Chapter 6

NATURE, COMPUTATION AND COLLECTION OF PILOTAGE CHARGES INCURRED BY SHIPS

The pilotage charges that the Canada Shipping Act requires shipping interests to pay are:

(a) pilotage dues;

(b) fines or penalties for infractions;

(c) indemnities and expenses for board, accommodation and travelling to which pilots are entitled if they are overcarried or detained in quarantine.

In practice, however, pilotage dues are the main and almost sole charge. No fine or penalty has been imposed on a vessel for violating Part VI of the Act, at least in the last decade, and indemnities to pilots for overcarriage or detention in quarantine are both rare and minimal ($15 per day of absence or detention, secs. 359 and 360).

I. PILOTAGE DUES

Despite the existence of a limiting statutory definition (subsec. 2(70)), the term "pilotage dues" derives two other substantially different meanings from the context of the Act.

(a) The normal meaning is contained in the statutory definition "the remuneration payable in respect to pilotage", i.e., the price that a ship has to pay for each pilotage service or, in other words, the pecuniary consideration of a pilotage contract (even if the pilot is not allowed to provide service after being taken aboard for that purpose (sec. 352)).

(b) In Districts where the payment of dues is compulsory, the term also means the amount of liquidated damages owed by a ship for breach of a pilotage contract, real or presumed by law (secs. 348 and 350).

(c) The term also means the penalty imposed on non-exempt ships which failed to hire a pilot in Districts where the payment of dues is compulsory (secs. 345 and 357).

In these last two instances "pilotage dues" is obviously a misnomer, not only because the term refers to different subjects, but also because giving it these meanings violates the basic rules of the interpretation of statutes. The only element the three definitions all have in common is that the amount involved is stated. In the United Kingdom Pilotage Act (subsec. 11(2)), the penalty referred to in (c) above is called a fine.

The aggregate amount of the dues collected is referred to as the "Cost to Shipping" of the pilotage service which, together with the direct and indirect subsidies paid by the Government (Cost to Government), forms the total cost of pilotage (vide McDonald, Currie & Co. financial study, Appendix IX to the Report).

A. PILOTAGE DUES FOR SERVICES RENDERED

As stated above, the basic statutory meaning of "pilotage dues" is the price a ship must pay for various pilotage services. At present, the charges are listed in a schedule to the By-law of each District, generally referred to as the tariff. Like the rest of the By-law, each schedule is a regulation made by the Pilotage Authority; the authority for the tariff is subsec. (h) of sec. 329 C.S.A. Once these rates have been established, they are legally binding on all concerned and can not be varied except by an amendment to the By-law approved by the Governor in Council. Because the Act gives Pilotage Authorities the prerogative to "fix the rates . . . in respect of pilotage dues", it is mandatory for each Authority to exercise this right fully and to include in the tariff a charge for every type of pilotage the pilots may be called upon to perform within the limits of their District or, at least, to lay down a formula by which the charge can be computed. An incomplete tariff is an undue restriction on pilots in the exercise of their profession and the provision of service to vessels since they can not be expected to perform gratis services for which no charge has been established. In Districts where the payment of pilotage dues is compulsory, a deficient tariff has the effect of an indirect, illegal exemption. For example, for many years prior to 1960, despatching two pilots on winter assignments was recognized as a necessary safety measure and, unofficially, the second pilot was always paid but, because it was not provided for in the tariff, he had no legal claim. Moreover, if he accepted whatever the ship was prepared to pay he committed an offence prohibited by sec. 372 of the Act. A proper charge has since been included in the tariffs of the three St. Lawrence Districts.

Another example was provided by ships merely in transit through the British Columbia District. Under the 1960 By-law they were indirectly exempted because the tariff provided charges only for trips which originated or terminated in a port within the District. The result was that no charge was made when no pilot was employed and also the Superintendent remained uncertain what to charge when a pilot was employed during such a transit.

Because this very seldom happened, a reduced charge was made by applying only the mileage component of the tariff. This practice had two disadvantages: the charge was both too low in comparison with normal pilotage assignments of similar length and also illegal in that it was not established in the tariff. The irregularity was corrected in 1965 (P.C. 1965-1084).

1. *Types of Pilotage Service*

(i) "pilotage voyage"[1] (often referred to as trip) is a journey, or that part of a journey, made by a ship within the limits of a District for the purpose of reaching a destination. It is completed when the ship reaches her destination within the District or crosses the district limits (sec. 361), but it is not completed when interrupted temporarily by events beyond the ship's control, such as being forced by stress of weather to anchor, or even to berth, en route. Within a District it may vary in distance. In the harbour type District, there are normally only two kinds of voyage, i.e., inward and outward. In the contiguous Districts of Quebec, Montreal and Cornwall as well as in the B.C. District, there are also transit voyages. Finally, in river and coastal Districts, there are voyages wholly performed inside the District;

(ii) movage, which in the By-law means the movement of a vessel within a given harbour from one place to another;

(iii) trial trip, whose purpose is to carry out various manoeuvres to test a ship's performance;

(iv) compass adjustment trip, during which a ship proceeds on various courses to test the accuracy of her magnetic compass;

(v) direction-finder calibration trip, similar to (iv) to adjust direction-finder equipment;

(vi) security watch, when the services of a pilot are required on board a ship at anchor or secured to shore, for various reasons, principally because it is feared she may go adrift due to severe adverse weather conditions;

(vii) requirement for two pilots, i.e., when two pilots are required on board for safety seasons. The second pilot either acts as relief pilot during long trips or as assistant pilot if conditions are such that

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[1] The term "voyage" is ambiguous and its statutory non-restrictive definition (subsec. 2(112) C.S.A.) does not clarify the situation: "'voyage' includes passage or trip or any movement of a ship from one place to another or from one place and returning;...". It is considered that a much more restrictive term should be found to define in pilotage legislation "pilotage voyage" as described above. It is believed that "trip" would be adequate provided the other meanings given to this term in regulations and pooling rules are discontinued. For details, vide Part IV, Quebec District, Pilotage Operations, Despatching.

the pilot in charge needs the aid of a person with special knowledge, e.g. winter navigation, manoeuvering a large ship in confined waters, or navigating a difficult tow;

(viii) detention, i.e., when a pilot's availability is retained for the ship's convenience;

(ix) cancellation, i.e., a request for pilotage service is cancelled after a pilot has been ordered and has reported for duty;

(x) special types of pilotage service peculiar to a District, e.g. in the B.C. District the tariff lists a charge for "gun trials or other exercises under Royal Canadian Navy control" (B.C. By-law Schedule, subsec. 4(3)), or services required by special circumstances, e.g. if a pilot is employed to navigate a salvage vessel engaged in salvage operations, or a cable-laying vessel.

2. *Omissions in tariffs*

None of the existing tariffs observes the principle that the schedule should contain a charge for every pilotage service that could possibly be performed in the District. They list only the cost of services normally provided and do not indicate how the charges for unusual services are computed. In fact, in most small Districts prices are fixed only for inward and outward voyages and movages (vide Bathurst, Botwood, Buctouche, Caraquet, Churchill, Humber Arm, Miramichi, Pictou, Port aux Basques, Prince Edward Island, Pugwash, Restigouche River, Richibucto, Shediac and Sheet Harbour).

Only the Halifax District tariff provides a charge for security watch (subsec. 7(2)). In some Districts the detention charge is applied despite the fact that it refers to a totally different situation. Nowhere is there provision for the price to be paid for the services of a second pilot when a double assignment is effected for the safety of a ship, except for the special cases of winter navigation in the St. Lawrence Districts, and pilotage trips of long duration in the B.C. District.

Because the Act does not provide any alternative method of fixing rates for services not covered in the tariff, Pilotage Authorities, instead of trying to devise By-law regulations for computing the price for uncommon or unusual services that might occasionally be performed, have resorted to the illegal device of arbitrarily fixing *ad hoc* prices wherever necessary. As seen above, this was the practice when dealing with transit trips in the B.C. District until the 1965 amendment. It is still the practice in the Quebec District for trial trips and security watches.

3. *Criteria For Fixing Rates*

The Act does not state what criteria a Pilotage Authority should follow when fixing rates nor what form rate-fixing should take in the regulations. When the basic organizational scheme now prescribed in pilotage legislation was originally drawn up it was not necessary to provide any statutory rules or criteria governing the exercise of the power to fix rates by regulation because, at that time, the Pilotage Authority was a completely disinterested party whose functions were limited to licensing. Furthermore, the free enterprise system prevailed, the number of pilots was usually unlimited, the Authority was not concerned with sharing assignments and, since pilotage was considered a private service to shipping, only the interests of the immediate parties had to be considered.

Under these circumstances the yearly income a pilot could earn depended on a number of material factors in addition to pilotage rates: his ability to attract clients, his eagerness to work and his qualifications. Like any other professional man, his reputation was a determining factor.

In the original context of the Act the charges were expected to be a reasonable remuneration for services rendered. The dues for a given service amounted to what the contracting parties would normally have agreed upon if they had been free to bargain, i.e., the Master could employ a pilot or not while the pilot could offer his expert services but was not obligated either to seek or to accept employment.

Under Part VI C.S.A. it is still no concern of the Pilotage Authority whether the rates are high enough to attract the best qualified persons or whether there are sufficient ships trading in the District to provide each pilot a reasonable income, thus ensuring that the service is maintained and that standards of qualification do not drop. The main function of the Pilotage Authority is to make sure through licensing that those persons who want to practice the profession of pilotage have the required qualifications. It is not concerned whether candidates apply or whether those already licensed wish to withdraw. Part VI of the Act does not foresee any scheme for organizing a pilotage service where none existed before, nor for maintaining a service; if no qualified pilots are found, the District is abolished.

Therefore, the Pilotage Authority under Part VI is in the unbiased position necessary for exercising the virtually judicial power of imposing its decisions on the parties directly concerned. The fact that the Pilotage Authority draws most of its expense money from pilotage dues does not alter the situation; the extent of the tariff has no bearing on what the Pilotage Authority may collect from the pilots or deduct from their pilotage dues to meet its operating expenses. It is not allowed to make a profit or to accumulate any reserve, but can assess the pilots only the amount needed to meet any outstanding balance.

The factual situation is, however, totally different because the Pilotage Authority is no longer the disinterested judge contemplated by the Act. Therefore, it is necessary to re-assess the situation. As seen before, because pilotage in most Districts is provided in the public interest, the Pilotage Authorities have assumed the additional responsibilities of maintaining the service and ensuring the availability of a sufficient number of qualified pilots. The free enterprise system has disappeared and neither the shipping interests nor the pilots are the free parties the Act presupposes with the result that the Pilotage Authority now has a personal interest in seeing that its pilots receive an equitable annual income which, combined with working conditions, is tempting enough to prevent them from leaving the service and to attract qualified, competent candidates. It controls the pilots' annual income by distributing the workload fairly, by pooling their earnings, by limiting them to the number necessary to meet the normal extended peak demand and by fixing the charges for their services. Hence, the situation has changed materially because the Pilotage Authority is now interested in what rates are established.

In the past, the rates did not have as direct an impact as at present. As indicated above, personal factors in the free competition system made the main difference between a reasonable income and remuneration so inadequate that the pilots were forced to seek other employment. Now, with controlled pilotage, the tariff has an immediate, direct effect on all the pilots. When their workload can no longer be increased, the only way to augment their income is to raise the rates, except when charges are computed according to the dimensions of vessels, in which case an increase in size automatically produces more revenue. But an increase in the number of ships has only a limited effect, because if the workload passes a certain level additional pilots will be licensed. This explains why the pilots consider the rates their most important mutual problem wherever controlled pilotage has been established.

As early as 1899 the Miramichi pilots, whose earnings were pooled, went on strike because the Pilotage Authority lowered the rates without consulting them. Ever since, the tariff has been the subject of most of the demands made by the pilots and of the numerous disputes that have flared up between the pilots and the shipping interests and between pilots and Pilotage Authorities. For example, it was because the B.C. Pilotage Authority, following the recommendations of the Robb Commission, tried to lower the pilots' annual share of pilotage earnings that the B.C. pilots went on strike in 1920. Because the controversy was considered insoluble at that time the B.C. District was abolished, effective May 6, 1920.

Again, in 1960 it was a question of rates that brought the Quebec pilots to the verge of a strike. Their main concern was a readjustment of the tariff to maintain the aggregate earnings of the pilots at the same level as before

the abolition of the special pilot system. At that time the remuneration of the second pilot in winter assignments was a point of contention in the three St. Lawrence Districts. In 1962 it was an attempt by the Government to lower the pilots' income by making them pay all, or part, of District operating costs without any increase in the tariff that caused the strike of the St. Lawrence pilots. The Saint John, N.B. and the B.C. pilots, who were similarly affected, threatened to walk out in sympathy.

Whether or not pilots are on a fixed salary, the present situation as regards rate-fixing is generally as follows:

(a) rates are essentially a local problem;

(b) rate-fixing is a function of the Pilotage Authority of each District;

(c) the Pilotage Authority is no longer unbiased and independent in the exercise of that function.

Essentially the value of each item of pilotage is determined, as is the service itself, by local circumstances and the peculiarities of each District. Hence, the wide variation from one District to another precludes adopting a general tariff applicable to all Districts.

Since the Authority who fixes the tariff must be fully acquainted with the nature and circumstances of each particular aspect of pilotage performed in the locality concerned, it is logical that this function should be performed by the Pilotage Authority of each District. Furthermore each Authority needs this power to ensure the necessary gross earnings in the District to enable it to meet its increased operating expenses and to pay the pilots an adequate income.

The fact that the Pilotage Authority is no longer disinterested as in the past is not a bar to the exercise of this function, provided that measures of control are provided in the Act to prevent abuses. Such measures could take the form of making the Pilotage Authority's decisions subject to appeal in certain defined circumstances but the principal control should be the establishment of criteria binding upon the Authority.

It was no doubt because fully controlled pilotage existed only in the Quebec District through the device of the Quebec Pilots Corporation that the 1873 Pilotage Act established criteria for fixing pilotage rates in the District of Quebec only. The relevant portion of sec. 18 subsec. (8) (corresponding to subsec. 329(h) of the present Act) reads:

> "Provided always that the rates of pilotage for and below the Harbour of Quebec set forth in Tables—one and two of Schedule A. . . (of the Trinity House Act). . . shall not be altered for three years after the commencement of this Act; nor then, unless the share of the net income of the Corporation of Pilots For and Below the Harbour of Quebec annually accruing to each member of the said Corporation acting and practising as a pilot for and below the Harbour of Quebec, has been less

than six hundred dollars on an average of the said three years; in which case it shall be the duty of the Trinity House of Quebec to submit to the Governor in Council for approval, a by-law establishing such increased rates of pilotage, or pilotage dues as may be deemed necessary for the purpose of securing to each such pilot an average annual share of not less than six hundred dollars of such net income, and so on for and during each successive period of three years thereafter."

These rules were retained in the 1886 consolidation of the Act (subsec. 15(g)). In the 1906 Canada Shipping Act these specific stipulations for the Quebec District took the form of a separate section (sec. 434) to which a reference was made in subsec. 433(h). It was undoubtedly because the Quebec Pilots Corporation controlled the pilots' earnings and because it was intended these pilots should revert to their pre-1860 status of free entrepreneurs that these criteria for fixing rates were not reproduced in the 1927 consolidation of the Canada Shipping Act, although they had not been abrogated by any special legislation.

(a) *One Possible Solution*

The problem can be largely solved if the pilots' earnings are not dependent on the tariff because if the pilots are not concerned with rate-fixing they avoid a constant source of conflict with the shipping interests. This situation exists only when the pilots are paid a salary which is not affected by what the shipping interests have to pay for the use and the maintenance of the service. Of course labour-management problems are created but this system appears the most logical in places where the interest of the public is highly involved and where the service can not expect to be financially self-supporting.

(b) *Pilots' Objections to Status of Employees*

The facts indicate that although the pilots object to being called employees, they acquiesce in being treated as employees, which, as seen earlier, is what they actually are in all the main Districts. Their principal objection to a fixed salary is that it takes away the incentive to make more money by working harder. Whether the prevailing pooling arrangement is complete as in B.C., New Westminster and Saint John, N.B., or partial as in the St. Lawrence Districts (where only the value of the pilotage trip is pooled but the possibility of increasing one's income is limited by despatching rules designed to provide equal opportunities for all), its only advantage over a fixed salary is that the pilots receive a temporary increase of pay if the workload increases. The increase is temporary because if the increased workload proves to be permanent in character, it will be corrected by an increase in the number of pilots. The pilots gain another advantage from the increase in the size of the ships as a result of the way the rules for computing

the rates are set out in the tariff. However such increases are problematic: during the past decade, generally speaking (contrary to what might have been expected) the ships being piloted have increased both in size and in number. This was no doubt due to the continuing economic expansion of Canada; otherwise the advent of larger ships would have resulted in a repetition of what happened when sailing ships were gradually replaced by larger, faster steamships: all Districts soon experienced an excess of pilots who shared smaller pilotage revenues.

Most pilots are prepared to accept the fixed salary system which guarantees income plus other fringe benefits if the future of their District becomes uncertain. No doubt, this was one of the reasons why the Sydney, N.S., pilots opted in 1966 to become Crown employees. The Crown, however, should not make such an offer unless it is warranted by superior interests, that is, if it is necessary for the economy of the country to maintain an adequate and efficient pilotage service in the locality concerned. If these superior interests do not exist, the District should be abrogated or, at least, it should be recognized that the service is maintained purely for the private benefit of the shipping interests.

It appears that the pilots' objections to receiving some form of salary can be overcome. For instance, the President of the B.C. pilots did not reject the idea; he considered it was merely a matter of discussing and resolving the amount of remuneration and working conditions. The New Westminster pilots informed this Commission that they would consider receiving a fixed salary provided such a proposal was made to them. It is immaterial to them where the money comes from provided they are given adequate remuneration for their workload. A fixed salary may not always be the answer to the problem because the workload and the working conditions of pilots constantly vary; it may be that the best solution is a fixed, guaranteed remuneration for a basic workload with additional remuneration if pilots are called upon to work longer hours or in abnormal conditions.

(c) *Criteria in Foreign Pilotage Legislation*

Of the foreign legislation consulted only two establish criteria for fixing pilotage dues, i.e., the Pilotage Laws of Germany and of the State of California, U.S.A.

The German Pilotage Act is federal legislation of general application. The pilotage organization is controlled by the Federal Department of Transport which, *inter alia*, is responsible for fixing all pilotage dues. Depending upon the areas, pilotage service is provided (a) by the Federal state through pilots who are Federal employees, (b) by pilots' Corporations through their united pilots and (c) by certified pilots acting as free entrepreneurs outside Pilotage Districts. Except where the service is provided by state pilots the tariff is divided in two parts: the pilotage expenses that belong to the Federal

state and the remuneration for the pilots' services that are payable to the pilots' Corporations, or to the individual pilots in unorganized areas. Sec. 7 establishes the criteria for fixing the tariff as follows (the second part of the section does not apply where the pilots are government employees):

> (*Translation*) "Sec. 7. When pilotage rates are fixed consideration must be given to public interest, shipping requirements and meeting public expenses incurred in providing the service. When the remuneration of the pilots is fixed, care should be taken to ensure that they receive an income commensurate with the training and responsibility of their profession and that adequate provision is made for old age, incapacity and death." (Ex. 877).

The German legislation does not provide any subsidy for pilotage services performed either in Districts operated by the pilots' Corporations or outside organized Districts. However, the Federal state is responsible for pilotage installations and equipment, the cost of which, as well as all other pilotage costs incurred by the state, are reimbursed from the first part of the pilotage dues.

The California legislation is more explicit on the subject of criteria. The rates are fixed by the legislature on advice received from a Pilotage Rate Committee which it has established. This Committee must hold public hearings biennially for the purpose of obtaining information relating to pilotage rates. In preparing its recommendations the Committee must give consideration to all relevant factors including the following:

> "(1) the costs to the pilots, individually or jointly, of providing pilot service as required;
>
> (2) a net return to the pilots sufficient to attract and hold persons capable of performing this service with safety to the public and protection to the property of persons using the service; and the relationship of that income to any changes in cost of living indices;
>
> (3) pilotage rates charged for comparable services rendered in other ports and harbours in the United States;
>
> (4) additional factors affecting income to pilots such as the volume of shipping traffic using pilotage, change in the size or structure of vessels affecting pilotage rates, numbers of pilots available to perform services, income paid for comparable services, and other factors of related nature."
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> (Ex. 879, Harbours and Navigation Code of the State of California—sec. 1211.)

To appreciate the importance of this foreign legislation the context must be understood. Since the diversity of situations met in Canada does not exist in California its legislation is of the *ad hoc* type, i.e., of a local character. In Germany, however, the overall situation is more analogous. While a variety of situations is reflected in the law, all their navigable waters border on heavily populated areas, so that there is a continuing demand for pilotage, although in varying degrees. The German service is administered by the state only when and where the pilots are employees of the Federal state. In other organized areas administration is entrusted to the Pilots' Corporations under a limited form of state control. In non-organized areas the free enterprise system prevails with the state acting as licensing authority.

4. *Rate-fixing Process*

In Canada, as seen earlier, except in a few small Commission Districts, pilotage is now, in fact, provided and managed by the state and the pilots are, in practice, employees. In these circumstances much more has to be taken into consideration than the face value of a given service. If pilotage must be maintained in the public interest, establishing the rates becomes an involved process: first, the expected total cost of the service must be established, second, what part of the total is to be collected from the shipping interests must be determined, and finally, the rates must be fixed at a realistic figure which will provide enough pilotage dues to cover the shipowners' share of the total cost.

Determining the expected total cost of the service in a District requires:

1. an estimate of the number, size and type of ships requiring pilots over a given period, together with the various kinds of pilotage service that may be required;
2. the working conditions of the individual pilot, including the maximum workload he should be expected to carry under normal circumstances and his periods of rest and leave;
3. the number of pilots needed to meet demands during expected peak periods of reasonable duration;
4. a target income for the individual pilots;
5. the amount required to meet the other operating expenses of the District.

As a rule the users of a service should bear all the costs. This is not always feasible and revenue from other sources may have to be provided if the service is to be maintained. At present, in pilotage this outside assistance which, as seen in the previous chapter, takes the form of direct or indirect subsidies from public funds is not foreseen in the Act because the pilotage service is considered merely a private service to shipping; Part VI does not provide for a central authority and each District is a separate, independent, autonomous unit which can not continue unless it obtains from the users of the service the necessary revenue to meet all costs.

The share the shipping interests should pay in a given District is determined by evaluating the maximum cost of each type of service performed and by computing the aggregate revenue they are expected to produce. Many factors must be considered when ascertaining maximum rates, *inter alia,* (a) the expected demand for each type of service; (b) the pilotage rates charged for comparable services in other Districts; (c) at what level the rates can be fixed without prejudicing the economy of the region, observing that the aim may be defeated if rates are so high that, when combined with other charges, they have the effect of reducing trade and, hence, pilotage

income. These maximum rates indicate whether the District will be self-supporting and, if not, what extra money should be obtained from other sources. Therefore, wherever a District is self-supporting shipowners must pay all expenses and if a District is not self-supporting, the charges are determined by the amount of outside financial help the Pilotage Authority can obtain.

These maximum rates also indicate whether a District could contribute toward supporting the service elsewhere in Canada. If the aggregate maximum revenue a District could produce is in excess of its total costs, the surplus might be used to support pilotage elsewhere in place of subsidies from public funds. In a country where pilotage is considered a necessary service the most favoured region with its frequent and continuing demands for pilots should be required to contribute, through a co-ordinating central authority, to the upkeep of essential pilotage services in less favoured regions. However, existing legislation does not permit the implementation of such a contribution.

Once the shipowners' total cost is determined, a charge should be fixed for each type of pilotage service so that the total dues are sufficient to ensure that the shipping interests pay their full share.

(a) *Target Income and Pilots' Objections*

When total costs are being computed, target income has been found to cause most difficulties. The pilots in the main Districts have always refused to consider target income as a factor that enters into rate-fixing. The 1961 negotiation meeting held in Montreal was deadlocked on the question of tariff because the shipping representatives wanted to discuss a target income while the pilots insisted that, since they are free entrepreneurs, only the value of the services they render could be considered and hence the aggregate revenue each pilot could earn during a given year was totally irrelevant. The B.C. pilots took the same attitude when the B.C. Pilotage Authority tried to obtain workload data and refused to co-operate on the ground that, being private contractors, the time they spent on duty concerned only themselves.

In theory, the pilots were right but, in fact, they were not. Their attitude would have been right if they had still been exercising their profession under the free enterprise competitive system but since they have become *de facto* employees (in that outstanding competence and personal reputation are no longer factors affecting their income, they have been relieved of their personal financial liability for accidents, their workload is equitably distributed and all earnings are pooled and shared equally), the question of annual income is now the main factor to be considered when rates are established.

Both the Shipping Federation of Canada and the Federation of the St. Lawrence Pilots made recommendations on this subject. The Shipping Federation's recommendation is based on retaining the relationship between pilotage dues and pilots' remuneration. It has advocated that the pilotage

rates and tariffs be fixed to provide sufficient revenue to cover the cost of the pilotage service including the remuneration of pilots computed on the basis of minimum/maximum yearly earnings as set by a central board of pilotage.

The St. Lawrence Pilots Federation, which advocates delegating the administration of the service to pilots' own organizations in Districts, also recommends retention of the relationship between pilotage dues and pilots' remuneration. They suggest dividing the dues in two parts, one for administration, the other for the remuneration of the pilots as in the German system. As for criteria they recommend that the service in any given District be self-supporting and that the rates for administrative purposes be established at a level which permits the payment of all administrative costs, any surplus in this category should be applied to reducing the tariff. The rates for pilotage, i.e., the remuneration of pilots, should be governed by the public interest, the value of the services rendered, the cost to the shipowners, and the necessity of attracting to the pilotage profession the finest candidates the maritime world can offer. The first recommendation of the New Westminster pilots concerns what they consider should be their minimum target income (Ex. 169):

> "Pilots should receive earnings comparable at least to the highest paid Master using their services."

A target income does not, however, apply everywhere, e.g., small ports in the Atlantic provinces where pilotage is not a full time occupation or harbours like Churchill where the season is very short.

But target income is the main factor where pilotage provides full time employment for all or most of the year. It becomes more important wherever the service is not financially self-supporting and has to rely on funds from sources other than pilotage dues earned in the District.

In fact, the target income concept has been the basis of tariff discussion on the B.C. coast, and has even been the unavowed aim of the pilots in the St. Lawrence Districts. For instance, the litigation in 1960 in the Quebec District was not over the amount to be charged for a basic voyage but the recovery of the $65,000 annual earnings lost by the pilots when the special service pilot system was abolished. It has also been the conscious or unconscious cause of the reaction of the pilots to any decrease in their annual income when a peak was attained through overwork and their workload was subsequently reduced by an increase in the number of pilots. This situation has usually been followed by a demand for an increase in dues to maintain the pilots' yearly income at the new level.

But the pilots have always declined, or neglected, to define what they judged an adequate annual remuneration. In 1962, the Treasury Board considered that the pilots of certain Districts like Quebec, Montreal, Saint John, N.B., and British Columbia were in receipt of annual revenues that were more than adequate and recommended, therefore, that Government

financial aid to these Districts should be partly or totally discontinued. But an "adequate income" for a pilot in a given District was not defined. An arbitrary figure was set (for instance for the Quebec District it was $14,000) which, it was realized, the shipowners would consider too high and the pilots too low. The main purpose of fixing an amount was to initiate discussions and negotiations.

In the B.C. District, the Pilotage Authority had a rule it tried to follow based on the supply and demand principle with some adjustments in order to ensure that candidates with high qualifications were obtained. It is the easiest and most equitable rule when it applies. In Districts like British Columbia where pilot candidates are available the target income is the income which, combined with given working conditions and other advantages that accompany the pilots' profession, will be interesting enough to attract the best qualified potential pilots and at the same time will prove sufficient to relieve them of the temptation to abandon the exercise of the profession after they have been licensed.

But this situation does not prevail everywhere in Canada. In many Districts, like the St. Lawrence Districts, trained candidates are not immediately available and it is necessary to resort to the apprenticeship system which is generally long and elaborate. These pilots are in an inferior bargaining position because they have few reasonable alternatives to pilotage if they are not satisfied with their working conditions and earnings. After joining the pilotage service as an apprentice and spending the better part of their lives in it, their principal knowledge and experience are limited to the art of navigating in their own Districts. Hence, if they decide to retire from pilotage there are very few employment opportunities for which they qualify. Unfair advantage should not be taken of their situation.

(b) *Prevailing Remuneration*

In such cases the criterion for a reasonable income has been what may be termed "prevailing remuneration", i.e., the remuneration that obtains for similar work under similar conditions in comparable regions. Reference is made to the McDonald, Currie & Co. study (Appendix IX to Part I) regarding the income derived by pilots in the various Districts and for comparison with the income of some other professions, especially paras. 34-54.

The main objection of the shipping interests to the request of the Quebec pilots that the official tariff should be adjusted to compensate for the $65,000 loss referred to above was not that the request was illogical (the preceding year the shipowners had agreed to a similar readjustment for the Montreal pilots) but that an increase in tariff would make the official income of the Quebec pilots disproportionately high compared to the Montreal and Cornwall pilots; under the prevailing remuneration principle, demands for increase in these Districts were bound to follow.

(c) *Statistics*

Although the principle of prevailing remuneration has been accepted, at least tacitly, by all concerned, in practice it has caused considerable disagreement. If the concept is to be practicable (i.e., similar income for similar workload, working condtions, responsibilities and risks), a system must be devised to overcome the difficulty of comparing the nature and circumstances of a service which varies markedly from District to District.

For this purpose statistics are necessary but they are useless and misleading unless they are well defined. Only those computed by the same method from comparable elements are valid for comparative purposes. The more detailed they are, the more useful and informative they will be.

It is because these basic rules were not strictly adhered to that the Department of Transport's efforts in recent years to compile statistical data on workload and earnings have been a major cause of disagreement and conflict. Since the components used in their computations were not of the same nature and, therefore, were not comparable, most of their statistics have proved to be misleading.

(i) *"Effective pilot" Statistics.* The number of effective pilots is defined by the Department of Transport as the "number of pilots either available daily for assignment to duty or on regular annual leave but does not include any pilot who is not available for assignment to duty because of sickness, special leave or any other reason" (Ex. 1307). Such a formula could not be applied to the pilots in the St. Lawrence Districts because it would not do them justice. This statistical concept is applicable only where the pilots, as far as distribution of workload is concerned, are considered employees, i.e., their remuneration is based on the time they are available for duty and a system of leave with pay is in effect. Such a situation prevails in all the main Districts except those on the St. Lawrence for the very good reason, as seen earlier, that in these three Districts the Pilotage Authority has deliberately refrained from pooling the pilots' earnings and has considered the pilots independent free entrepreneurs.

When the rules followed in other Districts to compute "effective pilot" statistics are applied in the St. Lawrence Districts the following irrelevancies, *inter alia*, appear:

(a) to be counted as one effective pilot a Quebec District pilot is not allowed to take any leave while a B.C. pilot who has been on leave 120 days a year is still counted as one effective pilot;

(b) the Quebec pilot who, according to the system prevailing in the St. Lawrence Districts for sharing the workload, has performed the maximum share permissible in a given year, is not entered as one effective pilot, if, as is permissible under the District despatching rules, he has occasionally been off the list at his own request but

has afterwards made up his lost turns. In the other Districts a pilot who has been absent (except on official leave) can not compensate for lost time by doing extra duty.

(ii) *Workload Statistics.* The workload statistics have been most misleading because they are oversimplified to the point that they become almost meaningless. They are usually based on the time spent by pilots actually piloting on board ships. While in the port type Pilotage Districts this accounts for most of the time devoted by a pilot to pilotage, in river and coastal Districts it represents only a fraction of the time a pilot is kept away from his home on pilotage duty. Statistics of this nature show these pilots at a marked disadvantage because they underestimate their working conditions and their actual workload.

Ever since these statistical figures were first provided in 1959 they have been relied upon both by the Pilotage Authority and the shipping interests but have been bitterly denounced by the pilots.

In 1960, 45 Quebec pilots spent most of their winter compiling their own figures in order to be in a position to show the exact situation in future negotiations. They arrived at different figures for workload, effective pilots and average yearly income. For instance, they found the daily average of duty was 9 hours instead of 6 hours shown by D.O.T. statistics. On the other hand their figure for average annual earnings per pilot was much lower. However, their efforts were unsuccessful for they failed to convince the Departmental officials concerned that the Departmental statistics were basically wrong and they retained the impression that the Departmental officials were not acting in good faith and were trying to convey a false idea of the pilots' work hours and remuneration. In the circumstances, negotiations based on such controversial data were bound to fail. No solution has yet been arrived at.

(iii) *Average Figures.* Average figures may also be very misleading in a service where the demand is not spread equally throughout the year. The number of pilots in a given District should be those needed to meet the demand in expected peak periods of reasonable duration. For instance, in the District of Saint John, N.B., most ships requiring pilots call during the winter months and pilots must be available in sufficient numbers to meet the demand then, with the result that there is a surplus of pilots the rest of the year. Under these circumstances a daily average workload figure calculated on a yearly basis is meaningless. If a certain number of pilots is required for a certain period, the aggregate time they are actually performing pilotage during a year is not a criterion. The questions to be decided are: (i) whether they have to be available at all times, (ii) whether their employment is on a part time basis (as in Churchill), (iii) whether, despite relatively slack periods, they must be employed on a permanent basis.

All these statistical data are worthless if taken at face value; they have to be read with reservations and when comparisons are made to arrive at the prevailing remuneration figure for a given District, their full local context must be taken into consideration.

(For further details, reference is made to those parts of this Report dealing with each District where these questions are fully studied in the light of local peculiarities and where the value and meaning of these statistics are appraised.)

5. *Tariff*

Once the share of the cost to be borne by shipping is established the next step is to convert this amount into tariff, i.e., into rates that will yield the required amount of revenue. It is not an easy task because there are different types of pilotage services, varying in scope, importance and circumstances for which there should be different rates.

There are three main considerations involved in this process:

(i) the general rules which define the extent and limitations of the discretionary power of the Pilotage Authority to fix rates;

(ii) the factors to be considered when assessing the value of a given service in a particular District;

(iii) the various forms of expressing rates in the tariff.

(a) *General rules*

The Canada Shipping Act (subsec. (h) of sec. 329) gives full discretion to the Pilotage Authority, but this discretion should not be mistaken for an arbitrary power. As indicated earlier, when the Pilotage Authority fixes rates it should be guided by the interests of the public, the pilotage service and the parties involved. A tariff that results from arbitrary action is illegal. Based on the clear intent of the Act, the following rules can be stated:

(i) the fixing of pilotage rates is exclusively a subject-matter of regulations;

(ii) a specific rate must be provided in the regulations for each and every possible pilotage service a pilot may render in a given District;

(iii) since discrimination is arbitrary, only objective criteria with a direct bearing on the value of a given service may be used;

(iv) since rates are standard charges, they must always produce the same revenue for the same service to the same vessel;

(v) the tariff must not differentiate in its rates between dues payable for services rendered and those payable as a result of the compulsory payment system;

(vi) the rates to be used for the computation of dues that may become payable under the compulsory payment system must be fixed so that they are applicable whether services are rendered or not;

(vii) the Pilotage Authority's rate-fixing power does not extend to any service performed beyond the limits of its District;

(viii) the tariff as a whole must be logical and consistent.

As stated earlier, rate-fixing is exclusively the subject-matter of the regulation-making power of the Pilotage Authority. Therefore, all the elements necessary for computing the pilotage dues that may become owing for each and every pilotage service that pilots may render in a District must be listed in the regulations. No discretion can be left in the provisions of the tariff to anyone because, if it were, rates would no longer be fixed by regulation.

The expression "pilotage services" to which the rate-fixing power extends must not be confused with "pilot's services" which has a much wider meaning. Hence the Pilotage Authority's power does not extend over charges for other professional services that may be rendered by pilots, such as giving expert opinions not related to the actual navigation of a ship, acting as expert or assessor in court cases. For instance, the expert advice of a B.C. pilot was sought before the construction of the pontoon wharf in Harriet Harbour, Queen Charlotte Islands, in the B.C. District. The rate-fixing power extends only to pilots' services rendered to ships, in which pilotage services are performed or are directly related to the performance of pilotage services.

Because rate-fixing is the exclusive legislative prerogative of the Pilotage Authority, any private agreement between the parties involved (even with the approval of the Pilotage Authority) has no legal value even if, on account of an omission, the tariff does not provide a rate for a given service.

While the rule must be retained that price-fixing must be effected by regulation, a realistic attitude should be taken regarding cases of exception, such as services of infrequent occurrence or services that occur in quite unusual circumstances. In practice it would be improper to try to cover in the regulations all the possible and hypothetical types of pilotage service a pilot might be called upon to render, because such a process would detract from the clarity and simplicity with which tariffs should be constructed. Furthermore, lacking basic data, the Pilotage Authority is unable to arrive at a reasoned decision and, therefore, any rates fixed in these circumstances are perforce arbitrary. The question is further complicated by the fact that when a Pilotage Authority fixes rates it exercises a delegated legislative power whose terms do not permit retroactivity. Therefore, if a case of exception for which no rate is provided occurs, it is too late to pass a covering regulation. For this reason it is considered this shortcoming should be corrected in future legislation. While the present system should be retained as the general rule, there should be provision for a procedure to fix an *ad hoc* rate in

exceptional cases. The indicated procedure is for a superior authority to be named in the legislation to act in a quasi-judicial fashion to fix a price unless an agreement can be reached btween the paarties immediately interested, i.e., the shipping interests and the Pilotage Authority, or the pilot concerned if the dues are to be paid directly to him, in which case the Pilotage Authority's approval should be required.

The Pilotage Authority must not discriminate against any user or group of users. Discrimination is an abuse and hence has no place in the exercise of a discretionary power. Therefore, different rates can not be fixed on the basis of flag of register or the identity or nationality of owners, or the type of voyage in which a vessel is engaged, that is, inland-waters, home-trade, coastal or ocean-going. These factors have no bearing on the value of the services rendered. If it was desired to provide different tariffs based on such criteria, specific authority should have been given in those provisions of the Act dealing with delegation of powers, such as was done for exemptions from the compulsory payment system (secs. 346 and 347). In the various tariffs now in force there is only one such case: it refers to movages in the Harbour of Montreal and provides a lower rate for movages of inland-water vessels (Montreal By-law, Schedule A, subsec. 5(1)). In this connection, the Federation of the St. Lawrence Pilots in its recommendations (Recommendation 20, Ex. 671) urged that:

> "All discrimination in the tariff in favour of coastal or inland-water vessels must be removed."

Only objective criteria with a direct bearing on the value of the services of the pilot should be taken into consideration. These will be studied later.

The tariff should always produce the same revenue for similar services rendered in similar circumstances. Since the rates are computation rules of general application, it should be possibe to ascertain beforehand the exact amount any particular service costs; no part of the calculation should be left to chance. This problem arises mainly with regard to travelling expenses when, through no fault of a vessel, no pilot is available at a regular boarding station.

The availability or otherwise of a pilot at an official boarding station should never be the concern of a Master or agent. This is an internal problem of service organization and no vessel should be penalized by being required to pay higher dues than other vessels on that account. Although this question is of general concern in all Pilotage Districts, it is more pressing in river and coastal Districts which cover large areas. It also has a certain significance in harbour type Districts because ships are not always berthed close to the pilot station, with the result that the pilots often have to travel by land to board ships proceeding out of a harbour, or to return to the pilot station after disembarking. In river type Districts, e.g. on the St. Lawrence River, the flow of traffic is not equally divided in a given period of time into

upbound and downbound ships and hence, at times, the number of pilots increases at one end of the District while a shortage develops at the other end. This is an organizational problem which is met by despatching the required number of pilots by the most convenient means to the station where a shortage exists. The costs of this transportation as well as travelling expenses from shore to pilot stations, and vice versa, are foreseeable operational costs. Whether a pilot has to travel by land and incurs additional expenses in order to service a given ship should not affect the pilotage dues the ship is required to pay. These occasional travelling costs should be taken into consideration when the tariff is drawn up and divided equally among all users.

In early legislation, pilots who were not engaged in piloting, or whose services had not been retained, were not allowed to remain at an inland station. They had to return at their own eypense to the seaward boarding station where they had to keep cruising throughout the boarding area in order to be available whenever vessels arrived. Nowadays, advance notice of requirements by radio makes it possible to limit the number of pilots at the seaward boarding station to those necessary to meet the expected demand and thus to improve the pilots' lot by allowing them to remain with their families until they are required. Under these circumstances, any extra operational expenses are amply justified. However, these expenses should not be met by a few chance ships but, together with other costs, should be shared equally by all potential users through the fixing of rates that will provide the revenue the District requires. The fact that there may be a number of possible boarding areas or embarking and disembarking points in a District should not alter the situation: how the demand will be met at these various places remains a matter of internal organization.

Such random charges violate another basic rule in that they can not be levied when no pilot is requested in compulsory payment Districts.

Exception should be made to this rule when the responsibility for the non-availability of a pilot can be attributed to a ship, for instance, if the ship does not meet its ETA, or fails to comply with ETA requirements, or when passing an official boarding station refuses, or does not ask for a pilot, and later while en route orders one. In these cases, any additional costs that would not have normally been incurred if the ship had complied with the rules should be chargeable. Future legislation should provide for this situation which is not covered in the existing Act.

The Quebec pilots are often faced with this problem. Occasionally, they all have to travel by land between the boarding stations in Quebec and Les Escoumains and from either one to any embarkation point in the District, mostly to Port Alfred or Chicoutimi and vice versa. When such a trip is necessary the charge to the ship does not include pilots' travelling expenses. This is the proper procedure because these costs were taken into considera-

tion when the rates were originally fixed. In the Quebec District, the individual pilots are not reimbursed probably because the pilots, who do their own pooling, consider that over a period of time these expenses will average out. In many Districts where pooling is operated by the Pilotage Authority, travelling costs are considered operating expenses of the District and are reimbursed to the pilot concerned from pilotage revenues before the pool is shared.

Two by-laws violate general rule (iv) (and also general rule (v)) as seen in the following paragraph:

(a) In British Columbia, sec. 11 of the tariff makes payable, in addition to the normal pilotage dues, "travelling and other expenses necessarily incurred" by a pilot embarking or disembarking in the northern region or when ordered from his base to a port in either region solely for a movage. Sec. 3 makes payable while aboard a pleasure yacht "the amount of any expenses necessarily incurred by the pilot during his absence from his base", in addition to the *per diem* rate provided for such pilotage service.

(b) In the Montreal District, subsec. 5(2) provides two rates for movages in ports other than Montreal Harbour depending upon whether a pilot is available locally or not.

The existence of the compulsory system in a given District must have no bearing on the question of fixing rates except in the way the rates are defined in the regulations. The tariff is nothing more than a list of prices for the pilotage services that may be rendered. The amount owing, when compulsory payment applies, is dealt with by the Act itself. For navigation and movages of non-exempt vessels the charge is the amount of pilotage dues that would have been payable if a pilot had been employed (secs. 345 and 357). For failure to take a pilot a lesser charge may be imposed only on vessels exempted under sec. 346, in which case it amounts to a partial withdrawal of the exemption. A good example of this situation is the tariff in Port aux Basques. If no pilot is taken, normally exempted vessels are required to pay one-fifth of the normal dues if a ferry, and two-thirds if any other steamship. (Vide Port aux Basques By-law, Schedule 2.) Another example is subsec. 6(2) of the Quebec District By-law wherein the exemption granted in subsec. 346(e) C.S.A. is partly withdrawn on the basis of tonnage combined with type of voyage.

(b) *Factors determining the Value of a Service*

Rate-fixing is governed by the following factors:

(i) the aggregate revenue the various items of tariff should yield;
(ii) the difference in objective value between different types of service;
(iii) the variation in value of a given service according to the circumstances in which it is performed.

As seen earlier, the amount the tariff should yield depends on whether the pilotage service in the District is fully controlled by the Pilotage Authority or whether the pilots are self-employed, operating under the free enterprise system. In the latter case the tariff should reflect the true value of the pilot's services, but where provision of the service is controlled, the amount of revenue required is determined by the total cost of the service; this amount is then spread over all the users by the establishment of rates. If the service can not be financially self-supporting, the share of the total cost that is to be borne by shipping is pro-rated. Normally, the established prices should not be higher than the objective true value of the services performed.

The rates for various types of service must also show the difference that exists between the value of one compared to another (general rule (vi)). For instance, except under special circumstances it would be an abuse of power amounting to illegality to fix a higher rate for a movage from an anchorage to a given wharf than for a full pilotage trip which was completed by berthing at the same wharf. The value of each different type of service should, *mutatis mutandis*, be based on the same criteria.

Although there are a number of different types of pilotage service that can be rendered, this causes little difficulty in practice due to the fact that the incidence of services other than pilotage trips and movages is minimal. For instance, in the Quebec District in 1962, pilotage trips (tonnage, draught, tonnage overcharge and Class A charge) provided 95 per cent of the gross revenue of the District. The next item was the remuneration of the second pilot on winter assignments, 2.6 per cent. Movages accounted for only 1.5 per cent, detentions 0.35 per cent and cancellations 0.02 per cent. However, there are special situations which have to be taken into account, e.g., in 1962, because of the physical peculiarities of the British Columbia District, combined with its considerable length and difficult land and air communications, detention and quarantine charges accounted for 11.8 per cent of the District gross earnings.

