

Minister of Transport (Appellant) v. Pollock (Respondent)

Jackett P., Thurlow and Noël JJ., in Admiralty—Ottawa, March 28, April 2, 1971.

Admiralty—Jurisdiction—Investigation of ship collision—Decision of investigating court not to recommend cancellation of master's certificate—Whether Minister of Transport has right of appeal—Canada Shipping Act, R.S.C. 1952, c. 29, secs. 496, 576(3).

In December 1970 a court constituted under s.558 of the *Canada Shipping Act* to investigate a collision between two ships made a report, concurred in by two assessors, in which it was decided not to deal with the certificate of the master of one of the ships involved in the collision whilst finding that his wrongful act and default were of sufficient culpability to justify dealing with the certificate. The Minister of Transport appealed to the Admiralty Court under s. 576(3) from the decision not to deal with the master's certificate.

Held (Noël J. dissenting), a motion by the master to quash the Minister's appeal must be rejected.

Per Jackett P.—Having regard to the Minister's responsibilities for investigation imposed by rules made by the Governor in Council under s.578, the Minister as representing the public is an aggrieved party by the decision of the court below and is entitled to appeal. *The Carlisle* [1906] P. 301, applied. Further, this court on appeal has the same jurisdiction as the court below to cancel or suspend the master's certificate.

Per Thurlow J.—Section 496 of the *Canada Shipping Act* which gives the Minister general superintendence of all matters relating to wrecks, salvage and shipping casualties is sufficient to commit to him the function of protecting the public interest in these matters and to make him an affected party with a consequent right of appeal from the decision of the court below in this case.

Per Noël J., dissenting—Under s. 568(1) of the *Canada Shipping Act* only the investigating court with the concurrence of at least one assessor has jurisdiction to cancel or suspend an officer's certificate. Further, s. 576(3) does not clearly give the Minister a right of appeal from a decision of the investigating court refusing to cancel or suspend an officer's certificate.

MOTION to quash appeal.

T. P. Cameron for applicant.

N. D. Mullins, Q.C., and G. A. Major *contrâ*.

JACKETT, P.—This is a motion for an order that the notice of appeal of the Minister of Transport (hereinafter referred to as "the Minister") herein be struck out on the grounds that the Minister has no right of appeal "as set out therein".

On August 14, 1970, under s. 558 of the *Canada Shipping Act*, the Minister appointed His Honour Judge E. J. C. Stewart to conduct a formal investigation into the causes and circumstances which led to the collision of the *M.V. Queen of Victoria* with the *M.V. Sergey Yesenin* in Active Pass, B.C., on August 2, 1970.

On December 3, 1970, Judge Stewart made a report, concurred in by two assessors appointed to act with him, by which he decided, among other things, "not to deal with" Captain R. J. Pollock's "certificate" although he made a finding that Captain Pollock's "wrongful act and default were sufficiently culpable to justify dealing with his certificate".

A "Notice of Appeal" bearing date December 30, 1970, and signed by a solicitor for the Minister was filed in this court on December 31, 1970. By that document, the Minister purports to appeal to this court from that part of the decision in question "with respect to the cancelling or suspension of the certificate of a master held by Captain Robert James Pollock".

This motion to strike out the notice of appeal was thereupon launched on behalf of Captain Pollock.

It is impossible, in my view, to understand the basis on which the Minister supports the appeal, or the attack made on it by counsel for Captain Pollock, without an appreciation of the provisions of the *Canada Shipping Act* relating to "Certificates of Officers" (Part II) and the provisions of that Act regulating "Formal Investigations into Casualties" (i.e. "Shipping" casualties—see s. 551), and "Inquiries as to the Competency and Conduct of Officers" (secs. 558 to 579). These provisions do not lend themselves to being summarized in a manner that is at once easy to understand and accurate. Nevertheless, before the legal question involved can be put in perspective, an attempt must be made to understand the general scheme of the Act in these overlapping areas. In making such attempt, I shall restrict my review to Canadian certificates.

