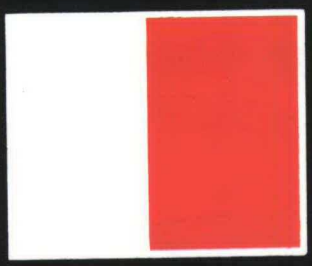

PART 1

CANADA

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General introduction

Study of canadian pilotage legislation and general recommendations

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ERRATA AND ADDENDA

Page	
98	409(i) should read 391(m)
103	C. 7 should read C. 6
123	p. 12 should read p. XXIV
136	subsec. 4(3) should read 4(e)
178	pp. 252-253 should read pp. 174-175
210	[second line] (vide 3 *infra*) should read (vide The Compulsory Payment System)
213	subsec. 391(a) should read 391(b)
241	The relationship of . . . does exist between . . . should read: The relationship of . . . does not exist between . . .
304	Desgroseillers should read: Desgroseilliers
325	p. 338 should read pp. 239 and 240
382	. . . the pilot is, or will be, indebted to the Pilotage Authority . . . should read: . . . the Pilotage Authority is, or will be, indebted to the pilot . . .
499	C. 6, pp. 186 should read: C. 6, pp. 192 and ff.
603	Millar, H.M.—Depart. of Public Works—143 should be inserted in between Middleton, K.C. and Miller, H.B.
811	[first line] 139 Code, c. 114, should read 1939 Code, c. 114.

CANADA

report of the royal commission on PILOTAGE

General introduction

PART I

Study of canadian pilotage legislation and general recommendations

(*Appendices in a separate volume*)

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1968

CANADA

ROYAL COMMISSION ON PILOTAGE

To His Excellency

THE GOVERNOR GENERAL OF CANADA

May It Please Your Excellency

We, the Commissioners appointed pursuant to Order in Council dated 1st November 1962, P.C. 1962-1575, to inquire into and report upon the problems of marine pilotage in Canada and to make recommendations concerning the matters more specifically set forth in the said Order in Council: Beg to submit the following Report.

CHAIRMAN

SECRETARY

MARCH 1, 1968

ROYAL COMMISSION ON PILOTAGE

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Chief Editor.

*Capt. J. A. Scott served as Nautical Adviser to the Commission from March 1, 1963 until his accidental death November 29, 1963.

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GENERAL INTRODUCTION

TERMS OF REFERENCE

By appointment dated November 30, 1962,[1] authorized by Order in Council P.C. 1962-1575 dated November 1, 1962, the Royal Commission on Pilotage was required:

> "to inquire into and report upon the problems relating to marine pilotage provided in Canada, more particularly under the Canada Shipping Act, and to recommend the changes, if any, that should be made in the pilotage system now prevailing, having regard to safety of navigation, development of shipping and commerce, the interests of pilots, shipowners, masters and the public generally; and in particular, without restricting the generality of the foregoing, the Commission shall consider and report upon:
>
> (a) the extent and nature of marine pilotage requirements, including compulsory pilotage, compulsory payment of pilotage dues and the granting of exemptions;
>
> (b) the duties, responsibilities and status of marine pilots; and
>
> (c) the adequacy of the organizational structure provided in the Canada Shipping Act for the administration, regulation and financing of pilotage, taking into consideration such factors as the provision of pilotage services, the determination, collection and disposal of pilotage dues, and the entry into service, technical standards, conduct, income, welfare and pension arrangements of pilots."

The wide scope of these terms of reference and the detailed subjects mentioned therein are indicative not only of the many problems affecting the organization and control of pilotage in Canada, but also of the importance of pilotage to our national economy.

Canadian pilotage is affected by geographical, current, tidal, climatic, ice and weather conditions that create operational problems which may be encountered in one area but not in another. The need for trained professional pilots to guide ships safely in and out of these areas grew progressively with the development of the industrial and commercial strength of Canada. Thus pilotage, like other professions, has encountered problems in adjusting to changing times and conditions that attend growth in an expanding economy, in particular those created by the substantial increase in the size of ships throughout the years.

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[1] The full text of the Commission's appointment is reproduced as Appendix I.

The importance pilotage has attained in Canada is further evidenced by the fact that, in the last fifty years, it has been necessary to appoint no less than five former Royal Commissions on the subject. One was appointed in 1913 to study the situation in the Pilotage Districts of Montreal and Quebec; another in 1918 to examine conditions in the Pilotage District of Halifax. Two similar inquiries were held in 1919, one for the Pilotage Districts of Vancouver, Victoria, Nanaimo and New Westminster, the other for the Pilotage Districts of Miramichi, Sydney, Louisbourg, Halifax, Saint John, Montreal and Quebec. Finally, a fifth was appointed in 1928 to examine and report upon the situation in the former short-lived Pilotage District of British Columbia. Twenty years later, in 1949, a Special Committee was appointed by Order in Council to consider pilotage matters in the Districts where the Minister was the Pilotage Authority. In more recent years, pilotage has been the subject of extended debates in both Houses of Parliament, particularly when Government measures were introduced to amend the Canada Shipping Act: February 1959 (Bill S-3), July 1960 (Bill C-80), and May-June 1961 (Bill C-98).

The mandate of this Commission, however, is very much wider than the terms of reference of the previous Commissions which dealt with pilotage matters only in some particular port or area. Indeed, this is the first time in Canadian history that a Royal Commission has been charged with the duty of conducting an inquiry into all aspects of pilotage, including the adequacy of applicable legislation, wherever the service is provided in Canadian waters.

BACKGROUND OF THE INQUIRY

In Canada, as in other countries, pilotage is a very old maritime occupation and, in fact, dates back to early colonial days. It has been on an organized basis on the St. Lawrence River for over 200 years, beginning with the appointment in 1731 of the first official pilot who was sent each season to Isle Verte (opposite Tadoussac) to await ships and bring them to Quebec. However, our present pilotage system goes back to 1873 when the Federal Parliament enacted the first "Pilotage Act" which abrogated most pre-Confederation pilotage legislation. Except for minor changes, the provisions of the 1873 Pilotage Act were retained and incorporated in the Canada Shipping Act when it was first introduced in 1906; in substance, they are still in effect.

This legislation has always dealt with pilotage as a service to shipping and the establishment of Pilotage Districts in Canada has been determined by local shipping needs in the light of existing conditions. Since the passage of the 1873 Act, 69 Districts have been established in this way but there are now only 26 in operation (including the Kingston District). These Districts (established, abrogated and operative) are listed in Appendix II.

There are now nearly 445 "licensed" pilots grouped in 25 Districts (excluding the Kingston District). There are also 85 Canadian "registered" pilots on the Great Lakes, 2 pilots employed by the Department of Transport operating at Goose Bay and an estimated 25 pilots operating mainly in non-organized areas. A list of the operative Districts, ports and areas where pilotage is performed, together with the number of pilots engaged in each, is in Appendix III.

Appendix IV is a map of Canadian navigable waters which shows the location and limits of existing Pilotage Districts and, in addition, the main areas where pilotage services (organized under the C.S.A. and others) are provided.

Organized pilotage in Canada has grown into a multimillion dollar business. In 1965, the total cost of pilotage was $12,000,000; of this amount, the shipping interests paid $10,700,000 (89%) and the balance of $1,300,000 (11%) was paid by the Federal Government.

Except for the Great Lakes, pilotage at the present time is governed by the provisions of Part VI of the Canada Shipping Act (1952 R.S.C. c.29), which constitutes the basic pilotage law of Canada.

With regard to the Great Lakes, it became necessary—following the completion of the St. Lawrence Seaway in 1959—to arrange with the United States for the establishment of a joint pilotage system in the Great Lakes Basin, and a law of exception designed to deal with that particular situation was passed by Parliament in 1960 and incorporated in the Canada Shipping Act as Part VIA. Because of its special nature, pilotage on the Great Lakes is dealt with separately in Part V of the Report.

At the commencement of the inquiry, Newfoundland's pre-Confederation pilotage legislation, i.e., The Port and Harbour of St. John's Act No. 1 of February 18, 1946 and C. 179 of the Consolidated Statutes of Newfoundland, 1916, were still in effect. These have since been superseded by Part VI of the Canada Shipping Act; however, due to "survival notwithstanding repeal" provisions, the General By-law of the Pilotage District of St. John's—which was passed under the pre-Confederation Newfoundland Statute—was still in effect as of Oct. 1, 1967. It is for this reason that no mention is made of the St. John's District By-law in the study of legislation in Part I of the Report.

In addition, on the East Coast and on the Great Lakes, there are private and public pilotage organizations that are not governed by the Canada Shipping Act except for its provisions of general application, mainly because they are outside organized territories. At Goose Bay, for example, pilotage services are provided by the Department of Transport and the rates are fixed pursuant to sec. 18 of the Financial Administration Act.

The organization of pilotage under Part VI of the Canada Shipping Act centres around the establishment of fully decentralized, autonomous and financially self-supporting Pilotage Districts which, with the exception of Quebec and Montreal, which are constituted by specific provisions of the Act, are established by the Governor in Council. Formerly, each Pilotage District was under the direction of a local Commission of three to five members appointed by the Governor in Council. Through provisions, which originated in 1903 to 1905, by amendments to the applicable statutes, the Minister of Transport is the District Pilotage Authority for Churchill and Bras d'Or Lakes and for most of the main Districts, i.e., Sydney, Halifax, Saint John, Quebec, Montreal, Cornwall and British Columbia. In the remaining 16 Districts (excluding the three so-called Districts in the Great Lakes Basin), the original system was retained.

It is of importance to note the distinction between the compulsory payment of pilotage dues, which obtains in all Districts governed by Part VI C.S.A., except the Prince Edward Island District, and compulsory pilotage, which obtains in the Great Lakes Basin under Part VIA C.S.A. In the former situation, the Master of a non-exempt vessel is not obliged to employ a licensed pilot but whether he does or not he must pay dues; in the latter case it is mandatory to take a registered pilot on board and, if a vessel is in "designated waters", she can not be operated unless navigated by the pilot.

Three basic concepts of Part VI are:

(a) the District Pilotage Authority, aside from its above-mentioned autonomous status, is a licensing authority enjoying certain regulation-making powers but having no authority either to provide or to direct the pilotage service;

(b) the only permissible status of the pilots is that of self-employed, free entrepreneurs competing against one another for ships;

(c) except on an inward voyage by a non-exempt ship, each Master or agent has the right to choose his pilot.

The actual situation, however, is altogether different. Pilotage, at least in all the larger Districts, is not only administered centrally but is fully operated and controlled by a Department of the Federal Government, the Department of Transport. In all main Districts, controlled pilotage has replaced free enterprise, the pilots are assigned to duty according to a tour de rôle system and they are *de facto* employees of their respective Pilotage Authority. This illegal situation which, in certain respects, meets real needs of pilotage, has existed for many years and has caused endless difficulties.

By early 1962, these difficulties had reached acute proportions and, at the opening of navigation in April of that year, the St. Lawrence River pilots went on strike for nine days—a walk-out which the British Columbia and Saint John pilots threatened to join. As part of the general solution to the

strike, the Federal Government agreed to appoint a Royal Commission to inquire into all aspects of pilotage in Canada. It was under these far from promising auspices that this Royal Commission was appointed November 30, 1962.

THE COMMISSION'S INQUIRY

The main function of this type of Royal Commission is, above all, to seek out facts. Its rôle is not to decide, to render judgment, but to discover all the facts pertinent to the multitude of problems that beset pilotage and its organizational structure so that those in authority may make appropriate decisions based on as complete knowledge as possible. The primary rôle of this Commission is, therefore, to inform; its secondary rôle is to recommend, that is, to suggest solutions which, in the light of its experience, appear to be appropriate.

Consequently, the first objective of the Commission was to unravel what appeared to be a very complex situation and establish the facts as correctly as possible. This included not only the many local problems directly affecting pilots, shipowners, Masters and the public generally, but also the broader questions of the present state of our pilotage law and its adequacy under existing conditions. For this reason, the Commission considered it essential to conduct an inquiry into the facts rather than an investigation based mainly on expressions of opinion, and to conduct this inquiry in public.

As a first step, the Commission prepared its own Rules of Practice and Procedure[2] to govern the submission of Briefs and the conduct of proceedings before it. These Rules were made known at the preliminary hearing held at Ottawa December 21, 1962, when all interested parties were informed that the Commission would not be sitting in judgment and that, since there was no trial, there would be no litigants before it and all witnesses would be considered Commission's witnesses. Submissions, briefs and testimonies might be given either in English or French, simultaneous translation would be provided at all sittings of the Commission in Ottawa and in the Province of Quebec, and elsewhere in Canada should it be deemed necessary. It was further pointed out that, as in any Court of Justice, the Commission would render its Report and base its recommendations only upon the facts properly established before it. This did not mean that secondary evidence would be rigidly refused but, where given, it would not be accorded as much weight as first-hand information. Nor did it mean that the Commission would be opposed to receiving information of a confidential nature but, if this was done, the information would only be used as a basis to orient the Commission's action in determining whether the matters thus brought before it should be made part of the record and, in the affirmative, the investigation would be held openly following the usual procedure.

[2] Appendix V.

This first decision indicated to all concerned at the very outset how the Commission understood and interpreted its mandate. The procedure, as originally laid down, was adhered to throughout the whole inquiry. Public hearings were concluded at Ottawa on January 15, 1965. At this last sitting, all parties were informed that, since they had all been given ample opportunity to be heard, the Commission now considered itself free to seek any additional information it deemed necessary, that the information thus obtained would be entered in the Commission's records as Exhibits, a list of which would be published from time to time, and that, should any of this information prove contentious, interested parties would be given an opportunity to present their case and, if necessary, to be heard at a public hearing convened for this purpose. Several hundred documents were so obtained to enable the Commission to complete its investigation but none required the holding of a hearing.

The Commission envisioned a heavy responsibility with far-reaching economic and geographical ramifications affecting Canada's economy. Its task was considered to include:

(a) extensive geographical study of the problems outlined in the Commission's Terms of Reference, with "on site" examinations of pilotage areas;

(b) investigations into problems on the Atlantic Seaboard, its adjacent waters, tributaries, harbours, bays, inlets and channels where skilled navigation by pilots is conducted or is necessary; of the St. Lawrence River with its tributary waters, including the Saguenay River; of the St. Lawrence Seaway and the waters of the Great Lakes with their connecting channels; of Hudson Bay; and of the vast expanse of the Pacific Coast, its islands and rivers, including the Fraser River;

(c) economically, to investigate all aspects and conditions of the important profession of pilotage;

(d) to be deeply concerned with the problems of the shipping industry, and all media of maritime transportation including the safe and expeditious transit of ships plying Canadian and connecting international waters;

(e) to create close liaison with, and seek information from, all Federal departments involved with ships, shipping or pilotage;

(f) to inquire into the *modus operandi* of the Department of Transport in its capacity as adviser to the Federal Pilotage Authority;

(g) through the Under-Secretary of State for External Affairs, to inquire into the marine pilotage organization of other countries.

To achieve a comprehensive inquiry by obtaining the co-operation of Government departments, pilots of the various Districts and their representa-

tives, representatives of the shipping industry and all parties and persons involved in pilotage, it was considered essential to convene the several Commission hearings intended to be held at the principal ports from the East Coast of Newfoundland to the West Coast of British Columbia.

The Commission began to hear evidence in Charlottetown February 11, 1963, and continued its public sessions regularly until January 15, 1965, as above noted. In all the ports where hearings were held, their harbour and pilotage facilities were visited. During periods between hearings, the Commission toured all other pilotage areas. A list of the ports and places at which hearings were held, together with their dates, will be found in Appendix VI.

In January 1964, before commencing its investigation of pilotage on the Great Lakes where Canada and the United States have common interests, the Commission visited Washington to obtain general information on the laws and regulations governing pilotage in the United States. Calls were paid on U.S. Government officials to advise them of the Commission's intention to inquire into the pilotage situation in that area and to extend an official invitation to attend the investigation. A visit was also made to New York in October 1964 to gain first-hand knowledge of the organization and operation of pilotage as constituted under the laws of New York and New Jersey, which had been quoted as an example by the Federation of the St. Lawrence Pilots and which, the Commission was informed by the Washington officials, had served as a model for organizing the American pilots on the Great Lakes.

The Commission's investigation and studies have already achieved some positive results. *Inter alia*, some recommendations made to the Commission have already been implemented and many amendments were made to District By-laws as a result of the situation revealed by the evidence produced at the hearings. The Commission's hearings also gave the parties concerned a forum to air their grievances and the opportunity to state their case fully. The greater appreciation thus obtained of the problems of others and of the general situation has resulted in better understanding and marked, increased co-operation.

REVIEW OF EVIDENCE

While it was clear from the beginning that the Commission had a broad mandate, the extent of its task was not fully realized until it began reviewing the evidence it had gathered during the public hearings, which alone took 175 days. The testimonies covered 25,000 pages of transcript. A total of 336 persons testified under oath and 34 additional persons addressed the Commission. The names of these persons are listed in Appendix VII. Over 1,700 exhibits were filed, mostly by bundles of correspondence, statistics and financial documents, all of which contained valuable information that had to be carefully scrutinized. In addition, 62 Briefs, some book-size, were submitted. These are listed in Appendix VIII.

The review and analysis of the evidence proved a monumental task. This was done progressively, District by District, generally in the manner in which the evidence was collected.

The problems which emerged frequently proved so varied and complex that their solution required profound research, including study of the historical background and legislative history of pilotage throughout the country. Moreover, the evidence submitted was, on occasion, found incomplete, thus forcing the Commission to pursue its inquiries, usually through an exchange of correspondence with the interested parties. This additional evidence subsequently became part of the public record and was filed as Exhibits according to the procedure already described.

While the Commission concluded that the pilotage services now provided are, on the whole, performed satisfactorily, it also found that the present organization and control of pilotage exist in contravention of the law. The Commission's finding concerning the absence of a proper legal basis for most of the existing administration of pilotage was such a startling development that it was deemed necessary to undertake a detailed analysis of the pilotage provisions of the Canada Shipping Act to verify the correctness of this conclusion.

As the Commission's deliberations progressed, certain research studies by experts were considered essential, i.e.:

(a) cost of pilotage;

(b) economic impact of pilotage;

(c) assessment of pilotage dues;

(d) pension arrangements for pilots.

The results of these studies are reproduced at the end of this Report as Appendices IX to XII inclusive.

It was necessary to conclude the financial and economic studies with the year 1965. The release of Part I of the Report would have been unduly delayed by waiting for the financial statements of the 1966 fiscal year which ended on March 30, 1967, and for the Dominion Bureau of Statistics figures for the year 1966. The 1966 figures will be quoted in the Report where deemed pertinent and if available; any material changes will be recorded in the closing remarks at the end of Part V of the Report.

The Commission also made studies of the broad aspects of pilotage in Australia, Belgium, Denmark, France, Greece, Italy, the Netherlands, New Zealand, Norway, Sweden, the United Arab Republic (Suez Canal), the United Kingdom, the United States of America (including the Panama Canal) and West Germany (including the Kiel Canal). Details of the pilotage legislation in those countries were obtained through diplomatic channels and were filed as Exhibits. Information with respect to most of the above European countries, as well as the United

States and Egypt, was also obtained at the Commission's hearings from the Federation of St. Lawrence River Pilots which had sent two representatives abroad to study pilotage in those countries before submitting its brief and recommendations to the Commission. Summaries of the pilotage legislation and organization in these countries are appended as Appendix XIII. Although these studies proved most useful to the Commission in the general direction of its recommendations, little time was spent in detailed study of the organization and operation of pilotage in the countries named because it soon became evident that pilotage is basically a local matter and few countries have as many diversified types of pilotage operations as are found in Canada.

PLAN OF THE REPORT

The Report is presented in five Parts, each contained in a separate volume or group of volumes:

Part I, a study of legislation, is a synthesis, accompanied by fourteen appendices in a separate volume. It directs attention to the present state of the law on pilotage (Part VI of the Canada Shipping Act) and related legislation, reports on its adequacy or otherwise in the light of existing conditions as disclosed by the evidence, and recommends the basic changes that should be made in the law to meet the present and foreseeable future requirements of the pilotage service. The one exception made in this general review of the law is with respect to pilotage on the Great Lakes (Part VIA of the Canada Shipping Act) which is dealt with in Part V of the Report. The Commission's general recommendations concerning the basic principles which should underly this new legislation, together with certain basic reforms deemed desirable in the general organizational structure of pilotage, appear at the end of Part I of the Report.

Part II (West Coast and Churchill), Part III (Atlantic Provinces) and Part IV (St. Lawrence) contain the fact-finding reports on the pilotage situation in each of the 25[3] Pilotage Districts administered under Part VI of the Canada Shipping Act. For purposes of reporting, these Districts have been grouped according to their geographical area and each individual Report follows the same pattern, namely:

(a) the legislation, including its historical background, pertaining to the establishment and administration of the District;

(b) the Briefs submitted in connection with pilotage in the District;

(c) the summation and analysis of the evidence on all aspects of pilotage in the District; and

(d) the Commission's recommendations, more specifically as they affect pilotage in that District.

[3] It should be noted that the Kingston District, which was created under Part VI C.S.A., is also known as the so-called Great Lakes District No. 1 governed by Part VIA, C.S.A., together with the so-called Great Lakes Districts Nos. 2 and 3.

Part V deals with pilotage on the Great Lakes. As mentioned earlier, pilotage in that area is a totally distinct matter involving separate legislation by Canada and the United States designed to facilitate, by agreement between the two countries, the operation of a joint pilotage system in the Great Lakes Basin. For this reason, as much as because of the international aspects, the Commission deemed it desirable to report upon the results of its inquiry and make the recommendations in connection with this matter the subject of a separate Report. This Part, which concludes the Report, also contains some general closing remarks and the Commission's acknowledgement of the generous co-operation and valuable assistance received at all times.

The Court cases cited in the Report are listed as an Appendix to each Part. For Part I, see Appendix XIV.

Part I

STUDY OF CANADIAN PILOTAGE LEGISLATION

(EXCLUSIVE OF PART VIA, CANADA SHIPPING ACT)

Chapter 1

HISTORY OF LEGISLATION

PREAMBLE

A clear understanding of the effectiveness of existing pilotage legislation requires careful study of the origin of this legislation and the circumstances that prevailed when it was introduced because some of its provisions are meaningless, or at least ambiguous, in the light of present day conditions alone. Such a study reveals that the first federal legislation, the 1873 Pilotage Act which had its origin in the 1854 Merchant Shipping Act of the United Kingdom, has survived to the present with no material change in the basic scheme of organization it originally provided, despite the fact that the circumstances and requirements of the service have materially changed since 1873. Hence the basic organization provided by the law no longer corresponds to modern requirements. Since 1873 there has been no serious attempt to bring pilotage legislation up to date and most changes have been limited to making the 1873 general scheme of organization applicable to all Districts by repealing those portions of the former organization in the four Districts of Quebec, Montreal, Halifax and Saint John, N.B. which had been retained in the 1873 Act as exceptions. This aim was attained, except for two minor points (sec. 328 and Quebec Pilot Fund), in 1934 and 1950.

The few changes made in the main part of the legislation to remedy the resultant maladjustment were never in depth and generally conflicted with the main body of the Act by introducing provisions that were incompatible with the basic scheme. The necessary basic changes were brought about by the illegal and ultra vires process of amending statutory legislation by local by-laws with the result that the organizational schemes stipulated in the various by-laws under which the pilotage service now operates are in direct conflict with Part VI of the Canada Shipping Act and are, therefore, illegal although in general they meet the existing needs of the service. It is believed that this climate of illegality is the main cause of the present chaotic and inefficient state of pilotage organization and of the loss of authority of those in charge.

LEGISLATION IN 1867

The Pilotage Act of 1873, the first pilotage legislation passed by Parliament after Confederation, is a complex law which provides for a general scheme of organization but, on the other hand, establishes or maintains a special status for the four main Pilotage Districts, namely, Montreal, Quebec, Saint John and Halifax.

Prior to Confederation, each province had its own legislation tailored to its own needs. After Confederation, pilotage fell within federal jurisdiction and the various provincial acts continued to apply until replaced by federal legislation.

The main features of the provincial legislation governing pilotage that existed in 1867 (for details see the Historical Section of each District concerned):

(a) In Upper Canada there was no pilotage legislation; in fact there was little, if any, pilotage because the ships in those waters were small, regular traders whose Masters were conversant with local navigation conditions.

(b) In Lower Canada, however, the situation was quite different because there was regular ocean-going traffic trading up to Montreal. Hence, there had been pilotage legislation since the early days of the French colony. No general legislation existed or was needed because the only pilotage problem was river pilotage on the St. Lawrence. At the time of Confederation, the legislative situation was as follows:

(i) For the Port (District) of Quebec, there was the Quebec Trinity House Act of 1849 (12 Vic. c. 114) and the *Corporation of Pilots For and Below the Harbour of Quebec* Act of 1860 also referred to as the Quebec Pilots Corporation Act (23 Vic. c. 123). Trinity House was a public corporation responsible for the navigable channel of the St. Lawrence River from Portneuf Basin, above Quebec, down to the Gulf and among its various duties was that of Pilotage Authority. As such, it exercised three distinct powers: first, delegated power of legislation, i.e., regulation making; second, licensing power; third, judicial power as a court of records over all pilotage matters. The Quebec system was unique in that the free exercise of the pilot's profession had been abolished by the Quebec Pilots Corporation Act of 1860; providing and administering the service were responsibilities of the Pilots' Corporation which, pursuant to the 1860 Act, operated a tour

de rôle system and provided the pilots' remuneration on the basis of equal shares of the net Corporation earnings, that is, pilotage money earned by all the District pilots, less pilotage and Corporation operating expenses.

(ii) For the Port (District) of Montreal, only the Montreal Trinity House Act of 1849 was in force (12 Vic. c. 117). This public corporation had the same powers over pilotage as its Quebec counterpart. Administration and provision of pilotage were left to each pilot under the free enterprise system which then prevailed. In 1850, 13-14 Vic. c. 123 incorporated the Montreal pilots as *The Corporation of the Pilots For and Above the Harbour of Quebec*. However, this Corporation never became operative although the Act which incorporated it was apparently never repealed.

(c) In Nova Scotia, pilotage was on a harbour basis with distinct and unrelated pilotage needs and, therefore, the law provided a general basic scheme of organization for the creation and operation of independent port pilotage units. The pilotage legislation (R.S.N.S. 1864 (3rd ser.) c. 79) applied to Halifax as well as to several other ports in the province. The Act provided that pilotage in each port came under the authority of Commissioners appointed by the Governor. They had power to make regulations and to license pilots.

(d) New Brunswick resembled Nova Scotia in that there was general legislation applicable to all ports (except Saint John), namely the 1786 Ordinance (26 Geo. III) which, with some amendments, was still in force at the time of Confederation. It provided for pilotage by independent contractors licensed in each of the counties by Justices of the Common Pleas on the recommendation of three or more wardens of the port concerned. The magistrates and wardens were the Pilotage Authority and, as such, had regulation-making powers and were charged with enforcing the law. In the Harbour of Saint John, pilotage came under the jurisdiction of the City of Saint John (City of Saint John Charter 1785 (25 Geo. III)).

(e) When British Columbia joined Confederation in 1871, the pilotage law in force was the Pilotage Ordinance of 1867 which provided basically the same scheme of organization as now exists in the Canada Shipping Act, that is, pilotage organized on a harbour basis and performed by independent contractors with a Pilotage Authority consisting of a board appointed by the Governor and granted regulation-making and licensing powers.

FEDERAL LEGISLATION 1867-1873

Between 1867 and 1873 the Federal Parliament passed five laws relating to pilotage. Three were amendments to the Quebec Trinity House Act and to the Quebec Pilots Corporation Act which dealt exclusively with pilotage in the Port of Quebec. The fourth concerned pilotage in Charlotte County, N.B. (35 Vic. c. 43) and the fifth, in 1869 (32-33 Vic. c. 41), contained the first provisions passed by the Federal Parliament concerning pilotage in general. It exempted government-owned vessels from pilotage in all Canadian ports and extended exemptions from compulsory pilotage in the Port of Quebec to all vessels not exceeding 150 tons registered in any port in Canada. However, when these exempted vessels required a pilot they had to employ a Quebec branch pilot.

PILOTAGE ACT 1873

The first Federal Pilotage Act, which was passed in 1873, established a general scheme, based on the 1854 Merchant Shipping Act of the United Kingdom (17-18 Vic. c. 104, Ex. 1482), which followed the organization existing at that time in British Columbia and Nova Scotia and was quite similar to the regulations governing port pilotage in New Brunswick. In addition, the Act maintained the special pilotage organization on the St. Lawrence River, *inter alia*, the special status of the Pilotage Authorities of Quebec and Montreal including the judicial powers that they alone enjoyed, and the special status of the Quebec pilots, that is, their compulsory partnership under their 1860 Act of incorporation. It extended the Montreal and Quebec concept of a Pilotage Authority composed of representatives of local interests and government appointees to the two other major harbours in Canada at that time—Halifax and Saint John, N.B.—and provided them with the same exceptions from the general scheme that existed in Quebec and Montreal, except that the pilots remained free entrepreneurs and that the Halifax and Saint John Pilot Commissioners did not enjoy any judicial powers. There, as in all Pilotage Districts except Quebec and Montreal, pilots had to be prosecuted before the regular courts for offences and breaches of regulations.

Most of the provisions of the 1873 Canadian Act dealing with the general organization of pilotage can be traced almost verbatim in the 1854 U. K. Act. The main principles are that pilotage is established for the convenience of shipping and is based on the free exercise of the profession by independent pilots whose qualifications have been certified by the licensing authority. The Master's right to choose his pilot is hardly ever interfered with and his right not to employ a pilot is recognized. However, in certain Districts named in the Act or where the Governor in Council has so decided, the Master is urged to employ a pilot by being obliged to pay the same amount of money whether he takes a pilot or not, i.e., the compulsory payment

system. In this regard the Canadian legislation was slightly at variance with the U.K. legislation, but basically it was a pure matter of semantics. In Canada, care was taken not to use the term "compulsory pilotage" which appeared in the 1854 Act and which was the system in operation in the Ports of Quebec and Montreal, but the effect was the same. In U.K. Districts where pilotage was compulsory, a Master was always permitted to navigate without a pilot but he was liable to a penalty of double the normal dues; in Canadian Districts where the payment of pilotage dues was compulsory, the Act stipulated the Master's right not to employ a pilot but retained a financial penalty in fact, if not in name, in that the dues were payable just the same. Both Acts had three types of exemption: ships to which no pilot offered his services on the inward voyage, ships piloted by one of their officers who held a pilot's certificate, and ships exempted by statute.

Canadian Pilotage Authorities had only two powers: to legislate by regulations within the limits contained in the Act and to license pilots, including the right to suspend and to withdraw such licences as defined in the Act. In addition, Pilotage Authorities were required to supervise the conduct and behaviour of their licencees and they were given related powers necessary to discharge their responsibilities. This basic scheme of organization has not been changed in substance since it was included in the 1873 Act.

Because of its long past and its many pilots, the Quebec Pilotage District had inherited a very advanced state of legislation that the 1873 Act desired to preserve. This aim was achieved by inserting a large number of provisions that were applicable only to the District of Quebec. The rights conferred by the 1860 Act on the Corporation of Pilots For and Below the Harbour of Quebec had to be recognized; hence, it was stipulated that nothing in the new Act was to be construed as giving power to Trinity House of Quebec "to make regulations respecting the management or maintenance of pilot boats, or respecting the administration or distribution of the earnings of pilots and pilot boats...." (sec. 91), and even over licensing of pilot boats (sec. 74). Since in Quebec the pilotage dues belonged to the Pilots' Corporation, it was necessary to include in each section of the Act which stated that the dues were payable to the Pilotage Authority a provision that, in Quebec, they were to be paid to the Pilots' Corporation (secs. 52, 57, 59 and 60). The managerial powers of the Pilots' Corporation were duly recognized (secs. 85-88). The Act retained the requirement that the apprentices had to be indentured to the Pilots' Corporation and also had to serve turns aboard pilot schooners belonging to the Corporation (sec. 25). The number of apprentices was fixed at a minimum of 36 and a maximum of 60 (sec. 26). Because the Pilots' Corporation was responsible for administering the pilotage service, the statutory offence of refusing or delaying to take charge of a vessel was, as an exception, made subject to the provisions of the Quebec Pilots' Corporation Act (subsec. 70(7)). The Trinity House By-laws respect-

ing pilotage had to be submitted to the Pilots' Corporation 20 days before being submitted to the Governor in Council for approval (sec. 21). In addition, the Quebec Pilotage Authority was denied full discretion to determine the number of pilots since the Act provided that their number was not to be less than 150 and was not to exceed 200 (they numbered 280 in 1860). The existing tariff was not to be reviewed except when over a three-year period the average annual remuneration per active pilot was less than $600. Trinity House was denied the right to license apprentices (subsec. 18(4)) and to fix their number (subsec. 18(6)).

The district limits of both Districts of Montreal and Quebec were fixed by the Act (secs. 5 and 6) and sec. 49 dealt with the special problem resulting from their contiguity by setting a limit to the extent of their joint jurisdiction over the Harbour of Quebec (sec. 49). The provisions of the Act regarding the creation and administration of the pilot fund were made not applicable to these Districts because the matter was already dealt with in the Quebec and Montreal Trinity House Acts. The Montreal Harbour Commissioners superseded Montreal Trinity House as Pilotage Authority for the District of Montreal (secs. 2 and 6).

The Act created for the Halifax and Saint John Districts a public corporation type of Pilotage Authority composed of representatives of local interests and of government appointees but it did not fix the district limits as in Quebec and Montreal. The reason, no doubt, was that for the Districts of Quebec and Montreal the limits were already established in the applicable Trinity House Act and, therefore, could not be varied by the Governor in Council. Since this problem did not exist for the Halifax and Saint John Corporations, which were created by the Pilotage Act, the task of fixing the limits was delegated to the Governor in Council (secs. 7 and 12). Secs. 11 and 16 provided for the appointment of a Secretary-Treasurer for each Corporation at a salary of $800 to be paid by the Crown.

In all four Districts, the Pilotage Authorities were denied the power to grant pilotage certificates enabling Masters and mates to pilot their own ships (subsec. 18(4) and sec. 65), and by statute the payment of dues was made compulsory (sec. 57).

There was one provision that was applicable to the District of Saint John alone, that is, the right to vary statutory exemptions. These could not be altered in any other District.

Some amendments to the Quebec and Montreal Trinity House Acts were repealed completely as was all the New Brunswick pilotage legislation including the Act passed the previous year by the Federal Parliament respecting pilotage in Charlotte County (35 Vic. c. 43), the whole of the pilotage legislation of British Columbia and the Federal Act passed in 1871 to place all Canadian vessels on an equal footing as regards pilotage in the Port of Quebec (32-33 Vic. c. 41). The Quebec Trinity House Act (12 Vic.

c. 114), The Montreal Trinity House Act (12 Vic. c. 117), and the Nova Scotia Act regarding harbour pilotage and Harbour Masters were repealed in part only (12 Vic. c. 79). However, none of the provisions of the Quebec Pilots Corporation Act of 1860 was affected.

AMENDMENTS 1873-1886

Until the 1886 revision, the main amendments to the Act were the following:

(a) In 1875 (38 Vic. c. 28), *inter alia,* the sections of the Act which provided for paying the remuneration of the Halifax and Saint John Secretary and Treasurer out of public funds were repealed and replaced by a general section empowering all Pilotage Authorities, except Quebec, to pay the operating expenses of the District out of pilotage revenues. The exception for Quebec was no doubt the result of its special organization which made it unlikely that the Pilotage Authority would incur any substantial operational expenses since the service was managed by the Pilots' Corporation; the dues belonged and were payable to, and were collected by, the Corporation. This is the origin of sec. 328 of the present Canada Shipping Act which has remained unchanged ever since.

(b) In 1875 (38 Vic. c. 55), the Harbour Commissioners of Quebec superseded, as Pilotage Authority, Quebec Trinity House which ceased to exist. The trusteeship and management of the pilot fund were transferred to the Pilots' Corporation, powers that it has retained ever since.

(c) In 1877 (40 Vic. c. 20), the procedure whereby clearance was not to be issued by the Customs Officer until the pilotage dues had been paid or settled was introduced. This provision has not changed materially since and is now subsec. 344(1) of the present Canada Shipping Act.

(d) In 1879 (42 Vic. c. 25), the power of the Pilotage Authorities (other than Quebec, Montreal, Halifax and Saint John) to issue pilotage certificates to Masters and mates to pilot their own ships was limited to ships registered in Canada. The Montreal Pilotage Authority was given the power to grant second-class pilot licences and to fix a special scale of dues for their services.