Many *factors affect the actual value* of each service. As far as possible, these have to be taken into consideration when the actual rates are fixed or computing rules are laid down in the regulations. These factors are mainly the following:

(a) the nature of the service itself as qualified by the peculiarities of each District;

(b) the difficulties attached to a "navigation unit";

(c) the importance to the ship and cargo of the service performed;

(d) the importance of devising a system which is as simple as possible consistent with equity so that any of the three factors listed above can be disregarded if it has a negligible effect on the final result. Efficiency will be facilitated by eliminating contentious and time-consuming calculations.

The local factor is the first in importance. The value of a service varies from place to place on account of local circumstances, e.g. the standard of training, qualifications, knowledge and skill required to navigate all types of ships in areas where known hazards exist; the cost to the District and to the pilots of maintaining and providing a pilotage service; the particular difficulties caused by special features, e.g. traversing the railway bridge in the New Westminster District, manoeuvering through the Second Narrows in Vancouver Harbour, or negotiating the Reversing Falls in Saint John, N.B., are hazards that are not met during every pilotage assignment in these Districts, but when encountered they warrant a special charge. The high degree of qualifications and training which the Saint John pilots require to conduct large vessels into Courtenay Bay, or which the Montreal River pilots must have to negotiate the narrow, tortuous channels in the St. Lawrence calls for higher remuneration than pilotage services performed where there are very few difficulties.

The difficulty involved in piloting a *navigation unit* is another pertinent factor. In the case of composite navigation units, the charge may reflect any added difficulties inherent in each type, for instance, most tariffs rightly provide for a 50 per cent surcharge (or 1½ tariff) for the navigation of a dead ship. The difficulty of navigation varies with each type of composite unit, i.e., a tug or a number of tugs towing or pushing one or a number of barges, scows, rafts, booms or any other floating objects.

If it is practicable to assess the difficulty or otherwise of piloting various types of navigation units, there would be no objection to stipulating a smaller charge for vessels or units which, because of their type of propulsion or their steering or other devices, are fast and easy to manoeuvre, and are equipped with instruments that facilitate navigation. Conversely, a higher charge might be set for special cases which call for greater skill and caution on the pilot's part, e.g., conducting vessels with cargoes of explosives through difficult, crowded channels.

Because vessels vary greatly in type and characteristics and because pilotage rates have to be fixed by regulations, it is a practical impossibility to take into account every aspect of every situation. When the Pilotage Authority establishes the formula for computing dues it must disregard the factors of little importance and average out the effect of other known factors and of unpredictable factors that make an assignment longer, harder, or more expensive, such as weather conditions, traffic, or occasional land transportation costs.

For instance, in theory, a large vessel deeply laden should pay more for a given service than a small vessel half laden, but this may not be necessarily equitable for the pilot, because he may have a much longer and more difficult assignment with the small vessel, which is less manoeuverable and considerably slower. On the other hand, for navigation through a tortuous,

narrow, shallow channel, it is the degree of skill and knowledge a pilot possesses that will be the determining factor whether certain ships can be safely piloted. Pilots with higher qualifications can navigate larger and more deeply laden vessels as well as a greater variety of types.

There is also a practical limit beyond which the comparative value of service should be disregarded, i.e., when the amount to be charged, taking into consideration the other charges and dues a ship has to pay, is relatively small. In such cases the resultant small differences do not warrant organizing a complex system. This explains, for instance, why most movage charges are set at a uniform flat rate.

(c) *Various forms of expressing Rates in the Regulations*

The Canada Shipping Act does not provide any specific basis or formula for the computation of dues. Subsec.(h) of sec. 329 merely states that the Pilotage Authority may "fix the rates, on either the same or different scales, of payments to be made in respect of pilotage dues". Subsec.(h) is not only not limitative, but it is also aimed at assuring the Pilotage Authority complete freedom to select whatever method it wishes when drawing up regulations for computing pilotage dues.

This wording was introduced in subsec.(h) when the Act was revised in 1934 in order to remove the ambiguity that resulted from deleting the reference to "pilotage dues" when the Pilotage Act was consolidated in 1886. The wording now recognizes and emphasizes the flexibility that pilotage legislation must have in Canada; different methods can be used not only in various Districts to compute pilotage dues but also in the same tariff for different types of pilotage service or components of different rates.

As must be expected, there is no uniformity between Districts in the method of computing pilotage dues and each has its own rules which, moreover, are substantially changed from time to time.

The various methods now in use may be grouped as follows:

(a) for a particular type of pilotage a price may be fixed:
  (i) for the service as a whole;
  (ii) for each of the possible components;

(b) for a complete service or for each of its components the charge may be:
  (i) a flat, invariable amount;
  (ii) a variable amount calculated by fixing a fee for a unit of one or a number of variable factors which depend on
    (A) the circumstances of the trip, normally only on its length, but on occasion its duration or the ship's destination;
    (B) the ship's characteristics, i.e., draught and/or tonnage (net or gross tonnage);

(C) the type of navigation unit;

(D) any combination of (A), (B) and (C).

(iii) a combination of both (i) and (ii), usually when either a minimum or a maximum is provided, or both.

(i) *Flat rate.* The charge for a given pilotage service may be invariable for the service as a whole or for any one of its components.

Mr. Herbert Colley, a member of the Shipping Federation of Canada and Chairman of its Pilotage Committee, made a personal recommendation during his testimony advocating adoption of the flat rate system whenever, due to the imposition of maximum and minimum rates, an average rate yielding the same aggregate revenue was not far from the minimum or maximum rate.

The Canadian Merchant Service Guild and the St. Lawrence Pilots' Federation in their briefs opposed the flat rate system claiming it is unjust both to shipowners and pilots: to the shipowners because it discriminates against small ships; to the pilots because the price for their services and the responsibility they assume should vary with the importance of the ship and its cargo. (Canadian Merchant Service Guild, Brief (Ex. 1382) paras. 35 and 36) (St. Lawrence Pilots' Federation, Brief (Ex. 671) paras. 545, 546 and 547). The argument sounds strange coming from the St. Lawrence Pilots' Federation. In the Districts of Quebec and Montreal, the fundamental question is whether the proposal is acceptable to the shipowners because they alone are concerned. The importance of a ship and her cargo means very little to the individual pilot and concerns him only remotely. Because of the special system of pooling which the pilots themselves devised, each pilot receives a flat remuneration for each trip in a given year, i.e., a uniform amount for each pilotage trip he performs irrespective of the size or draught of the ship he pilots on each occasion. The value of a pilotage trip is the result of averaging the sum of the various amounts yielded by all the trips performed by all the District pilots. (For details of the system, vide C. 6, p. 193, and Part IV, Quebec District, "Pilots' Remuneration and Tariff".)

The flat rate is a practical solution which is indicated in certain circumstances, e.g. the situation described by Mr. Colley, but the Commission does not agree that his proposal should apply to the Quebec District. Statistics show that the rates would vary materially unless it is accepted that a variation of $50 to $100 in the dues now being charged in the Quebec District makes little difference in the ship's aggregate cost. According to the Quebec tariff, a small ship (16 feet draught, 2,000 net registered tons) liable for the minimum charge would pay $83.20. There is no maximum on draught but ships are not charged beyond 15,000 net registered tons. Hence, a large ship of over 15,000 N.R.T. and drawing 30 feet of water would pay $293.50, including the $25 Class A charge, for the basic trip from Les Escoumains to Quebec, exclusive of the pilot boat charge. According to Mr.

Colley's calculations, the average flat charge in the Quebec District for 1962 would have been $150 thus representing an increase for all the small non-exempt vessels (liable for the minimum charge, irrespective of their size) of $66.80—80.3%, but for the large ships a saving of $143.50—48.9%.

The all-inclusive formula is applicable when a given service is always composed of the same components, its circumstances do not vary materially from case to case and the amount involved is either relatively small or almost constant because the few possible variations are slight. For instance, it would apply to inward and outward voyages in a harbour type District because they are always composed of two elements, the pilotage service of a pilot and the use of a pilot boat. In such a case, when both components are computed by the same method, there is no good reason for providing a separate charge for each. For example, this method was used to establish the pilotage dues in the Churchill District prior to the 1966 By-law. In 1965 the pilotage dues were $80 all inclusive and no useful purpose was gained by splitting the charge (P.C. 1966-1623 of Aug. 24, 1966) into two flat rates, i.e. $55 for the service of the pilot and $25 for the pilot boat since the pilot boat always has to be used. The flat rate is the simplest way to determine charges for movages, trials, compass adjustments and for pilotage trips, when, as in most port Districts, the length and circumstances of the trip are fairly constant. A flat rate could also be charged for a component which is intended to be constant, such as a pilot boat charge, or a charge in Vancouver Harbour for transiting the Second Narrows and in New Westminster Harbour for negotiating the railway bridge.

A different factor may have militated in favour of the flat rate system in the Cornwall District ($160 all comprehensive for a transit trip). The Cornwall District is part of the St. Lawrence Seaway system and basing pilotage dues on a flat rate had the advantage of avoiding the difficulty resulting from the lack of uniformity between the American and the Canadian systems of tonnage measurement. If the dues had been based on a variable charge depending on the size of ships, this problem would have had to be solved or Canadian upper lakers, for instance, whose gross tonnage is 10% to 13% higher than their U.S. counterparts would have had to pay a premium for transiting the District (vide pp. 168 and 168).

On the other hand a fixed charge is not indicated when:

(1) Some of the component's situations do not always arise, e.g. the pilot boat service in the Harbour of Quebec. While a pilot vessel must always be used at Les Escoumains, one will be needed in Quebec Harbour only if a ship is not berthed. For the same reason the tariff in this example might well provide separate berthing and pilot boat charges at Quebec, because in addition to the constant factors—pilot boat charge at Les Ecoumains and pilotage charge

from Les Escoumains to Quebec—there could be a requirement (unless the vessel anchored and the pilot remained aboard) for either a pilot boat or for berthing.

(2) The same component situations always arise, but it is desired to use different methods to fix the charges for each, e.g. a flat rate for the pilot vessel and a variable rate for pilotage.

(ii) *Variable rates.* The second method is to base pilotage rates on a number of variable factors, when the extent and the circumstances of the service vary substantially and the charge is large enough to warrant consideration of these differences. The importance of making due allowance for the type of navigation unit involved was stressed earlier and need not be elaborated here. The usual method consists in fixing a price per unit of each of these variable factors.

(d) *Local variable factors*

The first group of these pertains to the circumstances of the trip, i.e., length, duration of the trip and the circumstances of the route to be followed. This last factor was studied above with the factors entering into the rate fixed for each service.

(i) *Length of the trip.* The first and most important of these variable factors is the distance covered or the length of the trip. This factor is normally not important in a port type Pilotage District where all trips are of much the same length, but it is significant in river and coastal Districts where a trip may vary from a few miles to over 100 miles in any of the three St. Lawrence Districts or up to 600 miles in the B.C. District. In river Districts a sector plan is followed because there is no choice of routes; the longest trip is divided into a number of fairly equal sections (four sections in the Districts of Quebec and Montreal) or by a natural point of destination (as in the New Westminster District, the first section is from sea to New Westminster Harbour, the second involves transiting the railway bridge and the third extends upstream into Pitt River). Because each pilotage trip in the Cornwall District is, with very few exceptions, a complete transit, a charge is provided for the full trip with the proviso that a part charge "computed on the pro ata basis according to the distance piloted" is to be made for the occasional trip that commences or terminates within the District. In the B.C. District, however, distance is charged on a mileage basis because numerous routes may be selected. The mileage system could apply equally well to river Districts but the sector system has the advantage of simplifying computations, in that each sector calls for a fraction of the basic rate while the mileage system requires fixing a rate on a mileage unit, thus bringing in an additional variable factor in the computation of the basic charge.

The distance factor does not offer any particular difficulty nor is it a source of contention. It is quite obvious that the solution can not be theoreti-

cal but must be practical and essentially dependent upon the special physical features of each District. While a charge on a mileage basis is applicable where the circumstances and difficulties of navigation alter little en route, another method should be used to assess the charge for navigating especially difficult sections that are not encountered each trip.

(ii) *Time Factor.* This factor, as a rule, is not taken into consideration because Masters try to reach their destination as quickly as possible. Occasionally, a trip takes longer due to adverse weather conditions, traffic, unavailability of berth or mechanical failures. These are considered occupational hazards that have already been compensated for because the average duration of any pilotage service is one factor that has to be taken into account by the Pilotage Authority when it fixes rates.

However, when the duration of a trip can vary considerably, either on account of its nature or because of special circumstances, the time factor may be, and usually is, taken into consideration, e.g., in winter on the St. Lawrence River a trip that normally would take about ten hours may last a number of days because of ice. For this reason, the tariffs for the District of Quebec (subsec. 3(1)(a)) and for the District of Montreal (subsec. 7(1)(a)) provide a charge, improperly called detention charge, when for any reason, including stress of weather, a winter pilotage trip is interrupted and the pilot has to stay on board. Equally, when a pilot navigates a yacht on a pleasure trip, destination is not the determining factor. In the B.C. District, where this type of service is frequent, a special tariff is based on a *per diem* charge of $75 from base to base plus the pilot's expenses (B.C. District By-law Schedule, sec. 3). While the time element is not normally taken into account in such special assignments as compass adjusting and direction-finder calibration, because they are almost constant, it would be logical to charge for trial trips on the basis of time (B.C. District By-law Schedule, sec. 4).

(e) *Ships' characteristics*

These are also used as factors to vary charges according to the value of the service rendered. The characteristics used are normally draught or tonnage or a combination of both. Other ships' characteristics could be used, such as length, breadth, depth, deadweight and even the cargo actually carried, either singly or in any combination. Whatever method is used, the aim is to arrive at a price that would be indicative of the value of the service to the vessel.

In Canada, except in two Districts (not counting the Great Lakes Basin) where the flat rate system is adopted, each District has devised its own system for computing charges based on ships' characteristics. Aside from the prices for each unit, which varies from District to District, the rate for a pilotage trip is fixed in six Districts on net tonnage alone, in one District on draught alone, in two Districts on gross tonnage and draught, in thirteen Districts on net tonnage and draught.

A review of the pilotage legislation of 15 maritime countries shows that the ships' characteristics used in most cases to compute charges are draught and tonnage (either net or gross) taken alone or in combination, with a few exceptions:

(a) deadweight tonnage is used in the State of Maine together with draught;

(b) in Antwerp, Belgium, movage rates are based on the length of the ship;

(c) for the various services they provide, including pilotage, the Panama Canal and Suez Canal Authorities have devised their own systems of measurement which are referred to as Panama Canal tonnage and Suez Canal tonnage.

In the Australian States and in West Germany, the basis is generally gross tonnage. France, Greece and New Zealand use net tonnage. Sweden uses net tonnage and mileage (distance piloted). Belgium and the Netherlands (for inland pilotage) use draught and mileage. The Netherlands (for sea pilotage) and many States in the U.S.A. base their charges on draught only.

Registered tonnage (generally referred to as net tonnage) and gross tonnage are measurements of the cubic capacity of a ship, i.e., 100 cubic feet equals 1 ton. Whereas the measurements for gross tonnage are more indicative of the size of a ship and more related to her length, breadth and depth, those for net tonnage are more indicative of a ship's earning capacity. The draught of a ship at the time it is read indicates to what extent her earning capacity is being used. As will be seen later, the tonnage indices now in force present difficulties and are not universally uniform, a situation which leaves much to be desired. This has prompted recommendations to the Commission that a special uniform method be devised to compute pilotage charges that would eliminate the difficulties now encountered with the tonnage element, as now computed, and that could be made applicable throughout Canada.

(i) *Draught factor.* The draught factor has inherent problems which have been overcome in practice.

The draught of a ship is ascertained from the Master but it can be usually verified with reasonable accuracy by any pilot.

Subsec. 340(2) C.S.A. makes it the duty of the Master to declare to the pilot the draught of his ship whenever so required, whether this is when the pilot "begins to pilot or is piloting" the ship.

The By-laws of all Districts (except Churchill) contain a similar provision which, with some slight variation in terms, reads like the Quebec District By-law subsecs. 7(1) and (2):

"7 (1) On boarding a vessel the pilot shall ascertain from the master or officer-in-charge the draught, registered tonnage and other information required to complete the pilotage card supplied by the Authority.

(2) The completed pilotage card shall be signed by the master or officer-in-charge and by the pilot and shall be delivered by the pilot to the Superintendent (or Secretary) as soon as practicable thereafter."

In the By-law of the British Columbia District (subsec. 7(1)) and New Westminster (subsec. 7(1)), the wording is the same except for "registered tonnage" which is replaced by "the net and the gross registered tonnage".

The draught figure can be read and verified by a pilot with reasonable accuracy now that all foreign ships (except fishing vessels and small vessels under 150 tons gross) are marked with load lines and have draught marks set in and painted at the bow and stern. Such reading is accurate when a vessel is in calm water but only partially so when the sea is rough or a slight swell prevails. Accurate reading is impossible then, but the reading obtained is close enough to verify the Master's figure; small errors will make little difference in the total charge.

The bow and stern draught marks are not required by any international convention. Those marks provide vital information on which a ship's safety depends, i.e., the depth of water required for safe navigation, and are, therefore, essential for all except very small vessels. On British, American and most other foreign ships, measurement markings are in feet and inches, but on French, Russian and some Japanese ships as well, the markings are in decimetres. A few foreign ships are marked in both feet and inches and decimetres. The pilots, however, are conversant with decimetre markings, for which conversion tables are used, and no difficulty or problem has ever arisen in this respect. The presence of these markings would appear to be the reason why the former provisions of the Act (sec. 452, 1927 C.S.A.), which provided a speedy procedure for settling disputes about the draught of a ship, were not reproduced in the 1934 Act. However, subsec. 340(2) C.S.A. which makes it an offence for a Master to refuse or omit to declare the correct draught of his ship, was retained. Nevertheless, the pilots have no difficulty in this regard and the Department of Transport has reported that there has been no prosecution under subsec.(2) of sec. 340, at least during the last decade (Ex. 1504).

Captain W. A. W. Catinus of the Department of Transport stated that while he was Regional Superintendent of the St. Lawrence Districts there were a few occasions when the pilot's verification differed quite materially from the Master's declaration on the pilotage card. In these instances he contacted the agents or shipowners concerned and the difference in dues was reimbursed. The explanation given was that the incorrect statements were due to errors on the part of the Masters. He added that it is not possible in practice to carry out any investigation after a ship has departed. He reported only once to Ottawa a violation of subsec. 340(2) by a Master.

A ship's draught varies while en route for a number of reasons: fuel consumption; changes in trim by altering water ballast and using water supplies; floatation differential between fresh and salt water; or because water

ballast was changed at the pilot's request for safety reasons. When under way, draught also varies on account of the hydraulic effects resulting from a ship's movement through the water. The nature and extent of these effects vary with the shape of the hull, the depth of water in narrow, shallow channels, and the speed of the ship. Ships are generally loaded to draw a little more water aft than forward for efficient handling, with the result that the bow and the stern then show different draught readings.

All Districts, except Churchill and Halifax, whether or not they make use of ship's draught as a factor in the rates, have incorporated in their By-law a definition of draught for rate purposes. It is defined as "the deepest draught of a vessel at the time pilotage services are performed". It is, therefore, the deepest draught at any moment from the time the pilot boards the ship to the moment he disembarks; it is also the deepest draught mark the ship shows whether at the bow or stern. However, the variations of draught due to the movements of a ship when under way are not taken into consideration for tariff purposes (although for the safety of the ship the pilot must take them into consideration when navigating in shallow channels) nor should there be a charge for any increase in draught made at the pilot's request.

If a fixed charge is made per foot draught, there should be a rule whether there will be a charge for a fraction of a foot and, if so, how it should be calculated.

For no known reason the method of dealing with fractions of a foot differs from District to District:

(a) In Miramichi and Restigouche, the By-laws are silent on the matter, despite the fact that draught is used with tonnage in setting the rates.

(b) In New Westminster (Schedule subsec. 1(2)), a fraction of less than six inches is disregarded, but if of six inches or over it is charged as a foot.

(c) In British Columbia (Schedule subsec. 12(2)), a fraction of six inches or less is counted as half a foot, and as a foot if more than six inches.

(d) In Saint John, N.B. (Schedule sec. 1), a fraction is not counted unless it falls exactly (sic) on the half foot mark, when half a charge is made; any fraction up to the half foot mark is disregarded while if over it is counted as a foot. This rule is adopted in the other small commission Districts, i.e., Bathurst (Schedule sec. 1), Buctouche (Schedule sec. 1), Caraquet (Schedule subsec. 1(2)), Pugwash (Schedule subsec. 1(3)), Richibucto (Schedule subsec. 1(2)), Shediac (Schedule sec. 4), Sheet Harbour (Schedule sec. 1).

(e) In Montreal (Schedule subsec. 9(a)) and Quebec (Schedule subsec. 10(b)), the charge is per quarter foot, each fraction being counted to the next quarter.

Obviously these variations in the method of dealing with fractions of a foot draught result from lack of co-ordination and are not due to local requirements. Since draught can not be visually ascertained with accuracy in all circumstances to the inch, and since the pecuniary value of a fraction of a foot is small, it is considered that the New Westminster method (a fraction under 6 inches is disregarded but 6 inches or over is counted as a foot) is the most reasonable and most practical. It should be adopted by all Districts where the draught factor is in use.

Since the foregoing rule and the deepest draught rule are of general application wherever the draught factor is used, it is considered that they should both be enunciated in the Act itself. This would have the advantage of ensuring uniformity in legislation where there is no reason for any diversity, and also avoiding unnecessary repetition in every set of regulations where, all too often, subject-matters are not adequately covered.

Draught can be a controversial factor when used alone as a means of fixing pilotage dues but it has the marked advantages of being readily available and easily assessed, which probably explains why many large ports, such as New York, use draught alone. However, it is an arbitrary criterion which is not truly representative of either the value of the pilotage service to a pilot or to a ship, or of the extent to which a ship's earning capacity is being used.

Draught bears no relation to the size of a ship. Therefore, when taken alone as the basis of computing pilotage dues, the charge may not be truly representative of the value of the service a pilot renders, e.g. some larger ships are restricted to the draught imposed by the depth of water available in certain channels and harbours which they can enter only when light or partly loaded and hence show the same draught as much smaller ships. Draught is not necessarily the factor which determines a pilot's difficulties because, while a lightly loaded ship is normally less manoeuverable, a deeply laden ship in a shallow, narrow channel may prove difficult to handle because of small under water clearance and the hydraulic effects caused by her movements, i.e., bank suction and squat.

It is said that draught represents the value of the cargo or, at least, the extent to which the earning capacity of a ship is being used. This can not be true of passenger vessels and would be true of cargo vessels only if all ships were constructed the same way and all carried cargoes similar in weight, volume and value. A fully laden ship will show different draught depending on the specific gravity of its cargo.

(ii) *Tonnage factor.* Tonnage represents the cubic capacity of a ship. Basically it represents a ship's true dimensions, i.e., length, breadth and depth calculated as closely as possible taking into account the variable lines and shapes of each ship.

Tonnage (gross or net) is an arbitrary unit, an index, devised to indicate the objective value of a ship or of its earning capacity for the purpose of taxation. For this reason, and also because tonnage bears no relation to ship safety, shipowners have contrived every possible device and modification in ship construction since this index was first established to incur the lowest amount of taxation without losing earning capacity. When the regulations were revised to cover new situations thus created, new stratagems were found with the result that the present tonnage measurement rules still leave much to be desired, and have become a maze of complexity.

The problem is compounded by the fact that no system of measurement is fully recognized internationally. The nations using British rules disagree as to their interpretation with the result that their tonnage figures differ.

In some parts of the world where substantial services are provided to shipping, *ad hoc* methods of measurement have been adopted to which all ships wishing to use their facilities must submit, e.g. the Suez and Panama Canals. These special indices are much more indicative of a ship's worth as far as pilotage service is concerned, but they can not be used in Canada, because only the comparatively small number of ships which were intended to transit these canals, or actually did so, have been measured on this basis.

Ships' characteristics are so diverse and change so rapidly with technological progress that in order to meet the demand for transportation, and at the same time satisfy national economic needs, it was necessary to devise a measurement unit that would both show the worth of a ship and provide a convenient yardstick for taxation purposes. Cubic capacity, referred to as tonnage, is used and provides the basis or one of the bases, on which are levied dues, charges and tolls for canals, harbours, wharves, drydocks, pilotage and other marine facilities. It also serves as a means of establishing categories of ships for the purpose of legislation concerning ships when size is one of the determining factors, e.g., in pilotage legislation it is used to determine pilotage exemptions.

The difference between gross and net tonnage is determined by deductions. According to the concept established by the 1854 United Kingdom Merchant Shipping Act, gross tonnage is the whole internal space of a ship and net tonnage is the space available to carry cargo and passengers after subtracting the non-paying spaces not available for cargo, e.g., those occupied by crew, machinery and deck houses. Gross tonnage indicates nearly

total cubic space, while net tonnage indicates a ship's earning capacity. All countries accept these principles but they do not agree on the spaces that should not be included in gross tonnage (exemptions) nor on what should be defined as deductions.

Because ships vary greatly in shape it is a very complicated task to ascertain their cubic capacity and the best practical solution is to adopt arbitrary rules to calculate tonnage (vide Appendix, Ex. 1387, for actual details of tonnage measurements of *S.S. Sept Iles.*)

While all maritime countries recognize the necessity for a uniform system of tonnage measurement, they have been unable to reach an agreement to date. This question does not convey the same sense of urgency as the load lines on which an International Agreement was reached in 1930 because load line concerns ship safety. Disagreement exists as to the accuracy and pertinence of some arbitrary rules used in the measurement formulae. The question has been under study in Great Britain for over 200 years and no completely satisfactory solution has yet been found.

The British system, originally introduced in the 1854 Act, was adopted as the basis of legislation by many countries. However, they have repeatedly modified their legislation to cover new situations without coordinating their amendments, with the consequence that measurements now vary materially from country to country.

In 1939, under the auspices of the League of Nations, the majority of the leading maritime countries drew up a set of rules known as "International Regulations for Tonnage Measurement of Ships" which were based mainly on the British rules. The war intervened but in 1947 the Governments of Belgium, Denmark, Finland, France, Iceland, the Netherlands, Norway and Sweden met at Oslo and adopted these rules which became effective June 1, 1948. Britain did not join this group and Canada also abstained because of the British Commonwealth Merchant Shipping Agreement of 1931. Since the purpose of the 1931 agreement was that the laws pertaining to shipping registry should remain the same in all Commonwealth countries, any modification to the British rules of tonnage measurement had to become law in Britain and in all the Commonwealth countries before becoming effective. Therefore, since it would be improper for Canada or any other member of the Commonwealth to make unilateral changes in tonnage regulations, the Canadian rules are the same as the British rules.

Although tonnage measurements in the countries which signed the International Agreement are governed by the same rules and, therefore, should be identical, this is not always so on account of differences of opinion between the signatories about the interpretation of some of the measurement rules. This accounts for the differences in the Norwegian and Swedish measurements of the Norwegian passenger freighter M.S. *Lyngenfjord,* which

are very slight for gross tonnage but quite material for net tonnage. These tonnage indices, shown on her registry certificate which also shows her Suez and Panama tonnages, are as follows:

	Gross	*Net*
Norwegian	3,791 tons	2,177 tons
Swedish	3,811 "	2,851 "
Suez Canal	5,937 "	4,529 "
Panama Canal	5,900 "	4,292 "

The United States uses neither International rules (also called Oslo rules) nor British rules. They have rules of their own which are also used by ships of Panamanian, Liberian and other flags of convenience. While there are some slight differences between British rules and International rules, there are many significant differences between British rules and United States rules. The main differences are:

(a) Water ballast tanks. In both systems water ballast tanks situated in the double bottom are exempt and, therefore, do not count in the gross tonnage measurements. Water ballast tanks situated above the double bottom are also exempted under U.S. rules without limits but under British rules they are not exempted but are accepted as deductions from gross tonnage within limits to arrive at net tonnage.

(b) Side tanks. They are a most important feature for Great Lakes vessels where it is common for large bulk carriers to have side ballast tanks that extend along the sides of the holds. These side tanks are not included in gross tonnage in a ship under the U.S. flag but are included if the ship is Canadian. Since large American lakers are now trading between the Lakes and ports in the Gulf of St. Lawrence, this difference affects pilotage dues in the Montreal and Quebec Districts (but not in the Cornwall District which has an invariable (flat) pilotage charge). Occasionally ocean-going ships also have side tanks, e.g., the German M.S. *Lechstein.*

(c) Passenger cabins. Under U.S. rules any passenger cabins above the first deck which is not a complete deck to the hull are exempted for gross tonnage, but under British rules these spaces are not exempt. This difference is so significant that an American passenger vessel entering a Canadian port is required to produce an "Appendix Certificate" which shows the amount to be added to the tonnage shown on her certificate of registry to equal the tonnage under Canadian rules.

Tonnage measurement is such a problem of international concern that for a number of years it has been under active study by the Inter-governmental Maritime Consultative Organization (IMCO), a United Nations specialist agency responsible for international maritime affairs. IMCO has

proposed a solution for one tonnage problem, that is, open shelter-decks, which has now been adopted by most IMCO member countries and is on the way to adoption by the others. IMCO is aiming at a universal simplified system of tonnage measurement to cover all cases.

In Canada the two main problems concerning tonnage are:

(a) ascertaining the British equivalent when the ship does not carry a certificate showing British measurements;

(b) open shelter-decks.

Foreign measurements. Since the imposition of dues or other charges on shipping is a matter of taxation, the method to be used for the assessment of a ship comes within the legislative authority of Canada, failing the existence of an international agreement to which both Canada and the country of the ship's registry belong. As said earlier, Canada is bound by British rules but, whenever a ship does not carry a certificate showing its British measurements, she may be re-measured according to British rules if these measurements are necessary to assess pilotage dues or charges. The authority for this procedure is contained in sec. 100 C.S.A. A Minister's order issued pursuant to this section, dated July 31, 1956 (SOR/56-201, as amended in 1959 by SOR/50-930) (Ex. 587) lists fourteen countries[2] whose method of measurement differs materially from the British formula and ships registered in these countries, if not carrying a certificate of British measurement, may be re-measured in Canada. A compromise procedure has, however, been devised by the Customs Branch, Department of Revenue, and adopted by those concerned with ships' tonnage whereby an arbitrary twenty per cent is added to the tonnage shown on the tonnage certificate originating in these countries. If a ship refuses to accept the compromise procedure, she is detained for re-measurement as outlined in the Minister's order (Ex. 586). The process appears to be of doubtful legality because it is not authorized by any statutory provision and is contrary to the Minister's order. However it seems to be a valuable practical procedure which should be authorized by a relevant provision, at least in pilotage legislation. The United States of America is not among the listed countries, although Liberia and Panama, which use the American rules, are listed.

Therefore, the problems caused by different measurement systems are only practical in nature; it is merely a question of applying existing legislation.

Open shelter-deck problem. This problem is not solved under the prevailing British system of measurement. It is, in fact, an ingenious device developed to circumvent the British rules. Under British rules, only spaces permanently enclosed and available for cargo are measured for tonnage, and

[2] Argentina, Brazil, Chile, China, Costa Rica, Cuba, Czechoslovakia, Honduras, Liberia, Panama, Paraguay, Peru, Switzerland, Uruguay.

exemption of any space above the tonnage deck can be achieved by fitting openings (called tonnage openings) with closing appliances of a temporary nature. A shelter-deck is normally an additional deck above the tonnage deck, which is not completely enclosed and provides spaces which are not included in the tonnage measurements of the ship because they are fitted with "tonnage openings". When standard full strength hatch coamings are constructed around the tonnage openings, and other structural modifications made, the open shelter-deck becomes closed and such additional space is then added to the ship's registered gross and net tonnages. Ships so constructed and fitted when used in this open shelter-deck condition can have both gross and net tonnages some 30% less than a ship of exactly similar size and external appearance but which is not fitted with tonnage openings, or has had what might have been her open shelter-deck permanently closed.

One shipping periodical, *The Fair Play Shipping Journal,* 11 March, 1965, explained the situation as follows:

"At present, the open shelter-deck has the advantage that the shelter 'tween deck is exempt from tonnage measurement, provided that certain arrangements are incorporated in the structure. Her "tonnage opening" has to be provided on the weather deck to substantiate the fiction that the 'tween decks are "open", the bulkheads in the 'tween decks must have openings which cannot be "permanently closed" for the same reason and, as the second deck—because of these "openings"—is supposed to be at the mercy of the weather, the hatchways have to be provided with coamings 9 in. high and the scuppers from the deck to the bilges fitted with screw-down valves. All this is sheer fantasy, dating from the famous law case of 1872 when it was ruled that the upper 'tween deck of the coaster "Bear" should be exempt from tonnage measurement because it was not constructed in such a way as to protect the cargo completely".

The advantage of an open shelter-deck vessel to the shipowner lies in the additional cargo she is able to carry without the cubic space it occupies being included in the gross or net registered tonnage of the ship. In deciding whether a ship so constructed is to be modified from an open shelter-deck condition to closed or vice versa, the shipowner considers the nature of the cargo to be carried. If the cargo is heavy, such as steel, iron products and machinery, the ship may reach her load line marks before her cargo holds are full, but if the cargo is light, the holds may be full before she reaches her load line, in which case the open shelter-deck space could be used to great advantage.

To illustrate that registered tonnages of a ship vary materially between the closed and open shelter-deck conditions, the following cases were cited:

	Closed Shelter-Deck	*Open Shelter-Deck*	*Diff. Tons*	*%*
(a) *British M.V. Montcalm (cargo vessel)*				
Gross tonnage	6,950	4,999	1,951	—28.1
Net tonnage	3,875	2,615	1,260	—32.5
(b) *British M.V. La Selva (cargo vessel)*				
Gross tonnage	9,407	7,014	2,393	—25.4
Net tonnage	6,094	3,821	2,273	—37.3

There is, however, no dishonesty in the process because a ship is either in one condition or another, which can be easily ascertained: if in the closed deck condition, registered closed deck tonnage, i.e., maximum tonnage, is applicable. There is only an appearance of injustice in that the same ship may show different tonnages on different occasions, but there is no material difference if a ship's tonnage is altered by structural modifications and then remeasured. The fact that alterations can be done more easily in open shelter-deck ships does not change the basic situation. Furthermore changing from one condition to the other requires expensive structural modifications.

If such a ship was in the closed shelter-deck condition it would be a misrepresentation on the part of the Master to claim open shelter-deck tonnage.

It is worth noting here what appears to be a deficiency in the present Act: while subsec. (2) of sec. 340 makes it obligatory for Masters and owners of all ships to answer truthfully relevant questions to aid in ascertaining the correct pilotage dues, there is no punishment for contravening this provision. The only punishment provided is for misrepresentation or omissions by the Master regarding draught. It would appear, however, that the distinction was intentional for it is an obligation and duty of the Master to declare the correct draught as an important factor concerning the safety of the ship. When the question merely concerns information about fixing dues Parliament seems to have been satisfied that the question is adequately covered by civil and criminal legislation and also by the Pilotage Authority's power to enforce payment of any pilotage dues for which a ship is liable.

In their recommendation No. 20 the St. Lawrence pilots propose utilizing the maximum net or gross tonnage, as it appears in the certificate of registration, in order to cover ships with shelter-decks or side tanks. The B.C. and New Westminster pilots have already adopted maximum gross tonnage as the criterion. However, this recommendation does not go to the heart of the problem; it proposes a solution for only part of the shelter-deck question and is not the answer to the problem created by the side tanks in certain ships. It is only the "open shelter-deck/closed shelter-deck" ships that have two net and gross tonnage measurements; but the open shelter-deck ship which is never intended to be used in the closed deck condition has not been measured for the closed deck condition and her certificate of registry does not show maximum gross or net tonnages. There is no problem with side tanks under British measurements, and here the only solution is to apply Canadian law, i.e., these ships, whether they are American or other foreign registry, must be remeasured to show British measurements, unless they already carry British measurements in addition to those of their country of registry.

IMCO solution: tonnage mark. The IMCO tonnage mark system has been approved by all members and will become effective as an international agreement when it is adopted by all member countries. Some have already included the agreement in their legislation—United Kingdom, U.S.A., U.S.S.R. and others—but Canada has not yet done so.

The new system will do away with tonnage openings. Ships will be allowed to have two tonnage designations despite the fact that the 'tween-deck is to be permanently constructed in the closed deck condition. The new system was described as follows in an extract from *Lloyd's Report* (Ex. 1507):

> "The new system abolishes the 'temporary means of closing openings' (the class 2 closing appliance of the Loadline Rules) in bulkheads and deck as a condition for exemption of the spaces to which the openings give access. Thus, the open shelter deck ship will disappear, and with it the open shelter deck/closed shelter deck (OSD/CSD) convertible type".
>
> "The two deck ship of the future, if it is designed for maximum deadweight, will have two tonnages but only one freeboard assigned; the greater tonnage will include in the measurement all spaces below the weather deck, which will also be the deck from which the freeboard will be assigned, whilst the smaller tonnage will include in the measurement all spaces below the second deck only, the 'tween deck spaces being exempt even although they are without tonnage openings. A new special tonnage mark, to be set off from the second deck, will be assigned by the Tonnage Authority and will be cut in on the ship's sides. So long as this special tonnage mark is not submerged, the smaller tonnage will be the tonnage of the ship; if it is submerged, the greater tonnage will be the tonnage of the ship. Thus draught will control tonnage directly."

Gross or net tonnage. Is gross or net tonnage a better basis for computing pilotage dues? The answer depends primarily on whether the dues are considered remuneration for a personal service or a tax on ability to pay. Gross tonnage is more indicative of the value of services rendered. Since pilotage problems increase with a ship's size, gross tonnage is more closely related to dimensions than is net tonnage. For example, irrespective of their dimensions, tugs often have no net tonnage because all their available space is used for power, crew accommodation and other services.

The District of British Columbia was the first to adopt gross tonnage as an element for fixing pilotage dues. In a 1966 By-law amendment the New Westminster District also adopted gross tonnage to replace net tonnage.

Suggestions and recommendations received. For the above reasons the tonnage index as calculated from time to time was never wholly satisfactory and there has been much criticism. All those interested have urged the responsible authorities to replace it by another method of appraising a ship's worth for assessment purposes. Much criticism arises from misunderstanding the tonnage concept. By definition it is not a method of calculating either the real value of any service a ship receives or of assessments levied for various purposes. It is only a factor that may be used to fix these prices and assessments and must be taken for no more than what it represents, i.e., the cubic carrying capacity of a ship. For instance, speaking of the value of a

pilot's services, if two ships that take pilots obviously have similar dimensions the tonnage index could readily be used, or any of the three basic dimensions. However, the problem is not that simple because the relation between dimensions varies materially from one ship to another. At times tonnage index has a marked advantage because, although it has no constant relation with any of the three dimensions taken alone, it is indicative of the only common factor ships have: cubic capacity.

This question was one of those submitted to a Departmental Committee created August 10, 1949 (P.C. 3978) under the Chairmanship of Mr. L. C. Audette to investigate the administration of pilotage in those Districts where the Minister was the Pilotage Authority. The Committee reported that they had considered the question but were unable to reach any agreement and suggested the studies be continued:

> "We have endeavoured to consider the establishment of a uniform system to form the basis of tariffs in all districts. The districts are in sharp disagreement among themselves upon this subject, though none is unwilling to accept any new basis involving an increase in revenues.
>
> We have attempted to evolve various formulae upon which we could reach firm agreement. In this we have been unsuccessful for a variety of reasons. The work involved in obtaining the necessary data upon the ships of different types entering and leaving each district, the testing of each formula by applying it to the number of ships of each description in order to ensure that the proposal caused no unfairness to any class of ships would involve such a length of time that we do not believe it would be justifiable for this Committee to remain convened for that purpose. Though our efforts to reach any measure of firm agreement have been fruitless, we feel that there would be great advantage in exploring a formula combining draft and tonnage. Our suggestion along these lines might be pursued with the advantage by the able public servants on your staff who could peruse your departmental records and extract therefrom the statistical information required. They could embark upon this lengthy task without the obvious disadvantages attendant upon the present Committee being convened for so long a time. It is our belief that if this suggestion is pursued, a tariff system along these lines might be evolved which could serve as a common basis for all districts providing some element of flexibility is introduced to prevent certain classes of ships from bearing an unfair share and others from escaping too lightly. We recommend that any conclusions reached on this score by the staff of your Department be brought to the attention of the shipping interests and of the Pilots' Committees for any constructive criticism they may be in a position to offer.
>
> As such an undertaking has for its object the ascertainment of general principles and not the increase or decrease in the revenues of any district, we strongly urge that any proposals placed before the pilots or the shipping interests for their constructive criticism should be so adjusted in relation to the revenues resulting therefrom that they will present no change from the revenues produced by the existing tariffs. It is our belief that only in this manner could unbiassed criticism be obtained. If thereafter, there is any reason for an increase or decrease in the revenues of any district, this could be done by increasing or decreasing the rates by a given percentage." (Ex. 1330, pp. 18-20).

The Shipping Federation of Canada does not advocate any special method. They seem satisfied with whatever method of assessment is used provided it is arrived at through negotiations between the shipping industry and the other interested party (Recommendation No. 4, Ex. 726).

At the Halifax hearings (vol. 30, p. 3344) Captain A. D. Latter, District Supervisor of Pilots, stated:

> "I have views on the method of tariff calculation. In other words net tonnage is becoming more unfair each year with the trend of the shipowner to dodge some tariff by either sheltered decks, special tanks, deep tanks. I think eventually the only fair way to charge ships, be it on pilotage or harbour dues, is going to be some system that is worked out on the size of the vessel, not on the tonnage, but on her length, breadth and draught, because even the larger ships now can float at a shallow draught. The charge on draught, we have deep draught ships which are using net tonnage and don't have such great tonnage. I think length, breadth and draught will eventually have to be used and a rate scale put on that. In this District it is most unfair the way some ships are skipping on pilotage because of the sheltered deck business."

At present the Halifax tariff is based on net tonnage only. The main point of contention again appears to be open shelter-deck ships. Captain Latter proposes to do away with tonnage as an index and to replace it by a formula which permits the assessment of ships on the approximate volume of water displaced when a pilotage service is rendered, i.e., the cubic measurement computed by multiplying breadth, length and draught. Alternately a system could be devised to charge for each of these three dimensions as units. At first sight neither considers the actual size of a ship.

Captain William Crook, a Halifax pilot, proposed to the Commission a system basing the unit on the approximate surface of the main deck of a ship, doing away altogether with volume, i.e., overall length multiplied by breadth divided by 50 (Ex. 1180). This formula would give ship's units for computing dues with a fixed price set for each unit. It would appear that this formula would be equitable neither to ships of various types nor to the pilots. Since ships with the same surface measurement of weather deck may well vary considerably both in tonnage and in depth, this system would not determine a fair price for services rendered because deck surface is only a remote and inconsistent indication of the difficulty of a pilotage service and its value.

Captain F. S. Slocombe, Chief, Nautical and Pilotage Division, Department of Transport, in a paper prepared for the Commission on the subject of Tonnage Measurement, September 8, 1964 (Ex. 1387), concluded as follows:

> "Tonnage of a ship is affected by many arbitrary rules having no bearing upon the manoeuvrability, or the difficulty of handling a ship in pilotage waters. As long as pilots are remunerated on a fee basis, they will always find causes for dissatisfaction with individual cases of variation in tonnage.
>
> In considering possible alternatives to tonnage as a factor in pilotage dues it is essential to remember that the prime need is simplicity. It should not be necessary to make a computation to find a factor to use in another computation; and the factor chosen should be one that is clearly shown in the ship's documents, as in tonnage, but without the possibility of variation under different national rules. Overall length would perhaps be most suitable if it were shown on registry documents, but this is not the case. There remains the register length, which is the length from the fore part of the stem to the after part of the stern post. It may be taken that the breadth of a ship will be in proportion to the length and

> it should not be necessary to take this into account in computation of pilotage dues. If it were desired to substitute register length for tonnage where tonnage is now used, the procedure would be simple. All that would be necessary would be to take the sum of all the lengths in feet of ships named on pilotage source forms over a representative period of time, and divide the number of feet into the total amount paid on account of tonnage by the same ships. The result would be the amount per foot which would bring in the same amount of dues for the same traffic."

The Canadian Shipowners Association, in their brief (Ex. 1436), made the following recommendation:

> "Negotiate a realistic method for the assessing and payment of fees, giving proper regard to the value of the service rendered, the need or otherwise for compulsory pilotage or compulsory payment of pilotage dues, and the impact of such costs on the Canadian economy."

Captain J. A. Heenan, the Commission's Technical Adviser, delved very thoroughly into the question and tried to formulate a simple formula that might be made applicable throughout Canada in the computation of pilotage dues (Ex. 1505). He started from the principle that "the relative ease or difficulty of a pilot's task depends more on the size of the ship than on its measured tonnage" and other criteria. He devised a formula whereby a fixed unchangeable unit is arrived at for each ship by calculating the product of its registered length, breadth and depth divided by 10,000 (to reduce a large number to a workable denominator). A Pilotage Authority, in order to fix the rates of pilotage (and any Port Authorities, if they wish to use the same method for levying their port charges) would have to fix by regulation the price for a unit which, when multiplied by the number of the fixed units of a given ship, would provide pilotage dues. The price for the unit could be varied from time to time by regulations so that the aggregate amount of the pilotage dues so arrived at would yield the part of the total cost of the service that is to be borne by shipping. He remarked, however, that such a method would be more applicable to large ships than to small ones. If the unit of a small ship (below 4,000 or 5,000 gross tons) multiplied by the unit of the District would not provide sufficient pilotage dues, a minimum pilotage fee should be established. In his paper, he tested the formula on four ships.

While the aggregate yield under the proposed formula can be made to arrive at the same amount produced by the method now in use in each District by fixing the appropriate price per unit, the resulting charges at ship's level differ materially from the present charges between ships.

