordination of preparation of the annual budget for construction, operation and maintenance, compilation and publication of statistics and reports.

Now although the Chief of Aids to Navigation has a great number of people to rely on and in some cases may rely on mariners to assist in reporting defective aids to navigation, in a situation such as the present one where aids became progressively defective over a great number of years and can become perceptible only by verifying the position of the piers on which leading lights are placed, the responsibility becomes that of the Aids to Navigation

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Branch and its staff to do this work as Ballinger, the Chief of Aids to Navigation Branch, admitted at pp. 1835 and 1836 of the transcript:

THE REPORTER: (Reading): Q. Mr. Ballinger, would you consider that in the discharge of his functions the Chief of Aids to Navigation has a duty to shipping to warn mariners and navigators when an aid to navigation no longer serves its intended purpose—for instance, if it is out of place and no longer indicates, as in the case at hand, the centre of the channel?

Mr. OLLIVIER: My Lord, there is another possible objection to this. The question assumes that the Chief of Aids is aware of a displacement.

HIS LORDSHIP: Yes, I know, but let the witness say that. He is capable of saying that.

THE WITNESS: I think that this may be so, but I think that in considering what the Chief of Aids' position is, that it must be realized that as part of this overall system of keeping a check on aids to navigation that you have a great many people to rely on not only employees of the Department or of the Federal Government but users of the system as well, because, after all, it is an impossibility to employ sufficient staff to have a 24-hour watch on all aids to navigation. And I think that this must be kept in mind. I think that it is fairly clearly brought out in the various publications, notices to mariners, lists of lights, and the pilotage by-laws, that there is a responsibility on the part of the mariner to assist in this process, and I think, keeping all of this in mind, that the Chief of Aids has the responsibility of advising the mariners, providing that information is fed to him to so provide them. But, accepting also that they have the responsibility in this as well.

Mr. BRISSET: Q. I quite appreciate, Mr. Ballinger, that time is a factor in this. In other words, if an aid to navigation becomes displaced somewhere on the river and that situation has just happened, you would not be able, even with increased staff, to become aware immediately and take the necessary measure. But, if a situation develops over a period of years, would you not expect that through your own check of what is happening to aids to navigation that you would be able to do that work on your own with the staff that you have?

A. It would seem reasonable to me to accept that, and I would think that, if something has been developing over a period of years, that it would be so determined.

The sole question now remaining with regard to the matter of liability is whether the Crown is liable under section 3(1)(*a*) or 3(1)(*b*) of the *Crown Liability Act* or under both of these articles. The evidence discloses that those in charge of aids to navigation, in Sorel, as well as in Ottawa, were remiss in their duties in not taking the measures that could and should have been taken to investigate and determine properly the location of the pier on which the range light was located and warn navigators accord-

ingly. On this basis, it would even seem possible to hold the Crown liable vicariously under section 3(1)(*a*). I could, indeed, again paraphrase the dictum of Taschereau J. in *Grossman and Sun v. The King* (*supra*) at p. 604 and say in the same manner in which he expressed himself that I also would be loath to hold that an employee of the Crown, whose concern it is to maintain leading lights in a channel in proper and safe condition, and to indicate those lights which are not operating properly, could not, if he failed to do so, be neglectful of his duty to pilots and navigators who are invited or authorized to navigate in Canadian waterways. It is from him that diligence and alertness is rightly expected. His lack of vigilance is a personal negligence for which the superior is answerable before the Courts.

It appears, however, that the District Marine Agent's responsibility for ranges is a delegated one; it is indeed delegated to him by the Chief of Aids to Navigation, in Ottawa, who in turn gets his authority from the Minister of Transport. If such is the case, any action taken or not taken by the District Marine Agency is merely the action or omission of the principal himself and if this was the situation, we would have here a case of direct liability and there would then be no necessity that the act or omission give rise to a cause of action in tort against the District Marine Agent as required by section 4(2) of the *Crown Liability Act*.

Although the evidence discloses that no efficient and rapid system for the reporting of casualties and the dissemination of information to mariners had been set up by those officers in charge of Aids to Navigation or the Superintendent of Pilotage in Ottawa, so that navigators and pilots could receive timely warnings of dangers to navigation of which these officers had knowledge or should have had knowledge, there appears to me, in view of the delay of the pilots of the ships that sheered prior to the sheering of the *Hermes* in reporting these incidents, to have been no causal link between the system in operation at the time and the accident. The direct liability of the respondent was involved, however, in that no system had been set up to check from time to time the location of piers situated in the water and particularly those of a certain vintage. Had

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such a system been in existence, the displacement of the Pointe du Lac pier could have been detected and the pilots could have been informed or corrective measures could have been taken to relocate the light and this casualty would have been avoided.

It cannot indeed be said that the situation here is such as to support a finding that there was no duty owed to the suppliants, as was found in *Cleveland-Cliffs Steamship Co. et al v. The Queen*[13] where Kerwin C.J. said at p. 813:

> ... There was no duty owing to the appellants on the part of the Dominion Hydrographer to take soundings in the East Entrance Channel and in the circumstances of this case, I am unable to envisage any possible duty to the appellants resting upon any other servant of the Crown, the breach of which could form the basis of a cause of action against him. The case of *Grossman et al v. The King* ([1952] 1 S.C.R. 571), is distinguishable as there Nicholas, the airport maintenance foreman, was held to owe a duty to Grossman.

Nor would the words of Rand J. at p. 814 in the same case apply to the present instance in view of the justifiable reliance by navigators on the performance by the employees of the Crown of a duty to insure that leading lights have not been displaced and their failure to discover the change of position of the pier on which the leading light was placed and also because both judges deal only with vicarious liability of the Crown and do not deal with its direct liability.

I must place those in charge of such lights in a position similar to the one Brunet, an officer of the Crown was placed in, *The King v. Canada Steamships Lines Ltd.*[14] where Anglin C.J.C. said:

> The case of Brunet is quite different. He was undoubtedly an officer or servant of the Crown. He came to Tadoussac in the discharge of his duties or employment. He saw the use that was being made of the slip which afterwards collapsed and immediately realized that its condition was dubious and had reason, as he says, to "fear" for its safety. He was told by Imbeau that there should be an inspection *"comme il faut"* of the slip because it might be *"endommagé"*—to see if it were not also in bad condition. Instead of clearing up his suspicions by an immediate personal inspection, or at least promptly reporting his fears to Quebec, or warning the officers of the steamship company of the probable danger of using the slip in its then condition, he contented himself with asking Imbeau to make an inspection and to report the result in writing to Quebec. In taking the

[13] [1957] S.C.R. 810 at 813.

[14] [1927] S.C.R. 68 at 77.

risk, of allowing the continued use of the wharf pending such report and in failing to give any warning to the officers of the steamship company Brunet was in my opinion guilty of a dereliction of duty amounting to negligence on his part as an officer or servant of the Crown while acting within the scope of his duties or employment upon a public work (*The King v. Schrobounst,* [1925] S.C.R. 458) and his neglect entailed liability of the Crown for the consequent injuries in person and property sustained by the passengers in attempting to land on the slip on the 7th of July.

I must also conclude that the evidence in this case supports a finding of duty such as was made in *Grossman v. The King* (*supra*).

There is, of course, also here a recourse given to the suppliants under section 3(1)(*b*) of the Act "in respect of a breach of duty attaching to the ownership, occupation, possession or control of property".

I should reiterate that in view of the reliance of navigators on leading lights, the Department and its officers clearly had the obligation to take whatever steps were necessary and reasonable to ensure that the pier under their control (and particularly one which had been under water for a great number of years and which was known to have been subjected to considerable ice pressure each year and to require repairs) on which a leading light is placed, is solid and will resist whatever ice pressures they know or should anticipate it will be subjected to; to check from time to time to ascertain whether it is displaced and, finally, to use due diligence to ascertain the facts with which, in order to perform their obligations, they must be acquainted.

In dealing with the liability of the Crown so far, I have considered only a number of decisions under the common law. The law applicable under the civil law is, I believe, no different. Under the law which prevails in Quebec, abstention or an omission to act can also attract liability. Mazeaud & Tunc in their publication *Responsabilité civile,* éd. 1957, tome 1, p. 610 referring to a decision rendered by La cour de cassation state:

> Il faut donc louer la Cour de cassation d'avoir affirmé sans équivoque «qu'une abstention peut être fautive lorsqu'elle constitue l'inexécution d'une obligation d'agir» et que «cette faute ne saurait être déclarée sans rapport avec le dommage si les précautions omises étaient de nature à en écarter le risque.»

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The same authors, at p. 614 of the same volume, underline the difference between a simple abstention and what is called an abstention "dans l'action" such as found in the present case:

> Il y a abstention dans l'action lorsque l'auteur du préjudice, se livrant à une activité particulière, s'abstient de prendre toutes les précautions qui seraient nécessaires pour que cette activité ne cause pas de dommage à autrui. C'est le cas de l'automobiliste qui cause un accident en négligeant d'allumer ses phares: le dommage résulte de cette abstention, mais c'est une abstention qui se rattache au déploiement d'une activité. Il en est de même... de l'État qui s'abstient de signaler aux automobilistes des travaux sur une route...

and at p. 615:

> ... Les juges apprécient s'il y a faute quasi-délictuelle, en appliquant le critère qui a été dégagé: ils examinent ce qu'aurait fait un autre individu placé dans les mêmes conditions externes que le défendeur: aurait-il pris la précaution que ce dernier a négligé de prendre?

As a matter of fact, under the law of Quebec, as well as under the common law, an omission to act creates liability not only where there is an express provision which obliges one to act but also when there is a legal obligation to act. That there was a legal obligation for all those officers in charge of those ranges to act here can hardly be contested nor, in my view, can it be contested that all reasonable means were not taken to discover the misalignment which caused this casualty.

