BETWEEN:

NORD-DEUTSCHE VERSICHERUNGS GESELLSCHAFT *et al.* — SUPPLIANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT;

AND

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

Montreal 1967
Nov. 6
Nov. 9

*Court—Judges—Allegation of bias—Motion to appoint another judge—Principles of natural justice.*

A Commissioner appointed under s. 558 of the *Canada Shipping Act* to investigate a collision of ships in the lower St. Lawrence River found that negligence by a ship's pilot was the cause of the collision, but this court, on an appeal by the pilot heard by three judges, rejected this finding Subsequently suppliants filed a petition of right in this court for the loss of lives and a ship in the collision. The defence was that the collision was caused by the pilot's negligence, as the Commissioner had found, and the Crown moved that on the ground of natural justice the case be heard by a judge who had not sat on the appeal which rejected the Commissioner's finding.

*Held,* the motion must be dismissed.

Exchequer Court Rule 2, considered.

MOTION.

*A. S. Hyndman* for suppliants.

*Léon Lalande, Q.C.* and *Paul Ollivier, Q.C.* for respondent.

*J. Brisset, Q.C.* for third party.

JACKETT P.:—This is an application by the Attorney General of Canada for an order that the judge who will preside at the trial of this Petition of Right proceeding be other than one of the judges who sat and rendered judgment in the appeal of Cyrille Bélisle, being Admiralty Proceeding No. 308[1], on the following ground:

> That having heard and considered evidence relating to and expressed their opinion on some of the principal questions in issue

[1] [1967] 2 Ex. C.R. 141.

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in this action, it is not in accordance with the principles of natural justice that any of the judges who sat on the said appeal should now preside at the trial of this action.

Pursuant to Part VIII (section 588(1)) of the *Canada Shipping Act,* R.S.C. 1952, chapter 29, the Minister of Transport appointed The Honourable Mr. Justice Charles A. Cannon of the Superior Court of Quebec to be a Commissioner to hold a formal investigation into the circumstances attending a collision between the M.V. *Transatlantic* and the M.V. *Hermes* on the St. Lawrence River on April 10, 1965, and the subsequent loss of the M.V. *Transatlantic* with loss of lives.

The Commissioner, who was for that purpose a "court" (section 558(1)), held the investigation with three assessors selected for the purpose by the Minister (section 563).

By virtue of paragraph (*a*) of section 568(1) of the *Canada Shipping Act,* the "court" (i.e. the Commissioner) holding a formal investigation into such a "shipping casualty" has power, if at least one assessor concurs, to cancel or suspend the licence of a pilot "if the court finds that the loss..., or serious damage to, any ship, or loss of life has been caused by his wrongful act or default". In other words, the pilot must have committed a "wrongful act or default" and that wrongful act or default must have "caused" the loss or damage to the ship or loss of life.

On March 18, 1966, the Commissioner delivered his decision, with which all three assessors concurred.

To understand the present application, it is important to note some of the background.

As far as I can ascertain, it is common ground that the *Hermes* entered a narrow channel that was only partially marked when the *Transatlantic* was approaching from the other direction, and went too close to the submerged bank of that channel with the result that she took a sheer that resulted in her colliding with the *Transatlantic.*

The pilot on the *Hermes* took the position that he was following the line indicated by an aid to navigation—the Pointe du Lac ranges—and that a recent change in the position of one of the marks in question, of which mariners did not know and had not been advised, was the cause of his ship going over too close to the bank of the channel.

The Commissioner held, *inter alia*, that the licence of the pilot on the *Hermes* should be suspended for three months for reasons expressed as follows:

> All this evidence shows that there is no doubt that there is no fault to impute to the *Transatlantic* nor to her pilot or officers, but that on the contrary the fault is to be attributed to Pilot Bélisle who was imprudent in deciding to meet the *Transatlantic* in the narrow part of the channel when he could have met her in the wide part of the Yamachiche anchorage and that he was in fault:—
>
> (*a*) in going full speed into the narrow part of the channel when he had to meet a ship in it;
>
> (*b*) in attempting this manoeuvre when buoy 51 L that was to serve him as a guide to indicate the entrance of the narrow channel was not in place;
>
> (*c*) in following the line given by the Pointe du Lac ranges in line when he knew since last year that the lower range was not in its place;
>
> (*d*) in proceeding at full speed when it was the first time in 1965 that he was going down this part of the River as the pilot of a ship;
>
> (*e*) in neglecting to use his radio telephone.