The selected ships and their characteristics are as follows:

Ships	*Type*	*Length*	*Breadth*	*Depth*	*Gross Tonnage*	*Net Tonnage*
Empress of England	Passenger	640′	85′	29′	25,585	13,725
Severn River	General cargo	442′	57′	28′	7,158	4,378
Beaverlake	Passenger & cargo	498′	64′	30′	9,824	5,818
Invicta	Bulk carrier	576′	75′	30′	12,645	8,404

The dues for each of these ships calculated under the proposed formula (where the aggregate dues yield the same gross revenue in a given year as under the tariff now in force in those Districts) show the following differences:

	Halifax	*B.C.*	*Quebec*
Empress of England	− 9.5%	+11%	−10 %
Severn River	− 9.2%	+ 1%	− 9.2%
Beaverlake	+ 1.1%	− 1%	+11.6%
Invicta	+11.1%	− 9%	+ 9.4%

In these four cases the rates are based on ship characteristics. The substantial differences which result when the proposed formula is applied in the three selected Districts are caused by the fact that different ship characteristics with no mathematical relationship are used: Halifax District, net tonnage; B.C. District, gross tonnage and draught, no mileage variation; Quebec District, net tonnage and draught.

The Commission sought the advice of an outside expert, Mr. Richard Lowery, President of Davie Shipbuilding Limited, Naval Architect, whose Report appears in extenso as Appendix XI. In a learned and detailed report he exposes the short-comings of the present tonnage measurement system and studies the possibility of devising another system which would be based upon "convenience, simplicity of application and consistency of results between similar ships of any nation", and which "should result in all ships paying for services on a reasonably comparative basis". He reviews the different methods and suggestions and comes into general agreement with Captain Heenan's proposal but instead of registered depth he proposes the "depth to uppermost continuous deck" so that the cubic figure is better related to the actual size of the ship and, at the same time, takes care of the problem of open shelter-deck ships. One drawback is that depth as so defined is not shown on ships' papers and the information would have to be obtained from the Master of each ship. Mr. Lowery points out that " . . . it is of more importance to choose an appropriate factor which can be fairly readily obtained, than to choose an inappropriate one whose major merit is its convenience and availability." He sums up his findings as follows:

"1. Neither Gross Tonnage nor Net Tonnage is satisfactory, but Gross Tonnage is preferable to Net.
2. Any formula using 'Registered Depth' cannot be satisfactory.
3. Any formula using 'Freeboard Depth' cannot be satisfactory.
4. A formula using 'Registered Length', 'Registered Breadth' and 'Depth to Uppermost continuous Deck' multiplied together would be fairly satisfactory providing:
   (a) the pilotage authorities believe they could establish and enforce the 'Depth' without too much trouble,
   (b) the dues payable could be calculated on this basis to compare reasonably in both total and individual applications with those presently in operation.

As stated many times in this report, such a parameter would by no means be perfect. I believe, however, that it would be reasonable."

He warns that the proposed formula should not be put into practice until data on the proposed depth factor have been accumulated and tested. Furthermore, he admits that the proposed units may not be the sole factor that ought to be used in computing the rates and that "in some special instances it will be only right and proper to introduce another variable based upon estimated relative time to conduct particular pilotage operations within districts where different operations require great variations of time."

(f) *Fixing the Price for Components in Composite Rates*

Since no general principles are laid down to determine the appropriate relationship between the prices charged for pilotage dues which consist of a number of units or components, the Pilotage Authority must base its decision on local requirements and general experience. For instance, in Districts like Halifax and B.C. where the depth of water is not normally a problem, draught represents only the cargo a ship is carrying or the extent to which her tonnage is being used. In such cases, one method of calculating the value of a pilotage service for a vessel and her cargo might well be to fix a gross ton unit price which, when multiplied by gross tonnage, shows the maximum pilotage dues a fully laden ship would have to pay. If the ship is not fully laden the maximum charge could be decreased in proportion to the draught not being used, e.g., a ship with a 20-foot load line but loaded to the 15-foot mark, might be required to pay only three-quarters of the maximum charge. Many other formulae could be devised.

Ever since pilotage rates have been fixed on the basis of tonnage and draught combined, the method accepted has been to set a price for each factor normally in the form of a uniform price per unit (e.g. Quebec District $5.20 per foot draught plus three quarters of a cent per net ton). This method results in a fixed charge for each ship on tonnage and a variable charge on draught. The relationship between the charges for each component is determined by appraising the actual value of service to ships of various tonnages at various draughts and, on the basis of these data, fixing prices for each unit to represent as closely as possible the real value of a service for a given ship, i.e., the same amount that would be charged if an *ad hoc* price were fixed each time service was provided.

The situation becomes more complicated when, on account of restricted depth of water, less under water keel clearance means less manoeuverability which increases the difficulty of an assignment and demands higher qualifications and greater skill on the part of the pilot. The simplest way to deal with such a situation is to use the gross tonnage factor alone and to provide a scale of prices for given groups of tonnage units where prices are not increased mathematically but in relation to the local pilotage difficulties that arise with an increase in size. Alternately there might be a combination of a

fixed unit price for tonnage and a variable scale of prices on draught where charges increase sharply to compensate for pilotage difficulties up to the maximum draught above which a ship can no longer be safely piloted.

When, as is generally the case nowadays, tariffs are devised to yield a required amount of gross revenue, appropriate statistical data should be gathered to show up any change in the basic pattern, e.g., a decrease in the number of ships coupled with an increase in tonnage will not necessarily yield the same aggregate revenue if most of the dues are derived from draught, as in the Quebec District. Therefore a significant change in the basic pattern should call for a revision of the unit price of each factor. In the B.C. District, for instance, the number of pilotage trips is greatly affected because it is the local practice for ships to call at as many as seven ports taking on a special type of partial cargo in each one before obtaining a full cargo of lumber. As the Commission learned at the New Westminster hearing, pilotage revenue would be substantially lower if this pattern changed. Such a change was experienced in shipments from Fraser Mills because at times it was found more economical to ship large quantities of lumber by land from New Westminster to Vancouver, where a ship was being partially loaded, than for the ship to proceed to New Westminster to collect a partial cargo as was necessary before road improvements made overland shipments economically possible.

Therefore, the special requirements of the pilotage service in each District are the essential factors in determining how the tariff is devised and what price is set for each component. Diverse methods and unit prices are to be expected from one District to another and within a given District from time to time as changes occur. For instance, in 1962 the basic charge for a pilotage trip was calculated as follows in the following Districts (the figures in brackets show the percentage of the aggregate revenue derived from each component):

District	*Per Ton*	*Per Foot Draught*	*Per Mile*
Quebec	¾c. (23.7%)	$5.20 (76.3%)	— (0%)
New Westminster	1.3c. (52.1%)	$2.60 (47.9%)	— (0%)
British Columbia	½c. (38.3%)	$1.00 (20.3%)	$0.82 (41.4%)

The different use made of the same two factors in the Quebec and New Westminster Districts is difficult to explain. In the Quebec tariff the value of a pilotage service is based on the extent to which the earning capacity of a ship is being used at the time. In New Westminster, however, possibly on account of the controlling depth of the channel and also on account of the loading procedure followed on the B.C. Coast, full cargoes and deep-draught ships are not the rule but local factors are reflected in a higher charge per tonnage unit.

The differences between Districts are further emphasized when a uniform formula is applied, e.g., Captain J. A. Heenan's formula (Ex. 1505) which was analyzed earlier on pages 252 and 253.

The absence of criteria and of effective control may have resulted in erroneous calculations and tariffs prejudicial to certain ships. If these errors are significant they can be corrected on the basis of adequate studies and calculations.

Computers working with accumulated data could prepare more accurate rules for determining the value of pilotage services to a given ship at a given time in a given District, but the problem is not urgent because there appears to be no substantial injustice in any tariff now in force and no complaint on this subject was received from the shipowners.

Once the price relationship between the various components of a charge is established, an increase or a decrease in aggregate revenue can be readily effected by imposing either an overall surcharge or a general decrease in percentage (as was done during the Second World War and postwar years in most Districts, and recently, *inter alia*, in the Quebec and Montreal Districts) or by increasing or decreasing proportionately the charge for each component. However, a change in the basic trade pattern that prevailed when the rates were set makes it obligatory to reassess the whole scheme, i.e., to examine the relationship between the unit price of each component.

COMMENTS

There is no limit to the number and nature of rules that could be devised to fix pilotage rates. All formulae are legal provided they are of general application and not discriminatory and the components are directly related to the value of pilotage services.

It must be realized that it is essentially a local problem to establish pilotage charges and that the price for a given service is determined by its nature and circumstances, which vary from place to place. It would require arbitrary action to achieve uniformity in charges, or in formulae to compute charges, for services that are basically dissimilar from place to place and from time to time.

As indicated earlier in this chapter, rate-fixing is affected by a number of factors, principally the nature of the service itself, the peculiarities of each District, the difficulties inherent in each navigation unit and the importance of the service to the ship and her cargo.

When these factors are considered it is obvious that the only advantages of a standard fixed formula would be simplicity and ease of application but it would be unrealistic and arbitrary. If simplicity is the ultimate aim the flat rate system is indicated. If the rates are to be high and if responsibilities and difficulties, which vary from ship to ship and from District to District, are to

be compensated, local factors and ship's characteristics must be considered. It is agreed that ship's characteristics should indicate a ship's size because this factor has the greatest effect on pilotage services.

In the Suez Canal and the Panama Canal, where only a ship's characteristics are variable (the length of the transit is constant as are the route followed and the problems encountered), a formula based solely on ship characteristics is indicated. Since they are the only factors, any discrepancies between one ship and another have a greater effect on pilotage charges than in a system where characteristics are only one component of the computation. By adopting their own method of measuring ships the Suez and Panama Canal authorities solve any problems that might arise because of various tonnage measurement systems. Again a solution of this nature can not apply where a diversity of situations has to be contemplated but a number of localities where there is uniformity of pilotage services (like most port type Pilotage Districts) might well devise a special formula based on ship characteristics alone.

As pointed out by Mr. R. Lowery in his report, any ship unit must be a function of her three dimensions. To eliminate depth can only result in serious injustice in certain cases and an index so obtained would not indicate the true dimensions or the true size of one ship compared to another.

It is pertinent to note that the formulae proposed by Captain Heenan and Mr. Lowery are basically a tonnage measurement and that in the tonnage system the ton is also a "ship unit". For a given ship the number of tons is a fixed unchangeable number of units. If the dimensions used in the proposed formulae were (as for tonnage measurement) the average dimensions and not their maximum figures, which are true in only one aspect of a ship, then the difference between the ship unit as computed by the proposed formulae and the gross tonnage figure would be slight because the proposed ship unit would be based on the exterior dimensions of a ship while tonnage is based on inside dimensions. Therefore, the difference between the two figures would be accounted for by the volume of material that enters into a ship's construction and exempted spaces. The incidence of these exemptions in proportion to the total volume of a ship is very small, and even if they vary somewhat from one ship to another they have very little effect on the overall result.

The other difference is more significant. The simplified method of calculating the volume of ships for the purpose of arriving at ship units does not take into account the marked differences in the shape of ships, e.g. lakers and ocean-going liners are considered identical if their three dimensions happen to coincide. Because of the considerable difference in volume between ships with the same three maximum dimensions a complicated system of tonnage measurement has been devised. It is considered that to do away with the accurate figure of tonnage measurement in favour of the arbitrary

figure of ship units as proposed, because of some shortcomings in the tonnage measurement rules, may amount to an oversimplification of the problem by adopting a more arbitrary rule which is even less realistic.

The difference would be more marked in the net tonnage figure, which is not uniformly related to the true dimensions of a ship. It is considered, therefore, that the net tonnage figure should not be used to compute pilotage rates and, if tonnage is to be a criterion, gross tonnage is more equitable.

In order to arrive at an adequate ship unit from the pilotage point of view it would be necessary to calculate the actual volume of each ship according to its true dimensions, including shelter-deck and any superstructure that adds to the size of the ship and, hence, to the difficulties of pilotage. This, however, can not be done in practice because it would require a formula as complicated as the one devised for establishing tonnage, and the task of measuring volume would be so involved that it would be out of all proportion to the ultimate aim.

Gross tonnage as a ship unit has the marked advantage that it is readily available for most ships and when a certificate of registry does not record British measurements the law provides a procedure to ascertain them. Since pilotage dues form only a relatively small fraction of the total costs incurred by shipping in a given District, any special system of computing dues should be avoided unless the necessary information is readily available. A complicated system would prove contentious and time-consuming and its disadvantages would outweigh the known drawbacks of gross tonnage as a basis for calculating charges.

With regard to ship characteristics, the question is, therefore, whether a wholly Canadian system should be devised or whether the gross tonnage unit should be retained to be used either alone or with other factors. It is considered that no simple formula free from arbitrary features but, at the same time, truly representative of a ship's dimensions could be devised on the basis of accurate information now available. This problem is not peculiar to Canada but is of international concern. The Inter-governmental Maritime Consultative Organization (IMCO) is actively endeavouring to devise new universal tonnage measurement rules and if it reaches an equitable solution it is expected that the new rules will be accepted by the principal maritime countries. The result will be international uniformity in computing ship units. In the circumstances, it is considered that Canada should not try to innovate by devising its own tonnage system but, as a member of IMCO, should promote the adoption of an improved tonnage measurement system of international application. Few systems have the simplicity and the advantages of tonnage as a unit, once the index is duly corrected and universally applied.

Until IMCO has succeeded, problems should be solved at District level in the light of accurate statistics which show the nature and extent of difficulties that affect local traffic. If shortcomings in the tonnage index create

an injustice, corrective measures can be taken by assessing an appropriate surcharge for the category of ships involved. In the case of shelter-deck ships or those bearing tonnage marks under the IMCO proposal, the maximum gross tonnage should be taken, irrespective of whether the ship is in the open or closed deck situation, in order to relate the tonnage index as closely as possible to the size of the ship. When the certificate of registry shows only open shelter-deck tonnage, an arbitrary maximum tonnage should be computed by increasing the open shelter-deck tonnage by a prescribed percentage unless actual measurements are taken. Since tariffs are a subject-matter of regulations, they can easily be modified to meet any material change in the dimensions of certain ships which make the tonnage unit an inaccurate index.

The incidence of local factors and the various types of pilotage services make uniformity of rates or rate formulae impractical. For instance, distance can not be dealt with in the abstract, but ought to be considered on a practical basis, i.e., what is entailed in a given locality, e.g. transiting the Railway Bridge at New Westminster and negotiating the Second Narrows at Vancouver mean much more in terms of value of the pilotage service rendered than payment for fractions of a mile. Because these particular problems are not met in every pilotage trip, these local factors have to be specifically reflected in the tariff by providing special rates.

However, when the importance of local factors can be disregarded or when an increase in pilotage difficulties is closely related to the size of a ship, the indicated and simplest formula is a charge based on the gross tonnage unit. In the first case, the rate might take the form of a fixed price per gross tonnage unit with a fixed minimum; in the second case, it might take the form of a scale of prices for groups of gross tonnage units, the prices being related to pilotage difficulties. In addition to equity and simplicity, this method has the advantage of yielding the same aggregate revenue if many smaller ships are replaced by fewer larger ones as is the trend today.

The foregoing remarks concern pilotage trips involving a navigation unit which consists of a single, self-propelled vessel. If a navigation unit comprises a number of distinct components, ship characteristics no longer have the same comparative value. Whether or not use should be made of them is a question to be determined by reference to the various types of navigation unit that may be met in a given District. For instance, the rates for the navigation of a dead ship may be adequately assessed by a general surcharge of 50 per cent, as is now done in most Districts. Another possibility is to use as ship units the total tonnage of all the components of a navigation unit. Neither system would be adequate when a navigation unit consists of a tug with one or more barges or rafts. In that event the only solution would appear to be a special rate for special service.

6. *Pilotage Dues for Services Rendered and Pilots' Remuneration*

Subsec. (h) of sec. 329 C.S.A. refers to the "remuneration" of pilots in opposition to "pilotage dues". Although the Act frequently mentions pilotage dues it makes no further use of the other expression. Twice in sec. 329, subsecs. (b) and (*l*) (and nowhere else) the term "earnings" is used.

The use of different expressions in subsec. (h) in opposition to one another in the same sentence indicates that two distinct situations are being dealt with. When the term "pilotage dues" is replaced in subsec. (h) by its statutory equivalent (subsec. 2(70)), the "remuneration payable in respect to pilotage" is placed in opposition to the expression "remuneration of pilots".

When the question is studied in relation to the context, the reason for using the word "pilotage" instead of "pilot" to qualify remuneration in the statutory definition becomes apparent: pilotage has a wider meaning because it refers to the service as a whole.

"Pilotage dues" may be defined (a) from the ship's point of view as the price the ship has to pay for a given pilotage service, (b) from the pilot's point of view as the pecuniary consideration of a pilotage contract, i.e., the gross earnings derived for performing the services for which he was hired, including all expenses the task entailed.

However, there appears to be no difference between the terms "pilots' remuneration" and "pilots' earnings"; the two are neither contrasted nor defined. If a distinction ever existed it has no significance in the Act. The use of different terms to express the same meaning in the legislation is a drafting error which should be corrected.

"Pilots' remuneration" or "pilots' earnings" mean that portion of the pilotage dues a pilot collects, the amount which remains after two deductions are effected by the Pilotage Authority, and on which amount his compulsory contribution to the pilots' fund is calculated:

(a) the deduction of pilot vessel earnings, which the Pilotage Authority has fixed by regulation pursuant to subsec. 329(b) as the charge for using a licensed pilot vessel;

(b) any assessment the Pilotage Authority may make by executive order sanctioned by the Governor in Council pursuant to sec. 328 to meet the operating expenses of the District.

The second deduction was explained in the preceding chapter (vide pp. 107 and ff.). The first occurs only when a pilot does not operate his own pilot boat and licensed vessels belonging to third parties are available. The Pilotage Authority fixes by regulation the pecuniary consideration of the hire contract of the pilot vessel by the pilot which is the share of the dues earned as a result of the pilotage contract that the pilot has to pay over to the pilot vessel's owner.

"Pilot vessel earnings" should not be confused with "pilot boat charge". The latter is a component of the price a ship has to pay for pilotage service, while the former is the price that a pilot has to pay for pilot vessel service.

While the tariff may provide for a pilot vessel charge, there may be no pilot vessel earnings fixed in the regulations, e.g. in the Prince Edward Island District. The contrary may also be true, as in the Churchill District prior to the 1966 amendment when pilotage dues consisted of a comprehensive charge while the regulations fixed the portion of that charge which was paid for the use of a pilot vessel. When both expressions are used in the regulations, the practice has been that they coincide but this need not be so. For instance, when establishing pilotage dues the Quebec Pilotage Authority may well decide that the differential will be an additional $10 when a pilot vessel is used in Quebec Harbour, while the share of the pilot vessel is set at $25, taking into account the fact that the pilot's services were worth less because he did not berth the ship.

Because pilotage dues belong to the pilot who earned them, the Pilotage Authority can not make any deduction except with the express consent of the pilot concerned, unless an explicit authority is stipulated in the Act. Aside from the two statutory deductions mentioned above, there are no others in the present Act. Two further deductions are permissible from pilots' earnings but not from pilotage dues, i.e., compulsory contributions to the pilot fund (sec. 319 (*1*) 1934 C.S.A.), and possibly penalties imposed by regulations passed under subsec. (g) of sec. 329, if the regulations provide for such a method of recovery.

It is for this reason that deductions from pilotage dues imposed in the By-laws of the main Pilotage Districts in 1966 (e.g. B.C. District By-law, subsec. (5) of sec. 12 and tariff item 14, P.C. 1966-79 dated January 12, 1966) for radiotelephone rental are illegal. On the other hand, the radiotelephone rental charges against ships are legal because they are components of pilotage dues. As stated earlier, there is no limit to the variety of ways pilotage dues may be fixed, provided they do not contravene the basic principles of the Act, but once pilotage dues are collected they belong to the pilot who performed the services less deductions specifically authorized by the Act. The radiotelephone charge is not one of these. Therefore, in theory, a pilot is not bound by this assessment on his pilotage dues nor by the price so fixed for renting a radiotelephone unit. Furthermore, if he chooses to own a radiotelephone set, the dues (i.e., the "radiotelephone rental charge") are payable to him.

The situation is quite regular, however, when, as in item 5(a) of the Cornwall tariff, a fixed amount is charged as part of the pilotage dues to cover the land transportation of a pilot, if the Pilotage Authority refrains from disposing of it by regulation in favour of the carrier. The amount thus

charged to the ship belongs to the pilot as part of his pilotage dues and it is his responsibility to pay the cost of whatever mode of transportation he may select.

From the drafting point of view, once a method is adopted, it should be retained for the sake of clarity. The practice is now being followed to segregate in the regulations those provisions which fix pilotage dues. This part, which is called tariff, appears as a Schedule to the General By-law of each District. The tariff, therefore, is that part of the regulations containing all the prices that ships are required to pay for pilotage services, together with whatever regulations exist for computing charges. It follows that nothing else should be included, *inter alia,* any regulations concerning (a) sharing pilotage dues, (b) the total or partial withdrawal of exemptions from the compulsory payment of dues.

The right procedure is followed, for instance, in the Quebec By-law where the "pilot boat charge" and the "radiotelephone charge" appear in the tariff (Schedule, items 5 and 7), while the question of pilot vessel earnings is covered in the By-law proper (subsec. 9(3)) as is the partial withdrawal of exemptions (subsec. 6(2)). On the other hand, the wrong procedure is followed when these two latter questions are dealt with in the tariff, e.g. the partial withdrawal of exemptions in the Port aux Basques tariff (Schedule, item 2).

COMMENTS

The foregoing is the legal situation but the factual situation is altogether different. Due to the basic organizational changes that have occurred in all the main Pilotage Districts, many of the principles enunciated above no longer apply in practice. Since a pilot is no longer a party to contracts for either pilotage or hiring pilot vessels, pilotage dues no longer belong to him in reality and he is paid either a straight salary or a share of the net earnings of the District. These are consequences of the situation created by the new rôle assumed by the Pilotage Authority, i.e., full control of providing pilotage services. As seen earlier, this situation was created as a result of genuine pilotage service requirements and, for that reason, it should be recognized in future legislation. If a new Act is prepared, the various principles governing pilotage dues and pilots' remuneration and earnings will have to be restated.

B. PILOTAGE DUES AS LIQUIDATED CONTRACTUAL DAMAGES

The main underlying principle of the pilotage organization provided by Part VI of the Canada Shipping Act is freedom of contract. A Master, shipowner or agent may hire the pilot of his choice and such pilot may refuse unless the Pilotage Authority has passed regulations in the interest of the

service that he may not refuse to take charge of a ship upon being required to do so by "the master, owner, agent or consignee thereof, or by any officer of the pilotage authority of the district for which such pilot is licensed, or by any chief officer of Customs" (subsec. 329(f)(v)). This will be studied in the next chapter. Most District By-laws include the stipulation that pilots are obliged to accept any assignments given by the Pilotage Authority and its officers, but no By-law has extended this obligation to requests made by a Master, owner or agent. Most By-laws also go further by prohibiting pilots from undertaking any pilotage unless despatched by the Pilotage Authority which, as seen earlier, is ultra vires (C. 4, p. 76).

As a rule a pilotage contract takes effect when a pilot is "voluntarily taken on board of such ship by the master for the purpose of piloting her" (sec. 352) and from that moment the ship is obliged to pay the pilot his contractual remuneration, i.e., pilotage dues, whether or not the Master allows the pilot to act in his professional capacity. Sec. 352 creates a firm presumption that a contract is entered into but this is only one of several ways of proving the fact. A pilotage contract, like any other contract, is governed by provincial legislation unless superseded by appropriate *intra vires* federal legislation. Therefore, in the present case a pilotage contract may be concluded by both parties signing a written document or by agreeing verbally. If it can be proved that a contract is not carried out by either party, the aggrieved party is entitled to claim an indemnity against the other for any damages he can establish.

The Act provides an exception to these rules in a very special case. The pilots, as contemplated by Part VI, are free contractors competing with one another for clients, and are supposed to be available at the seaward boarding station at all times so as not to delay incoming ships. Hence, the law makes it an obligation in Districts where the payment of pilotage dues is compulsory for the Master of a non-exempt ship who requires a pilot to accept the services of the first to offer, and if the ship is exempt, of any one of the pilots who offer their services (secs. 348, 349, 350). If the ship does not comply, with the result that a pilot is not taken aboard, the Act stipulates that the contract has been concluded nevertheless. At the same time, in this case the Act liquidates the contractual damages that the ship is liable to pay for failure to carry out the contract by limiting them to the amount of pilotage dues that would have been owing if the pilot's services had been accepted. For collection purposes the section concerned stipulates that these damages are payable "as pilotage dues".

As seen earlier, this situation does not arise nowadays because the conditions outlined in these sections no longer (C. 3, pp. 60-61 and C. 5, pp. 103 and 104).

C. PILOTAGE DUES PAID AS PENALTY

In Districts where the payment of pilotage dues is compulsory, if a pilot has not been required and is not employed the effect of the compulsory payment system is that a non-exempt ship remains liable to pay the same amount of pilotage dues as if a pilot had been employed.

This money does not belong to any pilot because it is paid, not as a result of a contractual engagement, actual or presumed, but in compliance with the Act. This liability is, in fact, a penalty but the term was not used in the Act to avoid the charge that the system involved "compulsory pilotage" as will be seen in C. 7, p. 212.

By identifying such money with pilotage dues the Act has given this penal sanction the nature of a civil debt created by statute, i.e., what is now called a penalty as opposed to a fine (re meaning of the terms *fine* and *penalty,* vide C. 9. pp. 380 and 381). The provisions of the Act which create this statutory debt are contained in secs. 345 and 357:

> "345. Every ship that navigates within any pilotage district within the limits of which the payment of pilotage dues is, for the time being, made compulsory under this Part shall pay pilotage dues, unless. . ."
>
> "357. (1) Where, in a pilotage district in which the payment of pilotage dues is compulsory, the master of a ship that is not an exempted ship removes such ship or causes such ship to be removed from one place to another within any pilotage district, without the assistance of a licensed pilot for such district, he shall pay the pilotage authority the same pilotage dues as he would have been liable to pay if he had obtained the assistance of one of such licensed pilots."

Therefore, in these circumstances, the same pilotage dues are payable whether or not a pilot has been employed. The amount of the penalty is established by reference to the tariff which fixes prices for services rendered (vide p. 151 *supra*). The intent of the Act is that a ship will not benefit financially by dispensing with the services of a pilot and shall receive a bill for pilotage dues, which is exactly the same as if a pilot had actually been accepted. It follows that this requirement should be reflected in the tariff by fixing the rates for pilotage services rendered so that the amount can be readily calculated and that the result is the same whether or not a pilot is employed.

As pointed out earlier (vide p. 151 supra), *any* competent of pilotage dues which is left to chance is illegal, e.g., travelling expenses if no pilot happens to be available where required. It is also illegal to make whatever expenses a pilot has actually incurred a component of a charge because they will vary depending upon the individual who incurs them. The solution is to

establish a fixed amount (cf. the travelling expenses of the Cornwall pilots to Ste. Catherine or St. Lambert Lock), or to lay down a formula from which the charge could be objectively calculated in any circumstances, such as reference to an official tariff which applies in such cases.

The Pilotage Authority does not implement the compulsory payment system in its entirety if it charges only the component that happens to coincide with a pilot's remuneration, e.g., prior to 1966 a comprehensive charge of $80 was payable by non-exempt vessels in the Churchill District and the fact that this charge has since been broken down into two components, pilotage charge and pilot boat charge, has not altered the situation. For this reason a ship in transit in the Quebec District which fails to embark a pilot at Les Escoumains should be charged full dues: basic charge computed on tonnage and draught, pilot boat charge at Les Escoumains, Grade A surcharge if applicable, the radiotelephone charge unless she carries the required equipment. In Districts where fixed or objectively ascertainable travelling expenses are a component of the dues, they should be added.

Not all pilotage dues come under the compulsory payment system, only those defined in secs. 345 and 357, quoted above, as payable for pilotage and movages. Therefore, pilotage dues such as the following do not fall into this category: detention, cancellation, security watch.

D. COLLECTION OF PILOTAGE DUES

The collection of pilotage dues implies two questions:

1. To whom should payment be made?
2. What collection procedure should be followed?

1. *To whom dues are payable*

According to civil law a debt is payable only to the creditor, the only person who can give a discharge, or to an agent duly appointed for that purpose by the creditor. Similarly, only the creditor to whom money is owed can sue for its recovery.

However, these rules may be modified by unequivocal statutory provisions, as was shown by the 1920 Privy Council judgment in the case of Paquet v Corporation of Pilots of Quebec Harbour 1920 A.C. 1029 (1920, 54 D.L.R. 323). In the 1860 Act, which created the Quebec Pilots' Corporation, the Parliament of Lower Canada enacted a provision of exception which made pilotage dues for services rendered by the Quebec District pilots payable to, and the property of, the Corporation. In an Act passed in 1914, the Federal Parliament withdrew these extraordinary powers from the Pilots' Corporation and vested them in the Minister of Marine. The Minister, however, did not exercise these powers and let the Corporation proceed as if the 1914 Act had never been enacted. Pilot Paquet sued the Corporation for the reim-

bursement of dues which he had earned but which the Corporation had collected. The Minister did not intervene in the case. The Privy Council judgment recognized the constitutional validity of the 1914 Act and held that the Corporation had no rights over the earnings of the pilots since that date.

The present legislation contains such provisions of exception:

(a) Sec. 343 by saying that the pilotage dues "may be recovered as a debt due to the pilot or pilotage authority as the case may be, to whom the same are payable" indicates that only the pilot or the Pilotage Authority can sue for their recovery. The only question is to which of the two are the dues payable.

(b) Secs. 348 and 349 make dues owed as liquidated contractual damages payable to the Pilotage Authority which alone can sue for their recovery. Afterwards the Pilotage Authority must determine which pilot, if any, has any claim to them (sec. 351).

(c) On the other hand, the Act does not stipulate to whom dues owing as penalties under the compulsory payment system are payable.

(d) While the context of the Act indicates that dues owed for services rendered are payable to the pilot who performed the services, it appears from the last part of subsec. (h) of sec. 329 that, nevertheless, regulations can be passed to make them payable to the Pilotage Authority.

The reason why *dues payable as liquidated contractual damages* are made payable to the Pilotage Authority instead of to the pilot who is entitled to them is obvious: there can be no dispute about a ship's liability to pay dues but the identity of the creditor pilot may be open to question. No doubt to avoid unnecessary litigation it was provided that, in these cases, the Pilotage Authority alone is entitled to receive payment with the subsequent responsibility of determining whether or not any pilot has a claim and, if so, to pay him the amount due under the District By-law (subsec. 351(1)(b)); if not, to apply the dues to the benefit of the pilots in general by crediting them to the District pilot fund (subsec. 351(2)).

With regard to *dues payable as penalties under the compulsory payment system,* there is only an indirect mention (except for movages, sec. 357) that they are payable to the Pilotage Authority because these dues belong to the Pilotage Authority. As seen above, these penalties are civil debts, created by statute (secs. 345 and 357), which belong to the Pilotage Auhority's operating expense fund (sec. 328). In former legislation, this point was partly covered in the section corresponding to the present sec. 345 where it was provided that in the case of outward voyages such dues were payable to the Pilotage Authority. *Inter alia,* the inward voyages of non-exempt vessels which did not require a pilot, transit voyages and voyages completed within a District were not covered. Such a provision was last included in the 1927

C.S.A. in sec. 456. However, if it should be considered desirable to retain the compulsory payment system, future legislation should call these dues "penalties" and, in order to avoid any possible ambiguity, it should clearly indicate to whom these penalties are payable and how they should be disposed of.

As for *dues payable for services rendered,* the context of the Act clearly indicates that they belong to the pilot who performed the services and are payable to him:

(i) Secs. 348 and 350, when dealing with the amount to be paid as liquidated damages, state that it is to be "the same sum as would have been *payable to such licensed pilot* if his services had been accepted".

(ii) Sec. 352 states that a ship is liable "to pay pilotage dues *earned by any licensed pilot* voluntarily taken on board of such ship by the master for the purpose of piloting her".

(iii) Secs. 359 and 360, when dealing with the indemnities payable to a pilot overcarried beyond the limits of his District or detained in quarantine, stipulate that this indemnity is to be paid "over and above the pilotage dues *otherwise payable to him*".

(iv) Subsec. 362(1) provides for an automatic set off beween the damages awarded by a Court as a result of the neglect of a pilot and the *pilotage dues to which this pilot would have been entitled.*

(v) Sec. 372 makes it a statutory offence for a licensed pilot to *demand or receive* "any sum in respect of pilotage services greater than the dues for the time being demandable by law".

Nevertheless, in all the main Districts since the early days of controlled pilotage the pilots have been denied the right to collect dues. The By-laws of most Districts provide that the dues are payable to the Pilotage Authority which, in fact, arrange collections through its officers. The authority for this By-law provision is the last part of subsec.(h) of sec. 329 C.S.A. Although the text is far from clear, there is no other logical interpretation. It reads as follows:

> "329. ... every pilotage authority shall ... have power ... by by-law confirmed by the Governor in Council, to ...
>
> (h) fix the rates, on either the same or different scales, of payments to be made in respect of pilotage dues and the mode of remunerating the pilots licensed by such authority, and the amount and description of such remuneration, and the person or authority to whom the same shall be paid;"

At first sight the last part of subsec.(h) seems to answer the question but such a construction can not be grammatically correct: "the same" must refer

to "remuneration" and not to "pilotage dues". The expression "the same" means "the aforesaid antecedent" which in this sentence is "remuneration". This is confirmed when reference is made to the French version. The last sentence in the French text reads as follows: ". . . *et désigner la personne ou l'autorité à laquelle la rémunération doit être versée;*". The French text, therefore, leaves no room for interpretation or confusion and the word "remuneration" in subsec.(h) can only refer to the term used before, that is *"rémunération des pilotes brevetés"* and not to the *"droits de pilotage"*.

Hence, a strict interpretation leads to the absurd situation where dues for services rendered are payable to the pilot who performed the services (as is amply indicated by the context of the Act) but the Pilotage Authority has the right, by regulation, to force the pilot to pay over to some third party that part of these dues that the regulations have defined as being his remuneration. This is quite illogical. Such a drafting error is occasionally found in legislation, normally when amendments are made. The error was first committed by an amendment in 1886 but was compounded by a further amendment to correct the first error in 1934.

The evolution of what is now subsec.(h) indicates clearly that the legislature's intention was to enable the Pilotage Authority to take over collection of the dues, provided this power was specified in the By-law regulations.

In the 1873 Act, pilotage dues, tariffs, pilotage rates, remuneration for pilotage services and remuneration of pilots were all one and the same thing. The first part of subsec. (8) of sec. 18 reads as follows:

> "8. To fix and alter the mode of remunerating the pilots licensed by such authority, and the amount and description of such remuneration (in this Act called pilotage dues), and the person or authority to whom the same shall be paid".

Therefore, in 1873 there was no possibility of confusion, the pilotage dues were the remuneration of the pilots and the Pilotage Authority had the power to designate by regulations a person or an authority to whom the dues were payable.

When the Act was consolidated in 1866, the text between parentheses was deleted leaving the subsection otherwise unchanged. At the same time the definition of "pilotage dues" that still prevails (except for one slight modification) was introduced in the interpretation section, i.e., "the remuneration payable in respect of pilotage". This first amendment created a problem of interpretation in that the term "pilotage dues" that is used throughout the Act was not included in sec. 15 which listed the subject-matters of the regulation-making power of the Pilotage Authority and, in particular, was absent from subsec.(h) which dealt with fixing the price a vessel had to pay as pilot's remuneration. This amendment was no doubt introduced to indicate

the slight difference between pilotage dues and pilot's remuneration, as explained earlier (C. 5, pp. 107 and ff. and C. 6, pp. 182 and ff.). This amendment caused a certain *non sequitur* which, however, was corrected by the context of the Act. It was quite clear that pilotage dues were the remuneration of the pilot, i.e., the price paid for the pilot's services and that the Pilotage Authority had to fix the rates by regulation under subsec.(h). Therefore, "the same" referred to that price which was called in the text of subsec.(h) the "remuneration" of the pilot and which was identified by the context with pilotage dues.

Subsec.(h) remained unchanged until the Act was amended in 1934. The reference to pilotage dues was re-inserted in subsec.(h) but due to another drafting error the last part of the subsection was not grammatically related to the term "pilotage dues" to which it had always referred and was still intended to refer.

Therefore, the present situation is that, despite the ambiguity of the text, it is permissible to stipulate in the regulations that pilotage dues for services rendered are payable to someone other than the pilot who earned them. The next question is to whom they could be made payable. The generality of the terms "the person or the authority" and the absence of any qualification or criterion suggests that the Pilotage Authority has entire discretion to designate any person it chooses. However, this power is limited by sec. 343 to a choice between the pilot himself or the Pilotage Authority, because if the dues were made payable to another party they could not be collected since sec. 343 stipulates that they are "a debt to the pilot or to the pilotage authority" and to no one else and the criterion to determine which of the two is the creditor is "to whom the same are payable".

In the history of controlled pilotage in Canada, the collection of dues for services rendered has rarely been left a responsibility and prerogative of the pilot concerned, unless (a) the Pilotage Authority had other sources of revenues to meet its expenses and (b) the pilots were not required to contribute to a pilot fund, such as is at present the case in the Prince Edward Island District. It was soon realized that when either of these two conditions is not met, the Pilotage Authority has to take over the exclusive right to collect the dues. For instance, when Quebec Trinity House was created in 1805, it had revenues of its own and its only concern with pilotage dues was to ensure that the pilots made their compulsory contribution to the Decayed Pilot Fund. This contribution of eight pence per pound of earnings was to be paid by each pilot to the Clerk of the Corporation twice yearly, and the Act provided severe punishment for failure to pay and for filing false returns. Trinity House immediately experienced difficulty making the pilots pay their contribution, and the Act was amended in 1807 to provide for a system of deduction at source by having a Government official, the Naval Officer, retain the pilots' contribution out of the pilotage dues collected from Masters at the same time he collected the port charges.

In addition to eliminating complicated verification, the assumption by the Pilotage Authority of responsibility for collecting dues benefits the individual pilot by relieving him of both the tedious duty and responsibility of collecting and the risk of enforcing collection through court proceedings, if necessary.

There should be no ambiguity about the person or authority to whom pilotage dues are payable. The matter should be clearly defined in legislation, but there should be sufficient flexibility to provide for various types of organization within the service. It is considered desirable that the Act should stipulate that these dues are payable to the Pilotage Authority unless there are regulations to the contrary.

In addition to enhancing simplicity and clarity, this would be a realistic provision. Its necessity has been proved by past experience and is even more clearly indicated now that the Pilotage Authority in each main District has assumed responsibility for providing pilotage services and for pooling the pilots' earnings, wherever the pilots have not become its direct employees.

It should be the exception rather than the rule to make dues payable to the pilot who performed the services; this should be the case only when the Pilotage Authority's function is limited to licensing and pilotage service is provided by one or a few pilots acting as free entrepreneurs.

The dues should not be made payable to anyone else except to a person or authority whose duties and responsibilities toward the pilots are clearly defined in the regulations, and who is accountable to the Pilotage Authority and under its active surveillance for the disposal of pilotage dues. This might occur in Districts where the pilots are not employees of the Pilotage Authority and the Pilotage Authority does not consider that the interest of either the service or the public necessitates taking over full control. Under such circumstances, if the majority of the pilots so wish, despatching and pooling of earnings could be exercised by their own Corporation, in which case the dues would have to be made payable to the Pilots' Corporation.

Pooling of earnings

This raises the question of the nature and the constitution of such a pooling system. Whether the pool is operated by the Pilotage Authority or by the Pilots' Corporation, the Act should stipulate the form the pool takes, the money of which it consists and what expenses may be deducted from it. The Act should also provide effective measures of control. Again, basic rules should be enunciated with the possibility of exceptions being made by regulation to meet exceptional circumstances.

The first system for pooling pilots' earnings was created by the 1860 Act which incorporated the Quebec Pilots' Corporation. The Act stipulated that all monies derived from the pilotage of ships and from other services performed by the pilots for which a rate was fixed in the tariff were payable to the Corporation. At the same time, the Corporation was given almost full

control over despatching, an essential condition for the efficient operation of a true pooling system. The difficulties that were met arose from restrictions that were imposed on its despatching powers, i.e., the right of the Master to exercise a certain choice and the special pilot system.

At present, there are various pooling systems (vide C. 4, p. 74). In British Columbia, where both despatching and pooling are operated by the Pilotage Authority, the pooling system is of the most complete type. Not only are all pilotage earnings pooled but also any money related to the exercise of the pilots' profession, such as indemnities for overcarriage or quarantine, insurance benefits for loss of remuneration during absences due to illness, remuneration not provided for in the tariff but paid for expert advice and the indemnities or earnings for services outside district limits. Since a share in the pool is based on the time a pilot is available for duty, it is logical that all earnings he derives directly or indirectly from the exercise of his profession during the time he is considered as being on duty becomes part of the pool. All the expenses incurred for the benefit of the group, including premiums for group insurance which the pilots decided to take out by a majority vote, are paid out of the common fund before sharing.

On the other hand, in the Quebec District where the Pilotage Authority controls despatching and the pilots operate their own pool, only earnings derived from pilotage trips are pooled and each individual pilot retains any extra money he earns from movages, compass adjustments, Grade A bonus and indemnities under secs. 359 and 360 C.S.A. Complete pooling could not be equitably effected because the pilots had no legal control over sharing their workload and a common basis other than availability for duty had to be found. They had to adopt a system where shares were calculated on the basis of work actually performed and it was, therefore, necessary to ensure that only comparable work was included. There was no problem in the Quebec District because revenues from pilotage trips account for most of the District's gross earnings. The pooling system adopted consisted mainly of averaging the net value of a pilotage trip. The earnings of all the pilots are pooled as collected but each pilot is remitted periodically anything he has earned additional to pilotage trips, e.g., movages and compass adjustments. After group expenses have been paid, the average value of a "trip" for pooling purposes is found by dividing the remaining total trips earnings by the number of trips performed. Each pilot is then paid his share representing the trips he has performed multiplied by the set price. The Quebec pilots' pool also serves the same purpose attributed by the Act to the pilot fund, i.e., for benefits, illness (even suspension). The main criticism by some Quebec pilots concerned the lack of any control over the administration and operation of the pool by their own Board of Directors (vide C. 4, p. 91).

The introduction of grades for pilots has created another problem. In the Quebec District this was solved in two ways: first, by not pooling the

Grade A bonus; secondly, by attributing a lower value to a trip performed by a Grade C pilot. The system discriminates in favour of Grade A pilots in that this bonus makes no contribution to general expenses despite the fact it is part of the actual revenue from trips. In practice, this factor is unimportant in view of the relatively small amount of revenue now derived from that source, but in a complete pooling system it should be corrected.

Study of the evidence received on the subject (including the organization of the various pooling systems now in use) and consideration of the requirements of the pilotage service suggest the following rules for operating such pools:

(a) both pooling and despatching should be operated by the same authority;

(b) as a rule, pooling should be based on availability for duty and not on work actually performed;

(c) only pilotage revenue should be pooled, i.e., dues for which the tariff prescribes either a rate for usual assignments or *ad hoc* charges for occasional services;

(d) each pilot's share in the pool should be treated as if it were a salary and, therefore, the legislation should provide for regular leave of absence and sick leave of limited duration, both with pay;

(e) other revenue a pilot earns, whether or not related to his expert knowledge, should not enter into the pool, but the time he spends earning this revenue should not be considered time on duty for purposes of calculating his share in the pool;

(f) the pool should reflect pilots' grades (where they exist) by providing an appropriate scale of shares;

(g) deductions from the pool should be:

(i) District operating expenses less what is paid from other sources;

(ii) the pilots' compulsory contributions to the pilot fund (if one exists);

(iii) expenses incurred by the pilots as a group, or for their common benefit, provided they are incurred for the purposes, and pursuant to the procedure, laid down in the regulations, and not otherwise;

(h) the pool, whether operated by the Pilotage Authority or by a Pilots' Corporation, should be subject to audit by the Auditor General of Canada;

(i) the persons or authority responsible for operating the pool should bear the penal and civil responsibility of public officers entrusted with public funds under the Financial Administration Act.

2. *Nature of Pilotage Claim, Collection Procedure*

Pilotage dues, whatever their nature, are recoverables as a civil debt before the appropriate courts of civil jurisdiction (C.S.A. sec. 343). The procedure provided for the collection of fines (secs. 683 and ff.) and for penalties (sec. 709) does not apply.

Part XV of the C.S.A., dealing with legal proceedings, is silent on the matter, except that sec. 699 provides for executing against a ship any unsatisfied judgment rendered by any court against its Master or owner. The court concerned "may, in addition to any other powers they may have for the purpose of compelling payment, direct the amount remaining unpaid to be levied in distress or poinding and sale of the ship, her tackle, furniture and apparel".

The Pilotage Act, 1913, of the United Kingdom provides in sec. 49 (cf. sec. 341 C.S.A.) that pilotage dues may be recovered as fines but there is no corresponding provision in Canadian legislation.

As far as Canada is concerned, a claim for pilotage dues is considered an ordinary claim and no lien, guarantee or preferred rank is attached to it. No doubt when dues are payable to the Pilotage Authority, a claim will enjoy the general privileged rank granted to Crown claims; but this would not be the case if the dues are payable to a pilot personally. As seen earlier (C. 4, p. 67), subsec. 2383 (2) of the Quebec Civil Code, which is a pre-Confederation provision, grants a maritime lien on a ship to a pilot's claim and gives it a preferred rank in all cases.