(e) In 1882 (45 Vic. c. 32), Pilotage Authorities were given the power to administer oaths and to examine witnesses under oath in matters which they had the power to investigate. The Pilotage Authorities for all Districts including Halifax, but excluding Quebec, Montreal and Saint John, were authorized to limit pilot licences to a term of not less than two years and to renew such licences at their discretion for a further limited term of not less than two years. It was

further provided that no licensed pilots were to be thereafter appointed to act as Harbour Masters. The minimum and maximum number of pilots for the Harbour of Quebec was reduced and the Quebec Pilotage Authority was empowered to fix the number of apprentices indentured to the Corporation of Pilots.

CONSOLIDATION 1886

When the Pilotage Act was consolidated in 1886 (1886 R.S.C. c. 80), no material change was made, except the insertion of a definition of "pilotage dues" that in the 1873 Act was identified with "pilot's remuneration" and in the new Act was defined as "the remuneration payable in respect of pilotage", a definition that is still carried in the present legislation.

AMENDMENTS 1886-1906

Between 1886 and 1906 the main amendments were the following:

(a) In 1900, 63-64 Vic. c. 36 deprived the Montreal Pilotage Authority, that is, the Montreal Harbour Commissioners, of its judicial powers and the Montreal Pilots' Court was created. In addition to having general judiciary jurisdiction in pilotage matters, the Court was to conduct inquiries into shipping casualties if so directed by the Minister of Marine and Fisheries.

(b) In 1902, 2 Edward VII c. 27 amended the exemptions section, *inter alia*, by providing that the Pilotage Authorities for Halifax, Sydney, Miramichi, and Pictou could vary these exemptions with the approval of the Governor in Council.

(c) In 1903, 3 Edward VII c. 48 appointed the Minister of Marine and Fisheries the Authority for the District of Montreal but only with the powers that had previously been, and remained, vested in the Montreal Harbour Commissioners as Pilotage Authority for that District.

(d) In 1904, 4 Edward VII c. 29 amended the Pilotage Act to incorporate the precedent established the year before whereby the Minister could be appointed Pilotage Authority in lieu of the normal local board, provided this was recommended by local interests and the Governor in Council was satisfied that it was in the interest of navigation.

(e) In 1905, by 4-5 Edward VII c. 34 the Quebec Harbour Commissioners were superseded as Pilotage Authority by the Minister of Marine and Fisheries but only with the powers that the said Corporation had held as such, except that its judiciary powers were to be exercised by the Court provided in the Shipping Casualties Act of 1901 or by a tribunal or an officer designated by the Minister.

These major modifications to the Montreal Pilotage District organization had been prompted by the report of a Royal Commission created in 1898 following the 1897 Montreal pilots' strike.

CANADA SHIPPING ACT 1906

In 1906, following the example of the United Kingdom, Parliament consolidated in one Act, called the Canada Shipping Act of 1906 (1906 R.S.C. c. 113), all the laws pertinent to navigation including the Pilotage Act of 1886 and its amendments, and the Shipping Casualties Act of 1901 and its amendments. However, the U.K. was soon to revert to the old system by making its pilotage legislation a single, complete and distinct Act, the Pilotage Act of 1913. This was effected on the specific recommendation of a departmental committee which held an inquiry into pilotage in 1909. Its report was submitted in 1911.

As far as pilotage was concerned, the 1906 Canada Shipping Act was merely a consolidation and contained no new material. For instance, in the District of Quebec the designation of the Quebec Harbour Commissioners in the definition of the Quebec Pilotage Authority was replaced by the Minister. In Montreal, the existing texts were modified to incorporate various amendments, e.g., the change in Pilotage Authority, the creation of the Montreal Pilots' court, the right to issue second-class pilotage licences to apprentices, etc. There were no changes affecting Saint John and Halifax.

AMENDMENTS 1906-1927

When the next consolidation of the Act occurred the following amendments were made:

(a) In 1914, on the recommendation of the Lindsay Royal Commission of 1913, 4-5 George V. c. 48 abolished the compulsory partnership of the Quebec pilots that had been created by the Quebec Pilots Corporation Act of 1860. The Pilots' Corporation was deprived of its rights over the pilotage dues earned by the pilots and all its powers over the management of the pilotage service, namely, to maintain and operate pilot boats at the seaward stations, to collect pilotage dues, to control and manage pilots and apprentices. These powers were vested in the Minister as such who could then administer the service and the pilots instead of the Corporation. The Quebec Pilots Corporation retained only the trusteeship and management of the Pilots' Fund. This Act, except section 3 which dealt with the Pilot Fund, was later repealed by the revised statute of 1927 which retained all the special provisions of the 1906 Act regarding the Quebec Pilots Corporation and

merely substituted the Minister for the Corporation. This gave the Minister, as such, a power that he did not have as Pilotage Authority and that no Pilotage Authority in any other District possessed, i.e., the power to manage the pilotage service and to control the pilots.

(b) In 1916, by 6-7 George V c. 13 the statutory limitation on the number of pilots for the District of Quebec was further decreased and only a permissible maximum was established: their number was not to exceed 125.

(c) In 1919, by 9-10 George V. c. 41, sec. 432 of the 1906 C.S.A. regarding the appointment of the Minister as Authority in any District, was amended by deleting the requirement that this had to be recommended by local interests. No doubt the main reason was to legalize the appointment of the Minister as Pilotage Authority for the Halifax District that had been enacted the year before under the War Measures Act following a specific recommendation of the Robb Royal Commission (Ex. 1178).

(d) In 1922, by 12-13 George V c. 9 the exemptions section was re-amended and the name of the Saint John District was inserted in the list of Districts where the Pilotage Authority had the power to vary the exemptions with the approval of the Governor in Council.

CANADA SHIPPING ACT 1927

The 1927 Canada Shipping Act (1927 R.S.C. c. 186) was, as far as pilotage legislation was concerned, merely a consolidation. It contained no material changes and even omitted the actual modifications to the status and composition of the Halifax Pilotage Authority and the Saint John Pilotage Authority (Ex. 1509). The Act repeated the statutory provisions that the Authority was to consist of Commissioners appointed and elected as stated in the 1873 Act although, in fact, the Pilotage Authority in both Districts had been the Minister since 1919.

AMENDMENT 1933

There was only one amendment between 1927 and 1934. In 1933, 23-24 George V c. 52 added to the section authorizing the appointment of the Minister as Pilotage Authority the necessary provisions to assure the continuity of the office in his absence and also, in order to overcome the inconvenience caused by his remoteness from various Districts where he might be the Pilotage Authority, empowered him to delegate by by-law any or all of his powers to anyone he chose, *inter alia,* to a local representative called the Superintendent of Pilots for a particular District.

CANADA SHIPPING ACT 1934

A new Canada Shipping Act was passed in 1934 (24-25 Geo. V c. 44) as one consequence of the Statute of Westminster which changed Canada's legal status. Among other things the new Act repealed practically all the previous legislation on pilotage.

The main pilotage feature of the new Act was that it did away almost completely with what still remained of the special systems the four main Districts had enjoyed. Halifax and Saint John, N.B., were fully integrated and all reference to their special status were deleted from the Act.

The process was not as thorough for the Districts of Montreal and Quebec. Perusal of the Act suggests that when it was first drafted the intention was that these two Districts should also be made to conform to the general rules but, both while the Act was being drafted and during its adoption by Parliament, modifications were made with the intent of retaining some features of these Districts (often termed "acquired rights") which were contained in previous legislation. The result was that these changes were incorporated somewhat hastily without ascertaining whether they were in agreement with the remainder of the Act as re-drafted. The result was a confused legal situation owing to the equivocal status of the Pilotage Authority, the contentious power of the Governor in Council to alter the limits of these Districts and the illegality of the compulsory payment system. This unsatisfactory state of affairs has not been corrected and still persists.

What still remained of the special organization which the Quebec District inherited from the Trinity House Act and the Pilots Corporation Act was abolished except the Quebec Pilots Corporation trusteeship of the Decayed Pilot Fund, and the ban on the Quebec Pilotage Authority using pilotage money to pay District operating expenses.

The sections which dealt with the control and management of the pilotage service in the District of Quebec were repealed with the result that the Minister lost those powers he had inherited from the Quebec Pilots' Corporation by virtue of the 1914 Act. In law the system of organization automatically reverted to what it had been prior to 1860 but, in fact, the Pilotage Authority took charge and has provided and managed the service ever since.

The sections which established the Montreal Pilots' Court were repealed with the result that the prosecution of offences and the discipline of pilots were to be dealt with according to the general rules provided in the Act for all Districts. The restriction on the Montreal Pilotage Authority regarding the creation of a Pilot Fund and its management was withdrawn and the statutory provision concerning the issue of second-class pilots' licences was cancelled.

The special sections dealing with the granting of pilotage certificates to Masters and mates, and imposing various duties on them, were abolished and

the whole question was transferred to the Pilotage Authorities to be resolved under their regulation-making powers. The Pilotage Authorities of Quebec, Montreal, Halifax and Saint John were thus empowered to issue such certificates for the first time. The power to amend some of the statutory exemptions was extended to all Districts. The statutory right of appeal that the Quebec pilots had always enjoyed was withdrawn.

An effort was made to simplify the presentation of the pilotage provisions in the 1934 Act by re-arranging the sections in a new order, by deleting sections which presumably were found to be no longer applicable and by integrating other sections with the general provisions of the Act. For instance, the penal sanction for not complying with a provision was made part of the section concerned whereas before all the penal sanctions were segregated at the end of the Act. A distinction was made between fines and penalties and the provisions to impose and recover these were incorporated in the chapter of the Canada Shipping Act dealing with legal proceedings. Some provisions were delegated, *inter alia*:

(a) Sec. 465, 1927 C.S.A., which gave the Master of an exempted ship the status of a pilot respecting privileges, duties and responsibilities.

(b) The statutory provisions regarding the White Flag Certificate (secs. 467 to 473 inclusive, 1927 C.S.A.), *inter alia,* the provision that restricted the issuance of pilotage certificates to Masters and mates of Canadian registered vessels only. The whole matter was left to the Pilotage Authority to settle under his regulation-making powers.

(c) Secs. 475, 476, 478 and 481 inclusive, and 521 and 522, 1927 C.S.A., dealing with the characteristics of decked and open pilot boats and the penal sanction for infringement.

(d) Sec. 494, 1927 C.S.A., enabling the Pilotage Authority to administer oaths to witnesses appearing before them.

(e) That part of sec. 456, 1927 C.S.A. (not included in sec. 337, 1934 C.S.A.), which stipulated that when, on an outward voyage, a non-exempt ship had not employed a pilot, pilotage dues were then payable to the Pilotage Authority.

(f) Sec. 447, 1927 C.S.A., dealing with the jurisdiction of the Pilotage Authorities of Quebec and Montreal over the Harbour of Quebec.

(g) Sec. 452, 1927 C.S.A., which laid down the procedure for adjusting a special type of dispute between a Master and a pilot when they were ascertaining the draught of a ship.

(h) Subsec. (2) of sec. 414, 1927 C.S.A., which denied the Minister as Pilotage Authority the right to sit as a tribunal in pilotage matters.

(i) The statutory definition of the signals which indicated that a pilot was required (sec. 466, 1927 C.S.A.). The responsibility for determining the form these signals should take was delegated to the Governor in Council (sec. 356, 1934 C.S.A.).

Certain provisions were extended to all Districts by the deletion of the former restrictions they contained, *inter alia*:

(a) Each Pilotage Authority was left free to make regulations governing apprentices.

(b) All Pilotage Authorities were given the right to limit the duration of a pilot's licence to a minimum of two years.

(c) Each Pilotage Authority was required to maintain a licence register (sec. 342, 1934 C.S.A.).

(d) Except in the Montreal District, each Pilotage Authority was permitted discretion over some of the statutory exemptions (sec. 339, 1934 C.S.A.).

In the Districts of Quebec and Montreal, *inter alia,* the following were deleted:

(a) The statutory appointment of their Pilotage Authority.

(b) The necessity for the Quebec Pilotage Authority to submit proposed by-laws to the Quebec Pilots' Corporation prior to their submission for approval to the Governor in Council (sec. 419, 1927 C.S.A.).

(c) The statutory restrictions on the number of pilots in the District of Quebec (sec. 423, 1927 C.S.A.).

(d) The statutory provisions regarding compulsory contributions by the Montreal pilots to the Decayed Pilot Fund (sec. 484, 1927 C.S.A.).

(e) Secs. 491, 492, 493, 527 and 528 regarding the managerial power of the Minister, in lieu of the Quebec Pilots' Corporation, over pilotage in the District of Quebec.

(f) Secs. 495-509 inclusive, 1927 C.S.A., dealing with the Montreal Pilots' Court, sec. 510 regarding the special procedure for dealing with complaints against pilots of the Pilotage District of Quebec and 541 regarding the special procedure for recovery of penalties in the Quebec District.

Among the innovations in the Act were:

(a) Including the Deputy Minister of Marine (now Transport) in the definition of Pilotage Authority when the Authority is the Minister of Marine (now Transport) (subsec. 2(70), 1934 C.S.A.).

(b) Extending the statutory exemptions from Canadian registered ships to British Commonwealth registered ships (sec. 338, 1934 C.S.A.)

but, on the other hand, limiting the exemptions of local and coastal traders which formerly applied to steamships of any nationality to steamships of British flag only.

(c) Providing specific, statutory exemptions in the District of Montreal (sec. 339, 1934 C.S.A.).

(d) Providing the Pilotage Authority of any District with the power to compel the Customs officer of any port in Canada to withhold the clearance of a ship owing pilotage dues (subsec. 336(2), 1934 C.S.A.).

In résumé, the 1934 Act (i) retained all the features of the basic organization of the 1873 Act; (ii) deleted almost all of what still remained of the special organization provided in the 1873 Act for the Districts of Quebec, Montreal, Halifax and Saint John; (iii) omitted many statutory provisions that were thought no longer applicable, such as the right to administer oaths; (iv) transferred other responsibilities to the Pilotage Authorities to be dealt with under their regulation-making powers.

AMENDMENTS 1934-1952

Before the 1934 Act came into force August 1, 1936, it was amended earlier in 1936 by 1 Ed. VIII c. 23 (vide House of Commons Debates 1936, Bill 53). The two main amendments were:

(a) Each pilot's civil liability "for any damage or loss occasioned by his neglect or want of skill" was limited to the amount of $300.

(b) The regulation-making powers of the Pilotage Authority with respect to discipline of pilots were enlarged, *inter alia,* by downgrading some offences from statutory offences to by-law offences if the Pilotage Authority saw fit to so legislate, for instance, for a pilot to pilot while suspended or while under the influence of intoxicating liquor, for refusing to take charge of a ship when required by a Master, by an officer of the Pilotage Authority or by any chief officer of Customs.

In 1938, by 11-12 Geo. VI c. 35, the indemnity for pilots carried beyond the limits of their District or detained in quarantine was raised from $3 to $15 per day.

In 1950, 14 Geo. VI c. 26 made four important amendments:

(a) The Quebec Pilots' Corporation was deprived of the trusteeship and administration of the Decayed Pilot Fund and the Pilotage Authority was made responsible as in the other Districts. (In 1947, the Audette Committee had found the Quebec Pilot Fund in a deplorable state.) These provisions, however, were not to come into force until proclaimed by the Governor in Council. Up to the present this proclamation has not been made.

(b) Subsec. 337(a) was expanded to include the requirement of giving reasonable notice of expected time of arrival of a non-exempt ship on her inward voyage if she was to be excused from paying pilotage dues because no licensed pilot offered his services.

(c) The statutory exemptions were re-drafted, the special exemptions for Montreal were deleted and the right to vary certain of these exemptions was extended to all Districts without exception.

(d) The Pilot Funds, in Districts where the Minister was the Pilotage Authority, were entrusted for administration to the Ministers of Transport and Finance, and this privilege was extended to the other Pilotage Districts if they so elected and if approval was granted by the Governor in Council.

CANADA SHIPPING ACT 1952

As far as pilotage legislation was concerned, the 1952 Canada Shipping Act (1952 R.S.C. c. 29) was merely another consolidation.

AMENDMENTS 1952 TO DATE

The Canada Shipping Act has been amended three times since 1952:

(a) In 1956 (4-5 Eliz. II c. 34) there were three minor amendments:

(i) The limit on the minimum duration of a licence that a Pilotage Authority had power to prescribe by by-law was deleted from subsecs. 329(o) and (p).

(ii) The rule prohibiting the use of a non-licensed pilot in a Pilotage District was elaborated in subsec. 354(3).

(iii) Subsec. (2) of sec. 357, which had confirmed the right of the Montreal pilots to finish or commence their river trip in the Harbour of Quebec, was deleted. In its place a provision applicable to all Districts was added authorizing the Pilotage Authority to provide by by-law that a "move" by means of a ship's mooring lines would be subject to the compulsory payment of dues.

(b) The 1960 amendment (8-9 Eliz. II c. 40) established a special system of pilotage on the Great Lakes (Part VIA and sec. 356A).

(c) In 1961 (9-10 Eliz. II c. 32) the penal sanction for employing an unlicensed pilot was increased (sec. 356) and an exemption was provided for American ships while proceeding through any of the St. Lawrence River Pilotage Districts above Montreal if their operations are primarily on the Great Lakes and the St. Lawrence River, even if they make occasional voyages to ports in the "maritime provinces of Canada" (subsec. 346(ee)).

PILOTAGE LEGISLATION ADDITIONAL TO C.S.A. STILL IN FORCE

At present, the only legislation affecting pilotage is supposed to be contained in the Canada Shipping Act but the following legislation additional to C.S.A. appears to be still in force.[1]

(a) The Pilots Corporation Act of 1860 (23 Vic. c. 123) as amended in 1869 by 32-33 Vic. c. 53 (both reproduced in 1887 after the 1886 consolidation in a volume titled *Acts of the Provinces and of Canada not Repealed by the Revised Statutes* at pages 323 and 739), in 1899 by 62-63 Vic. c. 34 and in 1914 by 4-5 Geo. V. c. 48 (which last Act was repealed by the 1927 C.S.A.). The non-repealed part of the 1860 Act concerns the formation of the corporation of which all Quebec pilots are automatically members and which is still operating for the sole purpose of acting as trustee and administrator of the Quebec Decayed Pilot Fund pursuant to the powers inherited from Quebec Trinity House in 1875 by 38 Vic. c. 55. Sec. 32 which grants a Master the right to choose his pilot on the downbound voyage and secs. 2-3 of the 1869 Act which reaffirmed this right and extended it to the upbound voyage have not been repealed. It could be argued that these provisions have been indirectly repealed by the 1914 Act in that the privileges they approved were accessories to repealed corporation powers over despatching.

(b) There is also the Corporation of Pilots for and above the Harbour of Quebec which was incorporated as a public corporation in 1850 (13-14 Vic. c. 123) and amended in 1853 (16 Vic. c. 258). The corporation never became operative, the pilots having refused to attend the necessary first meeting (vide Montreal History Notes). The last mention of this Act is contained in the schedule of the 1859 consolidation of the Province of Canada Statutes where the letters L.C.P.L. indicate why the Act was not incorporated in the revised statutes: these letters mean "Lower Canada, Private, Local". Thereafter, no further mention of this Act is to be found.

(c) The Quebec Trinity House Act of 1849 (12 Vic. c. 114) was completely repealed by 57-58 Vic. c. 48 in 1894 but some of its provisions continued to apply through the 1875 Act (38 Vic. c. 55) which merely enacted that the Quebec Pilots' Corporation would succeed the defunct Trinity House with respect to the trusteeship and administration of the Decayed Pilot Fund because it continued to be governed by the specific provisions contained in the Trinity House Act.

[1] There may also be a number of sundry provisions in other areas of pre-Confederation legislation that deal specifically with aspects of pilotage, and these may still be in force provided they have not been indirectly repealed by the enactment of incompatible federal pilotage legislation. One example is subsec. 2383(2) of the Quebec Civil Code which provides a maritime lien and a privilege upon vessels for pilotage claims.

Chapter 2

EXISTING PILOTAGE LEGISLATION

1. EXTENT OF PILOTAGE LEGISLATION

Since pilotage falls within the definition of "navigation and shipping" it comes under the exclusive legislative authority of the Parliament of Canada (British North America Act, 1867, subsec. 92(10)). Most federal pilotage legislation is contained in Parts VI and VIA of the Canada Shipping Act (1952 R.S.C. c. 29 as amended). There are miscellaneous provisions in the Interpretation section of the Act (sec. 2); in Part VIII dealing, *inter alia*, with the powers and responsibilities of the Minister of Transport with respect to the safety of navigation; and in Part XV dealing with legal proceedings. Some pre-Confederation statutes that deal with limited aspects of pilotage are still in effect. They are covered in this Report where the peculiarities of the District to which they apply are studied, e.g. in the Quebec District, the Quebec Trinity House Act of 1849, the Quebec Pilots Corporation Act of 1860, etc. . . .

There is no limit to the extent of legislation that Parliament can enact ranging from simple rules to compulsory pilotage placed under the exclusive control and responsibility of the Federal Government.

Existing federal pilotage legislation covers three areas:

(a) Legislative provisions affecting pilotage in general.

(b) A scheme of organization to be applied when and where the Government may consider it to be in the interest of shipping to have the qualifications of the pilots controlled by a licensing authority.

(c) Provisions of exception (Part VIA) which place pilotage service in the Great Lakes Basin under direct Government control.[1]

There is one other area which is not covered by legislation, i.e., the Government, without specific enabling legislation, may enter the pilotage field by providing all or part of the service at certain places and under certain

[1] Part VIA is new legislation passed in 1960 (8-9 Eliz. II c. 40) to meet the particular requirements of the unusual situation which existed in the Great Lakes Basin and in the international portion of the Seaway after it opened in 1959. This "sui generis" type of organization is studied under Great Lakes Pilotage, Law and Regulations.

circumstances, e.g. by using its own employees to provide pilotage service. This intervention is not covered in the Canada Shipping Act and need not be because it is within the general powers of the various departments of the Federal Government to provide any service that is considered necessary in the public interest. If a service is provided in this way and if the Governor in Council is of the opinion that all or part of the cost should be borne by the persons to whom it is provided, the fee that may be charged is established in a regulation made by the Governor in Council pursuant to sec. 18 of the Financial Administration Act (1952 R.S.C. c. 116).

By resorting to this process the Government is in the same situation as any private citizen or private enterprise which offers a type of pilotage service such as exists at Port Cartier, Seven Islands, etc. The Government can not interfere with the right of any one, whatever his qualifications, to offer his services, no tariff is binding and the pilotage dues or remuneration for pilotage service becomes a matter of a private agreement between the ship and the pilot concerned or between the ship and the Government if the pilot is a Government employee. Failure on the part of the ship to pay dues does not make her liable to arrest under sec. 344 C.S.A. because there is no Pilotage Authority; the price for the pilotage is merely the monetary consideration of a private contract and the Government has no more right than any private citizen to enforce payment for any pilotage service rendered in unorganized territory (except for the ordinary precedence attached to a claim by the Crown).[2]

The fact that the cost is fixed by regulation changes neither the nature of the contract nor the situation. It is still a free agreement but the Crown's representative is bound by the fee prescribed in the regulations while the other party is at liberty to choose whether he will use the service at that price. Furthermore, Masters are not bound to employ D.O.T. pilots but may proceed without a pilot or may hire anyone who happens to offer his services as a pilot.

This type of service is usually provided by the Government where it is in the public interest to provide reliable and adequate pilotage service and where the requirement can not be adequately met by the creation of a Pilotage District under Part VI. This situation prevails at Goose Bay where, on account of its remoteness, no qualified pilots can be found in the vicinity

[2] Sec. 5 of the Goose Bay Pilotage Regulations (P.C. 1960-615 dated May 5, 1960, Ex. 1200) provides for the withholding of a ship's clearance in any Canadian port at the request of the Minister of Transport if dues for services rendered at Goose Bay are outstanding. There is no statutory authority for such a provision when contained in regulations passed under the Financial Administration Act (sec. 18); Sec. 344 C.S.A. can not apply because Goose Bay has not been enacted as a Pilotage District under Part VI of the Canada Shipping Act. The Department of Transport has been unable to point out any legislative provision authorizing such an extraordinary procedure to enforce payment of such a debt to the Crown. (Vide D.O.T. letter dated September 8, 1966, Ex. 1487).

and where, because of the short navigation season, it is impossible to provide remuneration that would induce qualified pilots to offer their services if the dues were maintained at a reasonable level. When all the traffic is for one organization the initiative and cost of providing pilotage are normally assumed by that group, e.g. the pilot who was employed by the American Air Force authorities at Harmon Field, Stephenville, Newfoundland, to handle the ships which called at their private port. If there is more than one interested party, and especially if one is the Canadian Government, a service provided by the Government is indicated. The scheme of organization envisioned under Part VI C.S.A. is based on free enterprise and if it is to be workable the conditions must be such as to assure the pilots a reasonable income from pilotage. In spite of the fact that these conditions could not be met at Churchill, a Pilotage District was organized with the result that an awkward situation was created (vide Churchill Pilotage District).

If the Government provides a pilotage service performed by its employees, it becomes responsible (within the qualifications contained in the Crown Liability Act (1-2 Eliz. II c. 30 and the Exchequer Court Act (R.S.C. 1952 c. 98)) for the damages caused by the act or omission of these employees. This situation does not exist under Part VI of the Canada Shipping Act because the power of the Crown's officer, i.e., the Pilotage Authority, is limited to licensing pilots.

The Government has also intervened beyond the limits of the legislation in force to provide service in organized territories either through the Pilotage Authority itself or through the Department of Transport or a Crown Agency. The Government provides the service in one of two ways: first, partially, by providing pilot vessels; second, on a more complete scale, by entering into pilotage contracts with owners and hiring employees to provide service. (The legal situation thus created is studied later in Chapter 3 "Pilotage Organization under Part VI" and Chapter 8, pp. 237 and ff., "Nature and Powers of the Pilotage Authority".)

2. GENERAL LEGISLATIVE PROVISIONS

There is nothing to prevent Parliament from passing legislation of a general nature affecting pilotage, such as creating special types of offences in the exercise of pilotage or enacting provisions that would affect all pilotage contracts. Has Parliament made use of this power and are any sections of the Canada Shipping Act applicable outside as well as inside Pilotage Districts and the Great Lakes Basin?

Prior to studying this question, it is pertinent to establish the scope of existing legislation by ascertaining the meaning that the legislature has given to the term "pilot".

(1) MEANING OF THE TERM "PILOT"

Semantics play an essential part in providing a clear understanding of the principles laid down in the Canada Shipping Act for regulating pilotage. In this Act, as in any legislation, the meaning of every term, every expression should be clear, constant and unequivocal.

According to the rules of interpretation, terms and expressions used in a piece of legislation are to be construed in their ordinary, common meaning as defined in the standard dictionary except when a special definition is contained in the legislation, either in the Interpretation Act or in the Interpretation section of a specific Act. When this is done, it is the sense as extended or as restricted by the specific definition that is to be used whenever the word, the term or the expression is found in the Act concerned.

One word that requires accurate definition is "pilot" because the meaning accepted will be one factor that will determine the purpose and scope of legislation in the pilotage field. This was realized from the beginning and the word was defined in the very first pilotage legislation passed in Canada after Confederation: section 2 of the 1873 Pilotage Act contained exactly the same definition as the 1952 Canada Shipping Act.

This definition (subsec. 2(64), C.S.A.) reads as follows:

"(64) "pilot" means any person not belonging to a ship who has the conduct thereof."

Pre-Confederation pilotage legislation contained no such definition. Its origin is the 1854 Merchant Shipping Act of the United Kingdom (Ex. 1482) where it is found verbatim. There also it has since remained unchanged and is now sec. 742 of the existing Merchant Shipping Act.

In statutory definitions when the verb "include" is used, it is to add something to the normal meaning by way of extension. Conversely, however, when the verb "mean" is used, it is to restrict the general sense to what is described in the definition. Hence, when a definition is restrictive, the meaning of the term can not be extended beyond the meaning of the components of the definition.

The statutory definition of "pilot" is not its natural definition but a restrictive one for the sole purpose of indicating the special sense in which the term is being used throughout the Act. Therefore, great care ought to be taken when comparing the Canada Shipping Act with foreign legislation and even with other Canadian legislation in which a different meaning is adopted. For instance, this was a cause of much confusion when the Canadian and American governments studied their joint pilotage operations in the Great Lakes Basin and considered the type of pilotage organization that ought to be adopted in the legislation of both countries. Where in the U.S.A. Act of 1871 it is required that "every coast-wise sea-going steam vessel

subject to the navigation laws of the United States, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the Coast Guard" (46 U.S.C. 364)(R.S. 4401). This means, *inter alia*, that a ship may be navigated by one of her own officers provided he is qualified for the navigation of the American waters where the ship is being navigated, i.e., is a pilot for these waters. (Ex. 1103, Hearings on U.S.A. Great Lakes Pilotage Bill H.R. 57 (1959) pp. 24-25).

(2) STATUTORY DEFINITION

This is composed of two elements:

(a) having the conduct of the ship, that is, the action of navigating the ship;

(b) not belonging to the ship, that is, the relationship towards the ship.

The expression "having the conduct of the ship" is not defined and, therefore, it should be construed in its normal meaning, that is, to have charge and control of navigation; in other words, of the movement of the vessel. Hence, the substantive "pilot" is synonymous with "navigator" and the verb "to pilot" is equivalent to "to navigate". It is the unofficial practice aboard naval vessels to refer to the officer in charge of navigation as the pilot, even though this officer is one of the normal complement of the ship. It is worth noting that in the Rules of the Road for the Great Lakes of 1954 (P.C. 1954-1927) passed at a time when there was no organized pilotage in the Great Lakes Basin, the term "pilot" is given its natural sense and is used throughout to refer to the navigator of the ship whoever he may be.[3] Section 1(b) reads as follows:

> "(b) 'pilot' includes the master, officer or other person in charge of the navigation of a vessel."

The verb "to pilot" and the noun expressing the action of piloting, i.e. "pilotage" are synonymous with "to navigate a ship" and "the action of navigating a ship". It is the sense of the first component of the definition. This clearly appears by the way these two terms are used throughout the Canada Shipping Act. For instance, Parts VI and VIA deal with pilotage in its general meaning and not merely as related to the action of pilots in the limited sense of the definition. These parts deal with all those who may take charge of the navigation of a ship (which includes pilotage) even though they are not pilots, namely, under certain circumstances, the Masters and mates who are granted pilotage certificates (subsecs. 329(d), (e) and (f)), and "B" licences (sec. 375B) which entitle them to pilot their own ships.

[3] It is a questionable drafting practice to make a legislative definition by regulation of a term already defined in the governing statute, especially when, as in this case, the two definitions do not agree.

The context of the Act also clearly indicates that the expression "having the conduct of the ship", which occasionally is replaced by having the "charge" of the ship (subsecs. 368(c), 329(f) and 340(3)), refers only to the actual act of navigation, *inter alia*:

(a) By the definition of "master", which excludes the pilot from those who may be in command of a vessel (subsec. 2(52)).

(b) In subsec. 329(f)(vi), the verb "to conduct" is applied to the act of navigating a ship, in that it may be made a breach of regulations for a pilot to refuse, "when requested by the master to conduct the ship . . . into any port or place into which he is licensed to conduct the same".

(c) A consequence of the wording of subsec. 647(1), as amended, is that a licensed pilot is not responsible for the application of the Collision Regulations unless he is a "pilot", as defined in the Canada Shipping Act, that is, that he has the conduct of the vessel.

(d) It is only if a licensed pilot has continued to navigate beyond the limits of his District that he is subject to the disciplinary regulations that may be passed under subsec. 329(f)(iv).

Therefore, to be a pilot as defined in the Act is not a question of qualification, profession, certificate or licence; it is the fact of actually navigating a vessel (and not of being capable or authorized to navigate a vessel). A pilot, whether licensed or not, ceases to be "pilot" when, for any reason, he is superseded by the Master or by the person in command. Similarly, if anyone is merely used as an adviser and is not entrusted with the navigation of the ship, he is not the pilot of that ship. Therefore, the general provisions concerning pilots do not apply to him under such circumstances.

The first component of the definition is, therefore, the ordinary sense of the term, i.e., the person who at a given moment is navigating the ship is the pilot at that time. It is by the second component of the definition that the legislature has restricted the general meaning of the term to those navigators who are not part of the normal complement of the crew. Therefore, a "pilot" as defined in the Act in addition to navigating a ship, must also be a stranger as far as that ship is concerned.

The expression "belonging to a ship" is not defined doubtless because the term is not ambiguous to a mariner. The verb "to belong" connotes permanency and also service to a ship. In other words "to belong" means to be one of what is normally referred to as the complement of a ship, i.e., "the full number required to man it" (Oxford Dictionary). This comprises the ship's Master, mates, engineers and crew, all those aboard whose relation to the ship's authority is one of master and servant, and who have entered into a contract of service on board the ship.

Therefore, because of this definition neither the Master nor any member of a ship's crew can be considered the pilot, despite the fact that he may actually be piloting the ship.

Whether or not a person belongs to a ship is a question of fact. If a ship uses articles, a seaman has to sign them in order to belong to the ship. In Canada all seamen who have signed the agreement specified in sec. 168 and ff., Canada Shipping Act, normally belong to the ship but documentary evidence is not complete proof in itself and may merely create a presumption in respect of third parties.

A subterfuge is sometimes resorted to when an unlicensed pilot is employed contrary to subsec. 354(3) Canada Shipping Act in Pilotage District waters by making him a member of the crew in a technical sense for the duration of his pilotage throughout the District. This "Sailing Master", as he is often called, is taken off the articles when the transit is effected, only to be re-enrolled aboard another ship for the same purpose. (Vide Quebec District, *Nature of Pilotage Service*).

(3) CONSEQUENCES OF DEFINITION

(a) The definition of the terms "pilot", "licensed pilot" and "unlicensed pilot" is not based on the same concept. In the Canada Shipping Act, "licensed pilot" is defined from an altogether different point of view than "pilot". If this is not clearly understood, confusion may result. The definition of "licensed pilot", as will be seen later, refers to the legal capacity of a person in a Pilotage District to enter into a contract for pilotage while, as seen above, the term "pilot" when taken alone means the legal status of a man at the moment he is engaged in the navigation of a ship and only then. The term "registered pilot" means the same as "licensed pilot", but only in the Great Lakes Basin and not in the other Pilotage Districts. Therefore, the fact that a person makes it his profession to pilot vessels, whether or not he is licensed or registered, does not make him a pilot within the meaning of the Canada Shipping Act, for instance: whenever his services have not been accepted; when his services have been accepted but he has not been placed in charge of navigation; when he is superseded by a Master or other officer representing a Master; when he has completed an assignment; when he is used as an adviser and has not the conduct of a vessel.

(b) The definition of pilot does not convey in itself a question of territoriality or of local knowledge: all that is needed is to be a person not a member of the ship's crew and to be put in charge of its navigation anywhere, on the open seas or lakes or in the confined

waters of a river or a harbour. It is only in the concept of licensed and registered pilots that the prerequisite of local knowledge or of a special skill necessarily arises.

The fact that the question of territoriality does not affect the definition of pilot is apparent from subsec. 333(3) which stipulates that a licensed pilot who navigates a ship beyond the limits of his District does not cease to be a pilot for that reason, but is merely "considered an unlicensed pilot". A British Columbia pilot continues to be the pilot of the ship whenever he has charge of her navigation whether he is in American waters, as happens whenever he sails through Haro Strait, or outside District limits, as may happen along the B.C. coast, e.g., between McInnis Island and Cape Beale.

(c) The statutory definition of "pilot" neither includes nor even implies the possession of any special qualifications, skill or knowledge. The present legislation is not concerned with the skill and competence of persons acting as pilots outside Pilotage Districts and the Great Lakes Basin and even in those areas if Masters hire unlicensed or unregistered pilots. It is then incumbent upon Masters to act with prudence and care before entrusting the navigation of their ships to others.