Had the suppliants not supplied such evidence that all reasonable means were not taken here or had such evidence not been conclusive, they would have still been successful in this petition because article 1054 of the *Civil Code* is applicable to the present case on the basis that, as the front range light of Pointe du Lac was under the control of the respondent and was the sole cause of this casualty, a legal presumption that the respondent is liable therefore arises and can only be rebutted by establishing that the respondent had taken all reasonable means to prevent the damage caused by the thing it had under its care or control. That it did not take reasonable means appears clearly from the inactivity of the officers and employees of the Crown in failing to take appropriate steps to check the light's position prior to the casualty and even after it. The only question now remaining is whether the damage was

caused by the active autonomous act of the thing without the intervention of man which is one of the conditions for the application of the article.

Professor Castel in *The Civil Law System of the Province of Quebec,* at p. 485, deals with this requirement and describes what is meant by an autonomous act:

> What then is the "autonomous" act of a thing causing damage? This is not an easy problem of characterization, but it would seem that such an act can be described both in negative and in positive terms. In negative terms, it would mean that paragraph 1 of article 1054 cannot be applied if, at the moment of the accident, the thing was in a complete state of inertia, of complete passivity. The damage then was not caused by a thing and liability must be proved under article 1053. For instance, if a person slips on a sidewalk, *Cité de Montréal v. Chapleau* (1960) Q.B. 1096, or trips on the root of a tree: *Rosler v. Curé de N.D. de Montréal* (1937) 75 C.S. 911, the sidewalk or the root cannot be said to be "things" within the terms of paragraph 1 of article 1054, any action must then be taken under article 1053 where the burden of proof is on the plaintiff. In positive terms, the application of paragraph 1 of article 1054, requires that a thing has actively caused the damage as a result of its own dynamism, of its own motion, without the direct intervention of man.

That the Pointe du Lac pier or light can be considered as a thing which is covered by the article, would seem to be clear in view of the wide meaning of this word. That this pier and light actively caused the damage here appears also clearly to have been the case when one considers that the light is lighted at night and in the daytime performs also a positive action of leading ships down or up the channel. This light was not at the time when the damage was caused in a state of inertia. It was a leading light and, therefore, it had a dynamism of its own. It was inviting ships to use it to proceed down and up the channel. Furthermore, the pier on which the light was placed, as well as the light itself, had been displaced by the forces of nature by ice pressure and man had had nothing to do with its displacement. This pier and these lights, indeed, had all that is recognized by our Courts as necessary to place upon those who had them under their care or control, a legal presumption of liability which, as already mentioned, the respondent did not rebut by establishing, as it had to, that it had taken all reasonable means to prevent them from causing the damage. The Crown's failure to establish that

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proper and reasonable means had been taken to ensure that these lights would not mislead and cause damage, also renders it liable for this casualty.

I also find support for applying article 1054 to the facts of the present case in the French doctrine, although I am fully aware that article 1384 (C.N.) is more extensively applied in France than our corresponding article 1054 is applied in this country. Our courts have indeed always distinguished between the act of man and the act of the thing itself and have always refused to call upon the notion of guard or control of a thing if the latter was activated by man at the time of the accident. On the other hand, article 1384 (C.N.) applies in every case where the thing itself has not remained passive in the hands of its guardian, (cf. Mazeaud & Tunc, *Traité et pratique de la responsabilité civile,* 5e éd., tome II, no 1257). If the thing was inert at the time of the accident, article 1054 C.C. cannot be invoked (cf. *Gravel v. Dame Thériault*[15]; *Tillotson Rubber Co. v. Smith*[16]) whereas in the same circumstances, article 1384 C.N. could be invoked providing, of course, the thing had caused the damage claimed. (Cf. R. Rodière, *La responsabilité civile,* éd. 1952, no 1508). Notwithstanding these differences, however, it is still helpful to cite here a passage from Mazeaud & Tunc, *Responsabilité civile,* éd. 1952, tome II, pp. 208-209, which points out clearly the distinction to be made when damage is caused by the autonomous act of a thing:

> 1211-9 Est-il possible d'aller plus avant dans les précisions, de dégager un critère permettant de savoir quand une chose joue un rôle créateur dans la réalisation d'un préjudice, quand elle est la cause génératrice de ce dommage?
>
> Sans doute, parce qu'il s'agit de fixer un lien de causalité, est-il impossible d'énoncer des formules ayant une valeur absolue. Du moins doit-on constater que la jurisprudence recherche si la chose se trouvait ou non dans une position ou un état susceptible normalement de créer un dommage, autrement dit, si elle était «anormale» ou «normale» par sa position, son installation ou son comportement. La chose normalement placée, installée ou conduite au moment de l'accident, celle qui n'était pas normalement susceptible de causer un dommage, n'a pas été *cause* du dommage. La jurisprudence est formelle sur ce point. Et il semble que l'on puisse affirmer réciproquement, comme l'ont fait certains auteurs, que, sous réserve peut-être de circonstances tout à fait extraordinaires, la chose qui est entrée en jeu

[15] [1959] Que. Q.B. 61.

[16] [1960] Que. Q.B. 380.

dans la production du dommage et qui était anormale par sa place, son installation ou son comportement, en a été la cause, ou, au moins, une des causes.

Quelques exemples montrent nettement l'exactitude de ces affirmations.

Une automobile a été placée par son gardien sur l'accotement de la route. Son intervention dans le dommage subi par un motocycliste, qui vient s'écraser sur elle, est «passive». Pourquoi? L'automobile n'est-elle pas intervenue dans la réalisation du dommage? Certes. Mais son intervention n'est pas la cause de ce dommage. Son rôle a été purement passif. Ce qui a causé l'accident, ce qui l'a produit, c'est peut-être l'éclatement d'un pneu de la motocyclette, ou son dérapage, ou peut-être simplement l'inattention du conducteur.

La même automobile a été laissée par son gardien sur la route et à la sortie d'un virage masqué, ou la nuit sans les feux réglementaires. Qu'une collision se produise. Cette fois, il y aura intervention «active» de la chose. Pourquoi? Parce que, cette fois, la chose a bien causé le dommage: c'est sa position qui a entraîné le préjudice; c'est de cette position qu'il est né; et peu importe que l'activité du gardien, si cette position en est le résultat, soit fautive ou non.

Il en est de même chaque fois que la chose se trouve dans une position susceptible de provoquer un accident (arbre couché en travers de la chaussée, objet encombrant dans un couloir obscur, saillie d'une bouche d'égout etc.), les juges ayant, dans chaque affaire, à préciser si la chose se trouvait ou non dans une telle position, en dehors de toute recherche d'une faute commise par le gardien.

Although the automobile in the above example had remained passive, it was yet held to have been active because the position it was left in on a turn in the road at night without lights really caused the damages. This situation would not be sufficient to bring into play article 1054 C.C. in Quebec. However, the pier and light in the present case were not merely active in the sense that it was the sole cause of the damage but because, in addition thereto, it caused this damage by actively inviting navigators to use it in order to navigate the channel. This activity, in my view, clearly brings the light within the requirements of article 1054 C.C. and, as already mentioned, the respondent has not succeeded in rebutting a presumption of liability which the application of this article raises against it. It therefore follows that the suppliant's petition of right must be maintained and the proceedings taken by the Crown against the third party must be dismissed.

I now come to the matter of damages. The respondent, in its pleadings (paragraph 70) states that it cannot be held liable for expenses resulting from the capsizing of the

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Transatlantic and its subsequent refloating as these damages were caused by the fault, neglect and inability of the captain and officers of the *Transatlantic* and the persons in charge of the salvaging operations for which the Crown alleges the suppliants must bear the consequences and more particularly because the captain of the *Transatlantic* and its officers did not take the necessary means to prevent the capsizing of the vessel in the channel by having it towed as they could have out of the narrow part of the channel. There is also an allegation that the captain and officers failed to fight the fire on board their vessel in accordance with the ordinary rules of the art and of prudence. I should say immediately that there is no substance to the latter allegation that the fire was not fought properly by the captain and officers of the *Transatlantic*. They indeed, as well as all those who participated in the fire fighting operations, including the officers of the *Hermes*, appear to have done everything they could have done in this respect after the collision.

With regard to the claim that there was fault in allowing the ship to capsize in the channel, Captain W. R. Colbeck, a marine surveyor and the water bailiff of the port of Liverpool, heard as an expert witness on behalf of the Crown, stated that a configuration existed a short distance downstream from where the *Transatlantic* capsized, where she could have been beached. The loss in such a case, according to Colbeck, would then have been greatly reduced both in respect of damage to the cargo and the cost of salvage of the vessel. I should say that in view of the intensity of the fire that gutted the vessel, it appears clearly that whether the vessel remained where it did or was towed elsewhere would have made little difference and we may, therefore, take it that the damage to the cargo could not, in any event, have been minimized. There is a possibility, however, that the expense of the salvage operations might have been reduced had the vessel been beached in a more appropriate location and the question now is whether such a manoeuvre was feasible.

Before going into this matter, however, I should deal with the submission on behalf of the respondent that the captain of the *Transatlantic* dismissed his pilot Vallée shortly after the collision. The latter, if retained, would

have been a most helpful expert to advise the captain with regard to choosing a better location for the beaching of his vessel.

Raymond Vallée asked, at p. 2253, how long he remained on the *Transatlantic* after the collision, answered that he did not know exactly and then explained as follows:

> R. Le nombre de minutes ou d'heures, au juste, je ne m'en rappelle pas au juste. Mais, je sais que je suis resté un petit bout de temps, là, tant qu'on a vu que le feu était incontrôlable. Et le commandant a dit: On fait mieux de partir et on va mettre la chaloupe à l'eau avant qu'il soit trop tard. Parce que ça brûlait.
>
> Q. Alors, c'est le commandant qui vous a demandé de quitter?
>
> R. C'est ça.

It therefore appears that the pilot left some time after the collision, when he was told to leave the burning vessel with all those on board.

The evidence further discloses that on the morning of the occurrence, around 11:00 o'clock, some five hours after the collision, a tug, the *George McKee*, arrived on the scene under the command of Captain William Picard and Jean-Louis Millette. This tug was 100 feet long, and had a 750 h.p. motor. It also had a winch and a 1,400 foot towing line.