The Commissioner explained the relatively light sentence, notwithstanding the "disastrous consequences" of the collision, as follows:

> In suspending the licence of Pilot Cyrille Bélisle for a relatively short period, the Court has taken into account the fact that he has a good record and that the primordial responsibility is that of the Department of Transport Pilot Bélisle was attentively following the line indicated by the Pointe du Lac ranges in line and which was supposed to be in the middle of the channel. He mentions this fact several times in his evidence If this line had indicated the middle of the channel, the accident would not have happened. Also, if there had been buoys on the South side of the channel and specially if there had been a buoy at the place where buoy 51 L is put in the Summer, the pilot would have known the exact location of the commencement of the narrow channel and he could have avoided the accident.

By virtue of section 574(3) of the *Canada Shipping Act*, the pilot appealed to the Exchequer Court of Canada on its Admiralty side from this decision in so far as it applied to him, and this Court heard and decided the appeal when Dumoulin and Noël JJ. and the undersigned were present. This Court heard the appeal with the assistance of two assessors brought in under section 30 of the *Admiralty Act*, R.S.C. 1952, chapter 1; and, in accordance with the practice of the Court, decided questions of seamanship involved in the appeal after having obtained and given consideration to the assistance received from such assessors with regard thereto. (It is important to remember that the

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views concerning such questions expressed to the Commissioner by the assessors sitting with him were not available to this Court, and that, as far as questions of seamanship are concerned, this Court's only expert assistance was the opinions obtained from the assessors called in aid in this Court.)

Reasons for Judgment in this Court were delivered by Noël J.[2] Dumoulin J. and myself adopted the Reasons so given. They dealt with the Commissioner's findings of "wrongful acts or omissions" as follows:[3]

> With respect to the finding that Bélisle was imprudent in deciding to meet the *Transatlantic* as he did there appears from the evidence to have been no good reason why the *Hermes* coming downstream should have stopped or reduced her speed in order to meet the *Transatlantic* in the anchorage section of the Yamachiche bend rather than in the bend in the dredged channel. The weather and visibility were good and had there been any reason to take any measure in order to meet a vessel coming in the opposite direction at a sharp turn or narrow passage, the ship stemming the tide, i e, the *Transatlantic* and not the *Hermes* (which was going downstream with the current) would have had to stop or come to a position of safety below or above the point of danger in accordance with Regulation 12, P C. 1954-1925 dated December 3, 1954, (Appendix B), (Exhibit C-5).
>
> Furthermore, it must be borne in mind that, although the Yamachiche bend and anchorage appear clearly on Exhibit C-2, on the day of the collision there was only one spar buoy on the north side that, if visible and reliable, would be of use in indicating to those on board the M/V *Hermes* the limits of the cut of the channel at the eastern part of the anchorage On the other hand, it must be borne in mind that while the Pointe du Lac beacons were Belisle's only aid to navigation, the Commissioner has held that ships were entitled to rely on them "to know where is the center of the narrow channel". Bélisle was therefore entitled to believe that his ship would meet the *Transatlantic* in a normal manner, port to port and without difficulty.
>
> It therefore follows that it is not possible under these circumstances to find in the conduct of the appellant, in choosing to enter the channel and meet the *Transatlantic* therein, anything to justify the suspension of the appellant's certificate as a pilot.
>
> The Commissioner held Bélisle blameworthy for going full speed into a narrow part of the channel when he had to meet a ship in it. The evidence discloses that the speed of the *Hermes* was 15 knots which is not full speed but full manoeuvring speed and which, under the favourable weather conditions which prevailed at that time, does not appear to have been excessive. Furthermore, he was guiding the ship by the Pointe du Lac range beacons on which he was entitled to rely and while he was entering a portion of the channel that, at this point, was narrower than it had been in Yamachiche bend which

[2] [1967] 2 Ex. C.R. 141.

[3] *Loc. cit.* at pp. 145 ff.

he was leaving, it was still of a breadth of 550 feet, which allowed ample room for navigation having regard to the size of the two ships involved. Now, although there is always a danger of interaction between two ships meeting in a narrow channel and of bank effect, which may cause a ship to sheer if a ship is too close to the bank, the appellant had no way of knowing at the time, and there was no reason why he should have apprehended, that he was being misled by Pointe du Lac range into an area in proximity to the bank (the latter being covered by water) where danger of bank effect existed and, therefore, cannot be held blameworthy because of the speed of the *Hermes* at the time even if such speed would increase the unforseeable bank effect on his vessel.

Indeed, had the *Hermes* been in the central portion of her own fairway as Bélisle was entitled to assume he was with Pointe du Lac ranges in line, there was no imprudence in entering the cut at full manoeuvring speed.

The Commissioner blames the appellant, secondly, for attempting this manoeuvre (i e, going full speed into the narrow part of the channel) which, for the appellant, consisted only in a slight change of course to port, when summer buoy 51 L, a guide to indicate the entrance of the narrow channel, was not in place.

