

BETWEEN:

HERMAN E. GAMACHE PLAINTIFF;

AND

D. R. JONES, J. A. MAHEUX and }
J. W. PICKERSGILL } DEFENDANTS.

Quebec
1967

Aug. 14

Ottawa
Oct. 10

Crown—Pilot—Downgrading of—Powers of Pilotage Authorities—General By-Laws of Quebec Pilotage District—Whether intra vires—Mandamus, whether available—Canada Shipping Act, R.S.C. 1952, c. 29, ss. 327, 329(p), 333.

On April 6th 1966 plaintiff, who had been a licensed pilot in the Quebec Pilotage District since 1948, was appointed a Class A pilot by defendant Maheux, the District Superintendent of Pilots, Department of Transport. Maheux had been appointed to his post by defendant Jones, the Superintendent of Pilots in the Department at Ottawa. On July 22nd 1966 plaintiff was downgraded to Class B at Jones' instance by reason of his conduct as a pilot in a 1963 collision although he had not been penalized therefor by the Commissioner who had investigated the collision under s. 558 of the *Canada Shipping Act*.

The General By-Laws of the Quebec Pilotage District, made by order in council, authorize the District Pilotage Authority to grade pilots, to assign pilots of different grades to various sizes of vessel, and to reclassify pilots found incompetent or unsuitable. The Minister of Transport (defendant Pickersgill) was District Pilotage Authority in accordance with s. 327 of the *Canada Shipping Act*, and the General By-Laws as authorized by s. 327(2) provided for the appointment of a superintendent of pilots to carry out the relevant provisions of the By-Laws.

Held, that the provisions of the General By-Laws for (1) grading pilots, (2) assigning them to various classes of vessel, and (3) downgrading

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them, are *ultra vires* of the Governor in Council and invalid and plaintiff's right as a fully licensed pilot is unaffected thereby or by any acts done thereunder.

1. Sec. 329 of the *Canada Shipping Act* authorizes the issue only of unrestricted pilots' licences and only by by-law confirmed by the Governor in Council (and not by simple appointment); and the Pilotage Authority has no authority under the Act to change or limit a licence after issue. *McGillivray v. Kimber et al* (1916) 52 S.C.R. 146, referred to.
2. Apart from the foregoing a pilot's licence issued under s. 333 confers a vested right to exercise a profession and as such becomes absolute and cannot be affected by regulations subsequently made, as, e.g. by establishing a grade system. *Proc. Gén. du Canada v. La Presse Ltée* [1967] S.C.R. 60, distinguished.
3. Moreover even if there was power to downgrade pilots plaintiff could not be formally downgraded solely on the ground of his conduct in a collision which occurred long before his appointment and for which he had not been penalized by the investigating Commissioner.
4. Assuming the above General By-Laws to have been validly enacted Maheux as District Superintendent of Pilots appointed pursuant to the General By-Laws had the delegated authority required by s. 329(p) of the Act to grade plaintiff, but a formal delegation was unnecessary where as here the Pilotage Authority was Minister of Transport, and even though Maheux was appointed not by the Minister but by Jones since the act of the latter as a departmental official was equally the act of the Authority. *Lewisham Borough Council v. Roberts* [1949] 1 All E.R. 815, applied.
5. Moreover as Maheux was the person empowered to carry out the provisions of the By-Laws Jones had no power to downgrade plaintiff.
6. The profession of pilotage has evolved from a mere service to shipping to one of public interest and pilotage officials are therefore officers of the Crown and amenable to the jurisdiction of the Exchequer Court. While the Minister of Transport is not an officer of the Crown he is sued here as Pilotage Authority appointed by the Governor in Council under s. 327 of the Act. *Ganépy v. The King* [1940] 2 D.L.R. 12 and *Humelman v. The King* [1946] Ex. C.R. 1, applied.
7. The action should be dismissed against defendant Pickersgill who did not direct his mind to the appointment or demotion of plaintiff but left the matter to the other defendants.
8. The downgrading of plaintiff without a hearing violated s. 2(e) of the *Canadian Bill of Rights*, S. of C. 1960, c. 44. Although the decision to demote plaintiff was an administrative one it entailed a duty to observe the principles of natural justice. *L'alliance des professeurs catholiques de Montréal v. Labour Relations Bd. of Que.* [1953] 2 S.C.R. 140, referred to. *Ridge v. Baldwin* [1964] A.C. 40 applied.
9. While *mandamus* would lie against defendants, who acted not merely as servants of the Crown but in the performance of statutory duties, a declaratory judgment would suffice. *The Queen v. the Secretary of State* [1891] 2 Q.B. 326, *The Queen v. Lords Com'rs of Treasury* (1872) 7 Q.B.D. 387, *The Queen v. Special* (1888) 21 Q.B.D. 313, *Min. of Finance of B.C. v. The King* [1935] S.C.R. 278 and *Eastern Trust Co. v. McKenzie Mann & Co.* [1915] A.C. 750, referred to.

ACTION.

Raynold Langlois for plaintiff.

P. M. Troop and *P. R. Coderre* for defendants.

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NOËL J.:—This is an action by the plaintiff, a licensed pilot, residing and domiciled in Quebec City, P.Q., against D. R. Jones, the Superintendent of Pilotage in Ottawa, J. A. Maheux, the Acting Local Supervisor (sometimes called superintendent) of Pilots at Quebec and J. W. Pickersgill, the Minister of Transport, as the Pilotage Authority for the Quebec Pilotage District, praying that this Court

- (1) issue an order declaring that the plaintiff has the right to be a Grade A pilot and that he has had this right from the date of his appointment, April 6, 1966;
- (2) order that defendants reclassify plaintiff as a Grade A pilot for the Quebec Pilotage District, and grant him every right and privilege attending such grade;
- (3) order that, if plaintiff is not so reclassified immediately, a writ of *mandamus* be issued by this Court against defendants;
- (4) order that costs be assessed against defendants whatever the issue of the cause;
- (5) reserve the rights of plaintiff for any other remedy; and finally
- (6) in any event declare that Order in Council P.C. 1960-756 and Order in Council P.C. 1961-425 (whereby the Quebec Pilotage District General By-laws were amended, three grades of pilots, namely Grade A, B and C were established and only Grade A pilots were authorized to pilot any vessel regardless of size, whereas Grade B pilots cannot pilot a vessel exceeding ten thousand tons) are illegal and *ultra vires* of the powers of the Governor-in-Council and order that defendants grant plaintiff every right and privilege attending to pilots entitled to pilot vessels without restriction as to size and order the defendants jointly and severally to pay plaintiff an amount equal to the remuneration received by the Grade A pilots from July 25, 1966, to date.

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The parties immediately prior to trial produced an agreed signed statement as to certain facts which are hereinafter set down:

1. The Plaintiff is and was at all material times a licensed pilot of the Quebec Pilotage District residing and domiciled in the City of Quebec in the Province of Quebec.
2. The Defendant, D. R. Jones, is and was at all material times, the Superintendent of Pilotage of the Department of Transport residing in the City of Ottawa in the Province of Ontario.
3. The Defendant J. A. Maheux was at all material times, the acting Supervisor of Pilots for the Quebec Pilotage District of the Department of Transport and residing at Quebec in the Province of Quebec.
4. The Honourable J. W. Pickersgill is and was, at all material times, the Minister of Transport, and as such the Pilotage Authority for the Quebec Pilotage District.
5. Captain G. Lahaye is and was at all material times the Regional Superintendent of Pilots of the Department of Transport, residing in the City of Montreal in the Province of Quebec.
6. By Order in Council P.C. 1960-756 made on the 2nd day of June, 1960, as amended by Order in Council P.C. 1961-425 made on the 23rd day of March, 1961, section 24 of the General By-law of the Quebec Pilotage District (was implemented):

"24(1) Every pilot in the District shall be graded by the Authority as a Grade A, Grade B or Grade C pilot and at the commencement of each season of navigation a list of pilots shall be issued by the Authority showing the grade of each pilot.

(2) Every pilot shall on admission to service in the District be classified as a Grade C pilot.

(3) The Authority may classify a pilot

(a) as a Grade B pilot after he has served satisfactorily at least two years as a Grade C pilot; and

(b) as a Grade A pilot after he has served satisfactorily such period as a Grade B pilot as the Authority deems necessary.

(4) Every Grade A pilot who has not attained the age of sixty-five years prior to the day on which this section comes into force shall become a Grade B pilot at the end of the season in the year in which he attains the age of sixty-five years.

(5) Every Grade A pilot who, in the opinion of the Authority, is incompetent or unsuitable may be reclassified as a Grade B pilot by the Authority.

(6) Notwithstanding anything in this section, every pilot who, at the time of the coming into force of this By-law, holds a pilot's licence shall be classified by the Authority as a Grade A or Grade B pilot."