Captain Picard states that when he arrived on the scene, his tug approached the *Transatlantic* and he tried to talk to the captain who was on the foredeck of his vessel. He was asked at p. 2875 whether he did speak to him and he answered as follows:

> R. Oui, j'ai demandé, j'ai essayé de le comprendre, je savais que c'était un bateau allemand, je savais par la nationalité de l'équipage, j'ai demandé au capitaine s'il voulait nous donner un câble ou s'il voulait que nous lui en donnions un pour le sortir du chenal, on a vu qu'il était à l'est de l'ancrage, on a regardé sur la carte, on a vu qu'il y avait une belle place pour le sortir du chenal, où il y avait assez d'eau pour le sortir, c'était pour pas qu'il reste dans le chenal. J'ai demandé au capitaine s'il voulait nous donner un câble ou s'il voulait que je lui donne un câble pour le touer, pour le mettre dans l'espace qu'on avait vu sur la carte, pour le sortir du chenal, pour le mettre en dehors du chenal de la navigation, pour laisser continuer les bateaux, on avait vu et on voyait qu'il y avait des bateaux, on voyait 3 ou 4 bateaux qui attendaient pour monter.
>
> Q. Qu'est-ce qu'il vous a dit le capitaine?
>
> R. Il m'a dit, si j'ai bien compris, avec un fort accent allemand, il m'a dit, j'ai compris: «My boat is a fire, I have fire on my boat, I want water». Là, on s'est accosté vis-à-vis la «hatch» numéro un ou

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deux, la voisine, on s'est aperçu que le flanc du bateau était pas mal chaud le réservoir de «fuel» qu'on avait était là, sur ce côté-là, on a pas pris de chance, on a sorti des «hoses», deux, une de toile et l'autre de caoutchouc, pour faire notre possible pour arroser.

Q. Quand vous êtes arrivé pour parler au capitaine, lui avez-vous parlé en français ou en anglais?

R. En anglais.

Q. Qu'est-ce qu'il vous a dit en anglais?

R. Je me souviens bien, j'ai dit ou à peu près: «Do you want us to give you a line or give us a line, will tow you out of the channel». C'est ça qui a été répondu là, il m'a dit quelque chose avant, j'ai compris, après: «My boat is a fire, I have the fire on my boat, I want water». C'est là qu'il a dit ça.

Picard, at p. 2880, states that he thinks the *Transatlantic* could have been towed to a point downstream situated at buoy 41L approximately 300, 400 or 500 feet from where the *Transatlantic* was at the time and where she capsized, where there was 22 to 24 feet of water and where the vessel would have been outside of the channel.

Captain Millette, at p. 2287, says that Captain Picard, after his conversation with the captain of the *Transatlantic,* told him that the captain was not interested to have a tow line on his vessel. Other tugs arrived on the scene shortly after the arrival of the *George McKee* such as the tug *Captain Simard* under the command of captain Roger Gamache and this tug also had a tow line that could have been used to tow the vessel. A number of these tugs also pumped water on the fire in the *Transatlantic.*

Lannin Perrigo, a marine surveyor and a member of a firm which represented the underwriters of the *Transatlantic* and which subsequently represented also other interests including the owners of the cargo, arrived on the scene at 14:40 hours at which time he says (p. 2076) "the vessel was resting on the bank burning fiercely, No. 3 and 4 holds were a holocaust. The bridge was almost completely burned out; No. 2 hold was smoking badly, although the hatch covers were on and No. 5 hold had commenced to burn at that time. The tug—there were several tugs there that were pouring water into the open holds, No. 3 and No. 4".

He enquired to find out where the captain was and found him on No. 1 hatch forward of the vessel, and spoke to him there. Perrigo then said (p. 2079 of the transcript) "I advised the Master that I was representing the under-

writers and he told me that I was to carry on from there". "I then looked for Mr. Paul DuTremble who is the salvage master for Marine Industries Limited and I discussed the situation with him as to what action he had taken to that time, together with the Master of the vessel, and he advised that he had been instructed by the Master to place the vessel against the bank and to put water into the holds".

Q. What was your opinion of this decision or this action on the part of the Master?

A. I think it was the wisest decision to make at that time because the vessel was burning fiercely and there were numerous small explosions going on inside the holds. We didn't know what the cargo consisted of and standing on the No. 2 hatch there were frequent and numerous minor explosions.

So we did not know what would be liable to happen to this ship, whether the shell plating could be blown out and I asked Mr. DuTremble what were the soundings around the vessel at that time and he advised me that the soundings were between 20 feet and 21 feet all around the vessel, indicating that it was on the bank. The draft of the vessel at that time was, I believe, 15 feet 8 inches forward and 20 feet, 10 inches aft.

There was a heavy tear in the port side in the way of No. 3 hold and this extended quite low. This vessel is a riveted ship, with the result that the seam of the butts below the water where they are riveted were unknown as to the amount of water that could be entering the hold at the time.

Also the frames of the vessel were also riveted and as a result of these inquiries my decision was that it was wisest to leave the vessel where she was resting on the bank so that if anything happened she would just settle there.

With regard to the possibility of moving the vessel from its location at the time, Perrigo (at p. 2080 of the transcript) explained as follows:

HIS LORDSHIP: Was there a possibility of it sinking if an attempt had been made to move it elsewhere, either downstream or upstream?

THE WITNESS: We were afraid of this, because they had been putting a lot of water into the vessel and naturally it could not be pumped out, and the entry of water into No. 3 hold could not be calculated and the free surface of the water would have made the vessel unstable if we had attempted to move it, and the possibility of it turning over in the channel was great.

He then, at p. 2088 of the transcript, explained how the capsizing of the vessel took place as follows:

The cause of the capsizing from what I was able to observe was the...I believe that the weight of the vessel due to continuously pouring water in, and in view of the fact that the vessel was close to

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the channel, I believe the weight of the ship caused the bank to capsize or to give away, and with the amount of water which we had poured in and also the addition of the water entering from the collision damage, caused the water to rush over to one side with the bank capsizing and then it was just continuous from there that the vessel continued to heel over with the weight of the water going all to one side.

Perrigo, at pp. 2121 and 2123, stated that it would have been possible when he arrived around 3 o'clock in the afternoon to tow the vessel from buoy 45 to buoy 41, some 4,200 feet, adding, however, that it might have capsized in the channel. He also stated that he had good reason to believe that the vessel was lying on the bank of the channel and not merely up against it. He suggested at one point in his evidence that a sounding had been taken with an echo-sounder and even stated that Paul DuTremble, an employee of Marine Industries, who on the day of the casualty was in charge of salvage operations, had told him that he had taken soundings and that there was 20 to 22 feet of water all around the ship. DuTremble, on the other hand, at p. 2897, says that he never took any soundings:

Q. Vous souvenez-vous, monsieur DuTremble, s'il y a eu des sondages de pris autour du «Transatlantic», ce jour-là?
R. Non, cela je ne peux pas vous l'affirmer s'il y en a eu. Moi, je n'en ai pas pris, personnellement.
Q. Vous n'en avez pas pris personnellement?
R. Non.

There was no explanation given in rebuttal by Perrigo or any one else on the question of soundings being taken and the only conclusion I can reach here is that no soundings around the vessel were taken.

It is as a matter of fact, difficult to see how soundings could have been taken with an echo-sounder as Perrigo seems to suggest. It would have had to be done by a tug twenty to twenty-five feet wide and there would be very little space available for the tug if the soundings were to be taken close enough to the vessel to be useful. As a matter of fact, the soundings could have been taken only if the vessel was far enough from the bank, in which case it could hardly have been on the edge of the bank. The assessor, Captain Turcotte, informs me that the only way an accurate sounding could have been taken here is by hand with a lead sounding line.

I am inclined to accept the view expressed by Captain Colbeck that the *Transatlantic* was not on the bank prior to capsizing, but had been held up against the bank by the tugs. A photograph of the vessel (Exhibit D-105) with the tugs up against it, would seem to confirm Captain Colbeck's evidence in this regard. If the vessel had been on the bank proper and not merely alongside it, the fore end of the ship which had a draft of 15 feet compared to her after end which had a draft of 20.2 feet would have been pushed more beyond the south bank than she appears to be on the photograph and the vessel would not have remained parallel to the south bank as it did. It also appears from the manner in which the ship capsized into the channel that prior thereto, it was merely being held up against the bank.

The master of the *Transatlantic,* Captain Buschan, was, in my view, at fault in not attempting to beach his vessel in a more appropriate place than the channel where it apparently capsized in a depth of 40 to 42 feet. He could have, and should have, used the tugs at his disposal to tow his vessel to a more appropriate location. It is indeed surprising that he did not avail himself of the means at his disposal to do this, but what however is more surprising is that it appears to have never occurred to him to do so. Had such an omission occurred when the captain had but a few minutes in which to take a decision, due allowance could then be made for the state of excitement in which he must have been in when he could not be expected to be as acute in his judgment, or act as skillfully and coolly as he normally would. Under those circumstances, after this sudden and devastating collision, he could, indeed, hardly have been criticized for his inaction. He had, however, a longer period of time than this to consider his position and take a decision; he had, indeed, at least from 6:30 a.m. to 11 o'clock (at which time the *George MacKee* arrived and offered to tow his vessel which he refused) and possibly even later, up until the capsizing of his vessel. The matter of towing the vessel downstream would, it is true, have required good seamanship, but such a manoeuvre would, according to the assessor Captain Turcotte, have been possible, particularly around noon time when although there was some water in the holds, there would not have been

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too much free surface effect because of the permeability created by the considerable cargo in the holds and, therefore, little risk of capsizing the vessel in the process. Captain Turcotte is even of the view that an attempt could, and should have been made, even after Perrigo arrived on the scene around 3 o'clock in the afternoon, to tow the vessel down towards an ideal location situated in the vicinity of buoy 41L where he says there would have been a good beaching area. It might, at this time, he says, have capsized on the way down but it still could not be any worse than where it had been kept up against the bank and where it actually sank.

It also appears to me that DuTremble who, under a Lloyd's open form, was in charge of the salvage operations from 4 o'clock in the afternoon, should have taken soundings even at that time. He, however, did not seem interested to see if the vessel was in an appropriate place to sink and even stated that he knew nothing of this type of operation.

