Chapter 11

GENERAL RECOMMENDATIONS

PREAMBLE

This chapter contains the Commission's Recommendations of general application. Recommendations of a local character are contained in the other Parts of the Report which deal with specific Districts. The Recommendations listed and discussed here enunciate the principles on which the recommended new Canadian Pilotage Act should be based in order to meet present requirements and those of the foreseeable future. In addition, certain proposals regarding the most appropriate provisions to implement these basic principles are embodied in various Recommendations. Many other proposals in the form of comments, remarks and conclusions are contained in the ten previous chapters but they have not been listed here to avoid repetition and also because they should be read in their context for best comprehension. A case in point is the determination of pilotage dues which is studied in detail in chapter 6.

The Commission was greatly assisted in its task by the numerous recommendations made by individuals and group representatives who appeared before it, but because their general recommendations were invariably accompanied by recommendations of local character which had to be studied in the local context of the District or the area where they were made in order to be fully understood, these recommendations are not listed here but appear in the other Parts of the Report which deal with the District to which the Briefs refer. When drafting Part 1 of the Report and forming its general Recommendations, the Commission gave careful consideration to all recommendations received and made specific references to them as appeared appropriate.

LIST OF RECOMMENDATIONS

1. Existing pilotage legislation to be repealed and replaced by completely new legislation.
2. The new pilotage legislation to be a separate Act of Parliament.
3. New legislation to be clear, uncomplicated, adaptable and flexible.

4. Control over regulation-making to be improved; proposed regulations to be examined for legality by a competent independent authority before submission for approval.
5. A procedure to be provided to keep pilotage legislation up-to-date.
6. The new Pilotage Act to be fully comprehensive and to contain provisions applicable to all aspects of pilotage.
7. The scope of application of the new legislation to be extended to permit the effective use of pilotage as the ultimate means to achieve safety of navigation and safe, speedy movement of ships when required by the country's superior interest.
8. The Pilotage District to remain the unit of organization.
9. The Act to provide for the problems of contiguous Districts.
10. Non-organized areas to be subject to limited pilotage control.
11. The Act to contain legislative provisions of control for the protection of pilots, shipping and the general public.
12. Licensing to be the essential component of any form of public administrative control over pilotage.
13. The Act to define the basic minimum qualifications required for licensed pilots and approved pilots.
14. The direction and management of the service at local level to be performed by the Pilotage Authority in Districts where pilotage is a public service.
15. The principle of decentralization to be retained and fully implemented.
16. The Central Pilotage Authority to be a Crown agency corporation responsible to Parliament through a designated Minister.
17. The powers of the Central Authority to be enlarged to meet the new aims of proposed pilotage legislation.
18. The function of the Pilotage Authority to be entrusted in each District to a locally self-governing public corporation answerable as such to the Central Authority.
19. Responsibility for making the necessary regulations to be shared between the Central Authority and Pilotage Authorities, according to their respective jurisdiction, and to be exercised under proper control.
20. Pilotage Districts to be self-accounting units under the control of the Central Authority and subject to audit by the Auditor General.

21. A central pilotage equalization trust fund to be created to finance authorized operational deficits incurred by Pilotage Districts.

22. Compulsory pilotage to be imposed when, where and to the extent required in the interest of safety of navigation.

23. Personal exemptions to be an essential feature of any compulsory pilotage scheme and the Act to guarantee the right to such personal exemptions to Masters and mates who are competent to navigate their vessels safely in District waters.

24. Where pilotage is classified as an essential public service, the status of licensed pilots to be that of Crown employees or quasi-employees of the Crown, the former being preferable.

25. All pilots in a District, or each distinct group of pilots within a District, to be a statutory corporate body.

26. Increased statutory surveillance and reappraisal powers to be granted to the District Pilotage Authority.

27. Legislation to establish special methods of keeping Pilotage Authorities informed of the competence, fitness and reliability of pilots.

28. Pilotage Authorities to possess full powers of investigation to conduct administrative enquiries within their reappraisal jurisdiction and responsibility for the safety of navigation.

29. The Act to affirm the right, and make it an obligation, not to despatch when unfitness is suspected, and give the Pilotage Authority the right to impose preventive suspension when reappraisal has been, or is about to be, initiated.

30. The existing distinction between the reappraisal and penal judicial functions to be maintained, together with the allocation of each to different authorities.

31. Pilotage Authorities to be authorized to modify and increase the minimum standard of professional qualifications required of licensed pilots (and other licensees) during the tenure of their licence, and granted reappraisal powers in that field.

32. The Pilotage Authority's reappraisal power over physical and mental disability to be extended to include jurisdiction over temporary disability.