The evidence discloses that buoys are not considered fully reliable at any time and of course the summer buoys had not been in place here during the period of winter navigation. The only permanent aids to navigation in this area were the Pointe du Lac ranges which the appellant was entitled to rely on in order to navigate through the channel at this point regardless of the presence or absence of any floating aid to navigation. Here again, it is not possible to find, in the conduct of the appellant, anything that would justify the suspension of his certificate.

The appellant was taken to task by the Commissioner, thirdly, for "...following the line given by the Pointe du Lac ranges in line when he knew since last year that the lower range was not in its place;" and, fourthly, for "...proceeding at full speed when it was the first time in 1965 that he was going down this part of the river as the pilot of a ship;".

The evidence discloses that between 1959 and 1964 there was a movement of the cement base of the lower range (as distinct from the steel tower itself on which the range was fitted) towards the southeast of the order of approximately 21 feet with a net effect at the end of the course of a misalignment of 100 feet south of the center line. The structure itself, however, had been strengthened by lengthening two of its legs to take care of the tilt of the base prior to 1963 which would have moved the beacon and light some six feet to the northwest and compensated somewhat for the displacement of the base.

The evidence of the appellant and other pilots disclose that prior to the year 1965, they knew that, with Pointe du Lac range lights or beacons in line, a vessel proceeding downriver would be about halfway between the imaginary center line in the dredged channel and the imaginary line marking the edge of the channel to the south.

For a down bound ship it was a practice of the mariners to correct the situation by keeping the ranges in line and thus placing the ship on the starboard side of the mid-channel and for an upbound

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ship, it consisted in opening the ranges astern to the north, thus placing the ship on her side of true-mid-channel and thereby allowing a safe port to port meeting.

While the appellant knew of the above displacement, he had no reason to suspect that the conditions had changed since 1964. No notification of any such change had been issued by the Department of Transport and there is no evidence of any other ground for apprehension having come to his attention. He could not have known, and did not know, nor had he any reason to believe that between 1964 and the date of the collision, the cement base of the lower range of Pointe du Lac had been displaced towards the southeast by an additional 11 feet which had the effect of showing the center line of the channel near buoy 54 L and 250 feet south of the true center.

Under the above circumstances, this Court cannot see how the appellant can be held blameworthy for the displacement of the lower range of Pointe du Lac or in proceeding at full manoeuvring speed in a channel relying on the line given by the Pointe du Lac ranges which he had no reason to believe had moved beyond the position they were in in the fall of 1964 nor can he be blamed for proceeding downstream at manoeuvring speed even if he was going down this part of the river for the first time in 1965.

The appellant was finally blamed for "...neglecting to use his radio-telephone".

The evidence discloses that no signal was given prior to the collision because both ships were too close by then and the collision had then become inevitable. As a matter of fact, the appellant being in no position that would cause him to anticipate any danger, it is difficult to understand why the appellant should have used the radio-telephone, how he could have done so and in what manner it would have prevented the collision There is no suggestion that it occurred to the pilot on the other ship involved to use that instrument to warn the appellant of the apprehensions that he says that he had as a result of his observations and no finding or evidence upon which a finding could have been made that he could have communicated anything to the appellant that would have avoided the collision.

Prior to the sudden and unforseeable sheering of the M/V *Hermes* both vessels were on their own side of the channel at a safe distance of each other and there was no obligation for either one to give out signals of any kind or to use the radio-telephone until the sudden and unexpected sheering to port and, of course, by then it was too late to discuss the situation over the radio-telephone. Here again, the appellant cannot be held guilty of any wrongful act or omission sufficient to justify the suspension of his certificate.

The Reasons then dealt with the question as to the "test" that should be applied in deciding how serious a "wrongful act or default" should be to warrant disciplinary action, and concluded as follows:

Applying that test, it follows that even if the appellant was guilty of the acts or omissions which the Court of Investigation found him to have been guilty of, which, as has already been indicated,

has, in the opinion of this Court, not been demonstrated, they were not of a sufficiently culpable nature to justify the suspension of his certificate, nor was it established, in view of the Commissioner's finding that the range light's last displacement took place prior to the collision, that these acts or omissions were the cause or even a contributing cause of the collision. Counsel for the Minister of Transport took an alternative position in this Court. He attacked the position taken by the Commissioner in holding that the last displacement of the range light had occurred prior to the collision, submitting that the evidence on this point was such that it should be inferred that this displacement took place between the 14th and 17th of April 1965, which was a few days after the collision. During the course of argument the Court took the position that it was not open to the respondent to put forward this submission in this appeal. No attack was made upon the appellant's testimony that he did set his course by the range lights and followed them. In fact, one of the charges against him, of which he was found guilty, was that he did follow the range lights at too great a speed when he should not have done so. Assuming that he did follow the line indicated by the range lights, his ship could not have followed the course that it did unless the last displacement had already taken place. The only explanation of the disaster, if the last displacement had not already taken place, is that pilot Bélisle had failed to set his course by reference to the range lights. An accusation that he did not avail himself of the only aid to navigation that was available to him would have been a very serious one indeed. No such charge was made against him before the Commissioner and it is too late at this stage to endeavour to support the Commissioner's decision to suspend the pilot's licence on the basis of a charge against which he has never had an opportunity to defend himself.