7. On the 2nd day of June, 1960, there were about 77 pilots licensed for the Quebec Pilotage District, 10 of which were classified as Grade A Pilots and the remainder, including the Plaintiff, were classified as Grade B Pilots

8. Prior to the 30th day of January, 1966, the Defendant J. A. Maheux asked the Plaintiff whether if he was asked, he would be interested, merely as a matter of information, in accepting a classification as a Grade "A" pilot.
9. By letter dated the 30th day of January, 1966, the Plaintiff wrote to the Defendant J. A. Maheux as follows:
- «Pour faire suite à notre récente conversation, il me fait plaisir de vous dire que j'accepterai de passer dans la classe «A» quand mon tour viendra d'y être nommé par l'autorité.»
10. By letter dated the 6th day of April, 1966, the Defendant J. A. Maheux wrote to Mr. Wilfrid Ménard, Secretary-Treasurer of La Corporation des Pilotes du Bas St-Laurent as follows:
- «Nous désirons vous informer que les Pilotes Olivier Paquet et H. E. Gamache ont été nommés dans la classe «A», en attendant d'autres développements »
11. On the 27th of April 1966, by inter-departmental telex, the Defendant D. R. Jones sent the following message to the Defendant J. A. Maheux:
- "Kindly supply this office with dates when Pilots Charles Auguste A. Chounard and Hermend Gamache became "A" Pilots"
12. On the 27th of April, 1966, by inter-departmental telex, the Defendant J. A. Maheux sent the following message to the Defendant D. R. Jones:
- "Charles Auguste Chounard became "A" Pilot 21-04-61
Hermend Gamache became "A" Pilot 06-04-66"
13. Subsequent to the receipt of the message referred to in paragraph 12 hereof, the Defendant D R Jones requested his assistant Captain Seeley to secure an explanation from Captain Lahaye on the Plaintiff's 'appointment'.
14. By inter-departmental memorandum dated May 5th, 1967, Captain Lahaye recommended to the Defendant, D R Jones that the Plaintiff be reclassified as a Grade "B" pilot as a result of the collision between the *Tritonica* and *Roonagh Head* (which collision took place on July 20th, 1963 and the report of the Commissioner therein is dated November 30th, 1963) stating that his "appointment" was a mistake in the first place.
15. By inter-departmental memorandum dated May 27, 1966, the Defendant J A. Maheux forwarded to the Defendant D R. Jones a list of pilots in which the Plaintiff was classified as an "A" Pilot.
16. By inter-departmental memorandum dated July 8th, 1966, the Defendant D. R. Jones advised Captain Lahaye that he concurred with Captain Lahaye's action in reclassifying the Plaintiff as a class "B" Pilot.
17. By letter dated the 22nd July, 1966 Captain Lahaye wrote to the Defendant J. A. Maheux as follows.

«La classification des pilotes de la circonscription de Québec a été révisée dernièrement par l'Autorité, spécialement en ce qui a trait aux pilotes faisant parti présentement de la catégorie «A».

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Il a été décidé que Monsieur Jean Bernier conserverait sa présente classification jusqu'à ce que jugement soit rendu sur l'appel qu'il a logé dans l'affaire *Lawrencecliffe Hall/Sunek*

L'Autorité considère que Monsieur H. E. Gamache soit reclassifié de la catégorie «A» à «B» en raison de son comportement lors de la collision *Tritonca/Roonagh Head*.

18. Subsequent to 6th April, 1966 and prior to July 25th, 1966 the Plaintiff was dispatched on 34 voyages on vessels requiring a Grade "A" Pilot.
19. After April 6th, 1966, the Plaintiff did nothing to render him, in the opinion of the Pilotage Authority, unsuitable or incompetent to be a Grade "A" pilot and to warrant reclassification of the Plaintiff to a Grade "B" pilot pursuant to subsection (5) of section 24 of the Quebec Pilotage District General By-law, and there was no change in the Plaintiff's physical ability to render him unsuitable or incompetent to be a Grade "A" pilot since April 6th, 1966.
20. By letter dated the 25th day of July, 1966, the Defendant J. A. Maheux wrote to the Plaintiff as follows:

«Je reçois, ce jour, l'instruction que le Ministère a réétudié la liste que j'ai fait parvenir en regard des classes de pilotes.

On m'informe que le Ministère n'approuve pas votre statut de pilote classe «A» et que vous êtes, à partir d'aujourd'hui, classé dans la classe de pilote «B».

21. The Pilotage Authority for the Quebec Pilotage District has not, at any material time, expressly authorized the Superintendent of Pilots or the local Supervisor of Pilots for the Quebec Pilotage District to exercise the function or power vested in the Pilotage Authority by section 24 of the Quebec General By-laws

Nothing in this Agreement prevents the parties or either of them advancing any additional evidence at the trial of this action.

The plaintiff's experience as a navigator commenced in the year 1928. He obtained a Canadian certificate as mate for home trade voyages in 1932. Between 1932 and 1948 he was employed on various ships as deck officer in the capacity of mate. On July 9, 1948, he was granted a pilot licence by the Minister of Transport for Canada as Pilotage Authority for the Quebec Pilotage District and from July 9, 1948, to June 2, 1960, he acted as pilot in the Quebec Pilotage District. On June 2, 1960, the Quebec Pilotage District General By-laws (P.C. 1957-191) were amended by Order in Council 1960-756 and three (3) grades of pilots, namely Grade A, Grade B and Grade C were established thereby. From the above date, the plaintiff was appointed to Grade B and acted as such until April 6, 1966. On April 6, 1966, the plaintiff was appointed to Grade A in the following circumstances. J. A. Maheux,

Acting Supervisor or Superintendent of Pilots for the District of Quebec, in his examination on discovery which forms part of the evidence herein, explains how the appointment was made at pp. 4, 5, 6 of the transcript:

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Q Pourriez-vous expliquer à la Cour dans quelles circonstances le pilote Gamache a été assigné aux bateaux de classe A?

R. Voici: c'est que d'abord il a été décidé, je me rappelle pas s'il en manquait à ce moment-là ou si on a décidé... quand je dis «on» c'est le département, si le département a décidé d'augmenter le nombre des pilotes de classe A, je me rappelle pas exactement les circonstances, c'est un ou l'autre; de toute façon, le nombre n'était pas suffisant, il fallait en avoir d'autres; on a suivi les normes d'habitude, c'est-à-dire qu'on a... quand je dis «on» c'est le capitaine Lahaie et moi-même, avons relevé les dossiers des pilotes suivant... par ordre de séniorité, tel que ça se fait d'habitude; à ce moment-là, quand on est arrivé sur le dossier de monsieur Gamache, j'ai fait remarquer au capitaine Lahaie que monsieur Gamache était le pilote qui avait été sur le Tritonica; sa réponse a été: «Est-ce qu'il a été condamné?»; j'ai dit: «Non, pas à ma connaissance».

Q Et puis?

R A ce moment-là j'ai demandé verbalement à monsieur Gamache si ça l'intéressait si on le demandait, tout simplement comme matière d'information; la première chose que j'ai sue, il m'a écrit, il m'a dit: «J'accepterais si vous me demandiez, ça me ferait plaisir»; à ce moment-là il avait accepté, il avait écrit; quand on l'a nommé il avait déjà accepté.

Q Qui l'a nommé monsieur Gamache?

R Moi, sous les directives du capitaine Lahaie.

Q Vous, sous les directives du capitaine Lahaie?

R Oui.

This appointment was confirmed to the Secretary of the Corporation of Lower St. Lawrence River Pilots by letter dated April 6, 1966 (Exhibit 1) from Maheux, the local supervisor or superintendent of pilots.

At pp. 6, 7 and 8 of the transcript, J. A. Maheux further explains how the appointment of plaintiff as a Grade A pilot was made and under what authority.

Q Ça sera le document «A» de cet examen au préalable. Vous dites que vous avez suivi des normes d'habitude, expliquez-moi donc ça, qu'est-ce que vous voulez dire par normes d'habitude?

R On examine les dossiers pour s'assurer que le pilote en question n'a pas eu d'accidents graves, qu'il n'a pas été condamné, qu'il a un bon record pour qu'il soit considéré; s'il a un mauvais record il peut être simplement rejeté.

Q Est-ce qu'à votre connaissance toutes les promotions sont accordées de cette façon?

R. Oui monsieur.

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Q Elles sont accordées par consultation entre le surintendant du district et le surintendant régional?

R. Oui.

Q. Est-ce à votre connaissance, avant juillet 1966, est-ce qu'il y a eu des nominations de changées par d'autres personnes ailleurs au Ministère des Transports?

R Des gens...des pilotes qui étaient de classe A qui ont été retournés à B?

Q Des promotions qui ont été changées?

R. Oui, si on s'en tient à ça; Jean-Paul Blouin, qui a été replacé dans la classe B à la suite d'un accident.

Q Mais il est arrivé quelque chose entre sa nomination et le moment où il a été dégradé?

R Il a eu un accident.

Q. Est-ce qu'il y a eu des nominations de pilotes, nominations qui ont été faites par vous-même après consultation avec le capitaine Lahaie, et qui auraient été changées pour des causes autres qu'un événement qui se serait produit après la nomination?

R Pas à ma connaissance.