In all of the parts of the *Canada Shipping Act* with which we are concerned, any reference to the "Minister" is a reference to the Minister of Transport. See s. 2(54).

By Part II of the Act, there is created a system whereby various classes of ships are required to be provided with officers, including "masters and mates" duly "certificated" according to fixed scales. Certificates are granted by the Minister under the Act either after examinations or otherwise as permitted by the Act. The Minister may also suspend or cancel a certificate if he has reason to believe that it was obtained on false statement or erroneous information (s. 131(4)).

A record of all certificates is kept in the Department of Transport (s. 140 and 2(23)); and, whenever notice of cancelling or suspending "affecting, by competent authority, of any certificate" is received in the Department, a corresponding entry is made in the record of certificates (s. 141).

Finally, it should be mentioned, in reviewing Part II of the *Canada Shipping Act*, that the Minister may, if he thinks the justice of the case requires it, re-issue and return a Canadian certificate that has been cancelled or suspended pursuant to any power in the Act. (s. 142).

After Part II, I think reference should be made to s. 579, which authorizes the Minister to cause an inquiry to be made where he has reason to believe that any master, mate or engineer

- (a) is from incompetency or misconduct unfit to discharge his duties, or
- (b) in a case of collision, has failed to render such assistance or give such information as is required under secs. 651 and 652.

The Minister may appoint a person to hold such inquiry or may direct that it be held before a judge of the Admiralty Court. Where the inquiry is held by a person appointed by the Minister, he is required to send a report to the Minister. Where it is held by a judge of the Admiralty Court "the inquiry shall be conducted and the results reported in the same manner, and the court shall have the like powers, as in the case of a formal investigation into a shipping casualty". The final provision in s. 579 authorizes the Minister to suspend or cancel a certificate where, "upon any such inquiry", he is satisfied

- (a) that any master, mate or engineer, is incompetent or has been guilty of any act of misconduct, drunkenness or tyranny;
- (b) that the loss or abandonment of or serious damage to any ship or any loss of life was caused by the wrongful act or default of any master, mate or engineer;
- (c) that any master, mate or engineer has been guilty of a criminal offence or has been blamed by any coroner's inquest in respect to the death of any person; or
- (d) that the master or mate, in cases of collision between his vessel and another vessel, has failed without reasonable cause to comply with the requirements of s. 651 with regard to rendering assistance or to giving information.

Against the background of such provisions concerning the system of certificated officers and the suspension or cancellation of certificates, I come to the provisions concerning the formal investigation of shipping casualties, which provisions also deal with the suspension and cancellation of officers' certificates.

The provisions for formal investigations may be summarized briefly as follows. By s. 558, the Minister is authorized to appoint an officer or judge of certain defined classes as a commissioner to hold formal investigations, or any formal investigation, and he is for that purpose "a court". Section 560 authorizes such a court to hold a formal investigation "upon that being ordered by the Minister" in the following cases:

- (a) a shipping casualty;
- (b) where an officer has been charged with incompetency, misconduct or default;
- (c) where a master, officer or pilot in charge of a vessel fails to render to the other vessel, in case of collision, assistance or to give it required information; or
- (d) where the Minister has reason to believe that an officer is from any cause unfit to discharge or incapable of discharging his duties.

A court holding a formal investigation into a shipping casualty must hold it with two or more assessors (s. 563).