Pilotage dues (except in the case of sec. 357 C.S.A.) are a debt payable by the ship (vide secs. 344, 345, 348 and 350 C.S.A.). In addition, sec. 341 makes additional co-debtors, "the owner, the master and the consignee or agent of any ship if such consignee or agent has sufficient moneys in his hands received on account of such ship". Therefore, any one of them could be sued for the recovery of dues.

For reasons that the Commission has been unable to discover, only the Master is liable to pay under the compulsory payment system dues owing when a ship is "removed from any place to another within any pilotage district without the assistance of a licensed pilot" (sec. 357). According to the rules of interpretation, such a specific indication can only be read as an exception to the rules previously stated, because otherwise the specification would be either meaningless or superfluous. Therefore, in this case neither the owner, consignee, agent nor the ship may be sued. But, as seen earlier, if the judgment obtained against the Master is unsatisfied, execution proceedings can be taken against the ship (sec. 699). This is an unnecessary and unwarranted complication which, if the provisions of sec. 357 are to be retained, should be made to conform with the general rule.

In the past, recovery proceedings had to be taken on occasion, especially when a dispute arose over the propriety of the charge or exemptions. Some of these cases are found in jurisprudence, e.g., Quebec Corporation of Pilots v Brigantine *Horsey*, 1884, 10 C.S. 257. However, in recent years there is no record of any legal proceedings being taken for such a purpose. The Department of Transport states "...to our knowledge there has not been any case during the past decade in which a Pilotage Authority has instituted a legal proceeding, either in its own name or the name of the Crown" (Ex. 1488).

Despite the absence of legal proceedings, very few accounts remain unpaid. The reason is, in part, sec. 344 C.S.A. which gives a Pilotage Authority the extraordinary power to detain a ship without any form of legal process by withholding clearance until pilotage dues are paid.

Sec. 344 reads as follows:

"344. (1) No Customs officer shall grant a clearance to any ship liable to pilotage dues at any port in Canada, where there is a duly constituted pilotage authority and at which pilotage dues are payable, until there has been produced to such Customs officer a certificate from the pilotage authority of the district that all pilotage dues in respect of such ship have been paid or settled for to the satisfaction of such authority.

(2) No Customs officer at any port in Canada shall grant a clearance to any ship if he is advised by any pilotage authority in Canada that there are outstanding and unpaid any pilotage dues in respect of the ship".

Clearance can be defined briefly as permission to proceed on an outward voyage given to a ship not holding a coasting licence by the Customs officer[3] of a port, after he has satisfied himself that the ship has complied with the following requirements:

Customs Act (secs. 80 and 82)

Immigration Act (sec. 46)

Canada Shipping Act (sec. 135, certificate of competency or service); (sec. 176, shipping master's certificate); (subsec. 315(6), payment of sick mariners' duty); (sec. 344, payment of pilotage dues); (sec. 412, Radiotelegraphy and Radiotelephony Certificates); (secs. 437 and 442, Load Line Convention Certificate); (sec. 448, timber certificate); subsec. 464(1) unseaworthy ships); (sec. 484, safety and inspection certificates).

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[3] (Vide Department of National Revenue Customs and Excise Memorandum D-18, Ex. 1489).

Coasting vessels (i.e., belonging to the coasting trade of Canada as defined in subsec. 2(13)) are issued an annual coasting licence (Customs) which allows them to enter and leave Canadian ports without obtaining clearance from a Customs officer. Therefore, sec. 344 does not apply to them. Such a coastal licence can not be withdrawn or suspended nor can its renewal be refused for failure to pay pilotage dues, because there is no authority either under sec. 344 or anywhere else. Since the power given in sec. 344 is of a very exceptional nature, it can not be exercised unless it is based on an explicit statutory provision. For the same reason, the terms of sec. 344 must be interpreted strictly and the expression "clearance" can not be taken as also referring by extension to coasting licences.

The penalty for sailing without a clearance is contained in subsec. 230(1) of the Customs Act which provides that "if any vessel departs from any port or place in Canada without a clearance . . . the master shall incur a penalty of four hundred dollars . . ., and the vessel shall be detained in any port in Canada until the said penalty is paid".

The necessity for this extraordinary procedure arises from the practical and legal difficulties of collecting a debt incurred in Canada when the debtor has left the country. The purpose of withholding clearance is simply to keep the vessel under the jurisdiction of Canadian courts until the dispute is settled and the judgment satisfied. This is not the case with coastal vessels because they never leave Canada. Withholding clearance is, in practice, summary arrest before judgment and hence should not be used as a means of compulsion to exact payment of a contentious claim while effectively depriving the alleged debtor of the opportunity to offer his defence before a Court.

It is believed that the wording of sec. 344 may give rise to much abuse, in that it does not provide the normal remedy in cases where a dispute is over the payment of a sum of money, i.e., either the possibility of payment under protest, or the deposit of a sum of money in escrow, or furnishing a bond to guarantee the payment of a judgment, in principal, interest and costs, if and when obtained against a ship, thereby allowing the ship to sail without undue delay, while affording on one hand the guarantee of a payment of a just claim and a check against any abuse of this extraordinary power of detention.

The right to have the clearance of a ship withheld, as provided in sec. 344 as drafted, amounts to nothing less than forcing the ship into unconditional surrender to the Pilotage Authority's demand for payment, since the Customs officer is prevented from issuing clearance without first obtaining permission to do so from the least disinterested party, i.e., the Pilotage Authority, who is the alleged creditor. The danger inherent in this procedure is that the losses a ship suffers during the delay while the case is settled in court exceed the relatively small amount of the contested debt to such an extent that in practice the owner is coerced into paying. In fact, in all cases

where this procedure has been applied to date the owners of the ships involved have preferred to pay rather than be delayed and, later, have not taken the trouble to institute legal proceedings against the Crown to settle the point at issue. For instance, the compulsory payment of dues has been enforced in this fashion by the Pilotage Authorities of the Districts of Quebec and Montreal despite the fact that the compulsory payment system has not applied in these Districts since the 1934 C.S.A. came into force. If the Pilotage Authority had been obliged to establish its claim before a court it would not have succeeded, with the result that some effort would have been made since 1934 to have the proper amendment made to the Act, if it was considered that the compulsory payment system was an essential feature in these two Districts.

Sec. 344 provides two modes of procedure. The first is contained in subsec. (1). It is the original provision but now outdated and no longer applied. It requires a positive act on the part of the Pilotage Authority in each case before a clearance can be granted. The second, which was introduced in 1934, is much more extensive and more in conformity with present needs, in that clearance is withheld only if a specific request is made by a Pilotage Authority.

The first subsec. of sec. 344 was introduced into pilotage legislation by an amendment in 1877 (40 Vic. c. 20, sec. 4) and, except for wording, has since remained unchanged in principle. Its scope is very limited for it applies only (a) to pilotage dues payable to the Pilotage Authority and (b) to the District from which the clearance is to be issued.

In 1877, ships paid cash for all charges they had incurred but this situation no longer prevails. Pilotage dues are now paid after a ship's departure by billing the agent or owner in conformity with general business practice. Since compliance with the provisions of sec. 344 would be perfunctory, the practical attitude taken by both the Customs officers concerned and the Pilotage Authorities is simply to ignore the imperative but unrealistic, obsolete provisions of subsec. (1). This, however, they do at their own risk and their attitude is basically wrong. If it is considered that subsec. (1) is no longer capable of application, steps should be taken to have it repealed. Until the Act is amended all authorities are bound by its imperative provisions and can not take it upon themselves to ignore any law passed by Parliament.

The 1934 amendment to sec. 344 introduced a more realistic and effective procedure in that any Pilotage Authority has recourse against any ship to recover outstanding pilotage dues but this remedy is applied only upon request. The remedy is complete in itself and should have replaced the obsolete subsec. (1) instead of being merely added as a second subsection. According to this new procedure, whenever a Pilotage Authority believes a

ship is a credit risk because dues are owing, it may request the Customs officers of any port in Canada to withhold clearance until the outstanding dues are paid.

How the two subsections of sec. 344 are applied is explained by the Department of Transport in a letter dated August 9, 1966 (Ex. 1490) which reads in part as follows:

> ". . . to my knowledge Section 344(1) of the Canada Shipping Act has never been strictly adhered to.
>
> Since outward pilotage cannot be billed for before the service has been performed, strict adherence to this section would mean almost 100% increase in the work of the pilotage offices in the main districts. In addition, it would not be in accordance with normal business practice and would cause a great deal of stress and confusion in the offices of the busy shipping agencies.
>
> On the other hand, the section has been used in the rare cases where doubt existed as to the intention of the shipowner or master to pay pilotage dues, or to enforce payment in cases of extreme delay in payment of such dues.
>
> We do not know of any place where the pilotage authority issues the certificates mentioned but no general instruction was issued to Customs officers in this regard."

The Halifax District Supervisor testified that he had only once been obliged to follow the procedure detailed in sec. 344. On that occasion under subsec. 344(2) he required the Customs officer at Dalhousie to withhold the clearance of a ship that had arrived at that port because pilotage dues were owed to the Halifax Pilotage Authority. He added that the debt was paid within four or five days and the vessel was released.

If the dues are payable to the Pilotage Authority, the billing and collection of all pilotage claims in the District are affected. Since the procedure consists of addressing bills to the agent or owner by mail, payment is effected long after a ship has left the District and, generally, the country. In the case of a round trip on the St. Lawrence and the Great Lakes it is the practice of certain companies to wait until all bills for pilotage dues in the various Districts en route are received and to make only one payment for the aggregate amount. The average time for receipt of payment is about one month after a bill is sent. The pilots have complained repeatedly that the Pilotage Authority is negligent in the collection of bills by allowing some to remain outstanding over a period of months (vide Part IV, Quebec District, *Financial Administration*). Very few pilotage accounts are not paid although there have been some cases of bankruptcy. Since most ships trading in Canadian waters return to a Canadian port, at one time or another, subsec. 344(2) has proved an effective deterrent.

A Pilotage Authority has no discretion whether or not to collect pilotage dues made payable to it by legislation. Once a tariff has been established by regulations, the Pilotage Authority must implement it. The By-law, including the tariff, is, together with the Act, the law of that District binding on all concerned: shipping interests, District pilots and Pilotage Authority alike.

Where dues for services rendered are payable to the pilot concerned, it is his own responsibility to obtain payment and, if he is negligent, he harms nobody but himself, but, when the dues are made payable to the Pilotage Authority, part of its fiduciary responsibility is to collect them in full, unless prevented by circumstances beyond its control. If, in certain cases, it is felt that the full amount of the dues should not be charged, and if the dues belong to one pilot, this pilot's authorization alone would relieve the Pilotage Authority of its obligation. However, if the dues belong to the Crown, only the Governor in Council, acting on the recommendation of the Treasury Board pursuant to sec. 22 of the Financial Administration Act, can approve an exemption. In both cases the loss of pilotage dues through the negligence or fault of a Pilotage Authority entails, *inter alia,* its personal civil responsibility.

COMMENTS

It is considered that pilotage dues should continue to be considered a civil claim enforceable before the appropriate court of civil jurisdiction.

If the compulsory payment system is retained, the statutory debt created thereunder should be called a penalty and collected as a normal civil claim before the same court.

It is further considered that it should be clearly indicated that the recovery of such a debt could be pursued in the Admiralty Court by proceeding *in rem* as well as *in personam.* This point is at present not clear, either here or in the U.K. (vide *British Shipping Laws,* Vol. II, Temperley, 1963 edition, para. 1364, note 2).

The Act should give any pilotage claim (pilotage dues and any other money owed by ships under pilotage legislation and contract, including contractual damages) privileged rank as well as a maritime lien against the ship involved.

Subsec. (1) of sec. 344 C.S.A. should be abrogated. Subsec. (2) should be retained but its arbitrary restriction should be corrected to permit a ship to obtain clearance by providing the Pilotage Authority a guarantee of payment when the point of contention is decided by the appropriate court. In such a case the Pilotage Authority should be required to institute recovery proceedings within a fixed period, failing which the guarantee would be cancelled.

II. OTHER CHARGES TO SHIPPING: FINES AND INDEMNITIES

Various sections of the Act provide *for fines* to be imposed on shipping in certain circumstances as follows:

(a) The Master of a ship is liable to a fine in the amount of double the pilotage dues payable if he makes a false declaration to the pilot about the ship's draught (subsec. 340(2)). As seen earlier,

the reason for this severe penalty is that this information has a direct bearing on the safety of the ship.

(b) A non-exempt ship which requires the services of a pilot in a District where the payment of pilotage dues is compulsory but which fails to show the signal for a pilot, or to facilitate his coming on board, is liable to pay to the Pilotage Authority what amounts to a fine, the amount of which is not to exceed the dues payable to the pilot (sec. 349 and subsec. 350(1)) if his services had been accepted.

(c) In any District, a Master who employs an unlicensed pilot without lawful excuse is liable to a fine not exceeding $250 for each day of violation (secs. 354 and 356).

(d) Failure on the part of a Master to display a pilot flag when there is a licensed pilot on board renders him liable to a fine not exceeding $250 (sec. 367).

Fines are payable to the Crown. Sec. 683 states how they are to be recovered, while sec. 707 states how they should be disposed of, i.e., they are to be recovered at the suit of any interested party before a court of criminal jurisdiction and are to be paid to the Consolidated Revenue Fund of Canada, unless otherwise directed by the trial judge. A fine awarded against a ship, her owner or Master, can be recovered by execution against the ship (secs. 698 and 699).

The question of the recovery of the unnamed pecuniary punishment of subsec. 350(1) poses a problem. According to one of the rules of interpretation "words should be consistently used; if the same meaning is intended, the same words should be used, and if different things are intended different words should be chosen" (Driedger, *The Composition of Legislation* 1957, p. 125). This pecuniary punishment can not be collected as a statutory debt because the amount is not determined but is left, as in the case of a fine, to be fixed by the court within a stated maximum. The fact that the word fine is not used as is done elsewhere should be interpreted as an indication that the reference is to a different thing, and, therefore, that sec. 683, which details the method of collecting fines, does not apply. This is an unnecessary complication which should be corrected if the provisions of this subsection are to be retained.

The other group of pilotage monies payable by shipping is composed of *indemnities, living out and travelling expenses* made payable under the Act to pilots carried outside the limits of their District, or detained in quarantine through circumstances over which they had no control (secs. 359 and 360). These are not pilotage dues and a Pilotage Authority has no power to deal with these indemnities in its By-law. They can not be part of a pilotage fund but belong solely to the pilot concerned as a debt owed to him personally by the ship.

To collect these indemnities and related costs the pilot concerned submits his account to the agent either personally or through his Pilotage Authority. Normally, as in the Quebec District, this money does not form part of the pilotage fund but there is a section in the By-laws of the Districts of British Columbia, Halifax, Sydney and Saint John which expressly provides for payment into the pilotage fund for eventual sharing among all the pilots (Ex. 1466(x)). Under the present legislation these By-law provisions are ultra vires of the regulation-making power of the Pilotage Authorities in that they are in direct contradiction to an express provision of the Act. However, where the pooling of the pilots' earnings is effected by the Pilotage Authority and sharing is on the basis of the pilots' availability for duty, any time lost for these reasons should not be counted absences for the purpose of sharing the pool (vide C. 7, pp. 192 and 193). The situation envisaged by secs. 359 and 360 is in conformity with the basic organizational principle underlying Part VI, namely, the only possible status for pilots is self-employed, free entrepreneurs whose remuneration consists of pilotage dues they earn by their own efforts.

Aside from living out expenses and travelling costs, indemnities are limited to $15 per day. The amount has always been rather low: $2 per day in the 1873 Pilotage Act (sec. 40), raised to $3 per day in 1934 (secs. 352 and 353). No doubt the reason it is maintained so low is that these situations are recognized as occupational hazards which arise in circumstances beyond the control of either the pilot or the ship. Therefore, it is strictly an indemnity in which profit should have no part.

However, sec. 359 does not apply when a pilot is carried over for a ship's convenience. If this occurs without his consent, the pilot has full recourse in damages against the ship for breach of a contract which implied an obligation to let him disembark at the regular boarding station after reaching the district limits. If a Master decides to do otherwise for his own convenience the ship should bear full responsibility.

Another situation that currently arises in coastal pilotage, and occasionally elsewhere, is when a pilot has to embark in a port situated a long distance away from his District, or when a pilot agrees to be carried over for a ship's convenience. Under the present legislation there is nothing to prevent a pilot from doing so and whatever indemnity he may ask for is a matter of private agreement between himself and the ship concerned. This extra service is rendered outside district limits and, therefore, is beyond the jurisdiction of the Pilotage Authority. The only control a Pilotage Authority has is through the pilot's licence by requiring the licence-holder to remain available within the District unless he first obtains leave from his Pilotage Authority. This situation agrees with the type of organization provided under Part VI but it is totally inadequate in a system where the pilots' earnings are pooled and where a Pilotage Authority dispenses pilotage services and con-

trols the practice of the profession. This is the situation that forced the Pilotage Authority in British Columbia to include in the tariff the *per diem* indemnity to be paid to its pilots when they are retained outside district limits for a ship's convenience. Because British Columbia is a coastal District it is a practical impossibility to maintain boarding stations at all possible places where ships may choose to enter the District. On the other hand the service should be flexible enough not to inconvenience vessels unduly by requiring them to make long, costly detours to embark and disembark pilots. This situation must be considered and provided for.

Under existing legislation these charges are not pilotage dues and their payment cannot be enforced as such. If a ship fails to pay, the only recourse is for the pilot concerned to sue for the recovery of the indemnity; the amount stipulated in the tariff may only serve as an indication of the pecuniary consideration of the private agreement between the ship and the pilot. In future legislation this situation should be dealt with and, in these circumstances, the Pilotage Authority should be allowed to fix in the District tariff the amount to be paid for obtaining such services from the Pilotage Authority's pilots. This money should be considered pilotage dues and should be recoverable as such, like payment for any other related services.

Chapter 7

FREEDOM OF PILOTAGE SERVICE UNDER PART VI C.S.A.

PREAMBLE

Under normal circumstances the pilotage profession, like any other, is exercised freely, including competition for clients who, in turn, have freedom of choice.

For the protection of both the users and those who offer their services the state has intervened either *proprio motu* or at the request of either party to provide a mechanism of control over the exercise of most professions and trades. Most liberal professions have obtained from the state the right to be incorporated in a professional organization, partly to promote the professional interests of their members but mainly to protect the public by ensuring a high standard of qualifications and professional ethics. Government intervention in the practice of a profession always means the imposition of some restrictions. The greater the degree of intervention the greater the diminution of basic freedoms, but on the other hand there is increased protection for all concerned. The pilotage profession has had the same experience: pilotage legislation has affected in varying degree any person's absolute right to offer his services as pilot, and any Master's or owner's free choice of the pilot he wishes to employ; in other words, the unhindered right to contract for pilotage services.

Aside from the duties and obligations imposed on the holder of a pilot's licence (which will be studied later in Chapter 8) Parts VI and VIA of the Canada Shipping Act deal with the extent to which the Government may intervene in the free exercise of the profession. The Act foresees five basic situations:

(a) non-organized localities;
(b) Pilotage Districts without the compulsory payment of dues;
(c) Pilotage Districts with the compulsory payment of dues;
(d) the designated waters of the Great Lakes Basin where there is compulsory pilotage;
(e) the undesignated waters of the Great Lakes Basin where it is compulsory to employ a registered pilot under certain conditions.

The first situation has been dealt with earlier. The only legislation applicable in non-organized territories and the only measures of control over the exercise of the pilots' profession are contained in the Canada Shipping Act in its provisions of general application (vide pp. 33 and 40). Under the scheme outlined in Part VI, non-organized localities can not establish any form of administrative control over the licensing, qualifications and remuneration of pilots. To implement such measures requires the creation of a Pilotage District under the Act as well as the appointment of a Pilotage Authority. For such localities, Parliament has not deemed it advisable to intervene, even to the extent of enacting minimum basic qualifications for the pilots. This attitude is consistent with the basic philosophy of the present pilotage legislation, i.e., pilotage is merely a private service for the convenience of shipping. As seen earlier, this concept is no longer in keeping with today's realities.

However, even in areas where pilotage is not Government-controlled, some limitation on the free exercise of the profession can be imposed but only, as in any other profession, by virtue of civil agreements. For instance, the owner of wharf installations can forbid the use of his facilities unless berthing is handled by the pilots he provides, as in the privately-owned and privately-operated harbour at Port Cartier. The same situation exists at the Cargill Terminal at Baie Comeau. But the Cargill Co. makes its two pilots available for services in other parts of the harbour, in which case complete freedom of choice exists to take a pilot or not.

The second and third situations are the organizational systems provided in the basic pilotage legislation, i.e., Part VI C.S.A. These situations are studied hereunder.

The fourth and fifth situations, that is, compulsory pilotage and the compulsory employment of a pilot, occur only in the Great Lakes Basin, and are exceptions to the general rule provided in Part VI of the Act to cover exceptional circumstances which do not occur elsewhere. Part VIA is the equivalent of a special Pilotage Act to cover one particular situation. This system entails a greater degree of Government intervention in navigation to the extent that compulsory pilotage is imposed in certain areas. These two particular situations are dealt with at length in Part V of the Report entitled "Great Lakes Pilotage".

GENERAL RULES APPLICABLE TO PILOTAGE DISTRICTS UNDER PART VI

The freedom of shipowners and Masters in pilotage matters is affected to a certain degree every time a Pilotage District is created, and to a greater degree when the payment of dues is made compulsory.

Part VI of the Act lays down the following rules which are applicable to all Pilotage Districts that are governed by its provisions:

(a) Acceptance of pilotage service is not compulsory (sec. 340).

(b) Except in special circumstances pilotage of ships may be performed only by licensed pilots (subsec. 354(3)).

(c) The Master has the right to choose his pilot.

(d) Tariff is binding on both parties (secs. 341, 343 and 372).

(e) Embarking a licensed pilot for the purpose of piloting a ship renders the ship liable to pay dues, whether or not the pilot's services as such are used (sec. 352).

The first rule makes it legally impossible to impose compulsory pilotage or to require a Master to embark a pilot because it would be ultra vires on the part of the Governor in Council (or anyone else) to do so under Part VI. For this reason new legislation (Part VIA) was necessary in order to legalize a departure from the rule in the special case of the Great Lakes Basin.

Outside the Great Lakes Basin, no shipmaster can be compelled to take a pilot on board, much less entrust navigational control to one. A Master can dispense with a pilot altogether and, if he embarks one, he may use his services partially, or not at all. A Master always retains legal command of his ship and always remains responsible for her navigation. Even though a pilot is entrusted with the "conduct" of a ship, the Master, or his representative, the officer of the watch, always has the right to supersede him (vide pp. 26-29).

Part VI merely ensures that the assistance of qualified pilots is available to Masters, who may employ them if they see fit. Whether or not a Master employs a pilot, the civil responsibility of the shipowner is not altered (subsec. 340(3)). The Government incurs no liability for any wrongful act or negligence of any pilot it has licensed and is liable in damages only for a wrongful act or the personal negligence of its Pilotage Authorities in the discharge of their licensing responsibilities, but not of any wrongful act or negligence on the part of the pilots in the performance of their duties. As explained earlier, there is no contractual relationship between a Pilotage Authority and a pilot or a ship; the only contract that exists pursuant to Part VI is between the pilot and the ship he has undertaken to pilot.

The second rule is laid down in subsec. 354(3), namely, in Pilotage Districts, pilotage of ships must be performed by licensed pilots only (the meaning of the term "ship" is studied in 3 *infra*). This is one restriction on freedom to contract that results from the creation of a licensing scheme. The reason for this restriction is not safety because (a) a ship may proceed without a pilot, (b) an unlicensed pilot may be employed in certain circumstances. The reason is that the licensing process would become an exercise in futility if ships, for whose convenience the selective process of

licensing was created, were allowed to hire licensed or unlicensed pilots indiscriminately. Furthermore, by guaranteeing licensed pilots regular employment the best candidates are attracted to the service and provided with the means to maintain their skill and knowledge.

Except in the case described in sec. 349 (in compulsory payment Districts the Master of a non-exempt ship which requires a pilot must display the approved signal and "facilitate the coming on board of the pilot") a Master or owner can hire whichever of the available licensed pilots he wishes. Equally, a pilot is at liberty to enter into a contract with any ship, provided he complies with any regulations which ensure his constant availability.

Subsec. 2(44) of the Act defines licensed pilot as "a person who holds a valid licence as pilot issued by a Pilotage Authority". This definition is completed by subsec. 333(3) to the effect that a licence is valid only within the limits of the Pilotage District for which it was issued, and even within a District there can be further restricted limits, shown on the licence, beyond which a pilot is considered unlicensed. For instance, in Prince Edward Island the rule is to limit a licence to a harbour and its approaches, e.g., a Charlottetown pilot is not licensed to pilot in Georgetown, and vice versa.

There are two exceptions to this rule. Pilotage may be performed by an unlicensed pilot:

(a) when the Pilotage Authority has indicated to a Master that a licensed pilot is not available (subsec. 354 (1)(a));

(b) in case of distress or in similar circumstances (subsec. 354(1)(b)).

The second exception is unambiguous but the first is out of context.

Formerly subsec. 354(1) corresponded, except for points of style, to sec. 46 of the 1873 Pilotage Act but in 1956 subsec. (1)(a) was amended. Prior to the 1956 amendment (4-5 Eliz. II c. 34) it read as follows:

> "354. (1)(a) When no licensed pilot for such district has offered to pilot such ship, or made a signal for that purpose, although the master of the ship has displayed and continued to display the signal for a pilot in this Part provided, whilst within the limits prescribed for that purpose, and ...".

The pre-1956 text was in conformity with the limited scheme of control provided under Part VI and fitted in with the other provisions of the Act, *inter alia,* secs. 348, 349 and 363. The 1956 amendment is out of context because it imposes on the Pilotage Authority a new duty that presupposes powers it does not have and which, in effect, is detrimental to shipping in the context of the scheme of Part VI.

Such an amendment fits into a system where the Pilotage Authority has powers and responsibilities (lacking under the present legislation) to provide pilotage service (i.e. to despatch pilots) and thus be in a position to state

whether pilots are available or not. Under Part VI the Authority can do no more than pass regulations to require pilots it has licensed to be in constant attendance, and, if they fail, to implement these regulations by having them prosecuted. In the free enterprise system under Part VI, a ship is never obligated to send an advance request for a pilot: only a reasonable notice of expected time of arrival (ETA) is required in compulsory payment Districts from a non-exempt ship if it is desired to exempt her in case a pilot is not available. It is the licensed pilots' duty to be available and ready at all times if they wish to exercise the precedence privilege conferred on them by their licence.

Furthermore, as the subsection is now worded, there may be abuses because a ship is left at the mercy of the Pilotage Authority which could keep a Master waiting, if he requires a pilot, and if an unlicensed pilot is available, by delaying the reply to his request for a pilot. Formerly, the availability of pilots was a mere question of fact that could be ascertained by anyone; in the free enterprise system it was logical that if no licensed pilot offered his services, a ship should not be prejudiced on that account, and a non-licensed pilot could be hired. The matter is further complicated by the fact that only the Pilotage Authority can certify that a pilot is not available and, in Districts where the Minister is the Authority, the reply has to come from him or from the Deputy Minister in Ottawa. Although it is true that under subsecs. 327(2) or 329(p) this is one of the powers that may be delegated by by-law to local representatives, no such by-law exists in any Pilotage District.

Sec. 355 provides that an unlicensed pilot is to be superseded whenever a licensed pilot offers his services. It is believed that, unless the Master so wishes, this provision should not apply when an unlicensed pilot is hired because no licensed pilot is available. For instance, during a pilots' strike a ship should need no authorization to hire an unlicensed pilot and retain him on board.

Except in these two special cases, the employment of an unlicensed pilot renders both Master and pilot liable to a maximum fine of $250 for each day of violation (sec. 356).

Sec. 356A purports to provide a third exception; the employment in the Great Lakes Basin of American pilots registered by American Authorities pursuant to Part VIA. At present, this provision is applicable in Canadian waters only in the Kingston District, which forms part of the Great Lakes Basin but was also created a Pilotage District under Part VI. Whether it is compatible under existing legislation to create a Pilotage District in the Great Lakes Basin under Part VI is studied in Part V of the Report "Great Lakes Pilotage".

Subsec. 354(3) contains no ambiguity: it is forbidden for a person not belonging to a ship, other than a licensed pilot, to act as pilot as defined in the interpretation section, namely, to conduct a ship. There is, however,

no legislation to prevent a Master from hiring a person not holding a pilot's licence to pilot a vessel which is not a ship (vide 3 *infra*) or to provide assistance to the ship's navigator if that person is not employed as pilot, i.e., does not "conduct" the ship, but is used only to advise on local knowledge. This is also apparent from the fact that Parliament used different language in the section of the Act dealing with an exempted ship which requires a pilot in a District where the payment of dues is compulsory: the Master is liable to a penalty if he employs "any person not belonging to his crew and not being a licensed pilot, to pilot or guide such ship . . ." (subsec. 348(b)). There appears to be no valid reason for this distinction. It is considered that in Pilotage Districts no person not a member of the crew without a pilot's licence should be employed to play any part in navigating a ship.

The third rule, to the effect that the Master is given, by the Act, the right to choose his pilot, has been studied in Chapter 4 (vide p. 71). There is only one exception to the rule: a non-exempt ship requiring a pilot in a compulsory payment District is obliged to accept the first pilot who offers his services (sec. 349).

Sec. 348 indirectly reaffirms the rule in the case of an exempt ship which, in the same circumstances, requires a pilot by stipulating that she will be liable to compulsory payment only if she does not accept the service of any of the pilots who offer their services in reply to her signal, but the Master retains his right to choose a pilot from those who answer his signal.

The fourth rule, i.e., that the tariff is binding on both parties, needs no further amplification (vide C. 6, pp. 133-136) *supra*). The tariff is the only valid pecuniary consideration of a pilotage contract, it can not be varied by private agreement. Pilotage dues established in the tariff are a debt payable by a ship to the pilot (or the Pilotage Authority if payable to it). Secs. 343 and 341 make the owner and Master co-debtors with the ship for payment and also the consignee or agent if he "has sufficient moneys in his hands received on account of such ship".

The fifth rule is that pilotage dues are owed and must be paid once a pilot is "taken on board" (sec. 352) for the purpose of piloting a ship, even if the Master does not make full use (or even any use) of his services to conduct the ship or to give advice, always provided that a pilot was available and fit to perform his duties. A natural consequence of a contract for services is that if a contractor is prevented by the other party from performing his obligations (provided he is willing and able to do so), the pecuniary consideration of the contract is payable. Sec. 352 of the Act stipulates that a pilotage contract has taken place when the pilot is taken on board. The charge is based on the applicable items in the tariff and, if the rate is for a full trip, the full dues are owed since neither party can vary the rates provided in the regulations.

Dues are also payable by a ship that can not be boarded due to existing circumstances but, when such ship is led by a pilot in another ship or in a boat, a pilotage service has been provided (sec. 353). A pilot may be prevented from boarding by high seas and unfavourable weather conditions, e.g., at Triple Island off Prince Rupert, the northern boarding station in the B.C. District.

However, the Act makes no provision for a shore-based pilot leading a ship in by radiotelephone, radar or other electronic means, as is done in some ports in Holland when, due to stress of weather, pilots can not board or even approach incoming ships. Scientific progress made this procedure possible, and the right to make use of it in special circumstances should not be denied because no statutory provision exists to authorize it.

THE COMPULSORY PAYMENT SYSTEM

Part VI of the Canada Shipping Act provides that in certain Pilotage Districts specified ships are required to pay pilotage dues, whether or not they employ a pilot, i.e., the compulsory payment system. This requirement is based on Canadian pilotage legislation of 1873, copied from the 1854 legislation of the U.K. which consisted of a partial compulsory pilotage system in that ships were not prevented from navigating without a pilot but were merely penalized if they failed to employ one. U.K. law has not changed in this regard (*British Shipping Laws,* Vol. II, Temperley, 1963 edition, para. 1310). In pre-Confederation days the Quebec Trinity House Act, as amended in 1849, provided for compulsory pilotage, a Master being obliged to give a licensed pilot charge of his ship under pain of a fine. This resulted in the Canadian courts refusing to hold a ship's owner responsible for the acts of Quebec District pilots (in re *The Lotus,* Clark, 1861, 11 L.C.R. 342).

In its first general pilotage legislation (the 1873 Pilotage Act) the Federal Parliament introduced a system similar in substance but under another name: the compulsory payment of dues. The Act took great care to make it clear that pilotage itself is in no way compulsory and that, despite the disguised fine it imposes, the normal civil consequences of a free pilotage system ensue. It stipulated these consequences in the Act by making the owner always responsible for the acts of a licensed pilot in charge of his ship, whether or not compulsory payment was in force (now sec. 340). The Act did attain its aim because the courts immediately reversed their former stand and held the owner responsible for the acts of the Quebec pilots, despite the fact that the payment of dues was compulsory, as shown by the following decisions:

> "Held: The law imposing compulsory pilotage having been repealed, the liability of shipowners for acts of pilots in charge of their vessels revived" (Vice-Admiralty Court 1875, The S.S. *Quebec* v The *Charles Chaloner,* 19 L.C.J. 201).

> "Compulsory pilotage having been abolished for a pilotage district, pilots are legally considered the agents of the owners of the ship, and the latter are therefore responsible for the acts of the pilot and for his negligence" (Exchequer Court, Quebec Admiralty District, 1897 Q.R. 12 C.S. 37 The Bell Telephone Company v The *Rapid*).

In Canadian legislation, the penal sanction for violating the compulsory payment system is not called a fine (the word is avoided) but by definition it is a fine or, at least, what is now called a penalty, i.e., a fixed, invariable sum of money becomes due, not as a result of a contractual obligation, but as a result of the provisions of the law when the conditions therein mentioned apply.

The system is not intended to promote the safety of navigation or to assure the necessary funds to operate the service, but merely to encourage ships to take pilots in order to provide the constant practice the pilots need to maintain and improve their skill and knowledge and, at the same time, to furnish them an adequate income. This was also the aim of the former compulsory system in Quebec, as indicated in an 1864 case (*Ex parte,* Chrysler; Simard v Corporation of Pilots (14 L.C.R. 209); "with a view to increase the activities and usefulness of the pilot".

As seen earlier (vide C. 3, pp. 59 and ff.), it is the exclusive prerogative of the Governor in Council, pursuant to sec. 326 C.S.A., to establish the system in any Pilotage District, except Quebec and Montreal where it is not permissible under present legislation. The Governor in Council has imposed the compulsory payment system in all Districts established under his authority with the exception of the District of Prince Edward Island. The Pilotage Authorities of the Districts of Quebec and Montreal have continued to enforce the system, as if the law, as far as these Districts are concerned, had not been amended in 1934.

The system is defined in sec. 345 and subsec. 357(1). Situations of exception are dealt with in secs. 346, 347 and subsec. 357(2) (exemptions), secs. 348 to 351 (inward voyage situations) and in subsecs. 329(d), (e) and (f) (pilotage certificates).

Sec. 345 and subsec. 357(1) provide that the compulsory payment system applies only, (a) to ships, (b) that navigate, or are removed from place to place by the Master, (c) within the limits of a District, (d) unless the ship qualifies for one of three exceptions, i.e.,

(i) exemptions;

(ii) is navigated by one of her officers who holds a valid pilotage certificate;

(iii) unavailability of a licensed pilot on an inward voyage.

The third condition (c) is clear enough. It conforms to the scheme of organization provided under Part VI whereby licensed pilots and an official tariff are available only in organized territories, that is, in Pilotage Districts.

Conditions (a) and (b) seem self-sufficient at first sight, but they have given rise to contention and leave much to be desired. The first deals indirectly with exclusions (not exemptions) by indicating to which type of ship the legislation applies; the second determines the type of pilotage services that are affected by the compulsory payment system. Any service that may be rendered by a pilot, but that does not entail navigation or the moving of a ship, does not come under the application of compulsory payment. For instance, dues could not be collected from a ship because a Pilotage Authority was of the opinion that, under the circumstances, it would have been advisable to assign a pilot to a ship as security watch. Dues would not be payable, even if a person not holding a licence had been posted by the Master because this is not a case where the employment of a person without a pilot's licence is prohibited (sec. 354).

The C.S.A. makes it clear that only ships are subject to the compulsory payment system. This distinction is also in keeping with the basic organization provided by the Act because pilotage is intended for ships only, which is borne out by its context. *Inter alia,* one of the requirements to meet the statutory definition of "pilot" is to have the conduct of a ship (subsec. 2(64)). In Pilotage Districts, a person not holding a pilot's licence may "pilot a ship" under certain circumstances (sec. 354). Despite the statutory definition, there has always been contention about what constitutes a "ship" for pilotage purposes.

Meaning of "ship". For the purposes of Part VI, the Act gives "ship" a non-limitative and ambiguous definition (subsec. 2(98)):

> " 'ship' includes every description of vessel used in navigation not propelled by oars".

Before the 1934 Act, "ship" was somewhat further qualified by opposing it to "boat" which was defined as meaning:

> "Every description of vessel used in navigation not being a ship" (sec. 2, 1873 Pilotage Act, subsec. 391(a), 1927 C.S.A.).

The term "vessel", although not defined, was the generic term that included both ships and boats. Pilotage legislation clearly applies exclusively to ships.

The definition of "vessel" came into pilotage legislation indirectly in the 1934 Act when the specific interpretation sections that formerly appeared at the beginning of each Part of the Act were amalgamated into one general section at the beginning of the Act itself. The present definition is found in subsec. 2(111):

> " 'vessel' includes any ship or boat or any other description of vessel used or designed to be used in navigation".

It is considered that the former situation has not altered and that vessel still remains the generic term. It includes three types of floating objects: (a) ships, (b) boats, and (c) other objects that are not included in the definition of either ship or boat, but which are used, or designed to be used, in navigation. Furthermore, the term "vessel" is used in Part VI only when a wider meaning than "ship" is intended, e.g. "pilot vessel" (secs. 364 and ff.) which is defined as meaning "any ship or boat employed in the pilotage service of any pilotage district" (subsec. 2(65)). This is further borne out by the text of sec. 353 which begins as follows: "Where any vessel having on board a licensed pilot leads any ship . . .". However, the corresponding section of the 1927 C.S.A., sec. 444, reads: "If any boat or ship having on board a licensed pilot leads any ship . . .".

The definition of "ship" is a verbatim reproduction of sec. 2 of the 1873 Pilotage Act which, in turn, was derived from the U.K. Merchant Shipping Act of 1854. Both in the U.K. and Canada the definition has remained unchanged ever since.

At first sight the meaning of the statutory definition of ship seems clear, except for the fact that it is non-limitative and the requirement that a ship must have her own motive power is indicated only indirectly and ambiguously. The distinction that separates a ship from a boat is that a ship is essentially self-propelled whether by sail, steam or other type of motive power. It does not cease to be a ship because, for one reason or another, motive power is not in use, or is not capable of being used (e.g. engine breakdown) unless the condition is permanent (e.g. a sailing ship intentionally deprived of its masts, a motor vessel whose engine has been permanently removed, a ship wrecked beyond repair). Conversely, boats are those vessels which, although used in navigation, have no motive power of their own for navigational purposes but depend on extraneous power, whether human power, through the use of oars, or power provided by a ship such as towing or some other external means. Since pilotage legislation is applicable only to "ships", floating objects such as non self-propelled barges, dredges and scows, rafts, cribs and booms, moved through the water by extraneous means, are automatically excluded from its scope of application.

As was to be expected, the interpretation of the meaning of the term "ship" has given rise to much controversy because it limited the application of pilotage legislation. Court decisions, both in the U.K. and Canada, have often been contradictory. The main decisions in Canada are the following:

(a) In 1879, it was held that a dredge was not a ship or a vessel because it had no motive power of its own and was not adapted to be an instrument of transportation (1879, 15 C.L.J. 268 (Ont.) in re *The Nithsdale*);

(b) In 1894, in Nova Scotia, it was held that a barque which had been wrecked and beached in Newfoundland and later condemned

and sold as a wreck could not be classified as a ship as defined in the Pilotage Act and therefore when it entered Halifax Harbour under tow it was not subject to the payment of pilotage dues (1894, 26 N.S.R. 333 (C.A.) Halifax Pilot Commissioners v Farquhar);

(c) In 1902, the Exchequer Court held that a vessel, in this instance a coal barge of about 1,000 tons register that had no motor power of itself, either by sail or by steam, when proceeding in charge of a tug is not a ship as defined in pilotage legislation and therefore is exempted from the payment of pilotage dues (8 Ex. C.R. 54, 79, Corporation of Pilots v the ship *Grandee*);

(d) In 1908, it was held that a "roller boat" was a ship, despite the fact that it had no motive power, because towing alone was not enough to conduct it. It was fitted with a rudder and a man had to be aboard to steer it. The point of contention was the jurisdiction of the Admiralty Court in the case of a collision between two vessels, one of them being the "roller boat". (Turbine Steamship Company v Knapp Roller Boat, 1908, 12 O.W.R. 723);

(e) In 1909, it was held that a raft is neither a ship nor a vessel for the purpose of enforcing a lien before the Admiralty Court in favour of a person not in possession (13 O.W.R. 190, affirmed 14 O.W.R. 639 (C.A.) Pigeon River Lumber v Mooring);

(f) In 1910, the Privy Council held that coal barges, about 440 tons each, with no motive power of their own, except sails that would enable them to run before the wind, but not so fitted to permit safe navigation, as for fully rigged sailing vessels, and towed by tugs or steamers in and out of the harbour of Saint John, N.B. were ships, and therefore liable to pay pilotage dues (1910, A.C. 208, Saint John Pilot Commissioners and Attorney General for Canada v Cumberland Railway Co.);

(g) In 1913, it was held that a boom of logs was not a vessel (1913, 16 Ex. C.R. 305, in re: Paterson Timber Co. v SS. *British Columbia*);

(h) In a Court of Formal Investigation decision rendered Sept. 30, 1966 in the case of the dredge *Manseau 101* by Mr. Justice Noel of the Exchequer Court, it was held that the dredge and the two tugs moving it constituted "a navigating floating mass" (*une masse flottante navigante*). Since a dredge and tugs are a *ship* as defined in the first part of subsec. 2(98) C.S.A., the Court of Formal Investigation had jurisdiction to enquire into the circumstances of the sinking under secs. 551 and 560.

To limit the application of pilotage legislation to "ships" was consistent with the principles on which the former pilotage legislation was based, but it is now an unrealistic restriction. Originally, pilotage was conceived as merely a private service (and in fact was) for vessels whose Masters did not possess the necessary local knowledge for safe navigation, i.e., sea-going vessels, all of which were ships. Boats and composite navigation units, such as tugs and scows, were generally engaged in well-known local navigational waters and did not require pilotage service. Hence, they were not made subject to the application of pilotage legislation. When a composite navigation unit is composed of a ship, assisted or moved by tugs, the ship alone is considered, and the act of navigation is properly deemed to be the act of the ship, whether or not the ship's engines are used.

This last point has been the subject of litigation. The courts decided that, for navigational purposes although not for the purpose of computation of dues (Saint John Pilotage Commissioners and Attorney General for Canada v Cumberland Railway Co. above cited), a tug and a ship comprise only one navigation unit, because they both carry out a single act of navigation directed by one person. Moreover, when so directed by one pilot, both vessels are under the charge of that pilot:

(a) In 1873, it was held by the Privy Council that the pilot on board a ship in tow has control over the tug and bears responsibility for its negligence (1873 L.R. 5, P.C. 308, Smith v St. Lawrence Towboat Company);

(b) In 1881, it was held that a tug towing a ship is bound to obey the orders of the pilot of the ship, whose employment is compulsory (1881, 6 A.C. 217, Spaight v Tedcastle).

But such limited scope of application is now too restrictive and does not meet the requirements of a pilotage service that has developed into one required in the public interest to ensure the safety of navigable channels. Any vessel that is being navigated and may become a menace to the safety of navigation is now the Pilotage Authority's concern. Therefore, it is considered that to be realistic the scope of future pilotage legislation should be enlarged to provide the Pilotage Authority with the means and powers to assure safety of navigation, wherever required, by extending its control over every water-borne object under navigation in its District. These powers should be under proper legislative and administrative controls to prevent abuses and arbitrary decisions. This aim could be achieved by using the generic term "vessel" instead of "ship", and by giving it a definition broad enough to encompass water-borne objects being navigated as a unit whether they move under their own power, or are being moved by other means. For the purpose of pilotage legislation, whether it concerns navigation, exemptions or tariff, a composite navigation unit should be considered one

vessel, irrespective of the number of its components, with the independent act of navigation being the determining factor. The question is covered in greater detail in C. 7, p. 233 and in a specific Recommendation.

Meaning of "navigate". As seen from the quoted court decisions, the means of the term "navigate" has posed serious problems of interpretation in certain cases. The situation was further complicated in 1934 by the introduction of the provisions of the present subsec. 357(1), apparently in an attempt to clarify the interpretation.

Prior to the 1934 Act, the extent of the compulsory payment system was defined only by the provisions of the section corresponding to the present sec. 345. Therefore, the key question is, "When is a ship considered to be navigating?" The expression "to navigate" used in sec. 345 seems to have a meaning wide enough to cover all possible movements of a ship under her own power, whether within a harbour, or between points inside or outside district limits, or between ports within the limits of a District. It might have been debatable whether a ship was navigating when it was moved by outside means, but the preponderance of the jurisprudence previously cited was in the affirmative (and rightly so), provided the ship had not ceased to be a ship, and was used for transportation purposes.