Q Est-ce qu'on vous a déjà fait part du fait que vous n'auriez pas l'autorité pour faire des nominations semblables?

R Je ne le crois pas.

Q. En vertu de quelle autorité avez-vous fait ces nominations?

R Sous les directives de mes supérieurs qui me donnent des ordres; je suis un employé, je suis les ordres qu'on me donne.

Q Vos supérieurs dans les circonstances c'est le capitaine Lahaie?

R. Le premier, oui, c'est-à-dire mon suivant par ordre d'hierarchie.

Q Le capitaine Lahaie, si je comprends bien, a été le surintendant du district de Québec pendant plusieurs années?

R. Oui.

Q Avant d'être promu?

R Disons quelques années.

Q Deux ans, je crois?

R. Oui.

Q Avant d'être promu surintendant régional?

R. Ou.

Q. Maintenant, après sa nomination est-ce que le pilote Gamache a été assigné à des navires de classe A?

R. Ou.

Q. Est-ce que vous avez eu des faits à rapporter, soit des accidents ou autres choses, après sa nomination?

R. Non monsieur.

Q. Est-ce que la conduite du pilote Gamache a été...doit être critiquée en tant que pilote de classe A, de quelque façon?

R. Pas que je sache.

Q. Pas à votre connaissance?

R. Non.

Q Est-ce que vous êtes satisfait, vous, en tant que surintendant à l'époque de la conduite du pilote Gamache?

R Aussi bonne que les autres.

He also added at pp. 12 and 13 of the transcript that since the system of classes has existed all appointments are made in the very same manner in which the plaintiff was appointed:

- Q Une fois qu'un pilote est nommé comme ça à une classe, qu'est-ce qui arrive, qu'est-ce que vous faites en particulier?
- R. J'avise le Comité des Pilotes, le bureau des Escoumins, le bureau de Québec, que monsieur Untel est dans la classe A à ce moment-là; le lendemain, du moment qu'il commence à voyager, il figure sur la liste de toutes les classes, pas en partie, pas séparé comme ça.

Maheux explained at pp. 14 and 15 of the transcript how the plaintiff was downgraded from Grade A to Grade B:

- Q Pourriez-vous expliquer pourquoi il n'est plus pilote de classe A?
- R A un moment donné j'ai eu une lettre du capitaine Lahaie de bien vouloir l'aviser qu'il était pilote de classe B, qu'il était reclassifié B, parce que le Département n'approuvait pas sa nomination.
- Q C'était la première fois que ça arrivait une chose semblable?
- R. Qu'on demandait...qu'on forçait...
- Q Qu'on dégradait?
- R. C'était la première fois; à part l'accident, Jean-Paul Blouin en a été un; je me rappelle pas d'autres.
- Q Charles-Auguste Chouinard?
- R. C'est toujours la même suite; à la suite d'un accident aussi.
- Q. Le pilote Gamache n'agit plus comme pilote de classe A depuis juillet 1966?
- R. Non monsieur.
- Q. Est-ce que vous savez, à votre connaissance personnelle, pourquoi on a changé la nomination du pilote Gamache?
- R. Parce que j'ai eu une lettre.
- Q. Savez-vous pourquoi?
- R. Si vous me demandez mes impressions, c'est une autre paire de bottes.
- Q Vos impressions?
- R. Est-ce que je suis obligé de les donner?
- Q. J'aimerais connaître vos impressions.
- R. Je suis sous l'impression qu'il y a eu des influences quelconques, des téléphones peut-être même anonymes, je le sais pas.

He reiterated at p. 16 of the transcript that before the plaintiff was appointed as a Grade A pilot, he had had discussions with Mr. Lahaie, the Regional Superintendent of Pilots.

- Q Avant que soit faite la nomination de monsieur Gamache dans la catégorie A, est-ce que vous avez eu des entretiens avec monsieur Lahaie au sujet de cette nomination?
- R. Oui, dans son cas comme dans les autres, son dossier a été ouvert, son dossier a été sorti, on l'a examiné tous les deux à ce moment-là.

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- Q Lorsque vous dites que vous l'avez examiné tous les deux, est-ce qu'il était question à ce moment-là de collision?
- R. Certainement; j'ai même fait la remarque que c'était monsieur Gamache qui était à bord du Tritonica; sur cette remarque-là le capitaine Lahaie m'a demandé: «Est-ce qu'il a été condamné?»; il n'y avait absolument rien dans son dossier.

D. R. Jones, the Superintendent of Pilotage in Ottawa, had this to say on the matter of his appointment as well as the appointment of J. A. Maheux as Acting Supervisor or Superintendent of Pilots for the District of Quebec and of Captain Lahaie as the Regional Superintendent of Pilots, at Montreal, at pp. 20, 21, 22 and 23 of the transcript:

- Q. And what are your terms of reference as superintendent of pilotage?
- A. Terms of reference in the precise sense of a document furnished to me? Is that the way you mean?
- Q Yes.
- A. I don't think that such a document exists; the duties, of course, are well known to me; we are appointed to the position, as you are aware, by the Civil Service Commission; this does not outline the duties in a precise way.

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- Q What are those duties, captain, that you know very well?
- A. The duties of the position are those of the operating chief of the pilotage district where the minister is; I am the head office operating chief for all pilotage matters, head office at the Department of Transport
- Q You are signing your letters, I believe, as superintendent of pilotage; where does that title come from?
- A This is really a Civil Service title, it has no relevance in the Act, in the Canada Shipping Act which, as you are well aware, refers to the pilotage districts and the by-laws under the Act do not refer to the superintendent of pilotage in Ottawa at all.
- Q Who was superintendent of pilots for the Quebec Pilotage district between April 1966 and July 1966?
- A There was no person properly at that position at that time, but there was an acting superintendent: Mr. Maheux.
- Q. Am I to presume that as acting superintendent he had all the immediate responsibility of a superintendent, but in a temporary capacity?
- A. Yes

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- Q. By whom Mr. Maheux was appointed?
- A He was appointed...I cannot think of a precise person that I can be sure of; he was appointed with the full cognizance of various officers, including myself.
- Q You're going to answer, captain Jones! Who appointed Mr. Maheux? I want to know the person.

A Well! It is when we do not have to make, to the best of my recollection, a written appointment of him, but there is no doubt that he was appointed; I cannot recall of any written document signed by any particular person.

Q. For the third time, captain Jones: who appointed Mr. Maheux?

A. I would say that I appointed him.

Now, later on, My Lord, on the same page:

Q Under which authority did you appoint Mr. Maheux as acting superintendent of pilots for the Quebec Pilotage district?

A. I appointed Mr. Maheux to carry out my duties; I am appointed to my duties, and subject to confirmation by other people, I am able to do this

Q In other words, you have implied authority?

A Yes

Page 7.

Q Now, there is another element involved in this matter, a person who became involved in the correspondence in this file: captain Lahare; could you explain to me who captain Lahare is?

A Captain Lahare is the regional superintendent of pilots, his office in Montreal, he exercises surveillance over the districts of Quebec, Montreal and Cornwall.

Q Does he have, in his position, any authority under the regulation by-laws governing pilotage?

A No, it is not the regulations, nor is it the Act; this is a Civil Service position

This answer, My Lord, is on page 8; and we continue:

Q Do I understand clearly that he has no authority in this position...

A. Yes.

Q. He has no authority either under the Canada Shipping Act or the regulation by-laws governing pilotage?

A No; he has authority from another source.

Q Where does he get this authority from?

A He gets his authority from his appointment to the position as a civil servant.

Q Authority in matters of pilotage; you will admit you will concur with me, captain Jones, that a civil service appointment is merely a formality, authority must come from somewhere; from where will he get this authority?

A He has no authority in the sense ..

Q He doesn't have any authority?

A Not in the legal sense you speak of.

Q How about the pilotage authority? Has he delegated authority as local regional superintendent?

A. He has no delegated authority in a formal manner, no

Q Informally?

A No.

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Asked if he had delegated his authority to the Regional Superintendent of the Pilots, he answered at p. 24:

A No I have no authority in that sense myself. I cannot delegate it.

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At p. 25 Jones stated it is not frequently that pilots are assigned to a grade and then downgraded afterwards adding that he didn't know why it (the appointment) did happen in this case "you can see that when I saw it, I cleared (queried) it".

He also explained at pp. 26 and 27 of the transcript how a pilot was appointed from Grade B to Grade A:

A. We first approach him to find out whether he is interested.

Q. Who approaches him?

A. The local supervisor approaches him after having decided that this man can possibly be a satisfactory grade A pilot.

Q. Under whose authority does he do that?

A. It is conceivable that at this stage he has not received any authority from anyone; it's his duty to find out the general changes in pilots, this does not involve any commitment of any sort.

Q. This is the first stage?

A. Yes.

Q. The pilot is approached to see whether or not he agrees to become a class A pilot?

A. Yes.

Q. He is approached by the local superintendent?

A. Yes.

Q. Do you know if pilot Gamache had been approached by the local superintendent to become a class A pilot?

A. Yes, he had.

Page 17, My Lord:

Q. What procedure was followed?

A. In this case of Mr. Gamache's appointment, his assignment to his duty was made prior to his consulting with head office.