It will have been seen that, under the heading "Formal Investigations into Casualties" are found provisions providing for formal investigations into either shipping casualties or various charges against or doubts concerning licensed officers. We now find that, under the same heading, one section—s. 568—confers the power of cancelling or suspending the certificate of an officer not only on courts conducting such formal investigations but on courts exercising powers under other provisions. For present purposes, it would seem that we can ignore the powers conferred on "naval courts", who seem to deal with Canadian ships in foreign waters, and courts holding inquiries under Part II. (I have not been able to find the relevant provisions in Part II in any event.) When we leave those courts aside we find that s. 568 authorizes the certificate of an officer to be cancelled or suspended

- (a) by a court holding a formal investigation into a shipping casualty, if the court finds that the loss or abandonment of, or serious damage to, any ship, or loss of life, has been caused by his wrongful act or default (the court holding the formal investigation is expressly prohibited from exercising this power unless at least one of the assessors concurs in the "finding" of the court); or
- (b) by a court holding an inquiry into the conduct of the officer "if it finds that he is incompetent, or has been guilty of any gross act of misconduct, drunkenness, or tyranny" or that, in case of collision, he has failed to render assistance or give information.

An officer whose certificate has been cancelled or suspended is entitled to a free copy of the court's judgment (s. 572). The court must in all cases send the judgment and the evidence to the Minister and, if it has determined to cancel or suspend a licence, it sends the certificate to the Minister (s. 573), who retains it (s. 574(a)).

After such review of the general background provisions, I may now turn to the provisions which are directly in point in this application. I refer to the following provisions in the *Canada Shipping Act*:

576. (1) In any case where a formal investigation has been held, the Minister may order the investigation to be reheard, either generally or as to any part thereof; and he shall so order

- (a) if new and important evidence that could not be produced at the investigation has been discovered, or
- (b) if, for any other reason, there has been in his opinion ground for suspecting that a miscarriage of justice has occurred.

* * *

(3) Where on any such investigation a decision has been given with respect to the cancelling or suspension of the certificate of a master, mate, or engineer, or the licence of a pilot, and an application for a rehearing under this section has not been made or has been refused, an appeal lies from the decision to the Admiralty Court.

(4) Any rehearing or appeal under this section is subject to and conducted in accordance with such conditions and regulations as may be prescribed by rules made in relation thereto under the powers contained in this Part.

* * *

578. The Governor in Council may make rules for the carrying into effect of the enactments relating to preliminary inquiries and formal investigations and to the rehearing of or appeal from any formal investigation, and, in particular, with respect to the appointment and summoning of assessors, the procedure, the parties, the persons allowed to appear and the notice to the parties or to persons affected.

to the following provisions of the *Shipping Casualties Rules*, which have been made by order in council P.C. 1954-1861 of December 1, 1954, under s. 578 of the *Canada Shipping Act*, viz:

2. In these regulations, . . .

(e) "investigation" means a formal investigation into a shipping casualty; and

* * *

8. The Minister and any person upon whom a notice of investigation has been served, shall be a party to the proceedings.

and to the following provisions of the *Shipping Casualties Appeal Rules* which have been made by the same order in council, viz:

2. In these regulations, . . .

(g) "party" means a party to the proceedings of a formal investigation under the *Shipping Casualties Rules*; and

* * *

12. The Exchequer Court may if it thinks fit order any person other than the parties served with a notice of appeal to be added as a party to the proceedings for the purposes of the appeal, on such terms with respect to costs and otherwise as the Exchequer Court may think fit, and any party to the proceedings may object to the appearance on the appeal of any other party to the proceedings as unnecessary.

The question that has to be decided on this application is whether the Minister may, under s. 576(3) of the *Canada Shipping Act*, appeal from the "court's" decision not to cancel or suspend Captain Pollock's certificate.

Prima facie, in my view, the matter falls within the words of s. 576(3). It is common ground that on an investigation that falls within the words "any such investigation" (that is a "formal investigation" such as is referred to in s. 576(1)), a decision was given not to cancel or suspend Captain Pollock's certificate, which is "the certificate of a master". This, in my view, was a decision "with respect to the cancelling or suspension of the certificate of a master".¹ No application was made for a re-hearing. The following words from s. 576(3) are therefore operative:

Where on any such investigation a decision has been given with respect to the cancelling or suspension of the certificate of a master, . . . an appeal lies from the decision to the Admiralty Court.