However, since 1934 with the introduction of subsec. 357(1) the Act differentiates between a ship being navigated within a Pilotage District (sec. 345) and a ship being "removed from one place to another" within a District by a Master (sec. 357). Confusion results, because if a Master "removes" his ship from one place to another within a Pilotage District, even using the ship's motive power alone, he is not navigating. If he were, subsec. 357(1) would be either meaningless or superfluous. According to the rules of interpretation, when the legislature enacts a special provision and uses different language, it is because it is referring to a distinct situation; here it must be inferred that when the legislature added subsec. 357(1) in 1934 it wanted to deal with a situation not already covered in sec. 345.

The origin of subsec. 357(1) C.S.A. can be traced to the Pilotage Act of the U.K. It appears that in mariners' language there are two types of ship movement: navigation properly speaking, i.e., voyages or trips, and the movements of a ship within a harbour which are referred to in Canadian pilotage By-laws as 'movages'. The corresponding section in the Pilotage Act of the U.K. differs from subsec. 357(1) in two material aspects: (a) it deals only with a movement of a ship within a harbour; (b) it duly relates such a movement to the general expression of navigating a ship. In this way the two types of ship movement are not opposed but made complementary. The British section reads as follows:

> "32.(1) A ship while being moved within a harbour which forms part of a pilotage district shall be deemed to be a ship navigating in a pilotage district, except so far as it may be provided by by-law in the case

of ships being so moved for the purpose of changing from one mooring to another mooring or for being taken into or out of any dock; provided . . . ".

The origin of this section is explained in a footnote under Pilotage Act, sec. 32, p. 596, in Temperley's *Merchant Shipping Acts,* fifth edition, 1954, as follows:

> "Under the repealed M.S.A., 1894, s. 596, an unqualified pilot might take charge of a ship for the purpose of changing her moorings or taking her into or out of any dock in cases where the act could be done without infringing the regulations of the port or any lawful orders of the harbour master. Thus, an unqualified pilot might conduct a vessel anywhere within the limits of the Port of London for pilotage purposes when engaged in changing her moorings.".

The only logical explanation is that in 1934 it was intended to remove any possible doubt and to indicate clearly that all navigation that occurred within a harbour, whether with or without a ship's own engines, was subject to compulsory payment. If this is correct, the resultant confusion is due to another drafting error.

But if this was the intention, it is unfortunate that the phraseology of the corresponding British section was not followed. Instead, use was made of an existing subsec. (447(1), 1927 C.S.A.) which dealt with a situation similar to the one prevailing on the Thames River where "navigation" could be related to a pilotage trip on the river as opposed to a movement within the Port of London itself. This could have been achieved by replacing the words "from one place to another within the Harbour of Quebec" by "from one place to another within any port or harbour situated in a pilotage district". Instead, the phrase was replaced by "from one place to another within any pilotage district". Obviously, only the port type Pilotage District was envisaged and the amendment becomes illogical when applied literally to river and coastal Districts. For instance, a trip between Chicoutimi and Quebec or between Vancouver and Prince Rupert would fall under sec. 357 and not under sec. 345, with the result that a ship engaged in these trips would not be considered as navigating but as effecting a movage and, furthermore, only the Master, not the ship or the owner or the agent, would be liable for the compulsory payment of dues.

The amendment, however, was indicated and despite the interpretative confusion it creates it serves its intended purpose in practice because it makes all movements of ships within district limits, whether or not by ship's motive power, and whether within a harbour or a District, subject to the compulsory payment system, directly or indirectly.

By-law definition of "vessel". Since many questions remained unanswered, the Pilotage Authorities tried to elucidate them by substituting in the regulations a redefined term "vessel" for the term "ship", and by making

the compulsory payment system applicable to vessels so defined. The term "vessel" is defined in the various District By-laws in three different ways:

(a) "vessel" means "every sort of ship in tow or otherwise" (vide By-law of Botwood, subsec. 2(j), British Columbia, subsec. 2(n), Humber Arm, subsec. 2(j), Port aux Basques, subsec. 2(j), Sheet Harbour, subsec. 2(i)).

(b) "vessel" means "every sort of ship in tow or otherwise, except an undecked barge that has no living accommodation and that is not self-propelled" (vide By-laws of Churchill, subsec. 2(f), P.E.I., subsec. 2(i), and Richibucto, subsec. 2(k) which omits "and that is not self-propelled"). The term "barge" is not defined.

(c) "vessel" means every sort of ship, in tow or otherwise, except a scow.

"scow" means any undecked barge having no living accommodation (vide By-laws of Bathurst, subsec. 2(m), Bras d'Or, subsec. 2(e), Buctouche, subsec. 2(m), Caraquet, subsec. 2(k), Cornwall, subsec. 2(*l*), Halifax, subsec, 2(*l*), Miramichi, subsec. 2(m), Montreal, subsec. 2(p), New Westminster, subsec. 2(m), Pictou, subsec. 2(k), Pugwash, subsec. 2(k), Quebec, subsec. 2(n), Restigouche, subsec. 2(m), Saint John, subsec. 2(m), Shediac, subsec. 2(*l*), and Sydney, subsec. 2(n). The term "barge" is not defined).

To amend or limit by regulation the statutory definition of the terms "ship" and "vessel" is illegal because this power is not included in the powers delegated to Pilotage Authorities by the Act. These definitions limit or extend the application to the various sections of the Act containing the terms, especially in the present case which involves the compulsory payment system and its exceptions. However, the mere fact that every Pilotage Authority found it necessary to redefine vessel in relation to its movement indicates that the statutory definition of ship and the meaning of the verbs "navigate" and "remove" used in secs. 345 and 357 are inadequate for pilotage purposes today. It is also an indication that future legislation should adopt realistic statutory definitions for these terms to meet the requirements of the pilotage service and pilotage organizations.

Furthermore, the terms "vessel" and "ship" are misused in these definitions because "ship" is made the generic term. This practice existed prior to the 1934 Act, e.g., the 1915 Quebec District By-law (Ex.1456n) always used *vessel* instead of *ship*. The definition of vessel as in (c) above appared in the 1928 Quebec District By-laws (Ex. 1448) when regulation definitions were first introduced. This indicates that *ship* had already lost the precise

meaning it had when it was first introduced in pilotage legislation. The reference to "scow" in the definition indicates that, in practice, the application of pilotage legislation had been extended to boats, probably in view of the confusion created by some court decisions, but mostly by the requirements of the service at that time, especially on the St. Lawrence River.

By-law definition of "movage". The By-laws of all Districts, except Montreal, contain another controversial definition: *the term "movage".* It is defined as follows (with a slight variation in the Saint John, N.B. By-law):

> " 'Movage' means the moving of a vessel within a harbour from one anchored or moored position to another but does not include the warping of a vessel from one berth to another solely by means of mooring lines attached to the shore unless a pilot is employed".

The Montreal By-law does not contain the definition despite the fact that the term "movage" is used in its tariff. This stereotyped definition was included in the By-laws without adaptation to local requirements except in Saint John, N.B. where, by a 1965 amendment, the words "within a harbour" were replaced by "within the District".

The legality of this definition is questionable if it is intended to restrict the application of sec. 357 to movements of ships within a harbour. The definition has been superfluous since the inclusion of the present subsec. (2) by an amendment in 1956, which had the effect of making a relative exemption of any movement effected solely by mooring lines. The use of different terms in the regulation definition to express the same thing as in the Act may cause problems of interpretation. Prior to the 1956 amendment, the restriction contained in the regulation definition was realistic, although illegal, and the 1956 amendment remedied the situation that the definition tried to correct. However, the regulation definition would be legal if it were only a means to define a type of pilotage service for the purpose of fixing rates, i.e., the movement of a ship from one place to another within a harbour by any means when a pilot is employed. This would not be objectionable in view of a Pilotage Authority's discretionary power to fix rates (subsec. 329(h)), as seen in the preceding chapter. If this was the purpose of the definition it should be contained in the tariff itself. But the present By-law definition goes much further and, therefore, is irregular to say the least. Furthermore, the use of the term "movage" is now objectionable as a possible source of confusion, on account of the wording of sec. 357, but as the term is now accepted in Canada and expresses a distinction in ships' movements that must be made, it is considered that the term "movage" should be incorporated and defined in the Act.

EXCEPTIONS TO COMPULSORY PAYMENT

A. EXEMPTIONS—FIRST EXCEPTION

1. *Nature and extent*

Under the scheme of exemptions provided in Part VI, ships that might be a safety risk on account of their size or because their Masters lack local knowledge do not enjoy any exemption from the payment of pilotage dues. Thus safety of navigation is automatically increased although it is not the governing factor.

The scheme of exemptions provided in secs. 346, 347 and subsec. 357(2), divides ships into three categories:

(a) exemption denied;

(b) absolute statutory exemption;

(c) relative exemption.

The Act does not provide any exemption for the following classes of ships:

(a) foreign ships over 250 net tonnage, that is, those for which the pilotage service was primarily established (except American local traders as indicated below);

(b) ships registered in Her Majesty's dominions which do not fall within one of the four exceptions provided in subsecs. (d), (e), (f) and (i) of sec. 346. These non-exempt ships are also ocean-going ships for which the pilotage service was established.

The present Act provides the following ships with an absolute statutory exemption that can not be withdrawn by a Pilotage Authority:

(a) ships belonging to Her Majesty (subsec. 2(100)) and to the Government (subsec. 2(30)) except those entrusted for operation and management to any Crown agency (346(a)(b));

(b) ships registered in any part of Her Majesty's dominions:

(i) if engaged in fishing (346(i));

(ii) if employed in salvage operation (346(d));

(iii) if not over 250 tons register (346(f));

(c) ships of any nationality entering a harbour for refuge (346(g));

(d) United States ships operating in a Pilotage District above Montreal and trading on the Great Lakes or between ports on the Great Lakes and on the St. Lawrence River, even if they make an occasional voyage to the "maritime provinces of Canada" (now an ambiguous, undefined term) (346(ee)). This exemption is the result of an amendment rendered necessary to assure similarity of treatment to Canadian and American ships following the opening

of the St. Lawrence Seaway and the introduction of joint Canada-United States pilotage arrangements on the Great Lakes (Bill C-98, 1961, Clause 15, which will become 9-10 Eliz. II c. 32). The result, however, is that American ships receive preferential treatment in that they enjoy an absolute exemption while their Canadian counterparts enjoy only a relative exemption as indicated hereunder in the following paragraph under (b) (ii).

The third group are those whose exemption is left to the discretion of each Pilotage Authority. They are divided into two classes:

(a) those to which the Pilotage Authority is empowered to grant an exemption:

  (i) small foreign ships not over 250 net tonnage by class or size, at the discretion of the Pilotage Authority with the approval of the Governor in Council (346(c));

  (ii) foreign hospital ships or ships of war at the sole discretion of the Pilotage Authority (346(h)) which discretion is exercised as each case arises through an administrative order (vide C. 8, p. 298);

(b) those enjoying a relative statutory exemption which can be withdrawn by the Pilotage Authority through regulations either completely or partially, either as to the amount of the dues or as to the category or class of the steamship concerned:

  (i) the exemption granted to every ship by subsec. 357(2) for a move effected solely by means of her mooring lines;

  (ii) the exemption granted to regular traders pursuant to subsec. 346(e). These regular traders normally do not need the services of pilots and usually dispense with them. However, they benefit indirectly from organized pilotage, in that the service is a safety factor when foreign ships are provided with pilots, or, at times, directly when they employ pilots for their convenience as relief Masters when transiting a long section of pilotage waters like the St. Lawrence River or when navigating under exceptionally adverse conditions. To enjoy this relative exemption the ships concerned must meet three conditions:

    (A) to be "steamships"; if they do not fulfill the statutory definition of steamship (subsec. 2(105)) and are not otherwise exempted they are subject to the compulsory payment of dues. Subsec. 2(105) defines steamship as "any ship propelled by machinery, and not coming within the definition of sailing ship"; and sailing ship is defined

(subsec. 2(93)) as "a ship propelled wholly by sails, and a ship principally employed in fishing, not exceeding 200 tons, gross tonnage, provided with masts, sails and rigging sufficient to allow her to make voyages under sail alone, and that, in addition, is fitted with mechanical means of propulsion other than a steam engine.";

(B) they are registered in one of Her Majesty's dominions;

(C) they are local traders falling into one of the following categories:

(i) local traders employed in any one port or between ports in the same province (346(e)(i));

(ii) coastal traders divided into two main groups: those on the East Coast employed in voyages in any waters between New York City and Hudson Bay, on the St. Lawrence or the Great Lakes (346(e)(ii) and (iii)); those on the West Coast employed in voyages in any waters between San Francisco in the south and Alaska in the north (346(e)(iv)).

The wording of sec. 347 gives rise to controversy whether the right of the Pilotage Authority to withdraw statutory exemptions applies only to the cases enumerated in subsec. 346(e), or to any ship enjoying any one of the other exemptions, provided the ship happens to be a steamship. The point of contention is the use of the word "section" in the fifth line of sec. 347 instead of the word "subsection". There can be no doubt that sec. 347 applies only to the cases listed in subsec. (e), otherwise the reference to this subsection in the second line becomes meaningless; furthermore, when the word "section" is considered in its context, there is no possible ambiguity, i.e., "steamship employed as specified in that section". Hence in sec. 346 it is only in subsec. (e) that mention is made of a specific employment of steamships. Furthermore, the other interpretation would lead to the absurd conclusion that a Pilotage Authority would have power to withdraw exemptions from Crown or Government vessels, from salvage ships, fishing vessels, and small vessels registered in Her Majesty's dominions, if they happened to be steamships, but would be powerless to do so if they happened to be any other type of ships. This again is the result of poor drafting at the time of the 1934 revision. Sec. 417 of the 1934 Bill did not contain this error but it was the result of an amendment made during debate (probably with the intent of clarifying the text) to make sure that sec. 347 applied only to subsec. (e) of sec. 346, *inter alia*, the words "notwithstanding anything contained in paragraph (e) of the last preceding section" were added

but the rest was left unchanged. Sec. 417 of the Bill, prior to amendment, read as follows:

> "417. The pilotage authority of any pilotage district may, notwithstanding anything contained in the last preceding section, from time to time, determine with the approval of the Governor in Council, whether any, and which, if any, of the steamships employed, as in the said preceding section specified, shall or shall not be wholly or partially, and, if partially, to what extent and under what circumstances, exempted from the compulsory payment of pilotage dues".

It is a drafting error not to use the same terms to make the same reference, especially when the two references appear in the same provision and in the same sentence. Different wording normally connotes a different meaning, unless the contrary appears from the text and context as is the case here. If this provision is to be kept in new legislation, it should be reworded in such a way as to dispel any possible ambiguity.

It is considered that the distinction between a ship and a steamship in sec. 346 is a relic from past legislation which met a situation that no longer exists. The distinction can be traced back to the first Canadian pilotage legislation where sec. 57 of the 1873 Pilotage Act distinguished between exemptions for "ships" and "ships propelled wholly or in part by steam". The distinction was realistic at that time because most ships were under sail and lacked in confined waters the manoeuverability of the steamships which were beginning to compete with sailing ships. Unless sailing ships were registered in the Dominion of Canada and were not over 250 tons, they were not exempt; their steamship counterparts were exempt if they were local traders. Since this situation no longer exists, it is considered that the distinction should be dropped.

It is interesting to note that in the proposed amendment to sec. 346 in Bill S-3 (unpassed), the term "ship" replaced "steamship" in subsec.(e).

It was charged that the provisions of sec. 346 are discriminatory in that flag is a determining factor. In the 1934 Act, exemptions for local and coastal traders were uniformly limited to steamships registered in Commonwealth countries. This apparently is discriminatory because it violates certain ancient treaties with other nations (vide Bill S-3, Senate Debates, Ex. 1191). When Bill S-3 was considered, an attempt was made to correct the situation by removing from this section the restriction on register but the Bill was not passed and no further attempt was made to amend the section except in the 1961 amendment, subsec. 346(ee) (9-10 Eliz. II c. 32), which solved the urgent problem of American vessels on the Upper St. Lawrence River and in the Great Lakes Basin. It is agreed that in legislation where the criterion for imposing pilotage on ships is safety of navigation, the flag question is absolutely irrelevant. The criterion for exemption should be the relative dangers that pertain to a given route, including the intensity of traffic, ship's characteristics such as size and manoeuverability and the

competence of Masters and officers in local navigation. Without delving into the extent to which these ancient treaties[1] might restrict the powers of Parliament to deal with certain aspects of navigation as far as countries that are parties to these treaties are concerned, a cursory study reveals that the purpose of the treaties is to prevent discrimination against these countries as to their right to navigation and the tolls, duties and charges they are to pay. In these respects their ships are to receive the same treatment as Canadian ships. No one could seriously argue that the sections of the Canada Shipping Act and of the National Harbours Board Act which authorize the Governor in Council and the National Harbours Board to modify the rule of the road or to establish traffic control, as warranted by local circumstances, are a violation of liberty to navigate as guaranteed by these treaties. These are safety measures for the protection of the public as well as the individual ships that have to comply with them. Whenever compulsory pilotage is imposed for reasons of safety it is also a safety measure. Compulsory pilotage and compulsory payment of dues may well be considered restrictions on the right to navigate in a system where pilotage was conceived only as a private service to shipping, but it can not be true where pilotage is conceived as a public service for the safety and protection of Canadian waterways and maritime traffic. The resulting lack of flexibility has created problems which have been settled, in part, by illegal agreements. For instance, the Vancouver Chamber of Shipping has made an agreement with the B.C. pilots to the effect that American ferries plying between a Puget Sound port and a B.C. port are exempt from the compulsory payment of dues, as are American ships merely in transit through B.C. District waters. However, the pilots have refused to extend the agreement to ferries plying between an Alaskan port and a B.C. District port or a New Westminster District port. In both cases, the Pilotage Authority abided by the pilots' decisions. It does not demand payment of dues by ferries from Puget Sound ports but enforces payment by American ferries sailing between Alaska and Canada. Equally, ships in transit which do not call at a Canadian port are not charged pilotage dues unless they employ a pilot.

In 1953, as a result of the controversy following the refusal of an American steamship company to pay dues for its ships engaged in coastal operations on the Pacific Coast, it was suggested that an unofficial exemption could be legally granted by providing in the tariff, under subsec. 329(h), a nominal fee for that type of American ship. Subsec. 3(b) of the Saint John Pilotage District 1934 By-law was cited as a precedent. It was specially drafted to exempt a line of United States passenger steamships, on a regular

[1]A list of sample clauses concerning Canada's obligations with respect to pilotage and a list of the treaties dealing with navigation in force between Canada and the U.S.A. are appended to Proceedings of Senate Committee on Transport and Communications, Bill S-3; February 25, 1959, pp. 235-239 (Ex. 1191).

run between Saint John, Boston and New York, by providing a nominal fee if the services of pilots were dispensed with (Ex. 1159). The proposal was not factually correct. The Saint John District By-law was not a precedent; it was in conformity with the legislation then in force but since repealed. Subsec. 457(c) of the 1927 C.S.A. exempted steamships of any nationality that were local or coastal traders on the St. Lawrence and on the eastern seaboard.

Apart from the relative exemptions listed above, a Pilotage Authority has no right to modify the scheme of exemptions defined in the Act either by granting additional exemptions or withdrawing any of those over which it has no power.

It is illegal to try to circumvent the law and to grant an unauthorized exemption either by not providing a rate for a class of ship, or a type of voyage, or by providing a lesser rate to be paid by non-exempted ships if a pilot is not employed. Pursuant to secs. 345 and 347, in cases where the payment of pilotage dues applies whether or not the services of a pilot are used, the amount of dues that ought to be paid is the same.

The provisions of sec. 347, whereby a lesser charge can be made when a pilot is not hired, is not an exception to the foregoing rule because sec. 347 applies to ships for which normally the compulsory payment system does not exist, that is, those enjoying a relative exemption. Subsec. 345(b) specifies that compulsory payment does not apply to exempted ships. Sec. 347 empowers a Pilotage Authority to withdraw a relative exemption, either totally or in part, for the steamships concerned. However, such a partial withdrawal does not empower a Pilotage Authority to set a different scale of pilotage dues for such ships, but only to provide to what extent the existing scale is to apply. If subsec. 329(h) was to be interpreted as giving a Pilotage Authority power to provide a different scale when no pilot is hired, it would also be permissible for a Pilotage Authority to provide a higher rate, which would conflict with the provisions of sec. 347.

It would also be illegal to fix a nominal price even though the amount to be fixed in the regulations is left to the discretion of a Pilotage Authority. This would be an injustice to the pilots and, moreover, it can not be within the power of a Crown officer to commit an injustice in the name of the Crown. It is the mandate and duty of a Pilotage Authority to fix the dues at rates that are just and reasonable for both vessels and pilots; otherwise, the dues become illegal *ipso facto* because they are the result of an abuse of power.

The withdrawal of relative exemptions is left to the discretion of each Pilotage Authority. The Act is silent as to the criterion that should govern the exercise of such discretion except to say they may be withdrawn "wholly or partially and, if partially, to what extent and under what circumstances". If rules are not set out in the text of the Act they must be derived from the

context because it is improbable that Parliament's intention was to allow this delegated power to be exercised in a purely arbitrary manner without taking into account the underlying purpose of the legislation, the requirements of the service and the principles of justice and equity. Therefore, any withdrawal of a relative exemption that can not be justified as such is illegal, because it results from an abuse of power. Safety of navigation may be one of these unwritten governing principles because, as seen above, the scheme of exemptions tends to increase safety of navigation. However, the main principle under the present legislation is to achieve the aim of the compulsory payment system, i.e., to provide the pilots with sufficient pilotage to permit them to maintain and improve their skill and knowledge and, at the same time, to ensure they receive an adequate income. But the compulsory payment system should not be used either to provide employment for more pilots in excess of the number required by the normal demand or merely to raise funds.

It would be illegal to base the withdrawal of an exemption on the nationality or residence of an owner and, for the same reason, it is considered that withdrawal based on flag or registry alone would amount to discrimination. Nevertheless withdrawal would be justified if it is based on class of ship, such as large liners and tankers, or bridge-aft ships, or the circumstances of a trip, such as those entailing some special difficulties, i.e., exemptions that would apply to certain areas of a District. For instance, in the New Westminster District, an exemption might be withdrawn only if the exempt ship has to transit the railway bridge.

If safety of navigation is recognized as the basis for imposing compulsory pilotage, the only criterion will be safety and an exemption will be granted only if and when a Pilotage Authority is fully satisfied that a vessel is not a safety risk when navigating in its District, or in a specific area of the District.

2. *Action taken by Pilotage Authorities on exemptions*

Pilotage Authorities always have used their By-laws to deal with exemptions (vide C. 8, pp. 246-248).

(a) *Small foreign ships.* Most Pilotage Authorities have not taken the trouble to make a regulation covering exemptions for small ships registered outside Her Majesty's dominions. This question is dealt with in only six Districts: Sydney, New Westminster and Port aux Basques, where an exemption is granted at large to all vessels under 250 net tons; and Halifax, Saint John and Churchill, where the exemption is restricted to pleasure yachts. The legal result is that any foreign ship, no matter how small, is subject to the compulsory payment of dues in all other Pilotage Districts, e.g., an American pleasure craft that is not a row-boat must pay pilotage dues when passing through the Cornwall District, or going up the Fraser River, or entering B.C. District waters. This requirement is so unreasonable that it is never applied. The resultant totally illegal situation could easily be overcome

by following the simple procedure outlined in subsec. 346(c). The Pilotage Authority concerned is bound to collect pilotage dues from every small foreign ship because, as far as it is concerned, each case is a public claim, and the Pilotage Authority has no power to take it upon itself to decide whether or not to collect public money. If this provision is to be retained in future legislation, it is considered that the question would be more adequately dealt with if subsec. 346(c) was amended to grant a direct but relative exemption to all small foreign ships of 250 tons net or less. This exemption could be subject to withdrawal by the Pilotage Authority in the same manner as provided for in sec. 347. Using this procedure, small ships would be automatically exempt except those categories a Pilotage Authority might consider undesirable to exempt on account of special circumstances which make them safety risks.

(b) *Withdrawal of relative exemptions.* Most Pilotage Authorities have taken advantage of the powers granted by sec. 347 to vary exemptions for steamships locally employed. Three examples are:

Subsec. 6(2) of the Cornwall District By-law restricts exemptions to Canadian registered steamships (their American counterparts enjoy an absolute exemption under subsec. 346(ee) C.S.A.); subsec. 6(3) of the Halifax District By-law withdraws exemptions except for Canadian registered ships which are totally exempt if under 1,000 tons and 50% exempt if over that tonnage; in the Humber Arm District, subsec. 5(2) withdraws the exemptions of subsec. 346(e) completely and, instead, provides another scheme exclusively for locally owned and locally employed vessels. The Humber Arm scheme is illegal in so far as it exceeds the terms of subsec. 346(e). Hence, despite the By-law provision, it is imperative for vessels that are not steamships and for those that do not come within one of the voyage classifications of subsec. 346(e) to pay dues.

(c) *Miramichi By-law.* The Miramichi By-law, subsec. 6(1), reproduces all the permanent provisions of sec. 346 C.S.A. except the exemption for small ships registered in Her Majesty's dominions, which was illegally restricted to ships of Canadian register. The practice of including in a By-law the provisions of the Act is objectionable because a By-law should contain only additional legislation made by *intra vires* regulations. This is not the case here and can only result in confusion, e.g., if the Act is amended and the By-law is not; or if, as has happened in this instance, a Pilotage Authority varies a permanent provision of the Act over which it has no legislative authority.

(d) *Complaints of discrimination.* In a brief (Ex. 1132) to this Commission, the Imperial Oil Company charged that the lack of uniformity in the scheme of exemptions as varied by the By-laws of various Districts amounts to discrimination. For instance, they complained that their Canadian registered coasting ships which are not subject to compulsory payment

on the West Coast, even if they sail between an American port and a Canadian port, do not receive the same treatment when they call at Halifax or Sydney. This complaint is unfounded and there can not be any question of discrimination. It must be remembered that each District is an autonomous entity and this lack of uniformity is exactly what was contemplated by Parliament when it granted to the various Pilotage Authorities power to vary relative exemptions. If uniformity had been intended, sec. 347 should not have been added. As seen earlier, the application of sec. 347 depends on essentially local considerations.

3. *Loss of Exemptions*

The establishment of the compulsory payment system does not affect an exempt ship except in an indirect way and in very special circumstances: an exempt ship loses her exemption if on her inward voyage she does not comply with the requirements that the Act has specifically imposed. An exempt ship will be called upon to pay pilotage dues, even if a licensed pilot was not employed, only in the two situations defined in sec. 348, i.e., when on an inward voyage:

(a) the ship showed she required a pilot by displaying the proper signal but failed to accept the services of any one of the pilots who offered their services (subsec. 348(a)) (Corporation of Pilots v Brigantine *Horsey* 1884, 10 C.S. 257);

(b) a non-licensed person was employed to pilot or guide the ship (subsec. 348(b)) (this in addition to the penalty provided in sec. 356 for hiring an unlicensed pilot).

But if an exempt ship undertakes any other type of voyage or trip, the compulsory payment system does not apply. For instance, employment of an unlicensed person for an outward voyage renders a Master liable to the fine prescribed in sec. 356 if the unlicensed person acts as pilot, but the ship's exemption is not lost. However, there will be no penalty if the unlicensed person is used merely to "guide" the ship because this is not forbidden under sec. 356.

Subsec. 348(a) no longer applies because there is no prescribed signal for a pilot (sec. 363) and, even if there were, the pilots no longer offer their services but are despatched if, and when, their services are required. It is considered that if the compulsory payment system is to be retained the application of subsec. 348(b) should be extended to all types of voyages and trips and to movages.

B. NON-AVAILABILITY OF PILOTS—SECOND EXCEPTION

The second exception to the obligation to pay dues is when no pilot is available on an inward voyage (sec. 345):

"... unless
(a) such ship is on her inward voyage and no licensed pilot offers his services as a pilot after a reasonable notice of expected time of arrival has been given".

This section raises the following questions: why inward voyage only, why such advance notice of expected time of arrival (ETA) instead of the former practice of displaying a signal for a pilot, and what constitutes reasonable notice?

In 1873, it was only on an inward voyage that the Master had no opportunity to verify whether pilots were available or not. There was no means of ship-to-shore communication whereby advance notice of arrival could be given and, therefore, in order not to delay ships, the pilots were required to cruise constantly in their pilot boats throughout the boarding area so as to be available as soon as vessels arrived[2]. Hence the regulation that if on arrival at the seaward limit a ship displayed the signal for a pilot and no pilot offered his services, the ship was allowed to continue on her own if the Master wished to dispense with a pilot. Under these circumstances the ship was not subject to compulsory payment.

The development of wireless communications enabled ships to send an ETA but since they were not required to do so they often arrived unexpectedly and the pilots were never sure when to look for them. This situation was corrected by the 1950 amendment whereby all non-exempt ships were required to give a reasonable ETA (14 Geo. VI c. 26).

No doubt the main purpose of an ETA was to permit the efficient operation of a despatching system which would relieve the pilots from the necessity of remaining in their boarding area. Aside from the fact that such a system is not permissible under Part VI, the factual situation is that Pilotage Authorities in the majority of the large Districts operate a despatching system as provided for in their By-laws. The requirement to provide an ETA is an improvement, but the situation still leaves much to be desired.

An ETA is required only from non-exempt ships, not as a condition for obtaining the services of a pilot, but merely to apply the automatic exemption that may result from the non-availability of a pilot and for allowing

[2] It was held that the Trinity House Act imposed compulsory pilotage under the regulation that the pilot was required to be in his pilot boat a reasonable distance from an incoming vessel, with a distinctive pilot flag flying at the mast head as a signal to indicate that he was on the watch for vessels to take them in charge and pilot them to Quebec. On one occasion a pilot had boarded a vessel as a passenger at Rimouski and when the vessel reached the district limits (at that time the boarding area was situated at Bic) he demanded to be given charge of the vessel. This he was denied. The claim for pilotage dues was dismissed because he had not offered his services in the prescribed way as aforesaid (*Ex parte* Chrysler; Simard v Corporation of Pilots (1864) 14 L.C.R. 209).

a ship to proceed without one. The despatching authority has no right to impose a pilot on a ship (much less to discriminate between ships which require pilots) any more than the pilots at a seaward boarding station have these rights. Ships are to be provided with pilots in the order of their arrival, whether or not an ETA was sent. Since the despatching authority plans its assignments on the number and priority of ETA's received, ships which arrive unexpectedly sometimes take the pilots intended for others thus creating a shortage of pilots. At times, pilots volunteer to proceed immediately on a new assignment after just completing one although they risk the safety of the ship concerned because they are tired and not physically fit. If despatching is recognized in future legislation, such situations should be covered by extending ETA requirements to all ships which require a pilot and, in addition to any penal sanction that may be provided, by giving precedence to ships that comply with the regulation.

The requirement for a reasonable ETA is vague and leaves room for much contention. Under the present legislation Masters are entitled to expect that pilots are constantly available at all boarding stations and, therefore, they need do no more than send an ETA sufficiently in advance to allow a pilot time to proceed from the boarding area to meet the ship. Under these circumstances a few hours' notice is all that is necessary in any District. However, the actual situation is different in that a despatching authority normally maintains in a boarding area only the number of pilots required to meet the expected demand. This provision lays down no criterion how to determine a reasonable time in relation to organizational arrangements which vary from one District to another. The amount of advance notice needed in each District varies from one or two hours, or even less in some ports, to a minimum of ten hours at Les Escoumains and at least one and a half days at Prince Rupert, under present arrangements. The Master of an incoming ship can not be expected to know the governing factors and, therefore, he has no way of deciding what is reasonable. There is no provision in the Act whereby the Authority can prescribe what the minimum notice should be in each locality.

It is relevant to note that the Pilotage Authorities have not tried to deal with ETA's in their By-laws and have not even laid down how long in advance they should be sent. But the By-law in each District, except Churchill, contains a section titled "Notice of Requirement of Pilot" which, except for a few minor changes to suit local needs is, in substance, the same as sec. 13 of the British Columbia District General By-law:

> "13. The master or agent of a vessel requiring a pilot shall notify the Superintendent in sufficient time to enable the pilot to meet the vessel, stating the time the pilot as required on board, the place where the vessel is to be boarded and the duty that is required to be performed."

The variations are as follows: In Prince Edward Island notice is to be given to "the pilot of the port concerned"; in the Restigouche River District "to the master pilot at least six hours in advance"; in the other Commission Districts to the Secretary; in the Montreal District the notice is also to contain draught and tonnage (no doubt because the pilots are classified into grades).

Under the present legislation this By-law provision is illegal because it does not come within any of the subject-matters on which a Pilotage Authority may legislate by regulation. Moreover, there is no way of enforcing application. This is probably why, except for Restigouche River, the Pilotage Authorities have not fixed a minimum time limit for notices of requirement. Two facts emerge: first, the ETA requirement for non-exempt ships only no longer meets the needs of the service; second, what is required now is adequate advance notice that a pilot is required. This is one consequence of replacing the free enterprise system with an orderly division of pilotage assignments by means of a despatching system because efficient planning to conserve the pilots' time necessitates advance notice from every ship which requires a pilot or is required by legislation to employ a pilot.

C. PILOTAGE CERTIFICATE—THIRD EXCEPTION

The third exception to compulsory payment is a ship navigated by one of her own officers who holds a valid pilotage certificate.

This exception is not actually applied, not because it has no practical value but merely because the Pilotage Authorities do not employ it. If an appropriate regulation was passed, the Pilotage Authorities would have power to grant certificates to Masters and mates to act as pilots of the ships in which they are employed, in accordance with the terms, conditions and fees established in the District By-law, in much the same way as the so-called "B" certificates for pilotage in the undesignated waters of the Great Lakes Basin (sec. 375B) (vide Part V, *Great Lakes Pilotage*).

The first legislation on this subject was introduced in the 1873 Pilotage Act and remained almost unaltered until the 1950 amendment (14 Geo. VI c. 26).

Prior to 1950, statutory provisions established the procedure for licensing Masters and mates, prescribed the certificate and limited its duration to one year, but made it renewable on payment of a fee. The fee for a certificate and its renewal was fixed by the Pilotage Authority with the approval of the Governor in Council. The certificates were subject to withdrawal for incompetence or misconduct. By an amendment introduced in 1879 (42 Vic. c. 25) such certificates could be issued only to Masters and mates of ships registered in Canada. Certificate fees were to be applied first to pay examination expenses and thereafter, at the discretion of the Pilotage

Authority, either to pay the general expenses of the District, or to add to the pilot fund, or to be disposed of for the benefit of the licensed pilots. The Act provided that such certificates could not be issued by the Pilotage Authorities of the Districts of Quebec, Montreal, Halifax and Saint John. If a ship piloted by such a certificate-holder entered the limits of a District, a white flag bearing the certificate number of the holder had to be hoisted at the main (hence the expression "white flag certificate") (secs. 330, 331 and 340, 1934 C.S.A.). The origin of these now repealed provisions has been traced to the U.K. Merchant Shipping Act, 1854 (subsec. 333(4) and secs. 340 to 344).

The 1950 amendment repealed all these statutory provisions and left the whole question to be decided by the Pilotage Authority by by-law legislation. This licensing power was extended to all Pilotage Authorities and the privilege of obtaining such certificates was extended to the Masters and mates of ships of any nationality.

This is a legal means placed at the Pilotage Authority's disposal to deal with statutory exemptions, e.g., it was the indicated solution to the problem of United States ferries in the B.C. and New Westminster Districts. Furthermore, such a solution has the advantages of being both legal and consistent with the safety of navigation, even more so than an extension of the statutory exemptions which Bill S-3 would have provided if it had become law.

At present, however, no District has a By-law on the subject, with the result that no Pilotage Authority may now grant certificates. If, at any time, a Pilotage Authority considers it advisable to have this power, it has only to make the necessary regulation.

COMMENTS

Local knowledge and experience in local navigation are the ultimate and most essential requirements for safe navigation in confined waters. Since the *raison d'être* of organized pilotage is to provide shipping with the services of qualified navigators who are experts in navigating local confined waters, an efficient and adequate pilotage service is the ultimate means of enhancing safety of navigation.

As a rule, compulsory pilotage should be imposed: (a) on Masters who do not possess the necessary degree of local knowledge to navigate their ship or navigation unit safely; (b) in ship channels where a maritime disaster would seriously affect the economy of the country and the interest of the public.

Because pilotage is the most effective way of achieving safety of navigation, it should come under the jurisdiction of the authorities responsible for the safety of navigation, wherever such safety is of vital importance to

the country. Conversely, the involvement of these authorities is not as necessary where the safety of navigation is not an essential national concern. For instance, nowhere is the safety of ship channels more vital to Canadian interests than on the St. Lawrence River. It is pertinent to note that in the St. Lawrence Pilotage Districts of Quebec and Montreal the Authority responsible for the safety of navigation has always been the Pilotage Authority. Originally the Trinity Houses of Quebec and Montreal, and the Harbour Commissioners after them, were, in fact, the Department of Marine outside the Government. They were fully responsible for the safety of navigation on the river and were given the means to achieve it, including their function as Pilotage Authority. In addition to controlling all maritime traffic, they also held inquiries into shipping casualties, whether or not pilots were involved. The situation was not altered when, in 1903 and 1905, the Minister superseded the Harbour Commissioners as Pilotage Authority in these two Districts. By contemporaneous amendments to the Quebec and Montreal Harbour Commissioners Acts their other powers over the safety of navigation on the St. Lawrence River had already been transferred to the Minister, a situation that has remained unchanged to date.

The degree of local experience the navigator of a ship or navigation unit should possess, and in what circumstances this experience is to be presumed or ascertained, are questions to be determined locally by including appropriate criteria in the regulations. Direct exemptions can be granted to vessels whose navigation is not considered to imply any safety risk in local circumstances, and indirect exemptions to a class of vessels by issuing pilotage certificates to those Masters and mates the Pilotage Authority is satisfied possess the degree of local knowledge and experience which has been established in the regulations as necessary for safe navigation. For instance, pilotage certificates may be made a general requirement before a vessel may enjoy an exemption whenever her navigator possesses a certificate of competency over which the Canadian Government has no control.

If future pilotage legislation places emphasis on safety of navigation, Pilotage Authorities should be given the means to achieve this aim under proper legislative and administrative control. The scope of the Act should be enlarged to apply to all vessels including rafts, booms, barges and any other water-borne objects under navigation. The Act should contain provisions whereby, when required in the public interest, a Pilotage Authority could be vested with power to modify the rule of the road to enhance safety, and the governing factor for imposing any degree of compulsory pilotage and for providing exemptions should be safety of navigation. Effective means to enforce the regulations should be provided and, if a vessel is prohibited from navigating except when conducted by a licensed pilot, she should be, in addition to other sanctions, liable to arrest if she attempts to proceed without a pilot and should remain under arrest until a licensed pilot is placed in charge.

The compulsory payment system has its merits and might still be applied as a lesser degree of compulsory pilotage. The same results could be achieved by making it compulsory to take on board a person duly licensed to act as a pilot and pay him as such, but without the Master being obliged to place the navigation of the vessel in his charge. Failure to comply would render the vessel liable to pay a penalty in the amount of the pilotage dues that would have been payable if a pilot had been taken on board.

The principles and procedures laid down in secs. 345, 348, 349, 350, 351 and 357 C.S.A. no longer correspond to present realities and, on account of the amendments to which they have been subjected, they lack co-ordination. If the existing system is to be retained, a realistic and effective procedure should be laid down. There is no longer any need to make special provision for inward voyages. In all cases an advance notice of requirement for a pilot should be an essential prerequisite. Failure to comply should make a vessel lose precedence in the despatching office and, in compulsory pilotage Districts, it should carry a penal sanction against a non-exempt vessel. In addition, a delinquent vessel should be liable to pay any additional expenses caused by failure to send an advance notice of requirement, unless the Master agrees to wait at the boarding station until a pilot can be made available in the usual way. The time of arrival at the boarding area would then be considered the equivalent of the required notice. Each Pilotage Authority, subject to the control of higher authority, should have power to determine, by regulation, the minimum time limit for such notices for each boarding area, to fix boarding areas, and to direct procedures and equipment to facilitate the embarking of pilots. Since Masters no longer have a choice of pilots the Act should make it possible to institute mandatory despatching. Exempt vessels should lose the benefit of their exemption automatically when a notice of requirement is sent or when an unlicensed person is used, either to pilot or guide a vessel, on voyages or trips of any type and in movages.

Such a scheme would make it possible to enforce compulsory pilotage even on inward voyages in coastal Districts, e.g., British Columbia, where enforcement of the compulsory payment of dues is now impossible because all six hundred miles of the B.C. coastline are pilotage waters which can be entered from anywhere along the coast. There is nothing in the Act which permits a Pilotage Authority to order a vessel to detour from her chosen route to a boarding area, or even to disclose the entry route she is following. Obviously the requirement of subsec. 345(a) was drafted with the port type Pilotage District, to which there is only one entrance, in mind. A mere ETA which does not indicate the place of entry exempts a ship from compulsory payment if no pilot happens to offer his services. In fact, in British Columbia, vessels could proceed to any port except Victoria, Esquimalt, Port Alberni and Prince Rupert without passing through a boarding area where the Pilotage Authority would normally arrange for a pilot to embark. The fact that the

problem never arises does not mean it is non-existent but merely that the great majority of non-exempt vessels which require a pilot would not dispense with pilotage service even if the compulsory system did not exist. If the exemption for inward voyages in subsec. 345(a) was abolished, the general rule would apply and all non-exempt ships would be liable to pay dues. Then if a ship wished the benefit of services of a pilot, she would have to conform to legally established requirements governing embarkation and disembarkation.

Chapter 8

NATURE AND POWERS OF THE PILOTAGE AUTHORITY

DEFINITION AND NATURE OF THE PILOTAGE AUTHORITY

In its Interpretation Section (subsec. 2(69)) the Canada Shipping Act contains a restricted definition of the term "Pilotage Authority" which has ceased to serve the purpose for which it was originally intended and, because of its wording, may now be a source of confusion. It reads as follows:

> "2(69) "Pilotage Authority" means any existing pilotage authority and any persons authorized by the Governor in Council to appoint or license pilots or fix or alter rates of pilotage; if the pilotage authority is the Minister of Transport, it includes the Deputy Minister of Transport".

This definition contains three distinct provisions:

(a) a transitional proviso;

(b) a definition proper;

(c) a stipulation as to the composition of the Pilotage Authority when the appointee is the Minister of Transport.

In the transitional provision the Act acknowledged the existence, and recognized the status, of the various Pilotage Authorities that existed when the 1934 Act came into force. A proviso of this nature was necessary to assure continuity, but to include it in the Interpretation Section seems questionable. The logical place for it is among the transitional provisions contained in any new legislation, in this case, sec. 718 of the 1934 Canada Shipping Act. The result of the transitional provision in the definition and sec. 718 combined was, *inter alia,* that until the Governor in Council finally appointed the Minister of Transport, Pilotage Authority for the Districts of Quebec and Montreal, he remained the Pilotage Authority appointed by special statutory provisions in 1903 and 1905 (3 Ed. VII c. 48; 4-5 Ed. VII c. 34), which were included in the 1906 and 1927 Canada Shipping Acts, but repealed in the 1934 Act. However, since that time the Minister of Transport has become Pilotage Authority by virtue of a Governor in Council appointment pursuant to sec. 327 of the Act. The last Order in Council which so appointed him Pilotage Authority for these two Districts (among

others) is dated August 15, 1956 (P.C. 1956-1264, Ex. 1143). The need for the transitional provision in the definition has now disappeared completely because all existing Pilotage Authorities have been appointed similarly, i.e., by the Governor in Council.

It is considered that *the third part of the definition,* regarding the composition of the Pilotage Authority when the Minister is the appointee, is not properly located because the same topic is covered in the first part of subsec. 327(2). For the sake of brevity and clarity, these two provisions should have been integrated.

What is purported to be the definition of the term 'Pilotage Authority' is contained in the *second part of the statutory definition,* i.e., "any persons authorized by the Governor in Council to appoint or license pilots or fix or alter rates of pilotage".

Although some definition may be necessary, it is believed that this wording creates confusion and moreover is inconsistent with the Act.

As the definition is worded, the two powers ascribed to the Pilotage Authority are not complementary but alternative. This indicates that the Governor in Council has power to appoint Pilotage Authorities which enjoy only one of the two enumerated powers, with the result that in the same District there could be one Pilotage Authority with licensing powers and a second to fix rates. This differentiation is inconsistent with the provisions of Part VI which deal with a single Pilotage Authority enjoying both powers. As worded, subsec. 327(1) makes it possible for two Pilotage Authorities to be appointed in one District, the Minister being the second appointee, but such an action amounts to dividing the District into two distinct and autonomous sectors with each Pilotage Authority enjoying the same full powers over its own sector. However, as seen earlier, such appointments were never made (vide C. 3, p. 47).

The reason this definition exists is purely historical: it is a slightly modified version of the 1873 statutory definition which was drawn verbatim from sec. 2 of the 1854 Merchant Shipping Act of the U.K. The 1873 definition read as follows:

> "The term 'Pilotage Authority' means any person authorized to appoint or license pilots, or to fix or alter rates of pilotage, or to exercise any jurisdiction in respect of pilotage".

In the U.K., a general definition of this nature was necessary in order to include all the various Pilotage Authorities that existed by virtue of special charters, particular Acts of Parliament and the Merchant Shipping Act. This, to a lesser degree, was also the situation in Canada at the time of Confederation. The Saint John Pilotage Authority existed by virtue of the Saint John City Charter, and there were other Pilotage Authorities that had been created or appointed by virtue of Acts of the various provinces. Their powers varied considerably, e.g., at one time the rates of pilotage dues for the ports

(Districts) of Montreal and Quebec were fixed by Parliament in the Trinity House Acts. This situation no longer exists because all Pilotage Authorities in Canada are now appointed under the same Act. Hence there is no need to retain the statutory definition as now worded.