Q. Consulting you?

A. Consulting me, yes.

Q. Is Gamache's case the only case?

A. No, I didn't think it is, I suspect there were others; at that time, for example, there was Chounard's case, the same development took place; when I saw this, I acted as subsequent events show.

Q. You saw this in April 1966 and action was taken in July?

A. This is right.

He admitted, however, at pp. 27 and 28 that no appointments to Grade A had since 1960 ever been made by the Pilotage Authority and that "this matter had in fact been handled perhaps at lower levels in the Pilotage Authority". He also admitted that he could not give a valid reason why such a procedure had been followed and that in fact the pilots are appointed by "people like (myself) and juniors (to him)" and that the documents or letters confirming the appointments are signed by the acting super-

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visor at the time, that is the district supervisor of pilots whom he says is the man referred to in the by-law as the superintendent and that "in this case, of course, no man had succeeded the former superintendent, it was done by Mr. Maheux". He also admitted at p. 29 that it was under his instructions that Gamache's appointment was subsequently changed from A to B in July 1964.

He was then asked at p. 29 of the transcript whether what occurred in July 1966 with respect to the plaintiff was a reclassification to which he answered at p. 30:

A. No, I would say no; it was a reassignment properly speaking. as, according to Jones, Gamache was never properly appointed a Grade A pilot.

Asked by counsel for the plaintiff why Gamache was not properly appointed, he answered:

A. He was not properly appointed to A according to my knowledge and my knowledge is reliable.

Q Do you have authority to appoint pilots?

A. No

Q Are you the person mentioned as the superintendent in the by-law of the Quebec Pilotage District?

A. No.

Q. Who is?

A. That time in question, Mr. Maheux.

The parties through counsel agreed that:

J. W Pickersgill, as Pilotage Authority, did not personally appoint the plaintiff as Grade A pilot or otherwise direct his mind to this case.

It is against the above background that the present proceedings were taken.

The Pilotage District of Quebec is established by statute and is, according to the *Canada Shipping Act, R.S.C. 1952, c. 29*, under the authority of the Pilotage Authority. Section 327 of the Act, which is set out hereunder, provides that the Minister of Transport may be appointed Pilotage Authority by the Governor in Council:

327. (1) Notwithstanding anything in this Part, the Governor in Council may, when it appears to him to be in the interest of navigation, appoint the Minister to be the pilotage authority for any pilotage district, or for any part thereof; and the Minister shall thereupon supersede the then existing pilotage authority for that district or part of a district.

(2) Whenever the Minister is appointed as pilotage authority for any district, his successors in office or any Minister acting for him

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or, in the absence from Ottawa of the Minister, or of any Minister acting for him, his lawful deputy, shall be the pilotage authority, and any such pilotage authority may by by-law confirmed by the Governor in Council authorize the Superintendent of Pilots in the district to exercise any of his functions, and, for such time or such purpose as he may decide, authorize any person to exercise any particular function or power vested in the pilotage authority by this Act or any by-law made hereunder.

Section 329(*p*) of the Act provides that "... every pilotage authority shall, within its district, have power, from time to time, by by-law, confirmed by the Governor in Council to

(*p*) authorize the pilotage authority to delegate to any person or persons either generally or with reference to any particular matter all or any of the powers of such pilotage authority."

In 1957 by P.C. 1957-191, the Minister of Transport of the time was named pilotage authority for the pilotage district of Quebec and section 3 thereof provided for the appointment of a "superintendent" and set down his duties as follows:

SUPERINTENDENT

3. (1) The superintendent shall have the direction of pilots and apprentices and may make orders for the effective carrying out of this By-law and, without limiting the generality of the foregoing, may make orders with respect to

- (a) the conduct of pilots and apprentices;
- (b) the use by pilots and apprentices of buildings and premises; and
- (c) the attendants of pilots and apprentices before the Superintendent.

Section 15 and section 24 of the above Order in Council (which deals with the pilots assigned for special service on regular lines or vessels) were amended in 1960 by P.C. 1960-756 and replaced by a new section 24 which, as already mentioned, classified pilots in three grades and contained the following paragraph 5:

(5) Every Grade A pilot who, in the opinion of the Authority, is incompetent or unsuitable may be reclassified as a Grade B pilot by the Authority.

Prior to the year 1960, the system was quite different as explained by J. A. Maheux, at pp. 11 and 12 of the transcript. There existed line pilots and the companies who owned ships decided who their pilots would be. The pilots who were interested in piloting a ship of a company made a request to the latter who in turn requested the Department of Transport to appoint certain pilots for their line

of ships and the Department would then send the district superintendent a note to the effect that such a pilot had been appointed. In 1960, these line pilots were replaced by Grade A pilots and the larger ships (above 10,000 tons) are now the responsibility of this selected highly qualified group who are paid higher fees for their services.

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The first question to be determined here is whether or not the classification of pilots in grades and the discretionary power given a pilotage authority, in its licensing capacity to demote a pilot from Grade A to Grade B for incompetence or unsuitability as effected by section 24(1) and (5) respectively of the Quebec Pilotage District General By-law (P.C. 1957-191 as amended by P.C. 1960-756) are validly enacted.

The second matter to be dealt with is whether or not in the event the above by-law is validly enacted, the appointment of pilot Gamache to Grade A by Maheux was a valid one.

I will deal with the position taken by the plaintiff on the latter question first and then look into the validity of the Quebec Pilotage District General By-law. The plaintiff submits that in an organization such as the Department of Transport, or the Government, an appointment or a decision made by someone in authority in the department, is presumed to be a valid decision and that, therefrom, it is for the defendants to establish that it is not valid. Counsel for the plaintiff further submits that the appointment of Gamache to Grade A is valid as although section 327(2) provides that "any such pilotage authority may by by-law, confirmed by the Governor in Council, authorize the Superintendent of Pilots in the district to exercise any of his functions" he has so delegated his authority under section 3 of P.C. 1957-191, hereinabove reproduced.

According to plaintiff, the classification of a pilot is merely a question of administration dealing with the despatching of pilots to various categories of vessels. The superintendent, in accordance with section 3 of the said by-law, is authorized to make orders for the effective carrying out of the by-law and this is in fact how the law was interpreted by the Pilotage Authority and by his officers, as both Maheux and Jones admit that the appointment of pilot Gamache was made in the same manner as all the other appointments to class A had been made since

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the system started in 1960. Counsel for the plaintiff further submits that it is not even necessary for the Pilotage Authority to pass a by-law in order to authorize the district superintendent of pilots to exercise any of his functions and that mere authorization is sufficient as the latter part of section 327(2) of the *Canada Shipping Act*, R.S.C., 1952, chapter 29, Part VI states that the Pilotage Authority may... "for such time or such purpose as he may decide, authorize any person to exercise any particular function or power vested in the pilotage authority by this Act or any by-law made hereunder".

Plaintiff's other line of attack is that in any event, section 24 of the by-law is invalid in that the Pilotage Authority must act within the limits of the powers given him in section 328 *et seq.* of the *Canada Shipping Act* and that nowhere in these sections is there authority to limit the licence of any pilot issued under section 333, paragraph (2) of the Act which reads as follows:

(2) Every pilot who has received a licence from a duly constituted authority in that behalf, may retain the same, under and subject to the provisions of this Part, and shall, for the purposes of this Part, while so retaining the same, be a pilot licensed by the pilotage authority of the district to which his licence extends.

This licence gives its holder the right to pilot vessels of any size, as nowhere in the Act is the holder of a licence restricted in this respect. There are, in fact, two limitations only in the Act which can be applied to a licence holder: (1) a limitation of district under section 333(2) of the Act and (2) a limitation of time under section 329(*n*) (as amended by 4-5 Elizabeth II, chapter 34, section 12) during which any licence to a pilot shall be in force, and under 329(*o*) where a pilotage authority may renew for a further limited term any licence issued for a limited period pursuant to paragraph (*n*).

Counsel for the plaintiff urged that a pilot who is issued a licence and has complied with all requirements prior to the issuance of such a licence has an acquired right that cannot be taken away from him unless he has violated the statute or a validity implemented rule or by-law, such as a pilot involved in a shipping casualty whose certificate is suspended following a formal investigation or the case of a pilot who violates one of the stipulations of the by-law

which deals with liquor or drugs (cf. section 329(f)(iii) of the *Canada Shipping Act*) or who is guilty of insubordination (as contemplated by section 329(f)(iv) of this Act).

Nor can a pilotage authority by a mere by-law or regulation limit a pilot who possesses an unlimited licence, to a certain category or type of vessel only and prevent him from being assigned to a vessel or vessels involving higher remuneration. The holder of a pilot's licence under the statute has a right to pilot the largest vessels in the district and, thereby, receive the privileges of those who do.