¹ If there could be any doubt as to the appropriateness of those words to include that decision, it is removed, in my view, by a reference to s. 568 where the words "the decision . . . with respect to the cancelling or suspending thereof" would clearly have applied to the decision here.

I have no doubt, therefore, that the words of the appeal provision are wide enough to authorize an appeal. My difficulty is in determining who is authorized by s. 576(3) to appeal from such a decision. On that question the subsection is silent.

Obviously, where an appeal provision is silent on the point, the persons aggrieved by a decision are the persons who may appeal. Section 576(3) therefore confers a right of appeal on a person whose certificate has been cancelled or suspended. The question is whether, on the facts of this case, the Minister is a person who may be said to have been aggrieved by the decision with respect to the cancelling or suspension of the certificate so as to have the right to appeal created by s. 576(3).

The Minister certainly occupies a special position under the *Canada Shipping Act* in relation to the system of certificated officers. He is the authority by whom certificates are granted and he has the duty and authority to institute inquiries² where he has reason to believe that certificates are held by persons who are incompetent or unfit and, after certain such inquiries, he is the authority by whom a certificate may be cancelled or suspended.

The Minister also occupies a special position under the *Canada Shipping Act* in relation to the investigation of shipping casualties. He is the authority by whom courts are created to investigate such occurrences and he receives their reports (s. 573). As such authority, he has a power and, in some circumstances a duty, to institute a complete or partial re-hearing into such an occurrence (s. 576).

In my view, however, neither the special position that he so occupies in relation to the system of certificated officers nor the position that he so occupies in relation to the investigation of shipping casualties makes the Minister a person aggrieved by a decision with respect to the cancelling or suspension of a master's certificate.

The matter does not, however, rest there. While the statute does not contain any rules relating to the conduct of formal investigations, s. 578 authorizes the Governor in Council to make rules for carrying into effect the enactments relating, *inter alia*, to formal investigations and, in particular, with respect to the procedure and the parties. In addition to the rules already quoted whereby the Minister is made a party to such an investigation, the rules impose on the Minister's department the primary responsibility for adducing evidence and authorize that department "to address the court in reply upon the whole case". By these rules, as it seems to me, the Governor in Council has, in the exercise of the powers contained in s. 578, imposed on the Minister a new role in connection with formal investigations. Being a Minister of the Crown who is thus charged with the most prominent position as a party in the investigation, he becomes the party who "represents the public in this matter".

² Formal investigations under s. 560 and inquiries by Admiralty Court judges or other persons under s. 579.

The position of the Minister in a Canadian formal investigation would appear to be the same as that of the Board of Trade as described in *The Carlisle*⁸ per the President at pp. 313-15, viz:

There is no question whatever of the fairness and propriety of the conduct of this case by the Board of Trade. In former days I had a great deal of experience of the conduct of Board of Trade inquiries, and as I was always opposed to the department I think I am pretty well able to judge of their fairness and propriety. The question is what is the position to be adopted by the Board of Trade at the conclusion of the evidence. Formerly there was no difficulty, because the Board of Trade were obliged to state in open court whether in their opinion the certificate of the officer should be dealt with. In the present case what took place illustrates the position pretty plainly. At the close of the evidence this is what occurred: [The learned judge referred to the discussion already set out between the solicitor representing the master, counsel on behalf of the Board of Trade, and the magistrate with reference to dealing with the certificate, and continued:] Now one of the questions put was this: "Was the loss of the *Carlisle* and the loss of life caused by the wrongful act or default of the master?" The position taken up by the Board of Trade is that they ought not to be condemned in costs where the case is left as counsel for the Board of Trade left it, and that it is for the magistrate to determine whether he will find certain facts which justify him in dealing with the certificate, whether he will deal with the certificate, and whether he will inflict such and such a sentence. The position taken up by that suggestion appears to me to be an incorrect position, because we must look at the course a case of this kind takes. A certain accident happens. It is an accident of such a nature that it is desirable an investigation should take place. The Board of Trade decides there shall be that investigation. The whole of the evidence connected with the matter is then placed before the Court in the usual way. An inquiry is being held. At the outset it is not certain at all what will be the course of the inquiry—what questions will arise and how the matter will be dealt with—and it is not until the close that anybody can be certain exactly what position ought to be adopted.