(d) "To conduct a ship" must not be confused with being "in command of a ship". The first expression refers to an action, to a personal service being performed; the second to a power. The question whether a pilot has control of navigation is a question of fact and not of law. The fact that a pilot has been given the control of a ship for navigational purposes does not mean that the pilot has superseded the Master. The Master is, and remains, in command; he is the authority aboard. He may, and does, delegate part of his authority to subordinates and to outside assistants whom he employs to navigate his ship, i.e., pilots. A delegation of power is not an abandonment of authority but merely one way of exercising authority. The Master always retains legal control, legal command, of his ship; it is only a *de facto* responsibility or control which he has entrusted to the pilot and which he can qualify or withdraw at will. When a Master makes one of his mates responsible for the conduct of his ship he has not abandoned his command although the mate has been placed in temporary charge of the navigation. In both cases, the pilot and the mate are actually responsible for navigation, both have to obey the Rules of the Road and the Collision Regulations. Any failure in the discharge of their duties involves their personal responsibility. Under Canadian legislation, the Master never relinquishes responsibility (that is, his duty) for the safety of his ship. The pilot's instructions are carried out with

the Master's authority. The pilot can not legally command the crew. The Master or his representative, i.e., the ship's officer in charge of the bridge, must supervise the pilot's instructions and warn him about any peculiarities of the ship that may affect her movements and also, together with the pilot, must make sure that instructions are promptly and correctly followed. A pilot's order transmitted to the wheelsman, which is not properly executed, involves the personal responsibility of both the pilot and the officer of the watch.

When dealing with this question, confusion is caused by the dual meaning of the word "responsibility". There is first the responsibility of the Master for the safety of the ship that is dealt with above. It is a duty which is discharged, *inter alia*, by hiring the assistance of a pilot, by supervising his navigation and by giving him whatever information and assistance he may need. There is also the responsibility of the Master in the sense of liability, which is discharged, in the case of civil liability, by paying the damages.

While the Master always retains his responsibility for the safety of the ship, his responsibility in the sense of liability is not absolute. Either civilly, criminally, or with respect to the safety of navigation, he is answerable only for his own acts, mistakes, negligence or omissions. At civil law, he is merely a servant of the owner and he does not incur personally any civil responsibility for any damage caused by a pilot's error in which he did not participate or which he could not have prevented. The same principles apply, with varying degrees of onus, to his criminal liability and his responsibility for safety of navigation. For instance, under Part VIII of the Canada Shipping Act, the certificate of the Master should not be cancelled or suspended if a shipping casualty was caused by the sole fault of a licensed pilot. The Master, however, would be considered blameworthy if it was established that his personal negligence contributed to the casualty. It has been found repeatedly that both Masters and pilots were equally to blame because the Collision Regulations were not followed, such as excessive speed during low visibility, failure to sound signals, etc., all matters that could not have passed unnoticed by the Master. (Vide District of Quebec, *Shipping Casualties.*) A Master would also be negligent if he entrusted the conduct of his ship to a pilot he had reason to believe was not in fit condition to pilot.

It would be negligence on the part of a Master "to get rid of" his responsibility by entrusting the navigation of his ship blindly to

a pilot. He personally or through his officers should always remain in command and supervise the pilot's actions. The pilot is not, and should never be, the "officer of the watch".

The situation remains the same on the designated waters of the Great Lakes Basin where pilotage is compulsory. A "vessel", if not exempted, can not be operated unless she is piloted by a registered pilot (sec. 375B C.S.A.). In other words, the pilot must be in charge of navigating the ship, but the Master remains in command, tells the pilot where he wants to go, when to depart and when to arrive. The pilot's orders are carried out with the authority of the Master. The pilot has no right to give orders to the crew. Only a registered pilot may navigate the ship but the Master retains the right to intervene and even to discharge the pilot, in which case the ship must be stopped as soon as this can be safely done. The Master must always co-operate with the pilot by advising him of the particulars and peculiarities of the ship. The Master retains responsibility for his ship and it is his duty to prevent a pilot from doing something he believes to be wrong which would endanger her safety. He must not allow a pilot to continue to navigate if he realizes that the pilot is not fit to do so. This principle finds its authority in the exception of distress or of "circumstances necessary for the Master to avail himself of the best assistance that can be found at the time" contained in subsec. 375B(4)(b), C.S.A.

With reference to the civil liability of the owner, it is possible that he should not bear responsibility for the errors of a pilot who holds the status of an independent contractor, but the question is academic now, at least under Part VI, C.S.A., because of subsec. 340(3) which renders the owner or Master responsible for damage or loss caused by a licensed pilot. This provision does not apply to registered pilots and Part VIA does not contain any similar provision. Because of the different relationship that exists under Part VIA, the question is studied in the Law and Regulations section of Great Lakes Pilotage, but it is pertinent to take note here of the judgment which the Vice-Admiralty Court, Lower Canada, rendered in 1861 (11 L.C.R. 342 in re: *The Lotus,* Clark) on the damage suit brought against the vessel *The Lotus* by the owners of the ship *Washington. The Lotus* while in charge of a branch pilot had dragged her anchor and caused a series of collisions with other vessels at anchor. The Court found that the pilot was solely to blame and dismissed the action v the owner because pilotage had been made compulsory in the Port of Quebec. The Quebec Trinity House Act, as amended, obliged the Master to take a pilot and to

give him charge of his vessel and made it unlawful to refuse to do so. The judgment pointed out that the plaintiff had recourse against both the pilot and the Quebec Pilots' Corporation, citing an English decision:

> "When the appointment (of pilots) rests with the owner himself, as in the case of the Master and crew, it is reasonable that he should be held responsible for their acts, who are agents selected by himself; and he is bound to provide persons with adequate skill, diligence and sobriety. But where a person is compulsorily put on board a vessel, and the owner's authority is superseded by legislative enactment, it would be a violation of all justice to hold such owner responsible for the skill, sobriety and caution of an individual with respect to whom he has no power of selection; whose qualifications he has no opportunity of deciding upon, but which are to be ascertained and determined by others; the owner himself being entirely debarred from any responsibility of interference."

There is nothing, however, to prevent the legislature from intervening further by passing appropriate legislation—even depriving the Master of his legal command over the navigation of his ship for the duration of a pilotage trip by imposing compulsory and absolute pilotage. Such legislation amounts, in fact, to an undertaking by the Government concerned to assume responsibility that a ship will transit a given pilotage area and will be returned safe and sound to her Master at the end of the trip. In the Panama Canal, where this situation obtains, the Canal Authority helps to meet its obligation by providing helmsmen, linesmen and the necessary special equipment. Subsec.9.1 of the Rules and Regulations Governing Navigation of the Panama Canal deals with the Canal Authority's responsibility which is a necessary consequence of such compulsory pilotage (Ex. 496):

> "9.1 The Panama Canal Company shall promptly adjust and pay damages for injuries to vessels, or to the cargo, crew, or passengers of vessels, which may arise by reason of the passage of such vessels through the locks of the Panama Canal under the control of officers or employees of the said corporation . . ."

(e) The nature of the contractual relationship between the Master and the pilot is not taken into consideration in the statutory definition of the term "pilot". All that the law aims to cover is the actual performance of navigation by a "person not belonging to the ship". This contractual relationship may take various forms. Although the pilot is usually an independent contractor, there are numerous other possibilities including: (i) being employees of the owner and serving more than one ship, like the two Canada Steamship Line pilots, the brothers Desgroseillers in the Kingston and Cornwall

Districts; (ii) being employees of a corporation or of a third party which leases their services like the Quebec pilots under the Quebec Pilots' Corporation system from 1860 to 1915 or the company pilots at Seven Islands, Port Cartier, etc.; (iii) being civil servants, as at Goose Bay and in Great Lakes Districts Nos. 2 and 3; (iv) being independent contractors but under a private partnership agreement like the river pilots in the Quebec and Montreal Districts.

(4) NECESSITY FOR A STATUTORY RESTRICTIVE DEFINITION OF "PILOT"

This arose when legislation was drafted to enable the Government to control the qualifications of pilots, to enforce the rules applicable to pilotage contracts and to administer public, organized pilotage, etc., e.g. subsec. 354(3)(a) C.S.A., which prohibits an unlicensed person from acting as a pilot in any Pilotage District except as therein provided. It is a controversial question whether or not in the Canada Shipping Act the legislature has passed general provisions which are applicable in all cases, i.e., whether pilotage is performed in a Pilotage District or in the Great Lakes Basin or elsewhere. This is studied under "Other Provisions of General Application".

(5) THE FACTS

The evidence presented before the Commission has established that when Masters employ a pilot it is their practice to entrust him with full responsibility for navigation. Masters very seldom interfere with a pilot's orders except on the rare occasion when it appears that the pilot is not physically fit. Some Masters allow the pilots to do all the navigating but take charge of berthing. Hence the factual situation corresponds with the statutory definition of "pilot".

The pilots in British Columbia told the Commission that they do not consider themselves in command of a ship, but they are, *de facto,* in charge of navigation from the moment they embark until they reach a safe anchorage or the next port. When a pilot boards a ship he meets the Master who normally lets him take over without delay if the ship is under way or when the time comes to sail if the ship is at anchor or in harbour. The pilot gives orders directly to the helmsman and passes orders to the engine-room through the officer of the watch. The pilot does not act as an adviser to the Master but actually navigates the ship. In point of fact the Master is then, to a certain extent, an adviser to the pilot when he points out the peculiarities of the ship. However, the Master always remains in command and closely supervises the pilot's performance. The late Captain W. A. Gosse added that in his 26 years of service Masters always gave him complete responsibility for navigation (B.C. District, *Pilots' Status*).

Similar evidence was received in all Districts and even from areas where pilotage was privately organized. It is disturbing to realize that the Prince Edward Island pilots do take charge of navigation, berthing and unberthing although they are not qualified mariners. Because it appreciates the situation, the Prince Edward Island Pilotage Authority has requested its pilots to warn Masters about their limited qualifications. Nevertheless, Masters continue to entrust them not only with navigation throughout the pilotage waters of the District but with berthing as well (vide P.E.I. District, *Limited Skill of Pilots* and *Recruiting and Qualifications of Pilots*).

This factual situation which corresponds to the legal definition of "pilot" is, in fact, the only realistic solution because, if pilots were used merely as advisers, navigation would be very hazardous and, at times, it would be impossible to proceed safely. For instance, there is no time for advice, consultation and deliberation when a supertanker is brought into the Courtenay Bay approach channel (Saint John, N.B.) or when a larger ship is brought down from Fraser Mills through the New Westminster Railway Bridge. The St. Lawrence pilots, in their brief (Ex. 671), quoted from a speech made in 1957 by Mr. J. T. Behan, a member of the Canadian Association of Marine Underwriters, when he said:

> "the name of St. Lawrence, to the underwriter, evokes a picture of one of the most hazardous navigation routes in the world".

And he added:

> "The difference is that navigation in the St. Lawrence allows for no second guessing. The first course a ship is committed to is frequently the last. If bad judgment has been used, the result is inevitable and swift".

(6) FOREIGN LEGISLATION

The legislation of most countries recognizes the realistic situation that there is not time for advice, consultation and deliberation between the pilot and the Master and that the pilot must navigate the vessel himself. How this situation is covered in legislation is a question of semantics, for example:

(a) In the State of South Australia, where pilotage is compulsory (shall on demand by the pilot give the ship in charge of the pilot), the authority of the Master is recognized. Section 114 of the Harbours Act 1936 (Ex. 893) reads as follows:

"114(1) The duty of a pilot shall be to pilot the ship subject to the authority of the master, but the master shall not be relieved, by reason of the ship being under pilotage, from responsibility for the conduct and navigation of the ship.

(2) The owner or master of a ship navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the ship or by any fault of navigation of the ship in the same manner as he would if pilotage were not compulsory."

(b) The Greek Pilotage Act (Ex. 888, sec. 17) is to the same effect:

> "Sec. 17. The presence of a pilot aboard shall not relieve the Master of the ship of his responsibility nor is he prevented by the presence of the pilot from navigating or manoeuvring the vessel as he thinks best."

(c) The Danish legislation puts the pilot in charge of navigation but clearly indicates that he is not in command of the ship by saying, in subsec. 25(2) of the pilotage legislation (Ex. 889), that "the pilot has no right to command the ship's crew but if the person in command does not carry out with the necessary speed the pilot's demands in regard to navigation or manoeuvring the pilot is without responsibility."

(d) In Sweden the rôle of the pilot is not to advise the Master but to give him "instructions . . . which are necessary for the safe delivery of the vessel and also to make sure that his instructions are correctly understood. The pilot must direct his instructions to the helmsman or other member of the crew unless the master should object to this. The master is responsible for the manoeuvring of the vessel".

In some countries "pilot" is defined as "licensed pilot", thereby necessarily limiting the scope of legislation to a publicly controlled pilotage service.

This is the case, *inter alia*, in West Germany and Norway. In West Germany, sec. 1 of the Pilotage Law (Ex. 877) reads as follows (translation):

> "Pilot in this Act means the person who, with the authorization of the Authority, navigates professionally ships on lakes and maritime lanes outside harbours as a specialist in navigation and in local knowledge. The pilot does not form part of the ship's crew."

The French legislation does not define the word "pilot" but his function, that is, "pilotage". The definition reads as follows (translation) (Ex. 876):

> "Pilotage consists of the assistance given to masters by personnel commissioned by the state for the conduct of ships in and out of harbours, in harbours, roadsteads, navigable rivers and canals".

COMMENTS

1. The statutory definition of the term "pilot" should remain, in substance, unchanged. It is considered that it fulfills its purpose and is necessary in order to indicate exactly what is intended to be covered in legislation.
2. Its wording should be altered in the following respects:
   (a) because the expression "the conduct of the ship" is ambiguous the intended meaning would be better rendered by:

(i) indicating that only navigation is involved;

(ii) replacing the controversial word "conduct" by "control";

(iii) adding "which function is exercised with the authority of the Master" in order to indicate (a) that the Master always retains legal command of his vessel and responsibility for her safety, and (b) the pilot is not subject to the Master's direction for the manner in which his function is performed.

The amended version might read "the control of the navigation of the vessel which function is exercised with the authority of the Master", or by phraseology to the same effect.

(b) The expression "not belonging to the ship" should also be clearly defined. A provision should be included to the effect that a person shall not be deemed to have belonged to the vessel despite an entry in the articles or other documents if this person has not remained with the vessel throughout the full length of the trip or voyage, unless it is established that the engagement as a member of the crew was bona fide, the proof of which shall lie on him and on the vessel.

(7) OTHER PROVISIONS OF GENERAL APPLICATION

As seen above, the statutory definition of the term "pilot" enables Parliament to pass legislation of a general character applicable to all pilots whether they are licensed or registered or unlicensed, and whether pilotage takes place within organized territory—i.e., in a Pilotage District or in the Great Lakes Basin—or elsewhere.

In a number of sections of the Canada Shipping Act, the term "pilot" is used alone and, unless it is otherwise qualified by the text of the section, according to the rules of interpretation it must be given the full meaning of its statutory definition and, hence, the section concerned is of general application. There is, however, another possible interpretation, namely, that these provisions are limited by the context and that they have no application beyond the scheme of organization provided by this Part of the Act in which they are found.

These provisions are the following:

(a) the definition of "pilotage dues" (subsec. 2(70)), i.e. "the remuneration payable in respect of pilotage";

(b) sec. 343 which makes the dues payable as a debt to the pilot or the Pilotage Authority as the case may be;

(c) subsec. 362(1) concerning the set-off between the dues owned to a pilot and the damage caused by him to a ship;

(d) subsec. 362(2) concerning the $300 limit of civil liability for damage caused by the pilot's want of skill or neglect;

(e) the statutory indemnity clause of sec. 359 for pilots carried to sea;

(f) the statutory offence created by sec. 369 for endangering a ship or the life of persons aboard through the pilot's misconduct;

(g) the statutory offence created by sec. 371 for any one to obtain or try to obtain pilotage of a ship through misrepresentation of circumstances upon which the safety of a ship may depend;

(h) the jurisdiction of courts of formal investigation (sec. 560).

There are two aspects of the problem: first, in a Pilotage District do these provisions apply only to licensed pilots?; secondly, if not, do they also apply outside Pilotage Districts, i.e., to all pilots in Canada?

Reference the first part of the question, there can be no argument that the terms "pilot" and "licensed pilot" have two different meanings; not only is the latter restricted by a qualification but the legislature also took care to leave no possible ambiguity by providing a statutory definition for both terms, as seen above (subsecs. 2(64) and (44)).

There can also be no argument that the non-licensed pilot is recognized in Pilotage Districts for, in the exceptions set out in subsec. 354(1), he can legally act as a pilot and is then entitled to full pilotage dues (subsec. 354(2)). Why would he then incur more liability than the licensed pilot who was not available? The word "pilot" is used alone in subsec. 362(2) and, therefore, it must be given the meaning of the statutory definition (subsec. 2(64)). To substitute another definition would make the provision ambiguous and give a much more extended application. The provision refers to specific damage caused by a person not belonging to the ship when engaged in the act of pilotage and not to damage at large that might be caused at any time by a licence holder. If the limited interpretation, i.e., "licensed pilot", is given to this provision, it would make sense only if one assumes (which is not permissible) that the words "while acting as pilot" are implied.

It is not believed that such was the intention because, whenever a provision is to apply to a licensed pilot, it is clearly indicated. When the term "pilot" is used alone, it must be concluded that it was deliberately done and that unless the text of the provision clearly makes it applicable only to licensed pilots it must be taken as referring to all pilots.

It can not be concluded, by considering the whole of sec. 362, that the limitation of liability can not apply to the non-licensed pilots. Even the first subsection of sec. 362 deals with both situations. It provides for the set-off between the pilotage dues owed to the pilot and damage caused by his error. The expression "pilotage dues" does not necessarily refer to licensed pilots nor to tariff fixed by by-law. The term is defined, not in Part VI, but in the

Interpretation section of the Act (subsec. 2(70)) and in a very general way as meaning "remuneration payable in respect to pilotage". To imply that it is as fixed by the Pilotage Authority is to add a restriction which is not in the text. The context clearly indicates that there may be other pilotage dues than those fixed pursuant to the provisions of Part VI (sec. 341). But even if it referred to the pilotage dues as fixed by the Authority pursuant to subsec. 329(h), unlicensed pilots are entitled to receive them in the circumstances described in sec. 354. Furthermore, subsec. 362(1) contemplates two cases where the set-off provision applies: (a) the licensed pilot whose licence has been suspended or revoked and (b) the pilot, licensed or not, who is condemned to pay a penalty[4] for having caused damage to a ship. Sec. 371 C.S.A. (sec. 72, 1873 Pilotage Act) provides that an unlicensed person, who has obtained pilotage of a ship through misrepresentation of the circumstances upon which the safety of the ship depends, is liable to a fine not exceeding $200, plus any liability in damages. It would be an improper restriction on subsec. 362(1) to claim that in such a case the set-off would apply only if the pilot is licensed.

There can be no argument whether sec. 371 applies to anyone, whether he is a licence holder or not, who acts, or who offers to act, as pilot because the section is specific on this point. In sec. 369, the general term "pilot" was used intentionally in contrast with sec. 368 where the series of offences is restricted to licensed pilots and apprentices. This is also borne out by the former legislation (sec. 71, 1873 Pilotage Act) where, as in sec. 371 of the existing Act, an additional punishment was provided when the pilot, i.e., the person who acted as pilot, held a licence.

The second part of the question is whether there is anything in these texts or in the context to justify limiting their application to those areas where the type of pilotage organization provided in Part VI, C.S.A., exists, that is, only within Pilotage Districts? In other words, is there anything in Part VI which applies where no Pilotage District exists, including the Great Lakes Basin?

Such a limited interpretation can result from an inference only because it is not stated anywhere in the Act but is merely implied from the order in which the sections concerned are placed in the text, i.e., Part VI, C.S.A., dealing with the organization of Pilotage Districts, must be taken as a whole and none of its provisions can apply except within a Pilotage District.

If such had been the intention, the most obvious means to convey it would simply have been to say so, first by restricting the scope of its title which is "Pilotage" and not "Pilotage in Pilotage Districts", and second by

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[4] The word "penalty" here must not be given the restricted meaning that was introduced into the Act in 1934 (subsec. 329(g) and sec. 709) (vide C. 9, pp. 380 and ff.). This wording dates back to pre-1934 legislation when the word penalty was used to refer to any type of pecuniary penal sanction (vide sec. 43, 1873 Pilotage Act).

composing an appropriate, clear and unambiguous provision, rather than resorting to the tedious, dull, confusing procedure of repeating the same qualifying terms throughout the various sections, i.e., to say each time that a given provision is to be applied only if it is within a Pilotage District, such as sec. 352 re liability to pay dues to a licensed pilot taken voluntarily; sec. 354 re prohibition to employ an unlicensed pilot; sec. 361 re the right of a licensed pilot to quit a ship.

If sec. 359, which stipulated the remuneration to be paid a pilot who has been overcarried, is applicable to licensed pilots only, why is this not stated as is done in the next section regarding the quarantine allowance to which only licensed pilots are entitled? It must be because sec. 359 applies to both types of pilots. But why provide for two situations if only one situation in fact exists, because whenever a pilot is taken to sea, he must be taken beyond the limits of the District? If the legislation made a distinction it must have been because it was intended to cover two different situations, in one of which no Pilotage District existed. The wording of sec. 359 dates back to the 1873 Pilotage Act (sec. 40) and while it corresponds to sec. 357 of the 1854 Merchant Shipping Act of the United Kingdom, it also corresponds to sec. 14 of the New Brunswick 1861 pilotage legislation (24 Vic. c. 16) which applied to all pilots. The latter read as follows:

> "That no pilot, except under circumstances of unavoidable necessity, shall without his consent be taken or carried to sea or to any place out of the Province and beyond the point or place to which his engagement or his duty shall require him to go".

With such a restrictive interpretation, the result would be that none of the provisions of Part VI could be made applicable to registered pilots who are not also licensed pilots, e.g. they would not enjoy the $300 limit of civil liability and the statutory offences of secs. 369 and 371 would not apply to them.

The word "pilot" is used alone in sec. 560 of Part VIII. According to the rules of interpretation, it should be given the meaning of its statutory definition. To hold that it refers only to licensed pilots is to restrict the scope of the term and to limit the jurisdiction of formal investigations. If the term was neither qualified nor restricted, it was because the legislature used it in its statutory meaning. To say that the Court of Formal Investigation has no jurisdiction to investigate the qualifications and conduct of a pilot unless he is licensed (because if he is not a licence holder, the Court would have no authority over him) is to misconstrue the main function of such a Court, which is above all a Court of Inquiry whose purpose is to find out the facts of a situation or a casualty, and only secondarily to deal with the licence of a pilot or the certificate of a Master, mate or engineer. Note should also be taken of the fact that a Master, mate or engineer does not necessarily hold a certificate (sec. 114).

Therefore, it is considered that these sections are legislation of general application and that they extend to all those who meet the statutory definition of pilot. However, the mere fact that such a long interpretation was necessary indicates that the matter is far from clear. Unless the intention of the legislature is clearly expressed, costly and unwarranted litigation will eventually take place.

COMMENT

It should be clearly indicated in the Act what provisions, if any, are of general application to every pilot, whether licensed, registered or not, and everywhere, in Pilotage Districts, in the Great Lakes Basin and elsewhere.

Chapter 3

PILOTAGE ORGANIZATION UNDER PART VI, C.S.A.

In Part VI of the Canada Shipping Act Parliament has defined in what way and to what extent the state may intervene in the exercise of pilotage as a profession in waters other than the Great Lakes Basin. The legislation does not provide for a nation-wide, centralized pilotage organization, nor is it stated under what circumstances it is considered in the public interest for the Government to intervene. The basic criterion is the convenience of shipping and the system is devised to keep state intervention at a minimum.

Parliament has restricted the Government's power of intervention to a bare minimum by retaining the free enterprise system with limited state control as the basis of the organization. The Government's powers and responsibilities with regard to pilotage are limited by legislation to deciding where and when to create and abrogate Pilotage Districts (except for the Districts of Quebec and Montreal where Parliament left the Government no discretion, by creating these two Districts and fixing their limits by legislation) and to fix and alter their limits, appoint and vary their Authorities and decide whether or not the payment of dues is to be compulsory. Aside from these powers, the Government has only indirect and secondary powers, that is, approval of by-laws and regulations and of certain other decisions made by Pilotage Authorities (the responsibility and initiative for which rest solely with the Pilotage Authorities), and a general duty of surveillance to see that the legislation in force is applied and respected.

Parliament has made independent local agents, ie., the Pilotage Authorities, responsible for seeing that pilotage service is provided in their respective Districts by a group of qualified, fit and reliable pilots who are in adequate numbers to meet the demand. The Pilotage Authorities are essentially licensing agents entrusted with the additional responsibility of providing by regulations the legislation which their locality requires. However, they have not been given the power either to control or provide pilotage service themselves or to participate in its management.

The legislation in Part VI is based on the free enterprise system where pilotage is provided by self-employed pilots acting as free contractors under local and independent licensing authorities.

PILOTAGE DISTRICT

The term "Pilotage District" is not defined anywhere but its meaning is apparent from the legislation. It must not be confused with the improper use of the term made in the regulations passed under Part VIA where it refers to special organizational structures which are applicable only in the Great Lakes Basin.

To those who employ pilots, Pilotage District means a defined and limited area within Canadian waters where pilotage service is provided under the jurisdiction of a Pilotage Authority.

From the organizational point of view, each District is a self-contained, independent, autonomous, self-supporting, decentralized unit under an agent appointed by the Government, who is called the Pilotage Authority, for the purpose of providing a designated area with an adequate number of duly qualified pilots.

A. ORGANIZED AND NON-ORGANIZED AREAS

The fact that pursuant to Part VI *licences can be issued in Pilotage Districts only* supports the view that controlled pilotage can not exist except within the limits of an organized territory, i.e., a Pilotage District, because only there can the capacity, fitness and reliability of a pilot be vouched for by a licence, and can persons deemed to be a safety risk be prevented from piloting.

On the other hand, in non-organized areas competent pilots may not receive any official recognition simply because the area where they exercise their calling is not within a Pilotage District. Unqualified and unreliable people enjoy equal rights to compete for employment by agents and Masters who normally have neither the means nor the opportunity to make a considered choice. The situation is clearly explained in a letter dated March 12, 1935, written by the Director of Pilotage in Ottawa in reply to a request for a pilot's licence for the port of Gaspé made on behalf of Mr. Norman Roberts (Transcript Vol. 3 C.D.H., p. 249).

> "I have your letter of the 8th. instant, in which you advise me that Norman Roberts of Grande-Grève, Co. Gaspé, wishes to have a license for the port of Gaspé. I beg to advise you that there is nobody in Ottawa that has the authority to grant a pilot's license in a port, which is not within a pilotage district. The only authority that can grant a pilots' license is a pilotage authority for the individual district. However, there is no reason why Mr. Roberts should not continue to pilot, irrespective of having no license. All he has to do is to offer his services to any ship, and if the master of that ship requires a pilot, it is for him to accept or refuse Mr. Robert's services. If such services are accepted, it is for Mr. Roberts and the master of the ship to decide as to what remuneration he will receive for his services. It is quite in order for Mr. Roberts to advise masters of the reason why he is unable to obtain a pilot's license as given above."

Pilotage a Necessary Service

Pilotage is not an artificial creation but answers a definite need. The evidence received has demonstrated that it is the practice of all prudent mariners to make full use of local help whenever they have to navigate in confined waters with which they are not thoroughly familiar. They do this both for reasons of their own safety and to expedite their passage. This practice explains why pilotage service is provided wherever the traffic includes irregular traders, for example, (a) before private pilotage was arranged in the lower St. Lawrence ports outside the Quebec Pilotage District, Masters regularly employed Quebec District pilots to take their ships into these ports; (b) since Gaspé Bay is not difficult to navigate no official pilotage service exists but local fishermen are regularly used as pilots; (c) on the east coast of Newfoundland, which is not an organized territory, there is a constant demand for coastal pilotage which is mostly provided by off duty St. John's pilots; (d) the same situation prevails in the Strait of Canso where pilotage is performed mostly by off duty Bras d'Or Lakes pilots; (e) in Prince Edward Island ports, where navigational difficulties are almost non-existent and where the payment of dues is not compulsory, no ocean-going vessels ever proceed without a pilot and most of the large regular traders use them; (f) in all Pilotage Districts where the payment of dues is compulsory very few Masters of non-exempt vessels dispense with the services of a pilot and when they do so it is because they are regular traders who do not come under the prevailing scheme of exemptions; however, exempted ships frequently take advantage of the service, particularly when they do not follow their usual routes or when difficult navigational conditions prevail.

It is instructive to note the experience of the pilots in the British Columbia District where coastal and port pilotage have existed since early colonial days. After a revolt against the Pilotage Authority, the District was abolished in 1920, but ships continued to employ pilots although navigation in most British Columbia waters presented little difficulty to experienced Masters. When the District was created anew in 1929, the principal reason was not safety but merely the convenience of both Masters and pilots by stopping the bitter competition which had developed among the pilots' groups and which adversely affected all vessels not on regular runs, i.e., those that did not belong to a line trading regularly in the District. The payment of dues was made compulsory in 1949, not to force vessels to take pilots nor to enhance safety nor to improve finances, but only as an indirect means of solving the problem created by American pilots illegally piloting within B.C. District waters. The shipping interests were not concerned because they had always employed pilots.

The progressive electronic and other technical developments in the fields of navigation and communications have prompted a reassessment of future requirements for pilotage compared with today's needs. Such progress is evidenced by Brief No. 42, submitted by Computing Devices of Canada Limited, for an integrated navigation and traffic control system and also by the continuous studies now being undertaken and the active progress made by the Telecommunications and Electronics Branch of the Department of Transport.

What impact will such developments have on pilotage? Will it be doomed because it is replaced by a fully automated guidance system or will scientific progress result in placing at the disposal of the pilots instruments and aids to navigation which will enable them to make safe and speedy transits under the most adverse conditions?

In these days of scientific achievement, it is not unreasonable to believe that electronic instruments and computers could be devised to provide a reliable and safe system of automatic guidance for vessels through the most difficult of channels in any given area, thereby dispensing with the necessity for the services of a pilot. On the other hand, there is a limit to what is economically possible. No doubt, over large areas navigation could be substantially facilitated at a cost which would prove reasonable in comparison to the advantages gained by providing one-way channels, electronic guidance devices such as microwave beacons, radar, improved hyperbolic navigation units (DECCA), ship-to-ship and ship-to-shore radio telephone, traffic control, etc., thereby supplying the means for navigation to be safely performed by ships' personnel trained in the use of such devices. With all these arrangements, the services of a pilot could be dispensed with, for instance, in the main approach channels of most of our seaports and in the lower part of the Quebec Pilotage District. However, there will remain areas where the desired improvements would be so costly that they would be considered economically unfeasible when compared with the advantages gained. For example:

(a) diverting the flow of the Saint John River to by-pass the harbour or to dredge Courtenay Bay approach channel to 35 feet at low water and to protect this channel from the flow of the Saint John River by the construction of a long breakwater;

(b) straightening and widening the Fraser River channel;

(c) twinning the channel between Quebec and Montreal;

(d) constructing a new channel through the mud flats north of Orleans Island and thus making it a continuation of the North Channel as far as Quebec.

Until works of the foregoing magnitude are completed, if ever they are, pilots highly skilled both in local knowledge and in the use of modern navigational instruments will be necessary.

At this stage in our pilotage history there is no doubt that the single controlling factor is the assurance of the constant availability of highly qualified pilots. On the othr hand, if methods can not be devised to assure stability in the service, to prevent the multiple causes of friction, disputes, frustration and dissatisfaction in the relations between pilots, shipping interests and Pilotage Authorities which eventually result in strikes by pilots, and if navigation in the area concerned is of vital importance to the economy of the country, then improvements, which may be very costly, are indicated, thereby minimizing the necessity for pilotage and the consequences of repeated or prolonged strikes.

Pilotage may be defined as the art of achieving the safe passage of a ship through confined and busy waters in the shortest possible time. Here, skill of a high order is needed. The pilot must know the ship's capabilities and limitations, the difficulties of the passage, including channel markers, tide, current and weather vagaries, etc. He must be skilled in the art of blind pilotage to a high degree if the ship is to make progress in inclement weather, or in conditions of heavy traffic density, and as is often the case, where many shore lights confuse the naked eye. He must be highly trained in the use of the various electronic and other devices, either shipborne or landbased, that are, or will be, made available to him. The trend is to larger and faster ships; their navigation creates problems which did not exist before, and their increasing number will create serious traffic problems in narrow and confined waters. Pilots with more skill and knowledge than they have today will be required to handle these ships expeditiously since all instruments and aids to navigation will be only as efficient as the men who use them. In the old days, it was said that pilots were lost when they could not see the land because they were then guided by landmarks and by their appraisal of ships' movements. Total darkness is still an appreciable hazard in channels that are lined by steep, mountainous terrain which casts dark shadows over the waters and where light beacons are infrequent. In these conditions there is great difficulty visually discerning where the sea ceases and the land begins. Such situations are encountered in the fiord-like channels of the B.C. Coast and in the Saguenay River. Pilotage in confined waters is essentially navigation by visual means, and until quite recently it came to a stop in periods of low visibility and very adverse weather conditions. With the aid of various electronic instruments, the pilot is now provided with means which are constantly being improved to "see" when visual means fail but this electronic "sight" has its limitations, and the images and information provided differ from what is seen with the naked eye. Therefore, to take advantage of these technical achievements, pilots must acquire the necessary knowledge and skill

to understand and use these instruments. The strange images that appear on the radar screen should be as familiar to the pilot as the land features in time of clear visibility and such local knowledge must form part of the qualifications of pilots today.

The rapid progress and changes in all navigational instruments necessitate a basic change in the system of licensing pilots. Formerly, changes happened progressively so that the necessary additional knowledge and skill were easily gained by experience but this is no longer true and additional theoretical and practical training will be necessary from time to time to make the pilot conversant with, and skilled in, the use of the new instruments. As will be seen later in Chapter 9, the present scheme of organization provided by Part VI of the Act does not give any control to the Pilotage Authority over the skill and qualifications of the pilots once a licence is granted. This omission should be corrected in future legislation.

The tasks to be performed by instruments become more and more complicated when a number of elements have to be taken into consideration at the same time, such variables as winds, currents, cross-currents, tides in restricted waters, various types of ships with different speeds and manoeuverability factors and unforeseen events: all these are taken into account at the same time by the pilot. No instrument can fully replace the human element, i.e., the pilot, and none can have his versatility. Events can happen very quickly in confined waters that often require a split-second decision to avoid damage or disaster which can only be made by an officer on the bridge. If local knowledge and skill in navigation in the waters concerned are necessary, this officer is the pilot.

Responsibility for Choosing a Pilot

Throughout the shipping world it is the recognized privilege of the Master to take advantage of any available outside assistance when he feels it would add to the safety of his ship or would speed up the trip. The accepted practice is that the Master is entirely responsible for choosing and employing a pilot and for supervising him in the performance of his duties. This practice has been retained in Part VI, with the sole limitation that only licensed pilots may be selected (except in compulsory payment Districts for non-exempt vessels on the inward voyage, as will be seen later in C. 4, p. 70 and C. 7, p. 210.

In areas where pilotage service is not organized, Masters do not generally have either the means or the opportunity for making a considered choice. Usually they have no knowledge of the qualifications of those who offer their services and they have no way of ascertaining them. In the majority of cases it is impossible to arrange ahead for the attendance of a particular pilot whose qualifications are known and if the traffic reaches a certain density the complexity of the situation is compounded; a wrong choice may mean disaster.

The basic scheme in Part VI provides much assistance to Masters in the discharge of their responsibilities. The licensing of pilots is an official appraisal of their skill, knowledge and reliability; in addition, the regulations ensure that competent pilots are almost always available for vessels, whatever their size, type, flag or ownership.

Criteria for the Establishment of Districts

Except for the Districts of Quebec and Montreal, which Parliament established by legislation, the Governor in Council decides if the creation of a Pilotage District in a given area is indicated or not. The Act is silent as to the criteria upon which the Government is to base its decision but the legislation as a whole makes it clear that neither public interest nor safety of navigation is a consideration and that the aim is merely to help shipping in the difficult task of making the right choice of those who offer their services as pilots.

There is no provision in Part VI of the Act which compels a Master, whether Canadian or foreign, to turn over the control of the navigation of his ship while in Canadian waters (except the designated waters of the Great Lakes Basin described in Part VIA) to the specialist in local navigation who is available in each Pilotage District, thereby making navigation safer both for the vessel concerned and for others in those waters. There is nothing to prevent a Master from proceeding without a pilot through the most dangerous Canadian waters (except in the Great Lakes Basin, Part VIA) if he decides to proceed alone, despite the fact that no prudent and competent Master would normally do so. For example, there is nothing to prevent the Master of a supertanker, who is under pressure from either the owners, the agents or the cargo owners, from proceeding in the freshet season through Courtenay Bay approach channel (Saint John, N.B.) against the best advice of the pilots, thereby not only endangering the safety of his own ship but also running the risk of blocking the channel completely and closing part of the harbour. A similar situation could arise in the course of many difficult operations, e.g. proceeding without a pilot in the Fraser River pilotage area, in the St. Fulgence Channel, under adverse conditions in such dredged channels as the North Traverse or those between Quebec and Montreal, where a mishap could completely block navigation on the river concerned.