The only conclusion I can reach here is that the captain, as well as those in charge of salvaging operations, were at fault in merely pressing the ship against the bank as they did. Had proper soundings been taken they would, no doubt, have realized the precarious position of this ship and taken prompt and proper action to have it removed downstream.

It therefore follows that the capsizing of the *Transatlantic* was not a natural and direct consequence of the collision which had taken place twelve hours prior thereto. It was indeed the result of the omission, and faulty management, on the part of the captain of the vessel and of those who had charge of the vessel after the collision in not taking the action necessary to beach her in a more appropriate location where the subsequent salvage operations would not have been as intricate nor as costly. It therefore follows that a portion of the cost of the salvaging operations arising from the removal of the vessel from where it capsized is not recoverable from the respondent. According to Perrigo, the wreck removal price was $1,000,000 plus 50 per cent of the net salved value of the hull and cargo. He believes that the additional amounts received in addition to the $1,000,000 did not exceed $150,000.

That part of the cost of the salvaging operations which is not recoverable from the respondent can be determined only by means of a reference to be carried out with possibly the assistance of an assessor, if such a course of action is possible.

Representations in this regard may be made to me at a time and place suitable to all parties to be arranged through the Registrar of this Court. The damages to which the suppliants may be entitled shall also be dealt with in the same manner.

I should now deal with the respondent's cross demand whereby it claims the right to limit its responsibility under the provisions of the *Canada Shipping Act*, section 668, on the basis that the channel where the accident occurred is really a canal of which it was the owner. The Crown's application during the trial for leave to file this counterclaim was taken under advisement to be dealt with at a later date. As I have now reached the conclusion that the respondent is solely responsible for its collision, leave is hereby granted to the respondent to file its counterclaim which shall be governed by the delays and rules applicable to such proceedings under the rules of this Court. I should, however, add that this counterclaim can be considered by the Court only after it is satisfied that all parties entitled to claim from the respondent herein have been given an opportunity to intervene and participate rateably in whatever limited amount is arrived at. This matter also shall be the subject of whatever representations the parties feel should be made in this regard at the same time as the procedure for dealing with the damages and the cost of the salvage operations is determined. The suppliants' petition of right will be maintained with costs and the proceedings taken by the Crown against the third party will be dismissed with costs. There will, however, be no formal pronouncement of judgment in the present case until such time as all the above matters are dealt with, the damages established and the cost of the salvage operations applicable to the removal of the vessel from the preferred location downstream has been determined. The manner in which costs in both proceedings should be determined and dealt with may also be raised at the same time.

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On September 10, 1968, I reached the conclusion that the respondent was solely responsible for this collision but that the capsizing of the *Transatlantic,* where it occurred, was not a natural and direct consequence of the collision which had taken place twelve hours prior thereto and that therefore a portion of the cost of the salvaging operations arising from the removal of the wreck was not recoverable from the respondent. I also expressed the opinion that that part of the cost of the salvaging operations which could not be recovered from the respondent should be determined by means of a reference to be carried out with possibly the assistance of an assessor and I added if such a course of action is possible. I also stated that the damages to which the suppliants were entitled should also be dealt with in the same manner.

I then dealt with the matter of respondent's cross-demand whereby it claims the right to limit its responsibility under the provisions of the *Canada Shipping Act,* section 660, on the basis that the channel where the accident occurred was really a canal and leave was then granted to the respondent to file its counterclaim which was to be governed by the delays and rules applicable to such proceedings under the rules of this court. I also invited the parties through their counsel to make whatever representations they deemed useful in order to deal with the above matters prior to pronouncing a formal judgment in this case.

Counsel for the parties appeared before me on October 15, 1968, and a number of motions were presented for directions as to the assessment of damages and costs, for directions as to the procedure to be followed in the limitation of liability proceedings, all counsel for the suppliants stating that there was no objection to respondent proceeding in the limitation of liability proceedings by means of a counterclaim. The issue as to what effect the capsizing of the vessel where it occurred had on the cost of removing the wreck was also discussed, the Crown submitting, however, that the referee should deal also with the effect this had, not only in increasing the cost of removing the wreck, but in increasing the damage to the vessel and the damage and loss to the cargo. In view, however, of the Court's decision at

p. 206 of the reasons for judgment in this case, there could be no question of determining by reference whether the cargo or ship would have been less damaged had the vessel been towed downstream in view of the conclusion I had arrived at on these points at p. 206 (*supra*) which could only be attacked by an appeal. I explained why such a claim could not be considered by stating:

> . . . I should say that in view of the intensity of the fire that gutted the vessel, it appears clearly that whether the vessel remained where it did or was towed elsewhere would have made little difference and we may, therefore, take it that the damage to the cargo could not, in any event, have been minimized.

I also pointed out to counsel for the Crown that although I had reached a conclusion on this matter, in doing so I had gone beyond the allegations of the respondent's proceedings as contained in paragraph 70 of its defence. On November 27, 1968, the respondent then moved by notice of motion for an order allowing it to amend paragraph 70 of her statement of defence by adding after the words "les dépenses", in the first line thereof, the words "et les dommages".

The motion was contested by counsel for the suppliants and for the third party and taken under advisement by the court to be dealt with in the further reasons for judgment now being issued.

In view of the conclusion reached by me in this matter, the possibility of an appeal and a possible revision of the conclusion reached with regard to the alleged increased damages to the vessel and the cargo by allowing the vessel to capsize where it did, I must, I believe, and do hereby, grant this motion and issue an order allowing such an amendment to paragraph 70 of the Crown's defence herein with, however, costs against the respondent in any event of the cause.

The matter of appointing a referee to deal with the question of determining the damages sustained by the suppliants, as well as with the additional expenses caused by allowing the vessel to capsize where it did, was also discussed and representations were made by counsel as to how this should be done and who should be appointed. A number of suggestions were made by counsel for the suppliants of competent persons to perform this function but there was no agreement on the persons suggested. The appointment of an assessor to assist the referee was also

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suggested by the suppliants but was resisted by counsel for the Crown on the basis that a competent referee would not need an assessor and could be properly advised by experts produced by the parties. The court at one point even suggested that in view of the difficulties involved in agreeing on the choice of a proper referee and in the manner in which the reference should be conducted, it might be preferable to deal only at this stage with the limitation of liability proceedings, to issue reasons for judgment thereon and appeals could then be taken on the question of liability for the collision and as to whether the Crown was entitled to limit its liability under section 660 of the *Canada Shipping Act*. The court was adjourned and a few days later counsel were reconvened and told that the matter would proceed as hereinabove indicated and December 3, 1968, was set down for the trial on the issue dealing with the right of the Crown to limit its liability.

The counterclaimant (the Crown) produced as witnesses John W. Pickersgill (the Minister of Transport in 1965 when the accident occurred), Mr. John Baldwin, the Deputy Minister of Transport, Herbert Land, an officer of the Department of Transport for 37 years and from 1958 to 1967 Chief of the St. Lawrence Ship Channel Division and Allan Douglas Latter, Superintendent of Pilotage Operations, Department of Transport.

The Crown, in order to limit its liability relies on section 660 of the *Canada Shipping Act,* R.S.C. 1952, chapter 29, which reads as follows:

> 660. (1) The owners of any dock or canal, or harbour commission, are not, where *without their actual fault or privity* any loss or damage is caused to any vessel or vessels, or to any goods, merchandise, or other things whatsoever on board any vessel or vessels, liable to damages *beyond an aggregate amount equivalent to one thousand gold francs for each ton of the tonnage of the largest registered British ship that,* at the time of such loss or damage occurring is, or within a period of five years previous thereto has been, within the area over which such dock, or canal owner, or harbour commission performs any duty or exercises any power, a ship shall not be deemed to have been within the area over which a harbour commission performs any duty or exercises any power by reason only that it has been built or fitted out within such area, or that it has taken shelter within or passed through such area on a voyage between two places both situated outside that area, or that it has loaded or unloaded mails or passengers within that area.

(Emphasis added).

The Crown had the burden of establishing under the above section that it falls within the conditions therein set down and it therefore had to show:

(1) that the channel through Lake St. Peter where the accident occurred, is a canal for the purpose of the *Canada Shipping Act*;

(2) that it was not in actual fault and privity in respect of the cause of damages claimed; and

(3) the largest British registered ship in the area within the five years preceding the date of the accident in order to calculate by means of its tonnage and the value of the gold franc its limited liability.

The value of the gold franc on April 9, 1965, was established by Arthur C. Lord, Assistant Chief of Foreign Exchange, Bank of Canada, Ottawa. Using 22,970,470 units (i.e., the tonnage of the Empress of Canada, the largest registered British vessel within the area at the time of the loss or within a period of five years previous thereto), he calculated that the maximum amount the Crown could be held liable for under section 660 was $1,644,-693.95. Although this calculation or amount was not contested by the suppliants, they refused to accept that the *Empress of Canada* was the largest vessel in that area and the Crown had to establish that such was the case. Captain Allan Douglas Latter, Superintendent of Pilotage Operations, Department of Transport, Ottawa, stated in evidence that he had searched for the largest British ship to traverse Lake St. Peter within the material time, and that it was the *Empress of Canada*. This evidence was not contradicted and, therefore, we may take it that the figure arrived at by Lord does indicate the maximum amount for which the Crown may be held liable if, of course, it is entitled to limit its liability under the Act.

The respondent submits that the channel through Lake St. Peter, where the accident occurred, is really a canal for the purposes of the *Canada Shipping Act*, which it had to establish in order to take advantage as the owner of a canal of the provisions of the *Canada Shipping Act*.

The source of section 660 of the *Canada Shipping Act*, for the limitation of the liability of dock, canal and harbour

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owners, is found in a United Kingdom Statute, 63 & 64 VIC., chapter 32, *Merchant Shipping (Liability of Ship Owners and Others) Act,* 1900.

The provision was introduced in this country by the *Canada Shipping Act,* 1934, c. 44 s. 652, and eventually became s. 660 of R.S.C. 1952, c. 29.

