B. LICENSING POWER

The licensing function of Pilotage Authorities is the basic feature of the pilotage organization provided by Part VI of the Canada Shipping Act. Therefore, the various sections dealing with licensing power must be correctly understood because all other powers with which Pilotage Authorities are endowed depend upon the proper implementation of licensing. Otherwise, except a few sections of general application, the remaining provisions of Part VI are meaningless.

Licensing is an administrative function of a *quasi-judicial character.* When a licence is granted it means, in essence, that the candidate meets the requirements and standards detailed in legislation. A Pilotage Authority has no discretion in this regard but must be guided by the prescribed legislative criteria. Any candidate has an absolute right to be licensed if he complies with the conditions imposed by legislation and meets the required standard, *onus probandi.* When licensing jurisdiction over the number of licences that may be issued is unlimited, a Pilotage Authority is bound to issue licences to every applicant who fulfills the requirements. An applicant can not be failed because the Authority considers he lacks qualifications which are not required by legislation. As far as licensing is concerned, the Authority is bound by the provisions of the Act and of the regulations as they stand at the time. If a candidate is failed under these circumstances, he is entitled to seek redress by prerogative proceedings against an abuse of authority. Conversely, no matter how exceptional the circumstances may be, a licensing authority can not pass an applicant who does not meet the legislative requirements, for such action would also be an abuse of power which would nullify the licence. If the criteria set out in the regulations are considered deficient or excessive, it is the responsibility of the licensing authority to take the necessary steps to have them modified without delay, but until this is done the regulations as they stand are the law. If an emergency arises due to a shortage of pilots, the remedy is not to license unqualified pilots, but to inform Masters and agents and allow them to employ any unlicensed persons they choose. Under such circumstances, a responsible Pilotage Authority would render Masters and agents a service by stating which non-licensed persons are best qualified, e.g., retired pilots; Masters and officers who have been employed in regular traders; fully qualified apprentices who have not been licensed because there is no vacancy or because they are beyond the age limit; apprentices who are near the completion of their apprenticeship. When the number of pilots is limited, the Pilotage Authority has no discretionary power to accept or reject qualified candidates. It must be guided by the acquired rights of the candidates according to the regulations and, if there are no applicable regulations, it must be guided by equity and the best interests of the pilotage service.

Once a licence is granted, the Pilotage Authority has no control over its duration as long as the holder conforms to the regulations and the Act. It is part of the licensing function to ascertain whether a licence holder continues

to meet requirements and to maintain the necessary standards. However, a Pilotage Authority's right to interfere with the duration of a licence, either by suspension or cancellation, is limited to the instances specified in the Act or in valid regulations. The licensing function also includes and implies a duty of surveillance. In addition to being responsible for ensuring that the Act and regulations are observed, the Pilotage Authority is responsible, within the limits laid down in the Act, that the pilots remain competent, fit and reliable. These responsibilities are studied in chapter 9.

As pointed out before, the absence of legislative criteria for the essential qualifications of a licence holder amounts to a denial of licensing power because, in the absence of standards by which to gauge the competency of a candidate, no judgment can be made. Hence, legislative criteria and rules must be contained either in the statute or in valid regulations.

Types of Licensing

A licence certifies that the holder possesses at least the minimum degree of competence defined in applicable legislation. Pilotage licensees may be divided into two groups:

(a) the licensees who perform pilotage, i.e., qualified pilots (divided into grades in some Districts), and Masters and mates holding certificates to pilot their own ships. Persons not in possession of a pilot's licence or a pilotage certificate who are employed merely as advisers on local conditions might also be included;

(b) licensees who provide auxiliary services which enable the pilots to perform their duties, principally pilot vessel operators but, under certain circumstances, those who provide land or air transportation and, in some areas, linesmen and wheelsmen.

In group (a), the Canada Shipping Act limits the licensing powers of Pilotage Authorities to pilots, Masters and mates; in group (b), to pilot vessel operators. However, there is no objection to extending licences by appropriate legislation to other persons and services if they are required.

I. *Licensing Pilots*

The basic purpose of Part VI is licensing pilots. Although this is an absolute power granted to each Pilotage Authority, it is stated only indirectly in the Act but with no possible ambiguity. The Act deals with related questions which become meaningless if such implied power does not exist.

Since licensing is merely a method of controlling the qualifications of persons who apply to act as pilots, and of pilots during the tenure of their licence, the licensing function is incompatible with the status of employer. However, this incompatibility can be overcome quite easily by enacting legislation which gives precedence to the licensing function. Part VI of the present Canada Shipping Act does not contain such a provision.

The incongruity arises because the licensing function covers a field which is normally also covered by the contract of hire. Appraisal of the qualifications of candidates is a prerequisite both to employing and licensing pilots, but the principles and rules applicable to each situation are essentially dissimilar and, furthermore, the relationship between the Pilotage Authority and its pilots is of an entirely different character.

1. WHEN THE AUTHORITY IS THE EMPLOYER, the relationship is contractual and, like other employers, the Pilotage Authority has complete discretion to make a selection from the qualified candidates and to distribute assignments as it sees fit. The status of employee implies not only permission to pilot but also an obligation to perform pilotage duties under the control and direction of the employer. Hence, from that point of view, licensing becomes an unnecessary duplication. The Pilotage Authority's decisions as an employer are essentially administrative in character and are governed by the terms and conditions of the contract that binds both parties. Dismissal or suspension from duty is a unilateral administrative decision by the Pilotage Authority, grounds for which must be based on the contract, e.g., breach of contractual obligations by the pilot. These decisions, however, are always subject to the control of the civil courts. Their function is to ascertain whether the pilot's alleged action or condition amounts to a breach of contract, whether the situation which developed has shown the pilot to be incapable of discharging his contractual obligations and whether, in the given circumstances, the Pilotage Authority had the right to terminate the engagement. Therefore a pilot who believes he has been wronged by such a decision may seek redress by instituting a civil action before a regular tribunal or, in part, through the grievance procedure that may be included in the contract of hire (as is normally the case where collective agreements exist).

In contrast, the licensing authority *per se* has no right to control the pilots in the exercise of their profession by distributing pilotage assignments. The selection of pilots from applicants remains an administrative function but of a quasi-judicial character, because no discretion is left the licensing authority to discriminate among candidates since its decisions are governed by applicable legislation. Dismissal of a pilot from the service resulting from the cancellation of his licence, as well as suspension, must be based on a quasi-judicial decision founded on a precise legislative provision (vide *Reappraisal Function,* chapter 9). Unless a system of appeal is provided, the licensing authority's decision is final and the pilot who believes he has been wrongly dealt with is without recourse, except through prerogative proceedings before the regular courts of civil jurisdiction in those exceptional cases where the licensing authority acted without jurisdiction, or exceeded its jurisdiction, or where the decision rendered was so unjust that the licensing authority was deemed to have exceeded its jurisdiction.

When the pilots are required to have the status both of licensees and employees of the Pilotage Authority, a confused and detrimental situation ensues under present legislation. One consequence is that discharging a pilot employee does not entail the withdrawal of his licence. The licence can be cancelled only for the reasons specified in the Act and by the Pilotage Authority acting in a quasi-judicial capacity, while the termination of employment is an administrative decision which is governed by the terms of the contract. The result in this case is that as long as the discharged pilot retains his licence he may exercise his profession as an independent contractor in competition with the Pilotage Authority's own service.

This incompatibility is at present irreducible merely because the status of employee for pilots is not contemplated in the Act. In future legislation, this could easily be corrected by recognizing that a pilot may hold the status of Crown employee and by retaining possession of a licence as a prerequisite for the exercise of pilotage, whatever his status may be. Such provisions would grant Pilotage Authorities full licensing power (including reappraisal) in all cases.

The Act should also stipulate that licensing provisions take precedence over any private agreements, with the result that holding a pilot's licence would be a prerequisite to all contracts of hiring persons to act as pilots, whether contracts for services or contracts of services, and whether the employer is any department, board or entity of the Crown, or a Pilotage Authority, or a private employer. Observing that pilotage has become necessary in the public interest, the qualifications of pilots must not be left to the mercy of negotiations and private agreements. It follows that the existence of a licensing authority is indicated to protect the interests of the public.

2. WHEN PILOTS ARE MERELY DE FACTO EMPLOYEES OF THE PILOTAGE AUTHORITY, there is incompatibility but to a relative degree only. The Authority can no longer be unbiased because it has assumed the responsibilities involved in providing pilotage services. A true master-servant relationship does not exist because there is no contract; the engagement is replaced by licensing, and the terms and conditions of the tenure of the licence must be defined in the same legislation that provides the Pilotage Authority with its powers. The fact that the Pilotage Authority controls the exercise of the pilot's profession through the despatching procedure is not an absolute obstacle to the exercise of licensing power because the licensing function remains the sole legal and effective means of control over the qualifications of pilots. As in those cases where the master-servant relationship exists, the Pilotage Authority is best qualified to appraise a pilot's performance. If the Pilotage Authority is the legal employer, appraisal is exercised by the Pilotage Authority because of its contractual rights despite its own interest in the matter. When the Pilotage Authority is only the *de facto* employer, the same procedure should be followed but the appraisal decision should always be

capable of reversal in appeal by an independent and unbiased authority. This *de facto* employee status is not permissible under the present legislation. It is considered this is an omission which should be corrected because such a status meets a definite need of the service.

3. IF A PILOT IS AN EMPLOYEE OF A THIRD PARTY, there is no objection from the licensing point of view since a licence is a prerequisite consideration to the contract of engagement, in that it is a condition precedent to acting as a pilot, and the Pilotage Authority retains its right of surveillance and its power, where so provided, to suspend or cancel licences. The present incompatibility arises from the limited scope of the other provisions of the Act which foresee that a pilot is always a free contractor and that the pilotage dues fixed in the tariff on a per trip basis are the only permissible consideration for the performance of pilotage services by a licensed pilot. Since this situation can not be modified either by regulations or by any private agreement, any other pecuniary consideration or any other type of contract would appear to be null and void. (Vide C. 4, p. 67 and *seq.*). At present, however, there are two licensed pilots who are employees of a private employer. The brothers Desgroseillers are licensed pilots for the Pilotage Districts of both Kingston and Cornwall, and are also in the employ of the Canada Steamship Lines, Limited, as pilots. The fact that they hold licences in the two Districts is because their employment dates from the time when the St. Lawrence-Kingston-Ottawa District was in operation. It appears that other licensed pilots have been privately employed at times to act as such in Pilotage Districts but only occasionally, since little mention is ever made of such employment. There is one reported court case where a pilot sued the Master of a ship for indemnity because he was discharged prior to the termination of his engagement at $45 per month. The validity of the contract does not appear to have been questioned before the court (1884, 12 R.L. 21, Zénon Lafrance v Joseph Jackson).

COMMENT

The facts indicate that existing pilotage legislation is too limited and is not adapted to the multiple and varying needs of the service today. If pilotage is to be of general application, it must have the necessary flexibility to cover all possible situations adequately. Since pilotage is a service, it must be essentially adaptable; therefore, future legislation should foresee and provide for every kind of status pilots may enjoy and should define the nature and extent of the control the Pilotage Authority has over them in each case. This aim could be generally attained by making the licensing system applicable in all cases.

II. *Licensing Masters and mates to pilot their own ships*

This is no longer an absolute power (as it was for a certain Pilotage Authority in pre-1934 legislation), but may now be exercised by all Pilotage Authorities, provided they pass regulations to that effect. In contrast with the procedure for licensing pilots, which leaves the Pilotage Authority no discretion about passing regulations, each Authority is left to decide whether or not to take advantage of the power to license Masters and officers.

This licensing power is accessory to every type of compulsory system of pilotage. Sec. 11 of the 1913 Pilotage Act of the United Kingdom lists pilotage certificates among the exceptions to compulsory pilotage, together with the non-availability of pilots and exemptions. It is not understood why mention was never made of this exception in sec. 345 C.S.A. and in the corresponding provisions of previous legislation, although the power to issue these certificates always existed and was even expanded in 1934. All Districts now enjoy this licensing power, which applies not only to Canadian-registered vessels as previously, but has been extended to officers of ships of any nationality.

It is a strange phenomenon that despite the foregoing no use is made of this power. Since 1934, no regulation has been passed anywhere in this respect with the result that, in the absence of appropriate regulations, pilotage certificates can not be granted. This is curious in view of the fact that therein lies the solution to many otherwise insoluble problems which some Pilotage Authorities have faced, e.g., the ferries and regular traders of American registry plying between American ports and the Pilotage Districts of New Westminster and British Columbia. It is also a means of adjusting exemptions to ensure that ships whose Masters or mates lack the necessary local knowledge and experience to navigate their own ship safely in District waters are required to take pilots.

The obvious reason is the overt opposition of the pilots to such "white flag certificates" (C. 7, p. 233) which they consider a menace to their profession for, by exempting these vessels, they lose revenue. However, a Pilotage Authority should not consider that its main function is to create increased employment for its pilots, but rather to serve the best interest of shipping and safe navigation.

In certain Districts the need to issue pilotage certificates may be so minimal that it is not worth considering, but in other Districts the Pilotage Authority's failure to act is totally unjustified, and indicates a lack of knowledge or a reluctance to assume responsibility, especially in Districts like Sydney, N.S., and British Columbia, where, contrary to the provision of secs. 328 and 351 of the Act, the Pilotage Authorities misapply dues collected from ships that have not employed pilots by giving them to the pilots. It is no wonder that under these circumstances the Sydney pilots objected bitterly to exempting the C.N.R. ferries running between Sydney and Port aux Basques,

either by way of a statutory exemption or by issuing a pilotage certificate to their Masters or mates, because such action would amount to the loss of about 50% of their personal revenue. In British Columbia the total amount collected in 1965 from non-exempt ships which did not take pilots, including ferries and regular traders such as the Japanese ore carrier *Harriet Maru,* was $29,887.13. This sum was irregularly credited to the pilots' pool and shared among them as remuneration. This situation is illegal and must be corrected. No doubt the situation would have been quite different if the dues collected from non-exempt ships that did not employ pilots had been applied as required by the Act, i.e., to the Pilot Fund if no pilot offered his services on inward voyages and, for other voyages, to the District operating expense fund (subsec. 351(2) and sec. 328 C.S.A.).

It is considered that, in a system of pilotage based on public interest and safety of navigation, full use should be made of the power to grant pilotage certificates to Masters and mates who qualify, irrespective of their nationality or the ship's country of registry, and thus enable Masters who do not require pilots to dispense with their services, without penalty.

It is also considered that the issue of pilotage certificates should be integrated into the scheme of exemptions. Only vessels which are most unlikely to become a safety risk in the circumstances prevailing in a given District (such as small ships) should be granted a direct exemption and, if an exemption is indicated for any other vessel, it should be made subject to the competence of the Master or mate to navigate in the District.

Here again, whatever the extent of its involvement in providing pilotage services, the Pilotage Authority remains best qualified to discharge this licensing responsibility.

Since experience has shown that Pilotage Authorities are unable to deal freely with this question, mainly because they work so closely with the pilots, it will be necessary to devise appropriate legislative and administrative controls, *inter alia*:

(a) First, it should be made a statutory right for any Master and mate who possesses the required qualifications to be granted such a personal exemption, either for a whole District or for a given route which he covers regularly.

(b) Minimum qualifications should be defined by Parliament. Thus, the absence of regulations would not amount to the denial of the right to an exemption (as is now the case).

(c) Pilotage Authorities should have the power to amend these statutory requirements by regulation in order to meet local requirements.

(d) Such regulations should be subject to modification by the confirming authority, either *proprio motu* or at the request of any interested party, if they prove discriminatory, abusive or intended to defeat the purpose of the Act.

(e) The Pilotage Authority's decision as licensing authority should be subject to review in appeal before the Admiralty Court.

A new term should be found to replace "pilotage certificate" which is confusing because of the statutory definition of "pilot". For instance, "personal pilotage exemption" would render the meaning more accurately. Whatever term is selected, it should have a statutory definition so that its intended meaning is unmistakable whenever it is used in legislation. When the definition is prepared, such expressions as "to act as pilot" should be avoided, and it should be made clear that the exemption applies to an individual holder to authorize him to navigate a named ship in which he is employed as Master or mate in a named District or part of a District, or on a given route within a District, without being obligated to employ a pilot or pay pilotage dues.

III. *Licensing pilot vessels*

The third licensing power concerns licensing an auxiliary service, i.e., water transportation for pilots. Sec. 364 C.S.A. makes it mandatory for each Pilotage Authority to *approve and license every pilot vessel* which is regularly employed as such in its District. Despite this obligation, and although pilot vessels are necessary in all Districts except Cornwall, licences are issued only in a few small Commission Districts. They, however, carry out this duty in a perfunctory and arbitrary manner for lack of criteria in the regulations (vide pp. 280 and *seq.*). Licensing pilot vessels does not differ from any other type of licensing; it is a quasi-judicial procedure which can be discharged only if the regulations contain standards by which to judge the adequacy of vessels proposed for a licence. A Pilotage Authority has no discretion but is bound by the requirements, if any are provided in the regulations and in the Act. In their absence, licensing is impossible. At present, in Districts where the Minister is the Pilotage Authority, no pilot vessel in regular use holds a licence from the Pilotage Authority, despite the fact that some are operated by private contractors. The factual situation has already been analyzed.

The reason why various Pilotage Authorities completely disregard this duty imposed upon them by the Act is the fact that the situation which existed when this provision was first included in the Act has now changed, and they consider there is less need for such licensing control.

1. HISTORICAL BACKGROUND. Sec. 364 has its origin in the early days of pilotage in Canada when transportation to and from vessels was each pilot's own responsibility. In view of the competitive system that then existed, each pilot normally provided his own transportation, either by owning and operating his own pilot vessel, or by hiring someone else's boat, and vied with the other pilots to be in a position to first offer his services to an incoming ship. However, in exposed boarding areas where rough seas were encountered,

individual pilots could not afford a suitable vessel, and the free enterprise system took the form of a partnership centered around pilot vessels which competed with each other.

In the 1788 ordinance of Governor Dorchester the pilot vessel was the basis of the pilotage service and the pilots operated in companies, composed of two pilots with at least one apprentice, who provided themselves with a suitable pilot vessel. A few years later, however, this requirement was abandoned and each pilot was left to fend for himself as a private entrepreneur. He was not even obliged to own a pilot vessel but, if he wished employment, he had to provide his own means of reaching incoming ships. Generally, a Quebec District pilot owned his own pilot boat which was manned by his apprentices who, at great risk, often ventured far outside the boarding area into the Gulf to be the first to meet incoming ships. The system was also prejudicial to the apprentices for, in addition to their precarious life in small and inadequate boats, they had little, if any, opportunity to learn pilotage. Their assistance in manning pilot vessels was so necessary that their Masters were reluctant to release them to obtain their pilot's licence. It required an amendment to the Act in 1847 to protect the apprentices. The situation changed in 1860 when the Quebec pilots won the right to administer their pilotage service and thereby ended the competitive system in the Quebec District. Pilot vessel service was provided at Bic by four schooners owned by the Pilots' Corporation and large enough to provide living accommodation for a number of pilots. Two of these schooners cruised constantly throughout the boarding area to meet vessels. The next change occurred in 1905 when by private agreement with the Pilots' Corporation the Department of Marine took over the pilot vessel service and transferred it to Father Point.

At Saint John, N.B., although free competition existed among the pilots up to the time pilot vessel service was taken over by the Department of Transport, they were forced by circumstances, and later by requirements imposed upon them by the Pilotage Authority by regulation, to group together in order to raise sufficient funds to own and operate a suitable pilot vessel. Navigation conditions off Saint John Harbour necessitate a large vessel which is too expensive for any single pilot to own and operate. Such a vessel was later accepted by the Pilotage Authority as an integral part of the District organization and the 1874 By-law made it a prerequisite for anyone obtaining a pilot's licence to be the registered owner of not less than 4 registered tons of a licensed pilot vessel. At that time, the pilots lived aboard the schooners which served as pilot vessels, pooled their earnings and shared expenses and profits as co-owners. In 1919, the Robb Commission found that many disputes arose between pilot vessels because of the competitive arrangements which still existed. By then, the pilots were divided into two groups, each owning a schooner and each competing against the other. Ships were often

called upon to pay two pilotage charges because both groups demanded payment, each claiming to have been the first to offer services to the incoming ship.

In the early days of pilotage in British Columbia, providing an adequate pilot vessel service for the boarding station off Victoria was a serious problem for the pilots. Here again, circumstances were such that no individual pilot could provide his own pilot vessel out of his earnings with the result that highly qualified mariners lost interest in pilotage as a profession. In 1859, complaints were registered after a series of disasters. In 1860, the pilots petitioned to obtain an increase in pilotage dues and promised to keep a suitable vessel cruising in the boarding area off Race Rocks. Their request was granted but they did not live up to their promises. In 1864, they hired a schooner but a year later reverted to the former practice of remaining ashore and employing a whale-boat manned by a crew of Indians when a vessel was sighted.

The record shows how dangerous it is at times for pilots to board or disembark at boarding stations and how important it is to provide them with safe, adequate pilot vessels. The failure on the part of Pilotage Authorities to make appropriate regulations in this field, and of most Authorities to approve and license pilot vessels, indicates clearly that this statutory requirement no longer fulfills a basic need. It is not suggested that Pilotage Authorities today are no longer concerned about the lives and safety of their pilots or whether efficient, reliable transportation is available to provide a service in all foreseeable weather conditions. This situation has developed as a result of factual changes for the following reasons:

(a) disappearance of the competitive system;
(b) statutory inspection requirements for all boats and vessels engaged in public transportation;
(c) incompatibility of licensing and operating functions when transportation is provided by the Pilotage Authority or by the Crown.

2. DISAPPEARANCE OF COMPETITION. The disappearance of the competitive system began in 1860 when the Quebec Pilots' Corporation was created and gradually occurred in all Districts (vide C. 4, pp. 77 and ff.) when there was no longer any need for a large number of pilot vessels used individually by pilots to enable them to compete for ships.

Only one basic requirement now remains, i.e., to provide an adequate, safe, and efficient means of transportation for pilots embarking or disembarking. Such a service can best be provided by one well-equipped operator and this has since become the rule in every boarding area throughout Canada. The only exception was Quebec Harbour where two operators competed for clients until 1966, when one operator bought out and absorbed his competitor's business. Under present conditions, a number of operators are detrimental to efficiency. Care must be taken to ensure that pilot vessels are suitable

for prevailing conditions in the boarding areas where they operate and that they are also well manned. Thus they will render safe, uninterrupted service despite adverse weather conditions.

These requirements should be recognized and Pilotage Authorities authorized to limit the number of pilot vessel licences to one operator, if necessary; in other words, to grant a franchise for a limited period to the operator who agrees to provide an adequate, efficient service.

A pilot vessel operator with a monopoly is interested in providing the best possible service because he fears that if the pilots suffer any inconvenience they will ask for other arrangements. Now that the competitive system has been abandoned the only interest the pilots retain in pilot vessels is their common concern for a safe, speedy, efficient service. Therefore, the need to licence pilot vessels as a means of control is no longer as imperative as formerly. However, licensing is necessary to grant a franchise on the basis of safety, adequacy and efficiency. Under the present system, a type of franchise automatically follows in that only licensed pilot vessels may offer their services, but, since a Pilotage Authority has no power to limit the number of licences there could be, in theory, a number of pilot vessels competing in a given District, with detrimental results. Furthermore, such competition has no place in a system of fully controlled pilotage.

3. COMPULSORY INSPECTION. The second factor which brought about a fundamental change was the compulsory inspection requirement for vessels and boats used in public transportation. Pilotage Authorities apparently feel they need no longer be concerned about seaworthiness or the adequacy of life-saving or other equipment in pilot vessels, because all vessels must have a 'Certificate of Inspection' before they can operate (vide sec. 395 C.S.A.). The Department of Transport has expressed the opinion that the intent of sec. 364 C.S.A. is now automatically complied with and, hence, Pilotage Authorities need not license pilot vessels, despite the imperative provision of the Act (Ex. 1461(t)).

This attitude is not altogether correct, even from the practical point of view, quite apart from its illegality (in view of the imperative provision of sec. 364). The D.O.T. inspection requirement does no more than reduce the importance of the question because a Certificate of Inspection does not mean that a vessel is suitable for the specialized type of work required in pilot vessel service, including going alongside ships in all kinds of weather and sea. The certificate merely indicates that a vessel is seaworthy and suitable to be used for public transportation, but much more is required of a pilot vessel. An example of this situation is the privately-operated pilot vessels at Prince Rupert, whose suitability was raised before the Commission. The pilots contended that the vessels provided by the private contractor, Armour Salvage Company, were not suitable for pilot vessel service in the boarding area off Triple Island. They charged that the vessels were "old fish tugs" not

built for pilotage service, their decks were too close to the water and the seas washed over them at times, they were fitted with bulwarks over which the pilots had to jump when reaching for the Jacob's ladder to climb a ship's side, thus making boarding even more dangerous. On the other hand, the Department of Transport maintained that these vessels were suitable because they were seaworthy and complied with steamship inspection requirements, although these contained no special provisions for vessels intended to be used as pilot vessels.

In their evidence the Churchill pilots claimed that the tug, *W. N. Twolan* owned by the National Harbours Board and used as a pilot vessel at Churchill, is not suitable for embarking or disembarking pilots. The vessel was described as "a deep-sea tugboat built for multi-purposes". But it has too much superstructure for a pilot vessel, rides too high, rolls heavily in a moderate swell and has a flared bow which makes it difficult, and at times impossible, to manoeuvre alongside vessels. When there is a heavy swell the pilots are obliged to disembark from outbound vessels just before leaving the protection of the inner harbour. However, incoming vessels, which are boarded in the vicinity of the fairway buoy, have occasionally been obliged to wait for long periods until conditions allowed a pilot to embark. The National Harbours Board is aware of these difficulties and during the winter of 1965-66 the *W. N. Twolan* was placed in the Pictou Foundry shipyard for refit and extensive alterations. Nevertheless, the official stand of the Pilotage Authority in Ottawa has been that the tugboats employed as pilot vessels at Churchill are adequate, simply because they have met D.O.T. steamship inspection requirements, viz "This Certificate which is issued by a branch of the Department of Transport, is considered to be sufficient evidence of their suitability as a pilot boat and the Authority has never issued a pilot boat license" (Ex. 1471(*l*)).

It has also been established that the requirements for pilot vessel service vary from place to place, principally according to the amount of shelter available. For instance, a vessel which is perfect for this service off Quebec City is completely unsuitable at Les Escoumains. Again, the Saint John pilots rejected as unsuitable for operations in the heavy seas and swell that prevail off Saint John Harbour a type of pilot vessel which is considered suitable at Sydney, N.S., and is also being used satisfactorily off Les Escoumains. Therefore, when a vessel is to be used for pilot vessel service, specific requirements are dictated, first, by the type of work to be performed and, second, by the circumstances and conditions peculiar to the boarding area. These requirements are not fully considered during a regular steamship inspection which is applicable to all vessels. It is the responsibility of each Pilotage Authority to ensure that vessels employed as pilot vessels in its District meet specific requirements, first, by defining criteria in its regulations and, second, by not allowing any vessel to operate as a pilot vessel unless it has been duly approved and licensed.

The Commission was also informed that steamship inspection requirements are not mandatory for Government-owned vessels, although the authorities responsible usually conform voluntarily. This point has its significance because the Department of Transport provides the more important pilot vessel services, i.e., at St. John's, Nfld., Halifax, Sydney, Saint John, N.B., Les Escoumains, P.Q., Brotchie Ledge and Sand Heads, B.C.; and the National Harbours Board is responsible at Churchill. However, the information given to the Commission is not correct. At present, steamship inspection is mandatory for Government-owned vessels. Sec. 16 of the Canada Shipping Act delegates to the Governor in Council the responsibility for passing legislation by regulation re the registration of "Government ships" (subsec. 2 (30)) as British ships and the applicability of the various provisions of the Act to such vessels. The latest regulations (P.C. 1966-1027 dated June 2, 1966) entitled "Registration of Government Ships' Regulations" do not list secs. 410 and 481 C.S.A., nor is sec. 364 C.S.A. among the sections of the Act that do not apply to Government vessels, with the result that Government-owned pilot vessels are subject to inspection requirements.

The Commission was further informed that steps were being taken in all Districts where the Minister is Pilotage Authority, including Montreal and Quebec, to "require all boats used for the transportation of pilots to receive licences for the coming [1967] season under Section 364 and that a prerequisite for the issue of such a licence will be compliance with safety standards set by the Steamship Inspection Division" (D.O.T. letter dated February 6, 1967, Ex. 1503).

When a Pilotage Authority is satisfied with a D.O.T. inspection certificate, it relies on the judgment and performance of a person or persons over whom it has no control. This, in addition to being an illegal and unauthorized delegation of power, indicates a serious misconception of responsibilities, especially when, by failing to make the necessary regulations, an Authority renders itself powerless to take any action if the vessels so certified are inadequate for their pilotage rôle.

4. INCOMPATIBILITY OF LICENSING FUNCTION. The third factor that has changed the situation is the incompatibility of the licensing function when pilot vessel service is directly or indirectly provided by a Pilotage Authority. When, as a result of abandoning the competitive system, only a single effective pilot vessel service was required, many Pilotage Authorities found that the most suitable way to reach this goal was to control pilot vessel service and, to this end, they purchased, maintained and operated pilot vessels. Their cost was considered an operating expense of the District and, therefore, was paid out of District revenues, i.e., licence fees and pilotage dues. This was the procedure followed by, *inter alia,* the Pilotage Authorities in Halifax and Sydney, until the Department of Transport assumed the responsibility for pilot vessels (vide C. 5, pp. 113-115). In the Newfound-

land Districts of Botwood, Port aux Basques and Humber Arm the Authorities still operate their own vessels (vide C. 8, p. 282). Logically enough, the By-laws of these Districts contain no regulations on the licensing of pilot vessels because their Pilotage Authorities have no intention of authorizing other pilot vessels to enter into competition, nor are they in a position to exercise the judicial function of licensing their own pilot vessels.

To all intents and purposes, the situation is the same where pilot vessel service is provided by the Department of Transport in Districts where the Minister is the Pilotage Authority. For instance, it was pointed out that it would be preposterous if the Minister as Pilotage Authority was obliged to approve and license the pilot vessels that he provides and operates as the Minister of Transport. While in theory and in law the two offices are quite distinct, in practice the distinction is not made and the terms "Minister" and "Pilotage Authority" are generally considered synonymous. It may not be realized that when the Department of Transport operates a pilot vessel service it is in the same position as any other operator *vis à vis* a Pilotage Authority. The responsibility for determining the criteria for pilot vessels in a given District rests solely with the Pilotage Authority, provided the requirements it imposes do not conflict with other legislation, e.g., the obligation to obtain a Certificate of Inspection. Pilotage Authorities may not require less than other legislation prescribes but they may require more, and in such a case the Department of Transport, like any other operator, is bound by their regulations.

COMMENTS

It is considered that the licensing requirements for pilot vessels should be retained with, however, some necessary adjustments to meet today's requirements, including:

(a) Possession of a valid Certificate of Inspection issued by D.O.T. should be a statutory prerequisite for obtaining and holding a pilot vessel licence. Since this condition is applicable in all Districts, it should be contained in the Act and not left to Pilotage Authorities, which, experience has shown, often neglect to include the necessary provisions in their regulations and, therefore, might have to license unseaworthy vessels.

(b) In order to ensure service of the highest quality, Pilotage Authorities should be authorized to limit by regulation the number of pilot vessel licences granted for a given boarding area and, if necessary, to grant a franchise to only one operator on the terms and conditions stipulated in the regulations.

(c) If licences are issued to more than one operator, Pilotage Authorities should be authorized, in the interest of efficient service, to make regulations for distributing work among the operators, in which case, the pilots should be obliged to use the licensed pilot vessels as provided for in the regulations.

(d) Pilotage Authorities should be authorized by regulations to limit the duration of licences, i.e., to grant term licences, so as to allow for periodical reassessment of the suitability of pilot vessels and also to permit additions that may be considered necessary to meet new needs.

(e) The Act should include a *pro forma* licence which indicates, *inter alia,* the duration of the licence, the number and date of the applicable D.O.T. Certificate of Inspection and the regulations which must be observed for the duration of the licence.

(f) If future legislation permits Pilotage Authorities to own and operate pilot vessels, they should also be subject to licensing but by an independent body, preferably a superior authority.

These recommendations are a great departure from the present legal situation, but they correspond to the practices which have developed as a result of the present needs of the service and are, in essence, followed in all Districts.

C. AUXILIARY POWERS

Auxiliary powers are those which, although they exist *per se,* are not part of the principal aim of a mandate but are given in addition to be exercised at the same time. Therefore, they must be defined in legislation. Since a Pilotage Authority is essentially a licensing authority, its regulation-making power is, in fact, one of its most important auxiliary powers. While Pilotage Authorities were not created to exercise the function of making regulations, once they were established the licensing function they exercised made them the logical bodies to be charged with responsibility for adjusting legislation to the peculiarities and needs of their Districts. This regulation-making power might well have been given elsewhere, e.g., the Governor in Council, the Minister of Transport, or Port Authorities.

There are two other auxiliary powers of great importance:

(a) power to collect pilotage dues and, in that connection, to have any foreign ocean-going ship detained if indebted;

(b) power to create and administer a pilot fund.

The power to collect pilotage dues has already been studied in chapter 6 (pp. 187 and ff.). This power meets a definite need and should be made a statutory rule applicable to all pilotage monies. However, some flexibility should be left by allowing each Pilotage Authority to provide otherwise by regulation if local circumstances are such that the rule would put the Authority to unnecessary trouble and expense.

The power to create and administer a pilot fund is also for the benefit of the pilots, i.e., the creation of a fund to provide them with financial assistance, when they or their families are in need (subsecs. 2(68), 329(m), 351(2),

and secs. 358, 375 C.S.A., and subsec. 319(*l*) 1934 C.S.A.). This power also might well have been given to another authority (as was done in the District of Quebec where it is exercised by the 1860 Pilot's Corporation which now exists for that purpose only) but it was normal to entrust it to the licensing authority which, because of its surveillance duty, is always in close contact with the pilots and knows their needs. (Pilot fund is the subject of Chapter 10.)

There are a number of other less important auxiliary powers, such as to act as arbitrator in disputes on pilotage matters between Masters, pilots and others (subsec. 329(k)), or between pilots over the right to pilotage dues in implied contracts (subsec. 351(1)(b)), or between a licensed pilot and an unlicensed pilot, when the latter is superseded, over his share of the dues (subsec. 355(2)); to grant *ad hoc* exemptions to foreign hospital ships or warships (subsec. 346(h)); to determine the non-availability of pilots and hence to allow a vessel to use an unlicensed pilot (subsec. 354(1)(a)).

D. ANCILLARY POWERS

Ancillary powers are the necessary accessories or adjuncts to other powers without which the latter could not be fully exercised. Normally ancillary powers are implied. Each specific power automatically includes whatever additional powers are necessary to exercise it, i.e., ancillary powers. They need not be expressed in legislation unless it is intended to derogate from what would have been the necessary inference. This principle is enunciated in subsec. 26(2) of the Interpretation Act:

> "26. (2) Where power is given to a person, officer or functionary, to do or enforce the doing of any act or thing, all such powers shall be deemed to be also given as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing."

Since these powers are essentially subordinate, their nature and extent are qualified by the nature and limitations of the specific power on which they depend. Hence, they are automatically affected and modified by every restriction or amendment affecting the specific power. If a specific power is withdrawn from a Pilotage Authority, the ancillary powers automatically cease.

I. *Quasi-corporate powers*

To a limited extent Pilotage Authorities have been given the kind of ancillary powers that are normally enjoyed by a corporate body. These quasi-corporate powers are defined in part because they would not normally

be held by an officer of the Crown; they were necessary to confer on Pilotage Authorities the special status they required to preserve their autonomy and render it effective.

When the pertinent texts are studied it must be realized that they date from 1873 and have not been altered since. They were drafted as legislation was worded at that time and, therefore, must not be interpreted in the light of today's ideas, language and methods. Two Pilotage Authorities (the Halifax Pilot Commissioners and the Saint John Pilot Commissioners) were given corporate status by the 1873 Act but their functions, powers, responsibilities and duties were governed by the provisions applicable to all Pilotage Authorities. Thus, they were not in any different position to other Pilotage Authorities. It appears that corporate status was given these Pilotage Authorities simply because some of their members were appointed by the Government and others were elected by local authorities. On the other hand, all members of the other type of Pilotage Authority were Government appointees. In this way a mandate was given to an entity created by the Crown, i.e., to a corporation and not to a group of persons some of whom were not Crown appointees.

Since a Pilotage Authority is an officer of the Crown, it normally should be unable to do anything in its own name and should act only in the name of the Crown, but by virtue of its special ancillary powers it has limited power to enter into contracts, to own assets and to sue and be sued in its own name.

In order to ensure a Pilotage Authority's independence it was first necessary to guarantee appropriate sources of revenue. In the absence of any legislative provision to this end, the mandate contained in the statute would have been sufficient authority to seek the necessary money from public funds through estimates, but Parliament made this procedure unnecessary by making each Authority financially self-supporting. The necessary revenue is provided by special funds, created by legislation, called "public monies for a special purpose". Each Pilotage Authority is authorized to draw on the appropriate fund to pay the expenditures it requires to discharge its duties imposed by the Act. If a special procedure is prescribed, it must be followed. A Pilotage Authority is provided with two types of funds on which it may draw, i.e., the Pilotage Authority's general expense fund and the pilot fund. In addition it has other funds that come into its possession primarily for collection purposes only, i.e., dues for services rendered, various monies belonging to the Consolidated Revenue Fund, and monies belonging to third parties (vide C. 5).

The general expense fund, which is created by sec. 328 C.S.A., is composed of licence fees and certain pilotage dues. In case these are insufficient, the Pilotage Authority is given power of assessment over the pilots' earnings which, in fact, is an indirect power of assessment on shipping because the Pilotage Authority is empowered to fix the tariff to provide pilots with an adequate income after District expenses have been deducted.

Sec. 328 prescribes two conditions for the use of this fund:

(a) expenditures must be for the "necessary expenses of conducting the pilotage business of the district";

(b) re procedure, the sanction of the Governor in Council is to be obtained.

It follows, therefore, that a Pilotage Authority, even with the Governor in Council's approval, has no discretionary power over spending this fund. This money can not be given away gratuitously nor attributed to pay other than District expenses, e.g., it could not be used to pay expenses incurred by pilots in the performance of their duties or to pay a pension benefit.

The purpose of this fund is couched in very general terms which, at first sight, might be interpreted as authorizing a Pilotage Authority to "conduct the pilotage service". It must be borne in mind that this is an ancillary power whose scope, despite the generality of its terms, is determined by the specific powers given to a Pilotage Authority. The Act gives no power to any Pilotage Authority to provide or to control the pilotage service.

The procedural requirement is merely a means of control imposed by legislation to prevent misuse of this fund and, presumably, to restrain the extraordinary power of assessment given to Pilotage Authorities. Similar controls are imposed on the expenditures of the various departments of Government by the Financial Administration Act. Being a statutory requirement, it is an essential prerequisite and non-compliance entails nullity of payment, which then amounts to mishandling public funds.

Sec. 328 has no application to the other funds that come into the hands of the Pilotage Authority. These funds must be disposed of as allocated in the Canada Shipping Act: pilotage dues must be paid over without delay to the pilot who earned them, after pilot vessel earnings and pilot fund contributions, if any, have been deducted; contributions so deducted, and any other monies received that belong to that fund, must be paid into the pilot fund; any monies allocated by statute, such as licence renewal fees referred to in subsec. 339(2) and monies for which no special attribution is made, must be remitted to the Consolidated Revenue Fund.

Nor does sec. 328 apply to the exercise of auxiliary power over the administration of a pilot fund. The power of effecting the necessary expenditures is covered by sec. 375 which authorizes a Pilotage Authority to pay out of the pilot fund: every expense properly incurred in the administration of the fund; benefits stipulated in the regulations, if any, passed under subsec. 329 (m) as they become due; benefits it may decide to give to retired pilots, or to the dependents of deceased pilots (sec. 358) in the absence of regulations; and, finally, such allowances as it may decide to make to any pilot who has had his licence cancelled by a Court of Formal Investigation after an "investigation of a marine casualty" (subsec. 375(c) and sec. 568). The approval of the Governor in Council or other special formality is not required for any of these payments.

II. *Powers over contract and assets*

Ancillary powers to enter into contracts, to own assets, to sue or to be sued must be authorized by a specific power, and their exercise is governed by whatever limitations, procedural or otherwise, affect the power on which they are dependent. For instance, the sanction of the Governor in Council is a prerequisite to the exercise of any ancillary power if it entails an expense falling under sec. 328, but not if it concerns the administration of a pilot fund.

The right to enter into contracts, to own property, to use and to be sued which arises out of the administration of pilotage is partly expressed, but mostly implied, in sec. 328 which provides how expenses incurred by a Pilotage Authority in conducting the pilotage affairs of his District are to be paid. This implies that the Authority is capable of incurring debts which are the result of contracts. Therefore, sec. 328 implies the right to make whatever contracts are necessary to discharge a Pilotage Authority's responsibilities, i.e., to purchase services or assets.

A Pilotage Authority has the right to employ the staff required for internal administration, the collection and handling of pilotage money, the drafting of regulations and the preparation of reports. When necessary, it may engage experts, such as legal counsel, physicians and experts in pilotage or navigation. When sec. 328 refers to "a secretary and treasurer", it merely gives an example of the rule enunciated in the final part of the section and names the most important single contract Pilotage Authorities have to make. A Pilotage Authority may also lease accommodation, and incur telephone, telegraph and other office expenses. Similarly, it may purchase and own whatever assets are necessary for its operations such as office equipment and stationery, and may even purchase a building for accommodation if circumstances either prevent leasing or make it preferable for the Authority to be the owner. However, all contracts must receive the approval of the Governor in Council because they always involve disbursements from the expense fund.

Because these powers are ancillary they automatically terminate when the purpose for which they were invoked has been achieved by the Authority in the discharge of its mandate. Contracts must then be terminated and surplus assets disposed of since the Pilotage Authority is no longer entitled to own them. Because these assets were paid for out of the expense fund, it would be logical to assume that they form part of that fund and that when they are no longer required they are liquidated and the proceeds returned to the general fund. However, as seen earlier, the Exchequer Court in Himmelman v the King (1946 Ex. C.R. 1), basing its opinion on the Consolidated Revenue and Audit Act of 1931, returned the finding that the pilots had no claim to such proceeds, despite the fact that the assets were acquired largely by assessments on their earnings, that these proceeds could not be returned to the Pilotage Authority expense fund because they were neither

licence fees nor pilotage dues (sec. 328), and that they ought to be deposited in trust or for a special purpose in the Consolidated Revenue Fund. However, it was considered they should be treated as if they were part of the Pilotage Authority's expense fund, i.e., to pay District general expenses. (In this case, the question of the power of the Pilotage Authority to own and operate pilot vessels was not a point at issue, but was taken for granted by both parties and by the Court.)