The plaintiff finally submits that he was, on April 6, when he was appointed a Grade A pilot, competent and suitable, that he did nothing thereafter to render himself incompetent and unsuitable or to warrant a reclassification to Grade B and that the acts of the defendants in downgrading him as they did are illegal and unjust and "in complete disregard to the *Canadian Bill of Rights*, 1960 S.C., chapter 44, more specifically to section (1) of said Act and to his fundamental common law rights".

The position taken by the defendants, on the other hand, is most extraordinary. Counsel for the defendants submits that by-law 24 of P.C. 1960-756 is valid and that although the plaintiff had been given an A pilotage grading by Maheux, the latter was in no way authorized to do so. He agrees that he was the Acting District Superintendent for the District of Quebec, but maintains that he was not appointed by the Pilotage Authority (i.e., the Minister of Transport) as such having been merely appointed by the Civil Service although Jones, the Superintendent of Pilotage, in Ottawa, admitted he had appointed him. He finally urged that in any event, this Court had no jurisdiction to entertain an action against the Honourable J. W. Pickersgill as under the authority of a decision of the President of this Court in *Pouliot v. The Minister of Transport*¹ he could not be considered as an officer of the Crown and, therefore, this Court has no jurisdiction herein under section 39 of the *Exchequer Court Act*, R.S.C. 1952, chapter 98, which is the only section under which such jurisdiction could exist. This section reads in part as follows:

29. The Exchequer Court has and possesses concurrent original jurisdiction in Canada

. . .

¹ [1965] 1 Ex. C.R. 330.

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(c) in all cases in which demand is made or relief sought against any officer of the Crown for anything done or omitted to be done in the performance of his duty as such officer; ...

I will first deal with the question as to whether section 24 of P.C. 1960-756, which established the three classes of pilots in the district of Quebec, is valid or not as, if it is not valid, then it cannot affect the rights of the plaintiff to pilot any type or class of ships nor, for that matter, can it restrict any other pilot duly licensed to pilot in that district and that would be the end of the matter.

I do believe that section 15(2a) (as amended by P.C. 1961-425) (whereby pilots of different grades were assigned to various sizes of vessels) and section 24(1) (whereby pilots were graded in three classes, A, B and C) which are both contained in Order in Council P.C. 1960-756, are illegal and *ultra vires* of the powers of the Governor in Council. It therefore also follows that section 24(5) of P.C. 1960-756 which purports to give discretionary power to a pilotage authority to demote a pilot from Grade A to Grade B for incompetence or unsuitability also becomes useless and falls by the way as a result of the illegality of the above sections although this last section is also invalid for additional reasons of which I will say more later.

The above sections 15(2a) and 24(1) are illegal and *ultra vires* for the simple reason that section 329 of the *Canada Shipping Act*, chapter 29 and its heads of power reproduced hereunder do not authorize the Pilotage Authority to license pilots or to affect a pilot's licence otherwise than as set down therein or in the statute. From a reading of these heads of power, it is clear that the only licences the Pilotage Authority is authorized to issue are licences for full pilots (without any restrictions as to the size of vessels they may pilot) and apprentices and the only manner in which such pilots can be licensed is by by-law confirmed by the Governor in Council (cf. sub-section (d) of section 329 of the *Canada Shipping Act*). They indeed cannot be licensed by a simple appointment under a procedure set down in a by-law such as contemplated in the above Orders in Council nor can they be broken down in categories by by-law without an amendment to the Act.

The Pilotage Authority under section 329(a) is entitled to determine the qualifications of pilots but in so far only as they are "persons applying to be licensed pilots and apprentices".

The pilot must then be licensed by by-law as provided in subsection (d) of section 329 of the Act and the licence so obtained cannot then be revoked or otherwise affected except in the manner provided for in the statute. The only provisions in the statute which can affect a pilot's licence are section 568 of the *Canada Shipping Act* where a pilot's licence can be cancelled or suspended by a Court of inquiry and subsections f(iii), (iv), (v), (vi), (vii) or (g) of section 329 where for the offenses therein set down, and providing valid by-laws are passed, a pilot's licence can be affected by suspension or withdrawal. There are also three other cases contemplated by the statute where a pilot's licence may be affected and that is 329(i) which provides for the compulsory retirement of any licensed pilot who has reached 65 years of age or where under 329(j) he has become incapacitated by mental or bodily infirmity or by habits detrimental to his usefulness as a pilot. Finally, section 333(3) states that a pilot who acts beyond the limits of his licence becomes an unlicensed pilot.

There is nothing in the statute or in the heads of power of section 329 hereunder which authorizes the Pilotage Authority to go beyond what I have hereinabove set out and this appears clearly from a reading of the subsections:

- (a) determine the qualification in respect of age, time of service, skill, character and otherwise required of persons applying to be licensed as pilots and apprentices;
- . . .
- (d) licence pilots and apprentices, and grant certificates to masters and mates to act as pilots of ships on which they are employed as masters or mates respectively, as hereinafter provided;
- (e) fix the terms and conditions of granting licences to pilots and apprentices, the terms and conditions of granting such pilotage certificates as are in this Part mentioned to masters and mates, settle the form of such licences and certificates and the fees payable for such licences and certificates, and regulate the number of pilots;
- (f) make regulations for the government of pilots, and of masters and mates holding certificates enabling them to act as pilots on their own ships, and for ensuring their good conduct on board ship and ashore and constant attendance to and effectual performance of their duty on board and on shore, and for

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the government of apprentices, and for regulating the number thereof and for the holding of enquiries either before the pilotage authority or any other person into any matters dealt with in this Part; and without restricting the generality of the foregoing make regulations with respect to every licensed pilot or apprentice pilot who, either within or without the district for which he is licensed,

- (i) lends his licence,
- (ii) acts as pilot or apprentice pilot whilst suspended,
- (iii) acts as pilot or apprentice pilot while under the influence of intoxicating liquor or narcotic drugs, while on duty or about to go on duty,
- (iv) is guilty of insubordination, misbehaviour, or malingering, or who pilots a vessel beyond the limits of the pilotage district without the consent of the pilotage authority,
- (v) refuses or delays, when not prevented by illness or other reasonable cause, proof of which to the satisfaction of the pilotage authority shall lie on him, to take charge of any ship within the limits of his licence, upon the signal for a pilot being made by such ship, or upon being required so to do by the master, owner, agent or consignee thereof, or by any officer of the pilotage authority of the district for which such pilot is licensed, or by any chief officer of Customs,
- (vi) refuses, when requested by the master to conduct the ship on board of which he is into any port or place into which he is licensed to conduct the same, except on reasonable ground of danger to the ship, or
- (vii) quits the ship which he has undertaken to pilot, before the service for which he was hired has been performed, without the consent of the master;
- (g) make rules for punishing any breach of any regulation made pursuant to this section by penalty or by the withdrawal or suspension of the licence or certificate of the person guilty of such breach and notwithstanding anything contained in any other provision of this Act, impose, recover and enforce any such punishment;
- (i) provide for the compulsory retirement of any licensed pilot who has attained the age of sixty-five years, subject to the provisions of this Part for the granting of a new licence;
- (j) provide for the compulsory retirement of any licensed pilot who has not attained the age of sixty-five years who has become incapacitated by mental or bodily infirmity or by habits detrimental to his usefulness as a pilot;
- ...
- (n) limit the period during which any licence to a pilot shall be in force . . .
- (o) renew for a further limited term, not less than two years, any licence issued for a limited period pursuant to paragraph (n);

There is indeed nothing therein which authorizes the Pilotage Authority to categorize the pilots in classes as it

did in 1960 or to change or limit a licence once it is issued, and I should add, nor can a licence-holder be affected by terms and conditions created after his licensing.

In this regard, counsel for the defendants took the position that although section 329 of the *Canada Shipping Act* and the above mentioned subparagraphs employ general words relating to the licensing of pilots or the government of pilots, they can be construed to authorize interference with acquired private rights. He also relies on section 31, of chapter 158, R.S.C. 1952, subparagraph (1), paragraph (g) of the *Interpretation Act* which states that:

31(1) in every Act, unless the contrary intention appears,

...

(g) if a power is conferred to make any rules, regulations or by-laws, the power shall be construed as including a power, exercisable in the like manner, and subject to the like consent and conditions, if any, to rescind, revoke, amend or vary the rules, regulations or by-laws and make others;

and here he maintains that under authority of the decision of the Supreme Court of Canada in *Le Procureur Général du Canada v. La Compagnie de Publication La Presse, Limitée*² which held that an Order in Council passed prior to the expiry of a radio licence changing the basis on which the fees were to be charged for such licence and increasing such fees was still valid even if it had the effect of retroactivity affecting the licence of the respondent.

I can find no application of the above decision to the present instance as Abbott J. (at p. 76), who wrote the notes for the majority decision of the Court, relied on the fact that in that case "... there was no contractual relationship between the Crown and respondent, and the latter had no vested or property right in the licence which it held. What it did have was a privilege granted by the state, conferring authority to do something which without such permission would be illegal."