The rule is set out without any possible ambiguity in subsec. 340(1) C.S.A.: a Master is never obliged to give a pilot charge of his ship because "acceptance of pilotage is optional".

If it became apparent that compulsory pilotage ought to be imposed in a given area in the interest of navigation and of the public, or for some other compelling reason, this could not be done under the present Act because it would be a complete departure from the letter and spirit of the law, and new

legislation would be required, as was done in Part VIA in 1960 to cover the joint American and Canadian pilotage operations in the Great Lakes Basin. Part VIA is exceptional legislation, the application of which can not be extended outside the Great Lakes Basin.

It is apparent from other provisions of Part VI that the three main prerequisites for the establishment and the maintenance of a Pilotage District are:

(a) the existence of a functioning pilotage service provided by pilots acting as free entrepreneurs;

(b) a proven need for establishing a system of state control over the qualifications of the pilots;

(c) a requirement by the shipping interests for pilotage.

The aim of the legislation is neither to create nor to organize a pilotage service but mainly to ascertain and guarantee the qualifications, fitness and reliability of those providing pilotage. Therefore, there must be a pre-existent service in which more than one pilot offers his services, which infers that there must be an adequate demand for pilotage. It is because these conditions do not exist at Churchill that this system can not work, and is not working, there. The Government acted wisely by not creating a District at Goose Bay. Both cases have similarities in that the demand for pilotage exists but there is no local person who offers, or is even capable of offering, to act as pilot. The problem was not to license pilots but to procure pilots and to provide the needed service.

The main condition, however, is that pilotage be required by the shipping interests. Since the aim of Part VI is to assist shipping, the convenience of shipping becomes the determining factor. The pilotage services that are provided along the Newfoundland east coast, in the Lower St. Lawrence ports, and in the Strait of Canso have not been organized into Pilotage Districts as requested by pilots, because the shipping interests have not asked for such a system and also because pilotage needs are adequately met by the existing private organizations.

Whenever any of these three prerequisites ceases to exist, Part VI can no longer apply and the Districts concerned ought to be abolished. This was done, for instance, when ships increased in size to such an extent that some New Brunswick and Nova Scotia ports became inaccessible except to very small vessels. On February 25, 1960, fifteen small Districts of this kind were rescinded by P.C. 1960-235 (Ex. 1144). Most of them had been in existence for more than 60 years.

Merger of Districts for Administrative Purposes

Along the coasts of Canada there are many small harbours to which the three criteria for the establishment of a Pilotage District apply, that is, there is a genuine need for a competent pilotage service, but the number of vessels involved generally does not justify licensing more than one or two pilots. It is illogical to develop for each of these small ports the involved organization of creating and operating a Pilotage District. This is the situation in most of the small commission Districts on the New Brunswick and Nova Scotia coasts. The reason why they were organized in Districts is that at the time there was a thriving trade which has since dwindled for various reasons, but mainly because the port's facilities are now too small for most vessels. As indicated above, 15 of these small Districts were rescinded in 1960 and most of the others are kept in existence merely because the local organizations are in being but, no doubt, they would not be created if the question was being considered in today's context. In some places, the fact that there is a Pilotage District creates a very awkward situation. This was also the problem that faced the small Districts which served the main harbours in Prince Edward Island. An artificial solution was found by merging them into one large District, comprising all the coastal waters of Prince Edward Island, under one single Authority but, in fact, pilotage exists in only a few ports. Licences are issued, not on a District basis but on a harbour basis. This *sui generis* situation, which was not foreseen in the scheme of organization provided in the Act, consists of the merger into one District of a number of former port type Pilotage Districts which are still independent and distinct from one another and whose pilotage services are not in any way integrated or inter-connected. From its description, the Prince Edward Island District would appear to be a coastal District but, in fact, it is not; since pilotage exists only in its ports there is no need for coastal pilotage. This was a reasonable approach and it works very well but the inadequacy of the legislation becomes apparent when the possibility of applying the compulsory payment system is considered. In order to enforce the payment of dues, it would be necessary to revert to the old system of a number of small, independent Districts because, otherwise, it would mean providing pilotage service throughout the waters of the whole District, i.e., coastal pilotage which is not needed.

However, it is believed that the merger type of organization should be resorted to in the small Districts of the New Brunswick and Nova Scotia coasts and a single Authority thus created should be responsible for licensing the pilots in any ports in the area whose importance does not warrant a Pilotage District. Such a move would protect both the licensed pilots and the

shipping interests. The various provisions of the Act should be modified to become consistent with an organization of this type which answers to a definite need.

B. PILOTAGE DISTRICT, A DEFINED AND LOCALIZED AREA

The pilot Part VI deals with is a qualified mariner who is expert in navigation within given confined waters and hires out his services as such to vessels.

The purpose of pilotage legislation is to select from persons who offer or intend to offer their services as pilots those who are qualified mariners and, above all, are expert both in the knowledge of the peculiarities, hazards and conditions affecting safe navigation in the area, and in the art of navigating in its waters.

Since the prime aim of this legislation is to provide (where the need for it exists) a selection process, it is adequately met by relying on a local board, the duties of which are: first, to make regulations defining the type of training and the standard of qualifications needed by pilots for the area over which their jurisdiction extends (subsec. 329(a)); second, to issue licences, limited as to territory, to those who meet the required standards (subsec. 329(d)). Local conditions, by definition, vary from one place to another and that is why a pilot is deemed to cease to be a licensed pilot once he is outside the limits of the District for which his expert knowledge and skill have been appraised (subsec. 333(3)).

For the same reason, a Pilotage Authority is powerless beyond the limits of its District. By-laws, because they are framed to meet the peculiarities and needs of one locality, can not extend over a territory for which they are not intended and its tariff cannot cover services rendered outside the district limits. It is only by general provisions contained in the Act itself that situations outside Pilotage Districts can be dealt with, such as was done for the indemnity that may be claimed by a pilot when through unavoidable circumstances he is carried beyond the limits of his District (sec. 359). Only Parliament has the power to create offences that licensed pilots might commit outside the limits of their District (sec. 368).

The district limit is a real boundary, a geographic line which designates the territory over which the jurisdiction of a Pilotage Authority extends. Inside this line ships requiring pilotage are obliged to employ licensed pilots and, if the payment of dues is compulsory, non-exempt vessels must pay the prescribed dues although they dispense with pilots. Provided this imaginary line does not mark the boundary of a contiguous District, pilots may go beyond it freely to disembark after completing pilotage assignments in their District or to embark to undertake inward assignments.

A district limit should not be confused with a boarding station, which is situated to seaward within a Pilotage District near the district limit. In compulsory payment Districts, ships which require pilotage must display the signal for a pilot in the area defined by the Pilotage Authority in its By-law (C.S.A. subsecs. 348(a) and (b); 349(b)). At present only the British Columbia District defines "boarding station" (B.C. District By-law, sec. 14) but most By-laws contain a "Notice of Requirement of Pilot(s)" which provides that the Master or agent of a vessel requiring a pilot shall notify the Pilotage Authority in sufficient time to enable the pilot to meet the vessel and shall state when and where the pilot is to board and the duty he is to perform (e.g. Quebec District By-law, sec. 10).

Part VI was designed to meet the requirements of a Pilotage District which consisted of a single port approached by a narrow entrance from the sea and serving as the terminus of an inward voyage. Since Part VI legislates for pilotage in single ports only, it is inadequate for other types of pilotage, i.e., the common problems of contiguous Districts including the necessity for uninterrupted service for vessels in transit, and the problems peculiar to coastal Districts. This inadequacy raises many legal questions for which there can be no real solution because appropriate legislation does not exist.

Contiguous Districts

The situation in contiguous Districts differs, *inter alia*, first, because there is more than one access to the District, so that the term "inward voyage" loses the precise meaning it has in the Act and second, because there is at least one common limit with another District.

Subsec. 345(a) provides that in a District where the payment of dues is compulsory, vessels are exempt, if on the inward voyage no licensed pilot offers his services. The meaning of "inward voyage" in Part VI is from sea to harbour and foresees pilots cruising through the boarding area situated at the harbour entrance, i.e., the seaward limit of the District, to offer their services to incoming vessels. The application of such a rule would create a chaotic situation if applied to vessels crossing over the common boundary of contiguous Districts. Sec. 345, which requires vessels to give a reasonable E.T.A. on inward voyages, pre-supposes port pilotage, because a transit voyage is neither inward nor outward. One problem, common to the Authorities of both Districts, is to assure the continuity of pilotage service with the least disruption possible but they are both powerless in this regard.

In 1873, when the first federal pilotage legislation was drafted, this problem existed only between the Districts of Quebec and Montreal, because all other Districts were composed of separate harbours. An adequate solution for that period was found by incorporating in the Act, throught provisions of exception, the system that prevailed under pre-Confederation legislation:

Quebec Harbour was made the joint territory of both Districts but only to enable the Montreal pilots to disembark from a downbound trip or to embark for an upbound trip, pilotage within the harbour being a monopoly of the Quebec pilots (sec. 49, 1873 Pilotage Act). Although the feature of Quebec Harbour as joint territory was retained (secs. 322 and 323 C.S.A.), the section dealing with the respective rights of each group of pilots was completely deleted by two amendments passed in 1934 and 1950. The corresponding section in the present legislation (sec. 357) bears no resemblance to the original provision. This creates, *inter alia,* the problem whether the Montreal pilots are now entitled to claim some movages in the harbour of Quebec, and also the legal problem as to which Pilotage Authority has the right to collect as a debt owing to it pursuant to sec. 343 the dues collected from non-exempt ships which are moved in the harbour of Quebec without the assistance of a licensed pilot. Since it is impossible for either one to establish an exclusive right, the right to claim might be denied.

The absence of statutory provisions to deal with the problems of continuity of service between contiguous Districts creates other serious legal problems for the pilots and the Pilotage Authorities. A licensed pilot "who acts beyond the limits for which he is qualified" is considered an unlicensed pilot (subsec. 333(3)). Therefore, if he crosses over into an adjacent District he is performing pilotage illegally and rendering himself and the Master of the ship subject to prosecution under secs. 354 and 356. On the other hand, the various regulations passed by his Pilotage Authority as to his "government and conduct" no longer apply and there is no competent Pilotage Authority to deal with what he may have done while in the other District. Two examples of illegal pilotage are the British Columbia pilot who boards a vessel in the United States, proceeds through the Gulf of Georgia and traverses the New Westminster pilotage waters that extend to the middle of the Gulf, and the Montreal pilot who proceeds into St. Lambert Lock.

Another problem concerning the continuity of pilotage service is approving and licensing pilot vessels. Under the present regulations, there is no objection if the pilot vessels are approved and licensed by both authorities concerned but, since the authorities are independent and autonomous, there is no superior authority to decide between them in case they disagree. The problem, therefore, is not adequately dealt with in the Act. The Pilotage Authorities concerned cannot be forced to pass similar and compatible sets of regulations covering the prerequisites for licensing pilot vessels. Establishing the charge to be levied for the use of pilot vessels may also prove an insoluble problem.

Sec. 357 is not clear in Districts that consist of more than one harbour because it covers the payment of dues for ships "removed from one place to another within any pilotage district." In a District composed of only one harbour this section is straight-forward since it covers movages, which

mariners define as the movement of ships in a harbour, as opposed to navigation, which they consider to mean trips between harbours. Sec. 345 covers the payment of dues by ships who navigate within a Pilotage District. In Districts that cover more than one isolated harbour, e.g. coastal or river Districts, sec. 357 must serve a dual purpose with sec. 345, unless it was intended to use the verb "remove" in the sense of movement not only from place to place inside a harbour but also from harbour to harbour. This would pose the question whether a trip from Vancouver to Prince Rupert or from Quebec to Chicoutimi could be called a movage. It is noted that neither "move", "movage", "navigation" nor "remove" is defined in the Canada Shipping Act with a resultant loss of clarity in some of its sections.

Under the present legislation the Governor in Council has no power to create a joint territory at the common border of two contiguous Districts, because he can not place two Pilotage Authorities in charge of the same territory and there is nothing in the Act to empower him to vary and limit the statutory powers that Pilotage Authorities enjoy in the Act. Furthermore, Pilotage Authorities are powerless to make an agreement between themselves about the extension of the authority of one into the territory of the other.

The 1854 Merchant Shipping Act of the United Kingdom provided a solution; the fact that it was not adopted is a further indication that the organization defined in the 1873 Act was aimed at port pilotage only. The U.K. Act (subsec. 336(6)) authorized Pilotage Authorities to make by-laws covering the necessary arrangements. It reads as follows:

> "336(6) To make such Arrangements with any other Pilotage Authority for altering the Limits of their respective Districts, and for extending the Powers of such other Authority or the Privileges of the Pilots licensed by such other Authority or any of them to all or any Part of its own District, or for limiting its own Powers or the Privileges of its own Pilots or any of them, or for sharing the said last-mentioned Powers and Privileges with the said other Authority and the Pilots licensed by it, or for delegating or surrendering such Powers and Privileges or any of them to any other Pilotage Authority either already constituted or to be constituted by Agreement between such Authorities, and to the Pilots licensed by it, as may appear to such Pilotage Authorities to be desirable for the Purpose of facilitating Navigation or of reducing Charges on Shipping".

Coastal Pilotage

Coastal pilotage involved other problems, *inter alia*, frequently crossing beyond the seaward district limit during the course of a pilotage assignment such as occurs on a trip from Cape Beale to Kitimat or from Vancouver to a northern destination by the seaward route. Sec. 361 is meaningless when it

states that the service for which the pilot has been hired is to be held to be performed as soon as the ship passes out of the Pilotage District, at which time the pilot may quit the ship. The type of pilotage foreseen here is obviously port pilotage.

COMMENTS

It is considered that the present legislation is inadequate, in that the problems of contiguous Districts, river Districts and coastal Districts are not covered, although most pilotage in Canada (excluding the Great Lakes Basin for which there is special legislation, Part VIA) is performed in Districts where these problems arise: Quebec, Montreal, Cornwall, New Westminster and B.C. Districts, and even the Halifax District, which is a coastal District although it is treated as a one harbour District.

If in future legislation the District type of organization is to be retained, a realistic view of Canadian problems should be taken by providing rules applicable to all cases and, when necessary, making specific provisions applicable to each specific situation rather than basing the legislation on one type of District only, as is done in Part VI.

C. PILOTAGE DISTRICT, AN INDEPENDENT AND AUTONOMOUS ORGANIZATIONAL UNIT

The Pilotage District is organized as an autonomous and independent unit. Once the District is established only its Pilotage Authority can take the necessary decisions to make it function: *inter alia,* determining the nature and extent of the qualifications to be required of candidates for a pilot's licence, how many pilots ought to be licensed, the method and amount of their remuneration, whether a given candidate meets the prescribed standards and should he be issued a licence. It is true that many of these powers can not be exercised without the authorization of the Governor in Council but the responsibility and the initiative for decisions rest with the Pilotage Authority. The Governor in Council's only power is either to approve or disapprove whatever is requested but he can never impose any decision or by-law, give directives or dictate policy. Provided that the Pilotage Authority is acting within the limits of its powers no one can interfere with, or revise, its decisions and there is no possible appeal to any higher authority. It is the sole and absolute master both as to policy and administration within the limits of its District.

Four different authorities have a part to play in the organization plan of Part VI: Parliament, the Government, the Minister of Transport and the various Pilotage Authorities. To complete the list: (a) the Minister of Finance has one secondary function, i.e., co-administrator with the Minister of Transport of the various Pilot Funds of the Districts where the Minister of Transport is the Pilotage Authority and of the commission Districts with the

Governor in Council's permission (sec. 373); (b) the Treasury Board functions if the Financial Administration Act applies to Pilotage Authorities. (This question is studied later in C. 5, p. 97 and C. 8, p. 319.

In the preamble to this study the functions and responsibilities of each of these authorities were set out briefly. They are studied in detail hereunder.

Powers of Parliament

Parliament is the supreme authority but it acts only through legislation. In pilotage matters, it draws its jurisdiction from the British North America Act (vide *The Contract of Pilotage*).

In the organizational scheme of Part VI as it now stands Parliament has generally confined its role to establishing a framework and enacting provisions of general application. It has delegated to the licensing authorities the responsibility and the power to complete the legislative provisions required to meet the local and particular needs of each District. These delegated powers are defined in specific provisions of the Act which will be studied later (C. 8, p. 241 and ff.) Any by-law or regulation that does not come within the ambit of one of these statutory provisions is null and void as being ultra vires. No one can legislate in lieu of Parliament except with the leave of Parliament given in the specific provisions of an Act. A delegation of powers is to be interpreted restrictively.

In pre-Confederation days, general schemes of organization existed in the laws of the Maritime Provinces and of British Columbia on account of the numerous coastal ports which had their own independent pilotage organizations. In Lower Canada, *ad hoc* legislation was indicated to cope with the unique case of pilotage on a river 400 miles long with two major harbours and several small ports en route. No general legislation was indicated and the matter was dealt with by specific legislation providing for an organizational structure suited to the two sectors of the river and containing provisions dealing, *inter alia,* with the continuity of the service from one sector to the other. The legislation that was passed was the Quebec Trinity House Act governing the specific scheme of organization applicable to the Port of Quebec, i.e., to what is now known as the Pilotage District of Quebec, and the Montreal Trinity House Act applicable to the Port of Montreal, i.e., the District of Montreal.

The first Federal Act had to provide for a system which would meet general needs throughout the new Confederation, in various ports of the Maritime Provinces, in British Columbia and in other areas, without having to apply to Parliament each time. Furthermore, since the administrative problems connected with pilotage service in small coastal ports could in no way be compared to the complexity and importance of the pilotage organization on the River St. Lawrence, a simpler and more expeditious system had to be arranged. The 1873 Act adopted as the basis of legislation the system

of local commissions that had been in use in British Columbia and in Maritime ports. Parliament also delegated to the Governor in Council authority to form these commissions.

There is nothing, however, to prevent Parliament from covering in its legislation the specific needs of a given region or even from dealing with a specific and essentially local problem. This becomes a necessity when, on account of special circumstances or peculiarities, the basic scheme and the general provisions of the legislation in force can not be applied. Legislation of exception is then adopted, e.g. Part VIA for the Great Lakes Basin. In the 1873 Act, special provisions were enacted to retain the scheme of organization that existed in Lower Canada thereby resolving the problems of contiguous Districts and of river pilotage.

However, most of these 1873 provisions of exception have since been deleted by subsequent amendments, thus making the legal scheme of organization in these Districts conform to the general rule. Unfortunately, some necessary provisions were abrogated without being replaced by general provisions to cover local problems, while others that could have been dispensed with were retained. These will be discussed later.

The very fact that a provision is passed by Parliament, i.e., is incorporated into an Act, gives in practice a certain character of permanency. This procedure should be followed for basic provisions and those of general application but it should not be followed lightly for enactments of a local character because it may prove to be more of a burden than an advantage. The real obstacle is the obligation to resort to the procedure of having legislation passed each time a change is desired. Experience has proved that it is a very involved process whose consequences are frequently uncertain, e.g. it took 29 years to have the eastern district limit of Quebec amended in the Act to make it conform with the real limit which had been moved from Bic to Father Point in 1905, and the next move from Father Point to Les Escoumains, which occurred in 1960, has not yet been reflected in sec. 322. Another example: the Seaway has been open since 1959 and the western limit of the District of Montreal has not, as yet, been modified to define which part of the entrance to the Seaway is part of the District. Again, in view of the exception contained in sec. 328, the Quebec Pilotage Authority is powerless to have the District expenses charged to the Pilotage Authority's expense fund.

Powers of the Government

The main rôle of the Government is to decide when and where a licensing body should be established and to establish it. Its secondary rôle is indirect control over local legislation and expenditures by Pilotage Authorities. These will be studied later in C. 8, p. 244 and C. 5, p. 98 and ff.

The powers of the Governor in Council pursuant to Part VI are the following:

(a) *To create Pilotage Districts, fix their limits and rescind them* (sec. 324). The Act provides two exceptions to this rule, i.e., the Districts of Quebec and Montreal, the existence of which is recognized and guaranteed by the Act itself (secs. 322 and 323). As will be seen later, there is no practical reason for retaining this status of exception which has been, and remains, a source of administrative difficulty.

The Act does not indicate the criteria on which the Government's decision to create a District should be based, but, as already discussed (vide pp. 45-46), these are apparent from the legislation taken as a whole. The list of Pilotage Districts established since 1873 (abrogated or operative) appears in Appendix II.

Since the limits of a District denote the extent of the territorial jurisdiction of the Pilotage Authority and the validity of the pilots' licences, it is of prime importance to describe them simply and completely and to use as reference points geographical features that can be identified easily. Instances have been found of limits being described by reference to a description contained in some other statute. This uninformative practice makes it necessary to consult other legislation and, in addition, creates a number of problems, *inter alia*, whether the district limits are altered if the description in the quoted statute is modified for reasons unconnected with pilotage. Two examples of the difficulties and uncertainties thus created are the limits of the Halifax District and the northern limit of the New Westminster District which are defined by reference to electoral district boundaries.

(b) *To alter the boundaries of any Pilotage District,* (sec. 324). This is a new power which was granted when the 1934 Act was approved. Because of the intended generality of its terms it applies to all Districts including Quebec and Montreal (vide Quebec District, *Legislation*. However, the Government refrained from using this power when it became necessary to alter the limits of these two Districts, and tried instead (without success to date) to have the Act amended. Included in the problems that remain unsettled are the eastern limit of the Quebec District, the western limit of the Montreal District and the *de facto* division of the Montreal District at Three Rivers.

The need arose to modify the eastern limit of the District of Quebec when the eastern station was moved from Father Point to Les Escoumains but it was considered that sec. 324 did not give

sufficient authority for the Governor in Council to take action tantamount to amending sec. 322 (vide Quebec District, *Legislation*). Therefore, since 1960 the District has been operated as if the eastern limit was at Les Escoumains, no pilotage is performed by the licensed pilots east of Les Escoumains and at Rimouski and Forestville pilotage is performed by unlicensed pilots despite the fact that those ports are still within the legal boundaries of the District. This is obviously an abnormal situation.

In the Montreal District, the existing definition of the western limit as the eastern entrance to the Lachine Canal has been totally inadequate since 1959 when the Seaway opened. The Pilotage Authority has tried to settle the matter by amending the District By-law but this action is ultra vires because it emanates from the Pilotage Authority instead of the Governor in Council. When the pilots requested a division of the District at Three Rivers more than a simple modification of limits was involved and a general amendment to the Canada Shipping Act was sought in 1959 by Bill S-3, which would have given the Governor in Council the same power to alter the limits of the Quebec and Montreal Districts as he possesses over the other Districts in Canada. However, the Bill was dropped because it contained a number of contentious provisions.

(c) *To appoint Pilotage Authorities in all Districts.* These appointments are during pleasure in view of the absence of provisions dealing with the question of their removal (subsec. 31(k) Interpretation Act 1952 R.S.C. 158).

The Act contains neither criteria for appointing Pilotage Authorities nor grounds for removing them. The evidence received is to the effect that in the small, commission Districts political considerations are recognized and the appointment of a new board is expected whenever there is a change of Government in Ottawa. It was explained that the Government is guided on the matter by the desire of the local population as expressed by the recommendation of their Member of Parliament. No consideration is given to the qualifications of the members of the Pilotage Authority who are being dismissed, nor to the adequacy of their administration, nor whether the pilotage service might suffer. The change in the Pilotage Authority is sometimes followed by the dismissal of the pilots who were licensed by the previous administration and the appointment of other pilots.

This practice is not new, as is shown by the 1915 Supreme Court of Canada judgment in the case of McGillivray v F. C. Kimber *et al* (52 S.C.R. 146). On June 13, 1912, Pilot McGil-

livray, who had been a licensed pilot for 25 years, was dismissed, prior to the expiration of his licence, at the first meeting of the newly appointed board of the Pilotage Authority for the Sydney District without being charged or given the opportunity to defend himself. The Pilotage Authority acted in an arbitrary manner. At the trial, one of the members of the Pilotage Authority admitted that one reason for the dismissal was political.

The Commission can not but condemn the practice of appointing Pilotage Authorities in this manner. It makes a farce of the pilotage organization and at the same time seriously endangers the safety of those ships which the Government entrusts to pilots whose qualifications and skill are judged by Pilotage Authorities with doubtful standards.

If the interests of navigation are so utterly disregarded in these Districts, it can only mean that there is no need for a pilotage organization and these Districts should be abolished.

The Pilotage Authority of a District can be of two types, a board of three to five members, or a one-man Pilotage Authority in the person of the Minister of Transport. As stated in sec. 325 C.S.A. the rule is that the Pilotage Authority should take the form of a local board or commission, but in practice this has become the exception.

Formerly, a board composed of local people was the only possible form of Pilotage Authority. The 1873 Pilotage Act created exceptions for the four Districts of Halifax, Saint John, N.B., Quebec and Montreal but only in the number of commissioners, their method of appointment or election and their status as a corporate body. These Authorities remained local boards.

In the present legislation there are two exceptions. The first concerns the Districts of Quebec and Montreal where the Governor in Council is prohibited from appointing such a board as Pilotage Authority. This prohibition is a carryover from the former legislation. Because the Trinity House Acts set out the procedure for appointing and electing the commission members, a limitation on the general powers of the Governor in Council had to be incorporated in the 1873 Act in order to avoid conflicting legislation (sec. 17). Since this special legislation was abolished many years ago there is now no reason for retaining the prohibition. The question of the special status given to Quebec and Montreal in secs. 324, 325 and 326 C.S.A. is studied at length under Legislation in the report on these Districts. It suffices here to say that the Commission has discovered no argument in favour of keeping what still remains of these special provisions. Apparently they are still in the statute partly for historical reasons and partly on

account of the unjustified fear of the pilots that they might lose some vague and undefined acquired rights. No serious representations on the subject were made to the Commission, not even by the pilots. It is believed that these special provisions, which served a useful purpose in the past, are no longer warranted and that, moreover, they make the pilotage service in these Districts more difficult to administer.

The second exception is contained in sec. 327 which provides that the Governor in Council may appoint the Minister as Pilotage Authority for any District or part thereof. Subsec. 2(69) states that the Minister as Pilotage Authority means the Minister of Transport and includes his Deputy Minister.

The first appointment of this nature was in 1903 when the Minister of Marine and Fisheries was appointed, by special legislation, Pilotage Authority for the District of Montreal. In 1904 the principle was extended to all Districts (vide *History of Legislation*). Eventually the exception became the rule and the Minister (Minister of Transport) became the Pilotage Authority in all the large Pilotage Districts, except New Westminster.

The practical effect of this change was that the basic principle of organization provided in the Canada Shipping Act was materially changed. At present, the *de facto* situation is that most pilotage administration is no longer decentralized; all important Pilotage Districts are administered from Ottawa by officers of the Department of Transport, i.e., by a department of government, instead of by independent, local agents. The Pilotage Authority is no longer a group of persons always available at local level and with complete up-to-date knowledge of the situation in one given District but is one person in Ottawa, the Minister, acting as common Pilotage Authority, He is remote from local realities, and, because of his other pressing responsibilities, he is unable to deal personally with questions of local policy, and is forced to have his pilotage responsibilities performed in his name by a large number of departmental advisers in Ottawa.

The one condition imposed by subsec. 327(1) on the selection of the Minister as Pilotage Authority is that it must appear to the Governor in Council that the appointment is "in the interest of navigation". However, none of the Orders in Council appointing the Minister as Pilotage Authority now in force make any mention of this requirement, nor is this vague expression defined anywhere. If interpreted in relation to the context, it can only mean that the action is taken in the interest of shipping for the convenience of which the licensing organization is established.

When this one-man Pilotage Authority system was made part of the Pilotage Act in 1904, there was an additional condition, i.e. that the appointment was required by local interests. It was deleted by a 1919 amendment, no doubt to regularize the appointment of the Minister as Pilotage Authority in the Halifax District which had been made the previous year under the War Measures Act on the recommendation of the Robb Royal Commission (vide *History of Legislation*).

It is permissible for the Minister to be appointed Pilotage Authority for part of a District only. This would create the awkward situation of having two Pilotage Authorities over one group of pilots. This provision, which has been in the Act since 1904, has never been used. The advantages of such a provision are difficult to visualize but the disadvantages and problems it might occasion are obvious. It is considered that this power should be deleted so that there could never be more than one Authority in any given District.

(d) *To determine whether the payment of pilotage dues is to be made compulsory in the Districts created by him (sec. 326).* Here again the exception is a surviving remnant of former legislation now repealed. There are only two Districts that have not been, and can not be, created by the Governor in Council, i.e. Quebec and Montreal. Prior to 1934 it was specifically provided in the section corresponding to the present sec. 345 that the payment of dues was to be compulsory in the four Districts of Quebec, Montreal, Halifax and Saint John, N.B. and also in those other Districts where it had been so enacted by the Governor in Council who had created them. In 1934, mention of the four Districts was deleted but the rest was left unchanged with the result that the payment of dues in the Quebec and Montreal Districts ceased to be made compulsory by statutory provision and power to do so in these two Districts (which the Governor in Council had not the power to create) was not delegated.

According to the rules of interpretation, this can not be taken otherwise than to mean that Parliament intended at that time to amend the previous legislation and to provide that the payment of dues could not be made compulsory in these two Districts except by decision of Parliament. (for further comments on the matter, vide Quebec District, *Legislation*).

Here again the law is silent on the subject of criteria for the adoption of the compulsory payment system, but they can be deduced from the context. (This will be studied later in C. 7, pp. 211 and ff). Suffice to say that the aim is not to provide additional

revenue to finance the operation of the service but to urge Masters to employ pilots in order to give the pilots more practice and, indirectly, more revenue.

From the wording of sec. 326, it appears that for the purpose of deciding whether to adopt the compulsory payment system, the District must be treated as a whole and that compulsory payment can not be made applicable in part of a District. This is confirmed by the generality of the terms used in all the sections which deal with the compulsory payment system, such as secs. 345, 348, 349 and 357. Whenever it is intended to make a provision applicable in part of a District only, this distinction is specifically made, e.g., subsec. 327(1). In fact, payment of pilotage dues has never been made compulsory in part of a District only. The only satisfactory explanation for the lack of flexibility is that Part VI was designed for port pilotage. In theory, Part VI could be incompatible with the separate needs of the various localities in river and coastal Districts and, as pointed out earlier, it is not applicable to a federation type District like Prince Edward Island (vide p. 47). In practice, no problems arise because occasional traders take pilots whether payment is compulsory or not.

(e) *To determine in regulations made by himself, which signals Masters should display, when requiring a pilot in Districts where the payment of dues is compulsory (sec. 363).* To date the Governor in Council has never exercised this power with the result (as will be seen later) that many sections of Part VI dealing with the compulsory payment of dues can not be applied. Prior to 1934, the matter was covered in the Act itself, e.g. sec. 466 of the 1927 Canada Shipping Act stated the signals were:

(i) "In daytime, the Jack or other national colour usually worn by merchant ships, having around it a white border one-fifth of the breadth of the flag, hoisted at the fore".

(ii) "At night, a blue light every fifteen minutes; or a bright white light, flashed or shown at short or frequent intervals, just above the bulwarks, for about a minute at a time".

When the Act was revised in 1934, these particulars were deleted and the responsibility for legislation on this point was delegated to the Governor in Council. At that time an international agreement was reached on the signals to be displayed by ships throughout the world. In reply to a query from the Commission, the Department of Transport stated (Ex. 1480):

> "none of these sources (Department's Law Branch, the Department library and the Public Archives) was successful in finding a regulation concerning this subject and, therefore, one must assume that there has

never been such a regulation passed. However, the signals for pilots are contained in the International Code of Signals which was brought into effect by international agreement on January 1, 1934. According to our files in 1934 the Department at that time considered no other action was necessary".

In Appendix B of the International Code of Signals, Vol. 1, signals for pilots are dealt with as follows (Ex. 1480):

"The following signals, when used or displayed together or separately, shall be deemed to be signals for a pilot:

In daytime:

1. The International Code Signal G signifying "I require a pilot".
2. The International Code Signal PT signifying "I require a pilot".
3. The Pilot Jack hoisted at the fore.

At night:

1. The pyrotechnic light, commonly known as the blue light, every 15 minutes.
2. A bright white light, flashed or shown at short or frequent intervals just above the bulwark for about a minute at a time.
3. The International Code Signal PT by flashing."

However, this international agreement was never made part of Canadian legislation, even by Order in Council, and the only official action took the form of Notices to Mariners stating that the new code had come into effect on January 1, 1934, e.g. Notice to Mariners No. 64 of 1938. Since a Notice to Mariners can not have any binding effect and does not meet the requirement of sec. 363, at present, a "signal for pilots" has not yet been legally approved.

Because the five powers studied above are delegated powers, they can not be exercised by anyone except the Governor in Council to whom they were specifically delegated by Parliament. Furthermore, in the absence of a specific provision (none is contained in the Act), according to the legal axiom *"Delegatus non potest delegare"* these delegated powers can not be further delegated. Therefore, all By-laws passed by Pilotage Authorities infringing on any of these powers are illegal, as ultra vires. The fact that the By-laws received the sanctions of the Governor in Council does not cover the nullity because the By-laws remain enactments of the Pilotage Authority. For instance, the following are null and void:

(a) Subsec. 6(1) of the British Columbia District General By-law (P.C. 1965-1084).

(b) Subsec. 6(1) of the New Westminster District General By-law (P.C. 1961-1740).

(c) Subsecs. 6(1) of the Quebec District General By-law (P.C. 1957-191) and 4(1) of the Montreal District General By-law (P.C. 1961-1475) making the payment of dues compulsory in these two Districts. As seen above, even the Governor in Council could not make such an enactment.

(d) The definition of the Harbour of Montreal contained in the Montreal District General By-law subsec. 2(h) is illegal inasmuch as it extends the jurisdiction of the Pilotage Authority beyond the District limits as defined in sec. 323, which do not include the entrance to the Seaway.

These illegal provisions in the By-laws purport to remedy deficiencies in the legislation but the only correct way to amend legislation is by amendment to the Act itself. The examples above do not fall within the regulation-making powers of the Pilotage Authority.

Powers of the Minister of Transport

The Minister, as head of the Department of Transport, has a minor role in the scheme under Part VI. He has absolutely no authority to intervene in the administration of any District or to dictate any policy or course of action to the Pilotage Authority. This is consistent with the philosophy of the basic organization of Part VI that Pilotage Districts draw their authority directly from Parliament and should be totally independent of one another and of any department of Government. Apart from sec. 327, where his possible appointment as Pilotage Authority is mentioned, the name of the Minister occurs only twice in Part VI:

(a) To play the role of arbitrator to establish the pilots' contribution to the pilot fund, if the pilots and the Pilotage Authority concerned fail to agree (subsec. 319(m) 1934 C.S.A.).

(b) To exercise surveillance over the activities of the Pilotage Authorities (sec. 332).

When the Act was revised in 1934, the Pilotage Authority was deprived of discretionary power to fix the compulsory contribution of the pilots to the District pilot fund and the above procedure was introduced. It is to be noted that the aim of the legislation is defeated wherever the Minister is also the Pilotage Authority. It is inconsistent that one of the parties to a dispute can also act as arbitrator. If the intention of the legislation is to obtain an independent decision, in this event provision should be made for an independent arbiter. Furthermore, because in the 1934 amendment Parliament has covered the subject completely and because no power was given any

Pilotage Authority to vary the contribution by regulation, all the By-law provisions that deal with it are ultra vires. Illegal provisions of this nature are contained in the By-law of every Pilotage District where a pilot fund was created by the Pilotage Authority.

Sec. 332 C.S.A. states that the Minister in his surveillance rôle shall require from each Pilotage Authority yearly within fifteen days after the end of the fiscal year whatever pilotage returns or reports he may deem necessary. This section was given its present form in 1934. In former legislation (vide sec. 422, 1927 C.S.A.) the report was to cover the calendar year and all the particulars it was to contain were listed. The amendment was probably made to avoid having to amend the law each time it was deemed advisable to modify the list in order to meet changing conditions.

The Minister has not issued a set of instructions or regulations on the matter but has merely prepared a printed, blank return form which lists the subjects on which information is required. The form applies only to Districts where the Minister is not the Pilotage Authority; it is felt at department level:

> "that when the Minister is the Pilotage Authority for a district, sec. 332 does not apply, since he would be making a report to himself".

However, in these Districts the local Supervisors always make a full report. The return form was last modified in 1962, and, apparently through an oversight, was made to cover the calendar year (Ex. 1485).