The Himmelman decision shows the consequences of passing new legislation of general application without ensuring there is no conflict with other legislation which it amends indirectly. This raises the question to what extent the system for handling pilotage funds (which has remained materially unchanged since the main provisions were included in the Act in 1873 and 1875) has been modified by subsequent general legislation governing public money. For instance, there is nothing in the Act which states who is responsible for the safekeeping of pilotage money. Secs. 328, 343, 349, 351, *et al,* C.S.A. imply that this responsibility rests with the Pilotage Authority. This must have been sufficiently clear when these provisions were introduced, but it is no longer so today because as seen earlier in chapter 5, the Financial Administration Act (1952 R.S.C. c. 116) applies to pilotage monies which come within the definition contained therein of "public monies for a special purpose". Subsec. 16(1) of this Act requires this public money to be deposited to the credit of the Receiver General of Canada and its expenditure supervised by the office of the Comptroller of the Treasury which will allow withdrawals if satisfied that expenditure is for a purpose specified in the applicable provision of the Canada Shipping Act and if the prescribed procedure has been followed.

These provisions of the Financial Administration Act not only are not followed, but are formally contradicted by the provisions of all Pilotage District By-laws (except Prince Edward Island District where no funds are handled by the Pilotage Authority) which provide that each Pilotage Authority keeps full control over all pilotage monies by depositing them in a bank of its choice in an account, referred to as the "pilotage fund" for the District concerned, from which it may draw at will, without formality. This practice and these By-laws, although approved by the Governor in Council, appear to be in complete contravention of the Financial Administration Act. On the other hand, they are consistent with the quasi-corporate status the Act has given Pilotage Authorities to ensure their independence and autonomy.

In future legislation this point ought to be clarified. It is believed that Pilotage Authorities should be allowed to continue to handle their funds, subject to examination by the Auditor General. This surveillance will become even more necessary if Pilotage Authorities incur substantially higher expenses as a result of increased responsibilities.

As far as Pilotage Authorities are concerned, pilotage is not a profit-making venture. They are not allowed to accumulate a surplus or incur a deficit. Unless a Pilotage Authority has assumed powers it does not possess, a surplus is not likely to occur under the system provided in Part VI. An Authority's own revenue which is applicable to the general expense fund should always be insufficient to meet its expenses. A surplus can not be accumulated unless the compulsory payment system is imposed on a large group of vessels which do not need pilotage services, because dues collected from vessels which did not take pilots and for which a special application could not be made under sec. 351 C.S.A. comprise the only substantial item of revenue for the expense fund. Such a situation should not be allowed to exist. Furthermore, a Pilotage Authority has no right to make any assessment on pilots' earnings unless there is a deficit in the expense fund. Sec. 328 authorizes the Authority to draw on the pilotage dues belonging to the pilots only when it is necessary to meet actual expenses.

Nor should a deficit be allowed to exist: accounts must be settled when they are due. However, if a substantial disbursement of capital funds becomes necessary, e.g., acquiring expensive items of office equipment and machines, or a building, there appears to be no objection to spreading the cost over a period of time so that it is equitably shared by all who will benefit. This method of payment, like any other expense, ought to be authorized by the Governor in Council under sec. 328. In view of the fact that sec. 328 applies only when obligations have actually been incurred, the opposite course, i.e., accumulating a reserve to replace assets, is not permissible.

Nevertheless, a Pilotage Authority is powerless to own pilot vessels or hire their complement, to employ staff for despatching pilots or to incur expenses connected with pooling the pilots' money, because existing legislation does not give Pilotage Authorities specific power to take such action. The control of the exercise of the pilot's profession and the operation of a pilot vessel service are not part of their mandate. Whenever a Pilotage Authority has assumed these powers it has created great confusion about title to ownership and responsibility for liabilities, e.g., the Halifax pilots and the New Westminster pilots considered themselves actual owners of pilot vessels through a sort of partnership administered for them by their Pilotage Authority. As stated earlier, when the pilot vessel *Camperdown* was lost, the Halifax temporary pilots sued for their share of the insurance. When the Department of Transport assumed responsibility for pilot vessel service at Sand Heads, the New Westminster pilots complained that they received no indemnity for the share of the cost they were forced to contribute by deductions from their earnings. In New Westminster, as in the other Districts where similar action was taken, the Department of Transport merely had the pilot vessels transferred by the Pilotage Authority to the ownership of the Minister, without reimbursing either the pilotage fund or the pilots, because

it was felt that the vessels did not belong to the pilots but to the Pilotage Authority, as agent for the Crown, although only pilotage money had been used to purchase them. By this process public assets owned for a special purpose became merely Crown assets.

A Pilotage Authority incurs no expense in those Districts where the Minister is the Pilotage Authority, because everything is paid for by the Department of Transport. In the other Districts (except Prince Edward Island where the Pilotage Authority has no operating costs), the various Pilotage Authorities have taken advantage of their financial powers and, in general, have exceeded them. This is especially true of the New Westminster Pilotage Authority which has always been very active. *Inter alia,* it has hired clerical staff and crews to man vessels owned by its pilots, purchased wharves and land, borrowed money from the bank, rented premises and land and leased a wharf to third parties (vide New Westminster Pilotage District). Aside from the fact that most of these contracts and expenditures were ultra vires, they were also all illegal (except the recent hiring of the Secretary and Treasurer), because the approval of the Governor in Council was never obtained, or even sought.

When a Pilotage Authority deals with a pilot fund it derives its powers from subsecs. 319(*l*), 1934 C.S.A. and 329(m) C.S.A. and By-laws made thereunder, and from secs. 358 and 375 C.S.A. which enumerate the types of payment a Pilotage Authority may make out of a pilot fund. Since a pilot fund is by nature an emergency fund to aid pilots and their families, it is unlikely to be exhausted every year, and a reserve should be accumulated to meet possible needs. The power to create and administer such a fund automatically carries the ancillary power to invest any unexpended capital, and the Pilotage Authority is required to act as trustee. The sanction of the Governor in Council is not necessary for any of these expenditures, payments or investments. Sec. 328 does not apply to pilot funds because expenses connected with them are not incurred while operating the pilotage service but in the exercise of the auxiliary power of administering funds as such. Moreover, the sections dealing with pilot funds contain no provision for controlling expenditures.

III. *Power to sue and be sued*

There remains the question whether a Pilotage Authority as such can sue or be sued. Here again, a distinction should be made between court proceedings arising from the administration of a pilot fund and those from other causes. Since any court proceedings imply a possible disbursement of money, either because the outcome is unfavourable to the Pilotage Authority or because the debtor turns out to be insolvent, and also because there are always incidental expenses that can not be recovered, the provisions of sec. 328 apply to all cases where the Authority may be sued, and which do not

arise out of the administration of a pilot fund. Therefore, prior approval of the Governor in Council is necessary each time before proceedings are taken.

Any power without effective means to exercise it is, in fact, a denied power; recourse to the courts is the ultimate recognition of its existence. The power of a Pilotage Authority to institute civil proceedings in certain cases is recognized by the Act. Sec. 343 makes the Pilotage Authority the creditor for pilotage dues whenever they are made payable to it, either by the Act, e.g., sec. 348 and subsec. 350(2) or regulations passed under subsec. 329(h). In the case of pilotage dues owed to the Pilotage Authority pursuant to sec. 348 and subsec. 350(2) and the quasi-fine a vessel is liable to pay under subsec. 350(1), the stipulation of subsec. 351(1)(a) implies that the recovery expenses are incurred by the Pilotage Authority since it is authorized therein to reimburse itself before remitting the dues to the pilot entitled to receive them, or to the pilot fund, as the case may be.

The power to enforce such payment, i.e., to sue in justice for recovery, is a power ancillary to a Pilotage Authority's right and duty to collect pilotage dues as a debt owed to it. Furthermore, it is a necessary ancillary power to the responsibility for licensing and the surveillance duty this implies, that the Pilotage Authority should be authorized to institute penal proceedings when a pilot commits a statutory offence or violates a regulation. If penalties are provided in disciplinary regulations, the last part of subsec. 329(g) authorizes the Pilotage Authority to act as plaintiff in recovery proceedings instituted pursuant to sec. 709 (vide C. 9).

Since Pilotage Authorities have power to enter into contracts and to own assets in their own name, pursuant to the ancillary power principle they should have power to sue in their own name for the protection of contractual rights and properties.

However, the right to be sued is not completely clear, in that there is no procedure provided for obtaining the Governor in Council's sanction if a Pilotage Authority refuses to obtain it when the issue of the proceedings implies a disbursement from the Pilotage Authority's expense fund. There is, however, no problem when the claim concerns the pilot fund: the costs of such a case are payable without formality as part of the administrative expenses of the pilot fund authorized by subsec. 375(a) C.S.A.

When the object of a claim is the recovery of damages arising from the wrong-doing of a Pilotage Authority or its servants, the plaintiff has a claim against the Crown (subject to the limitations imposed by pertinent legislation) for damages caused by Crown officers, in addition to the claim that exists against individual members of the Pilotage Authority or the servant concerned. Such an action can not be directed against the Pilotage Authority as a truly corporate body, because it owns no assets of its own, but only for specified purposes, none of which is applicable to the payment of damages caused by the Pilotage Authority or for which it could be responsible. To pay such damages out of the general expense fund under sec. 328 would amount

to making the pilots pay for the wrong-doing of the Authority since most of the fund is provided by assessments on their earnings. If a judgment on such a claim were to be obtained there would be no fund out of which the Pilotage Authority could pay the award and the costs. It appears that in this event recourse lies against the Crown for its vicarious liability for the wrong-doing of one of its agents. Conversely, when the object of a claim is the recovery of money that forms part of any of the various funds administered by the Pilotage Authority, the plaintiff has no claim against the Crown because the Crown has no authority to effect any disbursement from these funds. A judgment rendered against it could not be enforced. This claim lies against the trustee of such funds, i.e., the Pilotage Authority.

During the last decade, no recovery proceedings were taken either for pilotage dues or for penalties and no charges were laid before any penal tribunal with respect to pilotage offences (Ex. 1466(a)).

In a few cases, however, a sum of money has been claimed against a Pilotage Authority. The procedure normally followed was to direct proceedings against the Crown. Two such cases were reported. In both, the action was dismissed, not because the proceedings had been directed against the wrong defendant (the question does not appear to have been raised), but on the merits of the case. In the first case, Gariépy v the King (1940, 2 D.L.R. 12), Pilot Gariépy's claim for damages resulting from the abuse of power of the Pilotage Authority representative, the local Quebec Supervisor, was denied because of contemporaneous legislation regarding Crown liabilities. In the second case, Himmelman *et al.* v the King (1946 Ex. C.R. 1) referred to earlier, the Court found that the plaintiffs had no claim to the insurance paid the Crown following the sinking of the pilot vessel *Camperdown.*

However, in three other reported cases, the suits were directed against the Pilotage Authority. The question whether the right defendant had been assigned was not raised. In two of these cases, the Pilotage Authority had a corporate status granted by the provisions of the Canada Shipping Act existing at the time, but this seems to have made no material difference in that the provisions of what is now sec. 328 C.S.A. applied equally to them, and from the financial point of view these corporations were governed by the same provisions as any other Pilotage Authority. In the case of Spears v the Saint John Pilot Commissioners (1910, 39 N.B.R. 495 (C.A.)), Pilot Spears sued to recover pilotage dues collected by the Pilotage Authority from vessels for pilotage services he had rendered. The claim was denied on its merits. On account of the compulsory payment system, the dues were owed by the vessel whether or not the plaintiff had a valid claim. It was found that the plaintiff had no claim to them because he had not proceeded as prescribed in the By-law. These vessels had not been spoken to, reached and boarded on their incoming voyage by a pilot from a licensed pilot vessel (at that time, the earnings of the Saint John pilots were paid to companies formed to operate

licensed pilot vessels). Except for the court costs that the Pilotage Authority might have been obliged to pay if the plaintiff had been successful, this case did not come under sec. 328 because the money the plaintiff was seeking was not part of the Pilotage Authority's expense fund but of the pilotage dues for services rendered, which normally belong to the pilot and are collected for him by the Pilotage Authority.

The second case, Smith v Halifax Commissioners (1917, 35 D.L.R. 765), concerns a claim directed against the Pilotage Authority in its two capacities, both as licensing authority and as trustee of the pilot fund. The plaintiff sought recovery of the licence fees he had paid for his first licence and for its subsequent renewal. These formed part of the Pilotage Authority's general expense fund. He also sought the aggregate amount of his contribution to the pilot fund during the preceding 35 years. When he became incapacitated by old age and infirmity in 1914, the Halifax Authority denied his claim for a pension on the ground that St. Marguerite's Bay, where the plaintiff acted as pilot, was not within the Halifax District, while, on the other hand, refusing to reimburse what had therefore been illegally collected. The first court and the Court of Appeal found the claim founded and the Pilotage Authority was ordered to reimburse the plaintiff.

In the third case, in 1948, Canada Steamship Lines Ltd. sued the Minister of Transport, in his capacity as Pilotage Authority for the District of Montreal, for the recovery of pilotage dues in the amount of $540 which the plaintiff had paid under protest, claiming that the ship concerned was exempt. The Superior Court *proprio motu* stated its lack of jurisdiction *ratione materiae* because the litigation pertained to a Federal Act of a public character which came under the jurisdiction of the Exchequer Court. The decision was not appealed and it does not appear that the case was pursued before the Exchequer Court (1948 C.S. 378 Canada Steamship Lines v Hon. Lionel Chevrier and Attorney General of Canada).

COMMENTS

It is considered that the question of ancillary powers leaves much to be desired, especially in view of the status of exception they create. Lack of clarity may cause unnecessary litigation. In addition to the unnecessary expense a plaintiff with a valid claim may incur, he runs the risk of losing his right because it has become time-barred and he may be too late to take fresh proceedings if the first case is dismissed on a question of procedure.

As indicated above, the right of Pilotage Authorities to administer all pilotage money should be clearly recognized in order to legalize the practice that has been followed for many years because it meets a definite service need and is required for the efficient operation of decentralized units which the Pilotage Authorities are, and should continue to be. However, this right should be subject to supervision by the Auditor General of Canada.

Particularly if the powers of the Pilotage Authorities are extended, it is considered that they should be specifically granted corporate status with all the powers that pertain to corporations as defined in the Interpretation Act (vide P. 338) modified, if necessary, to fulfill any responsibilities. This action would, in effect, grant each Pilotage Authority all the ancillary powers it requires and would establish its autonomy without ambiguity.

Chapter 9

LICENSED PILOTS: SAFETY AND DISCIPLINE

PREAMBLE

Earlier studies have shown that pilotage is the ultimate means to achieve safety of navigation. Organized pilotage provides shipping with the services of expert qualified navigators in specified waters that are generally confined and congested by traffic. The value of pilotage as a safety factor is in direct relation to the degree of competence and the qualifications possessed by each pilot throughout the duration of his licence. It is not sufficient for a pilot to meet the prescribed minimum when he is licensed: his qualifications must be maintained and improved where possible, and he must continue to meet his responsibilities as a licensed pilot. It is important today, and will be even more so in the foreseeable future, for pilots to keep *au fait* with the increasing size of ships and new methods of handling and navigating.

Hence a pilotage system based on licensing presupposes three powers: to oversee, to enforce discipline and to reappraise. Unless the limits of these three functions are clearly understood, the service will suffer and vessels will be endangered.

These functions need not be exercised (and ideally should not be exercised) by the same person or authority and any one of them can be exercised by more than one person or authority, either concurrently or possessing exclusive jurisdiction over part of the function.

The extent of surveillance, disciplinary and reappraisal powers varies according to the importance to the public of a pilotage service and the standard of qualifications of its pilots.

In pilotage legislation based on the free enterprise system, where pilotage is considered merely a service for the convenience of shipping, it is to be expected that surveillance and remedial powers will be limited and will be exercised only in particularly serious cases. The true free enterprise system contemplated in the present Act contains an automatic selection process: a pilot's performance and reputation determine whether he makes a living by piloting or chooses other employment. When a Master or agent selects a pilot he is responsible for his choice and must suffer the consequences if he

lacks the necessary information and does not take due precautions. Under such a system the Crown bears no responsibility for the faults of a pilot but only for damages that can be directly attributed to a Pilotage Authority's wrong-doing. In that context it was normal to limit the surveillance function of Pilotage Authorities and to give them no extraordinary powers of investigation. There was no objection to sharing this function with the Minister of Transport. It was also logical that Pilotage Authorities had limited power to suspend or withdraw a pilot's licence, with the result that preventive suspension was considered most exceptional.

The limited powers given to Pilotage Authorities in Part VI are, however, completely inadequate in today's context, as is the scheme of organization to which they belong. Pilotage Authorities, following a process that permitted the establishment, in spite of the law, of a completely different pilotage organization, generally through ultra vires regulations but often without regulations of any kind, tried to give themselves the surveillance and control powers which were denied by the Act but were necessary for the efficient discharge of their considerably increased responsibilities. But here they met increasing opposition because the exercise of these powers clashes with the interests, as well as the statutory rights, of the pilots involved, so much so that now they are, in practice, deprived of the extra-statutory surveillance and control powers they tried to assume.

Other factors contributed to confuse the situation further. Gradually the terms Minister of Transport and Pilotage Authority came to be considered synonymous and the administration of all the larger Districts was centralized in Ottawa.

As a result, Pilotage Authorities now hold only the limited surveillance and remedial powers given to them by the Act but, at the same time, they are forced by circumstances to assume duties and responsibilities over which they can exercise no effective control. The total effect is that the Canada Shipping Act is not observed, most of the regulations in District By-laws are ultra vires and the Pilotage Authorities no longer control the pilots' conduct. In the ensuing confusion some of the most serious cases of misconduct have remained unpunished and incompetent pilots are allowed to retain their licence with serious consequences for the safety of navigation.

Under the new exigencies of the pilotage service, the Pilotage Authorities have assumed responsibility for a fully controlled service (vide C.4, pp. 77 and ff. for details) with the result that the free exercise of the pilot's profession, competition for ships and the right of Masters to select their pilots have all disappeared. Masters who require a pilot are now obliged to accept the pilot assigned to them by the tour de rôle system which shares the workload equitably among all the licensed pilots. One of the consequences of these basic changes is that by assuming the right to assign pilots to ships without Masters having any choice in the matter, the Pilotage Authorities

have undertaken (perhaps unwillingly), to guarantee the qualifications, fitness and reliability of the pilots. In addition, the Pilotage Authority has superseded the pilot as a party to the pilotage contract by contracting for the services of its licensed pilots who, to all intents and purposes, have become its servants with the added responsibilities this entails.

The principles enunciated in this chapter apply *mutatis mutandis* to all other licence-holders. However, at present the legislative and factual situations differ materially in that there is no statutory provision dealing with the reappraisal function nor with disciplinary powers over the holders of pilotage certificates as opposed to pilots' licences (vide C.8, p. 306). Formerly, the Act contained a section giving authority to withdraw pilotage certificates for drunkenness, misconduct and incompetency (sec. 472, 1927 C.S.A.), and listed some statutory offences concerning certificate-holders (secs. 518 and 520, 1927 C.S.A.) but these provisions, together with all others dealing with pilotage certificates, were deleted and the whole question of pilotage certificates was made a subject-matter of the regulation-making powers of the Pilotage Authorities, *inter alia,* under subsec. 329(f) C.S.A. to make regulations establishing the rules of conduct and discipline which meet the needs of each District. These changes notwithstanding, no advantage was taken by Pilotage Authorities of their regulation-making power for this purpose. If the future pilotage system contemplates making greater use of pilotage certificates, all basic rules which apply generally to the conduct of certificate-holders should be reinstated as statutory provisions. The same remarks apply to pilot vessel licences. Even in those Districts where there is some semblance of regulations regarding licensing, none exists regarding discipline or the power to withdraw such licences.

1. SURVEILLANCE FUNCTION

All parties concerned with an enterprise have the right of surveillance but when public interest is involved designated officers of the Crown must bear this responsibility. Hence, each Pilotage Authority must oversee its pilots to ensure that they fulfil their duties and remain qualified, while at the same time taking special care that the Canada Shipping Act and the pilotage regulations are observed both by the pilots and others. This surveillance power is implied by the existence of a code of service discipline and by the right to reappraise, if and when required, as an inherent function of licensing. The fact that this surveillance duty is not specifically expressed in legislation is often used as an excuse not to act. For instance, a former Supervisor in the Quebec District adopted the policy of never acting unless he received a written complaint. This seldom happened. Obviously this attitude resulted from either a misconception of his functions and responsibilities or inability to perform his duties and, therefore, indicated his unsuitability

for the office. Early pilotage legislation made it a duty on the part of the Superintendent of Pilots to supervise the activities of the pilots and made it a statutory offence for him not to prosecute any failure or misbehaviour that came to his knowledge.

In the Quebec Trinity House Act a clear distinction was made between surveillance duty and judicial and quasi-judicial functions. While the Superintendent of Pilots was *ex-officio* a Trinity House Warden, the Act provided that when the Corporation sat as a pilotage tribunal he could not be a member thereof and that his function in such cases was to serve as informant and prosecutor. As will be discussed later, while the 1873 Pilotage Act retained by way of exception the special organizations of the Quebec and Montreal Districts, it provided a simplified system for the other Districts where public interest was much less involved. Judicial power over disciplinary cases came under the jurisdiction of the regular penal tribunals whose sentencing powers were limited to imposing fines and terms of imprisonment. The right to deal with a pilot's licence by way of suspension or withdrawal was made a function of the reappraisal power of each Pilotage Authority and the Act specifically defined the few cases where such power could be exercised. Responsibility for surveillance was not laid down in the Act, no doubt because it was considered implied in the mandate of any publicly appointed licensing authority. (Specific provisions in this regard are necessary only when it is intended to derogate from this principle as was done in the Trinity House Act). This scheme of organization has not been materially changed since 1873, except that the Quebec and Montreal organizations were made to conform to the prevailing system and each Pilotage Authority's powers of surveillance and reappraisal were substantially diminished when in 1904 (4 Ed. VII c. 37) some powers were assumed by the Minister of Transport acting through the administrative courts under the provisions of the legislation now contained in Part VIII C.S.A.

The power of surveillance is essentially relative. It exists as a function of the limited remedies that are authorized by the Act. It also forms part of the assistance that must be provided to other authorities who are empowered to take specific remedial action, e.g., the Minister of Transport regarding safety of navigation under Part VIII of the Act, and the Minister of Justice and Port Authorities in the prosecution of pilotage offences or offences relating to pilotage.

The efficiency of the surveillance function is further limited by the means and powers placed at a Pilotage Authority's disposal, the scope of which will vary according to the importance given by the Act to pilotage as a service for the public.

The surveillance function may be divided in two phases designated here as

(a) discovery,

(b) initiating remedial action.

DISCOVERY

The discovery phase is fact-finding. It is a prerequisite to the second phase because to initiate any remedial action properly, the attention of a Pilotage Authority has

(a) first, to be alerted to a situation or an occurrence that falls within its surveillance jurisdiction (i.e., information);

(b) second, to be sufficiently acquainted with the pertinent facts, which, unless they are self-evident, are obtained by making the necessary enquiries (i.e., investigation).

MEANS OF INFORMATION

Although the powers of a Pilotage Authority are very limited under Part VI, it has certain means of information at its disposal.

The first means of information comes from complaints by third parties, mostly shipmasters and agents. It is the right of any aggrieved party to lodge a complaint. However shipmasters and agents are often reluctant to make adverse reports against pilots and do so only when the situation is too serious for them to remain silent, or because it is in their interest to complain. It appears that many blameworthy instances remain unreported because the shipmaster or the agent does not wish to become involved, or for fear of some sort of retaliation from the pilots as a group.

As demonstrated by typical instances cited later (under Pilotage District of Quebec—*Discipline*), the Pilotage Authority and its officers react to such complaints with deplorable inactivity and when a belated investigation is carried out only incomplete evidence, insufficient to support any corrective action, is available. For instance, no routine is set up nor effort made to have the condition of a pilot, reported impaired by alcohol, verified without delay while it is still detectable, by persons not belonging to the ship and by a physician. Such a case, therefore, depends only on the testimony of those on board, which means possible delay for the ship. It is no wonder that under these circumstances Masters and agents refrain from making reports which involve them in costly delay, trouble and ill feeling and, more often than not, produce no useful result.

If considered desirable, such reports can be encouraged, e.g., by urging Masters to report without delay any unusual behaviour by pilots using the quickest means available—radiotelephone, wireless or land telephone—and, when circumstances warrant, by initiating an immediate investigation.

At one time, in what is now the Quebec District, the cooperation of shipmasters was made a requirement in that they had to file a report on the pilot's performance after each trip (1790, 30 Geo. VI c. 1). This feature was not retained in pilotage legislation after Confederation and, at present, Masters are not even invited to make their comments when they sign source forms (Ex. 556). It is true that there is a blank space on the form entitled "Remarks" but no mention is made that it may be used by Masters for that purpose and, in fact, the space is used solely by pilots to give particulars of any unusual occurrences en route. It is considered that by statute all source forms should provide a space "Master's remarks", and that the Act should also state that a Master's failure to report immediately to the Pilotage Authority by radiotelephone or wireless any misbehaviour or incapacity on the part of a pilot and to record such report on the source form would bar the ship from any civil claim or defence in litigation with the pilot, the Authority or the Crown, based on the pilot's alleged impairment to which it would otherwise be entitled.

A second means of information can be provided by anyone involved in the process of providing pilotage service, i.e., pilots, complements of pilot vessels and the Pilotage Authority's officers and employees, especially despatchers.

As a rule pilots do not report a fellow pilot unless there is rivalry between them, such as existed during free competition when disputes among pilots were common occurrences, and during the special service system which created discontent among pilots. Under the existing controlled system a pilot has little incentive to report a colleague for such action requires more than a common sense of professional responsibility. This attitude is not peculiar to pilots but is found in all professions including law and medicine, e.g., a lawyer very seldom reports a fellow lawyer unless he is the aggrieved party.

Masters and crews of pilot vessels are unlikely to report a pilot because their personal interest is to remain uninvolved, even though on most occasions it is only through them that a Pilotage Authority can determine whether pilots are physically fit. There is a requirement for a specific statutory provision carrying a penalty of a fine, for failure to report serious cases, e.g., drunkenness, drinking alcoholic beverages while about to proceed to duty and obvious physical unfitness.

Lacking effective power, the immediate local representative of the Pilotage Authority in Districts where the Minister is the Pilotage Authority, i.e., the District Superintendent (or Supervisor) has identified himself more with the pilots with whom he works than with the Pilotage Authority. In those Districts where there were disputes between third parties and pilots it was apparent that, in general, the local Superintendent was clearly biased in favour of the pilots.

Now that the Pilotage Authorities of the larger Districts have undertaken to control and provide pilotage services the District Superintendents do not have the time to attend personally to despatching and hence this clerical work is delegated to clerks who are guided by standing orders and Superintendent's instructions. At the same time these despatchers are supposed to exercise surveillance but, despite this obligation and duty, the record shows that they seldom make an adverse report on a pilot. It appears that they derive insufficient authority from their position and are afraid of losing their employment.

Evidence to this effect was found in the Quebec District where the Supervisor requested that all reports be made in writing, the expression "on reasonable grounds" in subsecs. 19(3) and (4) of the Quebec By-law being limitatively interpreted by him as meaning a written complaint. A former Quebec Supervisor stated that when he took office he first acted on verbal information but when he found this caused him trouble he made it a point to require complaints in writing, adding that if this was not furnished he would not take any action. This attitude shows a lack of comprehension of a Supervisor's duty and responsibilities.

Normally, a pilot proceeding on duty calls at the pilotage office only if he has to use a pilot vessel and even then, if he has received his orders in advance, he may proceed to the pilot vessel directly. Formerly, some By-laws required the pilots to call at the pilot office before proceeding to an assignment but, possibly in order to improve the pilots' working conditions, this is no longer required anywhere. If a pilot calls at the office the clerk has an opportunity to see him. According to the provision of the By-law, whenever a pilot is suspected of being under the influence of liquor he is to be stopped and taken off the list and when the Supervisor is informed by the clerk that such action has been taken he should carry out an investigation and report to the Authority.

It was, however, stated that the requirement of the By-law is deliberately not followed, that the despatchers do not report these cases to the Superintendent unless there is an abuse on the part of the pilot. Generally, when a despatcher realizes that a pilot may not be fit to proceed, he suggests the pilot change turns. The pilot usually agrees, the case is not reported to the Superintendent and no further action is taken, but, if the pilot refuses, the clerk has no alternative but to report the matter.

A later Quebec Supervisor stated that his instructions were for the clerk on duty to be on the lookout for violations and the clerks were told verbally to remove from the list any pilot who did not appear fit to proceed.

Despite these instructions, however, he added that during his ten years in office no pilot, as far as he knew, was ever prevented by the clerks from embarking because of alcohol.

It was intimated that the despatchers adopt that attitude because they fear retaliation. This is reflected in the case of pilot No. 70 (vide Pilotage District of Quebec—*Discipline*). During the Advisory Committee's hearing the despatcher gave one version which left no doubt as to the condition of the pilot but many months later, when an investigation was held under sec. 579 Canada Shipping Act, he changed his testimony. It was suggested that he was induced to do so by outside pressure because, after he appeared before the Advisory Committee, he was persecuted by some of the pilots.

In this case, the Commissioner who later investigated under sec. 579 remarked in his report:

> "I am impressed by the responsibility borne by the despatcher in assigning pilots to ships particularly in cases where some urgency is attached to the situation. He may be all on his own and probably subject to the influence of others. I could not escape the conviction that Mr.... [despatcher's name] felt himself to be in a very embarrassing situation.
>
> I feel, however, that a sense of this responsibility should be urged upon him and all despatchers and in the interests of the pilotage service they should not hesitate to refuse to assign a pilot for duty if they have any doubt about his fitness for duty. Nor should they feel that it will be subsequently incumbent upon them to prove drunkenness.
>
> I should not want him to regard the outcome of this case as an indication that he or any other despatcher is not authorized to decline to send a pilot on board a ship if a pilot is, in his opinion, in no condition to carry out his assignment".

Similar fears were expressed by other despatchers both to the local Supervisor and to the Superintendent of Pilotage in D.O.T. Captain Slocombe added that the despatchers "are very low paid people and they stand in awe, you might say, of the pilots generally speaking. They feel that the pilots can make or break them". He added that the pilots are the offenders in this regard although only some of them are to blame.

The gravity of the situation may be compounded in the Quebec District by the fact that taking a pilot off the list is considered a sort of disciplinary measure and, in fact, has occasionally been used as such when suspended pilots were prevented from making up the turns they had lost (although nowhere in the By-law or in the Despatching Rules is there any authority for such action). Mr. J. A. Maheux a former acting Supervisor for the Quebec District, stated that taking a pilot off the list is considered a disciplinary measure because the pilot loses turns and earnings, although no charge is laid and there was neither trial nor conviction.

Mr. Maheux pointed out one such instance involving pilot No. 16 who missed his turn July 21, 1962. This was a case of drunkenness that had been reported by a clerk. When the pilot was reinstated, he had lost six trips and

he was prevented from making them up; no charge was laid and the licence was not withdrawn as required by the By-law. The entry in the *Establishment Book* for July 27, 1962, read as follows:

"Placed in turn with the average, lost six trips."

Pilotage Authorities have other means of control at their disposal. Subsec. 329(f) C.S.A. gives them the power to make regulations "for ensuring their [the pilots] good conduct on board and ashore and constant attendance to and effectual performance of their duty on board and on shore . . ." and subsec. 329(j) to make regulations providing for the premature retirement of pilots on the ground of physical or mental incapacity. It is under the authority of these subsections that District By-laws include provisions requiring the pilots:

(a) to report verbally immediately and in writing as soon as possible thereafter "on the form provided for that purpose" any shipping casualty (sec. 551) or incident in which the ship they were piloting was involved;

(b) to report similarly when "any violation of the law on the part of other vessels is observed" (in some District By-laws the wording is "violation of the law or regulations on the part of other vessels . . .");

(c) to report, as soon as noticed, any physical or mental impairment;

(d) to submit to periodical eyesight and hearing examinations.

With respect to requirement (b), the By-laws are not clear because they do not state to which legislation reference is made. If imperative provisions are to be effective they must be clear, unambiguous and *ad rem.* A further weakness is the "form provided" for the purpose of reporting does not exist; the only one available at present relates to shipping casualties and incidents (requirement (a)).

These limited means of obtaining information are insufficient to support a controlled pilotage service with all its attendant responsibilities.

POWERS OF INVESTIGATION

When information has been received (unless the case is self-evident), it becomes the Pilotage Authority's responsibility to hold or to initiate an investigation warranted by the situation.

There are two types of enquiry. The first is a fact-finding, also called administrative, investigation to enable an administrative authority to decide with full knowledge what future course of action is to be taken. In this type of enquiry, no person's rights can be finally affected; it is a complete process in itself. The second type is an enquiry, carried out by a tribunal, as an integral part of reaching a judicial decision. It establishes the evidence on which

a judgment affecting the rights of the parties involved is rendered and, since it forms part of a trial or a quasi-trial, the rules governing it are essentially different from those which obtain in the first type of enquiry. In pilotage matters the second type of enquiry is an integral part of exercising the licensing function, i.e., whether a pilot's qualifications are being appraised or reappraised in connection with his licence and also, during a trial, for a pilotage offence. It is not part of the surveillance function but of both the licensing and judicial function.

The duty of surveillance implies the right to hold investigations. A prerequisite to taking corrective action is full knowledge of all pertinent facts. Here again, the scope and importance of powers to investigate are proportional to the scope and importance of the surveillance function. Therefore, as is to be expected with the type of organization provided in Part VI, investigatory powers are very limited. Experience has shown that they are inadequate for the additional responsibilities assumed by Pilotage Authorities on account of present day requirements.

Fact-finding investigations may be divided into two groups depending upon the powers that are, or may be, exercised:

(a) informal investigations where information can only be obtained if volunteered;

(b) judicial type investigations, normally referred to as courts of enquiry, where the presiding officer possesses the powers of investigation that normally belong to a court of justice, to obtain all required information.

(a) *Informal and formal investigations*

No statutory provision is required to empower a Pilotage Authority to hold informal investigations because knowledge of the facts is part of the process of decision-making. However, specific provisions are required to authorize holding judicial enquiries because these powers infringe the basic freedom of individuals and are, therefore, powers of a very exceptional character which should be granted only when superior interests are at stake. In a systematization where pilotage is considered merely a service provided for the convenience of shipping, it was to be expected that such extraordinary powers of investigation would not be granted. Under the present legislation the safety of navigation is a responsibility of the Minister of Transport, but even his right to have a judicial enquiry held merely to establish facts has been limited by law to only the most serious cases affecting safety, i.e., shipping casualties. This aspect will be studied later.

Therefore, a Pilotage Authority possesses neither the powers nor the means to obtain complete information and must be satisfied with what it can discover by itself, in addition to whatever information is volunteered. It has

no power to compel the attendance of witnesses or the production of documents, to enter premises, to board ships, to take evidence under oath, or to afford witnesses protection. All these are powers that are normally given whenever Parliament considers it necessary, in the public interest, to hold a full enquiry. It is pertinent to note that even the power to take evidence under oath, formerly possessed by Pilotage Authorities in sec. 494 of 1927 C.S.A., was omitted in the 1934 Act. This section read as follows:

> "The Pilotage Authority of any district shall, in all cases of inquiry or investigation made by them under this Part, or under any other Act or law, have full power to examine any person appearing before them to give evidence in such a case on oath; and such oath may be administered by any member of such Pilotage Authority present at such inquiry or investigation."

The limited powers of investigation of a Pilotage Authority are in sharp contrast to the usual procedure followed by Parliament in the Canada Shipping Act whenever it wished to provide special powers of enquiry. Without exception, these powers are spelled out at length, e.g., the person or persons appointed by the Minister to investigate shipping accidents "may summon witnesses and compel their attendance by the same process as courts of justice, and may administer oaths and examine witnesses touching the cause of such accident . . ." (subsec. 552(2) C.S.A.); full powers are given by sec. 554 to the person appointed to investigate a wreck; the special powers of enquiry of the officer or person appointed to hold a preliminary enquiry in a shipping casualty are fully stated in sec. 556, i.e., to enter premises, board vessels, compel the attendance of witnesses, administer oaths, require and enforce the production of books, papers or documents.

The absence of such provisions in Part VI, or elsewhere in the Canada Shipping Act, regarding the investigations that may be carried out by Pilotage Authorities, and the fact that the power to take evidence under oath was withdrawn in 1934, can only mean that Parliament intended that Pilotage Authorities should have none of these powers. Furthermore, since the exercise of these special powers of investigation is an infringement on the basic rights of freedom of individuals, it can not be surmised that they have been granted by inference, on the ground that they are necessary attributes of a Pilotage Authority's responsibility for surveillance.

There is only one provision in the Act whose wording is wide enough to apply to all types of enquiries, viz. subsec. 329(*f*), but the context to which it refers restricts its application to the trial type of enquiry. It reads as follows:

> " . . . every pilotage authority shall . . . have the power . . . to
>
> (f) make regulations . . . for the holding of enquiries either before the pilotage authority or any other person into any matters dealt with in this Part . . . ".

Therefore, this subsection merely empowers every Pilotage Authority to prescribe by regulation rules of procedure for carrying out those investigations and enquiries that it is authorized to hold under the Act, i.e., adjusting pilotage disputes (subsec. 329(*k*)), settling claims by pilots for pilotage dues in the circumstances of secs. 348, 349 and 350 (351(1)), granting licences and reappraising the qualifications of pilots. The By-laws of various Districts contain a provision whereby in cases of impairment, or alleged impairment, due to intoxicating liquor or narcotic drugs, Superintendents are required to "make a full investigation into the matter and submit a report thereof to the Authority" (Quebec By-law, subsecs. 19(3) and (4)), but there is no definition of the procedure to be followed and the form the enquiry should take. In reality, this By-law provision gives no one any special power; it is merely an administrative directive from the Pilotage Authority to its officers, and not a regulation.

It is to be borne in mind that the administrative investigation is a complete process in itself whose aim is merely to ascertain a factual situation. The rules of evidence do not apply, although the quality of the enquiry may well suffer if they are ignored altogether, e.g., a report based merely on hearsay evidence should be treated with great caution. No one is on trial and no one's rights can be affected at that stage, except in most exceptional circumstances and on the basis of public interest, and such accessory consequences must necessarily be very temporary and must always be followed by a trial. In penal matters, this is the process of arrest before trial, and, in the case of the reappraisal of a pilot's qualifications, it is preventive suspension, a subject which will be studied later.

Because these enquiries are solely for the purpose of making executive decisions, they must normally be carried out with the least possible delay and without interference. There are no parties involved and only the Authority who caused the enquiry to be held has the right to interfere (The Queen v Bernard Randolph and World Wide Mail Services Corporation 1966 S.C.R. 260). There is no publicity whatsoever and proceedings and findings are confidential, unless the Authority responsible decides otherwise. For the same reason, evidence gathered at these enquiries can not serve as evidence against any one at a penal trial. But, as will be seen later, there is no objection to using such evidence during the reappraisal of a pilot's qualifications, provided it is fully disclosed to the pilot that he is given full opportunity for a complete defense and hearing. These reports have been repeatedly used illegally by Pilotage Authorities as evidence in disciplinary cases with the exception of the most serious cases when the pilot concerned insisted on a full trial.

Informal investigations are a daily occurrence in the administration of pilotage, especially in Districts where the Minister is the Pilotage Authority. Since decisions must be made in Ottawa, a full report of the facts and cir-

cumstances in all cases must be prepared locally by the Authority's local representative (District Superintendent or Regional Superintendent) and forwarded with recommendations to the Pilotage Authority for decision.

That full powers to conduct an enquiry are lacking is borne out by the facts: no Pilotage Authority has ever tried to compel the attendance of civilian witnesses; any investigations held have always been informal; only voluntary evidence has been collected; on the rare occasions when evidence was taken under oath, the oath was not administered by virtue of authority derived from Part VI C.S.A. or from any other provision of the Act but because the investigating officer happened to be also a Justice of the Peace or a Commissioner for the Superior Court in the Province of Quebec. This procedure is not only questionable, it is completely illegal because a Justice of the Peace and a Superior Court Commissioner are capable of administering oaths only when they are acting in that capacity, which is not the case here. This is a reprehensible abuse of the power to administer an oath; it is also a censurable practice because indirectly it tries to make use of a power which Parliament specifically denied to Pilotage Authorities. It is, therefore, considered this practice should cease until existing legislation is amended. Any oath taken under these circumstances is worthless and can never constitute a charge of perjury. Hence, the procedure is nothing more than a subterfuge and an illegal means of coercing witnesses.

The effect of the lack of special powers of investigation is evidenced by pilotage investigations carried out in the past. When Captain Jacques Gendron served as Regional Superintendent in the St. Lawrence River Districts, Sept. 1959-Dec. 1961, he carried out most of the enquiries for the Quebec, Montreal and Cornwall Pilotage Authorities, especially the investigation of shipping casualties when a pilot was involved. He did not limit his investigations to pilots' conduct but covered all aspects of the cases. He never waited for a specific appointment or instructions but immediately proceeded on his own whenever he became aware of a situation that he thought needed investigation. Because it was part of his duty to keep the Pilotage Authority informed of what was happening in his Region, he considered it his duty and responsibility to gather all possible information as soon as possible and to report without delay.

When a ship is involved, an investigation is always urgent because the ship concerned may be about to depart with the result that witnesses are not available. In Districts where the Minister is the Pilotage Authority, as noted earlier, according to the procedure established in the By-laws, the pilots are obliged to report verbally without delay any shipping casualties or incidents in which they are involved, and in writing as soon as possible thereafter on a form, colloquially called the "pink form", that is to be filed immediately with the Pilotage Authority's local representative. Normally, this officer made a quick, cursory investigation in order to send a preliminary

report at the same time he forwarded the pilot's accident report to Ottawa, but when the Regional Superintendent was appointed for the St. Lawrence Region, the Supervisors of the Montreal and Cornwall Districts ceased to perform these duties. Now the District Supervisors merely transmit the pilot's report to the Regional Superintendent without comment and, since he is stationed nearby, he immediately proceeds with his investigation. In the District of Quebec, however, the former practice is followed with the difference that the pilot's report and the Supervisor's comments are sent to the Regional Superintendent rather than to Ottawa. If the Regional Superintendent considers further investigation is indicated, he carries it out himself.