Judgment was pronounced by this Court on April 5, 1967. In the meantime, various proceedings had been instituted against the Crown in respect of death and injury resulting from the collision of the *Transatlantic* and the *Hermes*, of which this Petition of Right is one. As a result of an appearance of counsel involved in the various proceedings, it has been arranged that the other proceedings will be stayed while this action proceeds.

Counsel for the Attorney General of Canada has filed, before the motion came on for hearing, a memorandum in support of his motion, the substantive portion of which reads as follows:

1. The facts, and questions at issue between the parties to this action, appear from the pleadings.

2. It is alleged in paragraph 18 of the Petition of Right that the front range of the Pointe du Lac leading lights was displaced and out of alignment and in paragraph 19, that the misalignment of the Pointe du Lac leading lights was the immediate and sole cause of the collision between the *Transatlantic* and the *Hermes*.

3. These allegations are denied by paragraphs 15 and 16 of the Defence and paragraph 16 alleges that the collision between the two

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ships was due, *inter alia,* to the fault, negligence, imprudence and want of skill of the pilot of the *Hermes,* who was Mr. Cyrille Bélisle.

4 Paragraph 43, and the other paragraphs herein referred to, of the Defence give particulars of the fault committed by Pilot Bélisle by alleging, *inter alia,*

(*a*) that he entered the narrow part of the channel at full speed;

(*b*) that he so entered this part of the channel under winter navigation conditions when, as indicated in paragraph 39, only winter buoys are in place;

(*c*) that he so entered this part of the channel when a meeting with the *Transatlantic* was imminent, instead of reducing his speed and meeting in the Yamachiche Anchorage;

(*d*) that he failed to use his radio-telephone;

(*e*) that he relied entirely on the Pointe du Lac beacons when he knew that this range was inaccurate and unprecise, and as further indicated in paragraph 52, that the front beacon had been displaced and the range was out of line.

5. The Suppliant, by his reply, joined issue on these allegations.

6 A Formal Investigation under the *Canada Shipping Act* into the circumstances attending the collision aforesaid was held by the Honourable Mr. Justice Charles A. Cannon who delivered his report on the 18th day of March, 1966 and found that Pilot Bélisle had caused or contributed to the collision by his wrongful act or default,

(*a*) in going full speed into the narrow part of the channel when he had to meet a ship in it;

(*b*) in attempting this manoeuvre when buoy 51L that was to serve him as a guide to indicate the entrance of the narrow channel was not in place;

(*c*) in following the line given by the Pointe du Lac ranges in line when he knew since last year that the lower range was not in its place;

(*d*) in proceeding at full speed when it was the first time in 1965 that he was going down this part of the River as the pilot of a ship;

(*e*) in neglecting to use his radio telephone. (See pages 20 (top), 7 and 8 of the Report).

7. Bearing in mind that, under winter navigation conditions, buoy 51L was not in place, the foregoing findings of the Commissioner are substantially the allegations of fault made by the Respondent in this action against Pilot Bélisle.

8 On the appeal of Pilot Bélisle from the suspension pronounced against him by Mr Justice Cannon, the Court, composed of the President, Mr. Justice Noel and Mr Justice Dumoulin, considered the above allegations as well as some of the other issues of fact raised by the pleadings herein and expressed their opinion thereon, as appears from the Reasons for Judgment delivered by Mr. Justice Noel and concurred in by the other two members of the Court.

9. More particularly, as regards the allegations referred to in paragraph 4 (*a*), (*b*) and (*c*) hereof in regard to the speed of the *Hermes* in the circumstance of time and place, the said Reasons at pages 5 and 6 contain the following findings:

> With respect to the finding that Bélisle was imprudent in deciding to meet the *Transatlantic* as he did there appears from the evidence to have been no good reason why the *Hermes*

coming downstream should have stopped or reduced her speed in order to meet the *Transatlantic* in the anchorage section of the Yamachiche bend rather than in the bend in the dredged channel.

...The Commissioner held Bélisle blameworthy for going full speed into a narrow part of the channel when he had to meet a ship in it. The evidence discloses that the speed of the *Hermes* was 15 knots which is not full speed but full manoeuvring speed and which, under the favourable weather conditions which prevailed at that time, does not appear to have been excessive.

10 It is alleged in paragraph 43(*f*) of the Defence that Bélisle failed to make use of the winter buoys as an aid to navigation.

Mr. Justice Noel states on page 5 of his Reasons that "Pointe du Lac beacons were Bélisle's only aids to navigation".