However, the present definition makes it legally impossible to create a Pilotage District in the Great Lakes Basin, as defined in subsec. 375A(b) of Part VIA of the Act, i.e., the Canadian waters of the Great Lakes and the St. Lawrence River as far east as St. Regis, because the existence of a Pilotage Authority with both or either of the two powers enumerated in the statutory definition would be inconsistent with the provisions of Part VIA, if only because, in that area, the Governor in Council has no power to appoint, but only to make regulations. This matter will be further studied in that part of the Report dealing with the Great Lakes Basin.

It is desirable to define the term in the Act to avoid confusion or any possible ambiguity by identifying it with the licensing function thereby indicating that any other person or authority exercising any other pilotage function or power can not on that account be "Pilotage Authority".

From the context of the Act the term "Pilotage Authority" is synonymous with "District Pilotage Authority" (secs. 325 and 329) and always refers to the authority in charge of a Pilotage District.

LEGAL STATUS OF THE PILOTAGE AUTHORITY

It is pertinent to observe that under the existing provisions of Part VI, a Pilotage Authority is *not a corporate body*. This status would not be incompatible with the functions of an Authority, but under the scheme of organization presently in force, it is unnecessary.

Originally, the Act granted such a status to the Pilotage Authorities of the Halifax and Saint John Districts (secs. 423 and 427, 1906 C.S.A.). Montreal and Quebec Pilotage Authorities were also corporations as a result of special legislation. No doubt, this status was warranted because the persons who formed these four Pilotage Authorities were not all Government appointees: some were elected by local interests as provided in the pertinent Acts. The fact that these four were singled out can only mean that all other Pilotage Authorities which were composed of Government appointees only, were not corporate bodies, and that it was not intended they should be.

The distinction has some importance on account of the powers such a status implies. These powers are detailed in subsec. 20(1) of the Interpretation Act as follows:

"20. (1) Words establishing a corporation shall be construed

(a) to vest in the corporation power to sue and be sued, to contract and be contracted with by its corporate name, to have a common seal and to alter or change it at pleasure, to have perpetual succession, to acquire and hold

personal property or movables for the purposes for which the corporation is established and to alienate the same at pleasure;

(b) in the case of a corporation having a name consisting of an English and a French form or a combined English and French form, to vest in the corporation power to use either the English or the French form of its name or both forms and to show on its seal both the English and French forms of its name or have two seals, one showing the English and the other showing the French form of its name;

(c) to vest in a majority of the members of the corporation the power to bind the others by their acts; and

(d) to exempt from personal liability for its debts, obligations or acts such individual members of the corporation as do not contravene the provisions of the enactment establishing the corporation."

As will be seen later (C. 8, pp. 314 and ff.), a Pilotage Authority composed exclusively of Government appointees does not need all these powers. The Act ensures that the Authority is provided with the necessary powers to enable it to discharge the limited responsibilities imposed upon it by the Act. However, if future legislation substantially modifies the rôle of the Pilotage Authority and enlarges its responsibilities, it may prove desirable to grant it corporate status.

The status of the Pilotage Authority has been the object of some court decisions including:

(a) In the case of Himmelman *et al.* v the King (1946 Ex. C.R. 1), it was held that the nature of a Pilotage Authority is not modified by the fact that it is a one-man Pilotage Authority rather than a board. After considering the powers and rights of the Minister as Pilotage Authority, the control exercised by the Crown over revenues and expenses, the required approval of By-laws, the appointment of the Pilotage Authority by the Crown and the office held during pleasure, the court came to the conclusion that the Minister was an agent of the Crown when acting as such:

> "It is clear from this that the Minister as pilotage authority is not persona designata or 'a corporation sole'. I hold that the Minister of Transport as pilotage authority is the agent of the Crown."

(b) In 1940, the same court, in Gariépy v The King (1940, 2 D.L.R. 12) (Anger, J.), after having studied the various provisions regarding the appointment of the Pilotage Authority, stated:

> "It follows from these provisions, it seems to me, that the Minister of Marine when acting as pilotage authority in the Montreal or Quebec District does not exercise the powers conferred on him by the Department of Marine Act but those attributed to him by ss. 395 and 397 of the Canada Shipping Act and that being the case he appears to me to be an officer of the Crown in the same position as the pilotage authority created by ss. 399 and 400 or constituted under s. 411. As such, he is, in my opinion, on the same footing as any other officer of the Crown and he cannot bind the Crown by his errors, etc.".

(c) In the Supreme Court of Canada decision in the case of McGillivray v. Kimber *et al.* (1915, 52 S.C.R. 146) Mr. Justice Anglin stated, *inter alia*:

> "The relationship of master and servant does exist between the Board (Pilotage Authority) and the pilot. The Board has a statutory control over the licensing of pilots within the territory for which it is constituted. Its jurisdiction to cancel a pilot's licence is also statutory . . .".

These decisions, as well as the context of the Act, indicate that a Pilotage Authority, whatever its composition, is an officer of the Crown appointed as an agent for a special and definite purpose and its powers, duties and responsibilities are found in Part VI of the Canada Shipping Act. It is a licensing authority possessing other related and accessory powers.

POWERS OF THE PILOTAGE AUTHORITY

Part VI of the Act confers on a Pilotage Authority the following powers that can be exercised within the Pilotage District for which it is appointed:

(a) regulation-making powers,

(b) licensing powers,

(c) some miscellaneous powers related to (b).

A. REGULATION-MAKING POWER

Definition

As seen earlier, Parliament has established in Part VI the mechanism for appointing its licensing agents and for defining their territorial jurisdiction. It has also legislated on matters affecting third parties and shipping interests, and has incorporated in the Act almost all the provisions that have a character of permanency and are of general application. But it has not attempted to deal with the individual requirements of each locality where pilotage service is provided, i.e., to pass legislation that is special in character. Instead, for this purpose it has delegated to each Pilotage Authority its own legislative power with the responsibility of completing legislation to meet local requirements. This is the regulation-making power of a Pilotage Authority.

Mr. E. A. Driedger, Deputy Minister of Justice, in his volume "Legislative Forms and Precedents" (1963) sums up the situation on page 38:

> "Not all laws are made by Parliament. In most modern statutes, Parliament delegates to some other body or person the authority to make laws. Various words may be used to describe the instruments that may be issued in the exercise of a delegated legislative authority. Thus, they may be described as orders, rules, regulations, by-laws. Not infrequently two or more of these words, or similar expressions, are used. Thus, a Minister may be authorized to make orders and regulations. These terms do not have precise meanings and in many instances are interchangeable. But they are not always synonymous. Some instruments are best described as orders, others as regulations, others as by-laws, etc.".

Whenever a requirement or a matter of legislation is of a permanent and general character it should be incorporated in the Act. Whenever a regulation should exist, but in different degrees, a prototype should be incorporated in the Act with power delegated to each Pilotage Authority to modify the regulation to suit the special requirements of its District. Entire discretionary power over legislation should not be left to the Pilotage Authorities because experience has proved that more often than not this power has been neglected or improperly used. For instance, since a pilot is by definition a mariner who is expected to have sufficient qualifications to take charge of the navigation of any vessels likely to call in his District, a basic marine qualification should be a statutory requirement and the Pilotage Authority should be granted the power to increase, but never decrease, this requirement by its regulations. If this had been done, the situation that prevails in the Prince Edward Island District, where most pilots do not hold any marine certificates of competency, would not have arisen. If the question of the exemption of small ships (subsec. 346(c)) had been treated in the same way as those in subsec. 346(e), where exemption is granted subject to repeal or modification by Pilotage Authorities, the unsatisfactory situation that now prevails concerning the exemption of small foreign ships would have been avoided. With reference to the conduct of pilots, most of the offences enumerated in subsec. 329(f) should be contained in all regulations.

This power to legislate could have been delegated to someone else, to the Governor in Council for instance, as is done for the Great Lakes Basin under Part VIA, but there is no objection—on the contrary there are only advantages—if it is exercised by the agent of the Crown who is responsible for appraising the competence and reliability of the pilots in a given District. By definition, the Pilotage Authority is expected to be more conversant than anyone else with local needs and requirements. The Pilotage Authority envisaged in Part VI is all the more indicated because it is a disinterested party. In point of fact, this situation no longer prevails since in most Districts the Authority takes over complete administration of the service. Even so it is considered that the Pilotage Authority is indicated as the regulation-making authority, with the reservation that some method of active control by a superior authority is warranted as a check against misuse or abuse of this power.

Legislative and executive powers

There is a basic difference between a legislative regulation and an administrative or executive decision. When the two powers are exercised by one and the same person, the limits between the two become ill-defined and administrative decisions of a general nature that could be termed "standing orders" are often confused with regulation legislation. This is what has happened in the case of By-laws made by Pilotage Authorities. The main reason may be the fact that a clear distinction is not always made in the Act itself.

A regulation (referred to as by-law in Part VI) is, in fact, legislation passed by a Pilotage Authority acting in lieu of, and for, Parliament. The rôle of Parliament is not to administer any service but to pass legislation, i.e., to define and stipulate rules for the direction of persons in a certain domain, and to grant them various powers under which a system, including rights, privileges, offices and responsibilities, is created. On the other hand, an executive decision is the exercise by officers of the Crown of the powers granted by legislation. When such a decision affects the direction of another person it is an order, and becomes a standing order if it has a character of permanency and affects more than one individual. To become effective, a regulation must meet the procedural requirements set out in the Act under which it is passed, and also in the Regulations Act (1952 R. S., c. 235). On the other hand an administrative decision is valid without formality, unless there is some specific requirement in the Act governing the exercise of this power. Frequently, the similarity of the requirements in both cases is an additional factor which promotes confusion.

When a Pilotage Authority makes a regulation or takes an executive decision, it is acting in two distinct capacities which can become easily visualized by considering that the two powers are exercised by two separate persons. Then, it becomes obvious that a regulation-making authority has no power to deal with expenses and liabilities incurred by a Pilotage Authority in the discharge of its responsibilities because the legislative side of the matter has been fully dealt with by Parliament in sec. 328, C.S.A., which authorizes the Pilotage Authority to spend out of licence fees and pilotage dues the amount necessary to meet its expenses, subject to the sanction of the Governor in Council. It is not until the distinction between these two separate capacities of the Pilotage Authority is clearly understood that subsec. 329(p) becomes clear, as will be explained later.

A further cause of confusion is the use of the same terms—"by-laws, orders, regulations, rules"—for decisions of either a legislative or administrative character. However, it is important to differentiate between them not only to avoid the confusion which otherwise results but also because the requirements for their validity differ.

The distinction between regulations or by-laws made in the exercise of a legislative power and those that result from the exercise of an administrative power is made in sec. 2 of the Regulations Act. The term "regulation-making authority" is defined as meaning "every authority authorized to make regulations" (subsec. 2(b)) and the term "regulation" is defined in subsec. 2(a) as follows:

"2. In this Act,

(a) 'regulation' means a rule, order, regulation, by-law or proclamation

(i) made, *in the exercise of a legislative power* conferred by or under an Act of Parliament, by . . . a board, commission, corporation or other body or person that is an agent or servant of Her Majesty in right of Canada, or

(ii) for the contravention of which a penalty of fine or imprisonment is prescribed by or under an Act of Parliament, . . .".

Only the rules, orders, regulations and by-laws which satisfy the above definition are legislative and only these are subjected to the requirements of the Regulations Act as to transmission to the Clerk of the Privy Council for recording, publication in the *Canada Gazette,* and report to Parliament.

It is believed that legislation would be clearer and better understood if a distinction was made between regulations and orders resulting from legislative power and those resulting from executive power.

The easiest way to achieve this is to follow the basic rules for drafting legislation: first, by always using the same term to express the same concept; secondly, by stating in a statutory definition the intended meaning of each key term, especially of such terms as "by-laws", "regulation" and "order" which have more than one meaning. It is considered that:

(a) "regulation" should be used in its specific meaning, to designate legislation made under a delegated power. "A regulation is generally, in form and substance, of the same character as a statute". (Driedger *op. cit.* p. 39):

(b) "order" should be used to indicate a decision resulting from the exercise of executive power. "The term is used to describe a particular direction, usually to a particular person to do or abstain from doing a particular thing." (Driedger *op. cit.* p. 38);

(c) "The term "by-law" is applied to rules made by an association or corporation for the regulation of its proceedings. The by-laws may go beyond the proceedings of the association or corporation itself and govern the conduct of other persons". (Driedger, *op. cit.* p. 39). When used in the latter meaning (as in Part VI, C.S.A.) it becomes synonymous with "regulations". Therefore, it is considered that the term "by-law" should not be used in that sense in pilotage legislation but only in its specific and restricted first meaning.

Regulation-making power, limited and controlled

The power of a Pilotage Authority to legislate for its District by regulation is neither absolute nor unlimited because regulations must be confirmed by the Governor in Council and must also be *intra vires.*

Confirmation by the Governor in Council of a Pilotage Authority's regulations is not *per se* an essential requirement to the exercise of a regulation-making power, but is a requirement in this case because it is part of the scheme Parliament devised to permit a Pilotage Authority to enact legislation. The rule is stated in a provision of general application, subsec. 331(1), C.S.A.:

> "331(1) . . . every by-law made by any pilotage authority in the exercise of the powers conferred upon it by this Part shall be valid and effectual when confirmed by the Governor in Council".

Hence, it is a drafting error to repeat this requirement in sections which define the subject-matters of regulations (subsec. 327(2), sec. 329, subsec. 346(c) and sec. 347). It may be a source of confusion if the requirement is omitted elsewhere (e.g. subsecs. 349(1)(b) and 357(2)).

This requirement for confirmation is a means of control that Parliament has devised against possible abuses of this power by a Pilotage Authority and also to prevent the enactment of legislation that is in conflict with public interest, other legislation or Government policy. But the Governor in Council's power is purely negative. He can only refuse to confirm a by-law with which he is not in agreement; he can neither modify a proposed by-law nor withdraw confirmation once it has been granted; even less can he act *proprio motu,* no matter how defective a given set of District regulations may be.

In the U.K., the Pilotage Act of 1913 gives greater power to the approving authority, which can confirm by-laws made by a Pilotage Authority, with or without modifications (subsec. 17(2) Pilotage Act, 1913, United Kingdom). The reason for this modification is indicated in Temperley's *Merchant Shipping Acts* (fifth edition, p. 570). It resulted from the recommendations of the Departmental Committee appointed in 1909:

> "The control given to the Board of Trade over the byelaws made by pilotage authorities was found to be inadequate, no initiative being exercisable by the Board and considerable uncertainty existing as to the necessity for confirmation by the Board of byelaws of certain authorities.
>
> The Pilotage Act, 1913, now contains the general principles regulating pilotage in all districts. . . . The Act, too, empowers the local pilotage authorities to make byelaws applying the general principles therein contained to local conditions, subject to the effective control of the Board of Trade, assisted by a Pilotage Advisory Committee."

Since the privilege of passing legislation is exceptional for any authority other than Parliament, the terms of any delegation must be contained in the enabling Act and must be interpreted restrictively; furthermore these provisions must not be considered separately but must be read and understood within the whole context of the Act. Therefore, any regulation which does not clearly come within one of the enumerated subject-matters or which exceeds the imposed limitations is ultra vires, as is also any regulation which,

at first sight, comes under the delegated powers but which is inconsistent with the permanent and general provisions of the Act (unless it is clearly indicated in the Act that this is the intention). It is illegal to amend by regulation an Act of Parliament unless the right to amend has been specifically authorized by Parliament (e.g. sec. 347, C.S.A.).

In the Supreme Court decision of McGillivray v Kimber *et al.* (1915, 52 S.C.R. 146), Mr. Justice Idington stated regarding a By-law of the Sydney Pilotage Authority purported to be passed under subsec. 433(g), 1906 C.S.A. (now subsec. 329(g), C.S.A.):

> "The By-law No. 9 so enacted and apparently intended to be within said power of enactment cannot in law be extended beyond the powers given to enact it . . . it might be treated as null by reason of being in excess of the power given . . .".

For these reasons, as is further demonstrated hereunder, the By-laws now in force in various Pilotage Districts contain numerous ultra vires provisions.

Subject-matters of regulation-making powers

I. *Form of regulations*

The subject-matters of a Pilotage Authority's regulation-making powers are contained in subsec. 327(2), secs. 329, 330 and 339, subsec. 346(c), sec. 347, subsecs. 349(1)(b) and 357(2), C.S.A. The Act requires these regulations to be in the form of "by-laws", except for exemptions (secs. 346 and 347 (not subsec. 357(2)), fixing renewal fees (sec. 339), and establishing boarding areas (subsec. 349(1)(b)), for which no mention is made of the form the regulations are to take. It is difficult to understand why there is a distinction, especially now that the question is mostly academic since the Act imposes the same control on all regulations, i.e., the Governor in Council's confirmation is required (subsec. 331(1)).

The main differences appear to be that the orders in subsec. 346(c), sec. 347 and subsec. 349(1)(b) create rights, do not carry a penal sanction, and apply to persons not belonging to the pilotage service. On the other hand, the By-laws concern the internal organization and personnel of the service, while their effect on ships is only indirect. If by-laws are infringed there is a penal sanction (secs. 330 and 331). Subsec. 357(2) is a groundless exception for two reasons: although it deals with the withdrawal of an exemption, the regulation need not take the form of a by-law but the requirement of confirmation by the Governor in Council is not spelled out as it was for the others. The only logical explanation is inconsistency in drafting since it is a recent amendment to the Act (1956, 4-5 Eliz. II c. 34).

Sec. 339 is also an exception, due partly to historical development and partly to poor drafting. Originally, all licences were permanent, i.e., they were valid until the pilots reached the age limit of 65, after which a licence,

valid for one year, was issued and could be renewed annually (*no age limit*—sec. 38, 1873 Act) as long as the pilot was considered fit to perform his duties. While a fee fixed by by-law was payable when a permanent licence was issued, no fee could be demanded for a renewal after 65. In 1875 (45 Vic. c. 32, s. 5) the Act was amended to authorize the issue of term licences, valid for not less than two years, instead of permanent licences. This amendment was not applicable to the Districts of Quebec, Montreal and Saint John. By-law legislation was not required. The Authority concerned was then authorized to fix, with the consent of the Governor in Council, fees for the renewal of these term licences and a covering by-law was not required. Annual licences issued to overage pilots remained free. Except for the extension of the right to issue term licences to all Districts (sec. 434, 1927 C.S.A.) the situation remained unchanged until 1934. The 1927 C.S.A. made it clear that annual licences to overage pilots were issued free of charge since sec. 345 did not apply to sec. 432 but only to sec. 434. The 1934 Act made the question of issuing term licences a matter to be regulated by by-law by transferring the 1927 sec. 434 to the section dealing with by-law subject-matters, i.e., sec. 319 (now sec. 329 C.S.A.) where it became subsecs. (n) and (o), but sec. 435, 1927 C.S.A. authorizing the establishment of a fee was neither transferred nor deleted. Secs. 433 and 434, 1927 C.S.A., having been deleted, the former sec. 435 became the section next following the former sec. 432 (i.e., secs. 328 and 329, 1934 C.S.A.) (secs 338, 339 C.S.A.) to which, since its wording remained unchanged, it automatically applied. Therefore, for the first time, Pilotage Authorities were empowered to impose a fee for the annual licence issued to overage pilots as a renewal of a permanent licence. It is not believed that this was intended. Here again, it appears that the obvious explanation is poor drafting. In any event, it has remained a dead letter because no Pilotage Authority has taken advantage of sec. 339 (sec. 329, 1934 C.S.A.).

On account of the different wording in the Act, secs. 330 and 331, which provide the penal sanctions for breaches of by-laws, can not apply to the violation of orders made under secs. 346, 347 and subsec. 349(1)(b). The fact that these orders have been formulated in the by-laws does not make them by-laws, although they remain regulations to which the penal sanctions of secs. 330 and 331 do not apply.

Despite this fact, there seems to be no practical objection if all legislation affecting Pilotage Authorities takes the same form because there are many matters that have to be dealt with by by-laws which can not possibly carry a penal sanction, e.g., delegation of powers (subsecs. 327(2) and 329(p)) and fixing the tariff (subsec. 329(h)). Indeed, this is the form Pilotage Authorities have always used. It has the practical advantage of grouping in one document all District regulations. As stated above it is considered that the word "regulation" would be more appropriate than "by-law".

The legality of all existing By-law provisions dealing with *exemptions* is questionable because of the procedure being followed. Every Pilotage Authority By-law now in force carries only limitative confirmation by the Governor in Council pursuant to sec. 329, thereby restricting the scope of approval to the subject-matters enumerated in that section in which exemptions are not included. There would be no difficulty if subsec. 331(1) alone were quoted as authority, or at least sec. 347 together with sec. 329. Originally, such approval was given without reference to any particular section of the Act; later, the practice was adopted of specifying in the Order in Council the section or sections which were being applied. In the Quebec District, the last of such approving orders is P.C. 3415 of July 19, 1950, which was then made and approved under both secs. 319 and 329 of the 1934 C.S.A. (now secs. 329 and 347 C.S.A.). But this practice has since been modified and only sec. 329 is quoted as authority, thereby implying that approval is given only to the By-law provisions the Pilotage Authority had power to make under 329, and rendering those made pursuant to subsec. 346(c) and sec. 347 inoperative for lack of approval. The withdrawal of an exemption amounts to depriving some ships of a statutory right and, therefore, can not be effected except by following strictly the prescribed procedure which includes the direct and unambiguous approval of the Governor in Council.

Lack of uniformity in wording which refers to the same concept or the same procedure is an unnecessary source of confusion which should be avoided. It is considered that all the legislation effected through the exercise of delegated powers by Pilotage Authorities should be referred to only as "regulations" and that the procedure for their adoption should be enunciated in only one set of provisions in the Act, which would be of general application. If in some exceptional cases it is felt necessary to add requirements or to modify the general procedure, *ad hoc* provisions should be passed with a specific notation to the effect that it is an exception to the rules specified in the general provisions.

II. *Nature of subject-matters for regulations*

The legislative power of a Pilotage Authority is mostly concerned with its licensing function, i.e., establishing licensing requirements which are peculiar to a given District.

This power does not extend to matters that may affect *third parties,* that is, the public in general and even those indirectly connected with the service, such as tugs, line boats, stevedores, and vessels not taking pilots. When orders to third parties were indicated, care was taken that the appropriate provisions were included in the Act itself, e.g. subsecs. 337(2), (3) and secs. 341, 342, 344 and 371.

A Pilotage Authority has only limited legislative power over a pilotage contract, i.e., fixing the rates of pilotage dues (subsec. 329(h)), and adjusting disputes (subsec. 329(k)). A Pilotage Authority is powerless to deal with questions affecting the rights, duties and responsibilities of both parties to the pilotage contract, i.e., the pilot and the ship. Any additional legislative intervention into pilotage contracts was considered of a general nature which could not be affected by the peculiarities of a given District and, therefore, the field was fully covered by Parliament in the Act itself (*inter alia,* secs. 341-343, 352, and 359-362).

It was reasonable that the power to fix the scale of pilotage dues should be delegated to each Pilotage Authority because, as seen in chapter 6, the rates must perforce vary from place to place and the nature, extent and circumstances of the services performed make it impossible to set up a uniform tariff. This subject can not be adequately covered except by specific legislation for each District. If such legislation was contained in the Act itself, numerous and periodic amendments would become necessary in order to keep the tariff of every District adjusted to ever-changing local and economic conditions. Before Confederation, in Lower Canada where the two Pilotage Districts, then known as the Ports of Quebec and Montreal, were governed by their own separate legislation, there was no distinction between general and special provisions in the legislation. Also, at first, Parliament dealt with the rates, with the result that a great number of amendments to these Acts were for the sole purpose of bringing in tariff modifications. This procedure was soon amended by delegating to the Pilotage Authority the power to fix rates. This has been the situation ever since. (Vide Quebec and Montreal districts, *History of Legislation.*)

Disputes are normally adjusted in the regular courts, unless an arbitration clause is contained in the contract. Parliament has authorized each Pilotage Authority to make regulations that would be the equivalent of such an arbitration clause and which would lay down a procedure suited to the type of organization and the circumstances in each District. This intervention into the pilotage contract is warranted because in most cases one party to the contract is a foreign ocean-going ship on an outward voyage which should not be unduly delayed. If such arbitration procedure is provided, a dispute may be settled without legal action and as soon as a complaint is received.

Since a Pilotage Authority has no other regulation-making power over the pilotage contract the following By-laws are ultra vires: (a) dealing with, or affecting, a ship's right to choose a pilot, (b) forbidding pilots to undertake pilotage except through a method of despatching over which they have no control, (c) depriving a pilot of the right to receive that part of the dues that is payment for the services he has rendered, by either creating a compulsory pooling system, or by making the pilots employees of the Authority. These questions will be studied later in the Report.

A Pilotage Authority has no legislative power over ships except in a limited way concerning the pilotage contract, as seen above, and with regard to the establishment of boarding stations in compulsory payment Districts (subsec. 349(1)(b)). It can not enforce by regulations the obligation to give notice of requirement of a pilot, nor request a ship to detour from her route to pass by or through a boarding area, nor lay down a procedure to facilitate the boarding and disembarking of pilots. As seen earlier, the Act itself contains provisions of this nature. Pilotage Authorities are not authorized to enact additional legislation which adds requirements for their Districts.

COMMENT

It is believed that, in the interest of safety and of the efficiency of the service, legislative power over the above matters should be delegated to each Pilotage Authority, provided a vigilant confirming authority ensures that unreasonable requirements are not imposed on shipping.

III. *Analysis of subject-matters for regulations*

Observing that various Pilotage Authorities have abused their legislative powers, and with a view to appraising the suitability in present circumstances of the various matters which might form subjects of regulations, each subject-matter will be studied separately under four topic headings.

1. LICENSING FOR PILOTAGE. A licence is a guarantee to the public that the licensee possesses, and continues to possess, as long as the licence lasts, the necessary standard of technical, physical and moral qualifications which entitles him to be entrusted with the responsibility of navigating ships within a given Pilotage District.

Meaning of the term "licence". For the licence-holder, the licence establishes his right and privilege to act as pilot as defined in legislation. The creation of Pilotage Districts has restricted the exercise of the pilotage profession to those who hold a licence and the imposition of the compulsory payment system has made non-exempt ships liable to pay dues, even though a pilot is not employed. An exception is made when the Master or one of his officers holds a pilot's certificate issued by the Authority of the District concerned. It is a misnomer to use the word "licence" in respect of apprentices because the certificate given to them does not authorize them to perform the act of piloting. Since the apprenticeship stage is merely one of the prerequisites for licensing pilots, the licensing of an apprentice is merely an acknowledgment on the part of the Pilotage Authority that a successful candidate possesses the basic qualifications required and has been accepted as an apprentice. It is considered that "indenture" would be a more appropriate term than "licence".

The term "licence" also means the instrument issued to a pilot as proof of his licensing (C.S.A., secs. 333 to 339 inclusive). When the Quebec and Montreal Trinity Houses had pilotage responsibilities this instrument was known as a "branch".

Licensing power is not discretionary, but is governed by rules contained in legislation (both statutory and delegated) concerning:

(a) definition of required standard of qualifications;

(b) matters affecting licensing power;

(c) definition and limitation of rights conferred by a licence;

(d) obligations and responsibilities of licensees.

(a) *Standard of qualifications for pilots* (subsec. 329(a)). The Act does not define the qualifications a pilot must possess, which leads to the conclusion that Parliament felt there were no requirements of general application. The responsibility for determining such qualifications is left entirely to the legislative power of each Pilotage Authority to ensure they are drafted to meet the individual needs of each District.

Subsec. 329(a) enumerates some qualifications that ought to be covered in the regulations but the list is not complete, viz., "in respect of age, time of service, skill, character and otherwise required . . . ". This enumeration clearly falls within the *ejusdem generis* rule and, therefore, the generality of the last word is limited by reference to the preceding text. Hence, the only requirements that can be imposed upon candidates are those likely to ensure that they have the required standard of knowledge and skill to take charge of the navigation of ships within the District concerned, i.e., standards of physical and mental fitness, age and reliability. Residence, domicile, race and nationality have no bearing on the ability of a person to navigate. Therefore, the following By-law provisions are ultra vires as discriminatory: Bathurst (subsec. 10(b)) which requires that "the candidate be a Canadian citizen resident in the County of Gloucester"; Botwood (subsec. 10(b)) which specifies "a Canadian citizen resident in the Province of Newfoundland"; New Westminster (subsec. 12(a)) which prescribes "a Canadian citizen resident in the Province of British Columbia for at least two years immediately prior to licensing".

All by-laws deal at length with technical qualifications; this fact raises the questions of minimum requirements and apprenticeship.

Since the Act does not fix any *minimum professional requirements,* they are determined by each Pilotage Authority. The result is that in some Districts even a Master or mate's certificate is not a basic requirement for a person whose licence will nevertheless vouch for his knowledge and ability to navigate any ship in the District. Most By-laws call for the possession of a certain official certificate of competency, but the By-laws of the following Districts do not require any marine certificate and, in fact, do not even

require proof that the candidate can take charge of a ship: Botwood (By-law secs. 10 and 11), Port aux Basques (By-law secs. 10 and 11), Prince Edward Island (By-law secs. 8 and 10), Pugwash (By-law secs. 10 and 11) and Restigouche River (By-law secs. 10 and 11). The seriousness of the situation is compounded when it is considered that in all these Districts, except Prince Edward Island, Masters are encouraged, if not coerced, to employ these pilots by the implementation of the compulsory payment system. This is tantamount to misrepresentation and endangers the safety of ships.

Each Pilotage Authority is authorized to require by regulation that a candidate submit to a system of training designed to provide the necessary technical qualifications, i.e., to serve an *apprenticeship*. The Authority need not resort to such a system of training if it has at its disposal an available pool of qualified mariners who are experts in local navigation, such as in the B.C. District. Here, the equivalent of an apprenticeship is attained by the experience acquired as a navigator within the District for a period of years or months, which is one of the basic requirements. On the other hand, in Districts such as those on the St. Lawrence River where local experts do not exist in sufficient numbers, and where it takes long, intensive training to acquire the necessary knowledge and skill, an apprenticeship system is indicated. If the sole aim of apprenticeship is to develop knowledge and skill in local navigation, a Master's or mate's certificate of competency is a prerequisite to being accepted as an apprentice.

The physical, mental and health requirements for apprentices appear to be standard for all Districts because in all By-laws they are, in substance, identical, i.e., passing eyesight and hearing tests, and being in good physical and mental health. There is one exception: the usual eyesight and hearing standards are not a requirement for Churchill, which is obviously an omission.

The question of reliability is treated very briefly: no By-law asks more than that the candidate be "of good character", despite the fact that a pilot is in a position of trust with great responsibilities. Here again, there seems to be no reason for any variation in requirements from one District to another.

COMMENTS

As seen above, many of the qualifications are common to all Districts and must be possessed by all pilots. It is, therefore, considered that where such uniformity exists, the responsibility for legislation should not be left to the discretionary power of the Pilotage Authorities but should be included in the Act. Among the requirements of obvious general application are standards of eyesight, hearing and health.

Although pilotage requirements vary from District to District a minimum compulsory requirement should be imposed by the Act, with latitude

for each Pilotage Authority to raise the standard in its District. Since a pilot is by definition able to take charge of the navigation of a ship (subsec. 2(64)), and since his licence confirms this knowledge and skill, the Act should stipulate his minimum certificate of competency.

On the subject of reliability, the Act should contain provisions which deny a licence (unless permission is granted by some designated higher authority), to any person, (i) whose record at sea is unsatisfactory, (ii) whose licence has been cancelled in another District for disciplinary reasons, (iii) who has been established as a safety risk. Habits, or evidence of habits, which are detrimental to the exercise of the pilotage profession should also prevent a licence being issued.

It is further considered that where it is most difficult or unnecessary to recruit persons who hold a minimum certificate of competency, because navigational conditions are such that only advisers on local conditions are needed, the Act should provide for licensing advisers rather than pilots. This would solve the problem facing most small port Districts and the Prince Edward Island Pilotage Authority which is obliged to require its pilots to warn Masters employing them that they are not qualified to berth or unberth a ship.

(b) *Standard of qualifications for pilotage certificates.* When Masters and mates apply for pilotage certificates the Pilotage Authority is given no power to determine by regulation the qualifications they are expected to hold. Former legislation contained such a provision, i.e., an applicant was judged by his ability to pilot the ship of which he was Master or mate, anywhere in the District (sec. 467, 1927 C.S.A.). This provision, together with all other pertinent sections regarding the issue of pilotage certificates, was deleted from the Act when it was rewritten in 1934 and the whole subject was delegated to the regulation-making power of each Pilotage Authority, except for qualifications on which the Act is silent.

The only existing, or possible, prerequisites for Masters and mates are those fixed indirectly by the Act itself, i.e., the applicant:

(a) is duly qualified to act as Master or mate in the type of ship to which he belongs;
(b) is employed as Master or mate in such ship;
(c) has a working knowledge of the navigational conditions and peculiarities of the District, i.e., can navigate his ship throughout the District.

Since the pilotage legislation of Part VI C.S.A. was mainly conceived for the convenience of shipping, Pilotage Authorities did not have to consider such requirements as age, length of service or character, because a pilotage certificate entitles the holder to pilot only the ship in which he serves (vide also p. 265).

Here again, a Pilotage Authority can not make discriminatory regulations, e.g., by limiting a certificate to officers of ships of Canadian registry or of certain types of coastal or local trader. Under present legislation, if a By-law contains provisions for issuing such pilotage certificates, the Pilotage Authority, as licensing authority, is bound to license any Master or mate who meets the requirements and has no discretion on the matter. But a Pilotage Authority is not bound to accept the certificate of competency of a foreign Master or mate and may require proof that the Master or mate has the competence required of a Canadian Master or mate for the type of ship to which the foreign applicant belongs and, if necessary, may require him to pass a prescribed examination. The expression "masters and mates" in sec. 329 must be interpreted according to the definition in the Canada Shipping Act, or the equivalent.

(c) *Licensing procedure* (subsec. 329 (d)) *and form of licence* (subsecs. 329(e),(f)). Licensing is, first, the process whereby a Pilotage Authority selects pilots or, in other words, ascertains that they possess the required qualifications. It also comprises the reappraisal function and implies surveillance powers to ascertain that licensees maintain the required standards (vide C. 9 for details).

The wording of subsec. 329(d) creates a problem of interpretation. If this provision is to be retained, it should be redrafted. It now reads as follows:

> "329. Subject to the provisions of this part . . . every pilotage authority shall . . . have power . . . by by-law confirmed by the Governor in Council, to . . .
>
> (d) license pilots and apprentices, and grant certificates to masters and mates . . . as hereinafter provided;"

The wording of the essential part of this subsection corresponds verbatim to the original 1873 version. If taken literally, it means that licensing power is to be exercised by by-law, i.e., that a special by-law is necessary each time a pilot or an apprentice is licensed and each time a pilotage certificate is issued to a ship's officer.[1] In that case, the by-law would constitute the issuance of the licence. In theory, it is not incompatible to effect an appointment by legislation such as an Act of Parliament and, therefore, licensing could be done each time by regulation if Parliament gave each Pilotage Authority the necessary power. However, in practice, Parliament never resorts to such a procedure and, as a rule, the power of appointment is made the responsibility of an executive authority.

In any event, such a procedure has never been followed for licensing pilots and, furthermore, it would be inconsistent with the other provisions of

[1] This stand was taken in an *obiter dictum* contained in a recent judgment of the Exchequer Court (Ex. Court No. B-1334, Gamache vs Jones *et al*, Noël J., dated October 10, 1967, Ex. 1521b. Notice of appeal filed Dec. 1, 1967).

the Act, e.g., subsec. 333(1), which stipulates that licensing is to be effected by the Pilotage Authority issuing a licence and, therefore, not by passing a by-law. Subsec. 333(1) reads as follows:

> "333(1). Every pilot after being approved for licensing shall receive a licence in the form determined by the pilotage authority."

It is obvious that it is the process of licensing which is to be the subject-matter of the regulations: subsec. 329(a) defines the standard of qualifications a candidate is expected to meet to be licensed; subsecs. 329(e) and (f) define the rights and obligations a licence confers as well as its limitations. When subsec. 329(d) is read in this context, it must refer to the process of approving candidates for licensing, i.e., the procedure for examining and selecting candidates.

In every District where an apprenticeship system exists the By-law contains provisions governing pilots and apprentices but, at present, as seen earlier, no By-law contains any provision enabling a Pilotage Authority to grant a pilotage certificate to a ship's officer. This omission could easily be remedied by adopting regulations similar to those drawn up for pilots.

Normally, pilotage examinations should be carried out by the Pilotage Authority itself, as, for instance, the Trinity Houses used to do in the presence of any branch pilot who wished to attend. At present, this is no longer the rule and it would be a practical impossibility in Districts where the Minister is the Pilotage Authority. Examinations are carried out by a Board of Examiners appointed for this purpose by the Pilotage Authority pursuant to a delegation of power the Pilotage Authority is now authorized to make (as will be seen later (subsec. 329(p)), and the topics are defined in the District By-law.

(i) *Restriction on licensing power.* The last words of subsec. 329(d) qualify, by reference to the two following subsections, the nature and limitation of the licensing power of a Pilotage Authority, i.e., the number of licences and the rights the licences or certificates confer on the licensees. The question of the terms and conditions of the licence will be studied later but the number of pilots is studied hereunder.

The power of licensing is not arbitrary. The Pilotage Authority is bound by legislation which determines the eligibility and qualifications of the candidates, e.g., if the regulations do not contain any limit as to age, sec. 338 precludes licensing a person 70 years of age or over.

(ii) *Number of licences.* This power is also limited as to the number of licences valid at a given time, provided the number is limited by by-law in accordance with subsecs. 329(e) for pilots and 329(f) for apprentices.

It is only by exception that the number of persons admitted to the exercise of a given profession may be limited and, in the absence of a specific, legal provision to that effect, the licensing authority not only may

issue an unlimited number of licences, but must accept every candidate who is able to prove he is qualified. The profession is then open in the same way as the legal and medical professions. If, for some compelling reason, the number of licences must be limited, this can be done only by passing appropriate legislation. Since the pilots' profession has evolved from a service merely for the convenience of shipping to one of public interest, the conditions of the profession must be attractive enough to appeal to the best qualified candidates, *inter alia*, by assuring them of adequate revenue, reasonable working conditions and a certain degree of security. This aim is achieved by limiting their number to those necessary to meet the demands of the expected users and fixing the rates accordingly. The same principle applies to apprentices because an excessive number diminishes their chances of being licensed and discourages serious candidates. Since this situation obviously does not apply to Masters and mates who apply for certificates to pilot their own vessels, the power to limit their number is not given to Pilotage Authorities.

Formerly, the pilot's profession was open everywhere and at any time any candidate who felt he was qualified was entitled to ask to be examined and licensed if he passed the examination. For instance, in 1860, when the Quebec pilots obtained their incorporation, they numbered 280. With the arrival of steamships which were faster than sailing vessels, thereby shortening the duration of their trips, and were also much larger, thereby reducing the number of ships, the number of pilots exceeded the demand and, in order to maintain both a high standard of qualifications and a reasonable level of income, steps had to be taken to limit their number. Although the Quebec Pilotage Authority had the right to regulate the number of pilots, Parliament intervened by depriving the Pilotage Authority of its licensing power as long as their number exceeded a permissible maximum fixed in the Act; e.g., sec. 443 of the 1906 C.S.A. provided that the number of pilots for the Pilotage District of Quebec was not to exceed 125. Subsec. 329(e) of the present Act contains no provision limiting the number of pilots in any District and the question is left to be determined by each Pilotage Authority in its regulations.

The By-laws of all Pilotage Districts, except Churchill, contain a provision aimed at limiting the number of pilots. However, in all cases except Quebec, this provision is illegal and ultra vires, and the Quebec District provision, although legally correct, is out of date and is not followed.

The point being overlooked is that fixing the number of pilots is a legislative but not an administrative prerogative, and rightly so because under the organizational scheme of Part VI this factor directly affects the earning capacity of pilots and their working conditions. The number must be fixed in the regulations, either directly by providing for a fixed number, or indirectly by enunciating the criteria for determining the number with no discretionary power. It can not be otherwise fixed by regulation.

No District fixes a definite number of pilots in its By-law. The Quebec District By-law does so indirectly by stating how the number should be calculated objectively. Subsec. 4(1) reads as follows:

> "The number of pilots shall be determined by the Authority after consultation with the Pilots' Committee and may be approximately one for every 70 trips per annum."

This criterion dates back to the 1928 By-law. Its provisions corresponded more to the legal requirement in that it left less discretionary power than the present regulation. It read as follows:

> "24. The number of pilots to be licensed in the Pilotage District may be determined by the Pilotage Authority from time to time on the basis of fifty pilots for each 3,500 trips per annum".

The criterion has remained unchanged since 1928 despite the fact that working conditions, and the length and duration of pilotage assignments have changed considerably. In 1928, 70 trips from Father Point, Quebec, or the equivalent, was considered a reasonable annual maximum workload but now the pilots average over 110 trips per year. Due to the fact that the criterion was never amended, it is now completely out of date and to follow it would produce an excessive number of pilots. The obvious remedy was to bring in the necessary amendments, but despite the fact that the provisions of By-laws, once approved by the Governor in Council, are as binding upon the Pilotage Authority and other parties as is the Act itself, the Pilotage Authority has chosen to act illegally by ignoring this legislative provision and making the appointment of any new pilot, whether he is merely a replacement for one that has left or is to increase numbers, the object of an *ad hoc* administrative decision. This attitude has caused the pilots, the shipping interests and all the officers of the Pilotage Authority enormous loss of time and money, and almost every new appointment causes contention, endless negotiations and ill-feeling (vide *Quebec District*).

In all other Districts (except Churchill), the By-law provides that the number of pilots is at the entire discretion of the Pilotage Authority, sometimes after consultation with the Pilots' Committee. This regulation and also that part of the Quebec regulation which leaves a certain discretion to the Pilotage Authority, is ultra vires because it amounts to amending the Act by making what is supposed to be a subject of legislation the subject of an administrative decision. Such action can not be taken except through a specific provision in the Act, and none exists. For lack of authority, such By-law provisions are inoperative and, as a result, in all these Districts the pilots' profession is now open and the Pilotage Authorities can not refuse to license any qualified candidate who may so request.

COMMENTS

It is on account of such illegal and unwarranted increases in discretionary executive powers that Pilotage Authorities have lost their control. Since they lack legislative criteria or provisions on which to base decisions they are eventually obliged to yield to pressure, often against their better judgment. This situation is incompatible with the exercise of authority. The interests involved are too vital to the parties concerned for their fate to be left to arbitrary decisions. The method devised by Parliament is rational and adequate and must be followed even if the pilots are quasi-employees, i.e., when their remuneration is a share of the pooled revenues of the District. The situation is materially different when the pilots are employees receiving a fixed, pre-determined salary. In that event, the only question concerns working conditions, which should not be resolved by legislation but by administrative decisions on the part of the Pilotage Authority and by contractual agreements between pilots and Authority.

It has been explained that the Quebec criterion is difficult to apply in that it implies annual changes in the number of pilots on account of periodical fluctuations in traffic which result in an excessive number of pilots at times. All this may be be true, but the fault is not the requirement of the Act but the procedure adopted in the regulations. If the Quebec criterion is not adequate, other rules that would meet all objections could easily be devised, e.g., by making temporary appointments for a number of years until the traffic increase proves to be permanent or otherwise and, possibly, by always keeping a certain percentage of licences on a temporary basis to allow for necessary adjustments in case traffic decreases, provided the number of licences, permanent and temporary, is fixed in the regulations. The necessary criteria should be enunciated in the regulations, *inter alia,* when considering the permanency of an increase in traffic, factors of a temporary nature, such as strikes and special non-recurring traffic, should be disregarded.

With reference to the method provided in the Act, the only remaining question is to revise criteria from time to time. Whenever a vacancy occurs, whether permanent or temporary, the appointment of a new pilot should be made according to the regulations as a matter of administrative routine that can be automatically attended to by the local staff.

(iii) *Form of licence or certificate.* The form and content of licences and pilotage certificates are left to be determined by regulations drawn up by the Pilotage Authority (subsecs. 333(1) and 329 (e)). Normally they should vary from one District to another to reflect local exigencies.

Previously, the form of both documents was determined by Parliament. In the 1927 C.S.A. they were appendices Q and R of the Act (secs. 425 and 468, 1927 C.S.A.) and sec. 434 provided for the necessary amendment to be made when a Pilotage Authority decided to limit the duration of a licence. In 1934, these appendices were deleted, and determining the form of the licence

and the certificate was made the subject-matter of regulations by an insertion in subsec. (e) of sec. 329. The result is that no licence can be considered official unless it conforms to the pattern set down in the By-law. The previous statutory forms are no longer legal because they were repealed in 1934. Strangely enough, this subject-matter is not dealt with in any existing By-law with the result that no pilot in Canada holds a legal pilot licence, except those whose licences are dated prior to 1936, i.e., the year the 1934 Act came into force. The consequence is that all provisions wherein the word "licence" means the official instrument are no longer capable of application. *Inter alia*, it is no longer an offence for a licensed pilot not to carry his licence with him when acting as a pilot and refusing to exhibit it when duly required (sec. 335); nor if he fails to deliver it when his right to pilot has been either cancelled, or suspended, or he is compelled to retire (subsec. 337(1)). Determining the form licences and certificates will take is not a matter of executive decision but of legislation.