There is no statutory definition of the word "canal" for the purposes of this section and respondent submits that it, therefore, should be construed in its natural and ordinary meaning. It also submits that from reputable dictionaries of both the French and English language it appears that the words "canal" and "channel" in the context of this case are synonyms, both words deriving from the latin word "*canalis*" (cf. The Nuttal Dictionary of English Synonyms and Antonyms and Le Dictionnaire des synonymes de la langue française, par René Bailly (Librairie Larousse)).

It also submits that the Oxford English Dictionary gives as the chief modern sense of the word "canal" the following definition:

> 6. An artificial watercourse constructed to unite rivers, lakes, or seas, and serve the purpose of inland navigation.

and for the word "channel":

> 5. An artificial waterway for boats = "canal"

Webster's International Dictionary, second edition, contains the following:

> *Canal*
>
> 3. An international channel filled with water, designed for navigation, for irrigating land, etc.
>
> *Channel* (. . . see canal)
>
> 2. The deeper part of a river, harbour, strait, etc., where the main current flows, or which affords the best passage.
>
> 3. Obs. . . . b) A canal for vessels. N.B. It is interesting to note that Littré under the word "chenal" says: E. Forme ancienne de *canal* (voy. de mots);

Le Grand Larousse Encyclopédique contains the following definitions:

> *Canal*—Lit ou bras d'une rivière (on dit mieux dans ce sens, chenal ou bras) Voie navigable creusée par l'homme.
>
> *Canal fluvial,* canal qui unit deux fleuves, ou qui rend un fleuve navigable.
>
> *Chenal*: Passage resserré, naturel ou artificiel entre des terres ou des hauts-fonds, utilisé par la navigation (Syn. canal)

Le Dictionnaire Robert gives the following definitions:

> Canal—2° cours d'eau artificiel . . .V. Chenal
>
> *Chenal*—1° Passage ouvert à la navigation entre un port, une rivière ou un étang et la mer, entre des rochers, des îles, dans le lit d'un fleuve. V. Canal.

On the basis of such definitions, the Crown submits that the dredged cut through Lake St. Peter meets the dictionary requirements for a canal in that

(a) it is man-made and, therefore, artificial;

(b) it conveys water and is a watercourse;

(c) it unites the deeper waterways above and below Lake St. Peter;

(d) its purpose is to further inland navigation and without it the vessels *Transatlantic* and *Hermes* would not have been able to navigate to Montreal.

In support of its contention, the Crown referred to an American case *C. W. Chadwick & Co. v. Boston, Cape Cod and New York Canal Co.*[17]. This was an action in damages against a canal authority for the stranding of a vessel in the approach to the Cape Cod canal through the faulty piloting of a pilot employed by the Canal company. It was held therein that the dredged approach was for some purpose a part of the canal but in order, in this case, to determine only whether the pilot was acting within the scope of his employment by the canal company. It does not, however, in my view, determine that a channel is a canal.

The Crown also referred to an unreported decision of this Court by Thorson P., dated March 26, 1947, affirmed by the Supreme Court of Canada on October 5, 1948, Locke J. dissenting. *The Canada Starch Co. v. The King* (No. 20239 of the Exchequer Court).

The claim of the Crown in the above case was for wharfage and wintering charges made under the *Canal Regulations* pursuant to the *Department of Transport Act* in respect of a vessel that had loaded or unloaded cargo and had wintered at a wharf erected on the Old Galop Canal at Cardinal, Ontario.

Among the points involved, one was whether the Old Galop Canal was still a "canal" under the *Department of Transport Act.*

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[17] (1920) 266 F. 775.

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There was no question that the wharf was located on a body of water that had been part of a canal until 1961 when a new canal was built at which time the area in question was closed off but remained accessible from the St. Lawrence River through an opening for vessels wishing to moor at the Canada Starch Company wharf.

Thorson P. held the Old Galop Canal was still a "canal" under the *Department of Transport Act* and also that it had remained a canal under the ordinary meaning of the term. The majority in the Supreme Court agreed with Thorson P., Locke J. dissenting on the ground that the body of water in question was not a canal in the natural and ordinary sense of that term.

This decision is not, in my view, particularly useful in the sense that the section involved had at one time prior to 1901 been a canal and the only question was whether because of the cut off it no longer was one.

I also feel that none of the above definitions are, in my view, sufficiently precise to solve the question involved in this case. There is, however, one element which is contained in all these definitions and that is the "artificiality" which appears to be dominant in the make up of a canal. This, in my view, is the real distinguishing element between a canal and other bodies of water.

Artificialty, however, is a relative concept. No inland waterway is entirely natural. Navigable rivers, indeed, have to be dredged periodically and basins and harbours must be dug if navigation is to be successfully conducted on any navigable river. In any good sized port, or in any important waterway, one can readily see how much of a man's work must go into a natural watercourse to make it a great conveyer of goods and merchandise. Yet I do not believe that anyone will think of calling any port of the St. Lawrence river at Montreal, or the watercourse east of Montreal to Quebec City or down from Quebec City, a canal on the ground that the basins, the embankments, the jetties, were built by man or that the channels were deepened by man and not by nature. I believe that it follows from this observation that a canal can exist only where the ingenuity of man is paramount in the making of the watercourse and, although there is no question that the depth and

width of the channel through Lake St. Peter, as urged by counsel for the Crown, were increased and widened by man, the history of this channel reveals that it could, in its natural state, prior to such work, allow ocean vessels of 10 feet draught to ply its course.

Herbert Land, an officer of the Department of Transport from 1931 until 1968, described the Lake St. Peter channel as being some 500 feet in width and as being dredged to some 35 feet. He confirmed that prior to any improvement, the limiting depth of the channel was some 10½ feet although at high water stage, its limiting depth was some 15 feet.

Land agreed, in cross-examination, that the present course of the Lake St. Peter channel follows that of what was known as the old channel which has always been known as the natural channel in Lake St. Peter through which the waters of the St. Lawrence river eventually go to the sea and it is clear from the following answers that the channel involved in this case is a natural one:

> Q. In other words, what has been done in the channel is simply to improve what is and has always been a natural channel. Is that correct?
> A. That is right . . .

He later agreed also that in those days prior to any work being done to improve the channel, ocean ships could come to Montreal, although others had to anchor below what is known as the flats of Lake St. Peter where they would discharge their cargo which was then brought up to Montreal on smaller crafts.

It also appears, and Baldwin so admits that the St. Lawrence ship channel section, which looks after channels in Canada, including the Lake St. Peter channel, is a branch of its own and was never at any time a part of the same organizational structure which runs canals in Canada.

There is no mention of the Lake St. Peter channel as a canal in the past or present *Canal Regulations* nor does it appear in schedules A and B which list canals. John Nelson Ballinger, who, before he became Chief of Aids to Navigation was Chief of the Canals Division, stated at p. 1757 of the transcript that Lake St. Peter did not come within his jurisdiction when he was in charge of canals and Herbert

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Land testified that there was at one time a feasibility study made to canalize Lake St. Peter which, however, was never implemented. This, of course, indicates clearly that to people like Ballinger and Land, the Lake St. Peter channel was not a canal in the actual and ordinary sense of the term or in the natural and ordinary sense in which such people use the language.

The Department of Transport does not administer it as a canal as no tolls or dues are collected for its use as a canal for the simple reason that it is not a canal, but only a part of the St. Lawrence channel even if large sums of money have been expended on the river in order to render the port of Montreal accessible to bigger and faster and more modern ships. As a matter of fact, whatever has been done to Lake St. Peter has merely been to improve navigation as the depth of the drafts of vessels became greater. Furthermore, this portion of Lake St. Peter, or this channel, was originally invested in Her Majesty as an improvement in the course of the River St. Lawrence under section 108 of the *B.N.A. Act* and schedule under subsection 2, rivers and lakes improvements and not under subsection 1, canals.

The St. Lawrence River Pilot, the navigator's bible, refers in no way to the channel across Lake St. Peter as being a canal.

I cannot, therefore, see how it is possible to conclude that this channel can be considered as a canal. It is not listed as a canal in the regulations and schedules issued under the *Department of Transport Act*; it is not under the supervision of the Chief of Canals; is is not referred to as a secondary or a mainline canal; it is not under the jurisdiction of the St. Lawrence Seaway Authority and it has never been treated as a canal in any official manner. The Crown had the burden of establishing that this channel was a canal in order to benefit from the exceptional advantages of section 660 of the *Canada Shipping Act* and has not discharged its obligation in this regard. A statute such as the present one, which purports to create an extraordinary right by reducing the liability of a tortfeaser

which is contrary to the ordinary rules of the common and the civil law, must, I believe, be given the most strict interpretation. But even taking a broad view of this matter, it appears to me that this watercourse where the accident took place, although improved by man, is still a channel and not a canal in the same manner as the remaining part of the river channel from Three Rivers, P.Q. to Quebec and from Quebec to the sea and this, of course, can in no sense be considered as a canal.

As the respondent has not succeeded in establishing that it falls within one of the essential conditions set down in section 660 of the *Canada Shipping Act*, this should be the end of the matter. In view, however, of an appeal, the further question of whether the Crown was in fault or privity should also be considered.

The Crown here also had to establish that it was not in actual fault or privity in respect of the cause of the damages claimed.

It took the position that as neither Mr. Pickersgill, the Minister of Transport on the date of the accident, nor Mr. Baldwin, the Deputy Minister, can be charged with personal fault in respect of the cause of the collision, there could be no fault or privity on the part of the Crown.

Counsel for the Crown urged that the only persons who can represent the owner here are the Minister and the Deputy Minister, that the owner of the canal is Her Majesty in Canada, i.e., the Governor General acting on the advice of his ministers (who are similar to the board of directors of a company) that one of the members of this board has been entrusted with the responsibility of administering a department and he is the Minister of Transport and Parliament has indicated in the *Department of Transport Act* that the Minister shall have an assistant who is appointed by the Governor in Council the Deputy Minister, and no one else has been designated by Parliament to act or represent the Crown. All those persons underneath the Minister and Deputy Minister are merely employees of the Crown to whom responsibilities are delegated. There are, in fact, in the Department of

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Transport six Assistant Deputy Ministers, a number of heads of branches and sections, but they are, according to the Crown, merely employees of the Department in the same manner as simple messengers or elevator operators.