As soon as the inquiry is closed the questions are put. Those questions may directly involve the liability of the master or other officer to have his certificate suspended, and it is almost a natural course of things that from that moment the master or officer is placed in the position of a defendant who is being charged with an offence which may lead, if found against him, to the suspension of his certificate. So, if the matter is left as in this case it was left, the magistrate is in effect being asked to deal with the certificate if he finds that the facts justify him in so doing. It is natural, then, that the magistrate if he find those facts, should proceed to deal with the certificate and inflict the penalty which he thinks is justifiable. I cannot help feeling that that is not a satisfactory position. Allowing in every way for the fairness and propriety with which these inquiries are conducted, *the Board of Trade represents the public in this matter*. It has a duty also to those who are concerned—the master, the owners, and others—which it is desirable properly to discharge. Then we have to ask ourselves what position is the Board of Trade in, through its counsel, at the time the inquiry is closed. If at that time it is clear, reasonably clear, that there is not a case made for suspension of the certificate I cannot help feeling that the Board of Trade is at liberty to say so. If, on the other hand, the case is a strong one, showing gross negligence and impropriety of conduct on the part of the master, leading to a loss caused—to use the words of the section—"by his wrongful act or default," I think the Board of Trade is quite justified in the discharge of its duties in saying to the magistrate it is a case of that character, and the certificate should be dealt with. It seems to me logically to follow that at the close of the inquiry the Board of Trade has to determine upon the line of conduct it will pursue; and if it simply leaves the matter to the magistrate, instead of giving the magistrate its views on the matter, it leaves the magistrate entirely at large, and without, it

⁸ [1906] P. 301.

seems to me, the full assistance that can be given to him. It seems to me desirable in the interest of all concerned that the Board of Trade should have the power I have indicated, and that it should be exercised. I am not in the least afraid that it will be exercised in any way adverse to the person in charge of the vessel beyond what the evidence justifies, because I can perfectly rely upon the fairness with which any charge would be preferred. (The italics are mine.)

It is also to be noted that in *The Royal Star*,⁴ the Board of Trade was accepted as a party entitled to raise the objection that, in that case, the master had no right to appeal from a decision of a "court" which had censured him.

As he represents "the public" in the matter, if the decision of the court with respect to the cancelling or suspension of a master's certificate is wrong, in my view the Minister, on behalf of "the public", is a party aggrieved thereby.⁵

Having reached that conclusion, I must deal with the submission on behalf of the applicant that this court has no jurisdiction to cancel or suspend a certificate because that jurisdiction is given only to the formal investigation court. I see no basis for this submission. As I read the statutory provisions, the court holding a formal investigation is given jurisdiction to cancel or suspend a certificate and an appeal lies to this court from a decision of that court with respect to cancelling or suspending. It seems clear to me that, when there is an appeal, in the absence of a specific statutory direction as to the relief that can be given, the appeal court has jurisdiction to give the judgment that the court appealed from should have given.⁶

I am of the view that motion should be dismissed with costs in the cause.

THURLOW, J.—The question that arises on this motion is whether the Minister of Transport has a right to appeal to this court from the decision not to deal with the respondent's certificate, made by a court constituted under the provisions of the *Canada Shipping Act* for the purpose of holding a formal investigation into a shipping casualty in which a vessel under the respondent's command had been involved.

⁴ [1928] P. 48.