COMMENTS

This is another flagrant example of the way delegated legislative powers are neglected by persons who are so involved in their executive duties that their legislative responsibilities suffer. In the light of experience, it is believed that the only remaining solution is, as stated earlier, whenever a matter has to be covered in legislation, to include in the Act itself a prototype provision which will apply in all cases except where it is amended by regulations enacted by various Pilotage Authorities to meet their requirements. The power to alter such a statutory provision must be stipulated in the Act.

(iv) *Licensing fees.* The fees a Pilotage Authority is authorized to charge by subsec. 329(e) are for issuing a licence or certificate. This practice is followed in a number of Districts but the By-laws also often impose on all candidates an examination fee as a requirement to be admitted to the examination. This fee is not returned if the candidate fails. This examination fee is illegal because it is not authorized by any specific provision of the Act. It becomes an item of revenue for the Pilotage Authority which is an agent of the Crown and the Crown can not charge the public unless there is a specific, valid, legislative provision to that effect, e.g., sec. 18 of the Financial Administration Act, or the above-mentioned provision for fixing licence fees in subsec. 329(e) C.S.A.

No fee is fixed in any By-law for issuing pilotage certificates, and none can be fixed because, in the absence of enabling regulations, no Pilotage Authority can issue such a certificate. In the past, fees were never nominal, e.g., at one time in the B.C. District $100 was charged for a pilotage certificate of one year's duration. This was considered a contribution by the ships concerned toward District operating expenses.

COMMENTS

The basic aim of the licence or certificate fee is to repay examining costs incurred by the Pilotage Authority. It may be reasonable to require a fee from those who are licensed, but it is not normal to charge candidates because it is in the public interest to encourage them to take the examination. Most of the candidates forfeit their examination fees when there are only a few vacancies to be filled. The fact that the examination fees now charged are minimal does not alter the situation: the principle is wrong.

It is believed that licence fees still exist only for historical reasons and that they should now be abolished. Indeed, formerly it was the current practice to charge a fee whenever a licence, certificate or other official document was granted. There is no reason to continue this practice for pilots' licences, all the more so because the annual aggregate revenue from this source in any District is minimal. The small expenses incurred in the licensing process should be debited to District expenses, and eventually paid by the shipping interests for whose benefit the pilots were licensed.

The same reasoning, however, does not apply to pilotage certificate fees. The cost of both the examination and the pilotage organization from which their ships benefit can not be passed indirectly to shipowners because the pilotage certificate held by one of their Masters or mates makes them, in effect, exempted ships. It is reasonable that the fee for this type of certificate should be substantial on the basis that it is a contribution by shipping toward maintaining a pilotage service.

(d) *Terms and conditions of licences.* Once granted, a licence or pilotage certificate is, in effect, an acquired right: for the pilot, it is the right to exercise his profession; for the ship's Master or mate, it is the right to navigate his own ship without a pilot and to exempt her from pilotage dues.

Like any other right, this is absolute and permanent unless, when acquired, it was limited by legal terms and conditions. In the case of licences, these terms and conditions must be contained in the Act governing the licensing authority and in the regulations as they existed at the time of licensing. These terms and conditions become part of the licence for its duration and any later amendment to the regulations can not affect these acquired rights except (a) with the consent of the licence holder, or (b) if made pursuant to a condition that existed at the time of the licensing or (c) by a specific amendment to the Act. To introduce modifications in any other way would amount to a denial of the rights conferred by the licence.

The principle of the permanency of the terms and conditions of licences was infringed when the grade system was created in the Quebec and Montreal Districts, insofar as it limited existing licences to Grade B, and made the licences of the few pilots who were classified as Grade A subject to reclassification as Grade B in certain circumstances. The pilots who were licensed afterwards have no grounds for complaint because the grade system was part of the terms and conditions of the licence they received.

As was stated by the Supreme Court, in the judgment McGillivray v Kimber *et al.* (1915, 52 S.C.R. 146), the relationship of master and servant does not exist between the Pilotage Authority and the pilot; the Pilotage Authority is merely a licensing authority with only a statutory control over the licensing of pilots, and the Pilotage Authority has no arbitrary authority to interfere with the pilot's rights as a licensee. Mr. Justice Anglin put it this way:

> "The relationship of master and servant does not exist between the Board and the pilot. The Board has a statutory control over the licensing of pilots within the territory for which it is constituted. Its jurisdiction to cancel a pilot's licence is also statutory and arises only after it has been satisfied either by a quasi-judicial investigation, held after fair notice has been given the pilot and he has had reasonable opportunity to make his defence (. . .), or by the production of a conviction thereof made by a competent tribunal, that the commission of an offence subjecting the pilot to cancellation of his licence has been established".

Terms and conditions can be grouped in three categories:

(a) subjective and implied, that is, the pilot remains what his licence purports him to be, i.e., a skilled expert in local navigation, mentally and physically fit, and reliable;

(b) those determining objective duration of the licence;

(c) those determining the extent of right as to territory and capacity.

(i) *Terms and conditions as to territory and capacity.* The first two categories are governed by other provisions and will be studied later; (for (a) vide p. 271, for (b) vide p. 264. The terms and conditions of the third category are dealt with in subsec. 329(e) C.S.A.

For pilots' licences, only three types of such terms and conditions are contained in the By-laws presently in force:

(a) limitation as to territory;

(b) limitation as to earning capacity;

(c) limitation as to grade.

A. *Limitation as to territory.* The right of a Pilotage Authority in this regard is limited by the extent of its jurisdiction, for instance, the maximum limit of a licence as to territory is the extent of the district limits, and if the Pilotage Authority is the Minister appointed as such for part of a District only under subsec. 327(1), the licences he grants are valid only within his territorial jurisdiction. However, a licence may be issued for only part of the District (sec. 333). Licences that do not extend throughout the District exist only in the Montreal District and in the Prince Edward Island District.

In the Montreal District, the By-law (sec. 43) provides for issuing two types of licence: a river pilot's licence which is unlimited as to territory, and a harbour pilot's licence which is valid only within the harbour limits as defined in the By-law. In addition, by an organizational arrangement not reflected in the By-law, the river pilots are divided into two groups with the

Three Rivers boarding station being the changeover point. But the division and restriction are not noted on the licence which, therefore, remains valid for the whole District including both terminal harbours of Quebec and Montreal. In practice the restriction is maintained by the despatching system to which the pilots are subjected.

The Prince Edward Island By-law provides for the issuance of a limited licence but, contrary to the statutory requirements, the limitation is not defined in the regulations and is left to be determined in each case by the Pilotage Authority. This provision amounts to a blanket delegation of legislative power to be exercised by the licensing authority which, despite the generality of the terms of subsecs. 329(p) or 327(2), is not permissible, as will be discussed later (vide pp. 289 and ff.). In Prince Edward Island, the fact that the licences must be limited as to territory is the result of the artificial *sui generis* situation of this District which, in fact, is a merger of various harbour Districts with their own independent, separate pilotage services in no way related to one another. This situation is not foreseen in the present Act. Until the Act is modified, this situation could be covered and the By-law legalized, by stipulating that licences are to be issued on the basis of harbours, i.e., valid for the limits of one harbour and its approaches or for more than one in accordance with the application made by a candidate and the qualifications he possesses.

B. *Limitation as to earning capacity.* In many Districts, the first licence issued to a successful candidate contains restrictions on earning power. This is called a probationary licence (the question of its validity will be studied later, vide pp. 269 and 270. These By-laws generally pose a condition that the holder will not be entitled to receive the pilotage dues earned by his services but only an amount fixed by the Pilotage Authority at its discretion. This restriction is generally worded as follows:

> "Probationary pilots shall receive compensation to be fixed by the Authority",

or as in the New Westminster By-law:

> "10(2). The Secretary shall pay out of the Pilotage Fund each month the following:
>
> . . .
>
> (b) the remuneration of probationary pilots shall be seventy-five per cent of a regular pilot's share of the current earnings from the date of his appointment for the period of his probation . . ."

It is unnecessary to belabour these points but it should be kept in mind that the relationship of master and servant does not exist between the Pilotage Authority and any pilot, that the Pilotage Authority has no control over the earnings of a pilot except for fixing the general tariff, that under the

present Act a pilot is a self-employed, independent contractor who is entitled to receive the full amount of all dues he has earned, less, as seen in chapter 6 *supra*, the legal deductions the Pilotage Authority is authorized to make from the earnings of all pilots. The Pilotage Authority is not authorized to discriminate against any group of pilots and there can by only one scale of pilotage dues. A specific provision in the Act itself was necessary when, in 1879 (42 Vic. c. 25), the Montreal Pilotage Authority was given the power to grant second class pilot's licences and, at the same time, was authorized to fix a special scale of dues for the remuneration of the services of these pilots. This exceptional provision was repealed when the Act was revised in 1934.

This limitation on the earning power of probationary pilots meets a need created by the operation of pooling the pilots' earnings, because probationary pilots do not bring into the common fund the same contribution as full-fledged pilots, since they are normally assigned to smaller ships. This problem does not arise where the pilot is paid his own earnings. This restriction is at present illegal because compulsory pooling itself is illegal; but if such pooling is allowed to exist a regulation to cover this point will be necessary.

c. *Limitation as to grade.* Licences may also be limited depending upon the degree of competence of the licence holders, i.e., the grade system which is based on the type and size of ships. This is found in the Districts of Quebec and Montreal only.[2]

The Quebec and Montreal grade system (not applicable to the Montreal Harbour pilots), provides a temporary Grade C which is, in effect, a continuation of apprenticeship after a permanent licence has been granted so that a newly appointed Grade C1 or Grade C2 pilot is gradually initiated into the art of piloting. He begins with small ships and proceeds to larger ships, provided his services have been satisfactory. In Montreal, this training period lasts a minimum of three years. The licence is permanent because, strictly speaking, apprenticeship is terminated, but a pilot may remain Grade C indefinitely if his performance does not warrant promotion either within Grade C or up to Grade B, the basic permanent grade, from which a pilot can not be demoted except by his own volition. The larger ships are the responsibility of a selected, highly qualified group called Grade A. This grade is not permanent because pilots revert to Grade B automatically at the age of 65 or whenever the Pilotage Authority considers they no longer possess the necessary high standards of qualifications (vide C. 9, p. 354).

This grade system is new as far as regulations are concerned, but it corresponds, to a certain extent, to the practice unofficially followed by the

[2] The Exchequer Court in a recent judgment held that the pilot's licence can not be limited as to professional competency under the present legislation and declared ultra vires the by-law provisions of subsec. 15(2)(a), 21(1) and 24(5) (P.C. 1960-756) of the Quebec District establishing the grade system (Ex. Court No. B-1334, Gamache vs Jones *et al*, Noël, J., dated October 10, 1967, Ex. 1521b. Notice of appeal filed Dec. 1, 1967).

pilots themselves in certain Districts, e.g., Saint John, N.B. and British Columbia where a probationary pilot starts with relatively easy assignments which gradually become more difficult and entail more responsibility. The most difficult assignments are, by common consent, given to the senior and most experienced pilots. However, especially where there is a large group of pilots, it is most desirable to recognize this sensible practice officially, and to embody it in regulations. The Quebec and Montreal system is new and an amendment to the Act would be required to apply the grade system in its entirety. For instance, while the Pilotage Authority has the right to cancel or suspend a pilot's licence, either following a conviction for a statutory or by-law offence, or a breach of disciplinary regulations, it has no power to lower grades except from Grade A to Grade B. This creates an inconsistency in that a Grade B pilot whose licence is suspended because his performance was unsatisfactory, must be reinstated in Grade B at the end of his suspension. He can not be demoted to Grade C1 or C2 in lieu of, or during, suspension which would provide him an opportunity to gain further experience before being given more responsible assignments. This matter is studied further in chapter 9, and also in that part of the Report dealing with the Districts of Montreal and Quebec.

Another question concerns the legality of the discretionary power purported to be given a Pilotage Authority, in its licensing capacity, to demote a pilot from Grade A to Grade B. There must be no discretion about the terms and conditions of a licence. If Grade A requires a higher standard of qualification, the rules for its approval should be set out in the Act, in which case approval itself becomes a quasi-judiciary function (i.e., part of the licensing function) of the Pilotage Authority as opposed to a discretionary administrative function. If a pilot's Grade A is queried he should be given an opportunity to defend himself. In order to have Grade A considered a privilege that could be withdrawn at the discretion of the Pilotage Authority, and not a right, the Act should contain an appropriate provision of exception.

The terms and conditions affecting the apprentice licence are not laid down because the so-called licence does not confer the right to do anything. Under subsec. 329(a), the Pilotage Authority already has power to determine the terms of apprenticeship which candidates must fulfill in order to obtain a pilot's licence.

For pilotage certificates issued to Masters and mates the Act contains a statutory condition, i.e., they are valid only for the ships to which the holder belongs. Each Pilotage Authority can enact by regulation other terms and limitations similar to those imposed on pilots (subsec. 329(e)).

(ii) *Objective duration of licence and certificate.* A Pilotage Authority's control over the duration of a pilot's licence is neither absolute nor discretionary. A Pilotage Authority can not interfere with the tenure of a licensee

except when so authorized by specific provisions of the Act, or by legal regulations. The same applies to pilotage certificates.

The actual duration of such a licence or certificate is affected by two sets of factors:

(a) objectively, by its maximum duration which is fixed by the Act and the applicable By-law;

(b) subjectively, by the licensee himself contravening the Act or the regulations or for failing to meet legislative requirements. Such a lapse will either cause automatic, premature termination or will authorize withdrawal by the Pilotage Authority acting in a quasi-judicial capacity.

The Act is silent as to the duration of an apprentice licence or of a pilotage certificate granted to a ship's Master or mate. This omission is in contrast to the detailed regulations covering pilots' licences. In the case of an apprentice no problem really exists because an apprentice licence is, in fact, only a training requirement and the status of an apprentice ceases when the individual concerned reaches the maximum age limit for acceptance as a pilot, or fails to meet apprenticeship requirements, or is suspended or dismissed for misconduct (subsec. 329(f), and secs. 368 and 372).

Similarly pilotage certificates present no real problem. Formerly, they were limited by the Act to one year, but could be renewed from year to year on endorsement by the Pilotage Authority (sec. 469, 1927 C.S.A.). This provision was abrogated in 1934 along with all other statutory provisions dealing with these certificates and the duty of legislating on the whole question was transferred to the Pilotage Authorities with one limitation, that is, a pilotage certificate is valid only for the ship to which the certificate-holder belongs. Therefore, a certificate automatically lapses when its owner ceases to belong to the ship named on the certificate. Otherwise, the wording of subsec. 329(e), which enables a Pilotage Authority to fix by regulation the terms and conditions of a certificate, is wide enough to cover the question of duration. However, a Pilotage Authority is powerless to withdraw a certificate for incompetence or physical or mental unsuitability; the few provisions in these fields apply to pilots only (vide C. 9, pp. 356-370). No doubt, in such a case the shipowner would require the certificate-holder to leave his employment, thus automatically invalidating the pilotage certificate; or if the Master or mate holds a Canadian certificate he could be deprived of it on the initiative of the Minister under Part VIII of the Act. Although a Pilotage Authority has no statutory power to deal with these aspects of the problem, the situation is not serious because, normally, such certificates are of very short duration. The Act forsees that a Pilotage certificate may be forfeited for unreliability provided appropriate regulations are passed by the Pilotage Authority pursuant to subsecs. 329(f) and (g) (vide C. 9).

COMMENT

If, in future legislation, emphasis is to be placed on the issuance of pilotage certificates, both as a safety measure and as a method of granting exemptions, it is believed that the powers of Pilotage Authorities to suspend or withdraw these certificates should be extended so as to enable them to ensure that certificate-holders remain professionally qualified, physically and mentally fit and reliable.

A. *Permanent licences.* The Act provides for two types of licence:

(a) permanent licence (sec. 338 and subsec. 329(i));

(b) temporary licence (subsecs. 329(n) and (o)).

Licences are normally permanent and, in the absence of regulations providing for a temporary licence, any licence issued is automatically permanent.

The maximum duration of a permanent licence is determined by the age of the licensee; it is valid until the pilot reaches the statutory retirement age of 65, after which the licence is renewable on a yearly basis provided he is declared physically and mentally fit to continue piloting (sec. 338), and until he reaches the absolute retirement age of 70. However, the Pilotage Authority may by by-law make one change, i.e., provide for the compulsory retirement of a pilot at age 65 (subsec. 329(i)).

It is bad practice to repeat the statutory provisions of the Act in a By-law, e.g., subsec. 26(1) of the Bathurst Pilotage District General By-law which is a repetition of sec. 338 except that what appears to be a further requirement is added, namely, a pilot's eyesight and hearing must be satisfactory. This requirement is implicitly contained in sec. 338 which states a pilot must be "declared capable of performing his duties as a pilot by a medical officer appointed by the Pilotage Authority". In any event this is a matter for the courts to decide. A Pilotage Authority should not give its interpretation of a permanent statutory provision in a By-law unless it is empowered to do so, which is not the case here. Subsec. 329(i) only authorizes Pilotage Authorities to make regulations to

> "provide for the compulsory retirement of any licensed pilot who has attained the age of sixty-five years, subject to the provisions of this Part for the granting of a new licence".

Therefore, a Pilotage Authority has no power to vary the conditions imposed in sec. 338 for the reissuance of licences. If it is deemed that the terms of sec. 338 are not clear enough, it is the duty of the Pilotage Authority to recommend to the Government that the Act be amended. This principle was expressed in the Supreme Court judgment of McGillivray v Kimber *et al.* previously quoted on a similar point. In 1915, the Canada Shipping Act then in force authorized the Pilotage Authority to limit the duration of a

licence, but to not less than two years (sec. 454, 1906 C.S.A.). The licences issued by the Sydney Pilotage Authority bore a notation to the effect that they were valid for a period of one year only. Mr. Justice Duff stated:

> "Section 454 authorizes Pilotage Authorities to limit the period for which any licence can be in force to a period not less than two years. But our attention has not yet been called to any authority for limiting the period to one year. I am inclined to think that the words inserted in the licence granted to the appellant professing to provide that the licence shall be only in force for one year must be treated as inoperative".

At present, none of the Pilotage Authorities have acted on the power given in subsec. 329(i) by providing by regulation that the ultimate age limit in their District is 65. One of the reasons may be that when there is a pilot fund, neither the pilots nor the Pilotage Authority has any interest in advancing the age limit because this increases the liabilities of the fund.

B. *Term licences.* In the present C.S.A. there are two types of term licence:

(a) the statutory annual licence defined in sec. 338, i.e., issued to pilots between the age of 65 and 70 to replace a permanent licence. Its existence is not, and need not be, reflected in the By-laws for it automatically exists unless the contrary is stipulated in the By-laws (subsec. 329(i)). As said earlier, none of the present By-laws contain such a restriction;

(b) the regular limited licence issued for the term fixed by the regulations, and capable of renewal (subsecs. 329 (n), (o)).

For the sake of clarity and to avoid confusion, different terms should be used to refer to each of these two temporary licences. The second group could be referred to as "term licences"; as to the first group, if the provisions of sec. 338 are to be retained, they should be modified to provide, not for the issuance of new licences for pilots over 65, but for annual extension or prolongation of permanent licences by endorsement, until the final age limit is reached (always subject to the pilot's suitability). "Drafting should be consistent. If the same meaning is intended, the same words should be used and if different things are intended different words should be used" (Driedger *op. cit. supra*, p. 125).

Subsecs. 329(n) and (o) of the Act read as follows:

"329 . . . Every Pilotage Authority shall . . . have power . . . by by-law confirmed by the Governor in Council, to

(n) limit the period during which any licence to a pilot shall be in force,

(o) renew for a further limited term any licence issued for a limited period pursuant to paragrah (n)."

Except for the provisions for fixing the age limit in permanent licences, these are the only other provisions in the Act which authorize any interference on the part of the Pilotage Authority with the objective duration of a pilot's licence. This power is subject to two conditions:

(a) a term must be fixed;

(b) the term must be fixed by regulation.

These two conditions appear unambiguous. It is through the exercise of legislative powers that such decisions must be taken and, therefore, the duration of a term licence must be fixed either directly or indirectly in a By-law so that no discretion remains. Since a licence is a right, its extent must always be objectively ascertainable.

Until the last amendment to subsecs. 329(n) and (o), there was no possible ambiguity because the duration of a licence on first issue and any renewals were to be not less than two years and the period of validity had to be fixed in the regulations at or above this minimum. In 1956, the only amendment was to delete this minimum, thus authorizing a shorter term.

When subsec. 329(o) is read in conjunction with subsec. 329(n) the meaning is even clearer. Since subsec. (o) authorizes renewal for a further limited term, if the term fixed for a first licence has expired, this subsection would be meaningless if a licence could be issued for an indeterminate period, and could be cancelled at any time at the discretion of a Pilotage Authority. Under these circumstances there would be no reason for renewing a licence after deciding to cancel it.

Subsec. (o) was necessary to enable a Pilotage Authority to renew a term licence without being obliged to repeat the whole licensing process. It is a reasonable and realistic provision: the qualifications of any pilot issued a term licence have been fully appraised during his service and the Pilotage Authority is satisfied that a pilot is still qualified, fit and reliable and if there is a vacancy, it is only reasonable and logical that he should be reinstated on the basis of his experience. It is doubtful, however, whether under these circumstances a pilot has acquired the right to renewal or whether this is left to the entire discretion of the Pilotage Authority, which could discriminate against him for any reason whatsoever even, as has happened, on political grounds. If the number of pilots is not limited by regulation, there is no problem and the Pilotage Authority must renew licences either automatically or, if there is no By-law provision authorizing renewals, by requiring former pilots to pass an examination for a new licence. But if there is a fixed number of pilots there is nothing in the present Act which establishes any precedence for those who meet the required standards. It is believed that in order to attract the best qualified persons and to benefit from acquired experience, a right of precedence should be guaranteed to those whose licence comes up for renewal. In addition, each Pilotage Authority should be authorized to fix the terms and conditions of such renewal in its regulations.

The retirement age limit applies also to term licences in that it affects the capacity of a person to become or to remain a licensee. Therefore, even if term licences are issued, a Pilotage Authority may by by-law fix compulsory retirement age at 65.

In practice there are three types of term licence: (a) the only type of licence available in a District; (b) an accessory which is a prerequisite to obtaining a permanent licence; (c) a licence to meet temporary emergency situations.

In Churchill, there is only a term licence valid for the duration of the navigation season. This is necessary because for special reasons pilotage can not be self-supporting and the performance of pilotage duties is now complementary to employment as Port Warden and Assistant Port Warden, to ensure adequate remuneration.

The Prince Edward Island By-law (sec. 11) provides for limited licences; their duration is not fixed in the regulations but is left to be fixed by the licensing authority. As seen earlier, the provision is inoperative since it is illegal and all licences so issued are, in fact, permanent. No doubt this question was left to the discretion of the licensing authority in an attempt to overcome the difficulties created by the peculiar type of organization in this District where a different set of by-laws was needed in each port to resolve local problems.

In all other Districts, except Quebec and Montreal, a term licence called a probationary licence is a prerequisite to obtaining a permanent licence. It might be defined as a first licence issued to a successful candidate to allow the licensing authority to appraise his skill before a permanent licence is issued. The period (one year) is fixed in the By-law of only six Districts: B.C., Cornwall, Halifax, Montreal [for harbour pilots], New Westminster and Saint John. In the other Districts, the duration is not stated in the regulations but is left to be fixed by the licensing authority. At the expiration of the term so fixed, upon receipt of a favourable report from the Secretary or the local representative, the Pilotage Authority may, at its discretion, issue a permanent licence. Here again, because the term is not fixed in the regulations, the provision is inoperative and a licence is permanent when issued.

A probationary licence meets a real service need, whether or not there is an apprenticeship system. Until a Pilotage Authority has seen a candidate in operation over a long period of time his qualifications can not be fairly judged. The probationary period, which is, in fact, the final phase of training, affords this opportunity. The apprenticeship system in Quebec and Montreal is lacking in one respect, namely, if it becomes apparent that a Grade C1 or C2 pilot does not possess the necessary skill, the Pilotage Authority is powerless to deprive him of his licence and has to depend upon the decision of the administrative courts the Minister may create at his discretion under Part VIII. If the Minister does not convene such a court, all the Pilotage

Authority can do is not promote the pilot concerned to a higher grade. This is a very unsatisfactory situation. Furthermore, at present, in the absence of criteria defined in the regulations to determine what is considered a satisfactory performance, it is believed, despite the apparent discretionary power given by the Act, that a Pilotage Authority has no other option than to issue a permanent licence because otherwise it would be guilty of discrimination. In fact, it has been the practice to replace probationary licences automatically at expiration by permanent licences and no probationary pilot in recent years has been denied a permanent licence, or had such a licence postponed for lack of skill. Licences have been held back or delayed only when pilots were involved in shipping casualties. Since the probationary period is, in fact, one part of apprenticeship which is a prerequisite for licensing, its terms and conditions ought to be stipulated in the By-laws. The legality of a probationary licence is questionable but, on the other hand, it answers a definite licensing need. The Act should be amended to make probationary licences permissible and to define the rôle and powers of Pilotage Authorities as licensing authorities over probationary licences.

The third type of term licence was formerly provided for in several By-laws, but at present, occurs only in the Districts of Quebec (sec. 35) and Montreal (for river pilots) (sec. 34). It is called a temporary licence. It is an emergency measure to overcome a temporary shortage of pilots and its term is the duration of the shortage. Such a provision is legal, provided the regulations state how to determine whether a shortage of pilots exists and do not leave the matter to be decided arbitrarily. This point raises a number of questions that must be considered if consistent regulations are to be enacted.

If the number of pilots is not fixed, there is no problem, except for standards of qualifications, because the exercise of the profession is open to anyone. If a shortage is due to lack of candidates who are qualified as per regulations, the matter should be dealt with as indicated below.

If the number of pilots is fixed in the regulations, and there is no vacancy, a Pilotage Authority is powerless to issue emergency licences because the fixed number is the limit of its licensing powers. But, as stated earlier, the regulations which fix the number of pilots should provide for a number of temporary licences to cover temporary fluctuations. If there are vacancies, the usual causes are lack of candidates or absenteeism. To make up for a shortage of candidates who have completed their apprenticeship, the regulations governing prerequisites for licensing should contain provisions to authorize licences for candidates who have less training or who are not recruited as apprentices. The regulations should also state the qualifications required of emergency pilots and the limitations as to grade should form part of such licences. A Pilotage Authority should never be authorized by legislation to issue a licence to a candidate who does not reach the prescribed standard.

If a serious shortage is due to any combination of sickness, special official leave or suspension, or any one of them, of a temporary nature, the District By-law should provide the Pilotage Authority with power to issue temporary licences to apprentices that are qualified for licensing as pilots, such temporary licences to lapse automatically when the regular pilot or pilots return to duty.

(iii) *Subjective and implied terms and conditions of licences and pilotage certificates.* The possession of a licence or of a pilotage certificate indicates that the holder meets the licensing requirements and also implies that his qualifications are maintained because maintaining his qualifications and observing his duties and responsibilities as a licence or certificate-holder are subjective and implied conditions.

A distinction should be made here between the terms and conditions applicable to a given licence which can not be modified, except by an Act of Parliament or with the consent of the licensee once the licence is issued, and the means of ascertaining whether the terms and conditions, expressed or implied, are respected. These means may be modified and improved to meet new situations or to make surveillance more efficient but they do not affect the required standard of qualifications, e.g., a pilot can not be more or less physically fit, more or less reliable, he must be fit and reliable in the full meaning of the phrase.

While Parliament refrained from legislating with respect to licensing requirements and gave blanket authority to fix requirements by regulation, it acted much more cautiously with regard to the obligations and duties of licensees. It legislated on some aspects and delegated legislative powers to Pilotage Authorities on specific and limited questions only.

Licences and certificates, once granted, are considered acquired rights, the tenure of which is guaranteed by law.

The limited powers granted to Pilotage Authorities over pilot licences and pilotage certificates, once issued, the question of disciplinary powers over pilots and pilotage certificate-holders together with the interpretation of subsec. 329(g) are studied in chapter 9, to which reference is made.

Subsec. 329(f) has been given a wide interpretation and taken as authority for the Pilotage Authority to take over control of pilotage from the individual pilots, to manage the service and to make pilotage contracts. The problem is whether subsec. (f) merely confers on a Pilotage Authority the power to legislate for the conduct of licensees, and nothing else, or whether, through its regulations, a Pilotage Authority can give itself all these executive powers.

Before studying the terms of this subsection, it is pertinent to review the situation briefly. Subsec. 329(f), like the other subsections of sec. 329, defines one of the subject-matters of the regulation-making power of the Pilotage Authority, i.e., under this power the Pilotage Authority is merely

acting in lieu of Parliament to pass legislation applicable to its District. This legislative power is delegated and, therefore, is limited by the terms of the delegation contained in the subsection itself, the interpretation of which must be consistent with the context of the Act.

Leaving aside the question of fixing the number of apprentices, which has already been dealt with, and the question of the procedure for holding enquiries, both of which were wrongly located in this subsection through faulty drafting, the subject-matters of the regulations authorized by subsec. (f) are the following:

(a) "for the government of pilots, and of masters and mates holding certificates . . ., and . . . of apprentices";

(b) "for ensuring their (not apprentices) good conduct on board ship and ashore";

(c) "for ensuring constant attendance to and effectual performance of their (not apprentices) duty on board and on shore".

As for pilots and, *mutatis mutandis,* ship's officers holding pilotage certificates, the limit of a Pilotage Authority's power is to make the rules that govern the exercise of the pilotage profession by self-employed, independent contractors (which licensed pilots are supposed to be under Part VI) exactly like the licensing authorities of such professions as law, medicine and pharmacy. No licensing authority as such is empowered to become involved in the exercise of a profession.

"For ensuring their good conduct on board ship and ashore" is clear enough since it refers only to the behaviour expected of pilots or ship's officers holding a pilotage certificate, i.e., conduct becoming a Crown licensee. "For ensuring their . . . constant attendance to their duty on board and on shore", should not be ambiguous either for a pilot's licence is equivalent to a franchise in that only those who are licensed are entitled to exercise the profession. On the other hand, such a privilege carries responsibilities, one of which is to be constantly available when off duty and rested so that the purpose of licensing can be achieved, i.e., ships have a number of qualified pilots to choose from. Again, "For ensuring their . . . effectual performance of their duty on board and on shore", requires little explanation. Since a pilot's duty is to navigate a ship at a Master's request anywhere in the District, the effectual performance of these duties is the consideration of the contract of hiring. Normally, the non-performance or the incomplete or inefficient performance of such a duty would amount to a breach of contract rendering the pilot answerable in damages, but since the pilot is a licensee, the effect is a breach of his obligations as a licensee, a breach of trust that affects his reliability. Any pilot who, without cause, stops piloting en route, or does not obey a Master's orders when the safety of the ship is not involved, is unreliable.

It is the other provision "for the government of pilots, and of masters and mates . . ., and . . . of apprentices" that is more likely to be misconstrued. In fact, it is now taken as meaning that the Pilotage Authority, as executive authority, has the power to give orders to the pilots. This is a misinterpretation which is incompatible with the text of the subsection and the context of the Act, and which, when acted upon, imposes upon the Crown a wide responsibility that the legislature neither envisaged nor authorized. The term "government" here means "the manner in which one's action is governed". (*Shorter Oxford English Dictionary*). This view is supported by the French version of the C.S.A. which uses the term "*gouverne*" and not "*gouvernement*", which means "*règle de conduite personnelle*". It is also apparent from the text itself when not truncated that the term "government" applies in the same manner to Masters and mates, and must be equally applicable to pilots. But when the phrase "for the government of pilots" is taken out of both text and context it is easier to make a mistake. The meaning of the expression as used in the Act is now obsolete in English. It should be remembered that the words, the style and almost all the provisions of Part VI date back to the U.K. Merchant Shipping Act of 1854, and possibly even much earlier. Therefore, the words and terms should be given the meaning they had at that time. The fact that the meaning of some words may have become obsolete since, does not alter the substance of the law and if, on that account, the text has become ambiguous or difficult to understand, only Parliament can bring the Act up to date by redrafting.

Furthermore a rule of interpretation is that an enumeration defines and limits the general statements that accompany the enumeration. In subsec. 329(f), general provisions are followed by a list of points that may be covered in regulations for the "government of pilots". It is realized that this list is not limitative, otherwise the preceding general statements would not have been necessary, but the list gives examples of the type of regulations intended.

It is noted that none of the situations listed contains any reference to a power that could be delegated by by-law to a Pilotage Authority as executive authority. The only authorization is to pass regulations that are complete in themselves and contain all the elements required to determine whether or not there has been a breach of regulations, i.e., it is "to make regulations for the government of pilots" to provide that they must not lend their licence (item i), that they must be sober when about to proceed on duty or when on duty (item iii), that they must not proceed beyond the limits of the Pilotage District without the consent of the Authority (item iv), that they can not refuse to perform pilotage except on lawful and valid grounds (item v); to provide punishment for malingering with the intent of being unavailable, for behaving in a manner unbecoming a pilot, for repudiating contractual obligations by refusing to pilot a ship to a destination within district limits as

desired by the Master or by quitting a ship before she has reached her destination within the District. But there is no power to make regulations for constant attendance with a view to preventing pilots from accepting pilotage except upon assignment by the Authority. All a Pilotage Authority is empowered to do under subsec. 329(f) is to create by regulation a code of service discipline compatible with the type of organization and the status of pilots provided for in Part VI C.S.A.

The only point that may be open to contention is contained in 329(f) (iv): "is guilty of insubordination". This presupposes a lien of subordination, the right to give orders to a pilot. It can not be inferred, however, that these orders necessarily come from a Pilotage Authority or that these words alone give a Pilotage Authority power to give orders to a pilot about the exercise of his profession. It must be remembered, as stated by the Supreme Court in the McGillivray case quoted earlier, that the relationship of master and servant does not exist between a Pilotage Authority and a pilot and that each pilot is entitled to exercise his profession free from interference on the part of the Pilotage Authority, as long as he complies with the obligations imposed upon him by the Act and by valid regulations. Therefore, a Pilotage Authority has no discretionary power to give orders to a pilot. Any power that may be used must be founded on a specific statutory provision; e.g., if a Pilotage Authority in the exercise of the power related to its licensing power orders a pilot to submit to a medical examination under regulations passed under subsec. 329(j); or orders a pilot to appear before it or before any other person in the course of an inquiry authorized by regulations adopted under subsec. 329(f), or at a hearing to settle a dispute pursuant to regulations passed under subsec. 329(k). A pilot might also be considered guilty of insubordination if he refuses to abide by a Master's orders in cases which do not affect the safety of the ship such as the route to be taken when there are alternative routes, time of departure or speed, or, if he is available, refuses to undertake pilotage after being requested by a Master or by a representative of a Pilotage Authority.

However, punishment for most of these cases of insubordination could nevertheless be imposed as a breach of regulations passed under other subsections or of regulations passed under the general provisions of subsec. 329(f). The use of the term "insubordination" is liable to create confusion, and, if this item is to be retained in future legislation, it ought to be qualified so as to conform with the context. Its relative inconsistency may be explained by the fact that the term was included in the Act as a result of the 1936 amendments (1 Ed. VIII c. 23) which were mainly aimed at increasing the disciplinary powers of the Pilotage Authority (this is studied in chapter 9). It would appear that the amendments were drafted under the false assumption that the Pilotage Authority had full control over pilots and the exercise of their calling.

The interpretation that a Pilotage Authority may exercise managerial power over pilotage is also incompatible with the context of the Act, which, as demonstrated earlier, provides for a scheme of free enterprise pilotage, even in compulsory payment Districts. It is a rule of interpretation that a statute must be read as a whole. The exercise of full control over providing pilotage service makes the Pilotage Authority, for all practical purposes, the contractor and the pilots its servants. The difficulty is compounded when the Pilotage Authority also imposes its choice of pilot on a ship for, by making a choice, the Authority assumes a responsibility that properly belongs to the ship and, therefore, gives an implied guarantee that the pilot is fit and reliable at the time of the assignment. Such a responsibility is in no way contemplated in the Act. A Pilotage Authority is an agent of the Crown. The terms and the extent of its mandate are found in legislation and must be strictly interpreted. When an Act imposes a duty on a Crown agent, and defines his powers, it is implied that Parliament has taken into consideration the fact that the Crown is answerable for any damages caused to third parties by the agent while acting within the limits of his mandate and in the performance of his duty.

Therefore, the following provisions contained in Pilotage District By-laws are illegal:

(a) Those to the effect that the Secretary or the Superintendent, as the case may be, is given the direction of pilots and that he may make orders which the pilot must obey. Sec. 3 of the British Columbia By-law is clearly illegal in the present context of the Act. It reads as follows:

> "3. (1) The Superintendent shall have the direction of the pilots and may make orders for the effective carrying out of this By-law and for the administration and management of the District and, without limiting the generality of the foregoing, may make orders with respect to
> (a) the conduct of pilots;
> . . .".

The pilots are not under direction and any rules regarding their conduct must be enunciated in regulations and not left to the discretionary power of any one, much less a representative of the Authority.

(b) All provisions whereby the pilots are not permitted to undertake pilotage except as assigned by the Secretary or by the Superintendent as the case may be, e.g., subsec. 23(1) of the B.C. District By-law, which reads as follows:

> "23. (1) Pilots shall undertake pilotage duty when and where required by the Superintendent and shall not pilot any vessel except as directed by the Superintendent".

(c) All By-laws that provide that a probationary licence can be withdrawn at any time by the Pilotage Authority upon receipt of an

> unfavourable report. The Pilotage Authority has never had any discretionary power over a pilot's licence. The Supreme Court decisions re McGillivray v Kimber *et al.* apply here as in other cases and the fact that a licence is called probationary does not change the situation. A Pilotage Authority must derive its right to withdraw a licence from specific provisions in the Act or from *intra vires* regulations. The ground for withdrawal upon an "unfavourable report" is not contained in any such provision.

(iv) *Remuneration for pilotage services.* The price payable by a ship for any pilotage service rendered is fixed by regulation under subsec. 329(h) C.S.A. The scope of subsec. (h) and the distinction between "pilotage dues" and "pilot's remuneration" or "pilot's earnings" and "pilot vessel earnings" were dealt with in chapters 5 and 6.

2. REGULATIONS CONCERNING PILOT VESSELS. The only statutory provisions contained in the Act regarding pilot vessels are subsec. 2(65) the statutory definition, secs 365, 366 and 367 re pilot vessels displaying a signal; sec. 364 making it an imperative obligation on the part of each Pilotage Authority to approve and license all pilot vessels regularly employed as such in each District and, finally, subsecs. 329(b) and (c) delegating to each Pilotage Authority the duty and responsibility of passing any further legislation needed to discharge its licensing responsibility for the requirements and peculiarities of its District. In the By-laws and in official publications pilot vessels are generally referred to as "pilot boats". (For distinction between "vessel", "ship" and "boat" vide C. 7, p. 213 & ff.).

Formerly, the Act contained additional sections (secs. 475 to 481, 1927 C.S.A.) regarding the markings which decked and open pilot vessels were to carry for ready identification, i.e., the name of the vessel, the owner and the home port. This regulation had its importance in the days of free competition when a number of pilot boats had to be available to enable all the pilots in a boarding area to vie for clients, but this situation no longer exists under a system where pilots are despatched, as required, by tour de rôle. In most boarding areas, pilot vessel service is now provided by a single operator. It was no doubt because these sections had lost their usefulness that they were deleted when the new Canada Shipping Act was approved in 1934.

Pilot vessel requirements vary from District to District according to local conditions and the type of pilot vessel service required, e.g., there is no comparison between a pilot vessel that would be considered safe and adequate for use on the St. Lawrence River in sheltered waters off Quebec, and one to be used in the seaward approaches to Saint John, N.B. or Triple Island, B.C. Small craft suffice where distances are short and few passengers are carried at any one time, but larger pilot vessels are essential for long trips in open waters, particularly where traffic is heavy and a number of pilots

must be carried for many hours, e.g., during the years when the Quebec seaward station was at Father Point and, in modern times, *inter alia,* at Sand Heads in the New Westminster District and at Halifax.

The Act authorizes two types of regulation regarding pilot vessels: licensing (subsec. 329(b)), and "companies for the support of pilot vessels" (subsec. 329(c)).

(a) *Regulations relating to licensing.* Subsec. 329(b) gives a Pilotage Authority power to make all necessary regulations related to licensing pilot vessels in the context of a free enterprise system, but it is not adaptable to the type of controlled pilotage that has developed. Subsec. 329(b) authorizes a Pilotage Authority to make regulations covering:

(A) requirements for approval;

(B) method of licensing;

(C) terms and conditions of a licence;

(D) remuneration.

(i) *Mandatory duty to make licensing regulations.* Licensing pilot vessels is a duty imposed by Parliament on a Crown agent, the Pilotage Authority. The obvious reasons for the licensing requirement are to ensure (a) the safety of the pilots and (b) the availability of suitable pilot vessels. This licensing power is not discretionary but is a quasi-judicial function whose exercise is governed by precise, adequate rules and requirements that must be contained in legislation. Since the licensing of pilot vessels is mandatory (sec. 364) and there is no requirement or rule in the statutory provisions of the Act concerning the discharge of this duty, it becomes mandatory for each Pilotage Authority to enact the necessary regulations, i.e., it has no discretion whether to legislate or not to legislate. As will be discussed later, the need for the Crown's control in this field is not as great today as it was formerly but the change has not as yet been reflected in the Act whose imperative provision remains unaltered. Whether it should be altered or abrogated will be considered later when licensing power is studied (vide p. 312).

A Pilotage Authority can not decide not to legislate on the matter nor can it satisfy itself with superficial, inadequate regulations because, as licensing authority, it is obliged to approve and license any vessels that meet the requirements as laid down in the regulations. Once regulations are made and approved by the Governor in Council, they become the law of the land which is binding on the Pilotage Authority as licensing authority just as on any other person. Therefore, if these regulations are found to be deficient, it is the duty and responsibility of the Pilotage Authority to have an appropriate amendment drawn up in accordance with the prescribed procedure. Until

such an amendment is legally approved, the Pilotage Authority is powerless to add any District criterion or requirement not already contained in the District By-law.

(ii) *Requirement for approval of pilot vessels.* The first criteria to establish in the regulations are type of vessel and type of equipment considered essential for safety and efficiency in the area. The By-law must ensure that pilot vessels are seaworthy and of suitable construction to carry out the hazardous manoeuvre of going alongside vessels to embark or disembark pilots in all the conditions of sea and weather that may prevail in the area where the service is to be performed. It must ensure that accommodation is suitable for the number of persons the pilot vessel is expected to carry during normal tours of duty, and must define the life-saving equipment and other devices and instruments to be carried, such as radiotelephone, radar and echo sounder.

(iii) *Licensing procedure.* As for licensing, the regulations should lay down a complete procedure, i.e., application form, supporting documents, verification and examination procedure, licence format, and forfeiture.

(iv) *Terms and conditions of licence.* In order to hold a licence, it is not sufficient for a pilot vessel to be seaworthy and suitable for service at the time the licence is issued: the required standard must be maintained and the vessel must be manned by competent personnel. Therefore, these additional factors ought to be dealt with in the regulations as terms and conditions of the licence. The scope of these terms and conditions is determined in subsec. 329(b) as follows: "make regulations respecting the . . . management and maintenance of pilot vessels and their equipment, . . . and respecting the distribution of the earnings of pilots and pilot vessels;". There is no authority to fix either the duration or number of licences, or to charge a licence fee.

Since there is nothing in the Act to authorize issuing term licences, all licences must be permanent or, at least, unlimited and their duration is affected only by failure to observe a regulation.

There is no authority to impose a fee for issuing a licence; such a debt to the Crown must be authorized by statute. As seen earlier, such authorization exists to set fees for pilot licences and pilotage certificates and for their renewal. Hence, the absence of such authorization for pilot vessel licences can only mean that no fee can be charged. It should be borne in mind that in the original concept of the scheme pilot vessels were owned and operated by the pilots themselves. Here again, it is not clear what useful purpose could be gained by imposing such a fee which, in any event, has always been nominal.

A Pilotage Authority is not authorized to regulate by by-law the number of pilot vessel licences it will issue. Because licensing is in itself an infringement on the freedom of the exercise of a right (in this case the right of the owners of vessels to transport pilots is limited to those vessels which meet the licensing requirements), it is a further infringement when the duty to license

is limited to a given number of licensees. When such a restriction was intended, a specific statutory provision had to be included, i.e., subsecs. 329(e) re pilots and 329(f) re apprentices. Since no similar statutory provision exists regarding the licensing of pilot vessels, the Pilotage Authority is bound to license any vessel which meets the requirements of the regulation, regardless of the actual requirements of the service and the number of licences issued at the time. Any regulation which limits the number of licensees would be ultra vires. This is in accordance with the situation contemplated by the Act, i.e., licences are issued to independent contractors engaged in a competitive business. It is also for this reason that the Pilotage Authority is powerless, through its regulations or otherwise, to compel pilots to use the services of any pilot vessel so licensed; it is the right of the pilot vessels to compete among themselves for the pilots as customers.

As seen earlier, this is not the situation now because the exercise of the pilot's profession is no longer on a competitive basis anywhere in Canada. If future legislation legalizes a fully controlled pilotage service, an unlimited number of pilot vessel operators would impede efficiency. Pilotage Authorities should be empowered to pass regulations limiting the number of operators to those requisite to meet local requirements, unless a Pilotage Authority is itself authorized to operate a pilot vessel service and does so.

The only terms and conditions that may be imposed by regulation are those falling within the categories enumerated in subsec. 329(b), i.e., the management and maintenance of pilot vessels including their equipment, and the distribution of their earnings.