11. It is alleged in paragraph 43(*g*) of the Defence that Bélisle was at fault in relying on the Pointe du Lac beacons which he knew to be "inexacts et imprécis".

The Reasons, on page 6, state that Bélisle "was entitled to rely" on this range and add, on page 9, that:

> Under the above circumstances, this Court cannot see how the appellant (Bélisle) can be held blameworthy for the displacement of the lower range of Pointe du Lac or in proceeding at full manoeuvring speed in a channel relying on the line given by the Pointe du Lac ranges which he had no reason to believe had moved beyond the position they were in in the fall of 1964 nor can he be blamed for proceeding downstream at manoeuvring speed even if he was going down this part of the river for the first time in 1965.

...

12 It is alleged in paragraph 39 of the Defence that every pilot entering the Yamachiche Anchorage knows or should know that he will have to re-enter the narrow part of the channel and that this manoeuvre required more care during the winter season when only winter buoys are in place

The Reasons above say on page 6 that this part of the channel "was still of a breadth of 550 feet, which allowed ample room for navigation having regard to the size of the two ships involved", and on page 7, the finding is that Bélisle was entitled to rely on the Pointe du Lac ranges "to navigate through the channel at this point regardless of the presence or absence of any floating aid to navigation".

13 It is alleged in paragraph 43(*i*) of the Defence that Bélisle was at fault in having failed to use his radio-telephone. The Reasons find at page 9 that Bélisle was not at fault in this respect:

> The evidence discloses that no signal was given prior to the collision because both ships were too close by then and the collision had then become inevitable. As a matter of fact, the appellant being in no position that would cause him to anticipate any danger, it is difficult to understand why the appellant should have used the radio-telephone, how he could have done so and in what manner it would have prevented the collision. There is no suggestion that it occurred to the pilot on the other ship involved to use that instrument to warn the appellant of the apprehensions that he says that he had as a result of his observa-

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tions and no finding or evidence upon which a finding could have been made that he could have communicated anything to the appellant that would have avoided the collision.

14. The gist of the Crown's Defence in this case is that the acts and omissions of Pilot Bélisle were the cause of the collision between the two ships.

Mr. Justice Noël says on page 11, that even if the pilot was guilty of the acts or omissions which the Court of Investigation found him to have been guilty of, it was not established "that these acts or omissions were a cause or even a contributing cause of the collision".

15. Having considered the considerable evidence adduced in the Formal Investigation relating to, and expressed their opinion on, some of the principal questions in issue in this action it is not in accordance with the principles of natural justice that any of the judges who sat on the said appeal should now preside at the trial of this action.

The position taken on the motion is that, as a matter of law, judges who have had occasion in the course of their judicial duties to come to a conclusion as to the proper findings of fact on the evidence given in one proceeding are precluded from taking part in another proceeding where findings will have to be made with reference to the same facts.

There is no suggestion that there is any other ground for the motion than the fact that, in the due course of their judicial duties, the judges concerned have expressed their conclusions as to the effect of the evidence before them concerning the questions of fact that were material to the determination of the cause that they were duty bound to determine. I do not understand that there is any other ground for the application than that the conclusions so reached have given the advisers to the Crown a reasonable apprehension of "bias" on the part of such judges, it being made clear by counsel for the Attorney General that the word "bias" was not being used in any invidious sense.

There is, as far as I am aware, no provision in the statute law or rules of court having special application to this Court that deals with recusation or disqualification of a judge. In the circumstances, resort might be had to Rule 2 of the General Rules and Orders of the Exchequer Court of Canada, which reads as follows:

> In any proceedings in the Court where any matter arises not otherwise provided for by any provision in any Act of the Parliament of Canada (except section 34 of the *Exchequer Court Act*) or by any

general rule or order of the Court (except this rule), the practice and procedure shall be determined by the Court (either on a preliminary motion for directions, or after the event if no such motion has been made) for the particular matter by analogy

(*a*) to the other General Rules and Orders of the Court, or

(*b*) to the practice and procedure in force for similar proceedings in the Courts of that province to which the subject matter of the proceedings most particularly relates,

whichever is, in the opinion of the Court, most appropriate in the circumstances.

The *Quebec Code of Civil Procedure* deals with "Recusation" in Chapter Five. Articles 234 and 235 deal with the grounds for recusation and read as follows:

234. A judge may be recused:

1. If he is related or allied to one of the parties within the degree of cousin-german inclusively;

2. If he is himself a party to an action involving a question similar to the one in dispute;

3 If he has given advice upon the matter in dispute, or has previously taken cognizance of it as an arbitrator, if he has acted as attorney for any of the parties, or if he has made known his opinion extra-judicially;

4. If he is directly interested in an action pending before a court in which any of the parties will be called to sit as judge;

5. If there is mortal enmity between him and any of the parties, or if he has made threats against any of the parties, since the institution of the action or within six months previous to the proposed recusation;

6. If he is tutor, subrogate-tutor or curator, presumptive heir or donee of any of the parties;

7. If he is a member of a group or corporation, or is manager or patron of some order or community which is a party to the suit;

8. If he has any interest in favouring any of the parties;

9. If he is related or allied to the attorney or counsel or to the partner of any of them, either in the direct line, or in the collateral line in the second degree.