33. Reappraisal of moral fitness to be adjusted to the new pilotage organization but to remain subject to conviction by a regular court for a specified pilotage offence.

34. The Pilotage Authority and the appeal court in the reappraisal process to be untrammelled by rules of evidence and procedural requirements, provided the pilot is afforded an opportunity for full defence; any doubt to be resolved in favour of the safety of navigation.

35. Penal jurisdiction to remain with regular courts; a penalty system to be adopted as a summary procedure for dealing with minor offences.

36. The remedial power of courts created under Part VIII C.S.A. to be directed against pilots' certificates of competency and not their licences.

37. Power to impose suspension *per se* or pecuniary penalty following reappraisal to be denied; reappraisal award to consist only of cancellation of the licence or appropriate remedial action.

38. The Act to grant the District Pilotage Authority and the Central Pilotage Authority emergency powers to provide reasonable temporary pilotage service through alternative plans in case of a strike by pilots where the service is deemed essential in the public interest.

39. Pilot fund legislation to be abrogated; existing pilot or pension funds to cease as a responsibility of Pilotage Authorities and to be disposed of in such a way as to respect and guarantee acquired rights; in Districts where pilots are not Crown employees, welfare and insurance schemes to be imposed by District regulations if required by a substantial majority of the pilots.

RECOMMENDATION NO. 1

Existing pilotage legislation to be repealed and replaced by completely new legislation

The main conclusion derived from a study of the pilotage legislation in the Canada Shipping Act is that it is seriously out-of-date, unnecessarily complicated, obscure and ambiguous and, in some respects, incomprehensible to those who must implement it. The general plan of the Act became inconsistent and unworkable as a result of amendments which were incompatible with its underlying principles and legislation of general application which was approved without making the requisite correlative adjustments.

The Act is obsolete largely because it was drafted to meet the requirements of almost a century ago. Even at that time it was not original legislation but an adaptation of the legislation of the United Kingdom which was couched in language that dated back possibly more than 50 years. In 1873, Canada adopted the U.K. legislation, principles, style and wording. The only change in the general scheme was to avoid the expression "compulsory pilotage" by inventing "compulsory payment of the dues". Despite

this alteration, essentially the same system was, in fact, retained with the result that the Canadian Act was not as clear and simple as the U.K. legislation.

In addition to being unoriginal, the 1873 legislation was unrealistic because its basic scheme envisaged only port pilotage at a time when the most important pilotage operations in Canada involved river pilotage in the two Districts of Quebec and Montreal. This continued to be the situation, particularly after the St. Lawrence Seaway opened in 1959. River pilotage was treated as a case of exception by incorporating in the Act some of the operational provisions of the pre-Confederation legislation which governed these two Districts. Another important deficiency was the absence of any provisions dealing with the special problems of coastal pilotage, although the known extent of Canada's coast-line should have indicated the need for such legislation.

Since 1873, this composite legislation has been materially amended in two fields, both of which made the Act inconsistent and removed it farther from the realities of pilotage in Canada. First, all the provisions of exception which were made to adapt the basic legislation to river pilotage were gradually repealed without being replaced, leaving in operation only the basic scheme of the U.K. Act which is based on port pilotage; second, by introducing a system of exception that soon became the rule, the organization was basically altered by withdrawing the functions of the Pilotage Authority from local, independent, autonomous Boards of Pilotage Commissioners and entrusting these powers and responsibilities to a branch of the Government, the Department of Transport. This was accomplished by what may be termed the subterfuge of appointing the Minister of Transport Pilotage Authority in each of the main Districts, but without amending the basic provisions with which such a centralized and "remote-control" administration is in conflict.

Furthermore, Canadian pilotage legislation is obsolete because it does not provide for the present needs and requirements of pilotage. In Part VI of the Canada Shipping Act, we are still in the age of sailing ships which lacked the speed and manoeuverability of modern steamships or motorships and which had to rely on visual or audible signals to communicate with shore stations or with other vessels. According to the Act the pilots are still obliged to be on the look-out at the boarding station for ships on their "inward voyages". Moreover, the method of indicating that a pilot is required is to display the correct signal, which no longer exists, because the Governor in Council, who is responsible for defining the signal, never saw fit to do so for the obvious reason that, in practice, there is no requirement for it. For many years the services of pilots have been requested by radio long before ships reach the boarding station.

The scheme of the present legislation is based on free enterprise and independent, self-employed pilots, a situation that no longer exists in any Pilotage District in Canada. Free enterprise has been replaced by controlled pilotage so that assignments and earnings (whenever the pilots are not salaried employees) are shared equitably. Not only is this system not provided for in the Act but it is contrary to the basic principles of the Act, with the result that many of its most important sections are no longer applicable in any way.