In the present instance I have no doubt that the licence obtained by a pilot under section 333 cannot be revoked or otherwise affected except in the manner provided for by the statute. The licence obtained by a pilot under section 333 of the Act is not merely a privilege granted him but once granted becomes a vested or acquired right to pilot ships and exercise his profession. This right (unless

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² [1967] S.C.R. 60.

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restricted by the statute) is absolute and cannot be affected or limited in any way, unless when acquired it was limited by terms and conditions contained in the Act governing the licensing authority and in the regulations as they existed at the time the licence was issued. Such acquired rights as those obtained by a licensed pilot cannot be affected even by a valid amendment to the regulations subsequent to the issuance of the licence unless he acquiesces thereto or such changes are made by way of an amendment to the Act.

There is no question in my mind that the acquired rights of the holders of licences were infringed when the grade system was created in the Quebec district by section 24 of P.C. 1960-756 in so far as it limited existing licences to Grade B and I would so hold even if the grading system of pilots had been validly passed and pilots could be validly licensed as Grade A pilots by a simple appointment as contemplated in the Order in Council.

I am compelled, however, to go one step further and say that even the legality of the discretionary power purported to be given to a Pilotage Authority by section 24(5) of P.C. 1960-756 where it is stated that "every Grade A pilot who, in the opinion of the authority is incompetent or unsuitable may be reclassified as a Grade B pilot by the authority" is most questionable. I say it is questionable because a Pilotage Authority's control of the terms and conditions of a pilot's licence is neither absolute or discretionary. This was clearly set out in *John B. McGillivray v. F. C. Kimber et al*³ by the Supreme Court (per Anglin J.) when he stated at p. 173:

. . . The relationship of master and servant does not exist between the Board and the pilot. The Board has a statutory control over the licensing of pilots within the territory for which it is constituted. Its jurisdiction to cancel a pilot's licence is also statutory . . .

A pilot's licence cannot be issued otherwise than under the statute, by by-law and once given cannot be affected except, as already mentioned, by the statute or by by-laws or regulations validly passed at the time of the licensing. If a pilot is validly graded he also cannot be downgraded except for reasons contemplated by the statute or by validly passed by-laws or regulations. Indeed once a licence

³ (1916) 52 S.C.R. 146

is issued or a pilot is graded, he has an acquired right to the licence or grade he possesses. A pilot holding a Grade A licence can be downgraded at the discretion of the Pilotage Authority only if a Grade A is considered a privilege and this it cannot be without an appropriate amendment to the Act making it such. It certainly cannot be done by the mere passing of a (unauthorized) by-law. It therefore follows that for this additional reason, section 24(5) of the said by-law is invalid and *ultra vires* of the powers of the Governor in Council under the Act and could not validly be used to downgrade plaintiff.

It is, however, also questionable that even if the discretionary powers given the Authority to downgrade pilots had been validly enacted, plaintiff would have been validly downgraded from Grade A to Grade B retroactively so to speak on the sole basis of his conduct as a pilot in the collision between the *Tritonica* and the *Roonagh Head* on the St. Lawrence River which had occurred on July 20, 1963, some three years prior to his appointment to Grade A. This collision was the subject of a formal investigation by the Honourable Mr. Justice Arthur Smith as Commissioner under section 558 of the *Canada Shipping Act*, chapter 29, R.S.C. 1952, and a decision was rendered on November 29, 1963, some two and a half years prior to the date upon which the plaintiff was classified as a Grade A pilot.

I should mention here that although the plaintiff was made a party to the above formal investigation and although his conduct was held in some respects to have "caused or at least contributed to" the collision (cf. p. 13 of the Report, Exhibit 12) I must conclude that it was not blameworthy as it did not involve the cancellation or suspension of his licence or the payment of a penalty as provided for in section 568 of the *Canada Shipping Act*.

The evidence disclosed that the Acting Superintendent of Pilots for the District of Quebec, Maheux, together with the Regional Superintendent of Pilots for the District of Montreal and Quebec, had both graded the plaintiff as a Grade A pilot on April 6, 1966, at a time when not only was the above investigation's report available to Jones in Ottawa, to Lahaie and Maheux in Quebec, but also only after the latter had raised the matter of the plaintiff's implication in the collision, had discussed it with Lahaie, and

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finally discarded it as not involving anything which could affect his "suitability or competence" to be appointed a Grade A pilot.

Maheux, at pp. 16 and 17 of the transcript deals with this matter as follows:

- Q. Lorsque vous dites que vous l'avez examiné (le dossier de Gamache) tous les deux, est-ce qu'il était question à ce moment-là de collision?
- R. Certainement; j'ai même fait la remarque que c'était monsieur Gamache qui était à bord du Tritonica; sur cette remarque-là le capitaine Lahaie m'a demandé: «Est-ce qu'il a été condamné?». Il n'y avait absolument rien dans son dossier.

Having thus by his appointment to Grade A acquired rights to such a grade, I fail to see how he could be downgraded and lose such rights on the sole basis of something which had occurred long before his appointment and which had not been considered serious enough to warrant any disciplinary action by the Commissioner or even prevent him from being appointed by both Lahaie and Maheux unless, of course, his appointment to Grade A was invalid. Such, indeed, is the position taken by counsel for the defendants on the basis that the appointment of Gamache to Grade A was a nullity because neither the local superintendent of pilots for the district of Quebec, Maheux, nor the regional superintendent, Lahaie for that matter had authority to so appoint him.

He submits that the only manner Maheux could have been authorized to make this appointment was by delegation as provided by section 329(p) of the Act which authorizes the Pilotage Authority "to delegate to any person or persons either generally or with reference to any particular matter, all or any of the powers of such pilotage authority" and that as there was no delegation herein either to Lahaie or Maheux, they were not authorized to appoint the plaintiff to Grade A and such appointment is, therefore, non-existent. Both Lahaie and Maheux, and even Jones, although bearing the title respectively of Regional Superintendent of Pilots for the District of Quebec, Acting Superintendent of Pilots for the District of Quebec and Superintendent of Pilotage in Ottawa are, according to counsel for the defendants, merely appointments made by the Civil Service Commission and have, in fact, no statutory powers whatsoever regarding pilotage under Part VI of the *Canada*

Shipping Act. There is, I believe, an answer to this submission in that, firstly, section 3 of P.C. 1957-191 hereinabove reproduced is a delegation to the superintendent (which, the definition in the by-law states, “means: the Superintendent of Pilots or a person authorized to perform any of the functions of the Superintendent”) of the powers of the Pilotage Authority which section states that “the Superintendent shall have the direction of pilots and apprentices and may make orders for the effective carrying out of this By-law”.

The superintendent in the present instance contemplated by the by-law (and admitted by Jones, the Superintendent of Pilotage in Ottawa.) is the local supervisor in Quebec, Maheux who, as already mentioned, appointed the plaintiff as a Grade A pilot.

If he had under section 3 of P.C. 1957-191 the authority to make orders for the effective carrying out of his by-law, including the upgrading of pilots as contemplated by section 24 of the by-law and could validly appoint under the statute, I would have to conclude that his appointment of plaintiff as a Grade A pilot was, therefore, legally and validly effected.

I should add, however, assuming the validity of P.C. 1957-191 and its amendments, that even if the grading of pilots had not, in accordance with section 327(2) of the *Canada Shipping Act*, been delegated by by-law to the local superintendent, or that the latter had not been appointed in express terms by the Pilotage Authority, as claimed by Jones, this would not end the matter as I do not believe that in a case such as here where the Pilotage Authority is the Minister of Transport a formal delegation or a formal appointment of officials is required to authorize all those who in fact exercise such powers to make proper decisions and appointments and this is particularly so when they have, as here, exercised such powers over a long period of time. Furthermore, the evidence discloses that Maheux as well as Lahaie were appointed by Jones, the Superintendent of Pilots in Ottawa and although there is a well known maxim which states that a delegate may not re-delegate and therefore the Pilotage Authority may not permit another to exercise a discretion entrusted by a statute to himself, I do not believe that the principle of *delegatus non*

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potest delegare applies to the present instance where the Pilotage Authority happens to be the Minister of Transport. It does not apply because the act done by a departmental official such as here is equally the act of the authority and the departmental official has the power to act as if the authority had done it personally.

In *Lewisham Borough Council and Another v. Roberts*⁴ Bucknill L.J., referring to the dictum of the county court judge pointed out the manner in which ministers must operate in discharging their numerous duties and functions:

After quoting from the judgment of Lord Greene M.R. in *Carltona, Ltd. v. Works Comrs* ([1943] 2 All. E.R. 563) the learned county court judge continued:

... applying these considerations to the present case, I am unable to say that the evidence shows that Mr. O'Gara in purporting to sanction on behalf of the Minister the requisitioning of property, and in particular in issuing the document of Nov. 12, 1946, was acting without authority to do so. On the contrary, the presumption being that ministerial acts will be performed, not by the Minister in person, but by responsible officials in his department, I think where such acts of an official nature, all of them involving the knowledge and some of them requiring and receiving the concurrence of other officials, have, as here, continued over a long period, this of itself affords cogent evidence that the person in fact acting in such an official capacity was duly authorized to act.