⁵ The fact that s. 576(1) restricts an appeal thereunder to a case where "an application for a rehearing... has not been made or has been refused" does not otherwise restrict the ambit of that provision as I read it. I cannot read into these words an implied exclusion of any appeal by the Minister because he is the person to whom such an application would be made, if one were made.

⁶ I should also add that I do not appreciate how the direction in s. 568(1)(a) to the investigating court that that court shall not cancel or suspend unless one of the assessors concurs in the "finding" of the court can, as a matter of law, operate as a clog on the powers of the appeal court. There are differences of opinion as to precisely what that statutory direction means. *Prima facie*, the "finding" in which there must be concurrence is the "finding" referred to earlier in the paragraph "that the loss or abandonment of, or serious damage to, any ship, has been caused by his wrongful act or default". If, however, properly understood, that word refers to the conclusion as to whether there should be cancellation or suspension and, if so, what it should be, the appeal court would, as a practical matter, consult its own assessors (see Regulation 11). The meaning of s. 568(1)(a) becomes less clear to me, when the French version is read with the English version.

An appeal from such a decision is provided for by s. 576(3) of the Act but that subsection does not expressly say who may appeal. In effect it seems to say little more than that a decision of the kind referred to may be called into question before this court by an appeal thereto. The subsection does appear to contemplate that the appeal may be taken as an alternative to procedure by re-hearing under subsec. (1) and further that a re-hearing under subsec. (1) is a remedy to be obtained on an application. But again the subsection is silent as to who may make such an application. To me it seems somewhat incongruous that the subsection could contemplate an application by the Minister to exercise the jurisdiction conferred on him by subsec. (1). The incongruity of such a procedure, however, does not solve the present question since that procedure need not be invoked if appeal under subsec. (3) is regarded as the appropriate course, and it has not been invoked in the present case.

If, as I think, the matter is one of inference there is no difficulty in concluding from the wording of subsec. (3) itself that a person whose certificate has been cancelled or suspended is a party to whom the right of appeal is given. On the other hand, while nothing in the wording of s. 576(3) appears to me to preclude it, it is a much less obvious inference that the Minister of Transport has a right to appeal a decision of the court not to suspend or cancel a certificate or to suspend or cancel it for what the Minister may consider an insufficient period. Moreover, nothing in s. 576(4) would, as I see it, assist such an inference.

The President of the court is of the view that the procedure established under the rules relating to formal investigations, which have statutory authority, puts the Minister in the position of representing the public interest in the matter and of being thus a party aggrieved by the decision and entitled to appeal and in this connection he refers to the decision of the Court of Appeal in England on similar legislation and rules in *The Carlisle*¹. I do not dissent from this approach or from the conclusion to which it leads but I think the same result follows from s. 496 of the Act and I prefer to rest my opinion on it. The section reads:

496. The Minister has throughout Canada the general superintendence of all matters relating to wrecks, salvage and shipping casualties.

It appears to me that this provision by itself is sufficient to commit to the Minister the function of protecting the public interest in having shipping casualties investigated and the responsibility therefor determined and in seeing that the appropriate results with respect to the certificates of persons involved therein, as provided for by the statute, are achieved. It seems to me to follow from this that the Minister, as representing that public interest, is a party affected by a decision not to suspend or cancel a certificate just as directly as is a person whose certificate has been suspended or cancelled. I think, therefore, that the Minister has a right to call the decision into question on an appeal as provided by s. 576(3) and is a party to whom the right to appeal has been given.

¹ [1906] P. 301.

I would dismiss the motion and order that the costs be costs in the cause.

NOËL, J. (*dissenting*)—The appellant appeals to this court from that part of the decision of a formal investigation with respect to the cancelling or suspension of the certificate of master held by Captain James Pollock pronounced by His Honour Judge E. J. C. Stewart, on December 3, 1970, whereby he decided that the certificate of the said Captain Robert James Pollock, should not be cancelled or suspended as a consequence of wrongful acts or defaults by him causing serious damage to ships and loss of life.