235. A judge is disqualified if he or his wife is interested in the action.

It was not suggested that either of these articles lend support for the present application, but it was contended that the grounds set out therein are not exclusive. For this proposition, reliance was placed on *Bourdon v. Cité de Montréal*[4]. I do not propose to express any opinion as to whether that proposition is correct, but I shall assume for the purpose of these Reasons that it is correct.

[4] (1918) 54 S.C. (Que.) 193; 20 P.R. 70.

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Reference was also made by counsel for the Attorney General to other authorities, mainly from common law jurisdictions, but it was not suggested that any of them lent support to the application.

The principle that no man shall be judge in his own cause is, it would appear, based upon an incompatibility between "bias" and the exercise of the judicial function. Not only does this apply automatically when a person is a party to an action, but it applies automatically when a person has a financial interest in the outcome of an action.[5] "There is no doubt that any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as judge in the matter;...". [6] Furthermore, "a real likelihood" that a person would "from kindred or any other cause" have a "bias" in favour of a party would make it "very wrong" for him to act as a judge,[7] and would probably result in his decision being quashed, in the case of an inferior court upon *certiorari,* or upon appeal. There are many decisions in this country and in England where a justice of the peace or magistrate has had something to do with launching the proceedings, has been a member of or otherwise associated with the body by whom the proceedings were launched, or has been personally related to one of the parties, where one or other of these principles has been applied.[8] In all of that class of case, the disqualification is based upon "a real likelihood" of "bias" arising from the character of the judge's relationship to the cause and not upon a finding of actual bias. None of these situations are suggested in support of this motion and I mention them only to indicate how, as I see it, the authorities on the subject of disqualification are to be regarded.

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[5] *Dimes v. Grand Junction Canal,* (1852) 3 H.L.C. 759, where it was held that a decision of a Lord Chancellor was voidable because he owned shares in a company that was a party to the cause.

[6] *The Queen v. Rand,* L.R. 1 Q.B. 230, per Blackburn J. at pages 232-3.

[7] *The Queen v. Rand,* L.R. 1 Q.B. 230 per Blackburn J. at pages 232-3.

[8] See, for example, *Regina v. Langford,* (1888) 15 O.R. 52, *Regina v. Steele,* (1895) 26 O.R. 540, *Frome United Breweries Company, Limited v. Bath,* [1926] A.C. 586, the authorities reviewed in *Regina v. Camborne Justices,* [1955] 1 Q.B. 41, and *Boudreau v. The Queen,* (1960) 45 M.P.R. 45. Another type of case is where the judge is a member of a restricted class each of the members of which has a special interest in the outcome of the cause. See *The Queen v. Huggins,* [1895] 1 Q.B. 563, and *The Judges v. Attorney-General for Saskatchewan,* (1936-7) 53 T.L.R. 464.

While counsel for the Attorney General may not have put the matter that way, the motion is really based upon the view that the judges who dealt with the pilot's appeal are biased in sense that they have pre-judged some of the issues to be tried in this case.

Counsel referred me to *Hall v. Brigham*,[9] a decision of the Quebec Court of Queen's Bench (Coram: Duval C.J., Caron J., Drummond J., Badgley J., Monk J.), the effect of which is expressed in a headnote reading as follows:

> Held:—That a judge having in another Court in similar suit between the same parties expressed his opinion and delivered judgment in accordance therewith upon the pretensions of the parties which pretensions were to be urged before this Court, should refrain from sitting in the cause.

The report says that the only difference between the two causes was that a different quarter's rent was claimed, but it does not report what was said by the Court. In citing the case, counsel did not put it forward as having application to resolve the problem before me and I do not understand the note as indicating that the Court took the position that a judge was recused or disqualified under the circumstances indicated. Rather the view seems to have been that he "should refrain from sitting", it presumably being possible to arrange matters so that he might do so without interfering with the due administration of justice. Indeed, a recalcitrant renter might force his landlord to sue him for every instalment of rent and take each case to the Court of Appeal, and it seems improbable that the due administration of justice requires that he have a new quota of judges on each appeal even though each appeal involves exactly the same questions of fact and law as all previous appeals on which the judges will have had to pronounce themselves in disposing of those previous appeals.