Aside from receiving the reports, it is obvious that very little else is done to discharge this surveillance duty. Analysis of these reports by the Commission has revealed a number of flagrant irregularities and contraventions of the provisions of the Canada Shipping Act, repeated year after year, for intance, local Commissioners illegally remunerating themselves out of pilotage revenue as was done for many years at New Westminster; the appointment of a Secretary-Treasurer and the payment of his remuneration out of pilotage moneys without the appointment or the remuneration being sanctioned by the Governor in Council as specifically required by sec. 328; temporary licences being issued when not provided for in the By-law; dues collected from non-exempt vessels which dispensed with pilots being credited to the pool of pilots' earnings rather than to the pilot fund or to the expense fund as required by the Act, etc.

On the other hand, the pilotage staff of the Department has been busy, as noted earlier, actually administering the Districts where the Minister is the Pilotage Authority. Here again, the Minister is charged with an incompatible responsibility, i.e., the obligation to exercise surveillance over himself in that this duty is performed by the same staff that administers the Districts of which he is the Pilotage Authority. Under these circumstances the reports referred to in sec. 332 can scarcely fulfil their intended purpose—a situation which leaves much to be desired.

The Department of Transport advises the various Pilotage Authorities on pilotage matters, especially the drafting of by-laws and also serves as liaison between them and the Governor in Council when their By-laws and other proposals are presented for the Governor in Council's approval. Here again, this procedure is generally unsatisfactory as is shown by the number of ultra vires provisions that appear in every By-law.

The Minister of Transport, as such, has other powers which indirectly affect pilots and pilotage. They are derived from the provisions of Part VIII of the Act under which he may order a preliminary inquiry into a shipping casualty, or convene a court of formal investigation in respect to shipping casualties or to the fitness, competence and reliability of persons including pilots, having charge of vessels (unless he orders an inquiry under section 579). Parliament has made the Minister of Transport responsible for the safety of navigation in Canadian waters and Part VIII defines some of the ways this responsibility is to be discharged. Part VIII is of general application, and it may affect a pilot if he becomes a safety risk or is involved in a shipping casualty. (This situation is studied later in C. 9, p. 357 and ff.)

Powers of the Pilotage Authority

The powers of the Pilotage Authority will be dealt with later in C. 8. Other aspects of this study are given precedence to ensure fuller understanding and to avoid repetition as much as possible.

Chapter 4

THE CONTRACT OF PILOTAGE AND THE STATUS OF THE LICENSED PILOT

PILOT, A PUBLIC OFFICER

Intervention by the Crown as provided in Part VI, C.S.A. is based on the individual, civil, pilotage contract made between a vessel and a licensed pilot when he exercises his profession as a self-employed, independent contractor.

"Licensed pilot" is defined in the Interpretation Section (subsec. 2(44)) to mean "a person who holds a valid licence as pilot issued by a Pilotage Authority". In other words, he is a person who is duly authorized to act as pilot, i.e. to enter into pilotage contracts with vessels in a given Pilotage District. However, the licensed pilot is a pilot only when he meets the two requirements of the statutory definition of subsec. 2(64), i.e., "has the conduct" of a ship and is not a member of the crew.

Because of the licence he holds from the Crown the pilot was declared a public officer in a judgment rendered October 17, 1899, by the Supreme Court of New Brunswick, in Equity[1], which held that:

> "the office (of licensed pilot) is public and independently substantive" because "... The source of the office is clearly mediately or immediately from the Crown; its tenure is not during pleasure and its duty is certainly of public and independent character..."

[1] The Attorney-General of New Brunswick v Miller *et al* (2 N.B. Equity Reports, p. 28). The facts of the case, as related in the judgment, are briefly: On April 7, 1899, the Miramichi Pilotage Authority, without consulting the pilots, passed a by-law whose general effect was to reduce pilotage dues. When the pilots' request for repeal of the by-law was refused, all 20 District pilots went on strike May 23 by resigning their licences. Three or four large steamers and two sailing vessels which were loaded and ready for sea had to sail that day or wait ten or twelve days for the next spring-tide. In anticipation of the pilots' action, the Pilotage Authority had previously amended the District By-law without consulting them to enable the Authority to issue a licence to any person it found competent. The amendment was approved by the Governor in Council. When the strike occurred four new pilots were licenced and they performed pilotage at Miramichi. The Attorney-General sought an injunction against them claiming that their licences were illegal. The petition was dismissed on the ground that a pilot held a public, substantive, independent office emanating immediately, if not mediately, from the Crown. Since the objections to the validity of the defendants' licences did not claim that they had been licensed unfairly or in bad faith, the remedy, if any, should not be sought by injunction but by information in the form of a *quo warranto*.

Since the philosophy of the legislation is that the pilotage service exists for the convenience of shipping and not on the grounds of safety of navigation or of public necessity, the customary status of the pilot did not have to be modified and, in fact was not changed by Part VI: whether licensed or unlicensed, the pilot is a self-employed professional who hires out his services to navigate vessels. The pilot is hired by the ship, i.e. by her Master, owner, agent or consignee, not as an employee but as a free contractor making his expert services available for a specific assignment under the authority and the responsibility of the Master.

In areas where pilotage is not organized by the Crown, both parties are almost completely free to bargain and the rights, responsibilities and duties of both parties result from the civil agreements that are arrived at through mutual consent. Normally their freedom is restricted only by the general limitations contained in the civil legislation of the province where the contract is made but, since the consideration of the contract is the navigation of a ship, they may also be affected by restrictions contained in federal legislation pursuant to the principle of ancillary powers in constitutional law. The British North America Act gave the Federal Parliament implicit power to legislate in provincial fields of legislation to the extent necessary to prevent the defeat of any scheme of federal legislation dealing with a matter under exclusive federal jurisdiction.

FEDERAL AND PROVINCIAL JURISDICTION

Pursuant to sec. 91, subsec. 10, of the British North America Act, "Navigation and Shipping" fall within the exclusive legislative authority of the Parliament of Canada. Any doubt that pilotage came under this heading was removed by the Privy Council decision rendered in 1920 in Paquet v Corporation of Pilots of Quebec Harbour 1920 A.C. 1029 (1920, 54 D.L.R. 323). The pertinent excerpt reads as follows:

> "After the quasi-federal distribution of legislative powers which was effected by the B.N.A. Act in 1867, it is clear that the power to pass laws regulating the pilotage system of the harbour was given exclusively to the Dominion Parliament. Navigation and shipping form the tenth class of the subjects enumerated as exclusively belonging to the Dominion in sec. 91 of the Act, and the second class in the section, the regulation of trade and commerce, is concerned with some aspects at least of the same subject. Whether the words trade and commerce, if these alone had been enumerated subjects, would have been sufficient to exclude the Provincial Legislature from dealing with pilotage, it is not necessary to consider, because, in their Lordships' opinion, the introduction into sec. 91 of the words "navigation and shipping" puts the matter beyond question. It is, of course, true that the class of subjects designated as "property and civil rights" in sec. 92 and there given exclusively to the Province would be trenched on if that section were to be interpreted by itself. But the language of sec. 92 has to be read along with that of

> sec. 91, and the generality of the wording of sec. 92 has to be interpreted as restricted by the specific language of sec. 91, in accordance with the well established principle that subjects which in one aspect may come under sec. 92 may in another aspect that is made dominant be brought within sec. 91. That this principle applies in the case before their Lordships they entertain no doubt, and it was, therefore, in their opinion, for the Dominion and not for the Provincial Legislature to deal exclusively with the subject of pilotage after Confederation, notwithstanding that the civil rights and the property of the Corporation of Pilots of Quebec Harbour might incidentally, if unavoidably, be seriously affected."

On the other hand, various operational aspects of navigation involve activities that are normally governed by provincial legislation, e.g., sales, hiring of personnel, contracts for services, etc. As stated earlier, the civil legislation of each province applies to all contracts made within its boundaries to the extent that provincial legislation is not superseded by federal legislation. In addition, any pre-Confederation legislation on pilotage that was not repealed, directly or indirectly, after Confederation remains in force. For instance, the Canada Shipping Act does not create any privilege or lien against a ship to guarantee the payment of pilotage dues but, when the hiring contract is made in the Province of Quebec, subsec. 2383(2) of the Civil Code, which predates Confederation, provides such a privilege and a maritime lien against vessels.

As seen earlier, in areas where there is no Pilotage District (except in the Great Lakes Basin) the only federal legislation that appears to affect civil legislation on the contract of hiring as applied to pilots is contained in sec. 359 C.S.A., which fixes the indemnity payable to a pilot who is taken to sea or beyond the limits for which he is licensed, and in subsec. 362(2) C.S.A., which limits the pilots' civil liability for damage or loss occasioned by their neglect or want of skill. Under provincial law the pilots would normally be answerable to the full extent of damages but, by this provision in the Canada Shipping Act, the Federal Parliament has limited their liability to a maximum of $300.

Where there are Pilotage Districts (and hence licensed pilots) the basic situation remains the same, but there is greater federal intervention into the extent of the freedom of each party to vary the conditions and terms of the contract for services. The vessel and the pilot remain the sole parties to the contract of hiring for pilotage and, as will be shown later, the Pilotage Authority can neither be the employer of its pilots nor be a party to a pilotage contract. When a pilot, whether he holds a licence or not, is performing pilotage he derives rights, duties and responsibilities from the contract for services that was concluded between the ship and himself. Automatically included are all the other provisions of provincial and federal legislation that are applicable in the District concerned.

PILOTAGE CONTRACT THE BASIS OF PILOTAGE LEGISLATION

Part VI of the Act has been drafted to implement the basic principle of a pilotage service furnished by self-employed, independent pilots pursuant to contracts for pilotage which they make with vessels. This is apparent, *inter alia,* from the following sections of Part VI which otherwise would be inconsistent:

(a) With respect to the status of the pilot aboard a ship, the Act refers to him as having "undertaken to pilot" the ship (subsec. 329(f)(vii), sec. 361).

(b) The nature of the contract is one of hiring for service between the ship and the pilot; subsec. 329(f)(vii) speaks of the situation when, without the Master's consent, a pilot quits the ship "before the service for which he was hired has been performed."

(c) Subsec. 335(1) refers to the contract of hiring when it makes it an obligation for the pilot to show his licence and other pertinent documents "whenever so required by the master of any ship or other person by whom he has been employed so to act."

(d) Pilotage dues are recoverable as "a debt due to the pilot" when they are payable to him (sec. 343).

(e) The pilot "offers his services as a pilot (subsecs. 345(a), and 348(a)).

(f) A pilot is deemed to be hired, *inter alia,* when he is taken aboard for the purpose of piloting a ship (sec. 352); when his offer is accepted by the Master (subsec. 348(a)); or when a ship has asked for a pilot by displaying the proper signal and a pilot has accepted to act as pilot (subsec. 348(a), secs. 349, 350 and 351).

(g) In a Pilotage District "a master of a ship shall not employ as a pilot any person who is not a licensed pilot" (subsec. 354(3)(b)).

(h) Sec. 361 states that the contract of hiring is terminated when any one of the circumstances described therein is met, "whichever first happens, whereupon the service for which he (the pilot) was hired shall be held to be performed".

(i) When the pilot provides his own transportation to offer his services, sec. 366 requires that the vessel he uses be identified by the proper signal when he is "in the exercise of his calling".

(j) It is a statutory offence for a pilot to use false pretenses that might jeopardize the safety of a ship, or to use a pilot's licence to which he is not entitled in order to be employed or to endeavour to be employed as pilot (sec. 371).

(k) It is a statutory offence for a licensed pilot to demand or receive "in respect of pilotage services" a sum greater than the rate prescribed in the District By-law (sec. 372).

EXTENT OF FEDERAL INTERVENTION

When state control over the exercise of a profession is established in order to verify the qualifications and reliability of its members there will necessarily be some encroachment on their previous freedom to make contracts. If licences are granted, the implication is that those who do not hold licences have no right to practise that profession. On the other hand, retention of a licence is conditional on the fulfilment by its holder of the terms imposed by law and by regulations whose aims are to maintain the standards of quality and efficiency guaranteed by the licence. (Re compatibility of licensing function with other status of pilots vide C. 8, 300 and ff.)

In Part VI C.S.A., Parliament has effected many changes and restrictions and, at the same time, has brought about a certain uniformity across Canada in the method of contracting to perform pilotage services within a Pilotage District. These are:

(a) *Contracting on the part of the pilot*:

1. Except in a few exceptional circumstances which are expressly defined, only a licensed pilot can be hired to act as pilot (secs. 354 and 355), i.e. he has the legal capacity to enter into a contract for pilotage.

2. A person over 70 years of age can not be granted a licence. If he holds a licence it automatically lapses, thus depriving him of the right to enter into contracts for pilotage (sec. 338).

3. A licence holder automatically forfeits his licence if he "does not act as a pilot for a period of two years" (sec. 336).

4. The prerequisities to become a licence holder, that is, to acquire the right to enter into pilotage contracts, are stated in regulations made by Pilotage Authorities. A licence can be retained only if the holder complies with the terms and conditions imposed by regulations covering his physical fitness, his own "government" and conduct (sec. 329).

5. The licensed pilot has no part in fixing the amount to be paid for his services. This is done by regulations drawn up by the Pilotage Authority (subsec. 329(h)). Not only is it illegal but also it is a statutory offence for a pilot to demand, or even to receive, a greater sum for pilotage services than prescribed by law (sec. 372).

6. The pilot can not refuse to enter into a contract provided he is fit and available and the Pilotage Authority has made a By-law provision to this effect (subsec. 329(f)(v)). Up to 1936, this provision was contained in the Act itself and it was a statutory offence for a pilot to refuse, or to delay, to take charge of a ship displaying the signal for a pilot, or, upon being so required by any of the authorities responsible for the ship (the Master, the owner, the agent or the consignee), or by an officer of the Pilotage Authority, or by any chief officer of Customs (subsec. 530(g) 1927 C.S.A.; subsec. 70(7) 1873 Pilotage Act).

7. The pilot has no right to negotiate over the nature and duration of the pilotage service he is to perform within the limits of the District for which he is licensed: it is the Master who decides and the pilot who then performs the required pilotage. His refusal, in addition to being a breach of contract, can also become a By-law offence (subsec. 329(f)(vi)). The extent of his undertaking is determined by the Act which stipulates when his contractual obligations are to be deemed to be completed, i.e. when the "ship is finally anchored or safely moored at her intended destination or as near thereto as she is able to get at the time of her arrival or as soon as she passed out of the pilotage district to which his licence extends" (sec. 361). But outside the limits of his District he is considered an unlicensed pilot (subsec. 333(3)) and enjoys all the rights of an unlicensed pilot in those waters (although he may commit a breach of the disciplinary regulations of his District if he acts without permission).

8. When the circumstances are such that joint ownership of pilot vessels becomes a local requirement, the Pilotage Authority may by by-law compel the pilots to form a number of distinct, independent partnerships based on the ownership of one pilot vessel and its operation (subsec. 329(c)).

(b) *Contracting on the part of the ship* (i.e., Master, owner, agent or consignee):

1. Except in the special situation created by Part VIA which, as stated earlier, will be the subject of a special study, the ship is always at liberty not to enter into a contract, that is, not to hire a pilot, even where the compulsory payment system exists. If she has to pay dues, although a pilot was not employed, they are not the pecuniary consideration of a contract of hire but a condition imposed by law on vessels which navigate within district limits. This provision exists mainly to

induce vessels to hire pilots, thereby assuring them of sufficient work to enable them to maintain and improve their skill and qualifications, and at the same time providing them with a steady, reasonable income.

2. Except in one case, the ship has the right to choose the other party to the contract: in other words, to hire a pilot of her choice. Only a non-exempt vessel which intends to take a pilot on her inward voyage is required to accept the first pilot who answers her signal (sec. 349). No doubt this exception was dictated by the circumstances that existed when the legislation was first introduced. At that time ships had no means of communication with the land prior to entering district limits and therefore were not in a position to make a choice since they did not know which pilots were available and, even if they did, had no way of notifying a selected pilot sufficiently in advance to allow him to meet the ship in time. This lack of communications forced on pilots, in order not to delay ships, the strenuous duty of cruising day and night throughout the boarding area in all weathers. Under these circumstances, both in fairness to the pilots and for safety reasons, it was appropriate that the ship had to take the first licensed pilot who offered his services from the first pilot vessel. At that time it was a statutory offence for the nearest pilot not to answer a ship's signal for a pilot. There are, however, two exceptions which confirm the basic right of the Master to choose his pilot: first, the exempt vessel which requires a pilot on her inward voyage has the right to choose any of the pilots who offer their services (sec. 348); second, in the case of pilot boats jointly owned it was normally provided in the By-laws (and still could be provided) that the Master has the right to make a choice of those on board the pilot boat that answered the vessel's request (subsecs. 350(2)(b) and 329(c)). This principle had been officially recognized in the Quebec Pilots Corporation Act of 1860 (23 Vic. c. 123), which abolished the free enterprise system in Quebec but also confirmed the right of the Master on the downbound voyage to choose from those whose names appeared on the tour de rôle list at Quebec, and its 1869 amendment (32-33 Vic. c. 53), which extended this right during inward voyages by authorizing the Master to choose one of the pilots aboard the pilot schooner that hailed his ship (vide Quebec District, *Legislation*).

3. The ship is deprived of the right to negotiate the price of service and is bound by the rates fixed by the regulations. The

tariff cannot be varied by mutual agreement, even with the Pilotage Authority's consent, except by an amendment to the By-law.

4. In Districts where the payment of dues is compulsory, the contract of hire is completed when the non-exempted ship's prescribed signal for a pilot is answered by a licensed pilot. Then, whether or not the Master accepts the services of this pilot, the contract is valid and the pilot is entitled to his remuneration (sec. 349, subsecs. 350(2) and 351(1)(b).
5. In any circumstances taking a pilot aboard voluntarily for the purpose of piloting the ship is an irrefragable proof of the Master's consent to the contract of hire and the pilot is entitled to his remuneration whether or not the Master allows him to pilot (sec. 352). Since by his action the Master consented to the contract, he can not prevent the contract from continuing by not permitting the pilot to provide his services.
6. Secs. 359 and 360 impose on ships the obligation to pay an indemnity to a pilot if he is over-carried after the termination of his contract, or if he is detained in quarantine.
7. To protect third parties, the owner and the Master are made civilly responsible for the acts of the pilot as if he were the direct employee of the owner (subsec. 340(3)). This provision applies whether or not the payment of pilotage dues is compulsory. Since it concerns civil legislation which might vary from province to province, this section of the Act makes a uniform rule applicable throughout Canada.
8. The Act makes the "owner, the master and the consignee or agent of any ship" liable to pay pilotage dues (the consignee and agent to the extent that they have on hand money received on behalf of the ship (sec. 341). The dues, which are the price of the pilotage contract, are owed to the pilot unless they have by regulation been made payable to the Pilotage Authority for collection purposes (sec. 343).
9. The contract is still valid even if the pilot, through circumstances beyond his control, can not act as pilot, that is, take charge of a ship's navigation, because he is unable to board. In that case, if the ship is led by another vessel with a licensed pilot on board, acceptance of this guidance constitutes a contract involving the same remuneration for the pilot (sec. 353).
10. The choice that the Master of a ship may make is limited to pilots holding a valid licence (subsec. 354(3)(b)).

LEGALITY OF SPECIAL PILOT SYSTEM

The "special pilot" system is permissible but only in a limited way. It is not permissible for non-exempt ships on their inward voyage to have special pilots because they are bound by law to take the first pilot who offers his services, and the system can not interfere with the right of the Master of another ship to choose any pilot who is available if such a right (which prior to 1934 was a statutory one) is contained in the District By-law. In other circumstances vessels may hire the same pilots every trip and the Pilotage Authority can not prohibit the practice under the existing provisions of Part VI.

PILOTAGE AUTHORITY AND PILOTAGE CONTRACT

The Pilotage Authority is merely a licensing authority with no power to operate or provide pilotage service. As is demonstrated later (vide C. 8, pp. 301-304) the function of licensing is at present incompatible with the function of providing pilotage service and the same authority can not perform both.

The Pilotage Authority can not be a party to a pilotage contract. It may enact regulations to assure the constant attendance of pilots as a condition of holding their licence, and make them liable to punishment for any infringement but it has neither the right nor the power either to control the service or to undertake to provide pilots. Conversely, no one has any recourse against a Pilotage Authority because damage was suffered due to the non-availability of pilots, nor any way of forcing it to make pilots available. By taking over the responsibility for despatching pilots the Pilotage Authorities have departed from this principle and have assumed a power, with its attendant responsibilities and risks, to which they have no right.

The compulsory pilotage system in the United Kingdom is simply a variation of the Canadian compulsory payment system. The principal difference is in the wording used rather than in the system itself. In the United Kingdom, it is not against the law to navigate without a licensed pilot. When Masters require pilots their only obligation is to employ licensed pilots; otherwise they are liable to a fine amounting to double the pilotage dues. As in Canada, no contract takes place when the ship does not require a pilot, even if the pilot offers his services. The pilot in the United Kingdom is not entitled to receive any part of the fine then imposed upon the non-exempt ship nor is the pilot in Canada entitled to any part of the dues then charged. In the United Kingdom, as in Canada, the pilot is entitled to the dues only when a contract took place or is presumed by law to have been made (secs. 349 and 350, and subsec. 351(2) C.S.A.).

In addition to the terms and conditions imposed by Parliament on pilotage contracts (which therefore are applicable throughout Canada), the

Act makes it possible to draw up special terms and conditions to fit particular local requirements. This could have been achieved through specific legislative provisions included in the Act with application to named Districts only (such as was the case of the four Districts of Quebec, Montreal, Saint John and Halifax up to 1934), but a simpler procedure was adopted. Parliament has delegated to the Pilotage Authority of each District the power to legislate by by-law on certain matters enumerated in the Act, mostly in sec. 329. When such legislation is passed and duly approved by the Governor in Council, it becomes law for the District concerned as much as the Act itself, provided the Pilotage Authority has acted within the limits of its powers as defined in the Act. This requirement has been repeatedly infringed. (This by-law-making power is studied in C. 8.) Except for fixing the amount of the pilotage dues, passing regulations to assure the constant attendance of pilots and providing for the settlement of disputes between Masters and pilots (i.e. compulsory arbitration) the Pilotage Authority has no authority to interfere with the freedom of either the pilots or the shipping interests to enter into contracts.

The actual situation, however, is that both the regulations and the facts are at complete variance with the system provided for in Part VI, that is, pilots exercising their profession as licensed free entrepreneurs competing for customers. Out of 24 Districts (excluding St. John's, Nfld.) governed by Part VI only three small Districts with a total of 12 pilots (in 1964) out of a grand total of 510 pilots pay their pilots the dues they earn, less any normal deductions. In all other Districts the pilots retain no liberty in the exercise of their profession and vessels can not select their pilots. The Pilotage Authorities eliminate choice by providing pilots through a tour de rôle or roster system. The result is that, to all intents and purposes, the pilots are employees of the Pilotage Authorities. Their remuneration is either a fixed salary or an equal share in the net revenue of their District and they are no longer allowed to receive directly the dues they earned, but a share of the dues earned by the group.

A review of the existing situation is most revealing. In the study below the name of the District is followed by the pertinent section or sections of the local By-law, the approximate number of pilots constantly available in 1964 and the number of trips or assignments, including movages and trial trips.

(a) The pilots are independent contractors in the following Districts:

(i) *Prince Edward Island*—subsec. 5(2); 6 pilots, 109 vessels. There is neither despatching nor pooling because there is only one pilot per port and therefore no competition except at Georgetown, where it appears that the second pilot is a relief pilot. Traffic is light.

(ii) *Shediac* —subsec. 8(3); 3 pilots; total number of trips 20.

(iii) *Pictou*—subsec. 8(3); 2 pilots; 32 trips. The second pilot appears to be only a relief pilot because he does very little work.

(b) In the following Districts the pilots, pursuant to their By-laws, are the employees of their Pilotage Authority:

(i) *Humber Arm*—subsec. 8(2)(b); 3 pilots; 434 trips.

(ii) *Port aux Basques*—subsec. 8(2)(b); 1 pilot; 211 trips.

(c) In Pugwash the By-law provides that the pilots are paid on the basis "of the money earned by each" but, in fact, they are paid through a pooling system. In 1964 the 3 pilots did 37 trips.

(d) In the following Districts the basis for the pilots' remuneration is not indicated in the By-law but it is obvious that they are paid through a pooling system because they receive equal shares:

(i) *Botwood*—subsec. 8(2); 3 pilots; 100 trips in 1963.

(ii) *Caraquet*—subsec. 8(3); 2 pilots; 68 trips.

(e) In the following Districts the pilots are paid an equal share of the pool, the criterion being the time worked, i.e., the time they were available for duty:

(i) *Bathurst*—subsec. 8(3); 3 pilots; 54 trips.

(ii) *Bras d'Or*—subsec. 8(3); 3 pilots; 173 trips.

(iii) *Buctouche*—subsec. 8(3); 1 pilot; 17 vessels.

(iv) *Miramichi*—subsec. 9(3); 4 pilots; 397 trips.

(v) *New Westminster*—subsec. 10(3); 7 pilots; 1194 trips.

(vi) *Restigouche*—subsec. 8(3); 2 pilots; 280 trips.

(vii) *Richibucto*—subsec. 8(3); 1 pilot; n/a trips.

(viii) *Sheet Harbour*—subsec. 8(3); 2 pilots; 31 vessels.

(ix) *British Columbia*—subsec. 10(2); 70 pilots; 9,058 trips.

(x) *Churchill*—subsec. 5(2); 2 pilots; 118 trips.

(xi) *Halifax*—subsec. 9(3); 17 pilots; 3,760 trips.

(xii) *Montreal Harbour*—subsec. 46(2); 16 pilots; 7,156 trips.

(xiii) *Saint John, N.B.*—subsec. 9(3); 9 pilots; 1,664 assignments.

(xiv) *Sydney*—subsec. 9(3); 11 pilots; 1,965 assignments. In 1966 the Sydney pilots became employees of the Crown.

(f) In three Districts the pilots are despatched by the Pilotage Authority according to a tour de rôle system but, according to the District By-laws, they are paid the dues they have earned. However, the pilots are actually remunerated through a pooling system operated by their own organization to which they all belong:

(i) *Quebec*—subsec. 9(1); 78 pilots; 9,018 assignments.

(ii) *Montreal (River)*—subsec. 21(5); 123 pilots; 19,568 assignments.

The By-law makes the dues payable direct to the pilots' association, that is, the United Montreal Pilots.

(iii) *Cornwall*—sec. 9; 34 pilots; 2,724 assignments.

COMMENTS

The general situation is that Canadian licensed pilots are no longer the free entrepreneurs intended by the Act but *de facto* employees of their Authorities. When the Sydney pilots agreed in 1966 to become employees of D.O.T. the only material change in their status was that they gained in security by being given a fixed salary which guaranteed them a stable income, a better pension scheme and other fringe benefits. Although the legal position of the Montreal River pilots and of the pilots in the Quebec and Cornwall Districts appears to be basically different, there is, in fact, no difference. In the other Districts, the pool of the pilots' earnings is imposed by the By-law and is operated by the Authority while in these three Districts the pool is operated, with the Authority's knowledge, by the private organization to which all the pilots of each District belong but, as elsewhere, the pilotage service is controlled by the Authority and the pilots are assigned through a tour de rôle system.

The existing situation is totally incompatible with the principles on which the organization of Part VI is based and, furthermore, the pilots and the shipping interests are denied the exercise of what appear to be basic rights guaranteed by the Act, that is, the pilot's right to the free exercise of his profession, and the ship's right to choose a pilot. It is, however, pertinent to note the fact that although under the law both have uncontested rights, neither group in appearances before this Commission requested, or even suggested, a return to the free enterprise system. No complaint whatsoever was voiced by the pilots, with the exception of some dissidents in the St. Lawrence Districts who objected, not because they were in favour of free enterprise, but because they claimed there were abuses by the pilots' organizations (to which they sometimes did not belong) in the control of pooling. The shipping interests did not condemn the existing system and the question of free enterprise was raised neither by the Vancouver Chamber of Shipping, nor by the Shipping Federation of Canada, Inc., nor by any of the other organizations representing shipowners. Some individual operators complained about some of the disadvantages of the tour de rôle system which, they felt, had reduced the quality of the service they formerly received from their special pilots to the level of the less qualified pilot. However, it was against the lack of flexibility of the tour de rôle system that they complained rather than the loss of their basic right to choose their pilots. The Irving interests in Saint

John, N.B. objected especially to one pilot in whom they had no confidence for the difficult assignment of conducting their vessels through the Reversing Falls on the Saint John River. No doubt they would have been quite satisfied with a grade system which gave assurance that such difficult assignments would be reserved for pilots with the highest qualifications and with an unblemished record. Other companies regretted the loss of their special pilots (although they recognized that the Grade A pilots who were assigned to their passenger ships and large vessels were their former special pilots) but no one advocated a return to the free enterprise system of Part VI which entailed, however, the obligation for their ships on their inward voyage to take the first pilot who offered his services.

This extraordinary apathy on the part of both the pilots and the shipping interests toward the loss of the rights guaranteed to them by the Act can only be explained by the fact that these rights no longer correspond to the realistic needs of the service and that, therefore, those provisions of Part VI which are based on them are no longer adequate.

BACKGROUND OF EVOLUTION TO CONTROLLED PILOTAGE

The present situation developed through a long process that was progressively dictated by the common interests of all those involved in providing an efficient and reliable pilotage service. It started in the St. Lawrence River Districts of Quebec and Montreal about 30 years prior to Confederation when pilotage operations on the St. Lawrence River were the most extensive and the most important in Canada. Piloting the small sailing vessels of that era involved several days compared with the few hours required for pilotage in harbours. The pilots had to be highly qualified and their full attention was required the whole time ships were under way.

There were many more pilots on the St. Lawrence than in any other pilotage area of what is now Canada; in fact, more than in all the other pilotage areas combined. There were three reasons for this situation: the large number of ships requiring pilots on the River, the time involved in the majority of trips and the fact that since pilotage was a free profession there was no ceiling on the number of pilots. The resultant oversupply led to sharp competition under the prevailing system of free enterprise and unfair practices developed to the detriment of both the pilots and the shipping interests. In order to seize the first opportunity to offer their services to incoming ships, the pilots from Quebec—and even on occasion from Montreal —would venture into the Gulf of St. Lawrence beyond the Bic boarding area in frail, privately-owned pilot vessels. The loss by drowning of 48 Quebec pilots in the exercise of their profession prior to 1860 emphasizes the hardship and danger to which they were exposed.

Ships also suffered from the unreliable service and were frequently delayed. In adverse weather very few pilots would venture to sea; small, slow sailing ships did not provide attractive employment and Masters were liable to find no pilot when they entered the boarding area; often there was no pilot vessel in the boarding area to disembark pilots from ships bound for sea. Furthermore the rash nature of the pilots who ventured far out into the Gulf in defiance of the regulations was no guarantee of their reliability and their qualifications. This system gave little encouragement to the law-abiding pilots because it gave the pilotage of upbound ships to the most venturesome pilots and afforded greater oppportunities to unscrupulous pilots to bribe Masters and thus obtain pilotage downbound for themselves or their friends.

The St. Lawrence pilots soon realized that their interests and those of the service required the abolition of the free enterprise system. They sought authority to act as a group to control the exercise of their profession and to provide pilotage service. However, it cost them many years of hardship and many concessions to the shipping interests before the *Quebec pilots* could secure this reform in 1860 when Parliament, by a special Act, created a professional Corporation with powers to control the pilots and to provide service. The Pilotage Authority remained as before, i.e., a licensing authority only with limited control over the Corporation's power to make regulations. This marked the end of the free enterprise system for the pilots in what was to become the Pilotage District of Quebec. It was never reinstated, in fact, if not in law (vide C. 1, p. 13).

As far as the shipping interests were concerned the evolution took one hundred years to complete in the Quebec District, i.e. when the special service pilot system was abolished in 1961. In 1860 the pilots had made two concessions to the shipping interests: first, they gave Masters the right to refuse an assigned pilot and to choose in his place anyone else available at the time; second, they conceded to the Montreal Oceanic Steamship Company the right to have special pilots.

These privileges were to be the main cause of disagreement between the shipping interests and the pilots and even among the pilots themselves because they made a tour de rôle system unworkable, with the result that it was inequitable for the pilots to share the net earnings of the Corporation on an equal basis. The majority of the pilots made repeated representations to have these privileges withdrawn while, on the other hand, the shipping interests fought to have the Corporation abolished. The shipping interests were at first successful. Because of (a) abuses by some of the officers of the Pilots' Corporation, (b) nepotism that developed as a result of the control the Corporation had over admissions into the service, and (c) a series of disasters for which the pilots were found to blame, the shipping interests gradually succeeded in their aim. First, in 1904 the Quebec Harbour Commissioners were replaced as Pilotage Authority by the Minister of Marine

and Fisheries. The final step was taken on the recommendation of the Lindsay Commission whose very scanty report contained a majority opinion recommending abolition of the Pilots' Corporation and a return to the free enterprise system. The report also condemned the pooling system as "pernicious". An Act of Parliament passed in 1915 deprived the Pilots' Corporation of all its powers except those concerning the trusteeship of the Pilot Fund. However, the profession did not return to free enterprise; instead, control of the pilots and pilot vessels was transferred to the Minister, as such, and not in his capacity as Pilotage Authority. The Minister continued to exercise these powers up to 1934 when the relevant sections of the 1927 Canada Shipping Act were deleted. In theory, the 1934 amendments enabled the pilots to practise their profession freely as they had prior to 1860 but, in practice, ultra vires by-laws handed this power of control to the Minister as Pilotage Authority. He has exercised them ever since.

The right of the Master to choose his pilot, as approved by the 1860 Act, was soon abolished and was replaced by the special pilot system which developed to such an extent that all regular lines employed special pilots and thus left very little work for the other pilots. The Pilotage Authority itself had the system abolished in 1961 because it amounted to a denial of the Authority's assumed despatching function and was detrimental both to the efficiency of the service and to the standard of qualification of the pilots as a group. Since that time all the Quebec pilots have been despatched in turn according to the grade they hold. Pooling has continued without interruption. After the 1915 Act was passed the Minister collected the dues but paid them over to the Corporation instead of to the individual pilots. In 1920 after the Privy Council confirmed in the Paquet case that the 1915 Act had deprived the Corporation of all its powers over the pilots' own earnings, the pilots entered into a private partnership to which they all belonged for the purpose of pooling their earnings. Since that time every new pilot has joined the partnership and the pilots' earnings have been shared. (See Quebec District.)

The *Montreal pilots* also suffered from the inconveniences of the competitive system. As early as 1850, they tried to obtain control over the service; instead, they were incorporated by Parliament but had no power to control either the service or their earnings. They refused to activate the Corporation by not attending the first meeting. They kept up their opposition and finally in 1873 obtained an unofficial agreement which gave them the right to despatch by a tour de rôle the pilots who were not employed as special pilots. They also gained a kind of association status in the form of a pilots' committee which they elected to supervise their affairs, especially despatching. This is no doubt the origin of the Pilots' Committee provided for in the By-laws of all the main Districts. In Montreal, as in the Quebec District, the different status of the special pilots and the tour de rôle pilots caused constant friction and frequent disputes. Furthermore, the Pilotage Authority (at that time the Montreal Harbour Commissioners) illegally took over control of the pilots by making

the despatcher its employee although he was paid out of the pilots' revenue. On two other occasions the pilots tried to obtain the type of incorporation the Quebec pilots had been granted in 1860. In 1897, when their private Bill that had passed the Commons was defeated in the Senate, the pilots went on strike. They returned to work when a Royal Commission was set up to investigate their grievances. One result of the Commission was that in 1903 the Montreal Harbour Commissioners were replaced as Pilotage Authority by the Minister of Marine and Fisheries. Although it had no other authority than the apparent consent of the pilots, the Pilotage Authority continued to control the service by operating a despatching system (except for the special pilots). The Montreal pilots also formed their own association for the purpose of pooling their earnings. The special pilot system was abolished in 1960 and replaced by a compulsory despatching system for all pilots based on tour de rôle and grades. Therefore, the situation at present is the same as in the Quebec District. (See Montreal District.)