Both of these officers, the former Minister of Transport, Mr. Pickersgill, and Mr. Baldwin, were produced as witnesses. They both stated that they were unaware that the lower pier of Pointe du Lac had been displaced over a period of years.

Mr. Pickersgill stated that he was not aware on or before the collision of the displacement of the Pointe du Lac pier and did not even know it existed.

Mr. Baldwin, the Deputy Minister of Transport, testified at greater length and described the ramifications of the Department of Transport and produced a chart, Exhibit C-5, which sets down the responsibilities of its various sections or personnel. He produced also a key chart, Exhibit C-4, which indicates the set-up of the Department from the Minister to the Deputy Minister to the various Assistant Deputy Ministers down to the personnel in the field. He stated that as far as aids to navigation are concerned, district marine agents were located in several areas, including Sorel, P.Q., and they, according to the chart, reported to the Assistant Deputy Minister, Marine Services, Mr. Gordon Stead, who is not an engineer. He added, however, that such agents were also under the Chief of Aids to Navigation Division, located in the Department of Transport, Ottawa. Mr. Baldwin explained that with the Postal Service, the Department of Transport is one of the largest departments in the government.

From Exhibit C-5, p. 1, it appears that the Assistant Deputy Minister, Marine, is responsible to the Deputy Minister for directions and co-ordination of all activities of Marine Services including that of the district marine agenices, who are responsible for "the direction and administration of activities pertaining to the construction, operation and maintenance of aids to navigation...".

Mr. Baldwin explained that although the district marine agents would not communicate with the Director of Marine Works but directly with the Assistant Deputy

Minister in all important matters, in some cases they would go to the Chief of Aids to Navigation Division.

The Marine Works Branch, however, according to the chart, Exhibit C-5, is also "responsible for the direction and co-ordination of all activities of the branch, involving the construction, maintenance and operation of marine aids to navigation in navigable waters throughout Canada".

Baldwin stated that once these branches and divisions were set up, he would only become personally involved in their actual operation in what he termed "under the management by exception principle in the day to day workings of the structure as a whole". He was concerned with the manner in which the responsibilities of the divisions or sections were discharged only in the case where if the Assistant Deputy Minister had a new policy problem he wished to bring to his attention and "something emerged under the management by exception principle or as part of the future programme review".

He stated that he also was not personally aware of the displacement of the pier of the Pointe du Lac range prior to the collision and never received or saw a report of any kind as to the condition of this pier, adding that correspondence or memoranda between the District Marine Agents, the Chief of Aids to Navigation, the Director of Marine Works, do not normally cross the Deputy Minister's desk. He said that he became informed of the displacement of this particular pier very close to the end of April 1965 by means of an oral report from the Assistant Deputy Minister of Marine to the effect that to the latter's "considerable surprise and considerable amount of disbelief at that stage", information had been received which suggested that there may have been a displacement of this pier and that an investigation was taking place to ascertain further facts.

He was not, he said, aware of the particular decision taken in the fall of 1964 to place a tower on the pier for the first time during winter navigation. His awareness, he says (at p. 77 of the transcript)

> would relate rather to the fact, that the Minister had discussed with the Deputy Minister, the Deputy Minister had discussed with the

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> Assistant Deputy Minister in broad terms the question of whether additional aids should be available in the St. Lawrence River during winter periods, because of the evidence of increased use of the River during the winter period and various policy considerations relating to the economic benefit of the movement—the problems of the reaction of the Atlantic Provinces and similar matters would come up in the discussion—a policy decision might result, but as it did, I believe in this case, but the Marine Services should be given discretion to do something more than they had been doing within reason and then the matter would be left to the Marine Services Branch to determine what was reasonable and technically feasible.

I should say here that Baldwin is not an engineer and prior to coming to Ottawa, taught modern history at McMaster's for one year and admits he has no technical or engineering knowledge at all of the type of navigational aids involved in this case.

He was told by counsel for the Crown that the reasons for judgment herein fault the Department for not having a system of checking the position of the particular types of aids with which we are concerned in this case and gave a lengthy answer which I believe can be resumed as follows: He stressed that the function of the Deputy Minister was one primarily related to policy matters leaving the day to day operations in most cases to those who were heads of branches. He then stated (at p. 107):

> . . . the only method by which a department of the size and complexity and general physical scope of the Department of Transport can operate on a reasonably efficient management basis is by a high degree of delegation of operating responsibility right down the line and this has been the philosophy of the Department of Transport, so that there is a steady cone of delegation, if you will, with admittedly a major responsibility for day to day operating practices and actions resting not with necessarily with the Assistant Deputy Minister, but with the appropriate chief at whatever level may be the case. Physically no other approach would be possible in this type of management structure in my opinion.

Baldwin stated that when information reached him that the pier had definitely been displaced, he asked the Assistant Deputy Minister to take whatever action was necessary to deal with this problem. He was asked in cross-examination by Mr. Brisset (at p. 120 *et seq.* of the transcript) whether he agreed that a system should have been

established by whatever branch responsible to ascertain at all material times the position of aids to navigation in a system like the River St. Lawrence and answered as follows:

A. No, I don't think that any of my previous answers indicated—certainly was not intended to indicate my belief, that there was a lack of a system and that there was some system which needed to be established in this regard. My previous answers were intended to indicate—if I can make this adequately clear in a complex situation now, that the positioning and maintenance of aids to navigation does carry with it a need to be aware of the problems connected with continuation of location in any particular situation, but the method by which this is achieved is a method, which is—which is something which can best be done by assuming that the people at the appropriate level, whether it is field or headquarters, understand what their general job is in this connection and giving them reasonable initiative and flexibility in the matter of achieving those objectives.

Mr. Brisset then questioned him at p. 123 of the transcript as follows:

Q. . . . Now limiting myself to this later kind of aids to navigation, namely ranges and beacons, would you agree with me, that in the discharging of their functions, those responsible for the maintenance of these aids to navigation must of necessity have a method to use your system to check on whether they are at all times reliable and what—in that they serve the purpose, that they are intended to serve?

A. They should have some procedure for insuring, that the function is carried out—not necessarily the same procedure in every case.

He then, however, later added at p. 125:

A. . . . you may have one type of situation, where a check once every five or ten years is adequate and you may have another type of situation, where a check every few months or few weeks is adequate . . .

I do not think that it is sufficient in order to establish that it was not in actual fault or privity in respect of the cause of the damages claimed in this case for the Crown to merely say that the only two persons who can represent it are the Minister and Deputy Minister of Transport, that both being non-technical men were unfamiliar with the Marine Section of the Department and did not concern themselves with such matters as aids to navigation because

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the various branches and sections of the Department, including the Marine Section, were set up in such a manner that whatever obligations existed in such matters or whatever work was to be done was delegated down the line to eventually the men in the field. There is, of course, no question in this case that the men in the field, the District Marine Agents, were remiss in their duties and they have been held at fault in not taking the means necessary to insure that the piers on which the lights were left as the only fixed means of navigation for ships plying those waters in 1965 were properly located and had not been displaced (particularly when it was decided to use such lights for the first time in the fall of 1964 for the forthcoming 1965 winter season) and of warning navigators if they were displaced and such omission can be considered as involving the vicarious liability of the Crown. Such a responsibility, however, is not sufficient to involve the privity or personal responsibility of the employer or, as in this case, the Crown. Something more is required in order to prevent the employer from taking advantage of the limitation of liability provided under the *Canada Shipping Act*. From the decisions rendered, it appears to me that the notion of personal fault of an employer or as in this case, the Crown, involves drawing a distinction between the directing minds of the employer, a company, or a Department of the Crown, and inferior servants[18]. Generally speaking acts or states of mind of the directors or managers of a company, or of a large department, are imputed to the company or the Department so as to constitute personal fault, whereas, the acts or states of mind of inferior servants constitute merely vicarious fault (cf. *The Trucu-*

[18] In *The Lady Gwendolyn*, [1965] 2 ALL E.R. 283 at 295 Wilmer L.J. stated: ". . . but neither in the Court of Appeal nor in the House of Lords was it said that a person whose actual fault would be the Company's actual fault must necessarily be a director. Where, as in the present case, a Company has a separate traffic department, which assumes responsibility for running the Company's ships, I see no good reason why the head of that department, even though not himself a director, should not be regarded as someone whose action is the very action of the Company itself, so far as concerns anything to do with the Company's ships.

lent[19], where this doctrine was applied to the Crown and where the case of *Lennard's Carrying Co. v. Asiatic Petroleum Co.*[20] was followed).

It appears to me that the only way a proper distinction can be made in order to determine the type of responsibility involved in a particular case is to examine the circumstances of each case, the character and magnitude of the company's or Department's business and the authority delegated by the directors or the heads of the Department to the managing officers of the company or to the branches and sections of the Department.

That the employees in the field in the present case were at fault, as already mentioned, there can be no doubt. But there is also a finding, however, that they were not alone at fault and all those at the Ottawa office, during the whole period of the existence of the piers involved, i.e., from 1935 to 1965, who under the functional set up of delegation explained by Mr. Baldwin, were given responsibility for these navigational aids and thereby became the directing minds of the Department in this respect, were also, in my view, at fault. Their fault, however, is not the same fault as the fault committed by the District Marine Agents, but of a somewhat higher order which, nevertheless, caused the damage or contributed to it[21]. This different kind of fault was the omission[22] to supply or to order or set up a system of control or of checking the aids to navigation by the various branches, sections or personnel of the Department who had been entrusted with the responsibility of ensuring that such aids were properly maintained and their location from time to time ascertained in order to give timely warning to navigators. This was a

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[19] [1952] P. 1; [1951] 2 Lloyd's Rep. 308.

[20] [1915] A.C. 705.

[21] Marsden's Collision at Sea, Tenth Edition, at p. 189. "It has been said that to constitute actual fault the owner's action need not have been the sole or next or chief cause of the occurrence but it must be a contributory cause.