Counsel for the Attorney General also cited *Healey v. Rauhina et al.*,[10] again without suggesting that it applied a principle that could be used to support his motion. In that case, a magistrate's decision was attacked by reason of his utterances during the course of the hearing. Hutchison J. held as a fact that the evidence did not establish a "real likelihood of bias" but did establish a failure of natural justice "because of a view prematurely formed by the

[9] (1869) 13 L.C.J. 252.

[10] [1958] N.Z.L.R. 945.

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magistrate adverse to the third party".[11] This finding was based upon things said by the magistrate, some of them very early in the hearing.

I have no difficulty in appreciating the finding made by Hutchison J. in *Healey v. Rauhina et al.* and the principle upon which the decision was based. Put in other words, the third party in that case was not given a fair hearing.

The decision that comes closest to the matter that I have to decide is *Barthe v. The Queen.*[12] In that case, an accused person had been refused the issuance of a writ of prohibition to prevent a judge of the Court of Sessions from continuing with the hearing and adjudication of a charge against him of fraud, and he appealed to the Court of Appeal. Very briefly, his complaint was that, in disposing of a related charge arising out of the same facts against a co-accused, the judge had indicated that he had formed the view that the applicant was guilty of the offence with which he was charged. His appeal was dismissed. Choquette J. held simply that the applicant had waived the objection by his participation in the proceedings. Rivard J. (dissenting) would have granted the issuance of the Writ for reasons that seem to involve the extension of the concept of "real likelihood" of bias to cases where the sole ground for such a finding is opinions expressed by the judge in the due performance of his judicial duty. He was of the view that the whole of the record should be examined to see whether the probability of prejudice really existed. The third judge, Hyde J., expressed his conclusion as follows:

> Bias in a judge is a pre-disposition in favour of one of the parties. It may be inferred from financial or other interest where it offends

[11] This finding would appear to be the basis for the way in which the motion that I am dealing with was formulated. Counsel endeavoured also to apply it to the circumstances here during argument. I see no basis for the application. As I understand Hutchison J., he finds that the magistrate in that case had from very early in the trial formulated his conclusion against the third party. Having reached his "view... adverse to the third party" prematurely (without giving the third party a chance to be heard), there was a classic case of "a failure of natural justice". The view so "prematurely" formed in that case was the view upon which the magistrate acted in delivering the judgment that was being attacked. That was not a case of disqualification of the judge or bias but of a failure of a qualified judge to conduct a proper trial. It must not be overlooked that the judge rejected the case based on a "real likelihood of bias".

[12] (1964) 41 Criminal Reports (Canada) 47.

the principle that a person cannot be both judge and prosecutor at the same time. This bias may be sometimes inferred from extra-judicial opinions expressed by the judge, which, I presume, is the basis on which appellant attacks Judge Gaboury's jurisdiction in the present instance.

It is wrong, however, in my opinion, to make any such deduction from the statements made by the learned judge in the *O'Connell* judgment. He clearly recognizes, in the extract cited, that the appellant testified under the protection of the Court. That being the case, the judge is in no different position from that of any judge who hears evidence on a *voir dire* and after excluding the evidence objected to, proceeds with the hearing and adjudication of the case. In the course of the *voir dire* the judge may hear extensive evidence against the accused which he must ignore in disposing of the merits of the case.

The ability to judge a case only on the legal evidence adduced is an essential part of the judicial process. Appellate Courts are frequently called upon to hear appeals from new trials which they have ordered on appeal from a previous trial. The evidence in one may be substantially different from evidence considered in the other.

I see nothing in the judgment of Judge Gaboury indicating that he proposes to ignore the protection which he recognized must be given to the appellant when he testified in the *O'Connell* case. In my view, appellant has failed to establish that Judge Gaboury is biased against him or has prejudged his case.

I think the petition for the issuance of a writ of prohibition was properly refused by the Court below and I would dismiss this appeal.

In my view the correct view of the matter is that which, as I understand it, was adopted by Hyde J. in *Barthe v. The Queen,* when he said that "The ability to judge a case only on the legal evidence adduced is an essential part of the judicial process". In my view, there can be no apprehension of bias on the part of a judge merely because he has, in the course of his judicial duty, expressed his conclusion as to the proper findings on the evidence before him. It is his duty, if the same issues of fact arise for determination in another case, to reach his conclusions with regard thereto on the evidence adduced in that case after giving full consideration to the submissions with regard thereto made on behalf of the parties in that case. It would be quite wrong for a judge in such a case to have regard to "personal knowledge" derived from "a recollection of the evidence" taken in the earlier cause.[13] It is not reasonable to apprehend that there is "a real likelihood" that a judge will be so derelict in his duty as to decide one case in whole or in part on the evidence heard in an earlier case.

[13] Compare *Van Breda v. Silberbauer,* (1869) L.R. 3 P.C. 84 per Sir James W. Colvile at page 99.