The appeal is upon the ground that the above decision is wrong and that the wrongful acts or defaults of the respondent warranted suspension of his certificate. The appellant mainly contends that while finding that the respondent commanded his ship in violation of rule 25A of the Collision Regulations, P.C. 1965-1552 (in that in a narrow channel every power driven vessel, when proceeding along the course of the channel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel) the learned judge failed to consider or to give proper consideration to the provisions of s. 647(3) of the *Canada Shipping Act* R.S.C. 1952, c. 29, by virtue of which the non-observance of the Collision Regulations shall be deemed to constitute a wilful default of the person in charge of the deck of the vessel. The relevant part of the learned judge's decision with respect to the respondent reads as follows:

The case of Captain R. J. Pollock has given the Court difficulty. There is no doubt that his wrongful act and default were sufficiently culpable to justify dealing with his certificate. At the same time, it should be noted that his was a momentary lapse from an acceptable standard of seamanship, occurring at a time when he must have been lulled into a false sense of security by the radio-telephone messages by "Queen of Esquimaux".

. . . Captain Pollock was 57 years of age at the time of the hearing and obviously under great strain, making him appear older than his stated years. He has 36 years' experience at sea, some of it in the Royal Navy, during the war, in the marine section of the Royal Canadian Air Force, and thereafter in the home trade as a mate in 1948 and as master from 1953. He has been a master with British Columbia Ferries since 1963, taking command of "Queen of Victoria" almost 2 years ago. I know of no previous difficulty.

On the concluding day of the hearings it was announced that Captain Pollock was suspended by his employer. Without, in any way, criticizing that action, I regard it as a penalty already imposed. He may well find that the black mark caused by this accident may prevent reinstatement in his previous or similar command.

Captain Pollock has already suffered great punishment. Under all the circumstances, this Court has a serious doubt that a suspension of his certificate will, in any way, benefit the public or serve any useful purpose. The Court has therefore decided not to deal with his certificate.

The report was signed by the Commissioner and concurred in by the two assessors.

The respondent now moves this court for an order that the notice of appeal of the Honourable the Minister of Transport be struck out on the grounds that the Minister of Transport has no right of appeal herein and his counsel has submitted a number of reasons therefor.

This appeal should be struck out and I am content to rely on the two following grounds:

I am of the view that by virtue of s. 568(1) of the *Canada Shipping Act*, R.S.C. 1952, c. 29¹, only a court holding a formal investigation has jurisdiction to cancel or suspend the certificate of a master, mate or engineer and it has this power to cancel or suspend a certificate only if at least one of the assessors concurs in its finding to so cancel or suspend². It seems to me clear that it is only in such a case that a court can suspend or cancel a certificate as, in my view, the suspension or cancellation of a certificate is as much a part of the finding (*i.e.* a conclusion on a question of fact) of the court as that part of the decision or finding of the court which determines whether "the loss or abandonment of or serious damage to, any ship, or loss of life, has been caused by his wrongful act or default". This, indeed, is a matter which the court must eventually address itself to and as appears in s. 568(5) it "must state in open court the *decision* to which they (the court) have come with respect to the cancelling or suspending thereof". As the statute gives the right of suspension or cancellation to the investigation court (which is of the nature of a penalty) and only with the concurrence of at least one assessor, it follows, I believe that no other court has been given the power to do so, nor can I see how an appeal court can force an assessor to concur in a cancellation or suspension ordered by it.