The free enterprise system still existed in the *Saint John, N.B., District* when the Robb Commission made its investigation in 1918, but by that time it had been reduced to a bare minimum. Because of conditions in the boarding area the pilots had been obliged to group themselves into companies capable of owning and operating suitable pilot vessels. Free competition continued among these partnerships but at the time of the Robb Commission there were only two such companies competing for vessels. The Commission found that the competitive system was detrimental to the efficiency of the service and that it was causing vessels unnecessary trouble and litigation because both pilot vessels frequently claimed to have been the first to speak to the incoming vessel. The Robb Commission recommended that the pilot boat service be furnished by only one suitable vessel supplied by the Crown. The effect of this change would be to end the competitive system and, therefore, to place the Authority in control of the pilots and of the pilotage service. The pooling of earnings would then automatically follow. This recommendation was immediately implemented by the Minister who became Pilotage Authority to replace the corporation type of Pilotage Authority formerly provided specifically for the Saint John District in the Canada Shipping Act. Thereafter, pilot vessel service was provided by the Pilotage Authority and the last vestige of the free enterprise system disappeared. The same system was established in the *Halifax District.*

However, some of the other Districts had already suppressed the competitive system. Although special research was not undertaken to determine the various steps taken in each District, the 1899 New Brunswick Supreme Court decision referred to above (Attorney-General of New Brunswick v Miller *et al*, 2 N.B. Equity Reports, p. 28) indicates that there had been no competition for many years in the Miramichi District. This District had been and still was very active. Prior to 1882 there were over 30 pilots as is shown

by the By-law provision that no more apprentices would be licensed as pilots until the number of pilots was reduced to 30. The judgment refers to sec. 13 of the By-law which provided that the pilots should each year appoint one of their number whose duty it should be to arrange the turns in which the pilots should do duty, and to attend to some other minor matters, and that he should receive for his services a share of the net proceeds earned by the pilots which, by sec. 20, were to be divided equally among the licensed pilots at the end of each year.

When the *British Columbia District* was reinstated in 1929, the Minister became the Pilotage Authority. He took over control of the pilots and imposed the pooling system by by-law. The same system was gradually extended to every Pilotage District with several pilots. The regulations prohibited the pilots from acting as free entrepreneurs; instead, the Pilotage Authority assumed control of the service and despatched the pilots. Furthermore, in all these Districts (except the St. Lawrence River Districts) the Pilotage Authorities imposed and operated exactly the same pooling system that the Lindsay Commission found to be so pernicious that they recommended it be denied. It was and still is denied by the regulations to the Quebec District pilots and their fellow pilots on the Upper St. Lawrence, i.e., in the Montreal and Cornwall Districts.

As for the pilots, they generally claim that their legal status is self-employed, private contractors but, in practice, they try to have the best of both worlds by agreeing to be considered employees when this status is to their immediate advantage. They state they are self-employed in order to establish the right to claim professional expenses as an income tax deduction but, on occasion, do not hesitate to call themselves employees in order to qualify for provincial workmen's compensation or for employer-employee group insurance plans (life, accident, health, superannuation, etc.). In most Districts the pilots are granted annual leave, sick leave, "on full pay" or "with half pay", which is incompatible with the status of private contractors whose income is derived from services rendered.

The procedures followed by the Pilotage Authorities to implement the Canada Pension Plan illustrate their uncertainty about the status of the pilots. Of the 25 Districts under Part VI C.S.A. the Authority in 7 Districts treats the pilots as its employees, deducts half the contribution from the pilots' earnings and pays the other half from District revenues as a District operating expense:

(a) the four Newfoundland Districts, Botwood, Humber Arm, Port aux Basques and St. John's;

(b) the Commission Districts of New Westminster and Restigouche River;

(c) the Sydney District from the date the pilots became employees of D.O.T.

On the other hand, in the remaining commission Districts (information is not available for Richibucto because the Pilotage Authority of that District did not reply to this Commission's query) and in all the Districts, except Sydney and Churchill, where the Minister of Transport is the Pilotage Authority, the pilots are treated as self-employed persons. However, many of these Districts help their pilots by making the necessary deductions at source but, since this is a personal service, the Authority will not necessarily assist, e.g., in the Montreal District deductions are made for the river pilots but not for the harbour pilots. In Churchill since the pilots are also employed by the Government as port wardens, their full contribution to the Plan is dealt with under this status, the Department of Transport paying half the maximum contribution, the other half being deducted from their salary as port wardens (Exhibit 1500).

EQUIVOCAL STATUS OF PILOTS

Nevertheless the illegal powers over the pilots and the pilotage service which the Pilotage Authorities have usurped have not altered the legal status of the pilots who are licensed under Part VI, i.e., self-employed, independent contractors. Since the definition of their status determines their rights in relation to the Authority, or an insurance company or any other third party, it may be anticipated that the courts will refuse to allow a claim based on an ambiguous status, on the ground that the burden of proof rests on the claimant. For instance, it can be foreseen that the courts would uphold a refusal by an insurance company to pay an indemnity provided in a policy because of a material defect in the contract if the pilot's status as an employee is a warranty of the policy. Again, a pilot who thinks he has ample protection under a provincial workmen's compensation plan may, when incapacitated, find he is unprotected and without a claim if the plan is open to employees only. In the Humber Arm District ex-pilot Dyke saw his claim for a full share of the pilotage dues dismissed by the Supreme Court of Newfoundland not because his assertion that he was self-employed was incorrect but because the court found that he had acquiesced in the Authority's illegal practice of treating its pilots as employees. (Supreme Court of Newfoundland in circuit at Corner Brook, 1955, No. 63, Nathan Dyke v the Pilotage Commission of Humber Arm.)

PILOTS' ORGANIZATIONS

A. PILOTS' COMMITTEES

After the Pilotage Authorities assumed control of the pilots and the pilotage service they needed to communicate with the pilots as a group. For this purpose they resorted to the formula of a *Pilots' Committee* that the

Montreal pilots had introduced in 1873. The existing By-law of nearly every District[2] with a number of pilots contains provisions regarding the formation and the function of the Pilots' Committee. It is generally a group of five pilots appointed annually by their fellow pilots whose function is to provide liaison between the pilots, individually or as a group, and the Pilotage Authority. Nowhere in the regulation-making power of the Pilotage Authority is there the right to create such a Committee and to vest it with any power whatsoever which would have a binding effect upon the pilots, either individually or as a group. Therefore, these By-laws are null and of null effect, as if they did not exist, and at present the various Pilots' Committees have moral authority only.

However, all the Pilots' Committees have been very active and have played essential rôles: they have looked after the professional interests of the pilots; they have acted as the pilots' representatives in discussions with the Pilotage Authority about organization, fixing the tariff, working conditions, etc.; they have both represented the pilots and served as experts in pilotage when pilot candidates were examined; they have advised the Pilotage Authority on disciplinary matters. These Committees are necessary. Even if the pilots were to return to the free enterprise system, the Committees would form professional councils. Their rôle increases in importance to the point of necessity if the Pilotage Authority controls the service and the pilots' earnings.

But a Pilots' Committee will not serve the purpose unless (a) the matters to be attended to and the problems to be discussed are of a local character concerning only one District, and (b) the Pilotage Authority limits its activities to licensing or, if it has undertaken to control the service, operates not only despatching but also the pooling of the pilots' earnings.

If a District is isolated and both despatching and pooling are effected by the Pilotage Authority, as is done, *inter alia,* in the Districts of British Columbia, New Westminster and Saint John, N.B., or if the pilots are the Pilotage Authority's employees, the Pilots' Committee system is reasonably adequate to protect the pilots' interests as far as administration, working conditions and remuneration are concerned because these are all controlled by the Pilotage Authority.

In spite of the formation of local Pilots' Committees, the pilots have developed their own organizations in the Districts where all these conditions did not exist, i.e., in the St. Lawrence River Districts (Cornwall, Montreal

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[2] The By-law of the following Districts which come under Part VI C.S.A. contains a provision that a Pilots' Committee is to be appointed by the pilots:

British Columbia—sec. 5
New Westminster—sec. 5
Cornwall—sec. 5
Montreal (river pilots—sec. 20)
(harbour pilots—sec. 45)
Quebec—sec. 5
Saint John, N.B.—sec. 5
Halifax—sec. 5
Sydney—sec. 5

(River) and Quebec) where the Pilotage Authorities controlled both the service and the pilots by taking charge of despatching but, on the other hand failed to impose and operate the pooling of the pilots' earnings.

When the free enterprise system prevailed, the Pilotage Authority had no responsibility for seeing that each pilot had an equal share of the workload and of the earnings; all that was required was to provide equal opportunities and the onus was then on the individual pilot to take what advantage he wished of the situation. But when the Pilotage Authority undertook to distribute the work among the pilots it also assumed the obligation to make an equitable distribution both of the workload and of the earnings. Equal workloads do not necessarily produce equal earnings because most tariff charges are based on a number of variable elements, i.e. draught, tonnage and distance. An assignment in a small, slow ship will take much longer and will yield less than an assignment in a large, fast ship for a similar voyage. There are also causes of delay over which a pilot has no control such as fog, engine break-down, unavailability of berth, etc., which result in further inequalities. All these disparities can not be equitably solved by a despatching system, no matter how sophisticated, unless it is accompanied by pooling. Therefore, the normal scheme adopted by most Districts is to base assignments on tour de rôle, to pool earnings and to share the pool on the basis of each pilot's time available for duty.

B. PILOTS' ASSOCIATIONS AND CORPORATIONS

Where the Pilotage Authority is in charge of despatching but fails to operate a pooling system, the Pilots' Committee can not intervene to organize a pool because it lacks the necessary legal power over the pilots' earnings. The only alternative to compulsory pooling imposed either by the Authority or by legislation is for the pilots as a group to organize pooling. Since one of the aims of pooling is to ensure that all the pilots in a given District are treated alike, i.e., share both workload and earnings, the participation of all the pilots is a prerequisite. Otherwise, different procedures will cause dissension and anxiety among the pilots, to the detriment of the efficiency of the service and its administration. One solution is to draw up a civil partnership agreement whereby the pilots bind themselves for the duration of the contract to pool and share their earnings as stated in the contract. The pilots who were first faced with this situation adopted this course of action, and originated the first and only pilots' associations in Canada, i.e. the *Association of the Licensed Pilots for the Harbour of Quebec and Below* and the *United Montreal Pilots.*

As seen earlier, in the Quebec District when in 1920 the Privy Council judgment in the Paquet case confirmed that the 1860 Quebec Pilots Corporation had been legally deprived of its statutory right to control pilotage earnings by the Act of Parliament passed in 1914, and when the Pilotage

Authority took over from the Corporation the despatching of pilots as well as the collection of pilotage dues and amended its By-law to specify that the dues so collected would be paid directly to the pilot who had earned them, the Quebec pilots unanimously entered into a partnership agreement similar to the one under which the Montreal pilots were already operating. The two main aims were to provide the advantages and protection enjoyed by their confrères in the other Districts where the Pilotage Authority operated a pooling system based on availability for duty and where the share in the pool was not affected by absences due to illness. The third aim (the second listed below) was secondary and might well have been achieved by other means, *inter alia,* by a group insurance policy, as is done in certain Districts. The three aims are as follows (translation) Ex. 592A:

"1. The administration, collection and distribution by shares of pilotage earnings which will be pooled.
2. The payment of an indemnity to suspended pilots.
3. The payment of illness assistance. All three in accordance with stipulated conditions."

The 1920 Partnership Agreement contained a clause (clause 13), which is still retained, to the effect that the obligation for the pilots to pay over their earnings to the Association would cease if ever the pilots became Crown employees at a fixed salary.

The first contract was called the *Acte d'association de l'union des pilotes licenciés pour le hâvre de Québec et au-dessous.* In 1924 the name was changed to read *L'Association des Pilotes Licenciés pour le Hâvre de Québec et en Aval—Association of Licensed Pilots for the Harbour of Quebec and Below* (Ex. 592). A later agreement extended the life of the contract to May 21, 1980. The 1920 deed contained a clause to the effect that it would become operative only if and when all the pilots then on strength joined the Association. They all did, as have all those who have been licensed since.

The situation now is that the Quebec pilots operate the pooling system and the Authority controls despatching. However, the Authority has always worked closely with the Pilots' Committee (the Board of Directors of the Association and, since 1961, of the Corporation as well) in drafting the despatching rules. This co-operation has had the effect of placing despatching and pooling under the same authority, as it should properly be.

The same causes had the same results for the Montreal District river pilots. As seen earlier, in 1875 the Montreal pilots had obtained unofficially the right to operate the despatching system and they had instituted pooling. Despatching was taken away from them a few years later when their despatcher became the employee of the Pilotage Authority. In 1903 when the Minister replaced the Montreal Harbour Commissioners as Pilotage Au-

thority he continued, through his staff, to be responsible for despatching but pooling was left to the pilots. The partnership agreement that now governs the Montreal river pilots called *United Montreal Pilots,* dates from December 27, 1918 (Ex. 771). Its aims are listed in clause 3 which reads as follows:

> (*Translation*) "3. The object of the partnership and the aim for which it is formed are the association of their respective interests in the exercise of pilotage, placing in a common fund the amounts that may be owed or paid to any of them as fees or as the price of services performed as a pilot, except the amounts owed or paid in the form of a bonus; the collection of such amounts, the administration of this common fund, and sharing among the partners the amounts so pooled, in whole or in part, after all administrative expenses have been deducted. The partnership may also attend to any business concerning the interests of its members in the exercise of their profession as pilots, their protection, their promotion and their defence, but in conformity with the legislation governing these matters and the regulations established by the competent pilotage administration".

All the river pilots have subscribed to the agreement. The deed's duration, as extended in 1943, will expire December 27, 1968.

The creation of the Pilots' Corporations was merely a further development of the same situation. The pilots were urged by their legal adviser to adopt the corporation system by which, they were told, the same aims could be achieved but many substantial advantages would be gained. Some of these were listed in a letter dated March 18, 1960, addressed to the Quebec Association by their legal adviser (Ex. 676) which can be summed up as follows:

(a) A corporation has a legal existence distinct from its members who are not responsible personally for any wrongdoing of the corporation as is the case if they form an association.

(b) With the type of corporation envisaged (i.e. under Part II of the Canada Companies Act), there was no question of succession duties because the members have no share in the assets of the corporation.

(c) The existence of a corporation is unlimited, while the existence of an association must be limited to a certain period of time since it derives from a contract. Such permanency is important to keep the members together and to preserve their group assets.

(d) Incorporation is a prerequisite to the establishment of a truly professional organization with wide powers to govern the profession. The type of organization proposed is a step in that direction.

(e) Corporation law is less rigid than the Quebec Civil Code which applies to a deed of association.

The legal adviser further suggested incorporation under a federal Act rather than a provincial Act because pilotage is a federal matter[3]. He pointed out that the ideal situation would be a special Act of Parliament, like the 1860 Act which incorporated the Quebec pilots, but he added that "the climate in Ottawa" was not propitious at that time.

The pattern was set by the groups of pilots who were faced with the same problems but had not yet formed partnerships. The first charter of this kind was granted on April 19, 1956 to the *Corporation of the St. Lawrence-Kingston-Ottawa Pilots* (Ex. 806) which was to serve as a prototype for the others to come. Its purposes are as follows:

(a) to promote the practice and the progress of the profession of pilot in the interest of the members of the Corporation and the interest of navigation generally, in the St. Lawrence-Kingston-Ottawa Pilotage District and in any other district or region where the members of the Corporation may be authorized to practice their profession;

(b) to provide an efficient pilotage service for navigation;

(c) to establish and regulate the pooling, the collection, the administration among its members, of all or part of the money which may be due or paid to any of them for their services as pilots;

(d) to undertake and to pursue the study of questions of common interest to the members and to take as a result thereof, in any Province of Canada, any step or measure not contrary to law;

(e) to represent its members in any Province of Canada with government authorities, shipping companies, any public or private bodies, and any person;

All the pilots in the District joined the Corporation and signed a power of attorney authorizing it to receive payment of their pilotage earnings. In 1961, consequent upon the division of the St. Lawrence-Kingston-Ottawa District into the Cornwall and Kingston Districts, the name of the pilots Corporation was changed to *Corporation of the St. Lawrence River and Seaway Pilots—Corporation des Pilotes du Fleuve et de la Voie Maritime du Saint-Laurent* (Ex. 806) now composed of only the Cornwall pilots. The Kingston pilots also founded their own Corporation in 1961. (Because Kingston is part of the Great Lakes organization, its pilots' Corporation, as well as others existing on the Great Lakes, will be studied in the Commission's Report on Great Lakes Pilotage.)

[3] This however is not the basic criterion for granting charters under Part II of the Canada Corporations Act (then called "Companies Act") (1952 R.S.C., c. 53). Sec. 144 defines the conditions for the issuance of such charters and one of those is that it ought to be "for the purpose of carrying on in more than one province of Canada, without pecuniary gain to its members, objects of a . . . professional . . . character . . ." This limitation might well void any charter so obtained if it is established that the terms used in the application for incorporation are not absolutely correct on this essential point.

The next group to be incorporated was the Montreal harbour pilots, as soon as they became a separate group (on July 23, 1957, P.C. 1957-987) within the Montreal District. The charter is dated January 2, 1958 under the title *Corporation of the Montreal Harbour Pilots—Corporation des Pilotes du Port de Montréal* (Ex. 792). It contains the same five aims as above listed to which was added a sixth:

> "To regulate the practice of pilotage by its members within the limits authorized by law".

It is strange that the harbour pilots took this action because there was no need for it since the Pilotage Authority had bound itself in its By-law (subsec. 65(2) as amended in 1957, subsec. 46(2) of the present By-law) to operate pooling as well as despatching and to distribute the pilotage fund "on the basis of time worked by each (harbour pilot)". It is doubtful that this Corporation has the power to organize and operate a pooling of the pilots' earnings in view of the proviso in the charter which nullifies any of the Corporation's powers if they come into conflict with the District By-law. It appears that one reason was that some of the first harbour pilots were former river pilots who were accustomed to attending to their own pooling, and, no doubt, there was also a desire to make the organization conform with the other St. Lawrence Districts.

All the harbour pilots have joined the Corporation and, at the same time, have provided the Corporation with the usual power of attorney authorizing it to collect their pilotage earnings (Ex. 793). Upon receipt of these powers of attorney in 1958, the Pilotage Authority ceased to operate a system of sharing earnings and twice monthly ever since has remitted to the Corporation all the dues it has collected. When the Commission asked the Department of Transport why the By-law provisions on this subject were retained a letter dated January 12, 1967 (Ex. 1501(a)) stated, *inter alia,* "The Montreal Pilotage District General By-law was extensively revised in October 1961 but this opportunity to have the provisions of the by-law reflect the practice was overlooked". This, however, is only a practical solution which would have to be abandoned if, for any reason, some powers of attorney were either revoked or not furnished.

The Montreal river and Quebec pilots then reviewed their situation and concluded that the various By-laws of their Associations needed revision. The majority of the pilots were convinced by their legal adviser of the advantages of the corporation system as compared to a partnership and decided to be incorporated. On February 2, 1959, the Montreal river pilots obtained a charter under the name of *Corporation of the Mid-St. Lawrence Pilots—Corporation des Pilotes du Saint-Laurent Central* (Ex. 773) and on May 9, 1960, a charter was granted to the Quebec pilots under the name of

the *Corporation of the Lower St. Lawrence Pilots—Corporation des Pilotes du Bas Saint-Laurent* (Ex. 672). The Quebec charter contains one additional aim:

"(d) control of the education, training and apprenticeship of persons who wish to become pilots and members of the Corporation, within the limits authorized by law;"

(There is a similar aim in the B.C. charter.)

Effectiveness of Pilots' Associations and Corporations

The intention was to replace the Associations of Pilots in Quebec (Ex. 592) and Montreal (Ex. 771) by the new Corporations but a number of pilots in each District refused to join the Corporations. In 1963, these dissidents, as they are locally called, numbered six in Quebec and eight in Montreal. Since the Corporations are powerless to exercise any authority over non-members and their earnings, and, therefore, to enforce complete pooling, the problem was temporarily solved, first by keeping the Associations alive, and then by making the Associations' own decisions, actions, and by-laws automatically those of the Corporations. This was contrived by the dubious process of amending the terms of the Associations' deeds to that effect by a majority decision, a procedure authorized in the deeds. Such a procedure is of doubtful validity in that it leaves the terms of a contract to be determined and varied at the entire discretion of a third party, i.e. the Corporation which, furthermore, is controlled by some of the parties to the contract but not all of them. The resulting situation is also objectionable on the standpoint of legality in that, since the aims and powers of the Corporations are much wider than those of the Associations, not only can the clauses and modalities of the partnership agreement be altered by this process but even the nature of the contract can be modified. For instance, the dissident pilots could be subjected to the jurisdiction of professional, disciplinary tribunals which the Corporations created by their by-laws.

The association deeds as well as the letters patent of these Corporations are, however, nothing more than makeshift solutions to enable the pilots to operate a true pooling system. If pooling is not operated and imposed by the Pilotage Authority (provided that it can legally do so), the only adequate solution is to pass legislation granting these powers to a *sui generis* pilots' Corporation, as was done when the Quebec pilots were granted their first incorporation in 1860. In addition to creating the Corporation the 1860 Act imposed an automatic and compulsory membership and made all pilotage money assets of the Corporation, including the remuneration derived by the pilots from their services.

Neither deeds of association nor any provision of Part II of the Canada Corporations Act can assure a complete membership because there appears to be no legal means to compel anyone to join either an association or such a

corporation against his will, nor to remain a partner or a member if he elects to withdraw. Since an association is a partnership contract, it is the essence of such a contract that one may withdraw whenever he wishes, subject however to the liability to pay the other partners any damages he may have caused them by violating his contractual obligations.

The Corporations also have no legal power to force anyone to become a member. Conversely if a person wishes to join, the Corporations are not obliged to accept him, even though the applicant is a licensed pilot following his profession. Any member is always liable to be expelled by a decision of the Corporation. Furthermore the provision contained in all the By-laws, which denies a member the right to resign unless he also ceases to be a licensed pilot, seems to be of doubtful legality. It is true that by virtue of subsec. 145(2)(f) of the Corporations Act, the By-laws of the Corporation may provide "whether or how members may withdraw from the Corporation". However, the Corporations Act is federal legislation and falls under the application of the Canadian Bill of Rights (S.C. 1960, c. 44) which guarantees, *inter alia*, the freedom of association (sec. 1 (e)) and by way of consequence the right to cease to associate when one so elects. Furthermore it appears that by making such a regulation the Corporations arrogate a right that belongs exclusively to the Pilotage Authority, because they add a condition to the pilot's licence which can be done only by a by-law made by the Pilotage Authority pursuant to subsec. 329(f) of the Canada Shipping Act. But even if such a by-law were valid, the Corporation still can not force membership, nor can a pilot who has joined be assured of permanent membership.

There seems to be a further substantial deficiency in the constitution of these Corporations in that whatever rights they may have over their members' pilotage assets are not derived from their own powers and would be essentially revocable.

In the case of the Associations the legal situation is clear, because their rights are derived from the partnership deed and the members, by contract, have bound themselves to pool their earnings, subject to the terms and conditions expressed in the deed. This is not so, however, with the Corporations. The legal situation seems to be one of two alternatives: either the whole operation is illegal or their rights to dispose of pilots' money are essentially revocable.

A person can not be deprived of his assets (including pilotage earnings), or even of their free enjoyment except by a specific provision contained in legislation or by an agreement freely undertaken in his capacity as an owner. The provisions of subsec. 329(b) 1952 C.S.A. and of subsec. 319(*l*) 1934 C.S.A. (still in force) are examples of the first category; special provisions in the Act were necessary to empower the Pilotage Authority to fix what part of the pilot's earnings would belong to the operator of the

licensed pilot vessel and what part would be compulsorily deducted as his pilot fund contribution. The deeds of partnership are an illustration of the second category.

Whatever powers such a Corporation has, *per se,* must be founded on a provision of the Act under which it was created, i.e. Part II of the Corporations Act as limited by the terms of the charter. There is nothing in the Corporations Act which grants such Corporations powers to deal with their members' own assets without their consent; the fact that the assets are pilotage earnings makes no difference and a consent on the part of the owner of the assets is a prerequisite. It therefore presupposed a civil contract between the Corporation and its members, which is indicated by the necessity of obtaining the power of attorney.

What is the nature of that contract? It can not be said that it is an implied general assignment of pilotage earnings because the Corporation would then become the owner of such assets, and would be precluded by its charter from paying any part of them to its members.

The situation is hopelessly illegal unless it is looked upon as a combination of corporate and contractual powers. By its charter the Corporation is authorized to act as trustee for the administration of a fund belonging to its members; the exercise of such a power presupposes first, a partnership agreement among the pilots and secondly, a trust agreement between the Corporation as trustee and its members as both contributors and beneficiaries. These two contracts need not be in written form, they may be verbal. They are implied from the actions of the members when they define the terms of these contracts through the medium of by-laws (although they are ultra vires as far as the Corporation is concerned), to which they voluntarily submit themselves. In any case, pilotage money belongs at all times to the pilots and the Corporation has nothing more than a contractual power of administration which is essentially revocable.

Joining a Corporation can not result in a member's blanket, irrevocable surrender of his pilotage assets so that the Corporation may dispose of them at the discretion of the majority of its members. The argument to the effect that a member acquiesced when he joined the Corporation because he knew the contents of the By-laws is without value since by-laws are binding on the members only if they are *intra vires.*

The legal consequences could, therefore, be quite different to those the pilots envisaged when they selected the corporation system. As far as their personal liability is concerned they are still governed by a partnership agreement and the fact that it is implied does not alter the situation. The Corporation and its Board of Directors are answerable to each member for administering the trust fund and may be called upon to reimburse any deduction made from the share of any pilot without his consent, either expressed or implied.

Furthermore, the situation also leaves much to be desired because there is nothing to prevent the proliferation of such associations and corporations. There is no existing legal provision that could grant any one of them any exclusive or superior rights. The ensuing chaotic situation can not but cause dissension and conflict, as has happened in the case of the Quebec pilots and Montreal river pilots.

In the Maritimes and on the West Coast, the Commission found, through the evidence adduced at the hearings held in these areas and by meeting a great number of local pilots, that harmony and unity existed. By contrast, dissatisfaction and distrust were evident among the pilots of the St. Lawrence Districts and in the Quebec District there was open opposition and even hostility. This appears to be the normal consequence of the unsatisfactory status of exception that the Saint Lawrence Pilotage Authorities have imposed on these three Districts and the inadequate and unsatisfactory legal means at the pilots' disposal to remedy the situation.

In the Quebec District, two pilots filed individual briefs denouncing the abusive powers wielded by the Corporation, Captain Maurice Koenig (Ex. 571) and Captain Lucien Bédard (Ex. 1323). Later on, 21 pilots presented a written petition protesting against the existing pooling system at Quebec as illegal and anti-democratic. As seen earlier, six pilots have refused to join the Corporation. One of them, Captain Roland Barras, was subpoenaed by the Commission. In his testimony, he stated, *inter alia,* that he could not accept having his earnings paid without his consent to a Corporation to which he does not belong and which, against his will, forces him to share its expenses. He feels that this situation is illegal and he reserves his right to claim any money the Corporation retains from his earnings. He added that he had never demanded a complete accounting because in order to enforce his demand he would have to sue the Corporation and, in order to defend itself, the Corporation would incur legal fees that he would have to pay indirectly because these fees would then become a Corporation expense.

On February 12, 1958, the Cornwall Corporation, in a memorandum signed by its legal adviser and addressed to the Pilotage Authority, tried to obtain official recognition as the sole body whose members could pilot in the District. As was to be expected, the request was not granted because recognition would have placed immense powers in the hands of the Corporation, such as the power to determine the number of pilots by refusing to admit newly licensed pilots, or to control licences by the simple process of expulsion.

One member, Pilot George Downey, once tried to withdraw his power of attorney but his Corporation refused. With financial and legal assistance from the Shipping Federation he sued the Corporation but before the case came up for hearing he withdrew his proceedings and abandoned his claim.

The objection of the dissident Montreal river pilots is based more on a matter of principle. They object to what they believe are the excessive powers of the Corporation and its directors, which may lead to abuses. They prefer the association system where the limitations on, and powers of, the directors are defined in the terms of the contract. When the question of the creation of the Corporation was studied, these pilots sought an independent legal opinion. In a letter dated February 20, 1959 (Ex. 872) they were informed that the proposed Corporation and its by-laws did not provide the guarantees that the pilots enjoyed with a deed of association. The legal firm pointed out various extraordinary powers granted to the Board of Directors that they termed "dictatorial" and stated their opinion that these would subordinate all the pilot members to the most absolute, arbitrary control, and would open the door to unnamed abuses that the pilots would have no effective means to prevent.

When legal means are inadequate it is to be feared that illegal methods may be adopted. It is pertinent to note (a) despite the fact Pilot Downey apparently had a sound legal case and was provided with financial and competent legal assistance, he desisted before the case came up for hearing; (b) five of the 21 Quebec pilots who signed the March 12, 1964 petition filed during the following month five identical documents withdrawing their petition; (c) Captain Barras complained of discrimination against the six Quebec dissidents in that they are prevented from attending the meetings where decisions which affect their earnings are taken under the pretext that they are Corporation meetings, although the Association By-law provides that the Corporation's decisions bind the Association; (d) anonymous telephone calls are received.

The various objections raised by the dissidents, and by the other pilots, to the corporation system are studied at length in the sections of the report dealing with these Districts. They can be summed up by saying that they are based more on principle than on fact. At this stage the only important point to note is the atmosphere which has been created mostly, if not wholly, by the failure on the part of the Pilotage Authorities to impose pooling in these Districts combined with the pilots' lack of adequate legal means to resolve the problem.

The corporation system plays a secondary rôle which has a certain importance, i.e., it provides a legal representation for the group where common professional interests are involved, and it also provides the means to promote group activities. In this respect a corporation holds a marked advantage over a pilots' committee whose only power is to represent the pilots vis-à-vis the Pilotage Authority.

The success of the British Columbia pilots under their Pilots' Committee was achieved only because the Committee's own expenses were minimal and its activities were limited to matter that were generally not contentious as far

as the pilots were concerned. Under these circumstances unanimity was easily achieved. On February 22, 1963, a charter was issued under Part II of the Canada Corporation Act creating *The Corporation of the British Columbia Coast Pilots* (Ex. 93 and 1166). The charter lists the same aims as appear in the latest charter previously granted—the Quebec District Pilots' Corporation—including the power "to regulate the practice of pilotage", to control apprenticeship and to organize and operate the pooling of the pilots' earnings. These powers are rendered ineffective for the time being by the proviso that limits these powers since the District By-law provides for despatching and pooling to be effected by the Pilotage Authority and for pilots to be recruited by a different method than apprenticeship.

All British Columbia pilots have joined the Corporation. It finances its operations in the normal way, i.e., through membership dues.

C. FEDERATION OF THE ST. LAWRENCE PILOTS

Because the St. Lawrence Districts were contiguous, formed part of a single, continuous pilotage service, faced common problems and had common interests, they were led to follow the example of the Pilotage Authority and of the shipping interests by creating a central organization. In 1903 the Shipping Federation of Canada was incorporated by a special Act of Parliament (3 Ed. VII c. 190), and the Dominion Marine Association by letters patent dated January 13, 1961 (Ex. 1136). In 1959 the Department of Transport as adviser to the Pilotage Authority of these Districts created the post of Regional Superintendent as their representative with jurisdiction over the three St. Lawrence Districts (Ex. 542).

Letters patent issued November 5, 1959 created the *Federation of the St. Lawrence River Pilots* (Ex. 751), which all the pilots organizations of the St. Lawrence Districts have since joined. It is not a true federation but an independent corporation operated by members recruited from local organizations. Its decisions have no binding effect on the local organizations unless approved by them. Before the Federation existed the pilots had relied for group action either on the *Canadian Merchant Service Guild* grouping Canadian Masters and mates and pilots and to which most pilots belonged. and still belong, as individuals and not as groups, or on temporary and *ad hoc* joint committees similar to the one that was formed to oppose Bill S-3 in 1959. The pilots' strike of April 1962 was decided at the local Corporation level when negotiations by the Federation failed to bring the expected results, but the negotiations to settle the strike affecting the three Districts were carried out by the Federation. Here again the creation of such a federation answered a real need.

COMMENTS

It is considered that the need for legal recognition of a controlled pilotage service—wherever the service is justified by public interest or safety of navigation—has been fully demonstrated by events. It is agreed that in certain localities pilots should continue to be independent contractors competing for clients but, in general, future legislation should provide for full control of the pilotage service.

It is imperative to correct the prejudicial situation in which most pilots now find themselves due to the ambiguity of their status, i.e. whether they are self-employed or employees.

The full complement of pilots in a given District, or any clearly defined group of pilots recognized by the Pilotage Authority in a District should become a corporate body under pilotage legislation. The Act should enumerate and define the various powers to be enjoyed by these *sui generis* corporations: some of general character that all such corporations would automatically possess and some special powers that such corporations would enjoy only if and when granted by the Authority empowered to define the organizational structure of Districts, when such powers are needed to meet a particular requirement related to the type of organization under which a District, or part of a District is operating.

The Act should also provide an adequate system of control over the corporation's activities so that any irregularities, abuses or discrimination could be effectively prevented or corrected. It was mostly the abuses of its Board of Directors that brought about the demise of the 1860 Pilots' Corporation and these abuses arose largely because the Pilotage Authority lacked proper power to control the Corporation's activities. A secondary cause was the failure to exercise the limited supervisory and control powers the Authority possessed.

Chapter 5

PILOTAGE DISTRICT FINANCIALLY INDEPENDENT AND SELF-SUPPORTING

Pursuant to the Canada Shipping Act, Pilotage Authorities are self-supporting and hence are empowered to raise the money required to meet their operational expenses. There is no provision in the Canada Shipping Act which enables Pilotage Authorities to obtain money from outside sources, e.g., subsidies from the Crown.

PILOTAGE MONEY IS PUBLIC MONEY

Since the Pilotage Authorities are officers of the Crown (vide C. 8, pp. 240-241, all money they receive in their official capacity becomes public money which subsec. 2(m) of the Financial Administration Act defines as follows:

"(m) 'public money' means . . . and includes . . .

(iv) money paid to Canada for a special purpose".

This last expression is also defined in the Financial Administration Act as follows:

"(k) 'money paid to Canada for a special purpose' includes all money that is paid to a public officer under or pursuant to a statute, trust, treaty, undertaking, or contract, and is to be disbursed for a purpose specified in or pursuant to such statute, trust, treaty, undertaking or contract."

The Canada Shipping Act defines how most of this money is to be disposed of, including "for a special purpose".

In the absence of any provision in the Act concerned, this money, when collected, must be deposited to the credit of the Receiver General (subsec. 16(1) Financial Administration Act). The Pilotage Authorities do not follow this procedure but deposit pilotage money in their own name (*see Ancillary Powers of Pilotage Authorities,* C. 8, pp. 315 and ff.).

As seen later, except for funds that belong to third parties which ought to be handled as provided for in the Financial Administration Act, all money paid to a Pilotage Authority is public money which the Pilotage Authority, as an officer and agent of the Crown, can only dispose of as directed by legislation. The Pilotage Authorities, *per se*, have no assets or general fund which they can retain or dispose of at will. They are not profit-making concerns. All their funds and assets are marked for special purposes and can not be held or used in any other manner. Any payment or any disposal of this money by a Pilotage Authority for any purpose other than specified in the Act for a given type of receipt or even if spent for an approved purpose but without complying with the conditions and procedures imposed by the Act is illegal. Any such disposition by the Pilotage Authority would amount to misappropriation of public funds and would render the members of the Pilotage Authority concerned personally liable for reimbursement and also liable to penal prosecution under Part IX of the Financial Administration Act.

TYPES OF FUNDS

Part VI of the Canada Shipping Act refers to only one type of fund: the pilot fund (erroneously referred to as "Pilotage fund" in the marginal note to sec. 374), and deals independently with every other category of revenue collected by a Pilotage Authority. For study purposes, all revenues and monies which come into the hands of the Pilotage Authority of the District may be grouped in three classes: (a) the pilot fund, (b) the Pilotage Authority's general expense fund and (c) money belonging to the Consolidated Revenue Fund of Canada or to third parties.

The term "pilotage fund" which is currently used is a creation of the By-laws where it means the aggregate amount of all the money received by or on behalf of a Pilotage Authority, apart from the trust fund which is the pilot fund. It has no further meaning or implication because the application to be made of the various items that compose it varies with each type of revenue. It is, in fact, merely the name given to the bank account in which a Pilotage Authority deposits the money it receives.