Captain Gendron stated that he did not wait to receive a pilot's report before investigating: as soon as he heard of a casualty from any source he proceeded immediately and, on occasion, he was aboard a vessel very soon after an accident occurred.

When he was satisfied that further investigation on his part would add little to the pilot's casualty report, he made his report to Ottawa with his recommendations for further action, i.e., whether further official investigation was needed or whether the case should be considered concluded, together with his suggestions for disciplinary action.

The procedure he followed was summary and very informal. He had never received any directives from his superiors how to conduct enquiries. Upon receipt of information that there had been a casualty he tried to board the ship involved as quickly as possible to meet the Master and request his permission to investigate. If this was granted, he proceeded to examine the witnesses about their training and qualifications and obtain details of the accident. Generally, this examination was under oath, but not always, and it was Captain Gendron's understanding that this was left to his discretion; his problem in this respect was not whether witnesses were telling the truth but the language barrier, and he did not want to put witnesses in an ambiguous situation if their recorded answers were incorrect because of faulty interpretation. He stated that he had never found a witness refusing to answer on the ground of self-incrimination. When he first started, he took statements in writing but, later on, he used a dictating machine. The statements were generally in the form of questions and answers, word for word as much as possible. On a few occasions he was accompanied by a stenographer who took depositions verbatim.

The pilot was not invited to attend because Captain Gendron tried to obtain information with the least possible delay. On the other hand neither the pilot nor the shipowner was prevented from accompanying him. Sometimes they attended with their counsel and he always allowed them to put questions to the witnesses. On some occasions consular officials also attended. He never felt that their presence interfered with or impeded his work. Generally, however, he was alone when he made enquiries on board ships.

Although language differences raised problems of interpretation the Department of External Affairs refused him authority to employ official interpreters because they were too expensive and difficult to locate. Therefore, he had to devise a make-shift solution: voluntary interpreters who worked without remuneration. Normally these volunteer interpreters did not belong to the ship and were sworn in beforehand.

After collecting all the evidence he could, he forwarded his report to his immediate superior, the Superintendent of Pilotage in Ottawa, with his comments and opinions about the cause of the casualty, and also his view whether the pilot or the Master was at fault. He gave opinions and recommendations but, once again, he never received any directive from Ottawa in this regard. He simply felt that this was part of his duty and he was never told not to follow that procedure.

He took the same action whenever a pilotage offence came to his knowledge.

Captain Gendron also stated that he always had the entire co-operation of the pilots' associations and that they never interfered in questions of discipline or with his enquiries.

Captain Gendron added that he thought he derived power to take evidence under oath from sec. 552, Part VIII C.S.A. He was obviously mistaken, first, because he was acting for the Pilotage Authority and not for the Minister; second, because sec. 552 does not apply to "shipping casualties" (sec. 551) nor to statutory offences or breaches of regulations committed by pilots, but only to "accidents" on board ships; third, because authority to hold any enquiry provided for in Part VIII of the Act requires a specific appointment from the Minister as an essential prerequisite. However, he was not certain of his powers under this section since he never forced his way on board a ship during the many investigations he conducted. On one occasion, the Master of a Dutch vessel refused to allow him to inspect his ship and even asked him to leave, with which he complied. This ended the investigation in that case.

All such investigations carried out by a Pilotage Authority, either through the District Supervisor or the Regional Superintendent, were, therefore, unofficial fact-finding enquiries carried out to help the Authority decide what further action should be taken.

(b) *Medical examinations*

When the only question involved is the physical or mental fitness of a pilot which can be determined by a medical examination, the Pilotage Authorities have interpreted the provisions of subsecs. 329(f) and (j) as empowering them to compel a pilot to submit to a medical examination, at their entire discretion.

Such a claim is obviously too wide. While it is true that unless pilots can be compelled to undergo medical examinations the power to retire pilots on medical grounds would be in practice denied, this is obviously an ancillary power which does not have to be defined, but at the same time this power is essentially limited by the principal power on which it depends, i.e., the existence of a *prima facie* case of physical impairment which is incompatible with piloting. In the context of the present Act periodical compulsory examinations and discretionary powers to force pilots to undergo examinations as a matter of routine appear ultra vires of the legislative and administrative powers of Pilotage Authorities.

This requirement is found in By-law provisions and non-compliance creates an offence. At present District By-laws contain two such provisions, both based on subsec. 329(j):

(a) the periodical, compulsory eyesight and hearing examination referred to earlier;

(b) the periodical examination to which a pilot is obliged to submit whenever the Supervisor (or the Secretary) has reason to believe there is impairment due to a physical or mental infirmity incompatible with the performance of pilotage duties.

It is considered that the right of a Pilotage Authority to compel pilots to submit to periodical medical examinations, as well as to additional examinations, entirely at the administrative discretion of a Pilotage Authority, is a definite requirement which should be clearly stipulated in the Act. Such a right is not only highly desirable in the organizational scheme of the existing Part VI but it is also considered a requirement in a system providing for a controlled pilotage service.

It is also considered that this right should be extended to cover cases of suspected impairment due to drunkenness, or use of drugs, when a pilot is on duty, or about to proceed on duty. In view of the pilot's grave and heavy responsibilities, Pilotage Authorities should be clearly empowered by an appropriate statutory provision to order a pilot suspected of impairment to submit to an immediate medical examination, including any tests the designated physician may request. Refusal by a pilot to undergo such examinations and tests readily should be a statutory offence carrying the sole and obligatory penalty of cancellation of his licence and, in the interval until the case is decided, the pilot should automatically be suspended.

PILOTAGE AUTHORITY'S LIMITED REMEDIAL POWERS

Once a Pilotage Authority becomes aware of any situation which needs to be corrected or improved and which it has power to deal with or, at least, has power to cause remedial action to be taken, it is part of its surveillance responsibility to initiate a corrective procedure.

Action of two types is involved:

(a) an immediate corrective measure of a temporary and subordinate nature, i.e., preventive suspension;

(b) initiating remedial procedures, i.e., prosecution of offences, reappraisal of the qualifications of the pilot concerned or reporting to the authority who is empowered to deal with the case.

PILOTAGE AUTHORITY'S POWER TO IMPOSE PREVENTIVE SUSPENSIONS

Preventive suspension is the temporary withdrawal of a pilot's licence pending adjudication of the holder's competence to pilot.

Although it is essentially a temporary measure, it is nevertheless an infringement on the free exercise of a right before judgment and even before the pilot concerned is given the opportunity to defend himself. It is, therefore, an extraordinary power which should not be used unless superior interests are at stake in very exceptional circumstances.

It is for this reason that under the scheme of pilotage organization provided by the present Canada Shipping Act this measure is authorized in only two specific cases which, by their nature, raise a serious presumption that the pilot involved is clearly a safety risk:

(a) the Pilotage Authority may suspend the licence of a pilot pending the outcome of a charge either laid or to be laid regarding the alleged commission by the pilot of the indictable offence described in sec. 369 C.S.A., i.e., of having endangered a ship or persons on board by breach or neglect of duty or by reason of being under the influence of liquor or narcotic drugs (sec. 370);

(b) the officer presiding at a Preliminary Enquiry, convened by the Minister of Transport under the powers he derives from Part VIII of the Act, may suspend a pilot's licence pending the decision of a Court of Formal Investigation when he is of the opinion that the shipping casualty "has been caused by the wrongful act or default or by the incapacity of the pilot in charge" or that such pilot has shown his unreliability by the commission of "any gross act of misconduct or drunkenness". The suspension automatically lapses if within three days a formal investigation is not ordered (subsec. 555(2)).

Case (b) is studied later when the powers of the Minister of Transport, as such, over pilots' licences under Part VIII C.S.A. are reviewed. Court decisions in cases where the exercise of this power has conflicted with the rights of individuals will also be studied.

When the provisions of sec. 370 of the present C.S.A. were first introduced in 1875 they gave Pilotage Authorities much more drastic power. The 1873 Act contained no corresponding section. Before 1875, Pilotage Authorities, despite the seriousness of the situation, could take no action against a pilot's licence until judgment had been rendered by a regular tribunal of penal jurisdiction. Only a conviction by such a court empowered a Pilotage Authority, in its licensing capacity, to reappraise the reliability of a convicted pilot and to decide whether, under the circumstances, he was still sufficiently reliable to retain his licence. In an amendment effected in 1875 (38 Vic. c. 28, s. 2) Parliament, no doubt appreciating that a pilot suspected of such a serious offence was *ipso facto* a safety risk and, therefore, should not be allowed to pilot, gave Pilotage Authorities not only power to impose preventive suspension but also power to cancel a pilot's licence, even before his criminal trial. The 1875 provision read as follows:

> "A pilot shall be liable to suspension or dismissal by the pilotage authority of the district, for any of the offences mentioned in the seventy-first section of the said Act, upon such evidence as the said authority deems sufficient, and whether he has or has not been convicted of or indicted for such offence."

The resulting situation was that as a preventive measure a Pilotage Authority could go as far as dismissing the pilot before trial, while it retained the power to deal with the licence after conviction if the licence was not already withdrawn.

This situation remained unchanged until 1934 (vide secs. 532 and 533, 1927 C.S.A.). When the 1934 Act was passed, Pilotage Authorities were deprived of the power to deal with a licence after conviction (sec. 446, 1934 C.S.A.) and preventive power was limited to suspension (sec. 447, 1934 C.S.A.), a situation that has remained unchanged ever since.

Part of the 1934 modification was correct in that it brought preventive power into proper perspective, i.e., limiting it to preventive suspension pending the outcome of criminal proceedings, but the other modification defeated the purpose of the first and created a problem by denying Pilotage Authorities power to dismiss a pilot found guilty of such a serious offence although the power of dismissal is granted for such relatively minor offences as demanding or receiving more dues than those prescribed by law (sec. 372 C.S.A.) and may be imposed for breach of By-law (sec. 330). This amendment created a particularly awkward situation in that conviction automatically brings a preventive suspension to an end and, therefore, reinstates a pilot in the exercise of his professional function. From that point of view, he is in exactly the same position as if he had been acquitted.

In practice, secs. 369 and 370 C.S.A. are not used. They were employed in the past when sec. 370 was wrongly interpreted as giving a Pilotage Authority power to inflict a punitive suspension without prosecuting the

offence before a criminal court under sec. 369. The last attempt to make use of this provision dates back to 1956. In a letter dated April 4, 1966 (Ex. 1466(c)) Captain Slocombe, Chief of the Nautical and Pilotage Division of the Department of Transport, stated:

> "... of late years we have been disposed to take a more critical look at the propriety of the legal procedure which we had been following so that at the present time we do not take legal actions against pilots under these two sections."

The nature and the purpose of sec. 370 do not seem to have been understood by Pilotage Authorities. This is illustrated by a letter written by the Deputy Minister of Transport to the Deputy Attorney-General of Canada August 2, 1963, seeking his legal opinion as to the feasibility of using the power of suspension granted by sec. 370 as a means of discipline against a pilot. He was reminded by the Department of Justice, August 28, 1963, that "the right of the Pilotage Authority to suspend a pilot under sec. 370 of the Canada Shipping Act is incidental to the institution of criminal proceedings against the pilot for an offence under section 369" (Ex. 1466 (*l*)). The pertinent excerpt of the August 2, 1963 letter reads:

> "We wish to consider whether any disciplinary action should be taken against either of the pilots . . . Section 370 of the Canada Shipping Act appears to give the Pilotage Authority of the Pilotage District of... the power to suspend either or both of the pilots involved if he comes to the conclusion that, by breach or neglect of duty, the pilot contributed to the damage to any of the ships. I assume that this section must be read in the light of the Bill of Rights and that a pilot is entitled to a hearing before the Pilotage Authority suspends him. In the absence of any provision in the Canada Shipping Act or the General By-law of the... Pilotage District relating to inquiries for the purpose, I assume that the Pilotage Authority may name a person to hear the evidence, giving the pilot the privilege of attending during the hearing and of cross-examining, calling evidence and presenting argument in his defence."

This letter indicates a profound misconception of the rôle and powers of Pilotage Authorities. The quasi-judicial function of reappraisal is confused with the process of enforcing discipline and is considered a penal function. The essential nature of sec. 370 and the principles of its application are not understood. It may be said, therefore, that the provisions of sec. 370 were never employed. When, prior to 1956, use was purportedly made of this section, it was under a false assumption of its nature and hence, any disciplinary sentences awarded at that time were invalid unless they were authorized by some other provisions of the Act.

A distinction must be made between a preventive suspension and a decision taken by a despatching authority not to despatch a pilot at a given moment. By despatching, a Pilotage Authority is merely exercising the right of choice that Masters formerly possessed. Then a Master's refusal to hire a pilot was simply the exercise of his right of choice and did not amount in any way to interference with the freedom of the exercise of the pilot's profession. This situation is not contemplated by the Act, and obviously could not be, since it presupposes a power of despatching which the Pilotage

Authority does not possess at law. But if such a power is to be given in future legislation, the power not to despatch, unless the Pilotage Authority or its despatching officer is wholly satisfied with the pilot's fitness at that moment, should be differentiated from the extraordinary procedure of preventive suspension. The former is nothing more than one of the administrative decisions associated with despatching, while preventive suspension is a necessary accessory to the quasi-judicial process comprising the reappraisal of a pilot's competence. For instance, a preventive suspension must necessarily be a corollary to the withdrawal of a licence and there can not normally be a preventive suspension in a case that, in the end, does not entail the dismissal of the pilot. By contrast a tired pilot must not be despatched until he is rested.

If despatching was merely a service rendered by a Pilotage Authority to its pilots, the despatcher would be bound by despatching rules and instructions from the pilots as a group, and would have no discretion whatsoever whether or not to despatch a pilot when his turn came, unless the rules and instructions gave him some discretion. In such a case, not the Pilotage Authority but the pilots individually and as a group would bear responsibility for assignments. This was the precise situation when the Quebec pilots were grouped by their 1860 Corporation into a kind of partnership and provided shipping with pilots under a despatching system which they themselves controlled. In an 1861 judgment (11 L.C.R. 342 in re: *The Lotus,* Clark) the Vice-Admiralty Court of Lower Canada dismissed a suit for damages resulting from a collision that had been taken against the owner of one of the ships involved. The court decided that the collision was caused by the sole fault of the pilot of *The Lotus* and discharged the owners of *The Lotus* of all responsibility pointing out that the plaintiff's only recourse lay against the pilot or against the Corporation of Pilots. It was, no doubt, this decision and others of the same nature that prompted the adoption of the 1869 amendment (32-33 Vic. c. 58) to the Quebec Pilots' Corporation Act which decreed the non-responsibility in torts of the Corporation for the wrongful act, fault or negligence of any of its pilots.

However, when a Pilotage Authority imposes and controls despatching in its own name, the normal consequence is that it bears responsibility both for its errors and faults in making assignments, and also for damages caused by the wrongful acts of the pilots so assigned. In *The Lotus* case referred to, the court made the following very appropriate remark:

> "This case and the consideration which arise out of it, will shew the immense importance and responsibility of the office of pilot, and the necessity which exists that the utmost care and attention should be given by the authorities who make the appointment, to see that none are appointed but those who possess the requisite qualifications and character, since it has pleased the legislator to give to those whose property is to be placed under the sole charge of the pilot, no power to select one in whom they have confidence, or refuse one in whom they have none".

By imposing its assignments of pilots on shipping a Pilotage Authority assumes great responsibilities. As was pointed out before, this undertaking was forced upon Pilotage Authorities by circumstances and by the requirements of the service. This situation was not envisaged in the present pilotage legislation which, therefore, does not provide Pilotage Authorities with the means to discharge these new responsibilities effectively. If, in future legislation, the Pilotage Authority is to be given control over the assignment of pilots, the legislation should cover the liability in torts of the Pilotage Authority as well as the Crown, and should also enable the Pilotage Authority to assure shipping reasonable protection by having the right not to assign a pilot under any circumstances, if any suspicion exists as to his fitness or competence.

This is no doubt the reason why in most Districts the Pilotage Authority retains final control over despatching, despite the extensive despatching rules that exist in certain Districts. Subsecs. 15(1) and (2) of the Quebec Pilotage District General By-law, for instance, read as follows:

> "15(1) Pilots shall carry out pilotage duty when and where required by the Superintendent and shall not pilot any vessel except as directed by the Superintendent.
>
> (2) Pilots shall normally be assigned for duty in conformity with the practice that may be in force for the equalization of trips."

The right not to despatch a pilot when his name comes to the top of the tour de rôle should be of only very short duration, i.e., the time required to dispel or confirm doubt. If the pilot is found fit he should be considered available for immediate despatching; if not (unless his incapacity is of a temporary nature and can be remedied such as curable illness or injury, in which case the pilot concerned should be kept off the tour de rôle until he has fully recovered), a preventive suspension should be imposed, followed by whatever proceedings are indicated in the case. This aspect will be studied later.

Under the present legislation a preventive suspension can never be effected by any other procedure or in any other circumstances than those described above, i.e., in the case of a Pilotage Authority only in the circumstances contemplated in sec. 370. Such a situation may well have been the extreme limit of preventive intervention in the exercise of a free profession but it is totally inadequate in today's circumstances; moreover, it amounts to false pretenses on the part of a Pilotage Authority to impose upon a vessel a pilot whose competence it is not in a position to vouch for, but has reason to believe is temporarily unable to perform his duties adequately. This was clearly realized by Pilotage Authorities and attempts were made through regulations to extend the power to impose preventive suspension

in cases where a despatching authority would be obviously derelict if it failed to act, i.e., (a) when a pilot's ability is impaired through indulgence in alcohol or through the use of narcotic drugs; (b) when a pilot has failed the periodic eyesight or hearing examination and before a final decision is arrived at after he is given an opportunity to appeal and be re-examined (e.g. Quebec By-law subsec. 14(5)); (c) when a pilot is ordered to submit to a medical examination when the Superintendent (or the Secretary) has reason to believe that the pilot's fitness for duty is impaired by physical or mental disability (e.g. Quebec By-law subsec. 23(2)).

A pilot whose physical or mental fitness is suspected of being impaired or who has failed an eyesight or hearing examination is a potential risk, and the most elementary prudence requires that he be not entrusted with the safety of a ship and the lives of those on board until this suspicion is removed. But, under the present legislation, the sole power a Pilotage Authority possesses in this matter is through regulations made under subsec. 329(j) C.S.A., i.e., the power to retire a pilot compulsorily when impairment is established. It can not be argued that preventive suspension is an implied ancillary power on account of the exceptional character of this measure, the context of the organization provided by Part VI and, finally, because when such a power was intended it was clearly specified in the Act. Nor is it permissible under present legislation to impose a preventive suspension on a pilot suspected of being impaired by alcohol or drugs. Subsec. 329(f) empowers a Pilotage Authority to make by-laws for ensuring the good conduct of pilots and the effective performance of their duty afloat and ashore and, *inter alia*, to prevent them from piloting "while under the influence of intoxicating liquor or narcotic drugs while on duty or about to go on duty". All this provision authorizes is power to create an offence by making appropriate regulations. This provision dates back to early pilotage legislation when it was a statutory offence to act "as pilot when in a state of intoxication" subsec. 530(c), 1927 C.S.A. The 1934 Act enlarged the provision by also making it an offence to be in that state when about to go on duty. It was an amendment in 1936 that reduced this statutory offence, along with others, to a regulation offence, i.e., an offence only if the Pilotage Authority of the District sees fit to make it so by passing appropriate regulations. There were no other changes.

Therefore, under the present provisions of the Act, if a pilot is found to be under the influence of liquor when about to go on duty, and providing this has been made an offence by regulation, the Pilotage Authority's only recourse is, in addition to warning the Master of the ship, to lay a charge before a court and await a conviction before it may proceed to reappraise the pilot's reliability. The statutory provision never authorized the Pilotage Authority to prevent a pilot to act as such before this procedure was followed.

It should be borne in mind that, in the context, the choice of the pilot rested with the Master of the ship, who would bear full responsibility for his choice, and he was at liberty not to accept an impaired pilot. As the situation contemplated by the Act no longer exists, the Pilotage Authorities when passing regulations under this statutory provision felt compelled to provide for preventive suspension. This is the reason for the requirement in a number of By-laws that the Superintendent must remove forthwith from the assignment list any pilot whose ability appears to be impaired through the use of intoxicating liquor or narcotic drugs when he is about to go on duty. Similarly, the Superintendent may take the same action after the fact when he has reason to believe that a pilot has been under the influence of liquor or drugs while on duty. In both cases, the pilot is kept off the list until a full investigation is held. The Superintendent may then replace the pilot on the assignment list or impose a preventive suspension, but in either case he must first have the approval of the Pilotage Authority after the latter has had an opportunity to consider the report of the Superintendent's investigation. Such a suspension imposed by the Superintendent is merely a preventive measure, not a punishment, and is only temporary pending further action, i.e., laying a charge for a breach of the appropriate section of the By-law. In the Quebec District the whole question is dealt with in sec. 19 of the By-law which reads as follows:

"19 (1) No pilot shall, while on duty or about to go on duty, consume intoxicating liquor or consume or use a narcotic drug; and the licence of any pilot contravening these provisions shall be withdrawn by the Authority.

(2) No pilot shall consume intoxicating liquor or use a narcotic drug on shore during the season of navigation, if such consumption or use prevents good conduct and constant attendance to and effectual performance of his duty on board ship or on shore; and the licence of any pilot contravening these provisions may be withdrawn by the Authority.

(3) Where the Superintendent believes, on reasonable grounds, that the ability of a pilot, who is about to go on duty, is impaired through the use of intoxicating liquor or narcotic drugs, he shall forthwith remove the pilot's name from the assignment list and make a full investigation into the matter and submit a report thereof to the Authority.

(4) Where the Superintendent believes, on reasonable grounds, that a pilot has been under the influence of intoxicating liquor or narcotic drugs while on duty, he may remove the pilot's name from the assignment list and shall make a full investigation into the matter and submit a report thereof to the Authority.

(5) The Superintendent may, with the approval of the Authority following consideration of a report made under subsection (3) or (4), replace the pilot's name on the assignment list or suspend the pilot's licence."

The regulation offences and the Pilotage Authority's reappraisal power (sec. 331 C.S.A.) are stated in subsecs. (1) and (2) above. The following subsecs. (3, 4 and 5) deal with the preventive measures to be taken and the procedure to be followed. Subsec. (5) clearly distinguishes between the administrative decision not to despatch a pilot, which has to be taken forthwith, and preventive suspension which forms part of the quasi-judicial process of reappraisal. This is why subsec. (5) speaks only of suspension, like sec. 370 of the Act, and not of cancellation. Any other interpretation would be inconsistent, for instance, with the imperative provisions of subsec. (1) which states that a pilot's licence must be withdrawn if he consumes intoxicating liquor while on duty. However, it is believed that in the interest of clarity the nature of the suspension should be clearly defined.

These provisions were first introduced in the Quebec District by an amendment to the General By-law dated June 15, 1955 (Ex. 1448-23). At that time it contained a further provision respecting responsibility the Superintendent might incur in the process, which provision read as follows:

"(5) The Superintendent is not responsible for any loss of earnings by a pilot whose name he has in good faith removed from the assignment list under subsection (1), (2) or (3)".

This subsection was not reproduced in the 1957 version of the By-law, presumably because it was realized that a question of civil liability did not come within the regulation-making jurisdiction of the Pilotage Authority.

In practice, preventive suspension, as such, is never imposed but unwarranted use is made of the process of taking a pilot's name off the tour de rôle for a long period of time. Frequently the pilot is reinstated without his case being reviewed. This indirect method of preventive suspension is also used when the fitness of the pilot is being examined by an administrative Court of Enquiry, convened by the Minister under Part VIII of the Act (sec. 579 C.S.A.), where no provision exists to authorize preventive suspension in such a case. Such instances will be reviewed later (vide Pilotage District of Quebec—*Discipline*).

The fact, however, is that these regulations are, in this respect, ultra vires, and the unauthorized use made of these powers places the Pilotage Authority in a precarious position, in that these orders can not be enforced if a pilot refuses to comply. If a pilot is successfully barred from piloting during the time he is off the assignment list, or under preventive suspension, the Pilotage Authority might be liable to pay him the damages incurred as

a result of its own illegal action. This is particularly true when it develops, as has often been the case, that the suspicions or accusations can not be proved.

DUTY TO INITIATE REMEDIAL ACTION

Among the responsibilities of a Pilotage Authority as the Crown officer entrusted by Parliament with the administration of a District are: (i) to initiate proceedings whenever it learns a pilotage offence has been committed; (ii) to reappraise a pilot's qualifications whenever a situation defined in legislation arises; and (iii) to bring to the attention of other authorities any incidents that fall within their jurisdiction for remedial action and to co-operate with them in this connection.

Except on the ground of insufficient evidence, a Pilotage Authority has no discretion whether or not to initiate appropriate proceedings, once it has reason to believe that a pilotage offence has been committed or that a pilot should be reappraised. It is the rôle of the legislative authorities, i.e., Parliament and the Pilotage Authority as regulation-making authority, to create and define offences. Once an offence is committed the Pilotage Authority, as administrative authority, has no alternative but to prosecute. To do otherwise would be to usurp legislative power. It can not amend what legislation has defined as a crime or an offence, by deciding that they are no longer so in order to meet expediency in a particular case. Such action can be taken only by an appropriate amendment to the legislation but never by an administrative decision, and on no account should the problem be avoided by mere inaction. The Pilotage Authority is charged by Parliament with the duty of surveillance, to ensure, *inter alia*, that pilotage legislation is respected and offenders brought to trial.

When enforcing discipline, speed in application is most important and the prosecution of an offence should not be delayed or influenced by other considerations. For example, a repetition of the events that attended the case of the pilots involved in the collision between the *Argyll* and the *Sunima* should be avoided. The preliminary enquiry found that the collision was due to the gross negligence of both pilots; an Advisory Committee, which reviewed the case, recommended disciplinary action against both pilots. However, the Pilotage Authority delayed such action on the ground that it might prejudice pending civil litigation. But by the time the civil suit was concluded (1962 Ex. C.R. 293), penal prosecutions against the pilots were time barred (vide Pilotage District of Quebec, *Advisory Committee*). The attitude adopted by the Pilotage Authority in this case indicates a lack of comprehension of its responsibilities. The safety of navigation and the efficiency of the service should always transcend the pecuniary interest of the Crown and, even more so, of private parties.

However, the obligation to prosecute is limited to instances where a *prima facie* case can be established. It would be as reprehensible to launch

prosecution in a haphazard fashion as not to prosecute at all. Once a Pilotage Authority has been informed of the alleged commission of an offence, it must forthwith hold its own investigation to learn what happened and what evidence exists to prove the offence, bearing in mind that the pilot concerned will not be a compellable witness. A charge should be laid only when it is satisfied that a conviction is likely to be obtained.

The same principles apply to reappraisal cases, the main difference being, however, that (as will be seen later) in respect of qualifications, once a *prima facie* case is established the onus of proof rests on the pilot.

When the indicated remedial powers lie with other authorities, it is the duty and responsibility of the Pilotage Authority to notify the authorities concerned without delay, to make a full report of whatever information it has been able to discover through its own investigation and, thereafter, to co-operate with these authorities. Such other authorities may be Customs Officers or Port Authorities, but generally it is the Minister of Transport because of his responsibility for safety of navigation and the special powers he derives from Part VIII C.S.A.

As will be demonstrated later, Pilotage Authorities have failed deplorably in the discharge of their surveillance duties; in addition, remedial powers, even those of the Minister under Part VIII, have been misconstrued. It is, therefore, an essential requirement that adequate powers in this respect should be given and clearly expressed in the Act, and also that proper control be exercised to ensure that each Pilotage Authority lives up to its obligations and responsibilities. Without an adequate, effective surveillance system it will not be possible to provide the efficient, reliable pilotage service that both the users and the public have the right to expect.

2. REAPPRAISAL FUNCTION

NATURE

"Reappraisal", in the context of this report, means the reassessment of a pilot's qualifications (i.e., (a) professional qualifications, (b) physical and mental fitness, (c) moral fitness or reliability) by a Pilotage Authority at any time during the tenure of the pilot's licence when cause has been established that a reassessment is warranted. If a pilot's qualifications are found wanting and the cause appears capable of correction, suspension may be all that is required, but if it is found to be serious and permanent, cancellation of his licence is indicated.

Although reappraisal is part of the licensing function, it is not ancillary to the power to issue a licence but is an original power which should be specifically granted and defined in the Act. A licence is a right, the exercise of which can not be interfered with except as specifically laid down in legislation; it is not a privilege or an appointment held during pleasure.

Reappraisal is the second phase of licensing. It is quite distinct from the first phase although both are of the same nature and must be exercised in a quasi-judicial manner. It is neither an appeal against, nor a review of, the original decision to grant a licence which is a final process in itself. If it becomes apparent that the examination process has been vitiated either by a wrongful act of the candidate or because the legislative requirements have not been followed, the recourse is to have the licence so obtained declared null *ab initio* by following prerogative proceedings before the regular courts (Attorney General v Millar 2 N.B. *Equity Reports,* p. 28).

In reappraising a pilot the question is not the validity of the licence but whether the licensee still possesses the necessary qualifications to continue to hold his licence.

Because reappraisal power is an original power, it need not be exercised by the authority which grants licences, although this authority is clearly in the best position to do so. In fact, under Part VI, jurisdiction for reappraisal is shared between the Pilotage Authority and the administrative courts convened by the Minister of Transport under Part VIII as cases arise. Part of this jurisdiction could also have been given to other authorities such as the regular courts as an accessory jurisdiction when dealing with pilotage cases. However, so far this has not been done.

In particularly serious cases Parliament may take the step of making reappraisal the subject of legislation. In such cases the legislative provision not only defines the situation which requires reappraisal action, but also specifies the corrective measure without leaving any discretion to anyone. This may be done in legislation in two ways: either by imposing it directly, in which case the corrective measure applies automatically as soon as the factual condition defined in the legislation occurs (e.g. the licence is automatically forfeited at the expiration of two consecutive years of non-usage, sec. 336 C.S.A.) or by determining what remedial action is to be imposed by the reappraisal authority when the factual situation has been established (e.g. compulsory retirement when permanent physical impairment is established, subsec. 329(j)).

In an organization based on licensing, the right of the licensing authority to interfere during the tenure of the licence must, of necessity, be limited to cases where a serious presumption of deterioration, or defect in qualifications, is raised by the facts. Granting a licensing authority power to reassess a licensee's qualifications at will is the equivalent of denying the permanency of the licence, with the result that it is merely a privilege granted during pleasure.

Normally, a licence should be of the longest possible duration, i.e., permanent. Holding a licence and enjoying the privileges it implies should be considered acquired rights that can not be interfered with, except in those cases specifically provided for in legislation.

It is by including such cases in the Act and by defining them, that Parliament determines the control to be exercised over licensees during the tenure of their licence. Where a service is operated for private convenience, these cases should be limited to those of a very serious nature, but the power to intervene should be much greater when public interest and safety of navigation are the *raison d'être* of the service. This explains the limited powers of control granted Pilotage Authorities under Part VI and their inadequacy for pilotage requirements today.

Between the extremes of permanent licences and a system where licences are held at pleasure there are a number of intermediate solutions. One example is the term licence. Its main disadvantage is that it does not afford the necessary guarantees and security required to attract and retain highly qualified candidates. This is no doubt the reason why term licences were not allowed originally and also why, when they were first introduced, they were denied by law to the larger Pilotage Districts where the pilotage service had to be of the highest quality. Another solution which affords more flexibility is a combination of both extremes, i.e., a system where permanent licences are limited as to competency and the most difficult and responsible assignments are reserved for a limited group of pilots, selected on the basis of high standards of qualifications and past performance. This privilege lasts during pleasure only and, furthermore, is also limited by other terms and conditions laid down in legislation. When this privilege is withdrawn, the pilot reverts to his previous status, with his permanent licence limited as to competency. In fact, this is the situation in most Districts, where the most difficult assignments are given either by the Pilotage Authority, or by mutual consent of the pilots themselves, to the most highly qualified among them. This is also the essence of the grade system adopted in the Districts of Montreal and Quebec where grade B is the highest degree of competency of a permanent nature, and grade A denotes the highest degree of competency but held during pleasure only and limited by regulations. Although this method of licensing is not permissible under present legislation it meets the pilotage requirements of these Districts today (vide C. 8, p. 263 and ff.).

Reappraisal, like the original appraisal, of a pilot, is a quasi-judicial process in that decisions are not discretionary, but are determined, on one hand, by a factual situation over which the appraising authority has no control but is obliged to establish and, on the other hand, by the law, both written and implied, which it has no choice but to apply. For the appraising authority to act otherwise is to exceed its jurisdiction, thus vitiating the proceedings.

The first applicable law is the legislative provision which establishes jurisdiction, i.e., defines the cases where reappraisal is authorized and required and which also designates the responsible authority (e.g., in shipping

casualties, the Court of Formal Investigation convened by the Minister of Transport under Part VIII C.S.A. sec. 558, and, in cases of permanent physical impairment, the Pilotage Authority, subsec. 329(j)). Since instances where a licence may be interfered with during its tenure are infringements into the exercise of a right (being cases of exception), the terms of the legislative provisions which define them must be interpreted strictly, and any doubt must be taken against the jurisdiction. Establishment of these instances not only gives the reappraising authority its jurisdiction but, at the same time, creates a presumption of incompetence on which that authority is empowered to act, unless this presumption is rebutted by the pilot concerned who, from then on, has the *onus probandi.*

The reappraising authority must also be guided in its appreciation of the competence, fitness and reliability of a pilot by the rules expressed and implied in applicable legislation. For instance, a pilot in possession of a good record should not normally be retired after his first conviction for an offence which caused reappraisal, and possibly not even suspended. In its assessment of the pilot's reliability the Pilotage Authority should be guided by his past performance, his records and the particular circumstances of the case.

Unless otherwise stipulated in legislation, the choice of the means and procedure for ascertaining the factual situation is left entirely to the responsible authority using whatever powers are placed at its disposal by legislation. For instance, formerly, physical unfitness had to be established by evidence taken under oath, a power that Pilotage Authorities had at that time (sec. 415(j), 1927 C.S.A.) which, therefore, necessitated holding a formal hearing. This requirement which, in fact, was a limitation, was abolished in 1934. The only limitation that now remains in this regard is inherent in the exercise of any judicial or quasi-judicial function, i.e., the right of full defence which is rendered by the legal axiom "*audi alteram partem*". This does not mean that the only way to proceed is through formal hearings but merely that the person whose rights may be affected must be given the opportunity to acquaint himself with the nature and particulars of the charge against him and the complete evidence on which the authority plans to act, and be afforded the opportunity to produce pertinent evidence on his own behalf and to plead. Provided this right is respected, the manner of ascertaining a factual situation is not significant. The essential point is that the reappraising authority should establish the factual situation correctly. No doubt Parliament felt that a Pilotage Authority acting as a reappraising authority needed no special powers to establish the factual situation in the few cases where it has jurisdiction because, with the possible exception of cases of impairment due to detrimental habits (subsec. 329(j)), the factual situation depends on events that are easily ascertainable, such as a physical

infirmity or a conviction. In contrast, since the type of reappraisal dealt with under Part VIII requires full powers of investigation of a court of justice, these were duly provided in the Act.

Redress will be granted by the regular courts through prerogative proceedings whenever the right to full defence is not afforded, irrespective of the merits of the case and the correctness of the decision. Redress will also be granted whenever the reappraisal authority acts without jurisdiction or exceeds it. In that case, the question before the court hearing the prerogative proceedings will not be whether the factual situation necessary to give the appraising authority its jurisdiction was established or not before the reappraising authority, but merely whether it exists or not, the proof of which is then made as in a trial *de novo*.

The reappraising process must not be confused with the enforcement of discipline. Although both are necessary means to achieve the surveillance function, their nature, their aim and the rules governing their exercise are essentially different. The fact that at times the enforcement of discipline is a necessary step in the process of reappraisal does not alter the situation; in that event, a conviction made by a competent tribunal is the factual situation that gives the reappraising authority its jurisdiction, while at the same time it creates a presumption of unreliability against the pilot concerned. Because this correlation and interdependence are not clearly understood, the two functions have been confused to the prejudice of the effective enforcement of discipline and the maintenance of an overall standard of qualifications in the service.

There is no incompatibility (except in practice) between the two functions and there is no fundamental objection if they are performed by the same person or authority. However, since Confederation (except for the special pre-Confederation status of the Pilotage Authorities of Quebec and Montreal, which was retained until the Minister became Pilotage Authority in 1905 and 1903 respectively) Parliament has ensured by its legislation that the two functions are not exercised by the same person or authority. The principle has been adopted to leave jurisdiction over pilotage offences and the recovery of penalties, to the regular courts.

The Pilotage Authority's situation with regard to its reappraisal powers is well summed up by Justice Anglin in the 1915 Supreme Court decision of McGillivray v Kimber *et al.* (52 S.C.R. 146):

> "The relationship of master and servant does not exist between the Board (the Pilotage Authority in this case consisted of a local commission) 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 to the pilot and he has had a 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."

A pilot's qualifications are threefold:

(a) his general and special knowledge and skill make him an expert in navigation in the District for which he is licensed;

(b) his mental and physical fitness enables him to exercise his profession;

(c) his reliability makes him worthy of a Master's confidence, to the extent that he is trusted with the navigation of his ship.

Part VI C.S.A. gives Pilotage Authorities full powers to ensure that only qualified, physically fit and reliable candidates are accepted as pilots, but very little power to ensure that the pilots do not become safety risks after they have been licensed. The actual situation, as provided under Part VI, may be briefly summed up as follows:

A Pilotage Authority

(a) has no power of reappraisal over professional competence;

(b) has power over physical and mental unfitness only in cases of permanent impairment which prevent a pilot from exercising his profession;

(c) has limited and conditional jurisdiction over the reliability of pilots, i.e., only in those cases enumerated in the Act and always provided a conviction is handed down by a regular court.

On the other hand, power of reappraisal in any of these fields was given in a limited way to the Minister of Transport acting through the administrative courts he may convene under Part VIII C.S.A.

Because the reappraisal function is basically administrative, it should not be normally attended by the publicity that accompanies the dispensing of justice. In this regard, the Pilotage Authority's inquiry is to seek sufficient information to reach a decision and, at the same time, to ensure that the rights of the pilot concerned are protected. For instance, a Pilotage Authority, acting in its reappraisal capacity, should not have to hold a formal hearing to assess a situation when physical impairment, due to illness or other causes, has arisen, or when the professional competency of a pilot has been questioned. Publicity during such reappraisal is no more necessary than during the examination and licensing of pilot candidates. However, this does not mean secrecy; the findings of a reappraisal inquiry are public records and, therefore, should be available to the public.

PILOTAGE AUTHORITY'S REAPPRAISAL POWER OVER PROFESSIONAL QUALIFICATIONS

Except in one indirect provision, the Act has completely denied Pilotage Authorities the right to reappraise a pilot's professional knowledge and skill during the tenure of his licence. Furthermore, a pilot, once licensed, can not be forced to acquire additional knowledge or submit to any further examination, periodical or otherwise, in order to ascertain that the required standard of professional qualifications has been maintained. Such a legal situation was no doubt adequate at the time the licensing scheme which is still in force was drafted, but it is no longer appropriate because new knowledge and increased skill are constantly required. The situation is particularly grave, now that the Pilotage Authorities have undertaken responsibility for providing, as well as administrating, pilotage services.

The attitude adopted in the present legislation is apparently based on the premise that while it is to be expected a pilot's physical fitness and reliability will, or may, deteriorate, his knowledge and skill can not but improve as experience is gained by practice. Conversely, prolonged lack of practice is considered detrimental. Parliament has dealt with this question indirectly on the assumption that the professional qualifications of any pilot who has not acted as such for two consecutive years may have deteriorated to the point where he may be a safety risk. Sec. 336 decrees the automatic forfeiture of the licence, but it may be revived or reissued if the Pilotage Authority is satisfied "that the former holder is qualified to hold a licence". In effect, this is an indirect way of imposing a preventive suspension pending reappraisal of a pilot's qualifications.

This premise that experience is sufficient to maintain and improve a pilot's professional qualifications may have been valid years ago but it is not acceptable under modern conditions. Nowadays, unless a pilot keeps abreast of changes and developments in ships and new techniques in the art of navigation, he soon becomes incompetent. Much can be gained by experience if appropriate opportunities occur but, in these days of change, more than experience alone is required, e.g., both theoretical and practical training remain a prerequisite for the efficient use of shipborne aids to navigation. This is especially true of radar, no matter how often a pilot may use it, and will become even more important with the advent of increasingly sophisticated navigational aids and devices. Many shipping casualties have been attributed to the faulty use of radar resulting from insufficient knowledge of its use and limitations (vide analysis of shipping casualties, Pilotage District of Quebec). The advent of bridge-aft ships has demonstrated that special training is essential each time a major change occurs in the design or particulars of ships which directly affect their manoeuvering. Such additional training may well be gained by experience provided a sufficient number of such ships enter a given District to provide opportunities for all its pilots;

but, until the necessary experience is gained, pilots can not be expected to navigate these new ships as expertly as they did the old. The consequence is that, at times, pilots will be prevented by their lack of professional competency from safely navigating in certain areas, particularly under adverse conditions, until they are more highly qualified, e.g., bridge-aft ships have posed a serious problem in the New Westminster District. As a solution, the New Westminster pilots suggested that, for pilotage purposes, these ships should be made similar to conventional ships by erecting a special bridge amidships with all the necessary controls. It appears from evidence obtained in other Districts that bridge-aft ships are no more difficult to navigate than other types, provided the pilots have become accustomed to navigate them from an aft position. This experience could be gained by special training on board these ships, in addition to the study of new theoretical techniques. The problem is compounded when the natural incentive of open competition in a free profession is taken away, and each pilot is assured of the same share of work and revenue, whether his qualifications are maintained or not. When a franchise is given to a group, unless the Authority intervenes the natural tendency is a lower standard of qualifications and efficiency to the level of the least qualified. Evidence of this nature was encountered in many Districts.