The meaning of "maintenance of pilot vessels and their equipment" is clear, i.e., the standards required when the vessels were licensed must be maintained, but at first reading, *"management"* may be as misleading as "government" in subsec. 329(f). In its nautical sense manage means to handle or work a ship or boat (Shorter Oxford English Dictionary), and management of a vessel means all that is related to the obligation "to take reasonable care of the ship or some part of the ship, as distinct from the cargo" (Scrutton, *Charterparties*, pp. 243-245). Since the management of a vessel is to be regulated, and not the service the vessel is called upon to perform, this term can not be construed as authorizing a Pilotage Authority either to own a pilot vessel or to operate a pilot vessel service.

Furthermore, this interpretation would leave the regulations deficient because, in addition to seaworthiness, adequate maintenance and proper equipment, it is equally important for a vessel to be suitably manned and safely navigated. *Inter alia,* the Master must be competent, fit and reliable, attributes which are adequately covered by the first interpretation.

One consequence of the disappearance of free competition in the exercise of pilotage was the tendency for Pilotage Authorities to operate the pilot vessel service in their own Districts, e.g., New Westminster and Halifax. This unauthorized venture had serious legal repercussions which resulted in litigation.

At present, pilot vessel service is provided by the Government or by independent contractors in all large Pilotage Districts; a few small Districts under a local Pilotage Commission operate their own pilot vessels; in some Districts the service is still provided by the pilots individually.

To interpret the term "management of pilot vessels" as meaning the exercise of a pilot vessel service is inconsistent with the text of the section and with the context of the Act. The text provides a legislative and not an administrative power and the operation of pilot vessels by Pilotage Authorities implies vast additional responsibilities on the part of the Crown which Parliament neither authorized nor contemplated. Such an interpretation would be inconsistent with sec. 364, in that it would deprive Pilotage Authorities of their disinterested, unbiased position and thus theoretically disqualify them for their mandatory duty of approving and licensing pilot vessels.

A somewhat similar power existed legally only in the Quebec District when the Pilots' Corporation was created in 1860 and the free exercise of pilotage was abolished. Specific legislative provisions were required to give the Pilots' Corporation (not the Pilotage Authority) power to control both pilots and pilot vessels. When these powers were vested in the Minister in 1914, specific provisions to that effect were also required. The gist of these is essentially different to subsec. 329(b) because the term "control" was used. Sec. 1 of the 1914 Act (4-5 Geo. V c. 48) reads as follows:

> "1. The Minister of Marine and Fisheries subject to the provisions of the Canada Shipping Act, shall have charge of the examination, licensing, control and management of the pilots and pilot apprentices, and the control and management of pilot schooners, boats and other vessels for the pilotage district of Quebec . . . ".

The acceptance of *remuneration* for services as fixed in the regulations is an implied condition of a licence. Regulations to this effect are necessary only where regular pilot vessel service is furnished by third parties. As seen earlier, it is part of the contractual responsibility of a pilot to provide for his own transportation to and from a vessel he has undertaken to pilot. If local conditions are such that it becomes impracticable for pilots to furnish their own transportation, the Pilotage Authority states in its licensing regulations the amounts the operators of pilot vessels belonging to third parties are entitled to receive from pilots out of the dues earned for pilotage services rendered.

The distinction between "pilot earnings", "pilot vessel earnings" and "pilot boat charges" was studied in chapter 6, as was the recommended way they should fit in the regulations, either with or without the compulsory payment system (vide C. 6, pp. 182-184).

(v) *By-laws and factual situation.* However, existing By-laws do not correspond to the factual situation. The By-laws of the larger Districts

contain no provisions regarding approval, licensing, management and maintenance of pilot vessels and their equipment; the regulations concern remuneration for pilot vessel service and pilot boat charges only.

The main consequences of this omission are, first, Pilotage Authorities are powerless to comply with sec. 364, i.e., to discharge their imperative duty of licensing pilot vessels; secondly, the regulations which now purport to fix charges for pilot boat service are not binding.

At first sight, it would appear that in the absence of regulations governing prerequisites and conditions for licensing, all applications for a pilot vessel licence should automatically be granted as long as the object applied for can be identified as a vessel, whether or not it is seaworthy and suitable. However, this is not so. The absence of regulations or their inadequacy, which amounts to absence, makes licensing impossible. The mandate of a Pilotage Authority as licensing agent is to prevent vessels which do not meet required standards from being used as pilot vessels. In the absence of regulations, there are no standards to meet and no quasi-judicial decisions to render. The result is, in reality, a denial of the Pilotage Authorities' licensing power and any licence issued in such circumstances is null and void.

Just as with pilotage contracts, the power of a Pilotage Authority to intervene in the terms of contracts for pilot vessel service is a consequence of, and an accessory to, the power to issue licences. Acceptance by the licensee of the price fixed for his services by regulations from time to time is a condition of the licence. Therefore, when pilot vessel service is provided by non-licensees, charges remain a matter to be agreed upon by the pilots and the pilot vessel owners. A Pilotage Authority has no control over such a contract and has no power to enforce its regulations on an unlicensed owner.

After analyzing the regulation-making powers of Pilotage Authorities over the licensing of pilot vessels, it is pertinent to review the use that has been made of them. Pilotage Districts can be divided into the following categories:

(a) there is no need for regular pilot vessel service;
(b) pilot vessels are regularly employed but there is no regulation or charge in the tariff relating to pilot vessels;
(c) there are regulations and a covering item in the tariff;
(d) the regulation is limited to fixing pilot vessel earnings and there is a covering item in the tariff;
(e) there is no regulation but there is a covering item in the tariff.

Cornwall is the only District where there is no requirement for pilot vessel service. The pilots embark and disembark at both ends of the District, either in St. Lambert Lock or Snell Lock or at the approach walls. Since a pilot would have to embark or disembark en route only in unforeseen circumstances which can not be covered in the By-law, sec. 364 and subsec. 329(b) do not apply in the Cornwall District.

In the Newfoundland Districts of Botwood and Port aux Basques and in the Districts of Montreal and Quebec (in part), regular pilot vessel services exist, but their By-laws contain no regulation relating to pilot vessels. In the Newfoundland District of Humber Arm, the situation is the same except that a pilot boat charge is provided in the tariff. In these three Newfoundland Districts, the reason for the absence of licensing regulations is that the pilot vessels are owned and operated by their respective Pilotage Authorities and, according to the By-laws, the pilots are on salary. The Humber Arm By-law contains pilot boat charges in order to provide a higher charge when a tug must be used as a pilot vessel because of thick ice in the harbour.

Sec. 8 of the Botwood By-law segregates part of the pilotage dues for the operating expenses of the District and of the service, *inter alia,* for "the cost of acquisition, maintenance and operation of pilot boats".

Subsec. 8(3) of the Port aux Basques By-law provides:

> "Where, at the end of a financial year there is a surplus of funds in the Pilotage Fund over and above a safe operating capital after all salaries, remuneration and operating expenses including insurance and depreciation, replacement or renewal of the pilot boat have been settled, the surplus may, in the discretion of the Authority, be divided among the pilots and the boatmen."

While the Humber Arm By-law is not as explicit, it is to the same effect.

In a judgment rendered June 28, 1956, by the Supreme Court of Newfoundland (Dunfield J.) in the case of Nathan Dyke and the Pilotage Commissioners for Humber Arm, the organization of the Humber Arm District was found to be ultra vires under both the Canada Shipping Act and the pre-Confederation statutes concerning pilotage in Newfoundland, i.e., chapter 215 of the Revised Statutes of Newfoundland, 1952, entitled "Of Outport Pilots and Pilotage". Both Acts were considered by the Court as being practically nothing more than licensing Acts (S.C. Newfoundland, file 1955, No. 63). The ownership of pilot vessels and the provision of pilot vessel service by the Pilotage Authority were found ultra vires and extra-statutory.

In the District of Montreal there is regular pilot vessel service at Three Rivers and Longue Pointe and in the Quebec District at Les Escoumains and in Quebec Harbour. However, only the service at Les Escoumains is partly covered in the By-law. The other services are provided by independent contractors but they are completely ignored by the Pilotage Authorities of these Districts concerned as if they did not exist, or were not needed by the pilots to perform their duties. The legal consequences are:

(a) The actual cost of transportation in these pilot vessels should be borne by the individual pilot as part of his contractual expenses. No additional charge can be made against a vessel as part of pilotage dues, because there is no segregated item in the tariff to

cover it. Therefore, in the absence of a pilot boat charge in the tariff, it must be concluded that these operating expenses were taken into account when the rates were established and, hence, that they were included in the basic charge. A pilot can not refuse to undertake pilotage if a ship declines to assume these costs, because this would amount to demanding a higher remuneration, which is a statutory offence under sec. 372 C.S.A. and the pilot would then jeopardize his right to hold his licence for refusing to make himself available. However, this situation, which results from the failure of the Pilotage Authorities to discharge their licensing duties, is condoned by them.

(b) Unless a pilot is prepared to pay the cost of his transportation, a vessel which refuses to hire and pay the pilot vessel would be automatically exempted from compulsory payment (assuming it is in force) if, by such refusal, the Pilotage Authority is unable to provide a pilot.

However, to date, there has been no difficulty because the shipping interests have undertaken to provide these pilot vessel services under private arrangements concluded by the Shipping Federation of Canada with the contractors concerned, and to place pilot vessels at the disposal of the pilots, free of charge. These arrangements are outside pilotage legislation and have binding effect on the contracting parties only. While the costs are assumed voluntarily by ships, they nevertheless amount to an indirect overpayment of pilotage dues.

In a number of small Districts, lip service is paid to the requirements of the Act: a semblance of regulations relating to licensing is made and a pilot boat charge is included in the tariff. This is the case in all the local Pilotage Commission Districts in New Brunswick and Nova Scotia, i.e., Bathurst, Buctouche, Caraquet, Miramichi, Pictou, Pugwash, Restigouche, Richibucto, Shediac and Sheet Harbour. The provisions are all the same but the licence fee varies, e.g., the Bathurst District General By-law states:

"Sec. 24(1). No vessel shall be used as a pilot vessel unless there is in force a pilot vessel licence issued by the Authority.

(2). The Authority may, if satisfied after a survey that a vessel is suitable, issue a pilot vessel licence in respect of it, valid for a period of not more than one year, and may renew any such licence for periods of one year.

(3). The owner of a pilot vessel shall pay to the Authority a fee of $5.00 for the issue of a pilot vessel licence and a fee of $1.00 for the renewal of any such licence."

"Schedule A

Fee for Pilot Boat Service

4. In addition to the dues payable under sections 2 and 3 of this Schedule, all vessels subject to the payment of pilotage dues shall pay a fee of $15.00 for pilot boat services when entering the District and shall pay a like fee when leaving the District."

In all these Districts (if the provisions of their By-law are fully implemented), all money collected is pooled and the pilots are paid a share of the net income after paying District and pilots' expenses. There is no provision which establishes what part of the dues is pilot vessel earnings and what part is pilots' earnings.

In view of the principles established earlier, these By-law provisions (except items in the tariff), *inter alia,* prohibitions contained therein and term licences, are null and void. The suitability, or otherwise, of a pilot vessel should be decided by a Pilotage Authority acting in a judicial capacity and basing its judgment on standards and requirements laid down in regulations. These By-laws, as worded, are illegal amendments to the Act because they make a subject which the Act requires to be determined by legislation a matter for executive decision.

These By-law provisions illustrate faulty drafting. One of the rules of interpretation is "different words should not be used to express the same thing" (Driedger's *Legislative Methods and Forms,* p. 247). The regulations quoted refer to "pilot vessels", while the tariff refers to "pilot boats". Since the context indicates that both terms are synonymous it is obvious that the discrepancy is caused by loose drafting; the mistake was repeated in all District regulations as a consequence of standardizing texts (vide C. 7, pp. 213 and ff. for the meaning of the terms *vessel, ship* and *boat*).

The fourth situation arises in Districts where the regulation in question is limited to fixing pilot vessel earnings which, in all cases, are identified with the pilot boat charge established in the tariff. This appears in the By-laws in all Districts where pilot vessel service (or part of it) is furnished by the Crown, i.e., British Columbia (Brotchie Ledge), New Westminster, Churchill (provided by National Harbours Board), Quebec (Les Escoumains), Saint John, N.B., Halifax, Sydney and St. John's, Newfoundland.

Allowing for the variation in pilot boat charges, the By-law provisions in these Districts are similar to those contained in the Saint John Pilotage District By-law which reads as follows:

"9. . . .

(2) The Supervisor shall pay each month out of the Pilotage Fund the following:

. . .

(c) to the Receiver General of Canada, any amounts received in payment of charges made for pilot boat services as provided in the Schedule;

. . .

(8) For the purposes of this section moneys received on account of the pilot boat charge prescribed in the Schedule shall be deemed not to be pilotage dues.

. . .

Schedule

9. A charge of $10.00 is payable on each occasion that a pilot boat is used to transport a pilot to or from a vessel at anchor or entering or leaving the District."

The By-law is essentially incomplete in that it contains no regulation relating to licensing.

Subsec. 9(2)(c) of the Saint John By-law provides indirectly for sharing earnings between the pilots and the pilot vessel owner by stating that the pilot boat charge in the tariff is the price charged for pilot vessel service. As stated earlier, this provision is illegal for three reasons:

(a) Since no pilot vessel licences have been issued, no licensed pilot vessel is bound by the regulations.

(b) Indirectly it gives a franchise to the Crown to provide pilot vessel service by stipulating that all pilot boat charges shall be paid to the Receiver General of Canada. Therefore, if a pilot uses a pilot vessel which does not belong to the Crown, the pilot vessel charge is paid by the ship but, according to the By-law, since it was a fee earned by a pilot vessel, it has to be paid to the Crown, which did not render the service. Nevertheless, the pilot remains responsible for paying the cost of the pilot vessel out of his own pocket.

(c) As seen earlier (vide C. 6, p. 182 and ff.), a Pilotage Authority has no power to pay out any part of pilotage dues collected for pilotage services to anyone but its licensees and only in the instances provided for in the Act. There is no statutory exception for Government-owned pilot vessels as such.

Despite these irregularities and the resultant infringements on the basic rights of the pilots, this situation has never caused conflict or difficulty because, in fact, wherever this service is provided by the Crown it amounts to an indirect subsidy. Originally the service was free but a fee is now charged. However, the Crown charges the pilots far less than any private contractor would demand for a service offering the same standard of safety and reliability. Furthermore, the practice of having only one reliable pilot vessel operator meets present day needs for a controlled pilotage service.

The British Columbia By-law also contains an exceptional provision which is rendered necessary by the fact that it is a coastal District to which access can be gained by many routes, thus making it impossible to operate a pilot vessel service except at peak traffic points. Subsec. 13(3) of the Schedule containing the tariff reads as follows:

> "13(3). Where a boat is hired for the purpose of embarking or disembarking a pilot at a point other than at the pilot boarding station of Brotchie Ledge one-half the charge for the hire of such boat is payable by the vessel embarking or disembarking the pilot."

By Treasury Board Minute P.C. 1959-19/1093, dated August 27, 1959 the Crown undertook, *inter alia,* to provide regular pilot vessel service off Victoria and to assume half the cost of hiring pilot vessels elsewhere in the District (for background vide C. 5, p. 121). In the latter case, therefore, the pilot vessel fee charged to ships as pilotage dues is one-half the cost of hiring pilot vessels. This provision is not strictly legal because all items which form part of pilotage dues should be fixed directly or indirectly in the tariff. If neither the Crown nor shipping interests have any legal control over price-fixing, there may be abuses.

The fifth situation is found in the By-laws of the District of Prince Edward Island where a pilot boat must be used each time pilotage is performed, except for movages from one berth to another. The evidence has established that some pilots own and operate their own boats, while others always employ a fisherman or other boat owner. Although there is no regulation the tariff provides for pilot boat charges which have to be paid by vessels in all cases. However, when the services of a private operator are used these charges are not binding on him and he could demand higher remuneration. In such a case the pilot concerned is personally responsible for the difference.

COMMENTS

Since sec. 364 C.S.A. imposes an imperative duty on each Pilotage Authority to license every pilot vessel regularly employed as such in its District, two conclusions must be drawn from an analysis of the By-law provisions in this matter: (a) the Pilotage Authorities have failed in the discharge of their duties by not making the necessary regulations to enable pilot vessels to be properly licensed; (b) the Department of Transport, which serves as liaison between the Pilotage Authority and the Governor in Council for the approval of By-laws, is also to blame for not recommending that these By-laws be not approved on the ground that they were deficient in this regard. If the Department came to the conclusion that, in the existing circumstances, licensing of pilot vessels no longer had any useful application, it was its duty to submit the question to Parliament in the form of an appropriate amendment to the Canada Shipping Act so that Parliament

might decide. Until and unless such an amendment is passed, neither the Pilotage Authorities nor the Department has any right to ignore the law.

(b) *Providing aid for the support of pilot vessels* (subsec. 329(c)). This provision authorizes the passing of regulations for promoting the establishment of companies of pilots to operate pilot vessels. This provision dates back to the 1873 Act and refers to a situation which no longer exists. It deals with a case of exception to the free exercise of pilotage as a profession. On account of the expense entailed it is, in certain places, beyond the financial means of any individual pilot to own and operate a suitable pilot vessel. In order to remedy this situation, the pilots of the Districts concerned were encouraged to enter into partnerships to operate pilot vessels which competed for clients.

In 1778, an ordinance by Governor Dorchester grouped the Quebec pilots into companies of two per pilot boat. In the Saint John District where larger boats were required, a prerequisite for a pilot's licence was to own not less than four tons of a pilot vessel and the partnership per pilot vessel was composed of seven to ten pilots.

The special system that existed in Quebec between 1860 and 1905 did not come within the scope of this provision. The situation differed basically because the 1860 Quebec Pilot's Corporation Act did away with competition and all the 280 pilots were compulsorily grouped into a single partnership.

Subsec. 329(c) can not be construed as authorizing a Pilotage Authority to control or operate a pilot vessel service. Again it is merely one of the subject-matters upon which the Pilotage Authority is authorized to legislate and there is nothing in the subsection which permits an Authority to increase its own administrative powers by legislation.

Subsec. (c) no longer has any practical significance. For many years no regulation has been made under it and it is believed that, in the light of existing conditions, its retention is no longer warranted.

3. REGULATIONS REGARDING ENQUIRIES (subsec. 329(f)) AND SETTLEMENT OF DISPUTES (subsec. 329(k)). A provision buried in subsec. 329(f) gives power to Pilotage Authorities to establish by regulation the procedure to be followed at *enquiries* they are authorized to hold or to have carried out on their behalf under Part VI. Very little use is made of this power. An *ad hoc* procedure is provided for dealing with specific matters, but no By-law contains a code of general rules governing enquiries.

Since the question is studied at length in chapter 9, suffice to say here that the lack of interest on the part of Pilotage Authorities in a matter so vital to the effective and efficient discharge of their duties and responsibilities may be caused by the limited scope of their powers of investigation and the absence of effective means to conduct a full investigation. An additional reason may be the habit contracted over the years (apparently for the sake of expediency) of dealing with these matters in a most haphazard manner.

The specific cases where a procedure is specified in the regulations are the investigations required to implement subsecs. 329(g) and (j). All by-laws contain some regulations regarding the exercise of judicial powers by the Pilotage Authority with regard to the discipline of pilots, purportedly under the authority of subsec. 329(g), but only a semblance of rules of procedure is enunciated. In By-laws recently amended, such as sec. 23 of the Halifax District (1966 By-law amendment), the situation is even worse from the procedural point of view. This section provides only that the Pilotage Authority "may appoint a person to hold an enquiry to determine the validity of the charge", but no procedure is laid down stating how the enquiry is to be carried out, nor how the charge is to be laid, nor how the accused is to be afforded the opportunity to provide his defence (C. 9, pp. 397 and ff.).

The procedure is complete for regulations passed under subsec. 329(j) but, as will be seen later in chapter 9, the adequacy of the methods employed is questionable.

With reference to *disputes*, subsec. 329(k) authorizes the Pilotage Authority to provide by regulation the procedure "for the adjustment and decision of questions and disputes . . . respecting pilotage matters".

Most Pilotage Authorities have not taken advantage of this regulation-making power, with the result that, in the absence of procedure, this quasi-judicial power can not be exercised.

The By-laws of some Commission Districts, i.e., Botwood, Caraquet, Humber Arm, New Westminster, Pictou, Port aux Basques and Pugwash, contain the same general provision which reads as follows:

> "All questions and disputes arising among pilots, masters of ships and other persons respecting pilotage matters shall be referred to the Authority in writing for adjustment and decision; and the decision of the Authority shall be final."

It is considered that this By-law provision goes beyond the power of regulation-making granted by subsec. (k) in that, in addition to providing a semblance of procedure, it contains substantive law, i.e., denies the parties concerned the right to be informed of the allegations made by the other litigant and to appear and present orally or in writing whatever evidence may be pertinent to the case. The only rule of procedure contained in this regulation is that a statement of the case is to be filed in writing by either litigant, upon receipt of which the Authority is empowered to render a decision final and binding upon both parties, and all without any form of trial.

The basic deficiency of this By-law provision and the absence of any provision on the matter in the By-laws of the other Pilotage Districts indicate that the power to settle disputes is not exercised in any way by any Pilotage Authority. This is probably due to the fact that under the present organization there is little cause for serious contention between pilots and Masters.

Formerly, under the competitive system, more than one pilot often claimed dues on the ground that each had been the first to offer his services on an inward voyage. The Robb Royal Commission reported in 1919 that the main trouble in Saint John, N.B. was caused by disputes between pilots and Masters, and even among pilots themselves, which resulted from the competitive arrangements then existing "whereby a ship may be called upon to pay two pilotages, owing to not taking a pilot who claims to have offered his services first, and not being seen by the ship".

COMMENTS

The question whether such quasi-judicial power should be retained will be determined by the rôle the Pilotage Authority is to play in the future, bearing in mind that whenever a Pilotage Authority itself becomes, directly or indirectly, a party to a dispute it is no longer in a position to pass disinterested, unbiased judgment.

4. CREATION OF PILOT FUNDS (subsec. 319(*l*), 1934 C.S.A. and subsec. 329(m), 1952 C.S.A.). These subsections authorize any Pilotage Authority, except Quebec, to create a pilot fund alone or as part of a group by providing in its By-law the terms and conditions of the fund, the beneficiaries and the benefits. However, fixing the compulsory contributions of the pilots is no longer a matter of regulations; a minimum contribution of 5 per cent of each pilot's earnings is fixed in the Act and since 1934 the actual amount is to be fixed by agreement between the Pilotage Authority and its pilots and, in case of disagreement, is fixed by the Minister acting as arbitrator. Despite this basic change, the matter continues to be covered in By-laws by provisions which are in contradiction with the statutory provisions of the Act and are, therefore, ultra vires (vide p. 298). This point will be analysed later and the whole question of the present situation of the various *Pilot Funds* will be the subject of chapter 10 (vide also p. 298 *infra* re grammatical error in text).

Subsec. 329(*l*) of the 1952 Act is not yet in force. By virtue of a restriction contained in sec. 734, C.S.A., the former provision, i.e., subsec. 319(*l*) of the 1934 Act is to remain in operation until the new subsection is proclaimed. This has not yet been done. The only difference is that in the new subsection the exception concerning the Quebec District is deleted, thus depriving the Quebec Pilots' Corporation of the administration and trusteeship of their Pilot Fund which they have held since 1875 (vide Quebec Pilotage District). It appears that the Government has not yet considered it advisable for the Pilotage Authority of Quebec to take over the pilot fund from the Corporation.

5. REGULATIONS ON DELEGATION OF POWERS. Normally a Crown agent must exercise the functions and duties imposed on him by Parliament and can not delegate any of his powers unless he is specifically authorized to do so

by a statutory provision. Such an exception is provided for Pilotage Authorities on two occasions in C.S.A. Part VI, i.e., subsecs. 327(2) and 329(p), the pertinent parts of which read as follows:

"327 ...

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

"329 ... every pilotage authority shall ... have power ... by by-law confirmed by the Governor-in-Council, to

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

This power to delegate is a novel concept in Canadian pilotage legislation.

As a rule, when Parliament enacts a statute creating an agency or office on which powers are conferred, these powers must be exercised by the agent or the officer concerned and can not be delegated. Former pilotage legislation observed this principle which was consistent with the type of pilotage organization in effect at the time, i.e., an independent area under the direction of a Board which was in constant attendance. This Board alone was authorized to exercise the powers conferred on the Pilotage Authority, and its Secretary and Treasurer had clerical responsibilities only.

The Quebec Trinity House Act, for instance, stipulated that the examination of pilot candidates was to be carried out by Trinity House itself in the presence of any branch pilot who wished to attend. In 1893, a sentence pronounced against a Montreal pilot involved in a shipping casualty was quashed because it had been imposed, not by the Pilotage Authority, but by a committee appointed by the Authority. The Court found that the Montreal Harbour Commissioners (then the Montreal Pilotage Authority) had no power to delegate this function to a committee. The sentence was considered an absolute nullity which could not be remedied even by the acquiescence of the accused in the proceedings (Toupin v les Commissaires du Havre de Montréal, 1893, 4 C.S. 43).

This rule was first broken in 1933 as a result of the situation created in certain large Districts by the appointment of the Minister of Transport as Pilotage Authority. His permanent absence from these Districts combined

with his departmental duties prevented him from giving personal attention to most of his responsibilities as Pilotage Authority. Furthermore, it was doubtless realized that the delays caused by having to refer all matters to Ottawa for decision were prejudicial to efficient District administration. Hence, 23-24 Geo. V c. 52 (now subsec. 327(2) C.S.A.) was passed in 1933 conferring on the Pilotage Authority whenever the Minister was appointed as such, and only then, power to delegate by legislation any of his functions or powers, either to the District Superintendent of Pilots or to any other named person, at his discretion. In view of the fact that the type of delegation provided for is strictly legislative (i.e., the delegated power should be fully described and the delegation completed in the District By-law) once the By-law is approved, the specified powers are automatically vested in the named delegate and the delegation can be cancelled only by making a new regulation.

When the Canada Shipping Act was revised in 1934, the same power, but with a different procedure, was extended to all Pilotage Authorities by the addition of subsec. 319(p), which became subsec. 329(p) in the last consolidation of the Act, and, for unknown reasons, the 1933 legislation was retained as a separate section (now subsec. 327(2) C.S.A.).

The power conferred by subsec. 329(p) is, in effect, the same as provided by subsec. 327(2) except that it is granted to all Pilotage Authorities, and also may take effect in two stages, i.e., legislative authorization to delegate followed by action under such authorization. As in subsec. 327(2) the nature and extent of the delegation of power and the identification of the delegate must be defined in the regulations. An authorization is valid only when the person appointed, and his powers, are defined in the By-law. To leave any discretion to any one in a regulation is not authorizing by legislation but delegating power to authorize, and this the Pilotage Authority, as legislative authority, is not empowered to do.

Whether a regulation is passed under subsec. 327(2) or subsec. 329 (p), it must identify without ambiguity any person to whom a delegation of power is made, normally by referring to the office he holds, e.g., Superintendent of Pilots, senior pilot, or chief officer of Customs. When this person is identified by the office he holds, it is a prerequisite for him to be the lawful holder of that office. For instance, when powers are delegated to the Secretary of a Pilotage Authority no one can exercise these powers except the person who holds that office by appointment from the Pilotage Authority duly sanctioned by the Governor in Council pursuant to sec. 328. Again, if powers are delegated to the Superintendent of Pilots in a District, only the person who holds that appointment from the Pilotage Authority is authorized to act. The evidence has revealed that in local Commission Districts, only very few of the secretary-treasurers hold a legal appointment because the sanction of the Governor in Council has not been obtained and in all Districts where the Minister is the Pilotage Authority, no Supervisor or Superintendent holds an appointment from the Authority as such. They are

merely employees of the Department of Transport who have been engaged by the Civil Service Commission which holds no mandate from the Pilotage Authority to appoint its representatives. Such a mandate would be a delegation of power and, therefore, can not be valid under either section of the Act unless it is contained in the District By-law. This is not the case at present.

A regulation providing for a delegation of power to someone who can not be clearly identified makes an improper use of power to delegate. If the Act is amended on this matter, it is considered that the identity of each single appointee should always be fully established by regulation but the rule might be relaxed somewhat if powers are to be exercised by a board. The appointment, or designation, of a single appointee should be contained in a regulation as a means of control because, in effect, the delegate becomes an officer of the Crown for whose wrong-doing the Crown is answerable. Measures ought to be taken to ensure that the powers Parliament has given to a Crown agent (in this case the Pilotage Authority) do not fall into untrustworthy or unqualified hands. The qualifications of a delegate should always be covered in a regulation but, depending upon the nature and extent of the power to be delegated, other factors may also be equally important. Delegation of authority is a trust, and it is the responsibility of the delegator to ensure that the delegate is reliable. Such a duty can not be discharged without the latter's identity being established by the Pilotage Authority and, since this is part of its legislative responsibilities, identification must be by regulation.

When delegated powers are to be exercised by a board, the identification, in future legislation, of all its members need not be complete. There is no basic objection if the appointment of some members of a board is left to the discretion of third parties named in the regulation, provided the qualifications of those members are stated in the regulation. For instance, if it is felt advisable to give pilots the privilege of choosing one of their number as their representative on the Board of Examiners it would be prudent to add in the regulation what qualifications the pilot should have, e.g., a minimum of 10 years active exercise of the profession or Grade A pilot. By such a procedure the regulation-making authority ensures that the representative is competent and qualified to make a meaningful contribution to the Board of Examiners. If blanket authority is left to the pilots they may elect the least qualified simply because he is available or gains the support of the majority. Such representation is not permitted at present but if it is ever authorized, the pertinent provision in the statute should be carefully worded to void unqualified delegation of authority.

The second aspect of delegating powers, i.e., acting upon authorization, may take the form of either an executive or a legislative order. No doubt that explains why Parliament employed such unusual wording in subsec. 329(p); if the term "pilotage authority" had been qualified when used for the second

time by referring only to its administrative function, the result would have been to deprive a Pilotage Authority consisting of a board from making a firm delegation of powers. The inclusion in a regulation of a firm delegation indicates not only that the delegation is authorized, but that the Pilotage Authority has acted upon it. To say in a regulation that "the Secretary is authorized to . . . " has the same meaning as "the Pilotage Authority is given the power to authorize its Secretary to. . . and the Pilotage Authority, acting upon such power, does hereby authorize its Secretary to. . .". Therefore, since under subsec. 329(p) any Pilotage Authority may do what only the Minister could do in 1933 under subsec. 327(2), it is not clear what useful purpose subsec. 327(2) now serves. Since it appears to be only an unnecessary duplication, it is considered it should have been revoked.

But under subsec. 329(p) a delegation of powers defined in a regulation may also be brought into effect by an administrative order. In such a case, delegation is virtual until it becomes actual at a time selected by the administrative authority. If a regulation contains a firm delegation, an amendment to the By-law is required to effect cancellation, but if the delegation takes effect as a result of an administrative order, another administrative order is sufficient to cancel it, and the administrative authority may revive it as often as required by further administrative orders.

The reason for the difference between the provisions of subsec. 329(p) and subsec. 327(2) is found in the basic difference between the two types of Pilotage Authority. A local board need not, and, as a rule should not, bind itself by a firm delegation. It is only in very exceptional circumstances that a Crown agent should resort to delegation because the discharge of his duties is, and always remains, his own personal responsibility and he alone is answerable to the Crown. Since a board is always on location in its District it should retain, at all times, the right to exercise most of its powers alone. In dealing with current problems it then becomes a question whether a particular matter should be attended to by the board, or by delegation of authority, if and as provided for in the By-law. Conversely, when the Minister is Pilotage Authority, firm delegation is indicated as a matter of course, for the reasons which prompted the 1933 legislation, as seen above. However, the other procedure is now also open to him.

The generality of the terms of subsec. 329(p) (and to the same extent subsec. 327(2)) raises another question of interpretation: whether or not the power to make regulations is among the powers a Pilotage Authority may delegate. It appears that only administrative functions and powers are subject to delegation by a Pilotage Authority.

There is a basic difference between the two types of powers. The rôle of Parliament is to legislate, not to administer, and, hence, administration is effected by Crown officers (improperly called, from the delegation point of view, *Crown agents*) whose offices and powers are created by legislation. The

administrative powers vested in a Pilotage Authority are not delegated powers but original powers which Parliament could not exercise in a practical sense. Conversely, regulation-making powers possessed by a Pilotage Authority are essentially delegated powers. A cardinal rule of interpretation is that a person who enjoys a delegated power can not delegate any part of that power without specific authorization by statute. "*Delegatus non potest delegare*". Since the delegation of legislative power to a regulation-making authority is a procedure of exception, the terms of delegation should be strictly interpreted to obviate all doubt and ambiguity. *A fortiori,* this rule also applies to sub-delegation of legislative power, which is authorized unless there is a specific, enabling statutory provision. Existing legislation authorizes a Pilotage Authority to delegate by regulation its own functions and powers but not the functions of Parliament, i.e., to delegate but not to sub-delegate.

As far as legislative authority is concerned, it should be noted different levels of authority are justified only when a definite requirement exists. In such a case a specific delegation of powers is always desirable and an indiscriminate delegation of legislative authority is never warranted. Under the organizational scheme of Part VI, which foresees autonomous and self-supporting Pilotage Authorities, there is no need for any such sub-delegation. However, the power to sub-delegate legislative authority may well be indicated if future legislation creates a central Pilotage Authority endowed with legislative powers in certain fields. If regulations of general application are not indicated, it would be quite proper for the central authority, if so empowered, to sub-delegate to local Pilotage Authorities the power to legislate on these subject-matters in order to meet local requirements. Such legislation would, of course, be valid only for the District concerned.

It should be remembered that such sub-delegated power remains a power of legislation and, therefore, can be discharged only in the form of regulations which, *ipso facto,* become subject to the prevailing regulation-making procedure, i.e., under the present legislation, the Governor in Council's approval (subsec. 331(1) C.S.A.) and the Regulations Act. It is, therefore, an improper sub-delegation of a legislative power to stipulate that conditions and requirements are left at some person's discretion because this would amount to converting a legislative power into an administrative power, a step which is not permissible.

A delegation of authority does not mean abandonment of authority. A delegator does not lose a power he has delegated and a delegate may exercise the power so delegated as if he were the delegator, and both may then exercise it. The delegator retains the superior position and, therefore, may overrule any decision taken by his delegate, except when rights have been acquired by third parties as a result of the delegate's decisions. For instance, if a Superintendent who is authorized to hold an inquiry decides not to proceed, the decision does not create any right and may be overruled by the

Pilotage Authority, but if the Superintendent is given licensing authority, any licences legally granted by him can not be cancelled for that reason by the Pilotage Authority.

Under existing legislation it is not possible to make delegated power exercisable by a delegate alone. Since the Pilotage Authority is the delegator, the possession of the powers being delegated becomes a prerequisite to the delegation, and since the Pilotage Authority received these powers from Parliament, it has no right, unless so authorized by the Act, to abandon them. However, for the sake of good administration, it might be desirable, in certain areas, to allow a certain finality for delegates' actions and decisions. The evidence has shown that the existence of a higher authority who can overrule any decision of a delegate on any ground amounts, in fact, to a denial of the delegate's powers and, hence, the purpose of the delegation is not achieved. An unfavourable decision is likely to be appealed if all those who are in a position to pass judgment can have it altered, i.e., where the Minister is the Pilotage Authority, the departmental officers concerned all the way up to the Deputy Minister, and even to the Minister. This undermines the authority of the delegates who soon shy away from taking responsibility for fear of being overruled. Appropriate statutory provisions will be required to prevent arbitrary decisions. However, if a decision results from the exercise of a discretionary power, the delegator should not retain the power to intervene.

FACTS AND COMMENTS

Very little use is made of the power of delegation, even by the Minister as Pilotage Authority. In District By-laws four types of delegation occur:

(a) to the Secretary or the District Superintendent;

(b) to the Board of Examiners over candidates' professional competence;

(c) to a medical officer or board over pilots' physical and mental fitness;

(d) to the Investigating Officer in a disciplinary case.

Most of the powers delegated to the Secretary or the Superintendent are managerial in character and most of these are ultra vires. The evidence has revealed that Superintendents make very little use of the powers so delegated because of the "centralization attitude" of the Ottawa-based advisers to the Minister as Pilotage Authority. The effect of the delegation is defeated because local representatives take no responsibility either for fear of disapproval from superiors, or for lack of rules and policies from the Authority, with the result that even minute details of local administration are handled in Ottawa to the detriment of efficiency. It is considered that if the possibility of a non-resident type of Pilotage Authority is to be entertained, future legislation should be drafted to make fuller use of the power of delegation and to

provide that most administrative decisions are dealt with at local level. The powers of such a non-resident Authority would then be limited to questions of policy and to establishing criteria both in regulations and administrative rules to guide local officials. For instance, as far as licensing new pilots is concerned, the Pilotage Authority (unless it is located in the District) should have its activities limited to establishing qualifications, type of apprenticeship, number of pilots, types of licence and similar matters, all by regulation. The implementation of these regulations should be delegated to a local person, e.g., the Superintendent, who would be responsible for convening the Board of Examiners whenever a vacancy occurs whether caused by the departure of a pilot or by an increase in the numbers approved by a regulation made by the Pilotage Authority. On receipt of a favourable report from the Board of Examiners the Superintendent should be authorized to issue licences automatically without having to seek *ad hoc* authorization and direction from his superiors.

The mandate of the Board of Examiners is generally well defined in the regulations but the method of appointment is faulty in that the complete designation of each member is not contained in the regulations. As an example the provisions for the appointment of the Board of Examiners in the Bathurst District By-law are irregular or at least incomplete:

> "11 (1) There shall be a Board of Examiners consisting of three members appointed by the Authority."

Although it is more elaborate, the B.C. District By-law is also irregular in that only one of the five members in clearly identified and the four others have to rely for appointment on the discretionary power of other parties. Sec. 16 of the B.C. By-law reads as follows:

> "16. There shall be a Board of Examiners composed of
>
> (a) two representatives of the Authority, one of whom shall be the Superintendent who shall be the Chairman;
>
> (b) a member of the Pilot's Committee who shall be selected by that Committee;
>
> (c) a pilot of the District who shall be appointed by the Superintendent; and
>
> (d) a master mariner who shall be appointed by the Authority."

The fact that as a rule the appointment of some members is left to the entire discretion of an authority or a group of persons does not necessarily mean that it meets an actual need: very often it is either an easy and non-committal way of performing a regulation-making duty or a compromise solution to a contentious problem. Precise identification means amendments to the regulations when circumstances change and no matter how tedious this may appear to be, it is the very purpose of legislation by regulation in that

features of a temporary character can be easily dealt with by this summary, simplified legislative process. The designation by regulation of the members of a board or committee is a legislative function which defines policy, but, because it deals with problems in the abstract, it may give rise to controversy. Hence, the easy way out is often taken by dealing with the matter on an *ad hoc* basis without establishing any rule. This solution is irregular because a legislative responsibility is transformed into an executive power.

Nor does the present statute permit a Pilotage Authority to appoint (assuming such an appointment is permissible), anyone to hold an investigation which is part of the disciplinary process, unless identification is contained in the regulations. Subsec. 329(f) authorizes a Pilotage Authority to make regulations for holding enquiries either by it or by some other person on its behalf, but the power to carry out investigations and to have them carried out by others must be found elsewhere. As will be indicated later in chapter 9, a Pilotage Authority has almost no power of inquiry and no direct power of discipline. But any blanket power of appointment given by regulations to the Pilotage Authority (such as sec. 23 of the Halifax 1966 By-law) is illegal, *inter alia,* because neither the required qualification nor the identity of the appointee is included in the By-law. Furthermore, it is considered that such undefined delegation should never be permitted on account of the consequences its exercise implies. Since the findings of an enquiry entail decisions of major importance to the pilot concerned, it is most important that at least the qualifications of the presiding officer should be set out in the regulations in order to avoid abuses and any resultant injustice.

The wording of subsec. 329(p) is another example of unsatisfactory drafting because it lacks clarity and is open to various conflicting interpretations which may be the cause of confusion and contention.

6. REGULATIONS RE EXEMPTIONS (subsecs. 346(c), 346(h), sec. 347 and subsec. 357(2)). In Districts where the Governor in Council has made the payment of dues compulsory, the Pilotage Authority is authorized to grant some exemptions and to withdraw or vary others granted by the Act (vide C. 7).

As previously stated (C. 7, p. 212), the primary purpose of the compulsory payment system is to ensure regular employment for the pilots, thus allowing them to gain the experience they require to maintain and improve their qualifications. Under present circumstances, and even more so in the future, safety of navigation ought to be the determining factor. Since all these questions must necessarily be decided on the basis of local conditions, marginal cases must be left to local authorities. For this reason the Act divides vessels into three classes for exemption purposes: (a) all exemptions are denied, (b) absolute exemption, and (c) exemptions dependent on regulations passed by the Pilotage Authority (vide C. 7, p. 221 and *seq.*).

Subsec. 346(h) creates a problem in that it is not clear whether decisions by a Pilotage Authority to exempt or not to exempt a warship or hospital ship of a foreign country are legislative or administrative. The text requires clarification. At first sight, these decisions appear to be legislative because in effect they amend legislation, but such an interpretation would defeat the very purpose of the power granted because it would be incompatible with the circumstantial context. If these orders are of a legislative nature, the registration and publicity procedure of the Regulations Act would apply, the approval of the Governor in Council would be required and, furthermore, the matter would have to be dealt with in terms of policy and not on an *ad hoc* basis. The situation contemplated here is, in fact, of a very exceptional character because warships and hospital ships of foreign nations seldom call at Canadian ports. To make regulations means to establish rules; hence, where no rule is indicated no regulation is necessary, and each case should be dealt with on its merits.

7. COMMENTS ON REGULATION-MAKING POWERS AND THEIR USE. The regulation-making powers granted to a Pilotage Authority are adequate in substance for the type of Pilotage Authority and the scheme of organization now provided in the Act, i.e., simply a licensing authority and a pilotage service provided by free entrepreneurs. However, these powers are completely inadequate in the context of present day pilotage needs and, therefore, if the function of the Pilotage Authority is modified in future legislation, the scope of regulation-making powers should be revised and enlarged.

The description of subject-matters leaves much to be desired in language, form, clarity and logical arrangement. Most of the essential rules of drafting have been contravened. Flagrant mistakes cast doubt on the applicability of the normal rules of interpretation regarding the remainder of the legislation, e.g., too strict a meaning can not be attached to the wording of the 1934 amendments when the haphazard manner in which they were drafted and the mistakes they contain are realized. For instance, from a strictly grammatical point of view, the last part of subsec. 319(*l*)(1934 C.S.A.) can only be interpreted as meaning that the minimum contribution of pilots towards the pilot fund ought to be not less than 5 per cent of the Minister of Transport's own earnings. This obvious grammatical error which was made in 1934 has not yet been corrected, and was even repeated when the Act was consolidated in 1952 (subsec. 329(*l*)).

It is inexplicable why so many ultra vires regulations have been made and approved. It can be understood that some local Pilotage Authorities whose members have no legal training and little experience with legislative language may misinterpret their rôle and their powers and, therefore, may be prompted to include ultra vires provisions in their By-laws. The same may also be true of specialists in marine matters who act as advisers to the

Minister as Pilotage Authority, if no legal direction is given to them as to the scope of the Act and the meaning of its various provisions.

What is difficult to understand is how ultra vires By-laws prepared by these persons can pass unnoticed by the various legal advisers whose duty it is to check them, both in the Department of Transport and with the Department of Justice, before they receive the Governor in Council's approval.

It is conceded that slight irregularities are always liable to pass unnoticed and that it is possible to include provisions whose legality depends upon the interpretation given to other provisions of the Act and which, therefore, are not patently illegal. But it is inconceivable that so many ultra vires provisions were allowed to be made, some of them so flagrant that it is incomprehensible how they passed unnoticed. It is considered that the first duty of reviewing legal officers is to ensure that statutory authority exists for each provision of a proposed by-law and also that the proposed regulations do not conflict with the legislation taken as a whole.

The present method of fixing the compulsory contribution of the pilots to their pilot fund is a good illustration (among many others) of this point. Since 1934 the question has ceased to be an absolute subject-matter of the legislative power of the Pilotage Authority. In the last part of subsec. 319(*l*), 1934 C.S.A., Parliament imposed a condition and established a procedure. For once, the provision is expressed in clear, simple terms (except for the grammatical mistake referred to earlier). The Pilotage Authority alone now has no power to fix the amount of contributions—this must be decided by agreement between the Pilotage Authority and its pilots and, if this proves impossible, the amount is then fixed by the Minister of Transport, acting as arbitrator. The amazing fact is that, in every District where there is a pilot fund administered by its Pilotage Authority, no heed is taken of the amendment, every By-law contradicts the imperative provisions of the Act and, hence, is ultra vires. The Halifax By-law gives full discretionary power to the Pilotage Authority, without consulting the pilots, on the basis of an actuarial valuation. In other Districts the Pilotage Authority has the final decision. The pilots are given only a consultative rôle through their Pilot's Committee whose authority is not founded on any provisions of the Act. In the British Columbia District, as a result of a 1966 By-law amendment, the amount is determined at the end of each year by the Pilots' Committee and neither the Pilotage Authority nor the Minister shares in the decision. That such action has been taken because the Minister is the Pilotage Authority in those Districts and the By-law is merely a simplification of the procedure defined in the Act, can not be accepted as a valid reason. Since the office of Pilotage Authority and the office of Minister of Transport are two different entities, their only permissible relationship is that the two offices may be held at the same time by the same person. Even this slim excuse can not be offered for Districts where the Minister is not the Pilotage Authority, such as New Westminster.