PILOT FUND

The "pilot fund" (also referred to in the By-laws as the "pension fund" when it consists of a superannuation scheme) is defined in subsec. 2(68) C.S.A. where it is called "pilots' fund".[1] A Pilotage Authority may establish a pilot fund by by-law made pursuant to subsec. 319(*l*) 1934 C.S.A. (which

[1] According to the rules of interpretation, the use of a different expression should indicate that a different meaning was intended. This can not be the case here because "pilots' fund" is not found anywhere else; it is obviously another error of drafting which occurred with the 1934 version of the Canada Shipping Act; up to then, the definition referred to the expression "pilot fund" (vide subsec. 409(i), 1927 C.S.A.)

is still applicable) and sec. 735, 1952 C.S.A., as a trust fund that the Authority administers and uses according to secs. 358 and 375, or the regulations it has made pursuant to subsec. 329(m) for that purpose, "for the relief of retired or superannuated or infirm licensed pilots, or their wives, widows and children".

The pilot fund does not automatically exist. It is the prerogative of the Pilotage Authority to decide whether to create a fund or not (except for the District of Quebec where it exists, pursuant to the Trinity House Act of 1805). When such a fund is created, the Act stipulates what money shall form part of it:

(a) the pilots' personal contributions proportional to their earnings. The percentage must be mutually agreed to by the Pilotage Authority and the pilots; otherwise it is to be fixed by the Minister of Transport acting as arbitrator. In no instance shall it be less than 5 per cent of the pilots' earnings (subsec. 319 (*l*) 1934 C.S.A.);

(b) in the compulsory payment Districts, the residue of the pilotage dues collected from vessels requiring a pilot which failed to comply with secs. 348 and 349, after deduction of both the collection expenses and the pilotage dues to which individual pilots are entitled as a result of the implied pilotage contract (subsec. 350(2) and sec. 351, vide C. 7, pp. 230-232;

(c) the money, in the nature of a fine, collected from non-exempt ships requiring a pilot on inward voyages for their failure to comply with the procedure set out in sec. 349 (subsec. 350(1), vide C. 6, pp. 200-201;

(d) the fines (not penalties, vide pp. 101-102) paid by licensed pilots and apprentices for offences against the provisions of Part VI or for a breach of the By-laws, rules and regulations made under Part VI (subsec. 708(1)).

Sec. 375 provides for the expenditure of the money in the pilot fund, that is:

(a) as a first charge the payment of all expenses incurred in the administration of the fund;

(b) the payment of pension benefits, or other relief for incapacitated or retired pilots, their widows and children as the Authority may decide (sec. 358) or as provided for in regulations, if any (sec. 329(m));

(c) the payment of allowances that the Pilotage Authority may decide to make to a pilot whose licence was cancelled pursuant to subsec. 568(2) by a Court of Formal Investigation as a result of a marine

casualty (vide C. 9, pp. 409 and ff.). In each case it is left to the discretion of the Pilotage Authority to fix the amount of such allowances.

The nature and financial position of the existing pilot funds are studied later in chapter 10.

PILOTAGE AUTHORITY'S EXPENSE FUND

The second type—the Pilotage Authority's expense fund—is the aggregate sum of the money received by the Pilotage Authority from which it is authorized to pay the "necessary expenses of conducting the pilotage business in the district" (sec. 328). The meaning and scope of this expression are studied under Pilotage Authority—Ancillary Powers (C. 8, pp. 316 and ff.). Hereafter, the said expenses are called operating expenses. This fund is composed of two types of receipt:

1. The revenue that can be spent for District operating expenses only:

(a) whether or not a pilot fund exists, the dues collected as a result of the compulsory payment system (except as mentioned in (d) below), i.e. for outward voyages, transit voyages and movages (secs. 328, 345 and 357);

(b) fees for licences (excluding those for renewal of licences of pilots over 65 (sec. 339)), i.e., licences issued to pilots and apprentices pursuant to subsec. 329(e);

(c) in the absence of a pilot fund in the District, the fines (not penalties) paid by licensed pilots and apprentices for offences under Part VI (subsec. 708(2));

(d) in the absence of a pilot fund the dues collected as a result of the compulsory payment system from ships which required a pilot on their inward voyage but did not comply with secs. 348 and 349 when no pilotage contract, real or implied, was undertaken (secs. 328 and 348 to 351 inclusive). However it could be argued that they properly should accrue to the Consolidated Revenue Fund of Canada because in that eventuality no specific disposal application is made in the Act, sec. 351 being an exception to sec. 328;

(e) when pilotage dues for services rendered are not payable to the Pilotage Authority, individual pilot's contributions pro-rated to their earnings to cover any District operating expenses left unpaid after all the funds derived from the foregoing items have been expended. Since Pilotage Authorities are not authorized to accumulate any funds (except the pilot fund), the individual pilots may not be assessed more than is needed to cover any actual operational deficit.

2. Revenue received by the Pilotage Authority for collection purposes but belonging to others, i.e., pilotage dues for services rendered, if it is specified by by-law that they are payable to the Pilotage Authority (subsec. 329(h)). These pilotage dues are the earnings of the pilots and the licensed pilot vessels. When collected they must be paid by the Pilotage Authority to each pilot or pilot vessel which earned them, less the pilot's compulsory contribution to the pilot fund, if one exists, and in all cases less the *pro rata* share of the payment of the balance of District expenses.

OTHER MONEY

A third item of revenue is non-public money, and public money for which no special disposition is laid down in the Canada Shipping Act.

Pilotage Authorities must pay to those persons to whom it belongs any non-public money collected, including money received by error, the surplus resulting from the over-payment of dues, any dues paid under protest if subsequently they are found not payable, pilots' indemnities for overcarriage (sec. 359) or quarantine detention (sec. 360), pilotage dues which, according to the By-laws, are payable directly to those who performed the services.

Other items of public money which must form part of the Consolidated Revenue Fund of Canada because no special application or purpose is indicated in the Act include:

(a) any fine imposed on a pilot by a Court of Formal Investigation (subsec. 568(2)). Subsec. 708(1) does not apply because the fine is not imposed under Part VI;

(b) the penalty imposed in the disciplinary regulations passed under subsec. 329(g) except, when applicable, the half that belongs to the person who sued with the Crown for its recovery. Prior to 1934 there was no distinction between fine and penalty (re meaning of these terms, vide C. 9, pp. 380-381); when the distinction was made in 1934, different methods of recovery were provided for each (see sec. 683 on the recovery of fines and sec. 709 on the recovery of penalties). On the same occasion the section that provided for the application of penalties to the pilot fund (sec. 543, 1927 C.S.A.) was modified, *inter alia*, by deleting the word "penalty" and replacing it by the word "fine" (sec. 700, 1934 C.S.A.). This has remained unchanged ever since (sec. 708); no further provision has been made for the disposal of penalties. It must be concluded that Parliament intended that only fines should be disposed of in this manner and that all penalties should be payable to the Consolidated Revenue Fund of Canada. Because

there seems to be no logical justification for such a distinction, it appears that it is due to an oversight when the amendments were drafted;

(c) the licence renewal fees covered in sec. 339, that is, of pilots over 65 years of age. In Districts where the Minister is the Pilotage Authority, it is specifically provided that these renewal fees must form part of the Consolidated Revenue Fund of Canada (subsec. 339(2)). In other Districts, subsec. 339(1) indicates that renewal fees should be applied as "prescribed by this Part" but the Act contains no other provision on the matter with the result that these fees must also be paid into the Consolidated Revenue Fund. Here again the only apparent reason is an oversight in drafting. Formerly they were applied for the same purposes as the fees payable by Masters and Mates for pilotage certificates (secs. 35 and 71, 1886 Pilotage Act);

(d) the fees payable by Masters and Mates for pilotage certificates (subsec. 329(e)). It is no longer stated in the Act how these fees should be applied. A provision to this effect which was contained in former legislation was not abolished until 1934. Sec. 471 of the 1927 C.S.A., for instance, authorized the Pilotage Authority to apply these fees "to the payment of expenses of examinations or any other general expenses connected with pilotage incurred by such authority, or paid into the pilot funds of the District, if any, or disposed of for the benefit of the pilots licensed by such Authority in such other way as the Pilotage Authority shall deem advisable". This again would appear to be the result of poor drafting in 1934;

(e) when no pilot fund exists money derived from fines (less collection expenses) paid by non-exempt ships which required a pilot on their inward voyage but did not comply with the procedure set out in sec. 349 (subsec. 350(1)). This money is payable to the Pilotage Authority in addition to the pilotage dues in Districts where payment is compulsory. Because it is not identified in subsec. 350(1) with pilotage dues (as are other dues in secs. 348 and 349) it can not be considered as such;

(f) the Pilotage Authority has nothing to do with the fines imposed on any person other than a licensed pilot or on licensed apprentices, because these fines never come into the hands of the Pilotage Authority, except in the case when the Authority was the plaintiff and, pursuant to sec. 707, the trial judge directed that the fines be applied toward the payment of the court costs.

MINIMAL IMPORTANCE OF REVENUES OTHER THAN PILOTAGE DUES

Aside from pilotage dues, other items of revenue, if any, amount to very little.

(a) Licence fees yearly in a given District are small. If there are a large number of pilots and the licences are permanent, few fees are collected annually. Furthermore, the fees are minimal: generally $5 or $10.

(b) At present no fees are received for pilotage certificates issued to Masters and Mates, because, as will be seen later (C. 8, pp. 305-308), No Pilotage Authority can exercise this licensing power for lack of appropriate regulations.

(c) Fines for offences under Part VI are imposed on pilots in large Districts only, and, as far as it was possible to ascertain, no fines were ever imposed on apprentices. Even in the large Districts, the aggregate is very small in any given year. For instance, in the Quebec Pilotage District, in the eleven years from 1955 to 1965 inclusive, fines totalled only $805. In 1962, the total of $145 amounted to only .01 per cent of the gross earnings of the District.

(d) No penalty is provided in any of the current By-laws and, therefore, none is recovered.

(e) No renewal fees for licences of pilots over 65 years of age are provided in any of the existing By-laws.

(f) At present there can be no dues resulting from the compulsory payment system and belonging to pilots pursuant to subsecs. 350(2) and 351(1)(b), nor any quasi-fines (subsec. 350(1) vide C. 7, p. 201), because two of the prerequisite conditions no longer exist; first, there is no prescribed signal which an unexempted vessel requiring a pilot may display (C. 3, pp. 60-61); second, the pilots no longer offer their services as required in the Act by answering a ship's request personally. Therefore, the presumed contract that is created by the law when there is such a demand and such an offer can not take place and none of the pilots, either individually or as a group, have any legal claim to any part of the dues collected from ships that did not take a pilot.

It may be wondered why there are two ways of applying dues which are collected as a consequence of the compulsory payment system, i.e., they form part of the Pilotage Authority's expense fund except when they become liable under secs. 348 and 349, in which event they are paid into the "pilot fund" if no pilot can establish an implied contract. The reason appears to be that it was considered desirable to place the Pilotage Authority in an unbiased position, observing that sec.351 makes it the judge wheher an implied

contract exists and hence a negative decision would result in a benefit for its own expense account. It follows that if no pilot fund exists any undistributed dues collected under these sections should be paid into the Consolidated Revenue Fund of Canada.

ILLEGAL APPLICATION OF MONIES THROUGH BY-LAWS

As indicated earlier, Parliament has dealt fully with the application of the various kinds of money collected or received by the Pilotage Authority and in the law, as it exists today, no discretion whatsoever (except for pilot vessel earnings) is left to the Pilotage Authority, either through regulation-making or in the course of its administration. Therefore, every By-law provision that deals with the handling and the disposition of the various items of pilotage receipts (except for pilot vessel earnings, vide C. 8, pp. 280 and ff.) is illegal as ultra vires. If these regulations merely reproduce the provisions of the Act, they are superfluous; if they vary the statutory application, they are ultra vires. By-laws should not be used as a means of issuing bookkeeping instructions to the Secretary-Treasurer or the bookkeeper. These are merely administrative instructions that do not form part of the legislation and *a fortiori* must conform to the Act. Therefore, the following By-law provisions, *inter alia*, are illegal:

(a) the provisions which come into conflict with the Financial Administration Act on the subject of the safekeeping and handling of pilotage money;

(b) the provisions that deprive a pilot of the dues he has earned personally, namely, the By-law provisions for pooling pilot money, or making the dues the property of the Pilotage Authority, when and where the pilots are on a fixed salary;

(c) the provisions that modify the applications made by the Act of the various types of dues collected because of the compulsory payment system, such as:

(i) subsec. 9(2) of the Cornwall District By-law which extends the application of subsec. 350(2) C.S.A. to all types of voyages, despite the fact that subsec. 350(2) can not be applied as seen earlier (p. 103), and because vessels transit the Cornwall District and hence do not make "inward voyages". In Part VI the presumed contract for the inward voyage (subsec. 350(2)) is an exception to the rule governing actual contracts and, hence must be given a restricted interpretation. The situation for which secs. 348 to 351 inclusive were conceived does not exist in the Cornwall District because there is no seaward boarding area through which, as in the early days, pilots are obliged to sail in order not to

delay incoming ships. Therefore, in the Cornwall District there can be no question of a presumed contract and any dues collected from non-exempt vessels which do not employ pilots must be disposed of pursuant to sec. 328 toward the payment of the operational expenses of the District.

(ii) subsec. 9(2) of the Quebec District By-law, which provides that all such pilotage dues, without distinction, belong to the "Quebec Pilots' Pension Fund". Only dues owing in respect of inward voyages, provided the conditions of secs. 348 and 349 C.S.A. are met, can form part of a pilot fund (subsec. 351(2)). In the Quebec District, as elsewhere in Canada, secs. 348 to 351 inclusive are not applicable at present. Furthermore, sec. 328 does not apply to the Quebec District (C. 5, pp. 111 and ff.). Hence, because there is no specific application in the Act and because there can be no presumed contract in the District under existing arrangements, all dues owed because of the compulsory payment clause belong to the Consolidated Revenue Fund.

(iii) sec. 10 of the British Columbia By-law, sec. 10 of the New Westminster By-law, etc., which make all pilotage dues part of the pool to be shared among the pilots whether they were earned by pilots or were owing on account of the compulsory payment system. Because the Sydney District By-law contained a similar provision (sec. 9) the Sydney pilots, before they became employees of the Crown, derived illegally each year a sizeable part of their personal earnings from dues collected from the C.N.R. ferry vessels which did not use pilots and against which the pilots had no claim. In 1965, 86 per cent of the revenues of Port aux Basques were derived from pilotage dues paid by the same ferry vessels which neither employed nor needed the Port aux Basques pilot (vide Appendix IX, paras. 22 to 26).

(d) the provisions which make part of the pilotage dues payable to non-licencees, i.e., the Receiver General of Canada, when the pilot vessel service is provided by the Department of Transport or when ships have to be provided with radiotelephone equipment, also furnished by the Department (Quebec District By-law, subsec. 9(3)); or by the National Harbours Board when one of its tugs is used as a pilot vessel at Churchill (Schedule 2 Churchill By-law);

(e) the provisions that the indemnity payable pursuant to secs. 359 and 360, to pilots who are overcarried or detained in quarantine shall be made part of the pool to be shared by all the pilots, i.e., subsec.

12(1) of the British Columbia District By-law, subsec. 9(7) of the Halifax District By-law, subsec. 9(7) of the Sydney District By-law and subsec. 9(7) of the Saint John, N.B., District By-law;

(f) provisions that create new items of revenue not provided for in the Act, such as fixing an examination fee. A Pilotage Authority can not debit anyone unless there is specific authority in the Act, such as exists for the licence and certificate fees. The examination of candidates must be free of charge; for this reason subsec. 17(2) of the British Columbia By-law, subsec. 11(5) of the Bras d'Or Lakes By-law, subsec. 14(2) of the New Westminster By-law, are ultra vires;

(g) the various provisions for the payment of a fixed remuneration to probationary pilots, e.g. subsec. 19(2)(b) of the New Westminster By-law, *a fortiori* when the amount is left to the discretion of the Pilotage Authority as in subsec. 12(2) of the Bathurst By-law, subsec. 17(3) of the British Columbia By-law, etc.;

(h) the provisions for leave of absence with pay and half pay that are found in all By-laws in Districts where the Pilotage Authority operates a pooling system;

(i) the provisions which authorize the Pilotage Authority to accumulate a reserve fund, such as subsec. 9(3) of the Humber Arm District and subsec. 8(3) of the Port aux Basques District.

PILOTAGE AUTHORITY'S EXPENSE FUND

Therefore, pursuant to the provisions of Part VI, the Pilotage Authority is provided with revenue of its own to meet its necessary operating expenses and it is only in the event that an unpaid balance remains after this revenue has been exhausted that the Pilotage Authority has the power to raise the required money from the pilots and the licensed pilot vessels, *pro rata* to their earnings. Expenses should be paid as they are incurred. If the Pilotage Authority's own source of revenue produces a surplus the Act is silent about its disposal. It can not be paid to the pilots, either directly or indirectly, because they are entitled only to what they have earned either by performing services or through a presumed contract. It is considered that any such surplus should be retained by the Pilotage Authority to meet future operating expenses, because the fact that some of this money is not spent does not alter its nature and it remains public money for a special purpose, that is, to pay operating expenses. Eventually, if and when the Pilotage District is abolished, any unexpended balance accrues to the Consolidated Revenue Fund of Canada.

DISTRICT OPERATING EXPENSES AND PILOTS' OWN EXPENSES

The small number of statutory provisions covering the financial administration of Pilotage Districts is explained by the fact that under the scheme of Part VI the *operating expenses of any Pilotage Authority* can not be very large. To understand the situation fully, it is essential to ascertain what can be legally considered the "necessary expenses of conducting the pilotage business of the district". Here a distinction must be made between the operating costs of the Pilotage Authority and the operating costs of the pilots and in addition the term 'pilotage dues' as opposed to 'pilots' earnings', must be defined.

The Pilotage Authority's operating expenses are those that are necessary for it to discharge its responsibilities. As will be seen later, its main function is to issue licences. *Inter alia*, it has no power to intervene in the actual provision of the service, which is solely the statutory and contractual responsibility of the pilots themselves. Therefore, all costs incurred in providing pilotage for ships are the *pilots' professional operating expenses*. The Pilotage Authority's expenses are incurred particularly in making regulations and incidentally to issuing licences, i.e., the cost of examining candidates for pilotage, investigating whether a pilot is still qualified or fit to hold his licence, and prosecuting pilots for offences or breaches of By-laws. These expenses also include the costs incurred during the exercise of the Authority's auxiliary powers, e.g. the cost of collecting dues and of maintaining an office and the clerical staff required to perform its functions.

When the provisions of sec. 328 were included in the legislation for the first time, in 1875, the only possible type of Pilotage Authority was a Board, either a corporate body as in the four Districts of Quebec, Montreal, Saint John and Halifax, or Government appointees as elsewhere. The services of a Secretary-Treasurer were required to implement the Board's decisions. His remuneration, which was the main item of expenditure, was specifically dealt with in the Act, no doubt to prevent any criticism or interference by the pilots, while only a general provision was made to cover all the other items.

In the New Westminster District in 1963, for instance, excluding the Secretary-Treasurer's remuneration and the items of expenditure paid for the benefit of the pilots themselves—travelling expenses, premium for health and travel insurance, etc.—the operating expenses of the District amounted to less than one per cent (0.798%) of the District gross revenues. The aggregate operating costs for that year including the Secretary's salary of $6,600. amounted to 1.28 per cent.

PILOTAGE DUES AND PILOTS' EARNINGS

The term "*pilotage dues*" is defined in subsec. 2(70) as "the remuneration payable in respect of pilotage". Since only a pilot can perform pilotage, the dues are, in fact, the remuneration of the pilot who performed the service; they are the pecuniary consideration of the pilotage contract.

When pilotage legislation was first introduced the term was identified with the remuneration of the pilot (subsec. 18(8), 1873 Pilotage Act). It was amended to read as in the present definition at the time of the 1886 revision and consolidation of the Act. However the remaining provisions were not changed. In fact the organizational scheme was not altered, and only one ambiguity was corrected. The pilotage dues remained, and still are, the pecuniary consideration of the pilotage contract. For the ship the dues are the aggregate amount she has to pay for pilotage services; for the pilot they are the gross amount he earned through the pilotage contract, out of which he must pay his own operating expenses. Pilotage dues for services rendered always belong to the pilot who performed the services, despite the fact that in some exceptional circumstances, the Act, in order to reduce the pilot's own costs, has authorized the Pilotage Authority to provide by by-law for a limited compulsory pooling of the pilots' own earnings (pilot companies, subsec. 329(c)) and also for sharing the dues with the owners of licensed pilot vessels used by pilots (subsec. 329(b)).

That pilotage dues belong to the pilot who performed the services for which they are the price is an essential feature of the organizational plan of Part VI. A contrary view would be a direct contradiction of a number of provisions of the Act, which would then become meaningless, *inter alia*:

(a) Sec. 352 poses the principle that once a ship has voluntarily hired a pilot to act as such, she cannot be exempted "from the liability to pay pilotage dues earned" by the licensed pilot so hired. Whether the payment is, or is not, made compulsory in the District concerned has no bearing.

(b) Sec. 353 deals with the special case where, on account of unavoidable circumstances, a pilot cannot board a ship, and in the circumstances does the best that can be done, i.e., he guides the ship by leading the way in another vessel. The section provides that the pilot "so leading . . . is entitled to the full pilotage dues for the distance run, as if he had actually been on board and piloted such ship".

(c) The expression "the same sum as would have been payable to such licensed pilot if his services had been accepted" found in sec. 348 and subsec. 350(2) is meaningless if the dues do not belong to him and are not the price of his services.

(d) Only pilots or Pilotage Authorities (not the owners of pilot vessels) have a legal claim against a ship for pilotage dues (sec. 343).

The regulation-making power of the Pilotage Authority with respect to pilotage dues clearly indicates what made it necessary to distinguish between pilotage dues and a *pilot's own earnings*:

(a) The two terms are used separately in subsec. 329(h).

(b) Pilotage dues may also include earnings by pilot vessels when this service is not provided by the pilot himself. The Pilotage Authority has the power to define by by-law what part of the dues fixed in the tariff is distributed to the pilot vessels it has licensed and what part to the pilots, as their respective "earnings" (subsec. 329(b)).

(c) The pilot fund or pension fund contribution is a charge against the pilot's own earnings and not against his pilotage dues (subsec. 329(*l*)).

As is further demonstrated later (C. 6, pp. 182-183 and ff., and C. 8 pp. 276 and ff.), the share of the dues payable to the pilot vessel owner is not an operating expense of the Pilotage Authority (any more than is the pilot's contribution to the pilot fund) but an expense of the pilot himself, in that the responsibility for providing transportation to and from a vessel is an obligation of the pilot resulting from the pilotage contract he has made. He must provide the means to make himself available. The situation does not change when, instead of providing his own means of transportation himself by owning and operating a pilot vessel at his own expense, he privately hires the services of a boat owner; or when the pilots group themselves in companies to operate their pilot vessels. The transportation charge always remains one of the pilot's own operating costs and is not chargeable to the Pilotage Authority under existing legislation.

PILOTAGE AUTHORITY'S EXPENSES BORNE BY SHIPPING

In conformity with the principle that the cost of a service should be borne by the person to whom it is provided, the expenses that the Pilotage Authority has to incur in the discharge of its licensing and other related responsibilities must be borne by the ships which benefit from the licensing service. The fact that some of these expenses are paid out of pilotage dues does not alter the situation because this is merely a simple and indirect method of collection. The aggregate amount of a Pilotage Authority's expenses should be fairly constant from year to year and the main changes that occur are the direct result of Pilotage Authorities' decisions, e.g., raising the secretary-treasurer's salary, increasing the clerical staff or incurring higher office rental charges. Although the Pilotage Authority's own sources of revenue are very limited, its anticipated expenses vary little from year to year and the total is a predictable item that can be taken into account when the schedule of pilotage dues is drawn up. The aim must be to provide the pilots with adequate remuneration after deducting their operating expenses, their contributions to the pilot or pension fund and their share of District expenses.

PROCEDURAL REQUIREMENT

Parliament has ensured that the Pilotage Authority is sufficiently independent of the pilots, to whom the dues belong, by granting it power under sec. 328 to pay the unpaid balance of its operating expenses from the dues without obtaining their consent.

As a check against any possible misuse or abuse on the part of the Pilotage Authority, Parliament has established a means of control by subjecting the exercise of this power to the prior authorization of the Governor in Council.

Approval to take this action can not be obtained by by-law because when the Pilotage Authority makes a by-law it is exercising a delegated power of legislation which is strictly limited by the terms of the delegation. None of the sections of Part VI which give the Pilotage Authority its regulation-making powers provides that the Pilotage Authority can by regulation empower itself to pay its operating expenses. No by-law legislation is indicated because the point is fully covered in sec. 328. The confirmation of a by-law by the Governor in Council renders its provisions valid only if they are *intra vires* of the regulation-making powers of the originating Authority.

ULTRA VIRES BY-LAW AUTHORIZATIONS

Therefore, all the provisions contained in Pilotage District By-laws which authorize the Pilotage Authority to pay District operating expenses are ultra vires including:

(a) subsec. 3(3) of the New Westminster District General By-law which provides that the "Secretary shall receive a salary at a rate determined by the Authority";

(b) subsec. 10(2)(a) of the same By-law which provides that the Secretary shall pay out of the pilotage fund each month "the salary of the Secretary and such other expenses incurred in conducting the business of the District as are approved by the Authority";

(c) subsec. 8(2) of the Bras d'Or Lakes Pilotage District General By-law which provides that the "Superintendent shall pay out of the Pilotage Fund each month the current expenses of the District";

(d) the provisions to the same effect contained in the small commission District By-laws, such as Bathurst Pilotage District, subsec. 8(2)(a), Botwood Pilotage District, subsec. 8(4), Buctouche Pilotage District, subsec. 8(2)(a), Caraquet Pilotage District, subsec. 8(2)(a), Humber Arm Pilotage District, subsec. 8(2)(a), Miramichi Pilotage District, subsec. 9(2)(a), Pictou Pilotage District, subsec. 8(2)(a), Port aux Basques Pilotage District,

subsec. 8(2)(a), Restigouche River Pilotage District, subsec. 8(2)(a), Richibucto Pilotage District, subsec. 8(2)(a), Shediac Pilotage District, subsec. 8(2)(a).

The sanction required by sec. 328 is a specific sanction for each item of expense and, therefore, can not be granted at large. Recurring expenses, such as salaries, rent, etc., may be approved in advance provided the amount is already determined, e.g. sec. 328 authorizes the appointment and the remuneration of a "secretary and treasurer". The salary of the secretary-treasurer is established by mutual agreement between the Pilotage Authority and the person who is to be hired as such, after which authorization is obtained from the Governor in Council for the Pilotage Authority to incur the liability, i.e., to enter into a contract of hiring and to pay the salary as long as the contract is in force, namely, as long as the secretary-treasurer remains in the employment of the Pilotage Authority or until the Governor in Council permits the Authority to vary the remuneration. For items that can not be determined in advance, authorization must be obtained each time. For small items, the amount of which may vary but which are of a recurring nature, it is considered that it would be proper to prepare a budget or estimate as is done by government departments to obtain the funds they require (vide C. 8, p. 316).

EXCEPTION FOR QUEBEC DISTRICT

Sec. 328 makes an exception of the Quebec District Pilotage Authority and deprives it of permission to pay any of its own operating expenses. As already pointed out this exclusion has the effect, *inter alia*, of making all the money that normally belongs to the Pilotage Authority's expense fund payable to the Consolidated Revenue Fund. This exception is now groundless and should be deleted because the situation that formerly justified it has long since disappeared. This exception was included in the text of the 1875 amendment because, at that time, the Quebec Pilotage Authority (Quebec Trinity House) had other sources of income and because its duties as Pilotage Authority were only part of its responsibilities. Furthermore, the operational expenses of the Authority were very small as a result of the special system provided by the Act of incorporation of the Quebec pilots in 1860: all the dues belonged to the Pilots' Corporation and were payable to it, and the costs of collection were borne by the Corporation. There are many reported cases of the Pilots' Corporation acting as plaintiff to collect pilotage dues. The Quebec Pilots' Corporation has since been deprived of these powers and when the Act was amended in 1934 the Quebec District organization was made to conform with the organization of other Districts. Hence, there remains no reason to retain this limitation on the powers of the Quebec Pilotage Authority. It was intended to delete the exception but this was not done because the Quebec pilots protested, claiming that, pursuant to the

1905 private agreement between themselves and the Minister, all the costs of operating the District and of providing and operating the service were to be borne by the Crown (vide Quebec District).

SEC. 328, C.S.A., NOT FOLLOWED

In practice, the directions contained in sec. 328 are not followed: Pilotage Authority's expenses are being paid out of the pilotage fund without obtaining the sanction of the Governor in Council; ultra vires expenses are being incurred and paid out of the pilotage fund; in those Districts, where the Minister is the Pilotage Authority, the cost of operating the service is not charged to the users but paid directly or indirectly by the Crown.

The imperative provision of sec. 328 is almost completely disregarded, with the exception of the belated approval obtained for the appointment of the New Westminster Secretary-Treasurer. The Commission has been unable to discover when a Pilotage Authority last sought the approval of the Governor in Council before paying for an item of its operating costs. As seen above, blanket authority was purported to be given in by-laws (which were ultra vires) to pay District expenses at the discretion of the Pilotage Authorities concerned without further approval. Despite the clear and imperative provision of sec. 328 the approval of the Governor in Council for the appointment of secretary-treasurers and for their remuneration is not being sought and it is only in the New Westminster District that this error was rectified recently. The present secretary-treasurer had been appointed by the Pilotage Authority in 1952 and his salary was paid out of the pilotage fund for 10 years without the Governor in Council's authorization; it was only in 1962 that this approval was belatedly obtained. It also appears that neither the appointment nor the remuneration of his predecessor in office had ever been authorized. Again, in New Westminster, for many years the members of the Pilotage Authority voted and paid themselves a remuneration out of the pilotage funds. This was not permissible even if the approval of the Governor in Council had been obtained because there is no provision in the Act whereby members of any Pilotage Authority can receive remuneration of any sort. The practice was discontinued, not because the illegality was realized, but as a good will gesture to increase the pilots' remuneration without increasing the tariff. The New Westminster Pilotage Authority regularly made its annual report to the Minister of Transport as required by sec. 332 and the questions of the lack of approval by the Governor in Council and of the illegality of the Commissioners' remuneration were never raised by D.O.T.

The Department of Transport is acting on the assumption that it is no longer necessary to comply with the provisions of sec. 328 whenever the

payment of District expenses is authorized in a District By-law approved by the Governor in Council. In any event they feel that sec. 328 is not capable of practical application.

> "It would, of course, be impracticable to obtain Governor in Council approval of expenses prior to their payment and we have never considered that it is necessary to have an Order-in-Council passed expressly under the provisions of section 328 when the matter is covered in the By-laws." (D.O.T. letter dated Jan. 7, 1965, Ex. 1427 (*l*)).

By deciding not to insist on compliance with the requirements of sec. 328, by concluding that the section could not be implemented and by letting the various Pilotage Authorities spend pilotage funds without the sanction of the Governor in Council, the Department of Transport substituted its judgment for a decision made by Parliament. This, of course, was illegal. No departmental official—indeed, not even the Government itself—can substitute its opinion in a matter of legislation for a decision of Parliament. When difficulties in application occur, it is the responsibility of the department responsible for implementing the Act (in the present case the Department of Transport) to seek a new decision from Parliament in the form of proposed legislation. In the meantime, the imperative provisions of the Act must be enforced as they stand.

The question was not raised for several reasons. First, most of the operating costs of Pilotage Districts are now paid out of Government funds. It has been the practice in Districts where the Minister is the Pilotage Authority (except Bras d'Or Lakes) to have all their expenses paid by the Crown and not to assess the pilots for this purpose. In the other Districts these expenses are kept to a strict minimum.

Furthermore, as will be shown later, most Pilotage Authorities in the large Districts have assumed the power of managing the pilotage service and at times they provide part of the service. This has caused a great increase in District expenses and, at the same time, has decreased the pilots' operating costs. In Districts where the Minister is the Pilotage Authority (except Bras d'Or Lakes) there is no problem because the expenses have all been absorbed by the Crown. In other Districts these expenses were illegally deducted from the pilotage fund but there was no protest from the pilots because they benefited from the group arrangement. Protests were lodged only when and where the Crown became responsible for operating the pilot vessels and took over the ownership of the vessels, without compensating the pilots.

In New Westminster, for instance, for many years until the Department of Transport took over in 1959, the New Westminster Pilotage Authority owned pilot vessels and operated a service which caused a large capital outlay and considerable maintenance and administrative expenses, including the purchase and upkeep of the boats and the purchase of a waterfront property with a wharf. Other transactions followed such as renting part of the land and premises to third parties, renting other waterfront properties

from the Provincial Government, hiring the pilot boat crews, and paying for repairs and insurance. At first, the pilot boats were registered in the name of the Secretary of the Commission and later, on orders from the Department of Transport, in the name of the members of the Pilotage Authority. When the service was taken over by the Department of Transport, the changeover took the form of a simple transfer of the ownership of the pilot boats from the Pilotage Authority to the Department of Transport without any compensation either to the Pilotage Authority or to the pilots. The Department of Transport explained that the boats belonged to the Pilotage Authority because they were bought with the Pilotage Authority's own money, which was public money because it consisted of pilotage dues, and that, pursuant to the existing By-laws, the pilots were entitled only to the net revenue of the District. However, the legal position was entirely different. The Pilotage Authority had no power and no right to undertake to provide part of the pilotage service or to assume part of the contractual responsibility of the pilots by providing their transportation to and from ships. The fact that it did so could not legalize the situation. Indeed, the Pilotage Authority was only acting on behalf of the pilots, for it purchased the pilot boats and paid most of the related expenses with the pilots' own money. The pilots would have had a good claim that they were the real owners of the pilot boats. From the practical point of view, however, this transaction by the Department of Transport was all to the advantage of the pilots in that the Department absorbed the large debt that was still outstanding on the purchase of the boats, and also from that date provided pilot boat service at its own expense, with no charge to the pilots. When it was decided to levy a charge it was passed on to shipping by a corresponding increase in pilotage dues.

The same situation occurred in other Districts, *inter alia,* at Halifax, where it gave rise to a dispute between some temporary pilots and the Crown. The pilot vessel *Camperdown* had been owned and operated by the Halifax Pilotage Authority and, in order to finance its purchase the Pilotage Authority was obliged to obtain financial help from the Crown which lent the necessary money but required an engagement on the part of the pilots. The vessel was duly insured with benefits payable to the creditor, the Crown. When the vessel was lost as a result of a collision, the Crown received the insurance indemnity and some pilots sued the Crown in order to recover their share. At that time the Halifax By-law contained a section to the effect that the pilot boats belonged to the Pilotage Authority, and that the pilots could claim no share in them. The case was heard by the Exchequer Court (1946 Ex. C.R. 1 Himmelman v the King). The Court held that (p. 14) "the vessel, fuel and food purchase out of the fund as expenses under 6(a) are not the property of the pilots and they have only a right of user in them". At p. 15, the Court added that the pilots "are not the owners of the money in the Halifax Pilotage Fund and they do not own the chattels

required in the operation of the service and paid for as general expenses. Under their mode of remuneration provided by By-law 6, they were entitled to only the balance left after the payment of expenses out of revenue". It should be pointed out here that the legality of the two sections of the By-law dealing with the ownership of the pilot boat by the Pilotage Authority and the right of the Pilotage Authority to pay pilot boat operational expenses out of the pilotage fund was not challenged; they were taken by the Court as valid and binding upon both parties.

The Court held, however, that the indemnity paid by the insurance company could not belong to the Pilotage Authority because the "pilotage fund", according to sec. 318, 1934 C.S.A. (now 328), was composed only of the pilotage dues and the licence fees, with the result that the indemnity had to be paid to the Consolidated Revenue Fund. This created an awkward situation resulting from the fact that the Pilotage Authority had assumed powers that it did not have, and there was nothing in the Act to cover the situation. The judgment on this point reads as follows:

> "While the limitations in Section 318 of the Canada Shipping Act and in By-law 6, do not permit the proceeds to be deposited in the Halifax Pilotage Fund, the proceeds could be placed, in trust or for a special purpose, in the Consolidated Revenue Fund and be paid out under section 22(2) of the Consolidated Revenue and Audit Act, Chapter 31, Statutes of Canada 1931. The proceeds should be treated in the same way as the money in the Halifax Pilotage Fund and out of the combined totals would come the general expenses, including the purchase of a new vessel".