Under these conditions, Pilotage Authorities are powerless to require pilots to acquire new knowledge by further training, or compel them to submit to periodical or other examinations as to competence. The vital importance of pilot training is illustrated by the action taken by the Standard Oil Company quoted below:

> "The Standard Oil Company (New Jersey) will open, in July of this year, a marine research and training center to instruct tanker masters in the specialized handling of mammoth supertankers. The $700,000 facility, located near Grenoble, France, will be the first of its kind anywhere in the world.
>
> Approximately 150 shipmasters and pilots, in eight-man classes lasting two weeks, will be trained each year at the center. Esso employees with a wide range of ship-handling experience will serve as instructors.
>
> The center also will research new techniques in manoeuvering and berthing. Additional research will be done at Grenoble to confirm the behavior characteristics in restricted waters of the new goliath tankers before they are placed in service."
>
> "THE NEED:
>
> Evolution in tanker design and size has made it necessary to provide additional training for officer personnel in shiphandling. The increasing need to make transitions from general purpose size trade vessels to 90,000 tonners, to 200,000 tonners has accentuated the need to provide training and experience which will accomplish this transition in the most proficient and effective way possible." (Extract from pamphlet describing the training programme Ex. 1520.)

Each Pilotage Authority has full power to modify (and must modify) minimum professional requirements defined in regulations to meet new situations created by changes in techniques of navigation, types of ships, shipborne and other aids to navigation. However, such new regulation re-

quirements would apply to future licensees only and could not be imposed on pilots who now hold a licence, irrespective of how urgent and necessary additional professional qualifications may be.

Present legislation provides limited means, mostly indirect, to exercise control over the pilots' professional qualifications, but these are insufficient. For the most part they consist of the Minister's powers under Part VIII, term licences, licences limited as to competence, i.e., the grade system, and the possible use of disciplinary regulations.

Under Part VIII the Minister of Transport may cause the qualifications of a pilot to be investigated by a Court of Formal Investigation, whether or not there has been a shipping casualty (sec. 560) or by a Court of Enquiry (sec. 579 and subsec. 568(2)). A Pilotage Authority lacks the power to initiate such an enquiry, whether or not it deems an investigation is required. The decision as to whether such a court will be convened is in the sole competence of the Minister of Transport as defined and limited by the Act. Such an enquiry can not be used as a means of verification because a prerequisite for convening either of these courts is the existence of a *prima facie* case of incompetence and, even then, a preventive suspension can not be imposed pending the outcome of the investigation.

Indirect control can be achieved by issuing term licences (subsecs. 329(n) and (o)) (as is done in the Churchill District) but, here again, incompetence can be considered only at the time of their renewal and a Pilotage Authority is powerless while term licences last. Very little use is made of this power, possibly because of the insecurity implied for licence-holders. On occasions, a temporary licence is granted for a probationary period followed by a permanent licence if the pilot's performance is satisfactory but, as shown in chapter 8, p. 269, their legality is questionable under present legislation.

The situation is partly corrected in those Districts where the grade system exists because it allows the Pilotage Authority to reserve the most difficult assignments for those pilots who possess the highest standard of qualifications. However, the grade system is only a make-shift measure in that, under present legislation, a Pilotage Authority has no power to lower grades once they have been granted and can do no more than delay upgrading a pilot who is found insufficiently competent (chapter 8, pp. 263 and ff.).

Pilotage Authorities have also tried to obtain such control indirectly through their regulation-making power with respect to reliability, i.e., by incorporating these requirements as disciplinary regulations under subsec. 329(f). Most By-laws contain the provisions which obtain in the Quebec District (or others to the same effect):

> "15 (4) Every pilot shall, before his departure to pilot any vessel, . . . obtain from the pilotage office information as to the state of the buoys, beacons, and channels in the District."

"17 (5) A pilot shall maintain his knowledge of the District . . . and shall keep himself conversant with relevant Customs, Quarantine and other port regulations and with all conditions affecting navigation within the District."

A Pilotage Authority may provide, *inter alia,* that failure to comply with the regulations entails suspension or cancellation of a licence, not because the pilot concerned lacks the necessary knowledge but because he has shown unreliability by not obeying these regulations. The use of this method, to the extent it is permissible, merely provides a means of exposing a pilot to the knowledge he should acquire, but does not enable an Authority to verify whether the knowledge was, in fact, acquired.

PILOTAGE AUTHORITY'S POWERS OF REAPPRAISAL OVER THE PHYSICAL AND MENTAL FITNESS OF LICENSED PILOTS

In keeping with the guiding principle of Part VI C.S.A. that pilotage is a free profession, the power of a Pilotage Authority to review the physical and mental qualifications of its licensed pilots is limited to cases where the pilot's condition has deteriorated permanently to such a degree that his usefulness as a pilot is impaired and he must, therefore, be retired. Otherwise a Pilotage Authority has no power to intervene.

The governing provisions of the Act are:

(a) sec. 338 which requires that a pilot be "declared capable of performing his duties as a pilot by a medical officer appointed by the pilotage authority" before annual licences are granted to pilots aged 65 to 70;

(b) subsec. 329(j) which authorizes the Pilotage Authority to provide by regulation "for the compulsory retirement of any licensed pilot who has become incapacitated by mental or bodily infirmity or by habits detrimental to his usefulness as a pilot".

Sec. 338, which was incorporated in the Act in 1934 (sec. 328, 1934 C.S.A.), decreased the power formerly held by Pilotage Authorities to reappraise older pilots. The corresponding provision in the previous legislation, sec. 432, 1927 C.S.A., which was basically the same as sec. 36, 1873 Pilotage Act, reads as follows:

"Every licensed pilot shall, on his attaining the age of sixty-five years, produce and deliver up his licence or branch to the pilotage authority of the district to which it extends, and such authority may grant him a new licence for one year, and so from year to year".

At that time there was no statutory age limit but the Act provided that a limit could be set by regulations. Except for wording, the present subsec. 329(i) corresponds to subsec. 18(9) of the 1873 Pilotage Act.

Until 1934, when a pilot's licence came up for annual renewal at the age of sixty-five, the Pilotage Authority had full powers of reappraisal and could refuse to renew the licence if any of the pilot's qualifications no longer met the standards required. The 1934 amendment, in addition to setting the ultimate age limit for holding a licence at seventy, deprived Pilotage Authorities of their powers to reappraise by limiting the renewal requirement to physical fitness, as determined by a medical officer. Hence the Pilotage Authority's present function is reduced to appointing a medical officer and, once this routine appointment is made, the Authority is bound by the medical decision. If the report is favourable, the Authority has no option but to renew the licence; if unfavourable, it has no choice other than the compulsory retirement of the pilot.

The 1934 amendment had the advantage of giving the pilots more security by restricting the scope of appraisal to physical fitness, the reason why an age limit was, in fact, established. It is considered that the remainder of the amendment has imposed a questionable procedure in that the decision whether a pilot is physically fit to perform his duties is left, without a criterion of any kind, to the judgment and knowledge of a medical officer who may know little about the physical standards required for the performance of pilotage duties in a given District. Pilotage Authorities have no power to define in their regulations the standards which should be required for such a physical examination and there is nothing in the Act which obliges this medical officer to observe the physical and mental standards required when a licence is issued. Another drawback is that the pilots are at the mercy of an erroneous medical opinion, since they have no opportunity to provide additional medical evidence on their behalf. A person who is medically fit to work at a certain trade may be unfit, however, to ply a number of others; the governing factors are the nature of the trade and the circumstances in which it is exercised. Similarly, and for the same reasons, pilotage duties may be far more demanding in one District than another. Only a person fully conversant with the requirements of the exercise of pilotage in a given District is competent to decide whether a certain physical condition constitutes an impairment. Since the Pilotage Authority of the District or the Board of Examiners appear to be best qualified to reach an equitable decision, it is considered that either the Pilotage Authority or the Board acting on its behalf should be responsible for reappraising pilots. A medical opinion should be part of the process but the pilot concerned should have an opportunity to question the opinion of the appointed medical officer, especially by producing other medical evidence to counter any adverse report.

The By-laws of the Districts of B.C. (37(4)), Halifax (25(5)), Montreal (18(5)), and Saint John, N.B. (25(5)) contain a subsection which prescribes compulsory semi-annual medical examinations for pilots over 65 years of age, i.e., those holding annual licences issued pursuant to sec. 338 C.S.A. It reads as follows:

> "Every pilot holding a temporary licence issued pursuant to section 338 of the Act shall undergo a medical examination as to his mental and physical fitness to perform the duties of a pilot by a medical officer appointed by the Authority in April and November of each year, and if the medical officer reports that the pilot is unfit to perform his duties by reason of any mental or physical disability the pilot's licence shall immediately cease to be valid."

The first part of this provision pertains to the surveillance function and the powers derived from it are in relation to the available remedy. This provision obviously can not be based on subsec. 329(j) of the Act because it applies only to the retirement of pilots under 65 years of age. Therefore, it must fall under subsec. 329(i). It is considered that this subsection authorizes no more than the establishment by regulation of an upper age limit, either 65 or under 70. If subsec. 329(i) is interpreted as giving a Pilotage Authority the right to impose any conditions on annual licences issued pursuant to sec. 338, this would have the effect that these licences would be held conditionally. However, this is prohibited by the last part of subsec. 329(i) which makes the exercise of this power subject to the provisions of sec. 338, i.e., the licence must be for a one-year term only and the pilot's physical fitness must be certified before a new licence is issued.

In the second case, a Pilotage Authority's only power, provided it has made the necessary regulations, is to retire compulsorily any pilots who have become permanently disabled before attaining the age of 65. Since the legislative power of a Pilotage Authority is delegated, its scope is determined by the terms of delegation, which should be interpreted strictly. Subsec. 329(j) C.S.A. authorizes Pilotage Authorities to provide by regulation for the compulsory retirement of pilots under 65:

(a) in case of mental or bodily infirmity (in other words a condition of a permanent nature); or,
(b) for habits detrimental to their usefulness as a pilot (again the word "habit" connotes permanence).

It is noted that compulsory retirement implies the permanent withdrawal of a licence and not a temporary suspension and that the infirmity or habit must render the pilot incapable. The word incapacitated is not directly qualified but it is clear from the context that the incapacity must be in connection with the performance of duties and the discharge of responsibilities as a pilot.

Except for one point of style, subsec. 329(j) C.S.A. corresponds in substance to subsec. 18(10) of the 1873 Pilotage Act. Two minor changes were made when the 1934 C.S.A. was passed: (a) the former phrase "by habits of drunkenness" was enlarged to read "by habits detrimental to his usefulness as a pilot"; (b) the phrase "proved on oath before the Pilotage Authority" was deleted. The last part of the amendment is in keeping with the new policy adopted at that time to the effect that evidence before a Pilotage Authority should not be given under oath and that a Pilotage Authority should not have the power to administer oaths. Therefore, the 1934 amendment involved no substantial changes; the procedure was modified slightly and the reviewing powers of Pilotage Authorities remained as limited as before.

However, these limited powers are inadequate in the context of the new requirements of a pilotage service controlled by a Pilotage Authority. This is reflected in the various By-law provisions adopted in most Districts. Except for a few accessory powers, these provisions are all similar in substance to those contained in the Quebec By-law, studied hereunder.

Sec. 14 of the Quebec By-law sets the eyesight and hearing standards required by pilots while their licences are effective and provides for verification, *inter alia*:

(a) compulsory, periodical eyesight and hearing examinations every five years for a pilot under 50 years of age, and every second year for a pilot over 50 (This Bylaw can not be binding on pilots over 65 because the Pilotage Authority's regulation-making power on the matter is limited to pilots under 65.);

(b) these examinations must be conducted by a board composed of a qualified medical officer, an officer of the Department of Transport, both selected by the Authority, and a representative of the Pilot's Committee;

(c) the standard tests are specified in subsecs. (3) and (4);

(d) failure at this stage entails automatic suspension of the licence;

(e) subsec. (6) states that if suspended, a pilot "may appeal to the Authority for another examination at his own expense". The By-law does not state whether the Pilotage Authority may deny the appeal and, if so, on what grounds. For that reason, it would appear that an appeal is a right the Pilotage Authority can not deny. At first sight it appears that a new examination, in view of the fact that it is being paid for by the pilot, could be conducted by a physician of his choice. However, when the section is read as a whole it appears that it is a re-examination before the same board which is therefore requested to reverse its previous opinion;

(f) subsec. (7) states that "the decision of the Authority, following the appeal of a pilot who fails to pass an eyesight or hearing examination, is final".

Except for eyesight and hearing standards this By-law is confusing. It appears that examinations are held in two stages: fact-finding by a board, followed by a decision by the Pilotage Authority to retire a pilot if it is satisfied, on the basis of the board's decision, that the pilot is unfit for pilotage duties. Since members of the board are at one and the same time judges and expert witnesses, an appeal is, in fact, merely a re-examination by the same board, and there is no provision for a pilot to offer medical evidence from medical officers of his choice. The provision which stipulates temporary suspension pending the result of an appeal under subsec. (6) is ultra vires because the only permissible interference with a pilot's licence under subsec. 329(i) C.S.A. is compulsory retirement. The By-law, as drafted, leaves the final decision to the Pilotage Authority, but fails to define the Authority's powers. The only permissible power in such a case is to retire a pilot, in other words, to withdraw his licence, but such a power exists only if, and when, it is stipulated in a By-law, which has not been done here. Possibly this could be inferred from the context but, since it is a question of exception which requires strict interpretation, the lack of an express provision may well mean denial of the power. If this is accepted, all of sec. 14 of the Quebec By-law is meaningless and unenforceable.

Originally this By-law provision was more in conformity with subsec. 329(j) and the wording of the former regulation helps to explain the present faulty drafting. The last part of sec. 25 of the 1928 Quebec District By-law (Ex. 1448) read as follows:

> "Any pilot or apprentice who fails to pass such examination shall be retired and his license cancelled by the Pilotage Authority; provided, however, that he shall have the right to appeal to the Pilotage Authority for another examination to be held at his own expense. The decision of the Pilotage Authority shall then be final."

Because the only permissible power to take action against a pilot was to enforce his retirement, the 1928 By-law logically decreed mandatory cancellation of the licence immediately after an adverse finding by a Board of Examiners. An appeal to the Pilotage Authority was permitted; if this succeeded the Authority could renew the licence. No doubt it was realized that this procedure was illegal because in subsec. (j) there was no stipulation authorizing reissuance of the licence (as in sec. 336). No doubt it was also felt that the pilot should be given the opportunity to offer his defence before cancellation was ordered while, on the other hand, since an unfavourable report created a presumption of unfitness, the pilot should not be allowed to perform pilotage. Hence, the solution was adopted of imposing a preventive suspension after the first report and delaying cancellation until the outcome of

the appeal was known. However, due to a drafting error, the amendment has, in fact, deprived the Pilotage Authorities of the power to retire pilots. The power to retire a pilot for an infirmity of eyesight or hearing is not a statutory power and can be held only if it is enunciated in a regulation made under subsec. 329(j). Preventive suspension was a logical step especially in view of the awkward procedure being followed, but unfortunately it was not, and still is not, permissible under the Act.

It is considered that in this case, as in any other instance where the reappraisal function is exercised, the Pilotage Authority, or the board acting on its behalf, should sit as an administrative tribunal. It is necessary that licensed pilots be required to meet physical standards defined in the regulations and that this be subject to verification effected by a compulsory, periodical examination. In the event of an adverse finding, the Act should provide an automatic preventive suspension followed by a final decision with the least possible delay. The report of this periodical medical examination should form part of the evidence on which the Pilotage Authority, acting in its reappraisal function, bases its findings. The pilot concerned should be acquainted with this report and should be allowed to produce medical and other pertinent evidence. The Pilotage Authority should be at liberty to obtain any additional evidence deemed necessary, provided the pilot is authorized to challenge such evidence. When the evidence is complete, if it appears that the pilot's condition is not permanent or could be rectified, it should be possible to continue the preventive suspension until the pilot is able to prove that the infirmity has either disappeared or been corrected. When it appears that the infirmity is permanent and is of such a nature that it prevents the pilot from performing his duties, the pilot must be retired. It is believed that this is the logical and equitable way to deal with physical fitness, while respecting the rights of the pilots and protecting the public. This procedure can not be followed at present but it is considered that the Act should be modified to make it permissible.

In substance, all District By-laws have the same provisions regarding periodical eyesight and hearing examinations (except Churchill where there is none). The main differences between them lie in the standards to be met and whether the examination is by a board or simply by a medical officer.

In the District of New Westminster and in all Districts where the Minister is the Pilotage Authority, except Churchill and Sydney, the examination is conducted before a board of three persons, a qualified medical officer and an officer of the Department of Transport, both selected by the Pilotage Authority, and a representative of the Pilots' Committee, and where there is none, an individual selected by the pilot concerned. The B.C. District is a notable exception. Since the new 1965 By-law no one is empowered to appoint the qualified medical practitioner and, for that reason, a board can not be convened. The provision reads as follows:

"20(2) Eyesight and hearing examinations shall be conducted before a committee composed of a qualified medical practitioner, one person selected by the Authority and one person selected by the Pilots' Committee."

According to the text, neither the Pilotage Authority nor the Pilots' Committee is empowered to appoint the medical practitioner and, according to the rules of interpretation, it must be concluded that the intention was that the medical practitioner not be appointed by the Pilotage Authority, because the 1965 By-law differs from the previous By-law which provided, although in an ambiguous manner, for the appointment to be made by the Pilotage Authority.

In the Sydney District, the provision was deleted in 1966 when the pilots became Crown employees.

In the Commission Districts, except New Westminster, the examination is carried out before the "medical officer selected by the Authority".

The provision just discussed concerns only compulsory periodical examinations for eyesight and hearing. There is also a provision of a general nature, which applies to various forms of disability, physical or mental, that may make a pilot unfit for duty. If any impairment is suspected, a pilot may be compelled to submit to a number of medical examinations by medical officers appointed by the Pilotage Authority to ascertain his condition. The Pilotage Authority then acts on the basis of the medical reports. All District By-laws are the same except for minor modifications warranted by local circumstances. Sec. 23 of the Quebec District By-law reads:

"23 (1) A pilot shall report to the Superintendent when at any time he becomes aware that through defective eyesight or hearing or through any other physical or mental disability his fitness for duty is impaired.

(2) When at any time the Superintendent has reason to believe that a pilot's fitness for duty has become impaired by reason of defective eyesight or hearing or by reason of any other physical or mental disability he may, with the approval of the Authority, order the pilot to undergo an examination or examinations by medical officers appointed by the Authority, and the pilot shall not be assigned to duty until the Authority is satisfied that the pilot is fit to perform his duty.

(3) When a medical officer appointed by the Authority reports that a pilot is unfit to perform his duties by reason of any physical or mental disability the pilot may be granted sick leave as provided in section 22.

(4) Any pilot who, in the opinion of the Authority, based upon such evidence as the Authority may deem sufficient, has

become permanently incapacitated by mental or bodily infirmity or by habits detrimental to his usefulness as a pilot shall be retired."

The only part of this section that pertains to subsec. 329(j) C.S.A. is subsec. (4); the three other subsections form part of the surveillance function, i.e., the right to impose by regulations passed under subsec. 329(f) the obligation for a pilot to report any impairment or ailment and to submit to medical examinations.

Removing a pilot automatically from the tour de rôle when suspicion of disability is so strong that a medical examination is ordered is, in effect, imposing preventive suspension. However logical and desirable this action may be, it is not permissible under present legislation. Subsec. (3) is not concerned with reappraisal but deals only with the remuneration of pilots when they are off duty as a result of a preventive suspension.

Subsec. (4) of the By-law purports to give the Pilotage Authority the power that can be granted by regulations made under subsec. 329(j) C.S.A., i.e., to retire any pilot who is permanently impaired by infirmity or by habits detrimental to his usefulness. This subsection is illegal because it provides for discretionary decisions, a prerogative which has no place in the exercise of the power of reappraisal. It is only when a pilot is, in fact, permanently incapacitated that the Pilotage Authority is authorized to retire him, and a medical opinion which may prove to be erroneous can not suffice to establish this fact, even if the Pilotage Authority has declared it sufficient. The regulation is also illegal because it disregards the pilot's fundamental right to a full defence.

Again the regulation is objectionable for a reason already discussed, i.e., it leaves the decision on fitness for pilotage to a medical officer.

The procedure laid down in former regulations was more in keeping with the requirements of the Act, i.e., the Pilotage Authority had a court of enquiry establish the facts in a judicial manner. Upon receipt of information, or a complaint that a pilot was allegedly unfit, the Pilotage Authority first notified the pilot of the complaint and then appointed a representative to hold an enquiry. Evidence was taken under oath, because this was a statutory requirement at that time (subsec. 415(j), 1927 C.S.A.). Formal hearings were held and the pilot was afforded the right to appear, to have counsel, to refute the complaint and to adduce evidence on his own behalf. The written report of a medical examination was not admissible but the actual testimony under oath of the physician concerned was necessary. If the members of the Board were experts in pilotage and safety of navigation, they were themselves in a position to ascertain the extent of the impairment in relation to the exercise of the pilot's duties; if not, expert evidence in that connection was required. If, after examining the report of the enquiry, the Pilotage Authority was satisfied that the complaint was well founded, it had the power to retire the pilot.

This court-like procedure was deleted by the 1955 amendment to the Quebec By-law, and eventually from the By-laws of the other Districts, and replaced by the present provision, i.e., a medical examination without a hearing.

Apparently, the court of enquiry procedure was a dead letter in the regulations which is shown by the case of ex-pilot Drapeau who was summarily dismissed on the ground of incapacity as a result of drunkenness. Despite numerous requests he was denied the right to have his case investigated by a court of enquiry, which was the procedure then in force (the case of Pilot Drapeau is studied in Part IV of the Report, Quebec District, *Discipline*).

Two reasons were advanced for abandoning the court of enquiry procedure; first the word "incapacity" was taken to mean mental or bodily condition which rendered the pilot generally incapable of performing his duties; second, the necessity for a written complaint appeared to be an absolute obstacle in practice (Ex. 1461(v)). The first reason is not well founded because the interpretation given to the word "incapacity" is correct: it corresponds to the limit of the retirement power that the Pilotage Authority derives from subsec. 329(j) C.S.A. Whether or not a Pilotage Authority is satisfied with this limited power it can not, by modifying the procedure, acquire more power than the Act provides. The second objection appears to be better founded. It is believed that the formal hearing stipulated in the By-law lacked flexibility in a number of ways: the only evidence that could be considered was testimony given before an investigator sitting as a formal court; the Pilotage Authority's power to convene a court enquiry was unduly limited to cases where a formal written complaint was received; the whole process took the form of a criminal trial, which it is not.

The Pilotage Authorities preferred to deal with cases of alleged unfitness due to habits detrimental to the efficient performance of pilotage duties, as violations of disciplinary regulations. This practice was followed for many years because it was assumed at that time that the Pilotage Authority had an almost discretionary power to withdraw a pilot's licence (Ex. 1461(v)). As is shown later, this is no longer so because the pilots, on the advice of their legal counsel, now ask for a normal trial with full rights of defence. When a Pilotage Authority tries to act as a disciplinary tribunal, it is unable to provide such a trial under the existing provisions of the Canada Shipping Act and, therefore, the situation is now hopelessly confused.

COMMENTS

Under existing legislation, a Pilotage Authority has no power to suspend a pilot's licence or even to take him off the assignment list (which in practice amounts to a suspension) on medical grounds. Its only power over annual licences of pilots over 65 years of age is not to issue another when the

licence expires, if the pilot is found medically unfit. During the tenure of other licences, its only power is to cancel the licence, when it has been established before it that the pilot suffers a permanent incapacity which renders him incapable of performing a pilot's normal duties.

While it is considered that these powers are too limited to enable Pilotage Authorities to meet present day requirements, it is also felt that the summary method adopted in the past in incompatible with the duties and functions of a licensing authority.

As was pointed out earlier, the fact that a licensing authority has to act in a quasi-judicial fashion when dealing with a licence does not bind it to the procedures followed in the regular courts. Since the requirement that evidence be taken under oath has been deleted, a Pilotage Authority has full discretion over the ways and means it adopts to ascertain the physical condition of a pilot, provided the pilot's right to a full defence is respected.

Because legislation in this respect is essential and since at least the basic physical and mental standards apply equally to all Districts (as is evidenced by the fact that the By-laws of all Districts contain substantially the same provisions on the matter), this question and the procedure to be followed should be fully covered in the Act itself and not left a subject-matter of regulations.

POWERS OF PILOTAGE AUTHORITY WITH RESPECT TO MORAL FITNESS, I.E., RELIABILITY

Reliability is the cardinal quality a pilot must possess. Whether a pilot is reliable or not is a difficult matter to establish since moral fitness is an imponderable which is established on the basis of actions, behaviour and performance.

Parliament has dealt with the reappraisal power of Pilotage Authorities by defining in legislation instances which create a presumption of unreliability and give reappraisal jurisdiction to a Pilotage Authority, i.e., conviction for certain pilotage offences as specified in the Act or in the regulations made under Part VI by Pilotage Authorities. While Parliament has given Pilotage Authorities wide powers to create such pilotage offences by legislation, it has gone to great lengths to guard against abuses by requiring that the factual situation which gives rise to this reappraisal power be established by a regular court finding a pilot guilty of a listed offence before reappraisal power can be exercised.

As in other cases where reappraisal is exercised, reappraisal of reliability can be covered in legislation in two ways: dealing with reappraisal in the Act itself or permitting a reappraisal authority to adjudicate. Parliament has adopted the second method only, although in the case of "regulation" offences it has authorized that by "by-law" the reappraisal role of Pilotage Authorities

may be reduced to a perfunctory process by leaving no discretion as to the action the reappraisal authority must take in the event of a conviction.

A verdict of guilty of one of these pilotage offences by a regular penal court not only establishes the jurisdiction of a Pilotage Authority as reappraisal authority but, at the same time, creates a presumption of unreliability against the pilot concerned. The only problem left for the Pilotage Authority to resolve (unless no discretion is permitted by the governing legislation) is whether, in the light of the pilot's past record and the mitigating evidence he may adduce, the presumption of unreliability created by the conviction has been refuted. In this case, his right to hold his licence will be reaffirmed but, if the gravity of the offence and the pilot's past record indicate a clear lack of moral fitness, dismissal is indicated. On the other hand, if it is felt that the pilot could overcome his weakness, a suspension for a given period or, possibly, a simple warning may prove sufficient deterrent.

The Act uses two different expressions to describe the reappraisal decision in such cases: at times it authorizes the pilot's "suspension or dismissal" (secs. 330 and 368), at other times it authorizes the "suspension or withdrawal" of the licence (subsec. 329(g) and secs. 371, 372, 568 and 579). According to the rules of interpretation, different expressions should refer to different situations but in this instance the Commission has been unable to make a distinction. The particular wording of most of these sections dates back to the first Federal pilotage legislation and has remained unchanged since (vide subsec. 18(7), and secs. 70, 71 and 72, 1873 Pilotage Act). This creates an unnecessary problem of interpretation which should be corrected.

Because a Pilotage Authority has no reappraisal jurisdiction without a conviction before a regular penal tribunal, the discipline of pilots is intimately related to the reappraisal of their reliability. However, all cases of discipline do not place a pilot's licence in jeopardy: only those where such action is specifically indicated; in all other cases, discipline exists *per se*.

In the Canada Shipping Act reappraisal power was not given for the following minor statutory offences since they do not affect the efficiency or reliability of a pilot:

(a) failure by a pilot to carry his licence, a copy of the By-law and of the tariff, and refusal to exhibit them to a Master who asks for them, are statutory offences rendering him liable to a maximum fine of $40.00 (subsec. 335(2));

(b) failure by a pilot to surrender his licence when it is no longer valid renders him liable to a maximum fine of $40.00 (sec. 337);

(c) failure by a pilot to exhibit a pilot flag or pilot lights when he "goes off in a vessel not in the pilotage service" makes him liable to a fine not exceeding $200 (sec. 366).

But the commission of any of the following statutory offences creates a presumption of a pilot's unreliability and the Act requires reappraisal of his moral fitness if he is convicted of:

(a) one of the statutory offences listed in sec. 368, i.e., "fraud or offence in respect of the revenues of Customs or Excise", "corrupt practices relating to ships", their equipment or salvage, unnecessarily cutting cables, or aiding or abetting such offences;

(b) endangering a ship through misrepresentation of circumstances (sec. 371);

(c) demanding or receiving more than the prescribed dues (sec. 372).

Wide power is given to every Pilotage Authority to create by By-law other offences (subsec. 329(f)) and to make the commission of any of these offences due cause for exercising its reappraisal jurisdiction (sec. 330). Pilotage Authorities have abused this power through the device of provisions of general application by making all By-law offences reappraisal cases. When the Act does not expressly state rules or criteria, an Authority should be guided in the exercise of its legislative power by the manner in which Parliament has proceeded in the Act, i.e., in this connection to require the reappraisal of a pilot's moral fitness only for offences which create a serious presumption of unreliability. It is an abuse of legislative power and authority to jeopardize a pilot's licence for a minor breach of a By-law. As will be shown later, these By-laws are ultra vires because of their drafting and, therefore, are inoperative (vide p. 399). It is considered that future legislation should contain a proviso prohibiting such abuses of regulation-making power, for instance, by requiring that regulation offences which involve the power to reappraise must be specifically and individually identified in regulations.

There is, however, one notable exception, i.e., the By-law provision dealing with the use of liquor and drugs (as to the legality of its substance vide page 395), the pertinent subsections of which read as follows (e.g., Quebec By-law):

"19(1) No pilot shall, while on duty or about to go on duty, consume intoxicating liquor or consume or use a narcotic drug; and the licence of any pilot contravening these provisions shall be withdrawn by the Authority.

(2) No pilot shall consume intoxicating liquor or use a narcotic drug on shore during the season of navigation, if such consumption or use prevents good conduct and constant attendance to and effectual performance of his duty on board ship or on shore; and the licence of any pilot contravening these provisions may be withdrawn by the Authority."

Each of these two subsections contains two distinct parts: first, the offence; second, the reappraisal jurisdiction of the Pilotage Authority. The offence is to be dealt with like any other pilotage offence, i.e., by laying a charge before a court of penal jurisdiction. The fact that the regulation does not define the maximum fine that may be imposed means only that the Pilotage Authority did not take advantage of the power derived from the first part of sec. 330 and, therefore, the punishment that may be imposed by the court is a fine not exceeding $100 (subsec. 331(2)). Conviction of an offence renders the second part of these provisions applicable. In the first case, the reappraisal rôle is no more than perfunctory, and the Pilotage Authority has no alternative but to withdraw the licence. In the second case, however, it has an alternative and may decide not to withdraw the licence if it believes that the circumstances of the case do not warrant such drastic action.

3. JUDICIAL FUNCTION: DISCIPLINE

NATURE OF JUDICIAL POWER

The importance of this question and the confusion that now prevails make it pertinent at this point to review briefly the principles governing judicial power. The three main powers of the state are judicial, legislative and executive. They are generally exercised by distinct, independent authorities. Although a cardinal principle of justice is that those exercising the judicial function, i.e., dispensing justice, must be independent and unbiased, there is no objection if, at the same time, they also share legislative or administrative power, or both. As a rule, a judge exercises judicial power only, but in certain special circumstances the same authority is also given other functions in the interest of administrative expediency. In pilotage legislation, when Trinity House was a Pilotage Authority it administered the Pilotage District, possessed delegated legislative powers and was also an administrative tribunal, a court of records with exclusive jurisdiction over pilotage matters.

A court's jurisdiction is civil when its function is to adjudicate a dispute between opposing parties and to decide between them; its jurisdiction is penal when its purpose is to award punishment for an offence created by legislation.

Courts may be divided into regular courts and tribunals of special jurisdiction. The latter are tribunals of exception and the terms defining their jurisdiction must receive limited interpretation; if there is any doubt, jurisdiction does not exist.

For the administration of its laws, Parliament can either have recourse to the Provincial courts already in existence by imposing new duties upon them, or giving them new powers in matters which do not come within the classes of subjects assigned exclusively to the legislatures of the provinces,

or it may create new courts for that purpose (Valin v Langlois, 1879, 3 R.S.C. 1 pp. 74 and 76 & ff., 1879-80, 5 A.C. p. 120). With regard to the administration of the Canada Shipping Act, Parliament has adopted both methods. For the imposition of punishments in the form of imprisonment, fines and penalties it has recourse to the regular provincial courts (secs. 683 and *seq.* and sec. 709 C.S.A.) but, to deal with particular matters, it created *ad hoc* tribunals, clearly defining their jurisdiction and giving them their necessary powers to act as such (vide, *inter alia,* Part VIII).

The exercise of the judicial function is a process by itself. Since a court does not act *proprio motu,* matters have to be referred to it, which in penal questions takes the form of complaints. Normally, it becomes *functus officio* when its decision is rendered, unless a power of revision is included in governing legislation.

As stated earlier, Pilotage Authorities were given special judicial powers in civil jurisdiction, i.e., over disputes between licensed pilots (sec. 351) or between a non-licensed and a licensed pilot (subsec. 355(2)), and over rights to pilotage dues. Because these powers presuppose the free exercise of pilotage as a profession, no use is made of them. The crucial questions, however, are which tribunals have penal jurisdiction and do Pilotage Authorities possess such jurisdiction?

PILOTAGE AUTHORITY AND PENAL JURISDICTION

For many years the Pilotage Authorities of various Districts have acted as if they possessed judicial powers over pilots in disciplinary cases and have proceeded in a very informal way to find pilots guilty of offences and breaches of regulations, to impose fines and to suspend and cancel licences. This power has repeatedly been queried in recent years.

Two prerequisites to the exercise of judicial powers are essential: unequivocal and express provisions in legislation, and the necessary powers to discharge this responsibility. No matter how desirable it may appear for Pilotage Authorities to hold these powers, there is no provision in the existing Canada Shipping Act which gives them the right to sit as a court of penal jurisdiction in pilotage matters, nor does any Pilotage Authority possess the necessary accessory powers to act as such.

On the other hand, the Canada Shipping Act provides an efficient and equitable procedure for the prosecution and punishment of offences and breaches of regulations committed by pilots without obliging the Pilotage Authority to act as a penal tribunal in cases where it is, at one and the same time, the aggrieved party, the informer and the prosecutor and, hence, clearly not in a position to render justice.

Committing a statutory offence, or a breach of a by-law, renders the offender liable to punishment in the form of a fine or imprisonment, as specified in applicable provisions, which is imposed by a regular tribunal

of penal jurisdiction as provided in secs. 683 and following. The correct procedure is to lay a charge before the proper tribunal so that the case can be dealt with according to the principles governing the exercise of penal justice. Any sentence imposed is enforceable through the various means of execution and enforcement pertaining to the court in question (sec. 685). An appeal is provided against such a conviction whenever the fine inflicted exceeds the sum of $25 and the provisions of the Criminal Code respecting appeals from summary convictions apply (sec. 687). It is conviction for one of these offences (where it is so specified in legislation) that gives a Pilotage Authority reappraisal jurisdiction over the moral fitness of a pilot and, at the same time, creates a presumption of his unreliability. Nevertheless, no use is made of this system, and no one recalls the last time a charge was laid before a penal tribunal against a pilot for committing a statutory offence or breach of a by-law.

INTERPRETATION OF SUBSEC. 329(g) C.S.A.

Subsec. 329(g) is the only provision of the Act which gives any semblance of judicial power over some of the offences that may be committed by pilots. Therefore, it is necessary to analyze this subsection carefully in order to find out the actual meaning of its provisions, as amended in 1934 and 1936, in their context.

This subsection in its immediate, pertinent context reads as follows:

"329 . . . Every pilotage authority shall . . . have power . . . by by-law confirmed by the Governor in Council, to . . .

(b) make regulations respecting . . . management and maintenance of pilot vessels and their equipment . . .

. . .

(f) make regulations for the government of pilots . . . and for ensuring their good conduct on board ship and ashore and constant attendance to and effectual performance of their duty on board and on shore . . .; and without restricting the generality of the foregoing make regulations with respect to every licensed pilot . . . [here follows a list of suggested items that may be made the subject of disciplinary regulations such as lending his licence, acting as a pilot or apprentice while suspended, etc.]

(g) make rules for punishing any breach of any regulations made pursuant to this section by penalty or by the withdrawal or suspension of the licence or certificate of the person guilty of such breach and notwithstanding anything contained in any other provision of this Act, impose, recover and enforce any such punishment."

> "330. Every pilotage authority may, by by-law made according to the provisions of this Part, provide for the imposition of a fine not exceeding in any case two hundred dollars for the breach of such by-law, and may further so provide that suspension or dismissal at the discretion of the pilotage authority may ensue."

The first comment is that if subsec. 329(g) effectively gave penal jurisdiction, as alleged, it would be limited to "breach of regulations" in the meaning in which this expression is used in the subsection, but the Pilotage Authority would have no penal jurisdiction over statutory offences nor over breaches of by-law which are not at the same time breaches of regulations, if any exist (this is studied later). In Part VI, the term "regulation" is used in a much more restricted meaning than in modern legislation and as defined in the Regulations Act (vide C. 8, p. 241) and is not the generic term which refers to all the legislation made pursuant to the exercise of delegated legislative power as opposed to statutory legislation. The generic word used for this connotation in Part VI is "by-law" and the term "regulation", which, in Part VI, is found in sec. 329 only, refers restrictively to the type of "by-laws" made pursuant to subsecs. 329(b) and (f), and to nothing else. Therefore, any jurisdiction derived from subsec. (g) is limited to the application of those "by-laws" that are regulations within the meaning of sec. 329.

The second comment is that in pilotage legislation any corrective measure taken as a result of a Pilotage Authority's reappraisal power over reliability is called "punishment". The same word is also used in its natural meaning, i.e., to designate the sentence (the result of a penal judicial decision). This fact, together with the interdependence of the two functions in such cases, may have been the main cause of the confusion about these two powers.

It is a misnomer, an impropriety of term, to call "punishment" the result of reappraisal action on a question of reliability; it is no more a punishment than to refuse to grant a licence when a candidate fails, or to retire a pilot prematurely on grounds of physical impairment. At this stage, the only question to be decided by the Pilotage Authority is whether, under the circumstances of the case for which a pilot has been found guilty and punished, and taking into account his character and past performance, it is reasonable to believe he can still be trusted to pilot. Otherwise his licence must be withdrawn because he is considered unreliable. On occasions, a term of suspension may be deemed a sufficient deterrent because moral fitness is a quality and, therefore, is capable of being improved. A term of imprisonment or a fine awarded by a penal court is not concerned with moral fitness but is imposed because the law has been broken. However, a licence is withdrawn because it is considered that the pilot is no longer qualified.

The fact that reappraisal of reliability is made conditional on the enforcement of discipline contributes to the confusing use of the term "punishment".

Therefore, to use the language of the Act for those offences where the reappraisal function is required, legislation has provided two types of "punishment": the sentence imposed by the court dealing with the offence, and an additional "punishment" of a pilotage nature, affecting the pilot's right to act as such, which is imposed by the Pilotage Authority, if and when the pilot has been found guilty by a regular court.

This is further supported by the use of the term "guilty" to identify the person whose licence or certificate may be suspended or cancelled. A person is considered in law to be guilty only when convicted. It is considered that in future legislation a term should be found to designate the reappraisal action and that the term "punishment" should be used only in its natural meaning, i.e., to indicate the sentence awarded for the commission of an offence.

The situation is further confused when power is granted a reappraisal authority to impose a penalty in lieu of cancelling or suspending the licence where such a penalty is considered to be a sufficient deterrent in the circumstances. Such a power was granted to the Quebec Pilotage Authority in 1877 (40 Vic. c.51 s.7); it was retained until repealed by the 1934 Act. This provision (sec. 534 in the 1927 C.S.A.) read as follows:

> "534. Whenever the pilotage authority of Quebec has power to dismiss or suspend a branch pilot for and below the harbour of Quebec, it may fine such pilot in a sum not exceeding one hundred dollars, if it deems it advisable so to do in lieu of dismissing or suspending him."

A similar power was never extended to the Pilotage Authorities of the other Districts. However, such power is extended to the administrative courts of Part VIII, subsecs. 568(3) and (4) which read as follows:

> "(3) The court may, instead of cancelling or suspending any such licence, penalize any licensed pilot in any sum not exceeding four hundred dollars and not less than fifty dollars, and may make order for the payment of such penalty by instalments or otherwise, as it deems expedient.
>
> (4) Any penalty incurred under this section may be recovered in the name of Her Majesty in a summary manner with costs under the provisions of the Criminal Code relating to summary convictions."

A further comment prompted by the text of subsec. (g) is that whatever power a Pilotage Authority may derive from this subsection, is limited to the question of "punishment". The power to impose a punishment does not imply that its holder also has power to hold a trial, although a trial before a court and a court decision as to guilt are prerequisites to the imposition of a punishment.

As explained before, the Act has grafted the reappraisal of moral fitness onto the administration of discipline and has made jurisdiction for reappraisal conditional on conviction for a stated offence obtained in the regular manner through a regular court. The question of fact as to the circumstances of the case that may cause reappraisal is determined judicially at the trial for the offence conducted before the regular tribunal. Hence, while both the regular courts and Pilotage Authorities have powers of "punishment", each in their own field, Pilotage Authorities do not have, and need not have, the power to conduct a penal trial.

The only powers a Pilotage Authority may derive from the last part of subsec. (g) relate solely to whatever power it has to impose punishment. Furthermore, by the use of the words "such punishment" these powers are further limited, (a) to punishment in the form of either penalty, suspension or withdrawal of licence, and (b) in relation to "regulation" offences as above defined.

The Act throughout always makes a clear distinction between power of penal jurisdiction and the power of reappraisal exercised by a Pilotage Authority. Whenever the only punishment provided is penal sanction of an offence, it takes the form of a term of imprisonment (sec. 369) or a fine (sec. 331, subsec. 335(2), secs. 337 and 366, subsec. 340(2), and secs. 356 and 367), and the same language and drafting form are used whether the offender is a licensed pilot, the Master of a ship or any other person. The first part of the section defines the offence(s) and the second part states the maximum permissible punishment without mentioning which authority is to award the penal sanction. By contrast, when the commission of an offence also gives rise to the reappraisal of a pilot's moral fitness, the same method is employed in the first part of the provision, but a second specific part is added. The section then, first, as before, defines the offence and the maximum penal sanction it entails without indicating which authority is to take action but, in addition, states the extent to which the licence of the pilot may be affected and, in contrast with the other part of the section, the Pilotage Authority is mentioned as the authority empowered to impose the additional punishment (secs. 330, 368, 371 and 372). Sec. 371, for instance, after defining the offence reads as follows:

> " . . . is liable, in addition to any liability in damages, to a fine not exceeding two hundred dollars, and if he is a licensed pilot the proper pilotage authority may suspend or cancel his licence."