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If I may be permitted to say so, it seems to me that the real apprehension is that the judge who hears a case in which the same issues of fact arise as have recently been decided in the same court can hardly ignore the existence of the earlier decision for he cannot be unconscious of the possibility of apparently conflicting decisions creating an atmosphere of lack of confidence in the administration of justice. I should have thought, however, that a judge who participates in both of two such matters is more likely to appreciate and explain different results flowing from different bodies of evidence or differences in presentation and argument than a judge who had no part in the earlier case. I do not say this to indicate that I have a view that the same judge should always try two such cases, but to indicate that, in my view, it is not necessarily prejudicial to the party who assumes the burden of producing a result in the second case that is apparently in conflict with the earlier decision.

While I have dealt at some length with the submissions that have been put forward in support of this motion, and I have examined, as carefully as time permitted,[14] all the authorities that have been cited to me and that I have been able to find myself on the subject of recusation or disqualification of judges, I do not want to create the impression that I have found the particular point that has been put up for decision to be a difficult or doubtful one. In my experience in the courts, and reading authorities, the same question of law comes before the same judge for decision many times and, in the interests of the orderly administration of justice, he must try to be consistent until he is corrected by a higher tribunal, and, similarly, from time to time, causes arise, both in trial courts and courts of appeal, out of the same facts, and judges must, and do, make their findings on the evidence that has been adduced in the particular case. If the fact that a judge had had occasion to pronounce on either a question of law or a question of fact were a ground for recusation or disqualification, it would, as it seems to me, have been a ground for a new hearing in a very substantial number of

[14] By order made last May, this case was set down for trial to commence on November 27, 1967. This motion was brought on before me on November 6. I deem it a matter of urgency to clear up any doubt the motion may have created as to whether the trial will proceed as arranged.

cases in our superior courts. As far as I can remember or have been able to find, the point has never been taken before.

The result, if the Attorney General is correct in his submission that a judge cannot *as a matter of law* preside in the trial of a case where questions of fact arise that have arisen before him previously, would be to make it very difficult, indeed, to arrange for the due administration of justice in a relatively small court, such as this is. I can illustrate the difficulties that would arise by reference to the particular case. This is one of many claims against the Government of Canada that arise out of the same accident and that are the subject of different proceedings in this Court.[15] I am informed by counsel for the Crown that a substantial part of the evidence will be in French. As a practical matter, the only judges in the Court who are qualified to preside at a trial where there is a substantial body of evidence in French (leaving aside one who is on the verge of retirement) are among those who are the subjects of this application. If none of them is qualified to preside at the trial, it will not be possible to proceed with the trial of this action against the Government of Canada[16] unless a deputy judge who is qualified is appointed for the particular case by the Governor in Council under section 8 of the *Exchequer Court Act*, a solution that might be open to misinterpretation. I hope I have not been influenced in my conclusion in this matter by this practical consideration, but I cannot pretend that I have not had it in mind.

Having regard to the conclusion that I have reached, I do not have to consider whether it would have been proper to make the order sought if my conclusion had been that the judges in question are disqualified. It is not the practice of this Court, or any other with which I am familiar,

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[15] If the principle contended for upon this application is sound, a judge who decided any of such cases would be disqualified from deciding any of the others in which the Crown put the claimant to the proof of a fact found against the Crown in the earlier case, or in which the suppliant attempted to establish some fact that the suppliant in the earlier case failed to establish.

[16] If I had come to the conclusion that the Attorney General was otherwise correct, I should have had to consider whether there is an exception where it is dictated by the exigencies of the situation. Consider *Thellusson v. Rendlesham*, (1858) 7 H.L.C. 429, and *The Judges v. Attorney General for Saskatchewan*, (1937) 53 T.L.R. 464 at page 465.

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to entertain applications from the parties concerning the judge who will be assigned to a particular case. This is a matter that has to be decided as a matter of the internal management of the work of the Court and an impossible situation would, in my view, arise, if parties were encouraged to think that they could directly or indirectly play a part in the "picking" of a judge. On the other hand, I am conscious of the fact that there is a procedure in the Superior Court of Quebec for the recusation of a judge and that, in a proper case, that procedure may, I do not say it does, apply in this Court. It must be understood that I am not, because I find that this motion calls for serious and careful deliberation, inviting applications in the future as an indirect way of influencing the appointment of judges.[17]

Having said that, I must also emphasize that the judges of the Court are, of course, anxious that counsel draw to their attention any circumstances that might conceivably constitute a ground why a particular judge should recuse or disqualify himself. This can ordinarily be done by a letter to the Registrar with a copy to the opposing solicitor and should be done as long before trial as the circumstances permit.

The motion is dismissed with costs to the suppliant and third party in any event of the cause.

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[17] Compare *Reg. v. Tooke,* (1884) 32 W.R. 753 per Grove J. at page 754.