As will be shown later (C. 6, pp. 192 and ff.) the complete pooling of the pilots' earnings as a mode of remunerating the pilots is not permissible under the provisions of Part VI. However, in many Districts the By-law provides for the compulsory pooling of the pilots' earnings and the pool is operated by the Pilotage Authority. Disbursements incurred for the general benefit of the pilots, such as unemployment, health and accident insurance premiums or the expenses of the Pilots' Committee when acting on behalf of all the pilots are entered as District operating expenses, and paid out of the pool. None of these are Pilotage Authority's expenses but are pilots' own expenses and, therefore, do not come under the provisions of sec. 328. To make these payments the Pilotage Authority need not seek the Governor in Council's approval (and if obtained it would be worthless as legal authority to effect the payment) but must have the unanimous consent of all the pilots because, in fact, it is only acting as their agent and doing their bookkeeping and clerical work. As said earlier, the Pilots' Committee has no power to bind the pilots of a District by its decision. This is *a fortiori* true when the question involves the disposal of the pilots' own earnings; the refusal of one pilot would make it impossible and illegal on the part of the Pilotage Authority to make any deductions from his earnings for the purpose of paying any of these expenses. The consent of the pilots cannot be presumed

and any pilot who had not assented to any such group expenditure would have a claim against the Pilotage Authority which made a deduction from his earnings without his consent. However, this practice is being followed at the present time. (Vide, for instance, in Part II of the Report, the analysis of the Pilotage Authority's expenditures in the British Columbia District.)

DIRECT AND INDIRECT SUBSIDIES

The principle that a District should be financially self-supporting extends only to the payment of the Pilotage Authority's own expenses that it can legally incur. The question whether the pilots derive enough from their profession to enable them to make a reasonable living is another matter. The Pilotage Authority is obliged to fix the dues at a level that is a fair charge for vessels to pay for the nature of the pilotage service rendered. The rôle of the Pilotage Authority is merely to ascertain the qualifications of the pilots who offer their services and not to see that such service is provided, if none exists.

Therefore, when the dues are fixed at the highest reasonable rate and the number of pilots can not be reduced without affecting the quality and efficiency of the service, the Pilotage Authority—under the present legislation—cannot be concerned whether the income that the pilots derive is sufficient or not. If the situation becomes such that, through lack of traffic and other circumstances, the profession at a given place does not attract any pilot, this only means that, under the present legislation as provided in Part VI C.S.A., a Pilotage District and a Pilotage Authority can no longer serve any useful purpose and the District should be abolished. This is the case, for instance, in the Churchill District where there is no local pilot available, and where the income that could be derived from pilotage for some 80 odd ships that call during the 10 weeks the port is open would not be sufficient alone to attract the requisite number of qualified mariners. On the other hand, on account of local circumstances, an annual income from pilotage of $1,000 or even less at Georgetown and Souris, P.E.I., interests the pilots there because they are on location and pilotage is only one of their occupations. Their other occupations allow them to be available for pilotage duties and their income from all sources is sufficient in the aggregate to meet their needs.

However, where a pilotage service is maintained in the public interest the Government has been resorting to an indirect method of attracting competent pilots, i.e., by assuring them of an adequate income. In addition to providing them with other employment (as is done at Churchill), the Government contributes indirect subsidies by assuming most, if not all, of the pilots' own operating expenses. For a study of the income derived from pilotage by the pilots of the various Districts, reference is made to the financial study by McDonald, Currie & Co. (Appendix IX to this Report) especially paras. 34 to 54.

BACKGROUND OF SUBSIDIES

In order to determine whether the plan of organization provided by Part VI is adequate for present day needs, it is necessary to review briefly the events that led to large scale Government intervention in the pilotage field. Prior to Confederation, in conformity with the principle that the intervention of the Crown in pilotage was merely for the convenience of the shipping interests and that the costs incurred should be borne by them, Crown money was never paid, either directly or indirectly, to support pilotage services. The operating costs of the licensing authorities were levied on the pilots' earnings, except in Quebec and Montreal where the duties and responsibilities of the Pilotage Authority were made an additional function of the local Trinity House. Since these Corporations had their own sources of income in the form of light dues and harbour dues which they were authorized to levy on every ship using their facilities, they made no charge for the services they rendered as Pilotage Authority and the pilots received the full amount of the pilotage dues they had earned. On the other hand, the pilots had to bear the full cost of transportation to and from ships. There was no question that they were all independent contractors operating either alone or, at times, sharing the costs of their pilot vessels in partnerships called companies. This was a period of free enterprise when the pilots openly competed for customers.

The first major change in the system was brought about in 1860 when the Quebec pilots succeeded in having the competitive system abolished. The 1860 Act forced them into a compulsory partnership and the individual pilots lost the right to be a party to pilotage contracts which from then on were made by the Corporation. All pilotage dues belonged to the Corporation. The pilots had to serve in turn as directed by the Corporation, subject, however, to the right of the Master to choose any other pilot that was available. Providing transportation to and from ships in the boarding area became a charge against the Corporation. All the small, individual pilot boats were replaced at the Bic boarding area by four large schooners in which all the available pilots lived. The schooners were kept constantly cruising to meet arriving ships. The pilots were paid, on the basis of time available, an equal share of the net revenue of the Corporation, i.e., they still had to pay the full cost of pilotage operations but there was some reduction in expenses because of the joint operations conducted by the Corporation.

At the time of Confederation the Crown did not pay either the Pilotage Authorities' expenses or the operational costs of pilotage. The special type of organization in the Quebec District confirmed the rule that all the costs of providing the service were borne by the pilots.

The 1873 Pilotage Act retained the same principle and when the pilots had to resort to co-ownership or to third parties to provide pilot vessel service, the Pilotage Authority had the power to fix by by-law what part of the pilotage dues was payable to the owners of the licensed pilot vessels and

what part belonged to the pilots. The Pilotage Authorities were not entitled to pay any of the few expenses they had incurred out of the pilotage dues and the only source of money to meet these obligations was the fees for licences and pilotage certificates. However, the 1873 Pilotage Act, by way of an exception for the Pilotage Authorities of Halifax and Saint John, created a dangerous precedent by authorizing the payment from government funds of a sum not exceeding $800 a year for the remuneration of their secretary-treasurers (secs. 11 and 16, 1873 Pilotage Act).

No doubt Parliament soon realized the implication of this precedent because two years later, in 1875 (30 Vic. c. 28), secs. 11 and 16 of the 1873 Act were repealed and replaced by the provision that is sec. 328 of the present C.S.A., whereby all Pilotage Authorities, except Quebec, were authorized to use licence fees as well as pilotage dues to pay their expenses provided they had the approval of the Governor in Council.

The next change in the basic situation affected the Montreal pilots. As seen later, at the time of Confederation they were free, independent contractors, each paying his own expenses. Since the Montreal Trinity House had other sources of revenue it was satisfied with the licence fees and did not charge the pilots for any of its administrative costs. The situation changed in 1873 when, after a further attempt to obtain incorporation and after three years of discussion with the Pilotage Authority and the shipping interests, the Montreal pilots were authorized to elect from their number a committee of five to look after their interests and to operate a tour de rôle system aimed at ending the ruinous competition that had plagued their profession. The Pilots' Committee opened an office at Quebec and hired an agent to look after the tour de rôle assignment of pilots. The resultant expenses were borne by the pilots themselves. But, in 1878, their Pilotage Authority (at that time the Montreal Harbour Commissioners) established a precedent that was not authorized by their charter by assuming the operational costs of the pilots' despatching office at Quebec. The result was that the pilots' agent became the Pilotage Authority's employee and, for the first time in the history of pilotage in Canada, a Pilotage Authority took over the management and the operation of the pilotage service. In 1885, the Pilotage Authority refused to continue to pay the operating costs so incurred and for that purpose levied a 2% deduction of the pilots' revenue. The pilots charged that the Pilotage Authority was making a profit out of them because the aggregate deduction exceeded the expenses incurred. Furthermore, they argued that, as they were paying the expenses, the despatching agent ought to be their own employee and not responsible to the Authority. This was one of the contentious points which caused the Montreal pilots' strike in 1897. This eventually resulted in another important precedent: the appointment of the Minister as Pilotage Authority in lieu of a local board. Although no special research was undertaken to determine whether at that time the Minister assumed the cost of the pilots'

office at Quebec and the remuneration of their despatcher, it is assumed that this was done, since this was to be the case wherever the Minister became the Pilotage Authority.

In 1905, the Minister took over from the Quebec Harbour Commissioners as Pilotage Authority for the District of Quebec. In his capacity as Minister of Marine and Fisheries, and not as Pilotage Authority, he concluded an agreement with the Quebec Pilots' Corporation to relieve the Corporation of the cost of providing and manning the pilot vessels and maintaining the pilots' despatching office at Quebec. The Crown furnished new pilot vessels and the Corporation sold its four schooners. As part of the bargain, the Minister engaged the Crown to indemnify the pilots for their increased costs resulting from the loss of board and lodging formerly available in their schooners. A meal allowance at the seaward station and also at Port Alfred and Chicoutimi was paid regularly by the Crown thereafter until it was cancelled in 1961. Furthermore since the number of pilots was considered too great, the Minister induced the senior pilots to retire by undertaking that the Crown would pay an annual pension of $300, in addition to the normal pensions they were entitled to from their pilot fund. Four of these pensioners were still being paid in 1966.

When in 1914, following the Lindsay Commission, a special Act of Parliament (4-5 Geo. V c. 48) deprived the Pilots' Corporation of all its powers over the management and control of pilots and apprentices and gave these powers to the Minister of Marine and Fisheries as such, and not as Pilotage Authority, the Act also included the transfer of powers and responsibilities with regard to pilot vessels that the Minister had been enjoying since 1905, pursuant to the aforesaid agreement. In the 1927 C.S.A. the distinction between the Minister as Pilotage Authority (that is, as licensing authority) and as managing authority in place of the Pilots' Corporation is retained. The Minister as Pilotage Authority still has only the rights and powers of the Quebec Harbour Commissioners (sec. 395), since the pilotage dues that are payable elsewhere to the "Pilotage Authority" are by exception payable in Quebec to the "Minister". The legislature thereby clearly indicated that it is not in his capacity as Pilotage Authority because otherwise the distinction would be meaningless. At that time the Minister was also the Pilotage Authority for Montreal but the distinction is made only in the Quebec District where the Minister was acting in the two aforesaid capacities (sec. 456). Elsewhere, except with respect to the management of the Quebec Decayed Pilot Fund, the name of the Minister replaced the name of the Quebec Pilots' Corporation (secs. 491, 492, 493).

In 1934, all provisions dealing with the special status of the Minister as managing authority for pilotage operations in Quebec in lieu of the Pilots' Corporation were deleted from the Act, as were the provisions whereby the Minister as Pilotage Authority for the Districts of Quebec and Montreal had

only the powers of the public corporations he superseded. The result is that there exists no statutory provision giving anyone except the pilots themselves individually the right and the responsibility to provide the service. They have become free and independent entrepreneurs as they were before 1860, having the same status that the pilots had in law in all the other Districts. However, the Department continued to assume the operational costs both of the Minister as Pilotage Authority and those incurred as a result of the management and the operation of the service which he continued to assume in practice. This is the situation that now exists in all Districts (except pilot boat charges in Bras d'Or Lakes District) where the Minister is the Pilotage Authority.

Another precedent was set in the years 1948 to 1951 when the Crown recognized the necessity of maintaining an adequate pilotage service at Halifax, Saint John and Sydney, in the interest of the public. In order to give the licensed pilots of Saint John an incentive to pursue their profession, the Department of Transport included in its estimates certain sums that could have been paid to the District pilotage fund if the average earnings of the pilots in these Districts fell below a reasonable level. In the estimates of 1949/1950 the amounts so provided are: Halifax $5,000, Saint John and Sydney $2,500 each (transcript of evidence Vol. 133, page 17010). However, trade increased and the Crown never had to make any of these payments.

The question of Government assistance and subsidies was touched on in the report of the Audette Committee (Ex. 1330). The Committee recommended that similar assistance be extended to all other Districts where the Minister was the Pilotage Authority. This recommendation was based simply on the ground of discrimination and was made without ascertaining whether the reasons that warranted Government assistance, for instance, in Quebec, existed in the other Districts. In its report the Committee remarked that:

> "... the State has made certain monetary contributions towards the expenses of pilots in various districts, and has further placed at their disposal certain administration machinery to effect tasks which otherwise would have to be done by the pilots themselves or by other persons at their expenses."
>
> ...
>
> "In all districts, excepting that of Montreal, certain pilot vessels are essential. In the Quebec district a Government vessel has been made available to the pilots over a long period of years without cost to the pilots of that district. In most other districts the pilot vessels are maintained at the expense of the pilots themselves though varying forms of relief have been granted recently by the Government in certain districts. This variation in practice has produced certain resentment among those who have benefited to a lesser extent, or not at all, from the expenditure of public funds. During the course of our hearings we found this resentment to have reached a very acute point in the district of Halifax. This is partially due to the somewhat confused situation prevailing in that district in relation to the expense of maintaining the pilot vessels. However, it is probably due in much greater part to the fact that during the war the same vessel that is provided gratuitously by the Government for the use of the Quebec district pilots at Father Point was made available to the Halifax district for sometime and the pilots of this district were required to make a substantial payment for its use ...

> However, your Committee does feel that, in this instance, the Halifax pilots may well have had cause for complaint." "The varied practice throughout the different districts over a period of years, the present difficulties with which the pilots are faced in their finances, the public interest in the services rendered to transportation by the pilots and a desire to dispel any inequity that may exist, have influenced the thoughts of your Committee in relation to this much disputed subject. We have reached the conclusion that we should recommend the assumption by the Government of the full cost of acquisition, operation, maintenance and replacement of pilot vessels in the Sydney, Halifax, Saint John and British Columbia districts . . . "

For similar reasons the Committee also recommended the assumption by the Government of the cost of operating the pilot stations in these Districts.

The Audette Committee's report is dated November 29, 1949. On January 25, 1951, by P.C. 120/422, the Government was authorized to assume, effective April 1, 1950, the cost of operating, maintaining and replacing pilot stations and of providing pilot vessel service in the Districts of Sydney, Saint John, Halifax and British Columbia. The grounds for this extraordinary measure are set out in the preamble of the Order in Council, i.e. "with a view to assuring adequate remuneration for the pilots . . ., and to avoiding increases in pilotage rates . . ." (Ex. 52).

The same year, P.C. 164/1166 approved financial assistance to cover the cost of maintenance, operation and repairing of pilot vessels in the Pilotage District of Bras d'Or Lakes. It amounted to $200 per year which was raised to $500 in 1954 (P.C. 1954/37/590) and to $750 in 1960 (P.C. 36-257). The subsidy was discontinued in October 1963 when the necessary funds were raised from shipping through an appropriate increase in the pilotage dues (pilot boat charges). On March 5, 1964, the Orders in Council authorizing the grant were revoked (P.C. 1964-24/336)(Ex. 1497a).

In 1959, on the same ground of discrimination, the same assistance that had been granted to the Districts where the Minister was Pilotage Authority was extended to the Districts of St. John's, Newfoundland, and New Westminster (P.C. 1959/19/1093). But, in order not to increase the expenditure of government funds, shipping was required to meet part of the cost through the device of a pilot boat charge that the Pilotage Authorities concerned were required to include in their By-laws and pay over to the Crown when collected, i.e., $10 for pilot boat service in the Districts of Sydney, Halifax, Saint John, N.B., St. John's, Nfld., British Columbia and New Westminster, and $20 at Father Point, Quebec. In these Districts, except Quebec, the Crown undertook to reimburse half the cost of hiring privately-owned pilot boats where no regular service existed (Ex. 52). This is the situation that now prevails.

As seen above, prior to 1959, the Crown sought no reimbursement from either the Pilotage Authorities, the pilots, or the shipping interests for the

services and assistance it provided. The first step of this nature took the form of a pilot boat charge in 1959. Up to then, the practice had been to make a single aggregate charge for pilotage dues. When fixing the tariff, the Pilotage Authority concerned had taken into consideration the pilots' transportation costs to and from vessels. On this occasion, the same method could have been followed by increasing the existing rates by the amount charged by the Department of Transport for the use of its pilot vessels. Instead, a new procedure was adopted. The increased charges took the form of a separate item of pilotage dues, that is, the pilot boat fee (except in the Churchill District where, up to 1966, only an aggregate charge was made). In fact, this consisted of a substantial overall increase in pilotage costs to shipowners, but by making the pilot boat charge a separate charge additional to the regular pilotage dues, rather than combining both, the impression was not left that the pilot vessel service was being paid for by the pilots out of their own revenue.

Another precedent was established by splitting the pilotage dues into two parts, one ear-marked for the payment of the pilots' own operational costs, namely their transportation expenses, and the other the pilots' remuneration. The St. Lawrence Pilots' Federation recommended extending this system to cover all pilotage costs.

This additional charge brought substantial revenue to the Department of Transport. In 1964, for instance, the revenue derived from the pilot boat charge at Les Escoumains in the Quebec District amounted to $153,920, and a surplus over the total cost of operation of the pilot vessel service at that station of $7,000. But this is only part of the cost incurred by the Government for operating the District. For example, in 1964, the cost of operating the two pilotage offices in the Quebec District, i.e., at Quebec and Les Escoumains, amounted, in round figures, to $114,000. After taking into account the $7,000 surplus from pilot boat operations at Les Escoumains, the Crown had to pay $107,000 in the Quebec District that year.

In 1961, the Treasury Board reacted to the increasing amount paid by the public to operate the pilotage service throughout the country and suggested these payments were no longer justified in view of the high level of income being received by most pilots. As a result, the pilots of some Districts were asked to contribute part of their revenue to pay general pilotage expenses. *Inter alia*, the Quebec pilots were asked to contribute 4% and the Saint John, N.B., pilots 25%. This proposal was one of the main points of contention that caused the 1962 strike by the St. Lawrence River pilots, a walk-out which the British Columbia and the Saint John pilots threatened to join.

On this occasion the Department of Transport did not use the same strategy it had employed when establishing the pilot boat dues: instead of increasing the dues in order to pass the cost on to the shipping interests, it tried to charge the pilots, thereby decreasing their earnings.

The Pilots' Federation recommendation is to the effect that the pilotage dues be composed of two items, the first to defray the operational and administrative costs of the District; the second reserved solely for the remuneration of the pilots. Both should be determined separately and the pilots should play no part in fixing the level of the first item.

EXTENT OF SUBSIDIES

The study of the cost of pilotage in Canada for the five year period 1961 to 1965 (vide *General Introduction*, p. 12) made by the firm of chartered accountants, McDonald, Currie & Co. (vide Appendix IX), reveals that direct and indirect subsidies paid by the Government to assist pilotage services in Pilotage Districts governed by Part VI of the Act covered between 16% and 13% of the total cost; the rest was met by pilotage dues, i.e., borne by shipping. In 1965, the total cost amounted to $8,820,364, of which $7,625,781 was borne by shipping and $1,194,583 was "Cost to Government"[2].

The situation both in money and percentage for the five years is as follows:

Year	Total Cost of Pilotage		Cost to Shipping		Cost To Government	
1961.....	$6,899,163	100%	$5,758,144	84%	$1,141,019	16%
1962.....	$7,075,182	100%	$6,012,578	86%	$1,062,604	14%
1963.....	$7,257,920	100%	$6,159,435	84%	$1,098,535	16%
1964.....	$7,821,818	100%	$6,726,944	86%	$1,094,874	14%
1965.....	$8,820,364	100%	$7,625,781	87%	$1,194,583	13%

While during these five years the "Total Cost of Pilotage" increased by 28% ($1,921,201)[3], the amount in dollars of Government assistance remained substantially the same, with the result that there was a slight decrease in percentage. The major portion of the increase, i.e., $1,786,803, was pilots' gross income which is paid out of pilotage dues (vide Appendix IX, para. 76). The apparent static situation in "Cost to Government" is mainly due to savings attained by relocating the Quebec seaward station from Father Point to Les Escoumains which permitted the use of smaller and less expensive pilot vessels, thus changing a large operational deficit to a slight surplus in 1964, and the gradual closing down of the Marine Reporting Service now

[2] The Government's total financial involvement in 1965, including the Great Lakes area (administered under Part VIA C.S.A.) and Goose Bay (where pilotage is performed by two D.O.T. employees) was 15% of the total cost, the balance being borne by shipping, i.e., Total Cost $11,945,812. Cost to Shipping $10,642,851, and Cost to the Government $1,302,961. For details, reference is made to Appendix IX, paras. 9 and 10.

[3] For an analysis of the increase in Cost to Shipping, vide Appendix IX, McDonald, Currie & Co. study, paras. 77-80.

being replaced by a more modern and efficient but more expensive marine traffic control system (vide Part IV, Quebec District, *Marine Reporting Service*), the cost of which, for accounting purposes, is, under the present arrangements, charged to the Marine Hydraulics Branch of the Department of Transport and, therefore, is no longer included as a component in the pilotage "Cost to Government". This change in departmental accounting procedure materially modifies the financial picture for the purpose of comparison and statistics. These factors have concealed the substantial increase in administrative cost to Government in the pilotage field, as indicated hereunder without (item *Total*), and with (item *Grand Total*), the item *Marine Reporting Service*. (Vide D.O.T. letter dated August 30, 1967, Ex. 1522). (Vide also Comments contained in Appendix IX, McDonald, Currie & Co. study, paras. 81-85.)

Cost to Government	1961	1965	Difference	
H.Q. Administration	$ 59,006	$ 113,383	$ 54,377	+ 92%
District Administration	441,200	536,200	95,000	+ 22%
Pilot Vessel Service	486,600	448,000	−38,600	− 8%
Total	$ 986,806	$ 1,097,583	$ 110,777	+ 11%
Marine Reporting Service	154,213	97,000	−57,213	− 37%
Grand Total	$ 1,141,019	$ 1,194,583	$ 53,564	+ 5%

At the District level, the picture is different. Although, generally speaking, for any given District the Cost to Government figure remains practically unchanged from year to year, there is a striking difference between them. The distribution of Government assistance and its components for the year 1965 is analysed in Table "A", to follow. The Districts which received Government assistance are listed by order of decreasing total cost, by Districts where the Minister is Pilotage Authority and Commission Districts. The figures are taken from Schedule 1 to the McDonald, Currie & Co. study (Appendix IX). The Ottawa Headquarters expenses of $113,383 ($148,000 when the Great Lakes and Goose Bay are included) have been pro-rated among Districts receiving assistance from D.O.T. on the basis of their respective total cost. Their share is included in the items "Total Cost per District" and "Cost to Government" which accounts for the slight increase over the corresponding figures found in the McDonald, Currie & Co. study. Such an arbitrary rule was necessary because there are no data on which to base calculations. Reference is also made to the analysis of these costs to the Government which are contained in paras. 55 to 69 of the McDonald, Currie & Co. study.

In addition to the qualifying remarks contained in the McDonald, Currie & Co. study, it is important to note the following:

(a) The item "Administration Cost" is not necessarily what was spent for the District where it appears. Consequently, this slightly affects the item "Cost to Government" in each of these Districts, although the Government total cost is exact. There are no data to permit appraisal of the value of the administrative services rendered by one District to another.

  (i) In the case of contiguous Districts, part of this expense is for the administration of the pilotage service of the adjacent District. For instance, despatching Montreal River pilots upbound is effected by the Quebec District headquarters as a service to the Montreal District.

  (ii) The reason why the Bras d'Or Lakes District administration item is shown as "nil" is because its administration is carried out by the Superintendent of the District of Sydney.

(b) The financial statement does not give the true picture of the Churchill District. Indirect assistance is given by providing the pilots with an additional source of income by employing them as Port Warden and Assistant Port Warden at the same time, and by utilizing as pilot vessels the two harbour tugboats operated by the National Harbours Board. There would be a substantial deficit if the Department of Transport had to provide and maintain an exclusive pilot vessel service. Also, a direct subsidy would be required to provide reasonable remuneration for the pilots if they were not also employed as Port Wardens and paid accordingly.

(c) The "Cost to Shipping" is limited to that paid as pilotage dues, but does not include other costs paid by shipping in connection with the service. Three examples are:

  (i) the transportation of pilots when paid directly by ships to private contractors furnishing pilot boat service in the Harbour of Quebec, at Three Rivers and in Montreal Harbour, which in the year 1965 is estimated at $250,000;

  (ii) the unofficial remuneration of $25.00 per trip paid by most ships of the Shipping Federation to apprentice pilots in the Districts of Quebec, Montreal and Cornwall, but for which no record is kept;

  (iii) the cost to shipping of pilotage services operated outside federally established Districts.

TABLE "A"

ANALYSIS OF DIRECT AND INDIRECT SUBSIDIES (COST TO GOVERNMENT) PAID IN 1965 TO DISTRICTS GOVERNED BY PART VI C.S.A.

Districts	Total Cost per District		Cost to Shipping		Cost to Government		Components of % Cost to Government			
	$	% over Grand Total	$	% of the District Costs	$	% of the District Costs	H.Q.	Dist. Admin.	Pilot Vessel Service	Marine Reporting Service
Districts Where the Minister is the Pilotage Authority:										
Montreal	2,821,123	32.0	2,588,613	91.76	232,510	8.24	1.32	5.92	—	1.0
Quebec	2,014,446	22.8	1,791,176	88.91	223,270	11.09	1.32	5.86	0.5	3.41
British Columbia	1,898,314	21.5	1,636,276	86.2	262,038	13.8	1.32	6.16	6.32	—
Cornwall	668,265	7.6	607,451	90.9	60,814	9.1	1.32	7.78	—	—
Halifax	410,139	4.7	255,729	62.35	154,410	37.65	1.32	9.75	26.58	—
Saint John, N.B.	260,086	3.0	138,456	53.23	121,630	46.77	1.32	6.81	38.64	—
Sydney	160,029	1.8	88,919	55.57	71,110	44.43	1.32	14.68	28.43	—
Bras d'Or Lakes	26,680	0.3	26,328	98.68	352	1.32	1.32	—	—	—
Churchill	10,985	0.12	10,840	98.68	145	1.32	1.32	—	—	—
	8,270,067	93.8	7,143,788	86.4	1,126,279	13.6				
Districts Where a Local Commission is the Pilotage Authority:										
New Westminster	174,653	1.98	150,347	86.08	24,306	13.92	1.32	—	12.6	—
St. John's, Nfld.	151,504	1.72	107,506	70.96	43,998	29.04	1.32	0.66	27.06	—
	326,157	3.7	257,853	79.1	68,304	20.9				
Total for Districts Receiving Government Assistance	8,596,224	97.5	7,401,641	86.1	1,194,583	13.9				
Total for Remaining 14 Districts (All Commission Districts) Receiving no Assistance	224,140	2.5	224,140	100.0						
Grand Total	8,820,364	100	7,625,781	87	1,194,583	13				

The revealing figures in Table "A" prompt the following observations:

(a) Of the 25 Districts (26 before the abrogation of Lewisporte in 1964) only 11 received financial assistance from the Government and the remaining 14 (all Commission Districts) met all the cost of administration and operations out of pilotage dues; in other words, the total cost in these 14 Districts was borne by shipping.

(b) Most pilotage in Canada (not counting the Great Lakes) is performed in 9 of these 11 Districts which account for 97% of the total cost of pilotage and receive, between them, all Government pilotage assistance (excluding a small fraction of Ottawa Headquarters expenses). The aggregate total cost of the 14 Districts receiving no Government assistance amounts to only 2.5% of the grand total.

(c) Government assistance for all 11 Districts varies considerably in amount and percentage of the total cost. For instance, in 1965, the amount for the District of Halifax was $154,410, i.e., 37.65% of its total cost, while in Montreal it amounted to $232,510, i.e., only 8.24% of its total cost.

(d) The table indicates the relative importance of the various Districts, *inter alia*, the St. Lawrence sector, composed of the Districts of Quebec and Montreal, remains the most important pilotage area in Canada and accounts for 54.8% of the total cost of pilotage in Canada (Great Lakes excluded).

(e) River pilotage in the St. Lawrence Districts, i.e., Montreal, Quebec and Cornwall, and coastal pilotage in British Columbia, account for 83.9% of the total cost of pilotage in Canada. This alone reveals the inadequacy of the present pilotage legislation which was conceived solely for port pilotage (vide C. 3, pp. 49 and ff., and C. 7, p. 218.

(f) The deciding factor whether or not to provide Government assistance is not the importance of a District but its actual financial need, always assuming the service is required in the public interest. For instance, pilot vessel service in Quebec Harbour, at Three Rivers and in Montreal Harbour is not provided by the Department of Transport, as at Les Escoumains, because the requirement is adequately met by private contractors; this could not be done at Les Escoumains without subsidizing the operation or increasing the pilot boat charge substantially. In "Cost to Government", while the item "Administration" tends to be proportionate to the financial importance of the District, and increases with the volume of pilotage requirements, this is not the case with the overall cost of pilot vessel service (vide Appendix IX, McDonald, Currie & Co. study, paras. 27-33). This substantial item is not governed by the demand for pilotage, but dictated by the prevailing conditions in

boarding areas. For instance, very substantial savings were made by transferring the Quebec eastern boarding station from the exposed, remote boarding area off Father Point to the vicinity of Les Escoumains, which is much closer to shore and less exposed. This move made it possible to replace the large pilot vessels required at Father Point, which had to provide sleeping accommodation for the pilots, by much smaller ones at Les Escoumains, that comfortably shuttle between the shore station and the boarding area. What was formerly a very expensive operation is now close to making a profit. For the same reason as at Father Point, large expensive pilot vessels must be maintained at Halifax and Saint John, N.B. Furthermore, in these two Districts, the same pilot vessel service has to be maintained throughout the year despite the fact that pilotage is greatly curtailed outside the winter season. The pilot vessel service provided at Sydney and St. John's, Newfoundland, is costly when expressed in percentages because of the relatively small amount of pilotage in these Districts.

The present situation is, therefore, a complete departure from the basic principle of the 1873 Pilotage Act which, in this respect, passed unchanged into Part VI of the present legislation, namely, each Pilotage District is expected to be independent and self-supporting financially and the operational costs of the service are considered the pilots' responsibility, which principle has been, and continues to be, ignored, notwithstanding the law.

REASONS ADVANCED FOR GOVERNMENT ASSISTANCE

The reasons why the Government provided assistance are mainly the following:

(a) the practical impossibility, in certain Districts, of requiring shipping to bear the overall costs needed to provide an adequate, efficient pilotage service, including a reasonable income for the pilots;

(b) the consideration that it is in the public interest to maintain a pilotage service even though it is not financially self-supporting;

(c) the principle that there should be no discrimination in the method of subsidizing the pilots.

The last reason is obviously a fallacy because needs and operational costs can not be compared between Districts. The main question is whether at a given place it would be realistic to charge shipping the full costs of pilotage service. If the answer is in the negative, the next question is whether public interest requires an adequate pilotage service in that locality: if it does, the Government has good reason to provide whatever assistance is needed to ensure an adequate service; if not, the District should be abolished.

The reason why the Department of Marine and Fisheries assumed responsibility for pilot vessel service at the seaward station in the Quebec District in 1904 was, no doubt, because the Quebec Pilots' Corporation was not financially able to provide the pilot vessel service that became necessary with the advent of larger steamships which required more sea room to manoeuvre in the boarding area than was available off Bic. This meant replacing the pilots' schooners owned by the Pilots' Corporation with expensive steam pilot vessels because the intended boarding station off Father Point was exposed and provided no shelter for the schooners. The Corporation was not in a financial position to provide new vessels unless there was a substantial increase in the rates, a step which the shipping interests would have strongly opposed.

During the depression years the Government guaranteed the Halifax, Saint John and Sydney pilots a minimum annual income. At that time, shipping was unable to pay higher pilotage dues; in fact, in the St. Lawrence River Districts during that period, a 15% to 25% overall decrease in dues was effected in order to assist shipowners.

ECONOMIC IMPACT OF PILOTAGE COSTS

In most Pilotage Districts, the provision of an adequate, efficient pilotage service has become a public necessity. Hence, it must be determined whether or not shipping can reasonably be asked to bear the full cost of the service in these areas. In this connection, the incidence of pilotage rates on the cost of shipping and on the Canadian economy should be considered.

After studying the evidence adduced at the hearings on the matter and the official economic available data, the Commission concluded that pilotage rates being charged in the various Pilotage Districts are not excessive, and that their incidence on the overall cost of water transportation of goods is in fact minimal; that, therefore, the Canadian economy in general would by no means be adversely affected if the dues had been increased to meet the full cost of pilotage in Canada which, as of 1965, would have meant an overall increase of 13%, providing a satisfactory mechanism had existed to distribute the accruing revenues so as to meet the operating deficits of each District.

It was also realized that it would be unrealistic to insist on the principle that each District, where the service is maintained in the public interest, be financially self-supporting. The disproportionately high rates that would have to be charged in some Districts would defeat the main purpose of maintaining a service by making the port or area unduly expensive. In such cases, outside financial aid is required. Whether the necessary funds should come from shipping, by imposing an overall surcharge to create an equalization fund administered by a Central Authority, or directly from public funds, is a question of policy which is the subject of a Recommendation.

At the request of the Commission, the question was studied by a firm of economic consultants, J. Kates and Associates, and their report titled "Evaluation of the Economic Impact of Pilotage Costs" confirms the Commission's conclusions. The report is reproduced *in extenso* as Appendix X.

The five main questions to which the study was directed were:

(a) What is the relative impact of pilotage costs on Canadian trade?

(b) What is the trend in pilotage costs?

(c) How do pilotage costs influence vessel operations?

(d) Does the cost of pilotage service for access to Canadian ports cause traffic to be diverted to U.S. ports?

(e) Would the Canadian economy benefit more if the cost of pilotage were assumed by the Government?

The consultants' conclusions are summed up in Paragraph 1.0 of their report, as follows:

"1.0 SUMMARY

1.1 In 1963 the cost of pilotage services for access to Canadian ports of trade accounts for about 90¢ per $1,000 of the final value of merchandise traded. This is less than one-tenth of one per cent. Even if all costs of pilotage, including those now borne by government, were paid by shipping, the cost would average $1.05 per $1,000 of the final value of the goods traded. Pilotage costs are too small relatively to have a noticeable impact on trade.

1.2 A comparison of 1963 pilotage dues in Canadian districts and ports and major U.S.A. and European ports and channels shows that the dues charged in Canada are substantially lower for medium and large ocean vessels, and in some cases higher for very small vessels. Most ocean vessels engaged in Canadian overseas trade are medium and large in size and the trend to larger vessels will continue. While total pilotage costs to the ports of Montreal and the Great Lakes are higher than the cost of pilotage for access to most European ports and New York, the reason is simply the greater distances involved in access to these inland Canadian Ports. On the whole, the costs of pilotage for services performed in Canadian waters compares very favourably with pilotage costs in U.S.A. and European waters.

1.3 The trends in shipping and in the value of trade versus pilotage costs indicate that the relative impact of pilotage costs has been declining moderately since 1963.

1.4 The attention that the cost of pilotage has received in submissions to the Royal Commission on pilotage is mainly because these costs are not subject to the discipline of the market place in the same way as are most other costs of vessel operations. The main recourse vessel operators, agents and shippers have in the direct control of pilotage costs is representation or protest to appropriate government officials or agents.

1.5 It is a common experience, wherever prices and utilization of services or resources are regulated by governments under conditions which vary widely, that anomalous situations do develop. However, this evaluation has been confined to the question of whether pilotage costs, in general, present a serious threat to Canadian trade and the Canadian economy.

1.6 Pilotage costs are more significant relative to the trade carried in ocean vessels to and from the ports of the Great Lakes. However, most traffic which might conceivably be diverted because of the relatively small proportion of costs attributable to pilotage requirements would not be a serious loss to

Canada. Some of it would be diverted to Canadian lake vessels and some, principally U.S. grain, might go by other U.S. ports. In general, there is very little Canadian trade lost and very little trade diverted from Canadian trade routes because of pilotage costs on the St. Lawrence Seaway and Great Lakes.

1.7 It would not be in the long term interest of the Canadian economy to have the government bear all or most of the cost of pilotage services. At the same time, there are situations where government assumption of some of the cost burden and some of the risk in maintaining a high level of service is justified."

GENERAL COMMENTS

It is considered that the present statutory provisions which deal with the handling of various pilotage monies are inadequate even for the type of organization foreseen in Part VI. Furthermore, as a result of various amendments, these provisions have become unnecessarily complicated, illogical and are often meaningless.

The greater involvement of the state in pilotage requires a more elaborate financial procedure which should be fully enunciated in future pilotage legislation because this, not being governed by local peculiarities, is not a subject-matter for regulations.

Future legislation should provide for an adequate scheme of financing to enable each Pilotage Authority to ensure the quality and adequacy of the pilotage service for which it is now responsible and for any additional responsibility that may be imposed in the future, even if this means provision for obtaining money from public funds to meet an operational deficit where the service is maintained in the public interest.