The fact that the Pilotage Authority is named only in the last part indicates that the Authority has nothing to do with the trial and with the imposition of the penal sanction. If the Pilotage Authority had not been mentioned in the last part, the sanction against the licence would automatically have been added as a further punishment at the discretion of the tribunal with jurisdiction over the offence (sec. 683 and *seq.*).

The same process was adopted with regard to by-law offences (vide sec. 330 quoted earlier). Therefore, under the system adopted in the Act Pilotage Authorities did not need the power to hold a trial in order to impose the proper pilotage "punishment". The powers to compel the attendance of witnesses, to oblige them to give evidence, whether or not under oath, and to produce documents are infringements of the liberty of individuals. They can not exist without a specific and unambiguous legislative provision to that effect, such as are granted to the administrative tribunals formed under Part VIII (sec. 556 regarding *Courts of Formal Investigation* and subsecs. 579(3)(b) and (4) covering *Courts of Inquiry* into the competency and conduct of officers and pilots). The absence of similar provisions for Pilotage Authorities means, first, that Parliament did not intend to give this power to Pilotage Authorities and, second, that Pilotage Authorities have no judicial jurisdiction in penal matters.

The next question is what powers does subsec. 329(g) give to Pilotage Authorities that they would not otherwise have had?

To study this question it is helpful to divide the subsection as its grammatical construction requires. Under this subsection, the Pilotage Authority has power by by-law to:

(a) "make rules for punishing any breach of any regulation made pursuant to this section by penalty or by the withdrawal or suspension of the licence or certificate of the person guilty of such breach";

(b) "and notwithstanding anything contained in any other provision of this Act, impose, recover and enforce any such punishment".

The full extent of the first part of subsec. (g) is to authorize Pilotage Authorities to make, by by-law, rules concerning the exercise of the "punishment" power they possess. The governing words defining the power are "make rules for punishing"; the scope of the power is limited to "breach of any regulation made pursuant to this section"; and the nature of the punishment to which the power to make rules refers is defined by the rest of the first part of the subsection.

It seems that the main difficulty in understanding subsec. 329(g) arises, first, from failure to take into consideration the first governing words and, second, from the awkward method used to define the power of punishment to which the provision refers.

As explained before, secs. 368, 371, 372 and 330 provide two types of "punishment" which are only identified descriptively but are never defined in specific terms. The penal sanction to be imposed by the tribunal which heard a trial is described only by reference to the maximum fine or the term of imprisonment it may impose; the reappraisal "punishment" is similarly expressed descriptively by reference to the form it may take, i.e., sus-

pension or withdrawal of the licence, or dismissal of the pilot, which amounts to withdrawal of his license. This is the reason why the descriptive method is used in subsec. (g) to indicate to which of the two authorities with power to impose punishment the power to make rules conferred by subsec. (g) applies.

Prior to the 1934 amendment, which basically consisted only of adding a reference to "penalty", the whole corresponding provision read as follows (subsec. 415(g)):

> "(g) Make rules for punishing any breach of such regulations by the withdrawal or suspension of the licence or certificate of the person guilty of such breach;".

Under the 1927 Act, subsec. (g) possibly did more than merely confer the power to make rules regarding the reappraisal power of Pilotage Authorities in cases of offences against regulations, in that it also granted this power by implication in the absence of other specific provisions. Sec. 417 of the 1927 C.S.A., which corresponds to the present sec. 330, referred only to the sentence the court could award. This section in the 1934 Act (sec. 320) contained, however, a specific reference to the reappraisal power of "punishment" for the obvious reason that the intention was to reduce it to cases of continuing breach: "... and with relation to cases of continuing breach, may further so provide that suspension or dismissal at the discretion of the Pilotage Authority may ensue". However, before the 1934 Act came into force, this restriction was deleted by the 1936 amendment which is the origin of the present text of sec. 330. For clarity's sake, it is preferable to have this power clearly expressed, even if it is not limited.

As pointed out earlier, the rules that may be made pursuant to subsec. (g) apply only to those by-law offences that are, at the same time, regulation offences. A review of the by-law subject-matters presently provided by Part VI fails to disclose any by-law offence that could be created which is not, at the same time, a regulation offence. It is believed that this distinction was warranted in the past on account of provisions that may have existed in former legislation but, at present, it seems to serve no useful purpose. The reason may have been to distinguish between by-law offences applicable to licencees only and those applicable to other persons. At present a Pilotage Authority can create offences applicable to its licencees only; the other offences must be statutory.

The word "penalty", which was added in 1934, creates a problem of interpretation: either it is a generic term to designate pecuniary punishments in general, or it was introduced in the 1934 text for a definite purpose which was lost in the process of drafting or of the adoption of the Act.

Prior to the 1934 Act the term "fine" was never used; the term "penalty" was used instead as a generic term to refer to all types of punishments, and also more specifically to indicate a pecuniary punishment. The 1934 Act

innovated by introducing the distinction between "fine" and "penalty". While "fine" was used in sec. 320 (now sec. 330) to refer to the sentence to be awarded by a penal tribunal, the term "penalty" was added in subsec. 319(g) (now subsec. 329(g)). According to the rules of interpretation, the deliberate use of different terms should indicate different meanings and, therefore, in the present case the rules that could be made under subsec. (g) would not apply to punishment in the form of fines that could be awarded by the regular courts for a breach of a by-law. The facts that the corresponding marginal notes were left unchanged and that the word "penalty" appears therein where it refers to fine (e.g. sec. 368) or to a term of imprisonment (e.g. sec. 369) do not alter the situation: according to subsec. 14(2) of the Interpretation Act, marginal notes "shall form no part of the Act but shall be deemed to be inserted for convenience of reference only".

In modern legislation the word "penalty" connotes a very specific meaning. Mr. Elmer A. Driedger, Deputy Minister of Justice, in his memorandum on drafting Acts of Parliament and subordinate legislation dated October 1951, makes the distinction at page 12:

> "A fine should not be called a penalty. Fines are payable only upon convictions, but penalties may be recovered by civil action. If the two terms are confused, difficulties may occur in the application of the general provisions in the Criminal Code relating to fines on the one hand and penalties on the other."

The intention of Parliament in 1934 to distinguish between penalty and fine leaves no doubt when sec. 709 (then sec. 701, 1934 C.S.A.) is considered. It gives jurisdiction to the civil and summary tribunals mentioned therein for the collection of civil debts imposed as penalties "by Part VI or by rule, regulation or by-law made thereunder" in contrast with the other provisions contained in secs. 683 and following (then secs. 675 and ff., 1934 C.S.A.) which provide for the recovery of fines.

It is, therefore, considered that the word "penalty", used in subsec. 329(g) since 1934, refers to the reappraisal power of "punishment" appertaining to Pilotage Authorities, and nothing else. This is further evidenced by the construction of the sentence: the disjunctive "or" indicates that the penalty may be imposed only in lieu of suspension or withdrawal of the licence but not conjointly and, therefore, pertains to the same authority, while the fine is to be awarded in addition to suspension or withdrawal of the licence, i.e., two punishments, different in nature, which belong to two different authorities.

However, in the present context of the Act, it is considered that the "penalty" in subsec. (g) is a dead letter in the law. Its use there can not mean that power to impose it is inferred, first, because the power of "punishment" of Pilotage Authorities for by-law offences is dealt with in the last part of sec. 330, which deals exhaustively with the form reappraisal "punishments" are to take and "penalty" is not mentioned and, second, because the limits of this punishment are not defined. In the absence of a stated maximum amount,

it can not be surmised that the power to set an amount is unlimited. When this power is given, a maximum is always provided (vide subsec. 568(4) and sec. 7 of 40 Vic. c. 51 quoted earlier). In its present form, the provision referring to penalty is incomplete and, therefore, incapable of application.

The second part of subsec. (g), which was added in 1936, creates a serious problem of interpretation, not whether it confers judicial power or merely a power of punishment but whether it describes a further subject-matter of the regulation-making power of Pilotage Authorities, or is a misplaced statutory provision conferring additional administrative powers.

At first sight, it would appear that this provision simply defines a further regulation-making power regarding "such punishment", i.e., those punishments referred to in the first part of the subsection and that, therefore, Pilotage Authorities are thereby authorized to exercise these powers in, and by, by-laws. However, this interpretation fails when it is applied to the types of power referred to. The first term is wide enough to apply both to a legislative and an administrative power. A punishment can be imposed by legislation (e.g. sec. 101, 1886 Pilotage Act: "Every penalty imposed by this Act or by any by-law made under this Act . . .") or by an authority (e.g. subsec. 707(1) prior to the 1961 amendment: "Where any Court, Justice of the Peace or other magistrate imposes a fine under this Act . . . "). However, enforcement of punishment necessarily refers to an administrative power. It is true that legislation may decree that a penalty is to be automatically enforced by a set-off, but this is only one means of enforcement. Moreover it is incomplete because it presupposes that the pilot is, or will be, indebted to the Pilotage Authority, which will not happen in all cases (e.g., in the Prince Edward Island District). On the other hand, suspension or withdrawal of a licence is enforced only by the pilot delivering his licence and ceasing the exercise of his profession. If the pilot does not comply voluntarily, the required coercion can not be effected by legislation but requires the exercise of administrative power.

The only possible interpretation is that the 1936 amendment mistakenly included a provision giving statutory powers in a section whose sole purpose was to define the regulation-making power of Pilotage Authorities. This was not a precedent. A similar error occurred in 1934 when the provisions covering the procedure for fixing the amount of the pilots' compulsory contribution to the Pilot Fund was left in the section dealing with the subject-matters of regulations (subsec. 329(*l*) of the present Act) despite the fact that the new statutory provision dealt with the question fully.

The next question is what special powers which Pilotage Authorities did not have before were granted by this section? It is considered that the first part "to impose . . . such punishment" was not necessary because this was already expressly conferred by the last part of sec. 330; the essential purpose of power to reappraise is the imposition of remedies. The enforce-

ment of a reappraisal decision, i.e., the recovery of a penalty (if imposing a penalty is authorized) or the enforcement of the suspension or withdrawal of a licence, poses a problem. The question is whether here the text refers to the means of enforcement or to the right to enforce.

A Pilotage Authority possesses *per se* no means of enforcement of its reappraisal decisions and, for that purpose, use must be made of those pertaining to other courts. Unless the pilot concerned voluntarily complies with a decision, means of coercion are required because, otherwise, reappraisal power would be, in effect, denied. The fact, however, that a power is granted does not entail the right to apply force unless this is specifically granted. The procedure normally adopted by Parliament is to make use of the enforcement powers of regular tribunals, e.g., in Part VIII the decisions of administrative courts are enforced through penal tribunals; for instance, the failure of a pilot to deliver his licence when it is suspended or cancelled by a Court of Formal Investigation becomes a statutory offence to be prosecuted in the regular manner before a court of penal jurisdiction (secs. 571 and 683); likewise, the pecuniary award imposed by the same court in lieu of suspension or cancellation of the licence pursuant to subsec. 568(3) is recoverable summarily with costs under the provisions of the Criminal Code relating to summary convictions (subsec. 568(4)). Similarly, in pilotage legislation decisions of a reappraisal authority are enforced through the regular tribunals; failure to surrender a suspended or cancelled licence becomes a statutory offence which must be prosecuted before a regular court of penal jurisdiction pursuant to sec. 683, for which the pilot is liable to a fine not exceeding forty dollars (sec. 337), and failure to pay voluntarily a fine duly awarded by one of the regular courts referred to in sec. 683, in addition to the other means of enforcement pertaining to that court, may also carry a term of imprisonment not exceeding six months, unless the fine is paid sooner (sec. 685). Sec. 709 provides a means to recover penalties, i.e., before courts of civil jurisdiction as a debt, and the judgment is then enforced through the means of enforcement pertaining to that court, i.e., through writs of execution against property, or through garnishment. Therefore, not only is it evident that special means of enforcement are not given to Pilotage Authorities *per se* but the Act also clearly indicates how decisions are to be enforced.

The only doubt that may still exist concerns the right and power of Pilotage Authorities to initiate enforcement proceedings, i.e., to lay charges under secs. 337 or 356 in the case of suspension or withdrawal of a licence, or to launch recovery proceedings in their own name pursuant to sec. 709. As explained in chapter 8 (p. 322), it is considered that these rights are implied in the statutory mandate of Pilotage Authorities and are necessary to preserve the autonomous and independent position of these Authorities in the organizational scheme of Part VI. Normally, all judicial proceedings instituted by an officer of the Crown in his official capacity are supposed

to be taken in the name of the Crown and through the Department of Justice. The fact that a Pilotage Authority is an officer of the Crown may raise doubts whether an Authority could institute these proceedings in its own name; in the circumstances the 1936 amendment has the advantage of dissipating possible doubts. This is the only meaning that can logically be attributed to the proviso that was added through the 1936 amendment. It is considered that the same result could have been obtained in a less ambiguous and equivocal manner by saying so plainly and in a separate statutory provision.

HISTORY OF LEGISLATION WITH RESPECT TO DISCIPLINARY POWERS OF PILOTAGE AUTHORITIES

In order to appreciate the position of Pilotage Authorities with regard to the punishment of pilotage offences, it is instructive to examine how relevant legislation evolved.

(a) *Quebec Pilotage District*

When the Pilotage Authority of the Quebec District was a public corporation from 1805 to 1905, it acted as a court of records duly provided with its own court officers and procedure by virtue of the Trinity House Act; its jurisdiction extended over most pilotage matters, including disputes between third parties and pilots, discipline of pilots and casualty investigations, and an appeal from its decision could be made to the highest courts. It is worthwhile noting (as already pointed out) that, although the Superintendent of Pilots and the Harbour Master were both Wardens of the Quebec Trinity House, neither could sit on the Board when Trinity House was acting in its judiciary capacity because of the conflict of interests of these two officers whose duty was to prosecute those who had violated the provisions of pilotage legislation. This court was very active and many cases are reported in the various jurisprudence digests of that period.

When, in 1905, the Minister of Marine and Fisheries became the Pilotage Authority in lieu of the Quebec Harbour Commissioners, he was vested with all the powers that this corporation had as Pilotage Authority, with the proviso, however, that the judicial function would not be exercised by the Pilotage Authority, but by persons or tribunals duly designated by him for that purpose. The relevant part of the 1905 Act (4-5 Ed. VII c. 34 s. 2) reads as follows:

> "... provided that nothing in this Act shall authorize the said Minister to sit as a tribunal for the trial of offences of which pilots may be accused before the Pilotage Authority; but the said Minister may, in any case not provided for in the Shipping Casualty Act, 1901, and amendments thereto, designate a tribunal or officer to try any such offence."

In other words, the special judicial powers that the Quebec Pilotage Authority had enjoyed pursuant to the Trinity House Act were not repealed but were to be exercised by a delegate of the Pilotage Authority, no doubt to free the Minister of this time-consuming responsibility.

When, in 1906, all the acts dealing with navigation and shipping were amalgamated under the title "Canada Shipping Act", the special status of the Pilotage Authority in Quebec was retained by way of exception, and the special provisions quoted earlier relating to the Quebec Pilotage Authority's judicial powers became sec. 413 of the 1906 C.S.A.

Prior to 1905, the Shipping Casualty Act was not applicable to pilots. Quite apart from any question of discipline, the Pilotage Authority of the Quebec District had full power to investigate the competency and reliability of pilots, and to cancel their licences if they were considered safety risks. This was specifically provided for in sec. 100 of the 1886 Pilotage Act:

> "100. When any ship meets with any accident by reason of the fault of and while in charge of a pilot for and below the harbor of Quebec, the master, owner or consignee thereof, or other interested person may submit his complaint in respect thereto at any time thereafter, and the pilotage authority of the pilotage district of Quebec may, upon such information as it deems expedient and with or without complaint by any person, investigate the matter and declare the branch of such pilot forfeited: Provided, . . . ".

When the Minister became the Quebec Pilotage Authority this power was modified and sec. 530—the corresponding provision in the 1906 C.S.A.—read as follows:

> "530. When any ship meets with an accident by reason of the fault of or while in charge of a pilot for and below the harbour of Quebec, the master, owner or consignee thereof, or other interested persons may submit his complaint in respect thereto at any time thereafter, and the Minister may, in any case not provided for by Part X of the Act, upon such information as he deems sufficient and with or without complaint by any person, cause the matter to be investigated and the licence of the pilot may on such investigation be forfeited."

The Minister as Pilotage Authority, however, was not deprived of his reappraisal powers and, therefore, in cases where legislation so provided, he had the power to impose a term of suspension or to withdraw the licence after a pilot had been convicted. The Minister retained the special power that had been granted in 1877 (40 Vic. c. 51, s.7) to the Quebec Harbour Com-

missioners to substitute a pecuniary penalty for a term of suspension or withdrawal of a licence. Sec. 554, 1906 C.S.A. reads as follows:

> "554. Whenever the pilotage authority of Quebec has power to dismiss or suspend a branch pilot for and below the harbour of Quebec, it may fine such pilot in a sum not exceeding one hundred dollars, if it deems it advisable so to do in lieu of dismissing or suspending him."

This provision was retained until deleted in 1934.

Sec. 558, 1906 C.S.A. provided Quebec or Montreal pilots with an appeal to the Superior Court of Quebec from any judgment rendered against them by any tribunal or officer designated by the Minister as Pilotage Authority for the District of Quebec under the authority of Part VI for trial of any offence.

Pursuant to this right of appeal, the conviction of Pilot Gariépy by the Superintendent of the Quebec District was quashed by the Quebec Superior Court March 25, 1936. Gariépy, a Montreal District pilot, had refused an assignment from the Quebec Superintendent on the ground that he was not physically fit to take charge of a ship. The Superintendent disbelieved him and, without granting him a hearing, fined him $40 and suspended him from the tour de rôle until the fine was paid. Gariépy appealed the decision to the Superior Court which maintained his appeal and declared the sentence imposed by the defendant illegal, null and ultra vires and set it aside with costs. The grounds for the judgment were that the Superintendent had acted in an arbitrary manner and had abused his power (Quebec Superior Court file No. 32151, copy of judgment Ex. 1466(d)).

When the Canada Shipping Act was revised in 1934, all these special provisions were deleted and, as far as disciplinary powers were concerned, the Quebec Pilotage Authority was made to conform with the rules applicable to other Pilotage Authorities.

(b) *Montreal Pilotage District*

In the Pilotage District of Montreal, the Montreal Harbour Commissioners had judicial powers similar to those enjoyed by Trinity House in Quebec but, in 1900, at the pilots' request, the Pilotage Authority was deprived of its judicial powers and "The Montreal Pilots' Court" (63-64 Vic. c. 36) was created for the District of Montreal. It was presided over by a Commissioner appointed by the Minister and was assisted by one or more assessors. This court had jurisdiction over all charges and complaints made against pilots for any offence against the Pilotage Act or any regulation thereunder; moreover, it had all the powers of punishment the Montreal Pilotage Authority enjoyed. There was a stipulation, however, that as soon as a local Judge in Admiralty of the Exchequer Court was appointed, all the powers

and jurisdiction of the Montreal Pilots' Court were to be transferred automatically to the Exchequer Court of Canada (Admiralty side) and that the local Judge in Admiralty would have all the jurisdiction and authority conferred upon the Montreal Pilots' Court by the Act. These provisions became sec. 515 and following in the 1906 Canada Shipping Act, and were retained in the 1927 Act (secs. 495 to 509 inclusive).

As was the case in the Quebec District, the 1934 C.S.A. deleted all these special provisions, and pilotage offences in the Montreal District were to be prosecuted in accordance with the procedure then set out in the Act, which was applicable to all Pilotage Authorities without exception.

(c) *Other Pilotage Districts*

Between 1873 and 1934 the Pilotage Districts of Montreal and Quebec alone enjoyed a special status with regard to enforcing discipline. This situation arose because of their status as a Court that had been granted to them by special statutes prior to Confederation. The other Districts had to resort to the regular courts for this purpose.

The ultimate paragraph of sec. 18 of the 1873 Pilotage Act clearly expressed this requirement regarding punishment for a breach of a by-law:

> ". . . Every penalty imposed by any such by-law . . ., shall be summarily recoverable with costs by civil action or proceeding at the suit of the Crown only, or for any party suing as well for the Crown as for himself . . . before any court having jurisdiction to the amount of the penalty in cases of a simple contract, upon the evidence of any one credible witness other than the plaintiff or party interested . . .".

The 1873 Act did not indicate how the punishments provided for the commission of statutory offences were to be obtained. This was corrected in the 1886 Pilotage Act by the addition of a new comprehensive provision, sec. 101, which provided a uniform procedure for recovering all penalties whether concerning statutory offences or breaches of by-laws. This new section contained, in essence, the provisions of both present secs. 683 and 709. It read as follows:

> "101. Every penalty imposed by this Act or by any by-law made under this Act, . . . may be recovered or enforced with costs by civil action or proceeding at the suit of the Crown only, or of any person suing as well for the Crown as for himself, . . . before any court having jurisdiction to the amount of the penalty, or in any summary manner before a stipendiary magistrate, police magistrate or two justices of the peace, under the Act entitled 'An Act respecting summary proceedings before Justices of the Peace,' . . . upon the evidence of any one credible witness other than the plaintiff or person prosecuting . . .".

No change has been made since in the substance of these provisions.

DISCIPLINE AND MORAL FITNESS—REAPPRAISAL REGULATIONS (SUBSECS. 329(f) AND (g) AND SEC. 330 C.S.A.)

The Pilotage Authorities of all Districts except Churchill have taken advantage of their legislative power in the fields of discipline and reappraisal. The unformity of needs combined with the influence of D.O.T. has resulted in a quasi-complete standardization of these provisions, thereby indicating that most of them should be covered in the Act itself and not made the subject-matter of regulations. Similar provisions to those in the Halifax General By-law, which are quoted later, are found almost verbatim in most Districts.

It is through these regulations that the Pilotage Authorities tried to give themselves the enforcement powers they needed to exercise the extraordinary powers they have assumed. Hence, as is to be expected, a great number of these provisions are ultra vires.

(a) *Regulation offences (subsec. 329(f) C.S.A.)*

As already explained, Pilotage Authorities have not taken advantage of subsecs. 329(b) and (f) to create offences and provide for the reappraisal of holders of pilot vessel licences and pilotage certificates. With regard to pilot vessels, it is to be noted that the licence is issued to the vessel (sec. 364) and, therefore, it might be questionable whether disciplinary regulations could be enacted that would be binding upon the Master, operator or owner. It would appear that the only action a Pilotage Authority could take would be against the licence or against the vessel, possibly through *in rem* proceedings. Should it be found desirable to provide penal sanctions against the Master, owner or operator, a specific provision in the Act would be required.

The Act contains provisions creating offences that may be committed by apprentices (e.g. sec. 368) and, in Districts where an apprenticeship system exists, the regulations normally contain disciplinary regulations governing their conduct. There seems to be no problem in this field and the question need not be studied in detail. The principles enunciated hereunder regarding pilots apply *mutatis mutandis* to apprentices; suffice to say that since apprentices are not any one's emloyees, whatever control a Pilotage Authority may have over them must be based on specific provisions in the Act and must also be consistent with their status as apprentices under Part VI.

As far as pilots are concerned, in order to give effect to the organization envisaged in Part VI, the Act has created a number of statutory offences and through subsec. 329(f) has authorized Pilotage Authorities to create other offences, provided they come within the scope of the subject-matters defined in subsec. (f) as qualified by the context of the Act. (The meaning of the pertinent part of subsec. (f) was studied in C. 8, pages 271 and following.)

For ready reference, subsec. 329(f) authorizes the Pilotage Authority:

(1) to make regulations for:

(i) "the government of pilots";

(ii) "ensuring their good conduct on board ship and ashore";

(iii) for ensuring their "constant attendance to their duty on board and on shore";

(iv) for ensuring "effectual performance of their duty on board and on shore";

(2) "and without restricting the generality of the foregoing, make regulations with respect to every licensed pilot... who, either within or without the district for which he is licensed" (here follows a list of instances that could be made regulation offences, most of which were statutory offences prior to 1934).

The first comment is that since what is described in subsec. (f) is the subject-matter of the legislative power of Pilotage Authorities, it can be made effective only by regulations. Therefore, a regulation which authorizes the District Superintendent to make orders for "the conduct of pilots" is an illegal delegation of a legislative power, because orders regarding the conduct of pilots must be defined in the regulations themselves and can not be delegated to form part of the discretionary administrative power of a Pilotage Authority, and even less of one of its subordinates (vide C. 8, p. 293 *et seq.*) (B.C. By-law, subsec. 3(1)(a)).

In subsec. 329(f), as in the other subsections which describe subject-matters of the regulation-making power of Pilotage Authorities, the terms used must be read in the context of the Act. When taken in isolation they may appear to give wide legislative power on the subject but they must be read in their context which qualifies and limits them. Any regulation that clashes with its context is ultra vires. For instance, the power to make regulations for "the government of pilots" and for "constant attendance to . . . their duty on board and on shore" differs, depending upon the status of the pilot: to disobey the despatching authority's orders concerning an assignment is the subject of a disciplinary regulation in a law where the authority is given the right and duty to control the service, but it is incompatible and, hence, ultra vires in a law based on the free exercise of the pilot's profession. Therefore, the following provisions of the B.C. By-law (P.C. 1965-1084) are ultra vires:

"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.

. . .

(4) Unless he has been granted leave of absence pursuant to sections 34 and 35, a pilot shall
  (a) hold himself ready for assignment to any vessel;
  (b) report to the pilotage office immediately upon the conclusion of any trip or movage attended by him; and
  (c) keep the Superintendent informed of his whereabouts at all times."

Although the Act contains no rule stating how legislative power on the subject-matter of disciplinary regulations is to be exercised, Pilotage Authorities are once again limited by the context of the Act and must be guided by the general, implied rules of regulation-making and must be limited by the action already taken by Parliament in that field, e.g., care should be taken not to infringe in spheres already covered by statute. When Parliament covers a subject by creating specific offences, no scope remains for regulations and any regulation offences made on that subject would be null because they would, in effect, amend an Act of Parliament, a power that no Pilotage Authority possesses. For instance, that part of sec. 28 of the B.C. By-law which requires a pilot to carry with him, when on duty, an up-to-date copy of the pilotage rates of the District is illegal, because this is already the object of a statutory offence. In this case, the regulation provision is more than a mere repetition of the Act: it amounts to an amendment of the Act in that the By-law offence carries a much more severe punishment than the statutory offence (sec. 335 C.S.A.).

Again, because the provisions of subsec. 329(f) are the subject-matters of legislation by regulations, they must be fully covered in the regulations without leaving any discretion to any one to determine what may or may not constitute an offence. Regulations should be so worded that offences are readily identifiable by those to whom disciplinary regulations apply. Therefore, regulations phrased in general terms which may give rise to various interpretations are illegal and constitute, in fact, an illegal delegation of legislative power to a judicial authority. Since penal matters are matters of exception, they must be strictly interpreted and, unless the offence is described without ambiguity, the provision must be considered inoperative. For instance, the terms of sec. 3 of the B.C. By-law, which authorizes the Superintendent to make orders verbally or in writing regarding, *inter alia,* the attendance of pilots before him, and the terms of subsec. 32(c), which makes it an offence for a pilot to "disobey the order of the Superintendent or the Authority", to neglect his duty, or to misbehave, are too wide to be capable of application. It can be made an offence to refuse to appear before the Superintendent only if, pursuant to some other provision of legislation, the Superintendent has the right to order a pilot to appear before him. A pilot is obliged to obey orders issued by the Pilotage Authority and its Superintendent only if the

command or order is lawful. A prohibition against misbehaving first requires a definition by regulation of what conduct is expected of a pilot. In fact, the commission of any offence, especially a statutory offence, constitutes misbehaviour. There is no place in disciplinary regulations for general, ambiguous terms. It is, of course, much easier to phrase regulation offences in general terms but this is detrimental to the administration of justice and discipline. Discipline does not exist for its own sake: it is the ultimate means to give effect to legislation.

It should be remembered that while all offences are faults, all faults, whether wrongful acts or wrongful omissions, are not offences. A fault becomes an offence only if and when it is defined as such in legislation and a punishment is provided for its commission. It is against the principle of penal justice to make offences of all faults through this device of regulations couched in general terms.

One of the essential prerequisites of good discipline is a precise code of discipline, i.e., disciplinary provisions that are clear, reasonable, realistic and easy to apply.

It is preferable to have an incomplete code of discipline than to create offences that a Pilotage Authority does not intend to apply or that are not capable of practical application. It should be remembered that in the exercise of its surveillance duty a Pilotage Authority has no choice except to prosecute an offence once it has been committed and, therefore, the creation of a new offence by regulation creates *ipso facto* an imperative duty to enforce the regulation (vide C. 9, p. 350).

The greatest single factor for undermining authority is disrespect for, and disregard of, the law, if the example comes from the very Authority who is charged with ensuring that the law is respected. A legislative provision which is not enforceable or not intended to be enforced should never be included in legislation. Equally, a provision that becomes inoperative should be removed. Disciplinary regulations should be proportionate to the power of enforcement an authority possesses, and an executive authority which has accessory legislative power should never place itself in such a predicament by enacting unrealistic provisions. A good example of this is the lack of flexibility of pilotage regulations regarding the use of alcohol which are so drastic that they are deliberately not being applied, thereby defeating the very purpose of their existence (vide pp. 333 and ff.). The consequences of an adverse report are so considerable that despatchers cover up cases of drunkenness rather than report them, thereby allowing pilots who are safety risks to continue to pilot to the detriment of the service and the safety of navigation. A despatcher can not help being afraid of making a mistake when he appraises the condition of a pilot who is being despatched, because he may feel that the sequence of events his report will initiate are disproportionate to a situation which he does not consider overly serious. Once a despatcher's

report is made, the pilot concerned is immediately suspended; the despatcher's superior investigates and reports to his superiors in Ottawa; they, in turn, study the matter. The pilot's suspension will not be lifted unless and until the Pilotage Authority in Ottawa is satisfied the complaint is unfounded; otherwise, formal disciplinary action must be launched. (The M.V. *Arrow* incident [vide Pilotage District of Quebec—*Discipline*] is a good example of the intricate situation which may develop as a result of an adverse report.) Hence, it is little wonder that despatching clerks have gone to great lengths to avoid involvement and reported only those cases where the pilots failed to co-operate or when the infraction was so flagrant that it could not be hushed up. Under these circumstances it is also understandable that District Supervisors condoned the practice, thus defeating one of the main purposes of the District By-law.

Discipline is not created by severity in the text of the law but by reasonable, realistic provisions which are sufficiently flexible to avoid unnecessary hardship and, at the same time, are easy to apply.

(b) *Distinction between civil and penal responsibility*

The quasi-criminal character of disciplinary regulations must also be clearly understood. Civil liability must not be confused with penal responsibility and, in the same way, competency and fitness should not be confused with discipline. Pilotage Authorities should not try to secure through disciplinary regulations those reappraisal powers that are denied them by the Act. The correct procedure is to propose to Parliament an appropriate amendment to the Act but, until this is done, it is as illegal to exercise these powers indirectly under the cover of disciplinary regulations as it is to exercise such unauthorized powers directly. For this reason regulations like subsecs. 28(a) and (c) of the B.C. By-law appear to be of doubtful legality:

"28. Every pilot shall

(a) keep up to date in his knowledge of the District;

. . .

(c) keep himself familiar with relevant customs, quarantine and port regulations and with all conditions affecting navigation within the District."

Such knowledge forms part of the professional qualifications of a pilot over which, once a licence has been issued, a Pilotage Authority has no control (vide pp. 357 and ff.). A Pilotage Authority can not gain such control over pilots indirectly under the pretext that this requirement aims at promoting the effectual performance of their duties, any more than under the present legislation it can make a regulation offence any failure by the pilots to keep up-to-date their knowledge of radar or their skill in handling new types of ships which enter, or may enter, their District.

Furthermore, if the pilots bear any responsibility under customs or quarantine legislation and port regulations, provision should be made in the legislation concerned but not made the subject of pilotage regulations, unless this is specifically authorized and required by statute. Since this is not the case here, sec. 26 of the B.C. By-law which requires the pilots to "comply strictly with all directions given by the Harbour Master relating to the mooring and unmooring, placing or removing of vessels within the limits of the authority of such Harbour Master" is illegal when made the subject of a pilotage regulation. This provision is, in effect, a delegation of administrative power from the Pilotage Authority to the Harbour Master, which presupposes that the Pilotage Authority possesses the power to give such orders to pilots. This is not so. Therefore, such a provision is ultra vires when contained in regulations made by the Pilotage Authority and any power the Harbour Master may have over the pilots must be derived from other legislation.

It is not the aim of pilotage legislation to have the professional work of pilots overseen and checked by a Pilotage Authority any more than the actual exercise of his profession by a lawyer or a physician is scrutinized by a legal or medical association, except when a professional man acts in a criminal or quasi-criminal manner or to the detriment of his profession. Human error, errors of judgment, lack of knowledge and skill can not be made the subject of disciplinary regulations. All these failings pertain to the field of civil liability against which aggrieved parties may sue before civil courts. Since 1936, a pilot's liability in pecuniary damages has been limited by statute to $300 (subsec. 362(2)) in cases where damages were caused "by his neglect or want of skill", but civil liability is not limited in cases of wilful wrongful act or gross negligence. Normally, the civil liability of a professional man is an adequate incentive to exercise reasonable care and to maintain his qualifications. Possibly this incentive was taken away from pilots when their civil liability was limited to $300 by the 1936 amendment. However, it is improper to try to correct the situation by replacing the normal deterrent of civil responsibility by a penal provision. The limitation of $300 is obviously too low: an aggrieved party never sues a pilot in damages, obviously because the loss of time and the trouble and expense such civil proceedings entail make them unprofitable. The situation should be remedied by a substantial increase in the liability limit and, possibly, by requiring pilots to carry a bond to ensure that civil suits are not in vain; this is dealt with further in a Recommendation.

It is only when the "neglect or want of skill" assumes a criminal or quasi-criminal aspect that it becomes a disciplinary matter. Mr. Justice Noel of the Exchequer Court, in a recent judgment (Bélisle v Minister of Transport, Exchequer Court in Admiralty, file No. 308, dated April 5, 1967, Ex. 1468) analysed the meaning of the term "wrongful act or default" found in subsec. 568(1)(a) C.S.A.:

> "The wrongful act or default so involved does not necessarily have to be of a criminal or quasi criminal nature. It has been said that it can be a breach of

> legal duty of any degree which causes or contributes to the casualty under investigation (cf. *The Princess Victoria* [1953, 2LI., L.L.R. 619] at p. 627).
>
> An error of judgment in a moment of difficulty and danger, however, does not necessarily render an officer's certificate liable to be dealt with. There is no test that has been formulated that serves in all circumstances for determining when an act or omission is of a character that calls for the imposition of a disciplinary action. Possibly as useful a test as any is that the wrongful act must be the doing of something that "plainly" he ought not to have done and the default must consist in omitting to do something which it was "plainly" his duty to do (cf. *The Carlisle* [1905-1908, Aspirall's Report of Maritime Cases, vol. X N.S. p. 287] per Bargrave Dean P. at 293)."

Sec. 568 C.S.A. deals with a situation which is midway between civil wrongdoing and criminal or quasi-criminal wrongdoing, i.e., wrongdoing which indicates that a pilot is a safety risk. Therefore, while any wrongdoing may render a pilot liable to pay an indemnity to the victim, a plainly wrongful act is needed to give the reappraisal Courts listed in Part VIII the right to impose a remedial sanction. But much more is required to render wrongdoing the object of penal legislation: the wrongful act must have been intentional or the negligence deliberate. The least that can be said is that disciplinary regulations which do not meet the test devised by Mr. Justice Noel are clearly ultra vires.

It is further considered that this penal field seems to be fully covered by secs. 369 and 371 of the Act and, if such is the case, any further regulation on the matter is illegal. For instance, a general provision on this matter such as contained in sec. 29 of the B.C. By-law is illegal:

> "A pilot shall exercise the utmost care and diligence in the safe conduct of the vessel to which he is assigned and shall at all times observe the practices of good seamanship."

If this By-law provision is taken literally, a strange situation results in that negligence that would not give rise to a civil action might cost a pilot a fine of $200 plus loss of his licence, because the By-law provides these sanctions for breaches of regulations. This is an abnormal situation since civil law does not require "utmost prudence" but merely normal prudence under the circumstances of the case.

Most of the remaining disciplinary regulations in the B.C. By-law and those in the By-laws of other Districts are of questionable legality, when they are considered within the context of the Act.

That part of sec. 27 of the B.C. By-law which requires a pilot to report when "any violation of the law on the part of other vessels is observed" is illegal, because such a requirement does not come within the terms of subsec. 329(f) C.S.A. or any other provision of the Act. Part VI imposes no police duty whatever on pilots. For the same reason, it is considered that the requirement for a pilot to report a shipping casualty or an incident in which the vessel he was piloting was involved is also of doubtful legality. Unless there is a specific provision in the Act, a pilot can not be forced to file a

report which may incriminate him or, at least, assist in the preparation of a case against him. While it is considered highly desirable that pilots should be obliged to report casualties and incidents in view of the public character of the pilotage services they perform, it would appear that a statutory provision, such as exists with regard to Masters of a Canadian ship or of a British ship in Canadian waters (sec. 553 C.S.A.), would be necessary. Pilotage Authorities have no power whatsoever with respect to shipping casualties. There is no provision in Part VI to empower a Pilotage Authority to make regulations regarding shipping casualties in order to assist the Minister in the discharge of his responsibilities under Part VIII, nor is there anything in Part VIII which obliges pilots to assist the Minister to obtain information prior to an investigation by a Court of Preliminary Inquiry or a Court of Formal Inquiry.

It is considered that subsec. 30(1) of the B.C. By-law, which makes it a regulation offence for pilots to consume alcohol while on duty or about to go on duty, is ultra vires because it does not come within the terms of subsec. 329(f) C.S.A. The mere fact of drinking an alcoholic beverage can not be termed misconduct and does not necessarily affect a pilot in the satisfactory performance of his duties: it is impairment through alcohol that may be made an offence, as suggested by subsec. 329(f)(iii). To make an offence as a preventive measure of the mere consumption of alcohol without impairment or the use of narcotics when on duty or about to go on duty would require the inclusion of a specific provision to that effect in the Act. Its desirability, however, is questionable. As pointed out earlier, it is not the severity of the text of legislation that enforces discipline, because too strict a provision is unlikely to be implemented. The correct solution is to lay down a reasonable, realistic prohibition and to enforce it strictly. This matter is dealt with further in a Recommendation. If, however, it is considered advisable to enact such a prohibition in this case, it should be made a minor offence which never places a pilot's licence in jeopardy, i.e., does not cause reappraisal action.

It is considered that most of the offences listed in subsec. 329(f) should be contained in the Act itself and should not be left to the discretionary legislative power of a Pilotage Authority. Most, if not all, of these offences have a character of permanency and of general application and, hence, ought to be prohibited in all Districts at all times, e.g., it should always be an offence for a licensed pilot to act as such when his licence has been suspended, and it should not be left to the discretion of a Pilotage Authority to decide whether or not it is an offence for a pilot to take charge of the navigation of a ship while under the influence of intoxicating liquor or drugs.

The disciplinary regulation-making powers of subsec. 329(f) are consistent and adequate only for the type of Pilotage Authority contemplated in the Act, i.e., a licensing authority with surveillance powers. If future legislation alters and enlarges the powers and function of Pilotage Authorities to

include management of the service, despatching of pilots and other powers not yet authorized, the provisions of subsec. (f) will have to be modified accordingly. If the provisions of subsec. (f) are to be retained, the text should be redrafted to make clear the nature and the scope of the regulations Pilotage Authorities are expected to enact under it.

(c) *Regulations under sec. 330 C.S.A.*

For statutory offences the punishments provided are terms of imprisonment up to a maximum of 12 months in the case of the indictable offences in sec. 369, fines up to a maximum of $200 in cases of subsec. 366(2), secs. 368, 371 and 372, and $40 in cases of subsecs. 335(2) and 337(3). These provisions also state whether or not the commission of these offences requires the reliability of the pilot to be reappraised by the Pilotage Authority and, if so, the extent of the remedial action the Pilotage Authority may take. Such action is provided only for the offences listed in secs. 366, 371 and 372 and the extent of reappraisal is suspension or cancellation of the licence. As for breaches of by-laws, the rule is set out in subsec. 331(2), namely a fine not exceeding $100 (with no reappraisal of the pilot's reliability) which applies automatically, unless, as an exception, a different punishment and/or reappraisal sanction is specifically provided. Thus, by by-laws passed under sec. 330 a Pilotage Authority may vary the maximum amount of the fine by specifically providing for a given offence a lower or a higher maximum, but not to exceed $200. In addition, in each case, a Pilotage Authority may by by-law provide for the suspension or the cancellation of the licence, to be imposed by the Pilotage Authority as reappraisal authority, i.e., may determine which regulation offences cause reappraisal of a pilot's reliability. Therefore, a Pilotage Authority need not make use of sec. 330 unless it wishes to vary the maximum penal punishment imposed by subsec. 331(2).

It is obvious that the purpose of sec. 330 is to permit Pilotage Authorities to provide in legislation for punishments that fit the offences. The scale of these punishments is to be proportionate and consistent, and the criteria to be followed are found in the context, i.e., the fines enumerated earlier which are provided for the defined statutory offences. It is illogical that a minor regulation offence should carry a greater punishment than any statutory offence. The aim of sec. 330 is to provide for specific exceptions to the rule posed by subsec. 331(2), i.e., to provide by regulations, where warranted, specific penal punishments for specific offences, and also to determine specific cases calling for reappraisal. Therefore, it is considered that it is against the spirit of the legislation to make use of the legislative power of sec. 330 solely to amend subsec. 331(2), that is, to replace the statutory rule by a regulation rule thus providing another provision of general application wherein the maximum permissible punishments are provided in all cases, namely, a fine not to exceed $200 plus, even for the slightest breach of the least important

by-law provision, the risk of suspension or dismissal. It is realized that the maximum amount set for fines has not been raised since 1934, despite the decreased purchasing power of the dollar, but the fact that Parliament did not alter the fixed amount of these fines (especially considering that it did revise upwards the punishments provided for non-licensed pilots piloting illegally (sec. 356 as amended in 1956, 4-5 Eliz. II c. 34) and again in 1961 (9-10 Eliz. II c. 32)) indicates that Parliament did not intend to modify the criteria it had established for punishing pilots.