Bucknill L.J. at p. 822, referring to the dictum of Lord Greene M.R. in the *Carltona* case at p. 563, enlarged upon the manner in which ministers with multiple functions must of necessity operate when he said:

In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministries. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to the ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would

⁴ [1949] 1 All E.R. 815 at 821.

have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them. In the present case the assistant secretary, a high official of the ministry, was the person entrusted with the work of looking after this particular matter and the question, therefore, is, relating those facts to the argument with which I am dealing, did he direct his mind to the matters to which he was bound to direct it in order to act properly under the regulation?

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As a matter of fact, when a government department delegates its functions to an official, it is only putting someone in its place to do the acts which it is authorized to do. And as stated by Denning L.J., at p. 824, in the *Lewisham* case (*supra*):

...I take it to be quite plain that when a Minister is entrusted with administrative, as distinct from legislative, functions he is entitled to act by any authorised official of his department.

In the same case, Jenkins J., at p. 828, had this to say on this same matter:

The validity of the delegation which Mr. O'Gara purported by this letter to effect on behalf of the Minister was further attacked on the ground that, even if he was, in fact, authorized by the Minister to effect such delegations in the sense that the duties entrusted to him in terms extended to the making of such delegations, he could only be so authorized as a delegate of the Minister's powers with the result that as a matter of law he could not himself validly effect any further delegations, in view of the well-known principle of *delegatus non potest delegare*. I think this contention is based on a misconception of the relationship between a Minister and the officials in his department. A Minister must perforce, from the necessity of the case, act through his departmental officials, and where, as in the Defence Regulations now under consideration, functions are expressed to be committed to a Minister, those functions must as a matter of necessary implication, be exercisable by the Minister either personally or through his departmental officials, and acts done in exercise of those functions are equally acts of the Minister whether they are done by him personally, or through his departmental officials, as in practice except in matters of the very first importance they almost invariably would be done. No question of agency or delegation as between the Minister and Mr. O'Gara seems to me to arise at all. I think this view is borne out by the observations of Lord Greene MR, in *Carltona, Ltd. v. Commissioners of Works*. The delegation effected by the letter of Nov. 12, 1946, must, therefore, in my view, be regarded as a delegation by the Minister acting through one of his departmental officials in the person of Mr. O'Gara, and not as a purported delegation by Mr. O'Gara of functions delegated to him by the Minister. I am, accordingly, of opinion that this ground of objection also fails.

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It would, therefore, follow (if sections 15(2a), 24(1) and 24(5) of P.C. 1960-756 had been validly passed) that whether a proper delegation of the powers took place or not, Maheux and Lahaie would have been properly appointed as local and regional superintendents of pilots for the district of Quebec by the Pilotage Authority, through his department official Jones, and by virtue of the authority given him by section 3(1) of the general by-laws of the Quebec Pilotage District, Maheux's appointment of plaintiff as a Grade A pilot would have been therefore validly effected.

It also follows that if Maheux was the authorized authority to appoint Gamache and the latter was properly appointed by him as a Grade A pilot, it would seem that charged with the effective carrying out of the above by-law, he alone could downgrade him provided, of course, he had valid reasons to do so. It is indeed questionable that Jones had the authority or the right to downgrade him for unsuitability or incompetence under section 24(5) of the said by-law as he did although it is clear that even if he could do so, it could not be for conduct, which had occurred some three years prior to his appointment as a Grade A pilot which had not been held blameworthy by the Commissioner and which had been considered and weighed by Maheux who was authorized to appoint him and for this additional reason also, such downgrading is a nullity and of no effect.

Counsel for the defendants also submitted that Jones and Maheux and the Minister, as the public authority, were public officials but were not officers of the Crown and, therefore, this Court had no jurisdiction herein. He argued that the Pilotage Authority, historically and traditionally is not a Crown function and has never been a Crown function, and referred to *Paquet and another v. Corporation of Pilots for and Below the Harbour of Quebec and Attorney-General for Canada*⁵ as showing that originally the supervision and control of pilots in the Quebec District was a private function carried out by the Trinity House of Quebec. Now although originally the services of pilots were merely for the convenience of shipping, the *Canada Shipping Act*, R.S.C. 1952, indicates that the profession has evolved from a mere service to shipping to one of public interest and it therefore follows that the Pilotage Authority

⁵ [1920] A.C. 1029.

and those officials who apply the Act with regard to pilotage are not merely acting as public officials but as officers of the Crown as well to whom Parliament has assigned public duties.

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Defendants further submitted that in any event this Court has no jurisdiction to entertain an action against J. W. Pickersgill because as Minister of Transport he is not an officer of the Crown. A Minister of the Crown was held not to be an officer of the Crown by the President of this Court in *Pouliot v. The Minister of Transport (supra)*. Mr. Pickersgill is not, however, being sued here as Minister of the Crown but as the Pilotage Authority appointed by the Governor in Council under section 327 of the *Canada Shipping Act*, Part VI, chapter 29, R.S.C. 1952, and as the Pilotage Authority he is an officer of the Crown, as decided in *Gariépy v. The King*⁶ by Angers J. and by O'Connor J. in *Harris H. Humelman et al v. The King*⁷. In the case of *Gariépy v. The King* Angers J. expressed himself as follows:

It was not in his capacity as Minister of the Crown but as pilotage authority that the Minister of Marine acted. It is only in the pilotage districts of Quebec and Montreal that the Minister constitutes the pilotage authority in virtue of the law in force on the dates concerned; in other districts the pilotage authority is composed of pilot commissioners or of a committee of three to five persons appointed by the Governor in Council. Section 399 of the *Canada Shipping Act*, R.S.C. 1927, c. 186 provides "The Halifax Pilot Commissioners shall be the pilotage authority of the pilotage district of Halifax" and s. 400 of the Act provides that "The St John Pilot Commissioners shall be the pilotage authority of the pilotage district of St John" Section 411 provides that "The Governor in Council may constitute pilotage authorities for any pilotage district established in any places not included within either of the pilotage districts of Quebec, Montreal, Halifax or St. John;" the section adding that such authorities shall consist of not less than three or more than five persons

It follows from these provisions, it seems to me, that the Minister of Marine when acting as pilotage authority on the Montreal or Quebec districts does not exercise the powers conferred on him by the *Department of Marine Act* but those attributed to him by ss. 395 and 397 of the *Canada Shipping Act*, and that being the case he appears to me to be an officer of the Crown in the same position as the pilotage authority created by ss. 399 and 400 or constituted under s. 411.

I have no intention of belabouring the capacity or quality of the Pilotage Authority in this case because I need not come to a conclusion with respect to the present Pilotage

⁶ [1940] 2 D.L.R. 12 at 26

⁷ [1946] Ex. C.R. 1.

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Authority incumbent, Mr. Pickersgill (who, incidentally, according to the newspapers resigned as Minister of Transport and, therefore, no longer is the Pilotage Authority) as the latter, as agreed by the parties, never directed his mind to the appointment or the demotion of the plaintiff, leaving such matters as he had always done while he was the Pilotage Authority for the District of Quebec to those departmental officials (the other defendants) who, in fact, did discharge such duties. I must, therefore, dismiss the action taken against him. This dismissal, however, will be without costs for obvious reasons in that plaintiff had every reason to believe, until the beginning of this trial, that he had personally discharged his statutory duties as Pilotage Authority, and the defence was conducted on behalf of all the defendants with no additional costs involved in the defence of Mr. Pickersgill.

I am also of the view that plaintiff's demotion, or the refusal to allow him to pilot ships beyond 10,000 tons, as effected by the sole arbitrary decision of defendant Jones in Ottawa, was in complete disregard of the *Canadian Bill of Rights*, 8-9 Elizabeth II, vol. 1, 1960. Notwithstanding what the *Canada Shipping Act* says it cannot be construed as saying that it goes against the clear prescriptions of the *Canadian Bill of Rights* and particularly paragraph (e) of section 2 thereof which reads as follows:

2. . . . No law of Canada shall be construed or applied so as to

. . .

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

The decision taken by Jones and Maheux was no doubt an administrative one but it also entailed in my view a duty to act herein judicially and it involved a matter which affected the rights of subject and which carried with it an extra-remuneration. It therefore contained all that was necessary to require these public officials to observe the principle of natural justice (cf. *L'alliance des professeurs catholiques de Montréal v. Labour Relations Board of Quebec*⁸). Rinfret C.J. stated the principle in the *Alliance* case as follows:

Le principe que nul ne doit être condamné ou privé de ses droits sans être entendu, et surtout sans avoir même reçu avis que ses droits

⁸ [1953] 2 S.C.R. 140 at 154.

seraient mis en jeu est d'une équité universelle et ce n'est pas le silence de la loi qui devrait être invoqué pour en priver quelqu'un. A mon avis, il ne faudrait rien moins qu'une déclaration expresse du législateur pour mettre de côté cette exigence qui s'applique à tous les tribunaux et à tous les corps appelés à rendre une décision qui aurait pour effet d'annuler un droit possédé par un individu.