[22] In *Paterson Steamships Ltd. v. Canadian Co-operative Wheat Producers Ltd.* [1935] S.C.R. 617 Rinfret J. stated at p. 626 that "The words 'actual fault or privity' include acts of omission".

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responsibility which clearly falls within the province of an employer[23] and which may I add, if reasonably fulfilled, would have prevented this disastrous and costly collision.

That such a system was possible appears clearly in my view from the fact that a simple system of periodic triangulation or the placing of a couple of bridging marks on the shore would have allowed them to determine from time to time whether the piers were shifting. The standard of care required is not, in any case, that of perfection, but the standard of what would be done or left undone by a reasonable manager of Aids to Navigation in all the existing circumstances of this case would, it seems to me, be at least the setting up of a system of control as described above. Such a precautionary measure would, I should think, be commonly taken by people in charge of such important guides for navigation. The establishment of such a system, in view of the age of the piers involved in this case, the known impact of ice every spring, the reports of deterioration received, as wall as the report received

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[23] In *Hudson v. Ridge Co.* [1957] 2 All E.R. 229, Streatfield J. clearly describes the direct responsibility of employers at p. 230.

The question arises whether the employers are responsible. Counsel for the plaintiff did not contend that the employers were vicariously liable for any negligent act of a fellow servant: his contention was that they were primarily liable because they were guilty of a breach of their common law duty to take care for the safety of their employees. This is an unusual case, because the particular form of lack of care by the employers alleged is that they failed to maintain discipline and to take proper steps to put an end to this stupid skylarking which was likely to lead, or might lead, to injury at some time in the future.

As it seems to me, the matter is covered not by authority so much as principle. It is the duty of employers, for the safety of their employees, to have reasonably safe plant and machinery. It is their duty to have premises, which are similarly reasonably safe. It is their duty to have a reasonably safe system of work. It is their duty to employ reasonably competent fellow workmen. All of those duties exist at common law for the safety of the workmen, and, if, for instance, it is found that a piece of plant or part of the premises is not reasonably safe, it is the duty of the employers to cure it, to make it safe and to remove that source of danger. In the same way, if the system of working is found, in practice, to be beset with dangers, it is the duty of the employers to evolve a reasonably safe system of working so as to obviate those dangers, and, on principle, it seems to me that, if, in fact, a fellow workman is not merely incompetent but, by his habitual conduct, is likely to prove a source of danger to his fellow employees, a duty lies fairly and squarely on the employers to remove that source of danger.

from the Pilot of the *Trein Maersk* in 1964, was, in my view, obviously indicated in the present circumstances and all managerial levels to whom responsibility for these aids had been delegated should, I believe, bear responsibility for what I here term the failure of management which the facts disclose. The evidence also discloses that after the accident in 1965, a system, as explained by Mr. Baldwin, was immediately implemented.

He was indeed asked by Mr. Hyndman, one of the counsel for the suppliants, the following questions and gave the following answers at pp. 185 to 187 of the transcript:

> Q . . . is it correct, that after this casualty in 1965, which is to say in 1965, '66 or '67 or even 1968, that a different system is implemented (sic) in the Department, whereby there is an annual check made of all such Aides to Navigation—annual or periodic checks?
>
> A. It is my understanding of the situation, that some changes in operating procedures were made following the accident by the Aides to Navigation Branch, but it is further my understanding, that this did not take the form of an instruction in the sense of the phrase you have used, but in the sense of guide lines, that were used by the Aides to Navigation Branch to inform agents of various areas of checking, that they should keep an eye on.
>
> Q. Right—by whom were you informed of this new directive or guide line or instruction or call it what you will?
>
> A. I was informed by the Assistant-Deputy Minister for Marine, that such a step was under review and that at a later stage, that it was expected that the Aides to Navigation would make use of some guide lines, which in their opinion, would represent not a basic or major change, but a—if you like, an improvement in the light of new information...

It is quite impossible for me to conclude also from the above observations that the respondent has not breached a duty attached to its ownership and control of the pier involved herein nor that it has taken all reasonable means to prevent the damages caused by the thing it had under its care or control, which it had to do in order to successfully rebut the legal presumption of liability under article 1054 C.C. It therefore follows that I am not, of course, satisfied that the loss and damage in question in this case occurred without the actual fault or privity of the Crown and in my judgment, therefore, the claim on behalf of Her Majesty for limitation of liability fails and must be dismissed.

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There remains one matter of substance to be dealt with which is whether the suppliants are entitled to interest on the damages to be assessed against the respondent herein and, if so, at what rate.

My task in examining the various decisions of this Court as well as the Supreme Court has been considerably lessened by the well prepared written memorandum by counsel for the suppliants from which I will hereafter draw extensively.

The assumption has always been that as far as the Crown is concerned, no interest can be allowed against it unless there is a statute or agreement providing for it, cf. *Hochelaga Shipping and Towing Co. v. The King*[24] and *His Majesty the King v. The Royal Bank of Canada*[25].

The matter of interest is dealt with on a permissive basis and in the same manner in both section 53 of the *Exchequer Court Act* and section 18 of the *Crown Liability Act*, 1-2 Elizabeth II, chapter 30 and reads as follows:

Section 18:

18. The Minister of Finance may allow and pay out of the Consolidated Revenue Fund to any person entitled by a judgment under this Act to any money or costs, interest thereon at a rate not exceeding four per cent from the date of the judgment until the money or costs are paid.

There is also, of course, section 47(*b*) of the *Exchequer Court Act* which, however, deals only with written contractual claims. It reads as follows:

47. In adjudicating upon any claim arising out of any contract in writing, the Court shall decide in accordance with the stipulations in such contract, and shall not allow...

(*b*) interest on any sum of money that the Court considers to be due to the claimant, in the absence of any contract in writing stipulating for payment of such interest or of a statute providing in such case for the payment of interest by the Crown.

The question to be determined is whether the Crown has a special privilege with regard to the matter of interest or whether it is merely in the same situation as an ordinary defendant. It may well be, that as under the common law no interest was payable unless provided by a statute or an

[24] [1944] S.C.R. 138.

[25] [1948] S.C.R. 28.

agreement, the same rule was applied also to the Crown and permissive sections (53 of the *Exchequer Court Act* and 18 of the *Crown Liability Act*) were merely adopted to allow interest in meritorious cases.

It seems that generally speaking, interest was not payable on a debt at common law except in certain cases only and if provided by statute.

According to *Halsbury's Laws of England,* 3rd edition, vol. 27, at p. 8, paragraph 8, it is stated that:

> At common law, interest is payable (1) where there is an express agreement to pay interest; (2) where an agreement to pay interest can be implied from the course of dealing with the parties or from the nature of the transaction between the parties or from the nature of the transaction or a custom or usage of the trade or profession concerned; (3) in certain cases, by way of damages for breach of contract (other than a contract to pay money) where the contract, if performed, would to the knowledge of the parties have entitled the plaintiff to receive interest.

According to the same author, 3rd edition, vol. 11, at p. 21, paragraph 33 "the Crown is in the same position as a subject as regards interest on debts and damages, and on judgment debts and costs", and (cf. vol. 22, p. 782, paragraph 1662)

> Every judgment debt, including debts to and from the Crown, carries interest at 4 per cent per annum from the time of entering up judgment.

This meant that in most claims in tort the plaintiff could only get interest on the damages awarded from the date of the judgment and not from the date the cause of action arose. This was changed however in the United Kingdom by the *Law Reform (Miscellaneous provisions) Act* of 1934, which gave the court discretion to allow interest from the date the cause of action arose. The situation in Ontario apparently has not changed in this regard. The *Judicature Act,* R.S.O. 1960, c. 917, sections 35 and 36, provides that interest may be payable in certain limited cases. According to Holmstead and Gale on The Judicature Act of Ontario and Rules of Practice, vol. 1, 1968, at p. 275:

> In certain kinds of tort claims, interest may be allowed by way of damages, e.g. in the case of conversion of or trespass to goods, as noted above.

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> In other actions of tort, semble, that the general principles stated in *Borthwick v. Eldershe S.S. Company* [1905] 2 K.B. 516 at 520, viz: "where the withholding (of money) merely arises in the ordinary process of ascertaining the liability it could not properly be called wrongful."

Ridell J. in *Rowan v. Toronto Ry. Co.*[26] referred to the abhorrence of interest exhibited by the common law and the English objections to interest or usuary as being an explanation for the inability of the plaintiff to collect interest on his damages.

This practice, however, was in contrast to the practice in the Admiralty Court where interest was awarded in the case of the destruction of a ship from the date of the collision (cf. *The Northumbria*[27]; *The Amalia*[28]. In *Straker v. Hartland*[29], the Court of Chancery, hearing a matter which arose out of the collision of two vessels applied the Admiralty rule in allowing interest from the date of the collision.

The position taken in the present case appears to be, as already mentioned, that the Crown is not liable to pay interest unless there is some statute stating that it is so liable or there is a contract between the Crown and the suppliant which deals with the interest to be paid.

The earliest case cited as an authority for this proposition is *In Re Gosman*[30] where, in a very short judgment, the Court said:

> There is no ground for charging the Crown for interest. Interest is only payable by statute or contract.

In *Algoma Central Ry. Co. v. The King*[31] it was stated that the Crown is not liable for interest in Canada as well as in a number of other cases, but it does not appear from these decisions that the Crown holds a special position with regard to interest. It would, indeed, seem to be in the same position as a defendant was, or is at common law. In a number of cases originating in the Province of Quebec, even in actions against the Crown or its agencies, the Quebec practice of allowing interest from the date of the

[26] (1918) 43 O.L.R. 164.
[27] (1869) L.R. 3A & E. 6.
[28] (1863) 15 E.R. 778
[29] (1864) 2 H & M 570.
[30] (1881) 17 Ch. D. 771.
[31] (1901) 7 Ex. C.R. 239.

institution of the action seems to have been followed. The position of the civil law as regards interest (cf. 1056 C.C.) varies from the common law and this was pointed out in the *Northumbria* (*supra*) at p. 10:

> But it appears to me quite a sufficient answer to these authorities to say that the Admiralty Court, in the exercise of an equitable jurisdiction, has proceeded upon another and different principle from that on which the common law authorities appear to be founded. The principle adopted by the Admiralty Court has been that of the civil law—that interest was always due to the obligee when payment was not made *ex mora* of the *obligor*, and that whether the obligation arose *ex contractu* or *delicto*.