It is considered that in future legislation, a provision of general application, such as subsec. 331(2), should be retained giving Pilotage Authorities legislative power to vary punishments, never through a general provision, but by individual provisions, as Parliament has done in the present Act.

However, as will be shown later (vide p. 399), the general provisions contained in regulations for punishments in cases of breach of by-laws are ineffective at the present time because they are ultra vires. Therefore, except in the case of use of drugs and alcohol studied earlier, the only permissible punishment is a fine not to exceed $100 provided in subsec. 331(2) and conviction never places a pilot's licence in jeopardy.

(d) *Regulations under subsec. 329(g) C.S.A.*

The By-laws of all Districts, except Churchill, contain a provision entitled "Disciplinary Measures" which appears to be based on subsec. 329(g). The version contained in the 1961 Halifax General By-law seems in substance identical to the provisions that appeared at that time in the By-laws of 20 Districts (the By-laws of the Newfoundland Districts pre-dated Confederation and were not made under Part VI). In 1965 and 1966 in eight Districts the provision was replaced by a new section which is studied later. Sec. 23 of the 1961 Halifax Pilotage District General By-law read as follows:

"23(1) Every pilot who is found by the Authority to have violated this By-law is liable
(a) to a penalty not exceeding two hundred dollars; and
(b) to have his licence suspended or cancelled.

(2) Every pilot who is found by the Supervisor to have violated this By-law is liable to a penalty of forty dollars.

(3) Where a breach of this By-law is alleged to have been committed, the pilot accused of committing the breach shall be permitted to present his defence to the Authority either personally or in writing.

(4) The Supervisor may recover a penalty imposed on a pilot by deduction from his earnings or may suspend the pilot's licence until the penalty is paid.

(5) All fines imposed under these By-laws shall be paid into and form part of the Pension Fund."

In a few Districts, i.e., Bathurst, Buctouche, Miramichi, Quebec and Richibucto, these disciplinary regulations apply also to apprentices. In some Districts where the Minister is Pilotage Authority the term Superintendent is replaced by Supervisor and in the Commission Districts by Secretary. In the Restigouche District, if a defence is presented orally, it is before the Master Pilot instead of the Secretary. Subsec. 2 is found only in the Districts of Halifax, Quebec and Restigouche; therefore, in the other Districts the Pilotage Authority's local administrative officer, i.e., the Superintendent or Supervisor or Secretary, has no disciplinary power whatsoever. Subsec. 5 appears only in the Halifax 1961 By-law.

The By-laws were obviously conceived under the assumption that Pilotage Authorities have penal judicial jurisdiction over pilots. As has been pointed out earlier, this is not the case.

One interesting common feature of these By-laws is that the Pilotage Authority, whether the Minister, or a local Commission whose members are expected to be available in the District, never sees witnesses and a pilot can not appear in person before the Authority although it sits in judgment disposing of disciplinary cases indirectly as matters of administration. If a pilot wishes to make a defence, two avenues are open to him: either he does so in writing addressed directly to the Pilotage Authority or, if he wishes to defend himself verbally, he appears before the Pilotage Authority's local representative (except in the Restigouche District, before the Master Pilot) who, it is assumed, takes notes and makes a written report to the Pilotage Authority, although this point of procedure is not covered in the By-law.

A second feature is that the enquiry part of the trial is carried out, if at all, very informally. The right to a hearing to obtain evidence is not provided and the Pilotage Authority may use whatever information is available. It would appear that the term "defence", which generally means introducing evidence, mostly in the form of oral testimony by witnesses, is confused with "pleadings", which is the argument and may be either verbal or in writing.

These provisions could not have been made under sec. 330 C.S.A. because this section presupposes two distinct jurisdictions, i.e., penal jurisdiction exercised by one of the regular penal tribunals (as provided under sec. 683 and following) which tries the case and imposes a fine, and reappraisal jurisdiction which is exercised by the Pilotage Authority once a conviction is obtained. The word "penalty" used in the regulation might indicate at first sight that the regulation is based on subsec. 329(g) but this can not be correct, because in that subsection the "punishments" are alternative, i.e., the penalty is in lieu of suspension or cancellation of the licence and a penalty can not be awarded together with a suspension or a cancellation. Such action is permissible only under sec. 330 and provided it is done by two distinct jurisdictions, which is not the case here. However, it is clearly apparent that

the word penalty used in the regulation is an incorrect term and that it really means a fine. It is so identified in subsec. 23(5) of the Halifax 1961 By-law, and, furthermore, the context of provision makes it incompatible with the definition of penalty given by Mr. Driedger quoted earlier, i.e., a debt for a fixed amount which exists automatically with the advent of a condition, while here what is referred to as a penalty meets the definition of a fine, i.e., a debt imposed by a penal court as a sentence in an amount fixed by such court at the time and at its discretion within the limits provided in applicable legislation.

With reference to subsec. 23(4) of the By-law, which provides for the recovery of fines so imposed, it is considered that, for reasons explained when the last part of subsec. 329(g) C.S.A. was studied earlier, the two means of enforcement therein provided are ultra vires (vide p. 378). Unless it is specially provided for by a clear provision of the Act as under sec. 362 for dues owing and damage caused by a pilot's negligence, it is questionable whether a set-off may exist between (a) money held in trust for a pilot, in the form of pilotage dues earned by him and collected by his Pilotage Authority and (b) a fine owed to a Pilot Fund, or the Consolidated Revenue Fund in the absence of a Pilot Fund, because, although the two debts may be both existing and liquidated, they are not between the same estates. The compulsory means of enforcement through suspension of the licence until payment is effected would require a specific, unambiguous provision in the Act, which does not exist. The only time a suspension may be effected as a result of the commission of a by-law offence is in the case of sec. 330, i.e., by a Pilotage Authority in the exercise of its reappraisal powers and not as a means of enforcing the recovery of a fine. It is further considered that it is an unnecessary measure the consequences of which are disproportionate with the aim which is sought (Gariépy v the King, 1940, 2 D.L.R. 12).

Because a fine up to a maximum of two hundred dollars and suspension or cancellation of a licence are ordered by regulations as the punishments that pertain specifically to a Pilotage Authority when acting in its alleged penal jurisdiction over disciplinary cases, these punishments can not apply if a case is heard before a regular penal court. Since Pilotage Authorities have, in fact, no penal judicial jurisdiction, this whole provision entitled "Disciplinary Measures" is inoperative. The result is that the only possible punishment for the commission of a by-law offence is that provided in subsec. 331(2), i.e., a fine not exceeding one hundred dollars.

It is worth noting that the Supervisor or Secretary was given disciplinary powers only in the Districts of Halifax, Quebec and Restigouche. It was no doubt realized that the Supervisor or Secretary is too close to the pilots to be in a position to sit in judgment, because in most instances he is directly involved, either as the principal witness or the aggrieved party.

As will be seen in the last part of this chapter, the haphazard way various Pilotage Authorities deal with disciplinary cases was questioned before this Commission and a spokesman for the Department of Transport admitted that the procedure provided in this regulation left much to be desired from the legal point of view, especially regarding the right of the accused pilot to a full defence. The spokesman added that the Department was expecting the Commission to formulate a recommendation on the matter. However, probably on account of increased opposition by accused pilots, a new procedure was introduced, obviously to give the accused more protection. The new provision first appeared in 1965 in the three Newfoundland Districts of Botwood, Humber Arm and Port aux Basques when their first General By-law under Part VI was adopted. Later that year it became effective in the larger Districts, where the Minister is Pilotage Authority, i.e., B.C., Cornwall, Montreal and Quebec, and in 1966 in Halifax. Except for the arrangement of the text and the fact that the judicial powers are not delegated in all Districts, the provision corresponds in substance to sec. 23 of the 1966 Halifax General By-law which reads as follows:

"23(1) Where a pilot is charged with having violated a provision of this By-law;

(a) the Authority may appoint a person to hold an inquiry to determine the validity of the charge; or

(b) with the consent of the pilot charged, the Supervisor may determine the validity of the charge.

(2) Where a person appointed pursuant to paragraph (a) of subsection (1) determines that the pilot charged has violated any of the provisions of this By-law, the Authority may impose on that pilot a penalty not exceeding two hundred dollars or withdraw or suspend his licence or both impose a penalty and withdraw or suspend his licence.

(3) Where the Supervisor, pursuant to paragraph (b) of subsection (1), determines that the pilot charged has violated any of the provisions of this By-law, the Supervisor may impose on that pilot a penalty not exceeding one hundred dollars.

(4) Any penalty imposed on a pilot pursuant to subsection (2) or (3) may be recovered by deduction from moneys owing to that pilot by the Authority and the Authority may suspend the licence of a pilot until the penalty imposed on him has been paid."

The first comment is that the new provisions do not apply to apprentices in any District. Where the Minister is Pilotage Authority, the Superintendent or Supervisor is given judicial powers as well as power to impose fines not exceeding one hundred dollars but these powers are not extended to the Secretary in the three Newfoundland Districts.

The new system purports to give the accused pilot a fair and regular trial and in the Districts where the Minister is Pilotage Authority he has a choice between being judged formally by the Pilotage Authority or summarily by the Superintendent.

The only material change is the procedure set out for obtaining evidence. In order not to force the Minister as Pilotage Authority to preside at a hearing, the device was adopted of having the facts and the validity of the charge determined by a person especially appointed to hold the trial (that is, to obtain evidence in a judicial fashion while affording the pilot the opportunity to attend, to present evidence on his own behalf, and to plead) and also to render a verdict of guilty or not guilty of the charge. The Pilotage Authority's rôle is limited to imposing the proper punishment, once judgment is rendered by its appointee. This procedure applies unless the pilot elects to be tried summarily by the Superintendent (or Supervisor) who, in that event, hears the case and renders both verdict and sentence; the new provision does not specify whether the Superintendent is then required to hold an enquiry to establish the facts. The Superintendent's power of punishment is limited to a fine not exceeding one hundred dollars.

In the new regulation, however, no mention is made of the procedure to be followed at an enquiry or of the right of the accused to a defence. The powers of the enquiry officer are not defined and there is no provision to enable him to compel the attendance of witnesses, the production of documents, or to take evidence under oath. In fact, the situation that prevailed before the amendment has remained unchanged. For these reasons, as well as the reasons explained in relation to the 1961 regulation, the 1966 regulation is ultra vires and totally ineffective.

The sole by-law provisions which are legal from that point of view are those parts of subsecs. (1) and (2) of regulations contained in District By-laws concerning the use of liquor or drugs (vide sec. 19, Quebec By-law, quoted on p. 372), which determine the reappraisal powers of Pilotage Authorities under sec. 330 C.S.A., i.e., under subsec. (1) the mandatory withdrawal of the licence; under subsec. (2) a discretionary reappraisal power. Because no mention is made of penal sanctions, the rule posed by subsec. 331(2) applies, i.e., the regular tribunal hearing a case may impose a fine not exceeding one hundred dollars. In practice, however, these provisions have been interpreted by Pilotage Authorities as authorizing them to sit in judgment when these offences are committed, and remedial action arising out of reappraisal has been mistaken for the sentence a Pilotage Authority could impose as a penal tribunal.

Neither subsec. 329(g) nor any other provision of the Act justifies a rule such as is contained in subsec. 11(e) of the present B.C. General By-law which is aimed at denying a pilot the right to share in the common fund for the period of a preventive suspension. Sec. 10 of the By-law which deals with

sharing pool money on the basis of turns available for duty, is now affected by amendment P.C. 1966-980, which adds subsec. 11(e): "The time during which a pilot is off the assignment list pursuant to an order made by the Superintendent under sec. 31 shall not be included", i.e., the period of preventive suspension the Superintendent is required to impose before trial when he has reason to believe that a pilot has been under the influence of intoxicating liquor or drugs while on duty. This provision is reasonable provided there is an accompanying provision which stipulates that if the Superintendent's suspicions prove unfounded, or if the case is not proceeded with, the pilot shall have the benefit of the time during which he was prevented from performing his duties. Because this is not provided, paragraph (e) of sec. 11 is a permanent measure. The ensuing loss of revenue becomes an indirect but substantial pecuniary punishment which is imposed merely because the Superintendent had grounds to believe that such an offence had been committed, and which will stand whatever the outcome of the case. This measure is considered a desirable provision where despatching and pooling are operated by the Pilotage Authority, not as a disciplinary measure, but as a normal consequence of the right to impose a preventive suspension on the ground of safety. This would require, first, that the Act recognizes the right to impose preventive suspension in such a case, second, that provision be made for the retroactivity of the reappraisal decision, third, that where a despatching system exists, the pilot, unless later found guilty of the charge should have the benefit of the equalization of turns rule where it applies, and, where the pool is operated by the Authority, he should be entitled to a full share as if he had not been so suspended. This also presupposes the Pilotage Authority has a right which it does not possess, namely to operate the pilotage service.

4. MINISTER'S INVESTIGATIONS AND REMEDIAL POWERS

GENERAL

The Minister, as such, can not interfere in the operations of a Pilotage District which, according to law, is a totally decentralized organization and completely independent as long as it acts within its powers.

On the other hand, the Minister is the authority entrusted with the safety of navigation and, as such, on certain occasions he has to deal with cases involving pilots.

As far as safety of navigation is concerned, his principal responsibilities are, first, to ascertain the cause of every shipping casualty so that proper remedial action can be taken to prevent a recurrence, if possible; and, second, to ensure that all those who are allowed to take charge of vessels are, and remain, duly qualified and do not become safety risks. Therefore, the Minister is provided with the means to have a complete enquiry held into any shipping casualty, whether a pilot is involved or not, to have the qualifications and

conduct of any holder of a certificate or licence checked and, if necessary, to cause such licence or certificate to be cancelled or suspended. Here again, he may cause this action to be taken whether the holder is a pilot or not.

In cases where a pilot is involved, it should also be the Pilotage Authority's normal responsibility to ascertain whether the casualty was due to some fault of the pilotage organization or of the pilot and, at all times, to make sure that its pilots are, and remain, qualified and do not become safety risks for any reason.

There is nothing in the present Act to prevent both the Minister and the Pilotage Authorities from going their separate ways but because they have no special means of enquiry and only limited remedial powers, the practice has developed for Pilotage Authorities to report shipping casualties to the Minister, to provide him with any information they obtain from their own sources, and to desist from further action, unless the Minister decides not to proceed.

This *modus operandi* is realistic under the present legislation in that, in addition to avoiding unnecessary duplication and unco-ordinated effort, it assures more efficient proceedings because, in that field, the Minister has full powers of investigation which Pilotage Authorities lack.

This may also be the result of the practice established by previous legislation which prohibited a Pilotage Authority from becoming involved in any matter that could be otherwise dealt with under other Parts of that legislation which corresponds to Part VIII of the present Act.

In 1904, by 4 Edward VII c. 37, the powers of the Minister under the Shipping Casualties Act 1901 (now Part VIII, 1952 C.S.A.) were extended to include a right over pilots' licences and sec. 28 read as follows:

> "28. An investigation or inquiry shall not be held under 'The Pilotage Act' or the amendments thereto into any matter which has once been the subject of an investigation or inquiry under this Act."

At the same time, the Pilotage Act was amended (4 Ed. VII c. 29) to enable the Minister to become Pilotage Authority instead of the normal local Commission; it was provided that he could never sit as a court, that cases were to be dealt with under the Shipping Casualties Act 1901 and that only those cases not provided for in that Act were to be tried by tribunals or persons which had to be designated by him.

These provisions were reflected in the 1906 and 1927 Canada Shipping Acts but, for unknown reasons, did not appear in the 1934 version and, in this regard, the Act has not been amended since.

The powers of the Minister are contained in Part VIII of the Act. The provisions which apply to pilots are those concerning:

(a) Preliminary Inquiry (sec. 555 et seq.);

(b) Formal Investigation (sec. 558 et seq.);

(c) Inquiries as to the Competency and Conduct of Officers (sec. 579).

PRELIMINARY INQUIRY

The right to hold a judicial investigation into an event or into a person's conduct, merely to ascertain the facts, is an extraordinary power which implies infringement of the basic privileges of citizens and, therefore, even under Part VIII this power is granted only in very exceptional and specific circumstances. Cases involving pilots which may be the subject of a Preliminary Inquiry are restricted to shipping casualties as defined in the Canada Shipping Act. Such fact-finding investigations can not be extended to other cases not involving a shipping casualty, such as the alleged misconduct of a pilot (no matter how serious), the commission of an offence, his physical fitness or his lack of qualifications. In these cases, the Minister must base his administrative decision on nothing more than the information available from an informal investigation.

If the Minister is convinced that a pilot has become a safety risk or that some misconduct can not pass unpunished, the only power he has is to initiate proceedings against the pilot concerned; he does not have *per se* any right over the pilot or his licence. The only courses of action open to him are:

(a) in the case of a pilotage offence or of an offence against any other legislation, he may have an appropriate charge laid before the appropriate regular court, leaving it to the Pilotage Authority to reappraise the pilot's reliability, if foreseen in the applicable section and the pilot is found guilty by the tribunal;

(b) proceed to have the licence of the pilot dealt with when he has reason to believe that because of incompetence or misconduct the pilot is unfit to discharge his duties, by instituting a tribunal to deal with the case pursuant to either sec. 558 or 579 C.S.A.;

(c) to refer the case to the District Pilotage Authority for whatever action it may deem necessary and has power to take.

The Minister may learn of a shipping casualty in various ways, but it is mandatory for both the pilots and Masters of the ships involved to report any shipping casualty.

The requirement for a pilot to report, which is of questionable validity (vide page 394), is contained in the General By-law of every District, except Churchill, purportedly pursuant to subsec. 329(f) C.S.A. Subsec. 17(3) of the Quebec General By-law reads as follows:

> "When a shipping casualty, within the meaning of section 551 of the Act, occurs to a vessel with a pilot on board, or any incident out of the ordinary occurs in connection with the navigation of such vessel, or when any violation of the law on the part of other vessels is observed, the pilot shall report the same immediately to the Superintendent by

whatever means are available, and as soon as possible thereafter shall attend before the Superintendent and make a written report on the form provided for the purpose."

According to sec. 553 C.S.A., the officer responsible for a Canadian ship involved in a casualty or a British ship involved in a casualty in Canadian waters must report in person within 24 hours of landing to be examined at the office of the chief officer of Customs at or near the place where the casualty occurred, or in the vicinity of the place of landing. Since officers of foreign vessels are not compelled to report, unless a pilot is involved, news of any accident involving their ships normally comes from unofficial and indirect sources.

At first a brief, unofficial investigation is carried out to verify the report and to obtain whatever additional information is readily available, so that the nature and extent of the mishap can be appraised. As seen earlier, when a pilot is involved this informal investigation is carried out by the Pilotage Authority's Secretary or local representative. At the Department of Transport level the informal investigation is now carried out by an Investigation Officer (this is a new post created in 1961). The Investigation Officer is not limited to casualties involving pilots but is concerned with all shipping casualties throughout Canada. The description of his functions is as follows:

"Under direction, to hold preliminary inquiries into marine casualties; to submit reports on the basis of evidence produced and to make recommendations as to further action required; to make all necessary arrangements for the conducting of inquiries by officers of the Department into the conduct of ships' officers and pilots; to interview and obtain statements from witnesses; to make all necessary arrangements for the conducting of formal investigations by Commissioners appointed by the Minister to conduct formal investigations into shipping casualties, involving the appointment and taking of oaths of the members of the Court, notifying all parties concerned of the investigation, preparing the statement of the case, preparing the questions for the opinion of the court; to arrange for the employment of court reporters; to assist legal officers in preparing data and arranging attendance at investigations; arranging for payment of witnesses, court costs, etc.; to perform other duties related to administration of Nautical and Pilotage matters." (C.S.C. Competition 63-P-T-M-30 [Ex. 1416(b)]).

The first holder of this office was Captain J. Gendron from December 1961 until he left the Department's employ July 15, 1963. He was replaced by Captain W. A. W. Catinus April 13, 1964 (Ex. 1461(b)). The Investigation Officer has no greater power of investigation than the District Supervisor or the Regional Superintendent and he has no power to compel the attendance of witnesses. The appointment as Investigation Officer is not a blanket authority to hold Preliminary Inquiries because a specific appointment for that purpose has to be issued by the Minister in each case (sec. 555 C.S.A.) (see appointment for such a Preliminary Inquiry into the *Fort William* casualty, Ex. 1461(b)).

If the information so obtained does not enable the Minister to satisfy himself about the cause of, and circumstances attending, a shipping casualty, he is authorized by sec. 555 to appoint an officer or other person to hold a "Preliminary Inquiry". This authority is limited to shipping casualties. Although the right to order a Preliminary Inquiry does not extend to alleged misconduct of a pilot or into an alleged offence committed by a pilot before a charge is laid, a Preliminary Inquiry into a shipping casualty is not confined to ascertaining the cause of the accident but embraces all the circumstances, including the conduct and competency of all concerned unless the matter is clearly unconnected with the shipping casualty under investigation. However, there appears to be an exception in the case of pilots on account of the powers provided under subsec. 555(2) whereby the Inquiry Officer is authorized to impose a preventive suspension when during the investigation of the casualty a presumption is raised that the pilot in charge "has been guilty of any gross act of misconduct or drunkenness", whether or not this has been the cause of, or has contributed to, the casualty.

In cases involving a shipping casualty the Minister is not obliged to order a Preliminary Inquiry before reaching a decision, and there is no reason to institute such an Inquiry if he can obtain the information he needs by informal means (sec. 561). Normally a Preliminary Inquiry should be resorted to only when sufficient information is unobtainable without the special powers of investigation with which the officer or other person holding the inquiry is endowed by sec. 556.

It has only recently been considered desirable and necessary to have a formal document signed by the Minister or Deputy Minister appointing an official to hold a Preliminary Inquiry (D.O.T. letter of November 23, 1965, Ex. 1450(d)). Previously, Preliminary Inquiries were held at the request of an official of the Department of Transport, generally by telegram, but at times the request was made verbally and on occasions, when time was an important factor, the officer normally holding these inquiries carried them out as a matter of routine without any specific authorization (Ex. 1450(d)).

Normally the person appointed to hold a Preliminary Inquiry is a marine officer of the Department of Transport, holding a foreign-going Master's Certificate of Competency. There is, however, no established practice whereby the same man is appointed each time, except now that the office of Investigation Officer has been created he is normally appointed if available.

The Preliminary Inquiry is not a trial but merely a fact-finding administrative investigation in order to provide the Minister with the factual information required to enable him to decide what action should be taken. Hence, the person holding a Preliminary Inquiry has wide powers and is not limited by the rules of evidence, because the evidence it gathers can not be used against anyone in a future trial. When the Preliminary Inquiry is followed by a trial

before a Court of Formal Investigation, the letter of instructions to the counsel for the Department always stresses that the evidence adduced at the Preliminary Inquiry must not be used in the Formal Investigation, but can only serve as an aid for counsel in the conduct of the hearing. Pursuant to subsec. 568(7) a copy of the report of the Preliminary Inquiry must be furnished to a pilot whose licence may be in jeopardy before the commencement of a Formal Investigation. Since, except in the latter case, the report is for the information of the Minister alone, it is normally treated by all concerned as a confidential document, as are the accompanying documents, such as the Master's and pilot's casualty reports. However, if the Minister so decides, there is no legal objection to releasing this information to any individual, or even making it public. The first aim of this information is to acquaint the Minister with the situation so that he may take the necessary administrative decisions. It then remains part of the records of the Department and may be used in the normal course of events, *inter alia,* to assist the Crown Counsel in any suit, claim or prosecution in which the Crown is involved. There is no objection if the information is made public when it is considered sufficiently complete to inform the public about the circumstances of a casualty and that, in addition, no useful purpose would be gained by holding a Formal Investigation. But it should always be used merely as information. *Inter alia,* it can not be used as evidence on which to base a penal conviction as was the recent practice of the Pilotage Authority under the show-cause letter procedure.

The person holding the Preliminary Inquiry is given wide powers to ensure his investigation will be complete. In addition to being able to compel the attendance of witnesses, he has the right to board and inspect any vessel, to enter and inspect premises, to require the production of documents, etc. (sec. 556). His report must contain a full statement of the case and may be accompanied by any observations he may deem advisable (sec. 557).

Subsec. 555(2) gives the person holding a Preliminary Inquiry a temporary and limited power over the licence of a pilot as a preventive measure when the inquiry reveals that, *prima facie,* the pilot is a safety risk. In such a case, he may suspend the licence until the case has been dealt with by a Court of Formal Investigation; the duration of the suspension can not exceed three days unless, during that period, the Minister notifies the pilot that a Formal Investigation will be held.

This right was challenged by *certiorari* in the Fall of 1964 following the suspension of Pilot Yves Pouliot at the conclusion of the Preliminary Inquiry into the collision between the S.S. *Leecliffe Hall* and the M.V. *Apollonia* (Ex. 1457).

A first petition for *certiorari* that had been presented to the Exchequer Court (file #A-2423) was refused on the ground that, since the Exchequer Court was a statutory court, it had no jurisdiction unless such jurisdiction is

conferred upon it by statute, and none could be found. Mr. Justice W. R. Jackett, in his judgment rendered on October 21, 1964, remarked that the Minister of Transport, who was the sole respondent, was not an "Officer of the Crown" as contemplated by subsec. 29(c) of the Exchequer Court Act (1952 R.S.C. 98, Ex. 1449(a)).

A second petition, in which both the Minister of Transport and the Inquiry Officer appeared as co-respondents, was made before the Quebec Superior Court and leave for the issuance of the writ was granted by Chief Justice Frédéric Dorion on November 20, 1964 (Ex. 1449(b)). On the grounds for his judgment, the Chief Justice distinguished between the character of the Court of Preliminary Inquiry when only the powers conferred in the first paragraph of sec. 555 were applied and when those conferred by the second paragraph were used. It was held that the functions held by the Inquiry Officer under the first paragraph were purely of an administrative character and, therefore, not subject to *certiorari;* in the second paragraph, however, the Inquiry Officer would be exercising a judicial power in that he has to be convinced that the pilot is guilty of one of the "offences" enumerated therein. Mr. Justice Dorion stated that the fact that the petitioner was not allowed to attend the inquiry and to cross-examine the witnesses had the effect that the judicial decision to suspend the pilot was rendered *ex parte*, a decision which was full of serious consequences for the pilot: in other words, that the axiom *"audi alteram partem"* had not been followed. The Supreme Court decision in Guay v Lafleur (1965 S.C.R. 12) was distinguished because the investigation under the attack was of a purely administrative nature and no person's rights were affected.

Mr. Justice Dorion states that the decision rendered pursuant to subsec. 555(2) is in effect a sentence. Here, one may disagree, first, in part because a sentence is a final decision whereas, in this case, it was only a preventive and temporary measure (Ex. 1449) and not punitive, although the pilot's rights were at least temporarily affected.

This stand was confirmed by Mr. Justice Cannon who rendered the final judgment on August 12, 1965, maintaining the *certiorari* and quashing the temporary suspension (Ex. 1449(c)).

The application of the axiom *"audi alteram partem"* in temporary measures has since been the object of a recent judgment rendered by the Supreme Court of Canada in the case of Her Majesty the Queen v Bernard Randolph and World Wide Mail Services Corporation (1966 S.C.R. 260). The question involved was whether in the public interest, pending a final decision arrived at through the procedure set out in the Act, the Postmaster General could issue an interim prohibitory order pursuant to sec. 7 of the Post Office Act preventing the distribution of mail to a person believed to

be using the mail to commit fraud. Mr. Justice Cartwright, who rendered judgment for the Court, stated, *inter alia,*

> "There is no doubt that Parliament has the power to abrogate or modify the application of the maxim 'audi alteram partem'. In s. 7 it has not abrogated it. Rather it has provided that before any final prohibitory order is made, the party affected shall have notice and right to an expeditious hearing and has defined the procedure to be followed... Generally speaking, the maxim 'audi alteram partem' has reference to the making of decisions affecting the rights of parties which are final in their nature, and this is true also of s. 2(e) of the Canadian Bill of Rights upon which the respondents relied.
>
> The main object of s. 7 is to enable the Postmaster General to take prompt action to prevent the use of the mails for the purpose of defrauding the public or other criminal activity. That purpose might well be defeated if he could take action only after a notice and a hearing. Sub-section (1) enables him to act swiftly in performing the duty of protecting the public while subs. (2) gives protection to the person affected by conferring the right to a hearing before any order made against him becomes final.
>
> In my opinion, the two interim prohibitory orders in question were validly made."

COURT OF FORMAL INVESTIGATION

Part VIII of the Act enables the Minister to create two Courts *ad hoc* to deal with the licences of pilots and certificated officers who, in his opinion, appear for any reason to have become safety risks.

These two Courts are administrative tribunals: charges are not laid before them, neither is competent to hear complaints regarding the commission of criminal or statutory offences under the Act, and even alleged breaches of By-laws are beyond their jurisdiction. Their findings do not preclude conviction for any offences that could be heard by a regular court. Their sole function as regards persons is to ascertain whether an officer or a pilot is a safety risk and, if so, to remedy the situation by dealing with his certificate or licence, i.e., a function that normally belongs to the Authority which issued the certificate or licence. Furthermore, the Minister may not convene any such Court unless he has reason to believe that one of the instances where such Courts have jurisdiction exists. Therefore, they can not be used merely for exploratory means or routine verification, e.g., of a pilot's professional qualifications.

The first of these tribunals is the Court of Formal Investigation (sec. 558 C.S.A. et seq.). This Court must be resorted to in cases of shipping casualties when it is intended to have the circumstances and causes established publicly and in a formal manner. It must also be resorted to in other cases not involving a shipping casualty unless the case can be dealt with through the less involved procedure provided by sec. 579 (which will be studied later). In fact, for the last fifteen years no Formal Investigation into the fitness or conduct of a pilot has ever been held when there was no shipping casualty, and the rules that were drafted pursuant to sec. 578 for holding Formal Investigations apply to shipping casualties only.

Sec. 560 authorizes the jurisdiction of a statutory Court of Formal Investigation in the following cases:

(a) shipping casualty;

(b) when a Master, etc., or a pilot "is charged with incompetency, misconduct or default" while serving in a Canadian ship, or while serving in a British ship in Canada;

(c) for failure in case of collision to render assistance, or to give the necessary information to the other vessel;

(d) where the Minister has reason to believe that, *for any cause,* the pilot or the officer concerned is unfit.

The Court of Formal Investigation could, therefore, be resorted to merely to have the facts of a shipping casualty formally established, whether or not a Preliminary Inquiry was held. In serious shipping casualties it may be felt desirable that an investigation be held publicly because in some cases there is no certainty that the complete picture has emerged, even though a Preliminary Inquiry was held, in that such an inquiry is not conducted publicly, and that the parties involved are not necessarily afforded the opportunity to bring all the evidence they thought pertinent, or to cross-examine witnesses. That procedure is proper because the Preliminary Inquiry was never intended to deal with all the circumstances of a casualty nor to determine its causes conclusively, but merely to give the Minister enough information to assist him to decide whether, with regard to safety of navigation, a more complete and thorough inquiry ought to be made to establish the cause of the accident so that proper remedial action can be taken, if necessary.

The Court of Formal Investigation also has authority to inquire into and pass upon the competency, fitness and conduct of an officer or a pilot, whether or not these questions are related to a shipping casualty. Subsec. 568(7) makes it a prerequisite of this power that, before the commencement of the hearing, the officer or pilot concerned must be furnished with a statement of the facts as they are known at that stage.

When one of these Courts passes judgment on the professional competency and fitness of a pilot, it is not bound by the standards that may be laid down in the By-laws of the District to which the pilot belongs. Such a requirement would impose an unauthorized and unwarranted limitation on the jurisdiction of these Courts and would make them subservient to the various Pilotage Authorities in their determination of the qualifications a navigator should possess to avoid becoming a safety risk. These Courts must be guided by the interests of the public and the questions they have to determine are:

(a) is it safe to allow a pilot to continue to pilot ships in his condition;

(b) does he lack qualifications that the Court considers he should possess, although he may meet the minimum standard of qualifications required by the Pilotage District By-law.

For example, a Court may find that a pilot is a safety risk because he lacks competency in interpreting radar images, although this is not a qualification required by By-law but which may provide sufficient grounds to cancel his licence.

When the Minister has referred a case to a Court of Formal Investigation, he is *functus officio* with the case as far as dealing with the certificates of the officers involved or the licences of the pilots concerned. The Minister remains responsible for any corrective measures that may have to be taken in connection with the other causes of the casualty, e.g., amending the rule of the road to cover a special hazard, having an obstacle removed from the channel, or adding aids to navigation at a specific place, but the decisions the Court of Formal Investigation makes with respect to certificates and licences are final and the Minister's only power and responsibility is to see that such decisions are enforced.

This tribunal is in fact a special Court of Inquiry which consists of one Commissioner, assisted by two or more assessors, or of a Board also assisted by assessors. These assessors are experts in the field that is to be investigated. It is a true court which has to sit surrounded by normal publicity and which is endowed with the normal powers of a court to summon witnesses, obtain evidence, administer oaths just like a Court of Justice, and with similar publicity.

However, it is a Court of a very special character whose jurisdiction is properly neither civil nor criminal, but is primarily of an administrative character. Although the Court is given certain accessory powers its proceedings retain the character of an investigation throughout. The Court is not asked to deal with an offence committed by a pilot or an officer but to decide whether, because of misconduct or incompetency, the pilot or the officer involved has become a safety risk to navigation. The Court is not given the powers of sentencing that belong to any court of penal jurisdiction, for instance, it can not award a term of imprisonment but can deal with the certificate or licence which escapes the jurisdiction of the penal tribunal. When it is not a question of competency but merely a case of misconduct which endangered safety on one occasion, or if the deficiency in the pilot's qualifications is, in the opinion of the Court, capable of remedy, this Court may award a suspension if this is deemed sufficient to prevent a recurrence or to correct the deficiency. In the case of a pilot (but not of a ship's officer) where it is felt that the suspension or cancellation of the licence could well be replaced in the circumstances by a pecuniary award, the Court may impose a penalty instead, in a sum not to exceed $400 and not less than

$50 (subsec. 568(3)). It is considered that neither a suspension *per se* nor a pecuniary penalty is a remedial power consistent with the reappraisal character of this Court (this also applies to Courts of Inquiry under sec. 579, and to the Pilotage Authority as reappraisal authority). Therefore, both should be deleted from the Act. It is considered that the Act should provide for suspension to be imposed while any impairment, whether connected with professional knowledge, physical, mental or moral fitness, is being remedied. The suspension should be lifted only if and when the pilot is able to prove that the impairment has been corrected. This will be amplified in the Recommendations.

After it renders its decision, the Court of Formal Investigation ceases to exist (unless reviewed by order of the Minister to rehear the case pursuant to subsec. 576(2)). It has no power to enforce the recovery of any penalty which has to be sought by the Crown through a regular tribunal, i.e., "in a summary manner with costs under the provisions of the Criminal Code relating to summary convictions" (subsec. 568(4)), and it becomes a statutory offence for anyone who does not deliver a certificate or licence that has been suspended or cancelled, an offence that has to be prosecuted before a regular court of criminal jurisdiction (sec. 571).

As "punishments", the Court of Formal Investigation has two additional powers:

(a) to award the costs of investigation or any portion thereof against any party to the proceedings (subsec. 570(1) C.S.A.);

(b) the implied right to censure, which may be deemed severe enough owing to the nature of the case and the publicity attached to the proceedings (Court of Formal Investigation into the collision between M.V. *Lawrencecliffe Hall* and S.S. *Sunek,* Mr. Justice Chevalier's judgment on Objections dated January 26, 1966, and jurisprudence therein reviewed (Ex. 1461(y)).

COURT OF INQUIRY INTO THE CONDUCT AND COMPETENCY OF OFFICERS OR PILOTS

"Where the Minister has reason to believe"

(a) that any Master, etc., or pilot "is from incompetency or misconduct unfit to discharge his duties" or

(b) that in a case of collision he has failed to give assistance or give the necessary information,

the Minister may cause the case to be dealt with in a less involved way by the procedure prescribed under sec. 579 rather than through a Court of Formal Investigation.

In contrast to the formal procedure, once this Court is created, the Minister, far from being *functus officio,* is part of the Court; he exercises

judicial power by rendering the verdict and awarding the sentence but he must base his decision on the facts obtained through the inquiry conducted by the Commissioner or the judge he appointed for that purpose. However, the Minister can not do so unless he is satisfied on the basis of the evidence so obtained that the pilot or officer:

(a) is incompetent;
(b) has been guilty of an act of misconduct, drunkenness or tyranny;
(c) by his wrongful act or default, has caused the loss of, or serious damage to, a ship, or loss of life;
(d) has been guilty of a criminal offence;
(e) has been blamed by a coroner's inquest in respect of the death of any person;
(f) in cases of collision between vessels, has failed to render assistance or to give the necessary information.

These requirements which are stipulated in sec. 579, should be interpreted restrictively: they are the only cases which justify suspension or cancellation and the procedure therein indicated is the only permissible method by which the Minister himself may deal with a pilot's licence. However, this interpretation is not to be limited to, nor affected by, the pilotage offences created by the Act and the regulations; and, contrary to the situation of the Pilotage Authority in the exercise of its reappraisal power, when it is a question of a pilot's reliability it is not necessary to lay a charge before a court or to obtain a conviction to give jurisdiction to this Court or to a Court of Formal Investigation.

The provisions of sec. 579 are extended to pilots by subsecs. 568(1)(b) and (2). This view, however, is not shared by the Department of Justice despite the fact that the pertinent texts seemed to suffer no ambiguity. Referring to the *Arrow* case (vide p. 591 infra) in a letter dated March 19, 1963, the Deputy Minister of Justice, without giving the grounds for his opinion, said that he was not satisfied that subsec. 568(2) rendered a pilot subject to an inquiry under sec. 579. On August 28, 1962, in the case of the triple collision between the *Calgadoc, Canadoc* and *Bariloche* (Ex. 1466(*l*)) where "disciplinary action" was contemplated against two of the Masters and one pilot, the Deputy Minister of Justice stated with regard to the pilot's case: " . . . it is reasonably clear, in my view, that an inquiry under section 579 does not apply to a pilot unless, of course, he is acting as the master". The obvious reason is that an inquiry under sec. 579 should never be used as an indirect method of prosecuting a pilotage offence, but only for considering a question of competency.

The procedure is for the Minister to appoint a person as Commissioner, or to direct that the inquiry be held by a judge of the Admiralty Court. The judge has the same powers as provided for the Court of Formal Investigation,

while the Commissioner has the powers of a Steamship Inspector (sec. 385) to compel the attendance of witnesses. In either case, the pilot must be given the opportunity to make his defence. The question of costs is decided by the Commissioner or the judge and not by the Minister.

This is a composite Court which proceeds in two stages: (a) the Commissioner or judge establishes the facts, (b) the Minister then passes judgment on the basis of the evidence gathered during the first stage, and decides what remedial action should be taken. The Minister has the same "punishment" powers as a Court of Formal Investigation, i.e., he may cancel or suspend the pilot's licence or assess a fine not less than $50 or more than $400.

SHIPPING CASUALTIES RULES

Pursuant to sec. 578, the Governor in Council has made rules for holding Preliminary Inquiries, Formal Investigations into shipping casualties and appeals thereto. They have no application to inquiries held under sec. 579, nor to Formal Investigations which do not involve a shipping casualty.

These rules are the "Shipping Casualties Rules" (P.C. 1954-1861, dated December 1, 1954) and the "Shipping Casualties Appeal Rules" (P.C. 1954-1860 of the same date, Ex. 1464(b)).

The Shipping Casualties Rules contain certain provisions which seem to be substantive law and which have the irregular effect of limiting and restricting the ambit of the provisions of the Act regarding Formal Investigations and the Evidence Act, e.g.:

(a) defining the "statement of the case" referred to in subsec. 568(7) appears to have the effect of passing substantive law;

(b) stating that "the statement of the case . . . shall consist of the "date, place and nature of the accident" only seems to be contrary to the intent of the legislation and not in accordance with the context. Subsec. 568(7) appears to require the pilot or officer affected by the Court proceedings be furnished with either the report of the Preliminary Inquiry (sec. 557) if one was held, or, if none was held, a statement of the case, i.e., all the facts revealed by the informal investigation on the basis of which the Minister ordered the Court to be convened.

5. THE FACTS

The actual situation is, however, altogether different from that contemplated and prescribed by the Act or Pilotage District By-laws.

The prosecution of offences or breaches of by-laws before regular courts of penal jurisdiction is never resorted to. Neither the Pilotage Authorities, nor the Department of Transport, nor the Crown, nor shipping interests, nor any other third party ever uses secs. 683 and seq. and sec. 709 C.S.A. to

enforce Part VI of the Act, or the regulations made under it. On March 3, 1966, the Chief, Nautical and Pilotage Division, Department of Transport, in an answer to a query from this Commission asking how many times in the last ten years use was made of these sections replied:

> "The Pilotage section has carefully looked through all the incidents of pilot discipline handled during the last ten years. There are no instances in the Quebec Pilotage District where a charge was laid by the Pilotage Authority or by the Department of Transport, or on their behalf, or by anybody else before a regular tribunal of penal jurisdiction for an offence against or a breach of the provisions of Part VI of the Canada Shipping Act.
>
> This also applies to other districts where the Minister of Transport is the Pilotage Authority".

As for the recovery of penalties under sec. 709, the same officer reported March 28, 1966:

> "... The Minister as Pilotage Authority has not instituted any proceedings under Section 709 to recover a penalty during the last ten years" (Ex. 1466(a)).

Obviously satisfied that it had penal judicial jurisdiction over pilots, at least in cases of regulation offences, the Pilotage Authority itself settled disciplinary cases in the most informal manner, generally in complete disregard of the basic principles governing the dispensing of penal justice, except on the rare occasions when, either on account of strong opposition on the part of the pilot involved or because of the seriousness of the offence, regulation offences were referred for prosecution to a Court of Inquiry convened under sec. 579 as if it possessed penal jurisdiction. No use is made of statutory offences because District By-laws have been expanded to include them.

It appears from the evidence at the Commission's hearings that no use was made of the regular procedure provided by the Act for prosecuting pilotage offences (i.e. before tribunals of penal jurisdiction under sec. 683 and ff.) because the Pilotage Authority and its advisers firmly believed that the Pilotage Authority possessed judicial powers over pilots accused of contravening disciplinary regulations. The fact that this belief went unchallenged for years only served to encourage them in their opinion. Indeed the matter has not yet been directly questioned before a court: to date whenever there was danger of opposition, the Pilotage Authority has avoided affirming its judicial power, either by compromising on the punishment awarded, or by having the case dealt with under Part VIII.