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In the same case, Rand J. stated at p. 161:

...but in the complexity of governmental activities today, a so-called administrative board may be charged not only with administrative and executive but also with judicial functions, and it is these functions to which we must direct our attention. When of a judicial character, they affect the extinguishment or modification of private rights or interests. The rights here, some recognized and others conferred by the statute, depend for their full exercise upon findings by the Board; but they are not created by the Board nor are they enjoyed at the mere will of the Board; and the Association can be deprived of their benefits only by means of a procedure inherent in judicial process.

The most recent decision on the question of natural justice is *Ridge v. Baldwin et al*⁹, where the watch committee of a municipality dismissed the chief constable of its police force on evidence which it felt was satisfactory without affording him a hearing. The majority of the House of Lords held that the decision of the watch committee to dismiss the chief constable was null and void for failure to observe the principles of natural justice, although from a reading of the notes of judgment it appeared that the chief constable was arrested and charged together with other persons, with conspiracy to obstruct the course of justice and was later acquitted on the criminal charge. Later, on a further charge alleging corruption against the chief constable on which no evidence was offered, the judge referred to the borough's police force and remarked on its need for a leader "who will be a new influence and who will set a different example from that which has lately obtained". The majority of the Court held that:

... As the appellant was not the servant of the respondents and they could dismiss him only on grounds stated in section 191(4) of the Act of 1882, and they dismissed him on the ground of neglect of duty, they were bound to observe the principles of natural justice by informing the appellant of the charges made against him and giving him an opportunity of being heard and that they had not done so.

The above decision is very apposite and for the same reasons I also would hold that the decision of Jones to

⁹ [1964] A.C. 40 at 42.

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downgrade Gamache from Grade A to Grade B was also null and void for failure to observe the principles of natural justice.

Having thus come to the conclusion that plaintiff could not be restrained as he was to piloting ships under 10,000 tons only, or if the categorizing in classes were valid he could, in the circumstances, be validly downgraded, the question now remains what remedy can be applied to correct the situation. The matter is not an easy one to determine because the parties involved, both Maheux and Jones, are officials acting at the same time as public officials and officers of the Crown.

The plaintiff requests this Court to declare that he has a right to be a Grade A pilot and that he has had this right from the date of his appointment, April 6, 1966, and this, in view of the decision I have arrived at that the grade system is invalid I cannot do nor can I for the same reasons order as requested by plaintiff his reclassification as a Grade A pilot for the Quebec Pilotage District with every right and privilege attending such grade.

Plaintiff has also requested in the conclusions of his statement of claim that Order in Council P.C. 1960-756 and Order in Council P.C. 1961-425 be declared illegal and *ultra vires* of the powers of the Governor in Council and that defendants be ordered to grant plaintiff every right and privilege attending to pilots entitled to pilot vessels without restriction as to size and to pay plaintiff jointly and severally an amount equal to the remuneration received by the Grade A pilots from July 25, 1966 to date.

I am prepared to declare that the following sections of P.C. 1960-756 and P.C. 1961-425, i.e., sections 15(2a) (whereby pilots of different grades were assigned to various sizes of vessels) section 24(1) (whereby pilots were graded in three classes A, B and C) and section 24(5) (which purports to give discretionary power to a pilotage authority to demote pilots) are *ultra vires* and invalid. I am also of the view that defendants Jones and Maheux should grant plaintiff every right and privilege attending to pilots entitled to pilot vessels without restrictions as to size.

The means requested to enforce the Order of this Court is the prerogative remedy of *mandamus* which is a useful means for compelling performance of public duties. In

essence it is a royal command issued in the name of the Crown from the High Court ordering the performance of a public legal duty. Disobedience to a *mandamus* is a contempt of court for which the normal penalty is imprisonment. As *mandamus* emanates from the Crown, it follows I believe, that it cannot be against the Crown as it would be incongruous that the Crown should command itself to act.

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The legal problem here is whether such a writ could be issued against a Crown servant simply acting in his capacity of servant as there can be no judicial interference where a Crown servant is entrusted with certain duties by the Crown even if such duties involve some statutory duty owed to members of the public. His only duty in such a case is owed by him to the Crown and no one else but the Crown can enforce such duties. In *The Queen v. the Secretary of State*¹⁰ Lord Esher M.R. said:

. . . Assuming that the Crown were under any obligation to make this allowance to the claimant a *mandamus* would not lie against the Secretary of State, because his position is merely that of agent for the Crown and he is only liable to answer to the Crown whether he has obeyed the terms of his agency or not; he has no legal duty as such agent towards any individual.

In *The Queen v. Lords Commissioners of the Treasury*¹¹ where money in the Treasury was appropriated by Parliament for a given purpose, it was also "held that a *mandamus* would not lie inasmuch as the Lords of the Treasury received the money, which was granted to Her Majesty, as servants of the Crown, and no duty was imposed upon them as between them and the persons to whom the money was payable".

It therefore follows that in such a case any complaint or default cannot be made to the servant but must be made to the Crown.

The distinction between a person acting as a servant of the Crown and a mere agent of the legislature is well put by Lord Esher when Sir George Jessel, as he then was, as counsel in the above case at p. 389 thereof:

Where the legislature has constituted the Lords of the Treasury agents to do a particular act, in that case a *mandamus* might lie against them as mere individuals designated to do that act; but in the present case, the money is in the hands of the Crown of the Lords

¹⁰ [1891] 2 Q.B. 326 at 338.

¹¹ (1872) 7 Q.B. 387.

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of the Treasury as ministers of the Crown; in no case can the Crown be sued even by writ of rights. If the Court granted a *mandamus*, they would be interfering with the distribution of public money; for the applicants do not shew that the money is in the hands of the Lords of the Treasury to be dealt with in a particular manner.

When Parliament has imposed a duty on a particular person acting in a particular capacity a *mandamus* may therefore issue although such person is a servant of the Crown and acting on the Crown's behalf because his legal duty is personal and owed personally to the members of the public.

Such a situation was found in *The Queen v. The Commissioners for Special Purposes of the Income Tax*¹² where it was held that a *mandamus* would lay against the Special Commissioners of Income Tax (who were acting as servants of the Crown) "to issue orders for repayment of the amounts certified to be overpaid".

I should also refer to *The Minister of Finance of British Columbia v. His Majesty the King*¹³ where it was held (per Davis J.):

that in a proper case a *mandamus* lies against the Minister of Finance to compel payment out of the assurance fund

and the distinction was also made in that case between a Minister acting as a servant of the Crown and acting as a mere agent of the legislature to do a particular act.

I do find that such a personal duty has been imposed by Parliament on the Pilotage Authority as well as on all those officials such as Jones or Maheux or Lahaie who, as already mentioned, are officials through whom the Pilotage Authority here exercises his statutory functions and the Crown's immunity from *mandamus* is therefore no impediment in the present case.

There will be, I believe, no necessity of issuing a *mandamus* herein and a simple declaratory judgment should be sufficient. When saying this I have in mind the words of Sir George Farwell in *Eastern Trust Company v. McKenzie, Mann & Co.*¹⁴ at p. 759:

The second point taken by Idington J. is equally untenable and even more important. The non-existence of any right to bring the Crown into Court, such as exists in England by petition of right, and in many of the colonies by the appointment of an officer to sue

¹² (1888) 21 Q.B.D. 313.

¹³ [1935] S.C.R. 273.

¹⁴ [1915] A.C. 750.

and be sued on behalf of the Crown, does not give the Crown immunity from all law, or authorize the interference by the Crown with private rights at its own mere will. There is a well-established practice in England in certain cases where no petition of right will lie, under which the Crown can be sued by the Attorney-General, and a *declaratory order obtained*, as has been recently explained by the Court of Appeal in England in *Dyson v. Attorney General* ((1911) 1 K.B. 419) and *Burghes v. Attorney-General* ((1912) 1 Ch. D. 173). It is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it the Courts are open to the Crown to sue, and it is the duty of the Executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it.

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Judgment should and is therefore hereby issued declaring that section 15(2a) of P.C. 1960-756 as amended by P.C. 1961-425, sections 24(1) and 24(5) of P.C. 1960-756 (which revoked section 24 of P.C. 1957-191, the Quebec Pilotage District General By-law) are *ultra vires* of the powers of the Governor in Council and, therefore, invalid and that consequently plaintiff has the right since July 9, 1948, when he was licensed as a pilot to be a fully licensed pilot for the District of Quebec, to be treated as such and to be granted every right attending thereto including the right to pilot ships and vessels of any tonnage within the said pilotage district of Quebec.

It should also follow, however, that in the event the categorizing of pilots in 1960 and their appointment to Grade A is valid, the plaintiff shall be entitled to a declaration that he has the right to be a Grade A pilot, that he had this right from the date of his appointment, April 6, 1966, and that plaintiff should be reclassified as Grade A pilot for the Quebec Pilotage District and granted every right and privilege attending such grade.

The plaintiff is entitled to costs against both defendants Maheux and Jones to be taxed in the usual way.