I am also of the view that s. 576 of the *Canada Shipping Act* does not give the Minister an appeal. Subsection (1) of this section gives the Minister the right to order an investigation to rehear either generally or as to any part thereof. It then states that the Minister must so order (a) if new and important evidence that could not be produced at the investigation has been dis-

¹ 568. (1) The certificate of a master, mate, or engineer or the licence of a pilot may be cancelled or suspended

(a) by a court holding a formal investigation into a shipping casualty under this Part, or by a naval court constituted under this Act, if the court finds that the loss or abandonment of, or serious damage to, any ship or loss of life, has been caused by his wrongful act or default, but the court shall not, cancel or suspend a certificate unless one at least of the assessors concurs in the finding of the court;

² The English version of the section may not be as clear on this point as it could be but the French version is when it says in the latter part of s. 568(1)(a) "mais la cour ne doit annuler ou suspendre un certificat que si au moins un des assesseurs se rallie à sa conclusion;". This is also the interpretation given to this section by Pigeon J. in *Jones et Maheux v. Gamache* [1969] S.C.R. 119 at p. 126 when referring to s. 568(1) (a) of the *Canada Shipping Act* he said:

Enfin, comme on l'a déjà indiqué, au cas de sinistre, l'art. 568 permet à la Cour d'annuler ou suspendre un brevet de pilote si au moins un des assesseurs se rallie à cette conclusion, mais il y a droit d'appel de cette décision (art. 576, par. (3)).

covered or is discovered, or (b) if, for any other reason, there has been in his opinion ground for suspecting that a miscarriage of justice has occurred. Subsection (2) of this section then gives the Minister the right to order the case to be heard by the court by which the case was heard in the first instance or may appoint another commissioner and select the same or other assessors to rehear the case. It is not entirely clear, in my mind, whether the Minister can *proprio motu* order the case to be heard but it does seem that the Minister has here at his disposal a number of means to complete or correct a report. This, I believe, is the only recourse given the Minister following a report conducted as a formal investigation.

Subsection (3) of s. 576 of the Act seems at first glance to give any party to a formal investigation affected by the decision, a right of appeal and could include the Minister as representing the public interest, intent as he should be in seeing that corrective measures will be taken to prevent a repetition of the casualty investigated and in discharging his duty under the Act by insuring that only competent and officers of good conduct will hold certificates. There is, however, nothing in subsec. (3) that clearly gives the Minister a right of appeal from a decision of the Commissioner refusing to cancel or suspend a licence. The language indeed used in subsec. (3) that an appeal lies "with respect to the cancellation or suspension of the certificate of a master, mate or engineer, or the licence of a pilot" could, and, in my view does mean only when a certificate has actually been cancelled or suspended. This subsection must be read in its context and with due regard to the many recourses given to the Minister to complete or correct an investigation report or to deal with a defaulting mariner. If this is done, it then appears that the sole parties contemplated in the latter part of the subsection, and who are interested in appealing the decision, are only those whose certificate has been cancelled or suspended. The ending words of subsec. (3) of s. 576 that an appeal lies when "an application for a rehearing under this section has not been made or has been refused" clearly does not encompass the Minister as a party entitled to appeal. They indeed can only include a party affected by the decision of the Commissioner other than the Minister who has not made an application or who has seen his application refused as the Minister appears to be the one to whom the application is made and who could refuse it. It would indeed be absurd to hold that the Minister could make an application to himself or refuse his own application. This happens also to be confirmed by the manner in which the appeal rules are drafted where only parties other than the Minister can make such application.

I therefore conclude that it was never intended under subsec. (3) of s. 576 of the Act to give the Minister a right of appeal. The matter of deciding whether a certificate should be cancelled or suspended is indeed one of discretion within the power of the investigation court as stated in s. 568(1) "the certificate of a master, mate or engineer or the licence of a pilot may be

cancelled or suspended". This, as far as the Minister is concerned can only be corrected by a rehearing. I should also reiterate that having, by s. 568(1), given to the investigation court the power, but with the concurrence of one of his assessors only, to cancel or suspend a certificate, it would take clearer language than subsec. (3) of s. 576 to give a court of appeal the right to do so.

It therefore follows that the Honourable the Minister of Transport has no right of appeal herein and that his notice of appeal should be struck out.