The Quebec Civil Code provides in article 1056 that "the amount awarded by judgment for damages resulting from an offence or a quasi-offence bears interest at the legal rate as from the date when the action at law was instituted". This article was introduced on February 21, 1957. It appears, however, from a decision of the Quebec Court of Appeal in *Leduc et al. v. Laurentian Motor Products Ltd. et al.*[32] that it does not create a new right but merely specifies the manner in which the courts should give effect to a right already existing.

The first reported case establishing that the Crown is liable to pay interest in Quebec is *St. Louis v. The Queen*[33] where the Crown was sued for the balance alleged to be due on a contract. The Exchequer Court found in favour of the Crown, but on appeal the suppliant's claim was allowed, Taschereau J. stating at p. 665:

> Judgment will therefore be entered for $61,842.29 with interest from the 2nd of December, 1893, the date of the petition of right and costs.

There is no other reference to the payment of interest, no cases are cited and no reasons are given for allowing interest in this case.

Interest was also allowed in *Laine v. The Queen*[34] which was also a claim under a contract originating in Quebec.

The court comments at p. 128:

> With reference to interest, it has been the rule of this Court not to allow interest except where the same was made payable by statute

[32] [1961] Que. Q.B. 509. [33] (1896) 25 S.C.R. 649.
[34] (1896) 5 Ex. C.R. 103.

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or by contract. But in the case of *St. Louis v. The Queen,* lately decided in the Supreme Court and not yet reported, that Court, I understand, allowed interest to a contractor on the amount found to be due to him, from date affixed to his petition of right.

I do not understand that any reasons were given for departing from the rule laid down in *Gosman's* case but I assume that as the contract in question in *St. Louis'* case was performed within the Province of Quebec, the practice in force in that Province to treat the service of process as a demand of interest, and to allow interest from that date, was followed; the Court being, it would appear, of opinion that the Crown is bound by the rule or practice in that behalf in force in that Province. The rule is, it seems to me, a fair one. It affords at least a measure of relief and justice to suppliants who, in the absence of any statutory provision, or an express agreement, lose the interest on monies that may be found to be justly due to them from the Crown. The only question is as to whether or not the rule is applicable to a petition of right, and that I take to be settled as far as the Province of Quebec is concerned by the case to which I have referred. It may, perhaps, be thought to be unfortunate that the practice should not be uniform throughout Canada, but that is the question for the legislature.

With reference to the date from which interest should be allowed, I am not sure that it would be safe, as a general rule, to allow it from the date when the petition is signed; because in such a case, it would be very easy for the suppliant to antedate his petition. Besides, it would be unreasonable to hold the Crown liable on a demand of which it has had no notice. If the practice in force in Quebec is to be followed, it should, it seems to me, be followed as closely as possible; and I should think that interest should not be allowed at least prior to the date when the petition of right is filed in the office of the Secretary of State.

In 1897 in *Henderson v. The Queen*[35] the question of interest was again dealt with when the Crown was again found liable under a contract and the suppliant claimed interest. The suppliant was successful and the court stated at p. 49 that:

...interest was allowed upon the authority of the case of *St. Louis v. The Queen,* and not because I had myself formed any decided view that the plaintiff was entitled to it. Apart from that case, I should not be at all sure that the Crown is bound by the practice prevailing in Quebec to allow interest from the service of the Writ.

This case then went to the Supreme Court and Taschereau J. stated at p. 434:

A third ground of appeal taken by the Crown is upon the question of interest which the judgment appealed from allowed to the

[35] 6 Ex. C.R. 39, 28 S.C.R. 425.

Respondents upon the amount of the judgment since the date of the reference to the Exchequer Court.

Upon this point the appeal fails. The law of the Province of Quebec rules this case, and according to that law, such interest must be allowed upon a claim of this nature. This is not a case upon a written contract, so that Section 33[36] of the Exchequer Court Act does not apply.

The question of interest was dealt with also in accordance with the law of Quebec in *Ross v. The King*[37].

In *Leclerc v. The King*[38], the suppliant sought to recover damages suffered by reason of delay in transportation. The Court, per Audette J., held that the Crown was liable for the negligence of its employees and interest was awarded from the date at which the petition was left with the Secretary of State.

In *National Dock and Dredging Corp. v. The King*[39], Audette J. again found in favour of the suppliant and stated at p. 56:

> Following the decision of the Supreme Court of Canada in the case of *The Queen v. Henderson*, the cause of action having also originated in the Province of Quebec, the amount recovered will carry interest from the date the petition of right was left with the Secretary of State (Section 4, Petition of Right Act). This date may be established by affidavit. Failing which the interest will run from the date the petition was filed in this Court.

I should also refer to a more recent decision of the Supreme Court of Canada in *Langlois v. Canadian Commercial Corp.*[40], a Quebec case, where an agency of the Crown was sued in contractual damages and where the Court allowed interest in accordance with the law of Quebec on the basis that the obligation incurred by the corporate agency on behalf of the Crown was to be considered as having been incurred by the corporation itself. It was contended in the above case that had the defendant been the Crown and had the action been taken in the Exchequer

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[36] It is interesting to note that section 33 was the forerunner of section 47(*b*) of the present Exchequer Court Act.

[37] (1902) 32 S.C.R. 532.

[38] 20 Ex. C.R. 236.

[39] [1929] Ex. C.R. 40.

[40] [1956] S.C.R. 954.

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Court, it would not have been possible to obtain interest on the damages allowed as the contract in this case was one in writing which fell under the prohibition of section 47(*b*) of the *Exchequer Court Act*.

From this review of the case law it would seem that, with the exception of sections 47 and 53 of the *Exchequer Court Act* and section 18 of *The Crown Liability Act* the Crown holds no special position with regard to interest and is in the same situation as a defendant at common law and should, therefore, in this case be in the same position as a defendant in the province of Quebec. I would, however, go one step further and say that even if the law was that interest can be granted against the Crown only when authorized by statute or accepted by agreement, section 2(*d*) together with section 3(1)(*a*) and (*b*) of the *Crown Liability Act*, would in my view meet with the statutory requirement. If such is the case, claims originating in Quebec, founded on tort and governed by the *Crown Liability Act*, may possibly be dealt with in a manner different from claims originating in another Province. The question is an interesting one and in view of the large amounts involved in this case, an important one. Having regard to the language used in the *Crown Liability Act*, section 3(1)(*a*) and (*b*), it appears that the liability of the Crown for damages caused by tort (which in Quebec means under 2(*d*) delict or quasi-delict) is that of a private person of full age and capacity.

The *Crown Liability Act*, indeed, imposes a liability upon the Crown in such cases for damages as if the Crown was a private person and as far as the relevant law of the province of Quebec is concerned, such damages in such cases always bear interest at the legal rate as from the date when the action at law was instituted (1056 C.C.). The question here is whether section 18 of the *Crown Liability Act* which permits the Minister of Finance "to allow and pay out . . . to any person entitled by a judgment under this Act to any money or costs, interest thereon at a rate not exceeding four per cent from the date of the judgment

until the money or costs are paid", implies that in all claims against the Crown this is the only way interest can be granted.

The above section in my view does not set down such a rule. It deals only with the allowance of interest after judgment and, therefore, deals only with the allowance of interest from the date of the judgment to the payment of the amount awarded. It is also merely permissive, which in view of the reluctance of the common law in some cases to allow interest, gives the Minister a discretion when the common law of a Province may not grant any. This section, indeed, does not say that no interest is chargeable against the Crown, but merely that in some cases, interest may be granted. It would, I should think, take clearer language than this to set aside the right of a claimant from Quebec to obtain compensation for the damages and interest he is entitled to obtain under the laws of that Province and to which the *Crown Liability Act* refers in order to create the liability of the Crown in such cases. After a careful consideration of this matter, I can indeed reach no other conclusion without disregarding the clear language used in section 3(1)(*a*) and (*b*) and 2(*d*) of the Act. The suppliants will, therefore, be entitled to interest from the date of the deposit of their petition of right at a rate of five per cent (5%)[41] which is the legal rate mentioned in Art. 1056 C.C.

It therefore follows that suppliants' petition of right is maintained with costs and they are entitled to whatever damages may be assessed as hereinafter set down with interest at the rate of five per cent (5%) per annum from

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[41] Under section 91 of the BNA Act, Parliament alone can legislate on the subject of interest.

Under section 3 of the *Interest Act* R.S.C. 1952, c. 156, the legal rate of interest is set at 5%.

This statute deals also with the interest to be charged on judgments in sections 13, 14 and 15, but section 12 states that the above sections only apply to Manitoba, British Columbia, Saskatchewan, Alberta and the Territories. Although article 1056 C.C. was not attacked as being *ultra vires* in this case, it is interesting to note that in *Toronto Railway v. City of Toronto* [1906] A.C. 117 an Ontario statute regulating the payment of interest on debts was accepted as effective legislation.

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the date of the deposit of the petition of right. The proceedings taken by the respondent against the third party are dismissed with costs.

An order is issued amending paragraph 70 of the respondent's defence by adding after the words "les dépenses" in the first line thereof, the words, "et les dommages" with costs against the respondent in any event of the cause.

The increased cost of salvaging the vessel from where it capsized as compared to where it could have been taken downstream shall not be recoverable from the respondent.

The matter of assessing the suppliants' damages as well as the matter of determining the difference in the cost of salvaging the vessel from where it capsized as compared to where it could have been taken downstream, shall be determined by reference and in the event of an appeal, such reference shall take place after the appeal.

The respondent is not entitled to limit its liability under the *Canada Shipping Act* and its counterclaim in respect thereto is dismissed with costs. The costs, in the main action, in the third party claim and in the counterclaim shall be determined by taxation before the registrar, unless the parties by consent indicate, subsequent hereto, that they are prepared to have this Court determine such costs by the fixing of a lump or fixed sum in lieu of taxed costs at which time the matter may be further spoken to if necessary.