The objections raised against the exercise of penal jurisdiction by the Pilotage Authority have borne mainly on questions of admissible evidence and the right of the accused to a full defence. Since it was thought that the problem was limited to a question of procedure, repeated and sincere attempts were made in recent years to afford an accused pilot the opportunity to be heard and to produce evidence, e.g., the new procedure introduced by the

1965 amendment to the By-laws of the larger Districts, whose main aim was to give the pilot his day in court while still taking for granted the right of the Pilotage Authority to sit as a disciplinary tribunal.

A letter written August 30, 1963, by one of the legal advisers of the Department of Transport (Ex. 1466L) fails to distinguish (a) between the prosecution of offences and the measures provided under Part VIII to enhance the safety of navigation, (b) between the Pilotage Authority and the Minister of Transport and (c) between a fact-finding investigation for the purpose of taking an administrative decision and an inquiry that forms part of a trial. The pertinent excerpts are:

> "A licensed pilot may be disciplined under the Canada Shipping Act following the ship casualty for which he is found to have been at fault, as follows:
>
> (1) Pursuant to section 555(2) following a preliminary inquiry, by suspension of his licence until a formal investigation is held.
>
> (2) Pursuant to section 568, by a court holding a formal investigation, by cancellation or suspension of his licence.
>
> (3) Pursuant to the pilotage By-laws (in the present case, paragraph 21 of the Quebec Pilotage District General By-law) by a fine not exceeding $200.00 and suspension or cancellation of his licence.
>
> . . .
>
> The Deputy Minister of Justice has advised the Department that under paragraph 21 of the By-law, it is necessary that the pilot shall have "the right to have notice of charges of misconduct", and the question to be determined is the extent of the information, in this connection, that should be furnished to (pilot's name) when giving him notice "to present his defence", whether to give him a complete copy of the report and of the evidence on the preliminary enquiry or to furnish him with a copy of his own evidence only.
>
> . . .
>
> Notwithstanding that there may be sufficient material in the evidence given by (pilot's name) for the Minister to find that he has violated the By-law, however, in view of the advice of the Deputy Minister of Justice and the provisions of the Bill of Rights, the undersigned is of the view that from a legal standpoint, (pilot's name) should be furnished with a complete copy of the evidence . . .
>
> If (pilot's name) was advised that the Minister finds, solely on his own admissions, that he has violated the Pilotage By-law this may be contrary to the aforesaid provisions of the Bill of Rights in respect of self crimination."

Blame should not be cast upon those now charged with the application of the law and their legal advisers. They inherited an organization which they tried to improve and they were governed by an interpretation of the legislation that had been elaborated by their predecessors. With little time left free after their numerous other duties, it is normal that, as a result of the complexity and ambiguity of this outdated legislation, they failed to grasp its true meaning and tried to ameliorate a system whose basic illegality they failed to understand.

Mr. R. Macgillivray, who was Assistant Counsel for the Department of Transport when the Commission held its public hearings, provided

information about the manner in which investigations were carried out in practice, and how pilots were disciplined in Districts where the Minister is the Pilotage Authority.

He explained that there were two types of proceedings: summary and formal. A summary procedure is necessary if day-to-day happenings are to be dealt with efficiently. The policy was that minor cases which probably would not be subject to much contention were dealt with by exchange of correspondence rather than by *viva voce* hearings, but live hearings were held for the more important cases.

Disciplinary cases are dealt with in various ways depending on their degree of importance. For instance, if a pilot who has already received several warnings, is late reporting for his turn, he should be given a moderate punishment but there is no need for an extensive, formalized hearing. Some fifteen years ago it was quite normal for the District Superintendent (or Supervisor) to deal with such cases by having the pilot appear before him and informing him that he was fined fifty dollars. That was the end of the case. In other words, on minor matters the pilot was judged locally without the benefit of a hearing. The Department felt that this system worked very well.

However, when more interest was taken in civil liberties it was recognized that pilots must be guaranteed an opportunity for defence. One development was the introduction of the "show-cause" procedure. When dealing with minor offences the District Superintendent notified the pilot telling him the nature of the complaint and the particulars, forwarding a statement of the available information and adding that it was planned to impose a penalty. This could be done by correspondence (for a case dealt with in this way in December 1964, vide Pilotage District of Quebec, *Discipline*) or verbally by having the pilot appear before the Superintendent. If the pilot admitted the truth of the allegation and agreed that he had violated the By-law, punishment was awarded by the Superintendent, provided he had such power under the By-law and felt that his powers to punish were adequate. If the pilot admitted the truth of the allegation but denied that it was a violation of the By-law, he was permitted to present an argument on the legal question as well as a statement in mitigation. On the other hand, if he denied the truth of the allegation he was allowed to produce evidence. If the pilot requested that any witnesses who gave a written statement be called, the request was granted if it was practicable to do so. In such a case, the Superintendent allowed a reasonable adjournment for the purpose of calling these witnesses and any other witnesses the pilot might wish to produce. It was the policy that before the Superintendent refused such a request he normally referred the matter to headquarters for advice from the legal advisers of the Department.

Mr. Macgillivray admitted that the Superintendent has no statutory authority to compel the attendance of any witness except the pilots under the By-law of his District. When asked what would happen if a pilot appearing before the District Superintendent requested the appearance of the complainant whom the Superintendent could not compel to attend and whether the case would be dismissed if the complainant did not appear, he could not say what decision would be taken because this was a hypothetical situation that had not yet occurred.

A pilot's refusal or failure to appear before the District Superintendent when duly ordered to do so to answer a charge is considered an admission of guilt. The Superintendent would then proceed and assess whatever "penalty" he felt suitable within his powers. It is noted that under this procedure, contrary to the principles of the administration of penal justice, a pilot is considered guilty of an offence as charged unless he is able to establish his innocence, and that in *ex parte* proceedings the truth of an allegation need not be established at all.

Cases of a more serious nature are referred to the Pilotage Authority, either because the By-law so specifies (e.g., use of liquor or drugs, shipping casualties), or because the Superintendent feels his powers of discipline are inadequate in the circumstances.

Mr. Macgillivray mentioned another extraordinary feature of the disciplinary process: a sentence awarded by a District Superintendent is not necessarily final but may be increased by the Pilotage Authority if it is felt that the punishment awarded is insufficient. He explained " . . . I think that the attitude has been that it is up to the Minister to overrule the Superintendent if he assesses a penalty which the Minister thinks has been improperly assessed". He was not certain whether a sentence imposed by the Superintendent would be invalidated if, in awarding it, he had not followed instructions received from Ottawa.

The other alternative was for the Minister as Pilotage Authority to deal with the case in Ottawa himself. The whole trial then had to be conducted by correspondence by means of the show-cause letter procedure. The Minister as Pilotage Authority with the information made available to him, either through a Preliminary Inquiry under sec. 555 C.S.A. or through an informal investigation carried out either by local representatives of the Pilotage Authority or by the Department of Transport Investigation Officer or both, had a show-cause letter sent to the pilot. The pilot was told that from the information received it appeared he was guilty of a stated offence but, before punishment was awarded, he was invited to present his defence in writing if he wished, i.e., an argument and possibly additional evidence through affidavits, or, alternatively, to appear in person before the Superintendent (examples of such show-cause letters dated August 11, 1964 are filed as Ex. 1364). The original wording of the show-cause letter was modified in order to remove

any suggestion that the matter had been adjudged on the basis of the evidence already in hand. Mr. Macgillivray agreed that this procedure deprived the pilot of his right to cross-examine witnesses but he added the Department was fairly confident that, if a pilot felt he was being seriously prejudiced by his inability to cross-examine, he would say so and ask for a hearing. However, the show-cause letter did not tell the pilot he had this choice.

Mr. Macgillivray admitted that there is no machinery for the Pilotage Authority to investigate disciplinary matters, that it is incapable of arranging a trial, since it can not compel witnesses, and that when such action becomes necessary because the argument put forward by the pilot is so forceful, the Pilotage Authority has to go through the Minister in order to benefit from the extraordinary powers he derives from Part VIII. Mr. Macgillivray added that when people became more conscious of their civil rights and objected to the procedure for disciplining pilots that had been followed up to that time, it was recognized that the Department would have to find another method to replace the show-cause letter procedure of giving the pilot a hearing. He said that it would be unlikely that a pilot "would be content with" the type of informal hearing provided by the show-cause letter procedure where he is unable to cross-examine witnesses and that, in fact, in such cases the accused pilots raised such strong objections that the Pilotage Authority felt itself incapable of dealing with them under its own powers. On the other hand, a hearing held under sec. 579 C.S.A. by a Court of Inquiry gave the pilots an opportunity to produce their own witnesses. He stated that consideration had been given to amending the By-laws in each District but, instead, it was felt that "since the situation is now under review by a Royal Commission, to come up with something brand new would not be advisable", and the Department preferred to wait until the Commission's report was received. However, as noted earlier, the disciplinary provisions of the By-laws were substantially changed in 1965 in order to provide pilots an opportunity to be heard, whether cases were dealt with by the District Superintendent or by the Pilotage Authority.

On March 29, 1961, a set of proposed instructions regarding investigations and disciplinary measures was sent from the Department in Ottawa to some Superintendents and Supervisors. These instructions never came into force, possibly on account of the new policy they enunciated that in the St. Lawrence Region disciplinary cases would be dealt with by the Regional Superintendent instead of the District Supervisors, and possibly also because the proposed system clashed with many of the basic principles of the administration of penal justice without any supporting provision in the Act.

The main features of the proposed instructions were (Ex. 1363):

(a) All cases of misconduct were to be reported to the Regional Superintendent.

(b) Minor incidents or minor breaches of By-laws were to be dealt with summarily by the Regional Superintendent but an appeal lay with the Pilotage Authority. The summary trial procedure was described as follows: "When the pilot appears, the Regional Superintendent will explain what offence is alleged and the basis on which he considers it proven. If the pilot admits the offence or, having denied it, fails to satisfy the Regional Superintendent that there was no violation, the Regional Superintendent will impose such fine as he deems appropriate, not exceeding forty dollars."

(c) More serious cases were to be investigated by the Regional Superintendent: "If possible, he shoulld take sworn statements from all such persons who are not likely to be available to testify in person at the hearing". The Regional Superintendent's investigation was to be completed even if a Preliminary Inquiry was also held. In this event the two investigations were to be carried out simultaneously. The pilot was to be warned, if his testimony was given under oath, that it might be used against him at any subsequent hearing.

(d) Upon receipt of the Regional Superintendent's investigation report, the Ottawa headquarters had to decide whether to take disciplinary action and, if so, whether to have the matter dealt with by the Regional Superintendent or by the Minister pursuant to sec. 579 C.S.A.

(e) If the case was referred to the Regional Superintendent and the pilot pleaded not guilty "he will be shown the statements of the witnesses and documentary evidence" gathered by the Regional Superintendent during his investigation and "given the opportunity to refute this evidence by presenting written statements, calling witnesses and giving a testimony in his own behalf and to present any argument on the legal question involved . . . ". No decision was to be taken by the Regional Superintendent in such an eventuality without first obtaining the opinion of the department's Law Branch. At any time the Regional Superintendent could, if he considered the ends of justice would be better served, recommend that there be a hearing under sec. 579 C.S.A. If the pilot did not appear and did not plead in writing "he shall be deemed to have admitted the violation of the By-laws".

(f) If at Ottawa headquarters "it is decided that the matter should be dealt with by the Pilotage Authority without a hearing" the "show-cause letter" procedure was to be resorted to.

(g) Cases of a more serious nature were to be dealt with by the Minister under sec. 579. Reference the nature of the evidence, it was

> stated that "the legal adviser shall introduce statements taken from witnesses who are not available to testify in person; preferably such statements shall be produced by the Regional Superintendent who may be questioned concerning his impressions as to the credibility of the witnesses".

It must be observed that, *inter alia,* these proposals show a misconception of the nature and purpose of the Minister's powers pursuant to sec. 579 of Part VIII of the Act because they are clearly being used to enforce discipline and as a means of enforcing punishment for statutory offences or breaches of regulations. Furthermore, under the proposed procedure (except in cases dealt with under sec. 579 C.S.A.) the pilot is found guilty even before he is charged and, moreover, on the basis of evidence not admissible before a court of justice. In cases attended to by the Regional Superintendent, the judge is not only the prosecutor but also the person who, *ex parte* prior to the trial, has ascertained the facts and has arrived at the conclusion that the accused pilot is guilty of the offence with which he is charged. The accused is tried by a prejudiced and biased judge and the fact that the offence may not be serious in the eyes of the Pilotage Authority or its local representative does not alter the situation.

Throughout his testimony, Mr. Macgillivray used the words "Department", "Pilotage Authority" and "Minister" indiscriminately to mean one and the same thing. He explained that when such a hearing is held "it is pretty hard to say that anybody other than the Pilotage Authority is the judge". He considered that this was a defect in their procedure. That type of hearing was used only to gather evidence and it was always made clear that the person in charge of the inquiry was not making any judgment and that the decision would be made by the Pilotage Authority.

However, he was aware of the distinction, which was brought to their attention by the Department of Justice, that the Minister as Pilotage Authority is not the Minister of Transport. He is *persona designata* as Pilotage Authority but when he acts under sec. 579 he is not acting as Pilotage Authority. Mr. Macgillivray believed that it would be desirable if the wording of sec. 327 was amended to ensure that the Minister never operates in two distinct capacities by providing that, where no local authority is appointed, the functions of the Pilotage Authority shall be performed by the Minister of Transport. It is considered that if this provided any solution, it would apply to only part of the problem and the problem of the other Pilotage Authorities would remain unsettled.

Mr. Macgillivray also admitted that it was questionable whether sec. 579 could be applied to enforce discipline on pilots. This section provides that the Minister may cause an inquiry to be held when he "has reason to believe that any master, mate or engineer (or pilot) is from incompetency

or misconduct unfit to discharge his duties . . . ". The word "misconduct" was used apart from its context and in its general sense to mean any breach of discipline without considering whether the pilot was thereby rendered unfit to discharge his duties. Mr. Macgillivray agreed that they might "have been stretching the words" when they used sec. 579 for the type of hearing they required for a case important enough to warrant serious disciplinary measures.

As for the procedure followed at a hearing held under sec. 579, when a person has been appointed to hold such an inquiry a statement of the case is sent to the pilot concerned together with a summons to appear. Then the hearing is held with the pilot present and represented by counsel. The inquiry officer, as required under the Act, is advised by a legal assistant who calls all the witnesses and produces all the evidence he possesses. The pilot, through his counsel, may adduce further evidence and also cross-examine any witnesses produced by the Department.

Under this procedure the Minister once investigated the case of a pilot charged with the regulation offence of drunkenness while on duty. The case was heard and it was found that there was not enough evidence to support a charge before a regular court and the matter was dropped at that stage (vide Pilotage District of Quebec, *Discipline*—the *Arrow* Case). Mr. Macgillivray conceded that this case did not fall within the type of misconduct foreseen in sec. 579 but the Department was endeavouring to find some means in the Act for providing a hearing without becoming involved in the complications of a Formal Investigation. The Department of Justice advised subsequently that there was doubt about the applicability of this section to the discipline of pilots and, therefore, the Department of Transport stopped using it. As seen earlier, a Court of Formal Investigation has no greater competence to hear a trial regarding the commission of a statutory or by-law pilotage offence. Its only jurisdiction is to decide in the cases enumerated in subsec. 568(1) whether the pilot in the cases defined in paragraphs (a), (b) and (c) is deemed to be a safety risk and, if so, to order the proper remedial measure. A finding by such a court that a pilot "has been guilty of any gross act of misconduct, drunkenness" does not amount to a conviction of a statutory or regulation offence. A finding by a Court of Formal Investigation (and by a Court of Inquiry under sec. 579) is not a bar to prosecution for an offence before the regular courts, any more than a judgment rendered by a civil court condemning a pilot to pay the damages he has caused by his wrongdoing would be a bar to prosecution before a penal court if the wrongdoing also happens to be an offence. A plea of "autrefois convict" or "autrefois acquit" based on the finding of a Court under Part VIII will be rejected because the jurisdictions of these Courts are not of the same nature.

To illustrate the true legal situation under the Canada Shipping Act a shipping casualty caused by a pilot impaired by alcohol will give rise to the following recourses:

(a) Civil claims v the pilot before a court of civil jurisdiction for the full damages caused by his wrongdoing, the limitation of pecuniary damages of subsec. 362(2) C.S.A. not applying to gross negligence.

(b) Reappraisal of the pilot's reliability by a Court of Formal Investigation, if the Minister of Transport so decides, which may result in the loss of the pilot's licence if he is found to be a safety risk (secs. 560 and 568). Sec. 579 does not apply to shipping casualties as such.

(c) Prosecution of the pilot before a tribunal of criminal jurisdiction for the commisison of a statutory indictable offence listed in sec. 369.

(d) Preventive suspension of the pilot's licence under sec. 370 pending the outcome of a charge laid under sec. 369.

(e) Reappraisal by the Pilotage Authority of the pilot's physical fitness pursuant to regulations made under subsec. 329(j); if it can be established that he is incapacitated by habits detrimental to his usefulness as a pilot, he may be retired. But the Pilotage Authority has no reappraisal power over reliability if the pilot is convicted of an offence under sec. 369 because surprisingly, sec. 370 does not provide for such action (vide pp. 344 and ff.). The end of the criminal trial automatically ends both the preventive suspension and the power the Authority has over the pilot's licence under sec. 370.

Except for preventive suspension (d) which is dependent upon prosecution of the offence of sec. 369 C.S.A., the four other courses of action are distinct and may be exercised at the same time.

Mr. Macgillivray added that, to the best of his recollection, a hearing under sec. 579 was not a public hearing (while a Formal Investigation is always a public hearing (subsec. 566(2)) but a matter between the Pilotage Authority or the Department and the pilot. Therefore, other counsel such as those representing the shipowners should not be heard at all except as counsel for witnesses. He was not sure, however, that that policy was always followed since there were no firm rules of procedure laid down for inquiries under sec. 579; the reason for this policy being that an inquiry of this type is not into a casualty, as such, but into the conduct of a pilot.

The principal problem of the Department in connection with pilots' discipline had been to try to ensure that the pilot had a fair hearing. They recognized that upon occasion the Investigating Officer (who carries out an

informal investigation and whose report was used as evidence in the show-cause letter procedure) did not give the pilot an opportunity for cross-examination but there is a time element involved and some witnesses had to be contacted while they were still available. Hence, D.O.T. tried to arrange for a summary hearing in cases where the ship involved would be leaving Canada shortly, because one of the duties of the Department is to keep ships moving. They believed that this aim could be attained by the appointment of a Wreck Commissioner, i.e., someone who would always be available to initiate and hold a Preliminary Investigation at a convenient time and place.

They made efforts to have disciplinary cases investigated without delay by appointing a Regional Superintendent for the St. Lawrence Region. Previously the passive attitude of the local representative of the Pilotage Authority was the main cause of failure to enforce discipline for lack of proper evidence (vide Pilotage District of Quebec). The main difficulty encountered was late reporting. A complaint concerning a pilot boarding a ship under the influence of liquor often came to the Department's knowledge, long after the event, by the ship's agent sending a copy of the Master's letter to him giving the particulars, and sometimes accompanied by affidavits. It is very seldom that they are able to obtain witnesses from a ship for a trial and, there being no other evidence available, they can not proceed with the prosecution of the offence for lack of evidence.

Mr. Macgillivray explained that one of the weaknesses of the disciplinary procedure as provided in the By-laws was that the accused did not appear in person before the Authority. Over the years they endeavoured to give a pilot as fair a hearing as possible having due regard to the circumstances, the frequent delays before cases come to the attention of the Pilotage Authority and their desire not to delay ships. The two main factors are: the time element, as far as witnesses are concerned, and the remoteness of the Pilotage Authority.

Mr. Macgillivray reminded the Commission that when Pilotage Authorities were first set up under the law they were local bodies who devoted most of their time to pilotage, but where the Pilotage Authority is the Minister of Transport he has a great many other functions to perform; he added that it is quite clear that, except in the most important cases, it is unlikely that the Minister can give his full personal attention to matters other than reports from his officers. In other words, the situation that exists now was never contemplated by the law.

Observing that the Minister as Pilotage Authority is so busy, Mr. Macgillivray was unable to give any reason why advantage is not taken of the power to delegate by by-law, under subsecs. 327(2) or 329(p). He suggested that disciplinary powers were not delegated because the local Supervisors would be placed in a position for which they were unprepared, and which did not conform to their other functions. He also added that: "an

honest effort was made to find a means of giving the pilot a hearing . . . the Department does not consider that there is now a satisfactory system for dealing with infractions" and they are anxious to find a solution.

Captain Jacques Gendron, who was, in turn, Regional Superintendent for the St. Lawrence Region and Investigation Officer for the Department of Transport at Ottawa, gave a factual account of how the disciplinary problems of pilots are handled by both the Pilotage Authority and the Department of Transport.

For a shipping casualty where a pilot was involved, the procedure was for the local Supervisor or, in his stead, the Regional Superintendent, to make his own fact-finding informal investigation and to forward his report to Ottawa together with the pilot's casualty report. At Ottawa Headquarters an involved and complex process then took place. When a casualty report was received it was passed to the D.O.T. Investigation Officer to study and recommend what further action, if any, was indicated. When he reached a conclusion, the file, together with his opinions, considerations and recommendations, was passed to his immediate superior, the Superintendent of Pilotage. He similarly studied the file and made his own recommendations to the Chief of the Nautical and Pilotage Division. He, in turn, did a similar study, added his own recommendations and then passed the file to the Director of Marine Regulations. And so on up the hierarchy. The final decision on which recommendation to adopt was made, either by the Assistant Deputy Minister, or by the Deputy Minister and, on occasions, by the Minister himself. When this final decision was reached it was referred to the Superintendent of Pilotage for implementation. If the Pilotage Authority decided to punish a pilot, the normal procedure was to send a show-cause letter to the pilot concerned, but this procedure was not followed in all cases. On occasion the pilot involved simply received a letter to the effect that he was suspended. In neither case was the pilot provided with the full record, not because the Department objected, but only because it was not the procedure. If, however, the pilot so requested, he was shown the full record.

When disciplinary measures were taken by the Minister of Transport under Part VIII, he convened either a Court of Formal Investigation or a Court of Inquiry under sec. 579 C.S.A., unless he felt unable to do so because he considered his information incomplete. In that case, a Preliminary Inquiry was first ordered. In fact, this was the rule, and it was only in exceptional cases that a Formal Investigation was ordered in the first instance.

When disciplinary matters were handled by the Pilotage Authority, the Minister never sat as a tribunal. At times, the procedure followed was to send a show-cause letter to the pilot advising him that information received indicated he had been remiss in his duty, and that it was intended to take disciplinary action unless he proved that he was not at fault. However, Capt. Gendron recalled that sometimes when the investigation showed a pilot

was to blame, a show-cause letter was not sent to him and punishment was applied without further warning. In his opinion, there was no established pattern, "we were jumping from one case to the next without any actual rule laid out as to what to do in what circumstances and what procedure to follow". In some cases, the Authority would decide to send a show-cause letter and in other cases no letter was sent. Whether or not the pilot was present throughout the investigation had no bearing on this decision.

During his term of office as D.O.T. Investigation Officer (from Dec. 1961 to July 15, 1963), Capt. Gendron held a number of informal investigations, conducted one Preliminary Inquiry in a case where no pilot was involved, and sat once as the Inquiry Officer under sec. 579 C.S.A.

When a Formal Investigation was held, the Commissioner appointed for that purpose notified all the witnesses and all the persons concerned. He was normally assisted by a counsel from the Department. The pilot(s) involved, and even some of the witnesses, were assisted by legal counsel. The witnesses were examined and cross-examined and all parties were given an opportunity to put questions.

When the purpose of the Court (either Formal Investigation or Inquiry under sec. 579) was to investigate the conduct of a pilot, the statement of the case, which accompanied the appointment of the Commissioner, stipulated that the investigation was only to inquire into the conduct of the pilot. According to the practice followed, when a Master was asked to give evidence he was informed that his own conduct was not under investigation and that his testimony was merely for the purpose of helping the Pilotage Authority. This procedure was followed, inter alia, in the Formal Investigation conducted by Captain M. D. Atkins regarding the grounding of the vessel *G. N. MacWhirter* in 1963.

After a few months' experience at Headquarters in Ottawa, Captain Gendron formed the opinion that the process of decision-making following investigations on disciplinary matters was laborious, involved too many unnecessary people and caused much delay in enforcing discipline.

The recommendations at various levels contained divergent opinions, e.g., at times the Chief of Nautical Services did not agree with the recommendations Captain Gendron had made because, he explained, he knew the waters and could not agree with Captain Gendron's findings. It was suggested that a poor impression was created if officers of the Department contradicted each other, and that it would be an improvement if they formed a committee to discuss any casualty so that they could pool their experience by a meeting of nautical minds.

A committee was then set up in Ottawa composed of a group of D.O.T. officers sitting as a Board of Review. The intent was that this would relieve five or six senior officials of the responsibility of making their own

reviews and appraisals of each case, and that the Board of Review's findings and recommendations would serve as the basis for immediate decision by the Deputy Minister, thereby considerably curtailing delays.

This committee was unofficial and its functions were not defined in writing. It was not a court, and had no legal power, it could not hold an investigation by itself, and had no power to call any witnesses or to accept any representations. If the committee felt that further investigation was needed, the case would be referred back to the Investigation Officer with the request that the investigation be reopened, or a recommendation would be made to the Minister to have the case investigated by a Preliminary Inquiry. If the information available was considered complete, the committee recommended the action that should be taken.

The committee sat three times during Captain Gendron's term of office in Ottawa but it did not come up to his expectations. Delays were not shortened because, in spite of the committee, the old procedure continued to be followed. The committee had to forward its findings to the Chief Nautical Services who, instead of merely forwarding the file to his superior, continued as before to make a fresh review of the case, to insert his own remarks and recommendations. The process was repeated as before until the file reached the Deputy Minister through the usual chain of command, Officers at each level reviewing the case, making their own recommendations and ignoring the committee's intended function.

When Captain Gendron left the employment of the Department of Transport on July 15, 1963, the delays had not been cured, e.g., the case of a pilot involved in the *Sarniadoc*[1] accident was still pending after eight or nine months, the *Timna* case was undecided after a year and a half or two years and there had been a delay of a year and a half regarding the pilot involved in the *Arrow* incident.

Captain Gendron was of the opinion that the whole system of inquiry and discipline needed to be renovated. He felt that the system should not be operated by either the Pilotage Authority or the Department of Transport but that the procedure should be clearly stated in official rules and regulations and that the decisions arrived at should be enforced. He had the opportunity to attend some of the investigations into marine casualties carried out by the United States Coast Guard and he was greatly impressed by the publicity given to the hearings and findings as well as by the orderly procedure that was followed.

For examples of actual cases where the Pilotage Authority discharged its surveillance and reappraisal duties and enforced discipline of pilots, and for the extent of the use made of these powers, reference is made to the

[1] The Commission was informed in July 1966 that the pilot of the *Sarniadoc* was suspended for one month but that the other two cases were not pursued after objections by the pilots' counsels.

summing up of the evidence in the other Parts of the Report dealing with Pilotage Districts, particularly the Quebec District where these questions are given special consideration. The situation may be summed up by saying that, in general, the pilots are well disciplined and highly competent, and that the Pilotage Authorities have very few occasions to make use of their reappraisal powers and to resort to disciplinary measures. However, on the rare occasions when they must act, the process becomes involved and time-consuming because of the illegality of the procedure followed. Often, especially in the more serious cases, the Pilotage Authority finds itself powerless to enforce discipline, or to prevent a pilot who has become a safety risk from continuing to practise his profession.

COMMENTS

(a) *Passive Attitude of Pilotage Authorities*

It is considered that the new pilotage legislation should enable each Pilotage Authority to discharge its responsibilities fully and play an active, positive rôle in maintaining the qualifications of its pilots at the highest level, even if this entails the organization and support of pilot schools and training programmes afloat. To meet the challenge of modern technological and navigational developments, Pilotage Authorities should receive every encouragement from the Federal Government to train their pilots in modern techniques. However, sound legislation and adequate organizational structures are valueless if effective use is not made of them. It is a reasonable assumption that, if the service was founded by private organizations competing against each other for pilotage clientele, they would long since have taken the necessary steps to keep the competence of pilots in line with technical progress, if for no other reason than to meet competition and remain in business. In this field, mediocrity should never be tolerated, particularly when pilotage is administered by the Crown.

Although the chaotic situation that now exists may be chiefly attributable to inadequate legislation, it is considered that the problem could have been wholly, or at least partially, solved if Pilotage Authorities had not adopted the negative, passive attitude too often indicated by the record. The situation may become even more confused because both the pilots and the shipping interests may consider themselves forced by the situation thus created to strengthen their organizations in order to achieve positive results. Matters will not improve unless Pilotage Authorities assume all the responsibilities entrusted to them by Parliament. They must give direction to the service and take decisions without procrastinating or waiting for events to dictate action. In the field of safety, they must be active and progressive, and not delay until a disaster occurs before coming to grips with local problems. Pilotage Authorities must make a continuous effort to keep pilots' qualifications consonant with technological progress by making their own inquiries

and studies, by planning in advance and not remaining satisfied with compromise solutions negotiated by the immediately interested parties who have their own interests and not those of the public mainly in mind.

The field of safety and discipline provides a good example of the prevailing situation. In the last ten years, at least, no charges have been laid against pilots for committing any of the statutory offences listed in part VI of the Act, but it would be unrealistic to believe that none of these various offences was committed anywhere in Canadian pilotage waters during that period.

With regard to the use of alcohol by pilots (a danger of which Pilotage Authorities should be extremely conscious), perusal of the record of cases of drunkenness when on duty or habitual drinking shows how little awareness Pilotage Authorities seem to have had of their responsibilities towards the public. For example, in the Quebec District during a brief period, two pilots were refused at Father Point by the Masters of vessels on account of alleged drunkenness (May 9 and August 21, 1959). In the first instance, no remedial action could be taken because the case was mishandled by the Pilotage Authority's local representative at Father Point. It would seem logical that the Pilotage Authority would react sharply and issue precise instructions to cover a similar occurrence; at least, to instruct its representative to meet pilots on return to ascertain their condition at the time. However, when the second incident occurred three and a half months later, the same local representative at Father Point remained as passive as before; he did not even meet the pilot personally, but was satisfied to speak to him by telephone. Again, as might be expected, the second case failed due to lack of evidence. (For details, vide Pilotage District of Quebec, *Advisory Committee.*) The cases of ex-Pilot Drapeau and Pilot No. 70 are similar instances (vide Quebec District, *Discipline*). Despite lessons that might have been learned by experience, no instructions were issued to local supervisors and persons in charge at boarding stations.

It is considered that the major single cause of this state of affairs was departing from the basic, realistic principle of decentralization of administration. Through the device of appointing the Minister of Transport as Pilotage Authority for each of the larger Districts, their pilotage organizations were centralized in Ottawa within the Department of Transport. The isolation of the Pilotage Authority from pilotage operations, combined with administration by remote control, caused immediate dissatisfaction, e.g., the situation in the Quebec District in 1913 prior to the Lindsay Commission (vide Pilotage District of Quebec, *History of Legislation*). Failure to decentralize administration even by delegation of power to local staffs, lack of effective contact between the pilots, the users of the pilotage services and the Pilotage Authority, caused an unhappy situation to go from bad to worse. It still remains unsatisfactory. The record shows that in the few Districts where administration is most efficient, the Pilotage Authority's local representatives

are well qualified and do not hesitate, forced as they generally are by inadequate legislation, to assume responsibilities which, at times, exceed the powers they legally possess.

If Pilotage Authorities and the Department of Transport had realized the nature and extent of their responsibilities, they would have been alerted by their inability to control the situation because of their lack of power, particularly in the face of ever increasing obligations. They should have sought the necessary powers of control from Parliament but they failed to do so and continued (presumably not wishing to become more involved) to administer the public service that pilotage had become, by negotiation and compromise rather than according to law. This situation is wholly incompatible with the protection of public interest and efficient administration.

(b) *Strikes by Pilots*

A strike by pilots is the greatest calamity that can befall the pilotage service. Simply because a small group of people refuse to perform their duties, navigation in the area affected comes to a near standstill to the great inconvenience of the shipping interests and to the prejudice of the public in general. A strike by pilots, as in other professions or trades, is a show of force which is normally adopted as a last resort when the parties involved have lost confidence in, and respect for, each other and the positions they have taken appear irreconcilable. As soon as those who provide a service consider their working conditions unjust and believe that a strike is their only means of effecting a solution, it may be expected that they will resort to such action. In an area where pilotage is of great economic importance, the creation of a Pilotage District produces a monopoly in the hands of a few. In such circumstances, strike action becomes a disproportionate weapon which could easily be employed to gain private advantage to the prejudice of public interest. Unusual hardships fall upon the general public when pilotage services are withheld and no alternative exists.

The right to strike by those employed in a public service can be justified only when the alleged injustice to be corrected is commensurate with the loss and inconvenience the stoppage of work entails. Today—and even less in the future—it is difficult to conceive of circumstances that would justify prolonged strikes by pilots in most Pilotage Districts.

Strikes are not new in the pilotage service, but the 1962 strike by the St. Lawrence River pilots was the first of its kind. All previous strikes by pilots were confined to one District, whereas the 1962 strike embraced the three St. Lawrence River Districts and threatened to become national in scope when the B.C. and Saint John, N.B., pilots, who shared some of the same problems, declared their intention of joining in. The appointment of this Royal Commision to investigate pilotage problems was one of the conditions of settlement.

Without making a special effort to list all the strikes that have occurred in the pilotage service in Canada, the Commission's studies have revealed a considerable number, and there may have been others. A spectacular strike was waged by the Montreal pilots in 1898 when the Senate voted down their private bill which had already been approved by the Commons. This bill was the last of a series of fruitless attempts during the previous sixty years to gain control of the management of the pilotage service through incorporation, a privilege which the Quebec pilots had enjoyed since 1860. The appointment of a Royal Commission was also one of the conditions of the settlement of that strike. In the Miramichi District in 1899, the twenty pilots on strength refused to accept reduced rates fixed by their Pilotage Authority and resigned *en masse*. In 1919, the B.C. pilots walked out in protest against the implementation of the recommendations of the Robb Royal Commission which had resulted, *inter alia,* in the amalgamation of all coastal Pilotage Districts (except New Westminster) together with a substantial reduction in pilotage rates. This the pilots refused to accept. The Government reacted by abrogating the B.C. District, with the result that the pilotage service remained unorganized until the District was recreated in 1929 following another Royal Commission. There have also been strikes in other Districts, e.g., the strike by the Kingston District pilots in 1957 and in other forms, e.g., the Quebec special pilots once reacted against a decision of the shipping interests to reduce the special service bonus by refusing to act as special pilots, thus forcing the companies concerned to take pilots from the tour de rôle. There have also been a number of occasions when threatened strikes were narrowly avoided.

Strikes by pilots have always been illegal in Canada under pilotage legislation. One of the conditions for holding a pilot's licence is that the pilot must be available for duty unless prevented by some physical impairment. Most District By-laws contain a provision to that effect. Prior to 1934, it was a statutory offence for a pilot not to take an assignment when required to do so by the Master of a ship or by the Pilotage Authority. Despite all this, strikes have occurred repeatedly and no disciplinary action has been taken against any of the pilots involved. Furthermore, when a strike occurs, the general attitude taken by the authorities is to avoid involvement. In the 1962 strike by the St. Lawrence River pilots, the Pilotage Authorities concerned refrained from despatching pilots as soon as they were notified that the pilots were on strike and, therefore, technically the pilots committed no offence.

As seen in other spheres of activity, the fact that strike action has been outlawed for certain groups has not prevented strikes from occurring and almost invariably this flagrant violation of the law has been condoned by those in authority by their failure to take the punitive sanctions provided to enforce the legislative prohibition. Strikes may be outlawed but their occurrence can not be prevented. The best of laws can not replace the moral

conscience of individuals and groups. However, it is the responsibility of the legislature concerned (for pilotage the Parliament of Canada), to ensure that the vital interests of the public are protected.

The Shipping Federation of Canada has recommended that the right to strike be denied by the Act and, therefore, that strikes by pilots be made illegal. However, each clash does not affect the interests of the public with the same intensity because the importance and necessity of pilotage as a public service varies from place to place. Therefore, a general prohibition may not be warranted. It is considered that this is a point on which the Commission should refrain from making a recommendation. The question whether those providing a public service should be given the right to strike has been under consideration by Parliament and by the Government for many years and this Commission can not offer any new material of which the Government has not already been made aware. Reference is made, *inter alia,* to the report of the Preparatory Committee on Collective Bargaining in the Public Service (Heeney Report) and the legislation that ensued, i.e., the Public Service Staff Relations Act (14-15-16 Elizabeth II c. 72), the 1967 amendment to the Financial Administration Act (14-15-16 Elizabeth II c. 74), and the Public Service Employment Act (14-15-16 Elizabeth II c. 71). Nevertheless, every reasonable step should be taken to prevent strikes by pilots, particularly in view of the disproportionately disastrous consequences a prolonged strike would entail in a District where the service is essential. It is believed that the remedy does not lie merely in a legislative prohibition but, primarily, in legislation which provides an adequate organizational system where the causes of conflicts are reduced to a minimum, and where adequate mechanisms are provided to permit all those concerned to defend their rights and obtain redress of their grievances. At the same time, this legislation should ensure that, if a strike occurs, minimum services continue to be provided in Districts where pilotage is essential. Secondly, pilotage should be under the direction of competent persons, fully aware of their duties and responsibilities. They must bear in mind the fact that it is not sufficient to take the right administrative decisions, but it is also most important for the Authority to retain the confidence of both pilots and shipowners and, hence, every effort must be made to convince those involved of the correctness of decisions.

Pilots are educated, responsible persons and should be treated as such. Many of them were required to hold a Master's Certificate of Competency as a prerequisite to receiving their pilot's licence and, in addition, were in command for a number of years before becoming pilots. They are, therefore, experienced in the function of management and trained to take reasoned decisions. Such men will not be content with the dictates of authority, will resent arbitrary decisions, and will refuse service when they are convinced they are being mistreated, as the background of most strikes has shown (vide, *inter alia,* Montreal District, *History of Legislation,* 1898 strike;

Quebec District, *Pilots' Status and Working Conditions,* threatened strike in 1960 and the 1962 strike).

However, despite the best of legislation, adequate organization and strenuous efforts by a competent authority to appeal to reason, there is always the possibility of some failure in the system or of some irrational strike action taken as a means of coercion to extract unjustified advantages. Therefore, whether or not strike action is outlawed or restricted, the possibility of a strike occurring must be covered in legislation.

First, the Act should give Pilotage Authorities the necessary powers to provide reasonable service through alternative plans that can be implemented if a strike occurs, e.g., power to use the services of any Master, officer, former pilot or person whom the Pilotage Authority concerned deems competent; power to arrange convoys under the guidance of a qualified person in the leading ship or under the guidance of a Government ship, i.e., a Coast Guard or R.C.N. vessel. There may also be many other plans made possible by modern technology. An alert Pilotage Authority, conscious of its responsibility towards the public, should always have a reserve number of alternative plans especially conceived to meet the District's needs which could be put into effect as soon as a strike takes place. All costs incurred by the Government and by the Pilotage Authority in the implementation of these plans should be considered administrative expenses of the District.

The aim of such alternative plans is not to break the strike but to protect the public by reducing its otherwise disproportionate consequences. The best alternative plan will always remain a makeshift, temporary measure. In a District where pilotage is a necessary public service, substantial inconveniences will always be experienced because there is no adequate substitute for an efficient pilotage service.

Second, as previously suggested (vide C. 3, p. 43), another way of alleviating the consequences of a strike is to facilitate navigation in pilotage waters so that ships may proceed without pilots, although at some inconvenience, e.g., improvements to channels and efficient aids to navigation. Thus, at the worst, traffic would be delayed but not completely interrupted, except under very adverse conditions. Study of the traffic during the 1962 strike by St. Lawrence River pilots (vide Quebec District, *1962 Pilots Strike*) shows that trips were made by many ships without pilots at a time when a great number of aids to navigation were not even in place. It is considered that with active assistance from Pilotage Authorities and the Government, regular traffic might have been maintained, except possibly for those few days when adverse weather conditions prevailed.

Chapter 10

PILOT FUNDS

PREAMBLE

A "pilot fund" is the instrument provided by the Canada Shipping Act to enable Pilotage Authorities to extend financial assistance to pilots in need or to the dependents of deceased pilots. In practice, this term is not used but, characteristically, the term "pension fund" is employed instead as if both were synonymous. Pension funds, which are purportedly created under the statutory provisions governing pilot funds, normally exist only in the larger Pilotage Districts; generally speaking, they have been actuarially unsound and the pilots in the Districts concerned are almost unanimous in their discontent over the benefits they will derive from them.

The Commission's terms of reference make it necessary to investigate this situation, determine the cause and ascertain whether pilot funds retain their usefulness. One conclusion indicated by the Commission's studies of the whole pilotage field is that pilot funds were necessary when the rôle of the Pilotage Authority was limited to licensing and the only possible status of the pilots was self-employed contractors in a society lacking state social assistance, but the welfare programmes in existence today have altered circumstances to such an extent that these funds are now outdated. A second conclusion is that the pension funds which developed out of the original pilot funds are neither contemplated by the Act nor consistent with it, thus causing the present unsatisfactory situation.

A pilot fund consists of certain monies placed at the disposal of a Pilotage Authority for the special purpose of providing financial assistance to licensed pilots who are prevented from exercising their calling, either temporarily or permanently, on account of some physical incapacitation, or to dependents of deceased pilots and, of recent years, to pilots whose licence has been cancelled by a Court of Formal Investigation (vide C. 5, p. 98). The ultimate permissible limit of aggregate benefits is the amount of money available in the fund. Although a surplus could accumulate on account of the nature of the sources of the fund, this fund was never designed to be in deficit and, hence, any possible surplus could never be large.

LEGISLATION AFFECTING PILOT FUNDS

The pilot fund is a feature of the earliest Canadian pilotage legislation. All existing provisions on the subject are found almost verbatim in the first post-Confederation pilotage legislation, i.e., the 1873 Pilotage Act whose provisions on the matter were drawn from the 1854 Merchant Shipping Act of the United Kingdom.

QUEBEC AND MONTREAL DISTRICTS

Historical Summary

When the first Canadian pilotage legislation was enacted in 1873, it was necessary to take into account the *ad hoc* pilotage legislation governing the extensive pilotage operations on the St. Lawrence River in what was to be known as the Pilotage Districts of Quebec and Montreal. While the question of a pilot fund was new to the rest of Canada, such a fund had been in operation for the benefit of St. Lawrence River pilots since 1805 when the pilotage organization on the St. Lawrence River was put on the same basis as the Trinity House of London. One of the features of that re-organization, of which special mention is made in the title of the 1805 Act, was the creation of the pilot fund that was known up to 1934 as the "Decayed Pilot Fund". The 1805 Act provided, *inter alia:*

> "...and the said Fund is hereby vested in the said Corporation [Trinity House] for that purpose and shall be under the management of the said Corporation, who are hereby authorized and required to grant such relief out of the same, to distressed and decayed Pilots, and the Widows and Children of Pilots, as the said Corporation, or the majority thereof, shall see just and proper, and these monies, which, at the end of each year, shall not be distributed for the said purpose, shall be vested in securities, bearing interest, upon immoveable property, according to the best judgment of the said Corporation, or a majority thereof;...".

In 1812, this common fund was divided into two separate funds, one for the Montreal pilots and the other for the Quebec pilots.

This was the situation when the 1873 Act was passed and an exception was made for the Districts of Quebec and Montreal so that their pilot fund continued to be governed by their own legislation which, in the Quebec District, was the Quebec Trinity House Act as revised in 1849 and later amended. When the Quebec Trinity House was abrogated in 1875 and replaced as Pilotage Authority by the Harbour Commissioners of Quebec, in an unprecedented move, the trusteeship and administration of the Quebec Decayed Pilot Fund was entrusted to the pilots themselves, i.e., to the 1860 Quebec Pilots Corporation. Quebec was the only District where the pilots had been formed into a public corporation for the purpose of operating the pilotage service under the supervision of the Pilotage Authority. As far as

the pilot fund is concerned, this situation has remained unchanged ever since for, although the 1914 Act deprived the 1860 Quebec Pilots Corporation of all its operational powers, this responsibility remained. In 1950, following the report of the Audette Committee which had found that the Quebec Pilot Fund, along with other pilot funds, was in a precarious financial position, an amendment to the Act was made to transfer the trusteeship and administration of the fund to the Quebec Pilotage Authority and, at the same time, to abrogate the remaining provisions of exception in this regard. The amendment provided, however, that the new provisions were not to come into force until proclaimed by the Governor in Council and, up to the present, this proclamation has not yet been made. At the time of the last consolidation of the statutes in 1952, the 1950 provisions, although not in effect, were substituted for the others they were to replace, if and when proclaimed, with the result that subsec. 329(*l*) and secs. 373 and 374 of the 1952 Canada Shipping Act are not in effect and, on the other hand, subsec. 319(*l*) and secs. 366 to 370 inclusive of the 1934 Act are still in force (vide C. 1, pp. 8 and 9, and 16 to 18).

Quebec District Pilot Fund

Apart from subsec. 319(*l*) and sec. 366, both of the 1934 C.S.A., which contain a special proviso of exception, the other provisions of general application regarding pilot funds should apply to the Quebec District fund unless they are inconsistent with the specific provisions governing the Quebec fund and previous legislation which is kept in force by reference. There is no need to make an exhaustive study of the question here. At first glance, it would appear that none apply to the Quebec Pilot Fund because all the aspects dealt with in the provisions of general application of the Act are already covered in secs. 367 to 370, 1934 C.S.A. and in secs. 56 to 63 of the 1849 Quebec Trinity House Act (Ex. 703). However, except for the legal title of the trusteeship, the question of by-laws and the supervision of the operation of the fund, the Quebec Pilot Fund operates in conditions similar to those in the other Districts.

The specific statutory provisions applicable to the Quebec Pilot Fund are as follows:

(i) sec. 367, 1934 C.S.A., makes it the responsibility of the Quebec Pilotage Authority to fix the pilots' contribution and authorizes it to make the necessary deductions from the pilots' earnings and to pay these deductions over to the Treasurer of the Quebec Pilots Corporation;

(ii) sec. 368, 1934 C.S.A., quotes the statutory authority of the Quebec Pilots Corporation "which shall have the same rights and powers as Trinity House of Quebec possessed" in relation to the fund and requires that the administration be in conformity with the Quebec Trinity House Act of 1849 and its amendments;

(iii) sec. 369, 1934 C.S.A., limits the investment powers of the corporation to those enjoyed by trustees in general, thereby making applicable for this purpose the pertinent provisions of the Quebec Civil Code;

(iv) sec. 370, 1934 C.S.A., requires the corporation to account for its administration of the pilot fund to the Minister as such and not as Pilotage Authority.

The reference to pre-Confederation Acts that are otherwise abrogated is a source of difficulty, e.g., the procedural requirements regarding the adoption of regulations as contained either in the Trinity House Act or in the 1860 Quebec Pilots Corporation Act can no longer apply. This creates a serious problem as to the validity of the Corporation's by-law which regulates the Quebec fund. (The Quebec District pilot fund is dealt with in more detail in Part IV of the Commission's Report [Quebec District, *Pilot Fund*].)

Montreal District Pilot Fund

In the Montreal District, the last exception affecting the pilot fund disappeared in 1934 with the abrogation of sec. 484, 1927 C.S.A., thus placing the fund completely under the provisions of general application of the Act. In practice, this modification in legislation made little difference to the Montreal pilots because they never had control of their pilot fund.

OTHER DISTRICTS

The provisions of general application which govern the pilot funds of all other Districts, including Montreal, are the following: subsec. 2(68) C.S.A., subsec. 319(*l*) (1934) C.S.A., sec. 329(m) C.S.A., subsec. 351(2) C.S.A., sec. 358 C.S.A., sec. 366 (1934) C.S.A., sec. 375 C.S.A., and sec. 708 C.S.A. These statutory provisions must be studied carefully to reveal the true nature of the institution which early pilotage legislation envisaged as the "pilot fund".

Provisions of General Application

Subsec. 2(68), C.S.A., the first of these general provisions, is the statutory definition. It reads:

> " 'Pilots' fund' means any fund hereafter established by a pilotage authority for the relief of retired or superannuated or infirm licensed pilots or their wives, widows or children;"

The spelling of *pilots' fund* is considered to be a drafting error; this is the only place in the Act where the term is spelled in this way (vide C. 4, p. 98). This definition is still almost verbatim the definition contained in sec. 2, 1873 Pilotage Act and the only modification occurred in 1934 when the present text was adopted. The only change that could be considered of

substance was the addition to the list of beneficiaries of "retired" licensed pilots, thus indicating that not only incapacitated pilots can benefit from such funds but also those who are retired although physically fit. This addition coincided with the addition of the provision which is now subsec. 373(c) C.S.A.

Subsec. 319(l), 1934 C.S.A., provides that a pilot fund is created by a by-law made by a Pilotage Authority (vide C. 8, pp. 314 and 315). It also gives authority for pilot funds to be created jointly by a number of Pilotage Authorities through a joint by-law. Although this provision has always been in the Act, it appears it has never been implemented. The text was copied from the legislation governing the Trinity House of London where the operation of joint pilot funds is facilitated because it is the Pilotage Authority of a large number of Pilotage Districts (vide App. XIII, *United Kingdom*). In Canada, the only experience with a joint fund occurred in the early days of the Quebec Trinity House when its jurisdiction extended to the pilots of both the Quebec and Montreal Districts. The Quebec pilots soon complained against the extensive demands made on the fund by their colleagues of the Montreal group and their objections led to the division of the fund in 1812. This step foreshadowed the division of the District (vide Part IV, Quebec District, *History of Legislation*).

The word *funds* is used in the plural indicating that more than one fund can be created in a District, probably for different classes of beneficiaries or for different purposes but, in fact, since Confederation, no more than one pilot fund per District has ever been created. Conversely, this subsection gives the Pilotage Authority power to determine by by-law the contributors to each of these funds and foresees that the amount of their contribution will be fixed.

It is interesting to note that the funds that could be created under this section are not identified in the text by the use of the term "pilots' fund" (or "pilot fund") as might be expected in view of the statutory definition. Instead, the subsection re-defines these funds by repeating the text of the statutory definition except for the reference to "retired" licensed pilots which is omitted. A strict interpretation would see in this a deliberate act on the part of Parliament which would mean that a pilot fund for pilots that are retired other than for superannuation could not be created under this subsection. However, such an interpretation would render the provision of subsec. 373(c) inapplicable as there is no other means provided for the creation of a pilot fund. Here again, it must be considered that this was merely the result of another of the numerous drafting errors which occurred in the 1934 Act because the necessary correlation was neglected.

This subsection also authorizes the Pilotage Authority to make the necessary regulations regarding the administration of such funds (the provisions of sec. 328 C.S.A. do not apply to the pilot fund—vide C. 8, p. 317),

to determine the contributors and the amount of their compulsory contribution. (Re power to sue and be sued—vide C. 8, p. 321 and ff.) Prior to 1934 (vide subsec. 415(l), 1927 C.S.A.), fixing the contribution was an absolute power of the Pilotage Authority to be exercised through by-laws. While the Act was silent as to the criteria for fixing the contribution, it is apparent from this context that it was to be a percentage of the pilots' earnings sufficient to produce enough revenue for the fund to meet current and expected liabilities still unpaid after the money accruing from other sources of revenues was spent. Since the 1934 amendment, the rôle of the Pilotage Authority as regulation-maker has been reduced to an obligation to reproduce in the By-law the decision arrived at on this question, either through an agreement between the pilots and the Pilotage Authority or, failing this, by the Minister acting as arbitrator (vide C. 8, p. 299). The only permissible contribution that may be levied is against the pilots' earnings and not against the pilotage dues (vide C. 5, p. 109). [For comment on the grammatical error in the last phrase, vide C. 8, p. 298.] Except for the 1934 amendment regarding fixing the contribution, the contents of this subsection correspond to the first part of subsec. 18(12), 1873 Pilotage Act.

Subsec. 329(m) C.S.A. authorizes the Pilotage Authority of any District to determine through by-laws the beneficiaries of the fund and to fix "the terms and conditions upon which they are so entitled" [to participate]. This provision is a verbatim reproduction of subsec. 433(m), 1906 C.S.A. Formerly (vide subsec. 18(12), 1873 Pilotage Act), the provisions of this subsection formed only one subsection with those of subsec. (*l*). In order to be understood, this provision must be read in its context, especially with secs. 358 and 375 C.S.A.

Subsec 351(2) C.S.A. is a verbatim reproduction of subsec. 60(3)(c), 1873 C.S.A. It refers to a situation that is almost no longer found. It creates two additional sources of revenue for the pilot fund: first, pilotage dues collected in Districts where the payment of dues is compulsory from ships which are required to take a pilot on their inward voyage but failed to do so; these dues are to be attributed to the pilot fund if the Pilotage Authority is unable to find any pilots with a valid title to them (vide C. 5, p. 99); second, the quasi-fine that may be imposed under subsec. 350(1) on non-exempt ships which have failed to comply with the requirement of sec. 349 (vide C. 5, p. 99 and C. 6, p. 201).

Sec. 358 C.S.A. creates a statutory right for certain persons to be beneficiaries of a pilot fund. It stipulates that a pilot who was "compelled to retire . . . on account of age or mental or bodily infirmity, and every widow and child of a deceased pilot is entitled. . ." to benefit from the fund, but the extent of the benefits is left to be determined by the Pilotage Authority. This section is almost a verbatim reproduction of sec. 39, 1873 Pilotage Act. As a result of this section, the potential beneficiaries of a pilot fund as defined in the statutory definition and the first part of subsec. 319(*l*), 1934

C.S.A., are divided into two categories: those who are beneficiaries by statutory right whenever a pilot fund exists, i.e., those enumerated in sec. 358 C.S.A.; and those who may become beneficiaries if so designated by a by-law made under subsec. 329(m), always provided they fall within the terms of reference of the fund as above stated. The only categories of authorized beneficiaries not covered in sec. 358 are pilots only temporarily incapacitated and pilots compelled to retire because their licence was withdrawn by a Court of Formal Investigation. The omission of a reference to the latter group in sec. 358 (unless it might be attributed to an error of drafting in 1934) would mean that the Pilotage Authority through an administrative decision (because it does not come within its regulation-making power as defined in subsec. 329(m)) could decide under subsec. 375(c) not only the extent of the benefits to which they would be entitled but also whether any benefits at all would be granted. This, however, does not appear to be the intent. As for the former group, it might be debatable whether temporarily incapacitated pilots, if they were made beneficiaries by a regulation made under subsec. 329 (m), could derive a benefit from a pilot fund. However, it is considered that this is the case, as will be demonstrated later.

Sec. 366, 1934 C.S.A., provides for the administration of pilot funds of the superannuation, retirement and annuity type. It authorizes the Minister of Transport and the Minister of Finance to become joint administrators, states that funds deposited with the Receiver General are to draw interest at a rate fixed by the Department of Finance and regulates the investments that may be made by the Pilotage Authority when investments become necessary by providing that they are limited to "Dominion bonds or other Government securities approved by the Governor in Council, in the name of the Minister of Finance in trust for such funds". This procedure is compulsory for Districts where the Minister is the Pilotage Authority and is optional for the others.

This raises two questions: first, how are pilot funds not of the three types mentioned to be administered observing that Parliament, by using other language to define the type of funds to which sec. 366, 1934 C.S.A., applies clearly restricted the application of the provisions of this section to these funds; second, would the Pilotage Authorities who have not elected to have their pilot fund administered pursuant to the provisions of sec. 366, 1934 C.S.A., be entitled to invest any monies not immediately required and, if so, is there any restriction on their power of investment? As for the first question, the Act contains all the necessary provisions, i.e., funds will be administered as provided in the regulations made under subsec. 319(*l*), 1934 C.S.A. There appears to be no objection if the actual administration is entrusted to any third party but, in all cases, the Pilotage Authorities would remain the legal trustees and, therefore, would remain accountable and personally responsible. The second question raises difficulties. On one hand, it indicates that in Districts where the Minister is not the Pilotage Authority

there may be pilot funds in the form of superannuation, retirement and annuity funds and, hence, there will be sums of money which should be invested. Good administration also requires that any unspent surplus and any other money that is unlikely to be spent for a substantial period should be invested, bearing in mind that the contributions from the pilots can not be reduced below the 5% statutory minimum (vide C. 8, p. 321). The absence of provisions limiting their power of investment would indicate that the Pilotage Authorities would have the power to invest these funds as they see fit but, in all cases, they would be personally responsible if a loss occurred through risky investments. This very unsatisfactory situation, both for the trustees and other interested parties, is the result of the 1934 amendment which unduly limited the application of the former general provision it replaced. Before its abrogation by the 1934 Act, this provision was sec. 490, 1927 C.S.A., which corresponded almost verbatim to sec. 84, 1873 Pilotage Act. Sec. 490 came immediately after what is now sec. 375 C.S.A., i.e., the section which defines the only permissible expenditures from the pilot fund. It was in logical sequence because it authorized the investment of any surplus that might remain after all the fund liabilities were met, and it applied to any type of fund. Sec. 490, 1927 C.S.A. reads:

> "490. Every sum of money belonging to any pilot fund which has not been employed in such payments as aforesaid, including sums of money forming part of pilots' funds now existing, of which reinvestment becomes necessary, shall be invested in Dominion stock or other Government securities, approved by the Governor-in-Council, in the name of the pilotage authority having control of the fund to which the sum of money belongs".

The provisions of sec. 490, 1927 C.S.A., can still be found in the last part of sec. 366, 1934 C.S.A., but it is now qualified by the first part which, on one hand, restricts its application and leaves the cases to which sec. 366, 1934 C.S.A., does not apply uncovered. Furthermore, the provisions of sec. 366, 1934 C.S.A., can not apply to investments made by Pilotage Authorities in their own name, such as is done, for instance, in Miramichi, or as done—until a few years ago—in New Westminster, because then such investments were not made "in the name of the Minister of Finance in trust for such funds". Furthermore, by reversing the sequence of the sections, the direct dependence of the question of investments on having a surplus in the fund after liabilities have been paid has been lost, thereby creating a further cause of confusion.

It is considered that the 1934 amendment was the result of failure on the part of those who drafted it to grasp the real meaning of a pilot fund as an institution. By identifying it with an investment fund (into which it had, in fact, developed), they encouraged a concept which is in conflict with the rest of the statutory provisions governing pilot funds.

Sec. 375 C.S.A. defines the only permissible ways the Pilotage Authority as trustee of the pilot fund may dispose of trust monies. Any other disbursement, therefore, becomes a misuse of public funds (vide C. 5), for the reimbursement of which the members of the Pilotage Authority are personally accountable in addition to the penal sanction to which such action renders them liable. The fact that by-laws exist purporting to authorize additional expenditures does not alter the situation because nowhere is any power given to anyone to make regulations modifying or enlarging the complete and limitative provisions of sec. 375. The only permissible expenditures from the fund are:

(A) administrative expenses of the fund, including the cost of legal proceedings in which the Pilotage Authority may become involved in its function of trustee (vide C. 8, pp. 322 to 325);

(B) benefits to incapacitated pilots during the period of their incapacitation and to dependents of deceased pilots;

(C) benefits to pilots whose licence was cancelled by a Court of Formal Investigation following a marine casualty.

Pilot fund monies can not be spent for any other reason. *Inter alia,* no payment is authorized, not even partial reimbursement of contributions, to pilots who retire voluntarily, or are compelled to retire for any other reason than in (B) and (C) above, e.g., either because their licence is forfeited for non-usage pursuant to sec. 336 or is cancelled by the Pilotage Authority for unreliability (vide C. 9, pp. 370 and ff.).

Subsecs. (a) and (b) of sec. 375 are a verbatim reproduction of sec. 83, 1873 Pilotage Act; subsec. 375 (c), is new legislation which was added in 1934 (subsec. 371(c), 1934 C.S.A.). Prior to that amendment, a pilot whose licence was cancelled by a Court of Formal Investigation could derive no benefit from the fund, even though cancellation placed him in financial straits. It was felt that since he had brought about his own misfortune, he was not entitled to the assistance of his confreres. It is considered that this 1934 amendment also arose from a misconception of the nature of the pilot fund because it was erroneously treated as a pension fund conferring acquired rights on the contributors although this is not the case with a pilot fund.

Sec. 708 C.S.A. creates a fifth source of income for the fund, i.e., any fine that a pilot or apprentice pilot is awarded for an offence against the provisions of Part VI or for a breach of pilotage regulations. This provision corresponds in substance to secs. 18 and 89, 1873 C.S.A. Due presumably to an error in drafting when the 1934 Act was prepared, when the distinction was made between a fine and a penalty, the former provision corresponding to sec. 708 was limited to fines and no disposition was made of the other penal sanctions that could be imposed, i.e., penalties. There appears to

be no valid reason for not having credited both fines and penalties to the pilot fund. In practice, there has been no problem because no use was made of the power of imposing penalties through regulations (vide C. 6, p. 201).

SPECIAL PROBLEMS

Nature of pilot funds

As indicated above, most of the amendments made in 1934 to the statutory provisions governing pilot funds were made under the erroneous concept that a pilot fund was synonymous with a pension fund, i.e., a fund whose contributors acquired rights to stated benefits. The wording of the unamended provisions and of the provisions prior to the amendments clearly indicates that a pilot fund was intended to operate so that liabilities were paid as they arose out of the fund itself and the investment of capital was not the governing factor but only a possible eventuality that would arise if a surplus remained after all current obligations were met. Such a fund was never supposed to be in deficit because any liabilities that remained after all the monies received from other sources had been expended were to be covered by an appropriate contribution from the pilots' earnings. In other words, this fund was to operate in much the same way as a District operational expense fund. This is far from the modern concept of a pension fund where each contributor acquires rights, so much so that, if he ceases prematurely to become eligible to benefits, he is normally entitled to withdraw his contributions. Such rights do not exist in a pilot fund: the only purpose served by the pilots' contributions is to pay current liabilities.

Like the operating expenses of the District, pilot fund benefits are, in fact, met by shipping through pilotage dues. The fact that they are collected from the pilots' earnings is only a method of indirect assessment because, when the Pilotage Authority fixes the dues, it takes into consideration what net earnings will remain for the pilots after all deductions from pilotage dues, i.e., their gross earnings.

Determination of benefits

While the existence of a pilot fund entitles the beneficiaries listed in the Act and in the regulations to some kind of benefit when in financial need, they do not acquire any right to a definite or predetermined amount. No specific sum is defined in the Act for any class of beneficiary and the Pilotage Authority is powerless to bind itself in advance by defining any benefits through regulations. The determination of benefits is not a matter of legislation but a matter to be decided administratively, bearing in mind the circumstances of each case, i.e., the degree of financial need, the extent of the fund's other liabilities and the amount available in the fund. Subsec. 329 (m) C.S.A., which deals with the naming of beneficiaries, allows the Pilotage Authority to establish the terms and conditions for those beneficiaries to

become entitled to participate in one of the many funds that may exist in the District but does not permit fixing the actual amount of such benefits. This is consistent with the nature of the fund which mainly depends upon current earnings for its operations and, therefore, precludes drafting legislation which will cause liabilities to be incurred automatically irrespective of the solvency of the fund. This is further substantiated by the text of secs. 358 and 375 (c) which make it a prerogative of the Pilotage Authority to fix benefits and place no conditions on the exercise of this power in contrast to the proviso which is always included when the power is to be exercised through regulations (vide, *inter alia,* secs. 327, 329 and 330).

Temporarily incapacitated pilot as a beneficiary

Another question of interpretation is whether the fund, as defined in the various texts of the Act, applies only to ex-pilots and to dependents of deceased pilots or whether it might also apply to active pilots who are financially distressed because their activities are suspended due to illness or temporary injury.

First, it must be remembered that the system was devised for free contractors whose only income was the pilotage dues earned by their activities and that interruption of their activities meant they received no revenue during any period of incapacitation. If subsec. 2(68) C.S.A., subsec. 319(*l*), 1934 C.S.A., sec. 490, 1927 C.S.A., secs. 358 and 375 are read together, this intention is clearly indicated.

Since the beneficiaries in sec. 358 are designated by different terms than those uniformly used in other sections, it is clearly indicated that a distinction is being made.

Sec. 358 clearly refers to retired pilots and dependents of deceased pilots who participate in a pilot fund by statute if they meet the conditions stated in that section. The statutory definition (subsec. 2(68)) distinguishes between retired, superannuated and infirm licensed pilots (the category "retired" was not added until 1934, probably to cover the new beneficiaries not previously covered, i.e., pilots whose licence was cancelled by a Court of Formal Investigation but who were neither superannuated nor infirm). "Superannuated" refers to a person who was compelled to retire because of age limit or incompatible disability. "Infirm" pilots are mentioned without further qualification (contrary to what is done in subsec. 329(j)). The word "infirm" used alone refers only to a person who at a given moment is not in good health either temporary or permanent. It is important to remember that the language used in these sections dates back over 150 years because these provisions are found almost verbatim in various sections of United Kingdom pilotage legislation predating our Confederation. In fact, in the U.K., these words have given rise to the same controversy and some Pilotage Authorities have interpreted them to authorize them to grant relief in cases of temporary

incapacity (vide Report of the Departmental Committee on Pilotage [United Kingdom] 1911, sec. 210). The same procedure was followed here in Canada in the early days of the Quebec Trinity House as is proved by the complaints filed by pilots against the obligation imposed upon them to pay back financial relief received during periods of temporary incapacitation. In the complaint the pilots forwarded to the Government in 1831 they urged, *inter alia*, that "all Pilots in case of sickness should receive a proportionate allowance from the same Fund, without being obliged to reimburse the same on the recovery of their health" (vide Part IV, Quebec District, *History of Legislation*).

SUMMARY OF GENERAL PROVISIONS

It follows from the foregoing general statutory provisions that:

(i) a pilot fund is merely an assistance fund of a benevolent character for pilots and their dependents in financial need; it is not a compulsory saving plan nor a plan in which contributors ever acquire rights to predetermined benefits;

(ii) to exist, a pilot fund must be created by District Regulations (except the Quebec Pilot Fund which was created by statute, i.e., the Quebec Trinity House Act); where none is created, the sources of revenue attributed to the Pilot Fund by statute must be paid to the Consolidated Revenue of Canada unless an alternative is provided (vide C. 5);

(iii) there are five sources of revenue for a pilot fund:
  (A) compulsory payment of pilotage dues when the conditions of sec. 351 C.S.A. are met;
  (B) quasi-fines imposed pursuant to sec. 350(1);
  (C) fines paid by pilots and apprentice pilots (sec. 708);
  (D) interest derived from the investment of any surplus after liabilities have been met (sec. 366, 1934 C.S.A.);
  (E) not less than five per cent of pilots' earnings levied by regulation to meet expected expenses and liabilities (subsec. 319(k), 1934 C.S.A.);

(iv) there are two types of beneficiary:
  (A) statutory beneficiaries who are:
    (1) retired pilots whose retirement was caused by age or mental or bodily infirmity (sec. 358);
    (2) widows or children of deceased pilots (sec. 358);
    (3) pilots whose retirement resulted from the withdrawal of their licence by a Court of Formal Investigation following a marine casualty (subsec. 375(c));

(B) regulation beneficiaries, i.e., pilots temporarily incapacitated through illness or injury, if this contingency is covered in a regulation (subsec. 2(68) C.S.A.; subsec. 319(*l*), 1934 C.S.A.; subsec. 329(m) C.S.A.; subsec. 375(b) C.S.A.);

(v) determination of benefits is left to the administrative discretion of the Pilotage Authority (subsec. 329(m), sec. 358 and sec. 375 C.S.A.); they can not be fixed in advance by regulation, but must be the result each time of an *ad hoc* administrative decision.

To complete the picture, it is worth mentioning that prior to 1934 there was an additional source of revenue for the pilot fund, i.e., the fees payable by Masters and mates for granting or renewing pilotage certificates. In the 1927 C.S.A., this was covered by sec. 471 which, with all the other provisions relating to pilotage certificates, was abrogated when pilotage certificates were put under the regulation-making power of Pilotage Authorities. However, the definition of the regulation subject matters contained in subsecs. 329(d), (e) and (f) C.S.A. failed to authorize Pilotage Authorities to legislate on the application of the fees they could impose. Of all the sources of income of the Pilot Fund, the pilots' contribution is the most important. The three first sources listed are always minimal. Interest will never be significant because large surpluses are not normally accumulated if the fund is managed on a strict basis of earnings and expenditures to ensure that a contribution is levied only when there is not enough money in the fund to meet current liabilities.

FACTUAL SITUATION

EXISTING PILOT OR PENSION FUNDS

The factual situation is totally different to that provided for by legislation. The term "pension fund" is used in District By-laws instead of *pilot fund,* thus clearly indicating the type of benefit scheme into which pilot funds have developed. As of 1963, only eight Districts (not counting St. John's, Newfoundland) had some kind of pension arrangement and there was none in the smaller Districts, except Miramichi. In addition, in all the Districts where the pooling system exists, the pilots enjoy many financial benefits, e.g., holidays with pay, sick leave with pay, medical and hospital coverage, incapacitation protection, all paid directly or indirectly out of the pool.

As of 1963, the situation in those Districts which possess some sort of pilot fund or pension fund was as follows:

(a) Six Districts where the Minister is the Pilotage Authority had a pension fund, i.e., British Columbia, Halifax, Montreal, Quebec, Saint John (N.B.) and Sydney.

(b) Three Districts where a local commission is the Pilotage Authority had coverage based on the statutory provisions:
  (i) Miramichi, a type of compulsory saving, i.e., a "money-purchase" plan, the annual contribution being used to purchase government annuities for the contributors;
  (ii) St. John's, Newfoundland, a form of compulsory saving whereby contributions were accumulated by the Pilotage Authority as trustee to be handed over with interest to the pilot when he left the service;
  (iii) New Westminster, a private group "money-purchase" plan administered by an insurance company to replace the District pension trust fund which the pilots voted to abolish.

(c) The four Districts of Bras d'Or, Churchill, Cornwall and Kingston where the Minister is Pilotage Authority had neither pilot nor pension fund.

(d) The thirteen other Districts where a local commission is Pilotage Authority, i.e., Bathurst, Botwood, Buctouche, Caraquet, Humber Arm, Pictou, Port aux Basques, Prince Edward Island, Pugwash, Restigouche River, Richibucto, Shediac and Sheet Harbour, had neither pilot nor pension fund.

In view of the importance of the question, the Commission employed The Wyatt Co., a firm of actuarial consultants, to study existing pilot or pension funds, analyse their benefits and appraise their actuarial situation. In their study, the firm reviewed all relevant testimony received during the various hearings of the Commission and also all available documentation on the subject, *inter alia,* the Audette Committee Report, and a number of actuarial studies made by the Department of Insurance on various occasions. Their report dated May 18, 1965, is contained in Appendix XII to this Part of the Commission's Report. In addition, each case is studied in detail in the other Parts of the Report dealing with the Districts concerned.

AUDETTE COMMITTEE REPORT

However, in order to appreciate how such a confused situation actually developed, as well as the attitude taken by Pilotage Authorities and the Government, it is relevant to refer to the Audette Committee Report of 1949 and to trace the sequence of events since then.

The Audette Committee was appointed August 10, 1949, by Order in Council P.C. 3978 "to consider and report upon pilotage and related matters" in the main Districts where the Minister was the Pilotage Authority, i.e., Halifax, Sydney, Saint John, Quebec, Montreal, St. Lawrence-Kingston-

Ottawa, and British Columbia. Their investigation showed that the question of the various pension funds that existed in most of these Districts was particularly disturbing. It is noteworthy that, although they detected the cause of the difficulty, they did not recommend a remedy. On pages 10 and 11 of their Report, they state:

> "Our witness went to great pains to show us that the difficulties had arisen as a result of confusing what was originally a Decayed Pilots' Fund with an ordinary pension fund containing certain insurance features. We do not think it essential to analyse this difference for the purpose of our report."

They continued trying to ascertain what organizational changes could be made to improve existing pension schemes, apparently taking it for granted that such institutions were required but without investigating whether such funds were permissible under existing legislation. On page 10, they bring out the two main reasons why the pension funds had deteriorated:

> "Our examination of the pension fund vicissitudes has led us to the belief that the difficulties in the various districts and the instability or insecurity of the various funds are due to the fact that the contributions by the pilots and the benefits paid out do not bear a sound actuarial relation one to the other. A further contributory cause has been the fact that the number involved in the various pension groups is too small for stability."

They found that the six pension funds existing in Districts where the Minister was Pilotage Authority were deeply in deficit and that the situation was bound to get worse because the pilots were not satisfied with the pension benefits derived from their contributions and were requesting a substantial increase. The Committee pointed out that if this was done the increase should also be extended to the actual pensioners in view of the decreased purchasing power of the dollar. As for the deficit, they say on page 11:

> "The total deficit of the amalgamated pension funds on their present basis is represented to us as now being approximately $1,500,000. We are further informed that, on the basis of benefits equivalent to $100.00 for each year of service, which is approximately what the pilots now seek, this deficit would be in excess of $3,000,000.00."

In order to correct the situation, the Committee pointed out that it would be an unbearable burden for the pilots if they were requested to make good the deficit and instead, in view of the share of the blame that the Pilotage Authority (i.e., the Minister) had to accept as the authority responsible for these pilot funds, it recommended that the deficit of $1,500,000 be made good by the Crown, that the six funds be amalgamated and that such amalgamated pension funds be strictly administered in order to keep them actuarially sound. Here are pertinent excerpts:

> ". . . we feel that the situation has now reached a point where the making good of the deficit by the pilots themselves would represent a crushing burden.
>
> Our recommendation is that the Government should make good this deficit of approximately $1,500,000.00 and that the pension funds of the various districts should be amalgamated in one fund completely under the control and in the

custody of the Pilotage Authority. We realize that some of this payment by the Government represents a compensation for its share of responsibility in the disaster which has befallen the Pilots' Pension Funds and that some of it is ex gratia."

". . . We feel that there would be a distinct advantage to all concerned in such an amalgamation as it would give a measure of stability which has been lacking."

In making this recommendation, the Committee failed to appreciate the situation as a whole. There was no possibility of centralizing a pension fund in the hands of "the Pilotage Authority" because under Part VI pilotage is essentially decentralized and there are as many Pilotage Authorities as there are Pilotage Districts. When the Committee refers to the Pilotage Authority, it is concerned only with the Districts where the Minister, as Pilotage Authority, had, in fact, become a central authority. The Committee did not take into account the other pension funds that existed or could be created in Districts where the Minister was not the Pilotage Authority.

On page 14, the Committee pointed out the cause of the inherent difficulty, if not incompatibility, of a true pension fund for pilots. This explains the basic changes that were made later on in the nature of the pension funds:

"It appears to us that contributions made by the pilots towards their pension funds cannot be made on the basis of a direct percentage of their earnings. These earnings fluctuate and vary over long periods and, in many cases, are seasonal. If the contribution to the pension fund is based upon a factor which is essentially variable, it may well be that the fund will again be faced with a serious deficit if the volume of business drops off or perhaps with a surplus if times are good. We do not think that any pension system should be set up on a basis involving a gamble with economic conditions and we recommend that the contributions to the pension fund should bear a direct actuarially sound relation to the benefits which the pilots seek to withdraw in their old age. In making this recommendation, we are fully aware of the fact that the burden of payment will be proportionately lighter in the better years and proportionately heavier in the leaner years. This is an inevitable result of economic principles . . .".

GOVERNMENT ACTION

The Audette Committee recommendation was not implemented; the Crown did not make good the deficit and the Pilot Funds were not amalgamated, even in those Districts where the Minister was Pilotage Authority. However, their report impelled the Government to take notice of the situation and the following action was taken:

(a) In order to make possible direct control over the Quebec Pension Fund, a 1950 amendment to the Act abrogated all special statutory provisions for the Quebec Pilot Fund. The effect of this amendment was to place the Pilotage Authority, i.e., the Minister, in full charge of the Quebec Pilot Fund as in the other Districts where he was Pilotage Authority and, at the same time, to deprive the Quebec Pilots Corporation of all the controls and powers they had

enjoyed over that fund since 1874. As stated earlier, this amendment was not to come into force until proclaimed; so far this has not been done and the Quebec Pilot Fund remains under the control and administration of the Quebec Pilots Corporation.

(b) The active pilots were required to make good the errors of their predecessors and of their Pilotage Authorities.

(c) Regulations were made to ensure actuarial relationship between contributions and guaranteed benefits.

In order to achieve these last aims, the Government exercised closer supervision over the pension funds and many actuarial appraisals were made by the Department of Finance as a result of which various adjustments were made both in contributions and benefits. Although the aggregate deficit of the six funds reported on is still very high, the situation in general has gradually improved. The most drastic remedial measure was taken in the Halifax Pension Fund: its benefits ceased for service after March 31, 1956, but the pilots were required to continue to contribute five per cent of their earnings to make up the deficit without deriving any eventual benefit. While this action was sound in practice, nevertheless it was illegal under the existing statutory provisions governing pilot funds. Once a pilot fund exists, the persons mentioned in sec. 358 C.S.A. have statutory rights to benefit from it and, although the amount of the benefit is left to the discretion of the Pilotage Authority, it must be reasonable and equitable, otherwise it becomes in effect a denial of those statutory rights.

As pointed out in the Audette Committee Report, it was actuarially unsound to provide through legislation for fixed benefits in return for variable contributions. For this reason, each pension plan over which the Government had control was eventually changed to a "money-purchase" plan combined with a deficit liquidation plan. The deficit was terminated on a certain date by altering future pension benefits to pension units determined by total contributions. Under this system there will never be a deficit but the pilots can not calculate in advance what amount they will eventually receive. On the other hand, since liabilities incurred up to that time had to be made good, part of the contributions made by the pilots were diverted in accordance with the liquidation plan to meet the deficit that had accrued up to then.

In 1962, the Royal Commission on Government Organization touched on the question of the pilots' pension plans and in volume 3 of the Report, pages 294 and 295, made the following comments and recommendations:

> "Only one fund is in a solvent position. Deficits in the others, which have been calculated to exceed $1.2 million, have arisen through a steady improvement in benefits without corresponding increases in contributions. These plans cover no

more than 360 pilots, and the deficiency on a per capita basis is extremely large. The Halifax plan has already ceased to operate, and others will encounter the same fate unless action be taken to place their financing on a sound basis.

Nevertheless, your Commissioners realize that a solution to this question is only part of the larger problem of clarifying the entire future status of pilots and the government's responsibilities to them.

We therefore recommend that: Either the pilots' pension plans be placed on a sound financial basis, or the government clarify its position by repealing those sections of the Canada Shipping Act that imply some responsibility."

ARRANGEMENTS MADE BY PILOTS

The latest trend has been for pilots as a group to contract out their pension scheme to insurance companies and corporate trust companies. The first pilots to adopt that method were the New Westminster pilots who, as a group, entered into a contract with an insurance company and obtained a group annuity. The plan was instituted October 1, 1958, to replace a pension fund previously administered by the New Westminster Pilotage Authority. The assets of the trust fund were transferred to the insurance company and allocated to the then members and retired members on the basis of years of service. Despite the fact that the terms of the pension contract with the insurance company are not detailed in the District By-law and that the Pilotage Authority neither created the new pension scheme by by-law nor exercises control over it, use is still made of the provisions of subsec. 319(*l*), 1934 C.S.A., to levy compulsory contributions for the support of a private fund. This situation is considered to be irregular. Since there is no pilot fund created under a New Westminster District By-law, no use can be made for other purposes, even with the pilots' unanimous consent, of the powers given by subsec. 319(*l*), to impose a privately arranged pension scheme by regulation. The pilots, as individuals, are at liberty to subscribe to any private scheme but their participation and their contributions can not be made compulsory under the Canada Shipping Act.

ACTUARIAL APPRAISAL

The actuarial appraisal of the pension funds of six Districts where the Minister is the Pilotage Authority that was conducted by the Commission's consultants (vide Appendix XII, Schedule 3), showed much improvement as of December 31, 1963. Although this may be partly attributed to better management of the various funds, another factor is the better yield obtained from investments which made it permissible for the actuarial evaluation to be made on an assumption of higher interest, i.e., 4 per cent instead of 3½ per cent which was the basis of the previous appraisals. It showed an actuarial surplus for British Columbia, Montreal, Sydney and Saint John, while Halifax and Quebec were still in deficit for $44,525 and $553,148 respectively.

RECENT DEVELOPMENTS

In order to bring the factual situation up to date, it is necessary to indicate some material changes that have occurred since the 1963 data on which the consultants' report was prepared:

(a) Effective September 23, 1963, the British Columbia pilots, following the example set by the New Westminster pilots, withdrew their pension trust fund from the trusteeship of the Minister of Transport and the Minister of Finance and handed it over to a trust company as the first instalment on the purchase price of pension benefits in a "money-purchase" plan that they agreed to as a group with the trust company. The book value of the assets of the fund as of December 31, 1963, not including accrued interest, amounted to $1,307,277, and according to the latest actuarial evaluation showed an actuarial surplus of $80,259. The contribution to the plan is still levied through regulations passed under sub-sec. 319(*l*), 1934 C.S.A. The necessary alterations to the sections of the District By-law dealing with the pension fund were effected September 22, 1966, by P.C. 1966-1812.

(b) When the Sydney pilots became Crown employees in 1966, they were automatically entitled to all the welfare benefits enjoyed by public servants including those provided by the Public Service Superannuation Act. In consideration of the transfer to the Crown of their accrued trust fund (book value as of December 31, 1963, not including accrued interest, $431,421), the Sydney pilots were credited for the purpose of superannuation in proportion to the value of their respective personal accumulated contributions and the fund liabilities to those already on pension were assumed by the Crown. This change is dealt with in regulations entitled "Sydney Pilots Pension Regulations" made under the authority of the Appropriation Act, No. 9, 1966, on January 19, 1967. At the same time, the Sydney Pilotage Authority, by By-law dated December 9, 1966 (P.C. 1966-2313), revoked Part II of its By-law, which dealt with the pension fund, and the other provisions, which fixed the compulsory contribution, thereby abrogating the pension fund it had created pursuant to the pilot fund provisions of the Act.

(c) The Montreal pilots have requested their Pilotage Authority to allow them to follow the example of the New Westminster and British Columbia pilots, but as of early 1968 this had not been authorized.

COMMENTS

Most pension funds still provide for the refund of at least a sizeable part of a pilot's aggregate contributions when he retires voluntarily before he is eligible for a pension, despite the fact that this is contrary to the statutory provisions governing pilot funds.

Whether pilot funds have developed into compulsory savings or insurance coverage, two facts are clear: no type of pension fund is permissible under present legislation and none of the existing plans provides the pilots with the financial protection they most need, i.e., against the ever present risk of premature retirement or temporary suspension following illness or accident. At first sight, it seems strange that the pilots have not reacted and requested effective protection and that the various Pilotage Authorities have not taken steps to provide such protection. The reasons are that the actual situation has changed materially and that most of this protection is now provided indirectly by programmes that did not exist previously.

The social environment in Canada is now totally different to what it was 100 years ago and pilots, like all other citizens, now enjoy a number of social and welfare benefits that obviate the necessity of benevolent programmes such as pilot funds. It is no longer necessary for a pilot to provide for minimum financial assistance for old age because this is already available through the Old Age Pension and, latterly, the Canada Pension Plan benefits that will accrue. In some provinces, the pilots are forced by provincial legislation to contribute to the Workmen's Compensation provincial scheme which, therefore, solves for these pilots the question of financial protection in case of injuries incurred on duty. There also exist a large number of public and private programmes to which individuals and groups may belong on a voluntary basis and which, for a reasonable premium, afford all possible types of protection, e.g., medical and hospitalization benefits, group life insurance, and pension plans. Any pilot who feels he needs special protection not already provided through the common fund can easily obtain appropriate coverage.

As seen earlier, the disappearance of free enterprise has resulted in pooling the earnings of all pilots as a group and pooling has made it feasible (in practice if not in law) to provide financial assistance in case of temporary disability by another means. The pooling rules provide for the continuation of remuneration during illness, which is treated as a normal permissible deduction from the common fund as are contributions to the Provincial Workmen's Compensation scheme where pilots are deemed eligible, as well as premiums for the group protection plans to which the pilots as a group have decided to subscribe. All the benefits derived therefrom are benefits that, pursuant to the present legislation, could only be provided from the pilot fund. Such sick leave remuneration, contributions and premiums could well have been paid out of the money accumulated for that purpose in a pilot fund, but a much simpler procedure is provided with the creation of such a common fund which, to all intents and purposes, if made legal, would render pilot funds obsolete as an institution.