It is considered that no attempt should be make to rejuvenate existing legislation by amendments. All indications point to a completely new Act tailored to meet present needs and based on altogether different principles. It should require Pilotage Authorities to play a much greater rôle in the control of the pilots and the service. Legislative reform is required in such depth that the fraction of today's legislation which may be worth retaining would not provide the necessary framework on which to build tomorrow's Act.

The new legislation should be drafted in simple, plain language, the organizational principles should be clearly set out and the sections grouped in logical sequence and arranged as simply as possible. (For further details see Recommendation 3.)

Since the Act is the foundation upon which the Pilotage Authority rests, the aim of the legislation is defeated if the Authority's powers, rights and responsibilities are not expressed in clear, simple, unambiguous and realistic terms. This fact is evidenced by the present chaotic situation: the Pilotage Authority no longer possesses or exercises any effective power and its rôle has been reduced to mediating between the pilots and the shipowners, always with conflicting interests.

RECOMMENDATION NO. 2

The new pilotage legislation to be a separate Act of Parliament

It is indeed suprising to note, first, the number of inadequate provisions in Part VI of the Canada Shipping Act that can not pass unnoticed, because they are so obvious; second, the extensive use being made of the illogical and illegal process of amending the Act indirectly by ultra vires regulations.

It is one of the principles of parliamentary procedure that the submission of a bill to amend legislation automatically places the whole Act before Parliament, however slight the amendment may be, a step whose consequences are unpredictable. Therefore, the Government is reluctant to introduce such bills unless the question involved is so important that it is impossible or impracticable to do otherwise. Furthermore, when such bills

are introduced, care is generally taken, as a practical way of limiting debate, to confine the amendment to the specific question at issue and consequently to exclude other amendments that may be desirable but are either less essential or are liable to cause controversy. An example was Bill S-3 (1959) which was proposed shortly before the St. Lawrence Seaway opened in an effort to deal logically with the new problems that were foreseen. The Bill attempted to amend the basic pilotage provisions with the aim of allowing flexibility and deleting sections that were no longer applicable. However, there was so much opposition that the Government decided not to put the Bill to a vote and it was abandoned. Bill C-80 (1960) was later introduced. In order to limit debate it dealt specifically with Seaway problems by the unsatisfactory method of legislation of exception. Nevertheless, this approach was successful.

The situation is also unnecessarily complicated by the fact that the Canada Shipping Act is a mosaic of a number of distinct and disconnected pieces of legislation that have as their only common denominator the fact that they are related to navigation and shipping. This causes serious drafting problems which are resolved at the expense of simplicity and clarity. Because of the rule of interpretation that in a given piece of legislation the same words should retain the same meaning throughout, definitions necessarily become either noncommittal or very involved. But the interpretation of any given provision becomes an intricate task on account of the other principle that a piece of legislation should be taken as a whole and that its separate provisions must be interpreted in terms of all the other provisions in the Act. Moreover, the present version of the Canada Shipping Act, which version dates from 1934, has always left much to be desired both in substance and drafting.

Another factor that has brought about this unsatisfactory state of affairs is the ease with which legislation is brought down by passing ultra vires regulations—and this with complete impunity. When changes in the structure defined in the Act itself become necessary and when all those immediately involved desire, or at least do not object to, the changes, legislation by regulation is a tempting, speedy and easy solution, despite the fact it is illegal. As seen in the Study of Legislation, this device has been regularly employed.

It is considered that the obvious way to resolve this problem is to make pilotage legislation the subject of a separate and distinct Act, as it was prior to 1906. On this point, it is interesting to note that when, in 1906, Canada adopted the consolidation formula that had been in force in the United Kingdom since at least 1854, the U.K. was about to revert to separate legislation for, in 1913, a new Pilotage Act was adopted there, thus implementing one of the recommendations of the Report of the Departmental Committee on Pilotage of 1911.

RECOMMENDATION NO. 3

New legislation to be clear, uncomplicated, adaptable and flexible

Since pilotage legislation provides the basis on which a public service is performed, it should be drafted in terms that are easily understood by those who use it at any level. This aim can not be achieved unless the legislation is coherent in design and clear in presentation. An intricate law is likely to be confusing. In the field of pilotage, such a law would prove difficult for most users to understand and the inevitable misinterpretations would soon force pilotage administration back into the same state of bewilderment and illegality that now prevails. Simplicity and clarity can be achieved by adhering to the basic rules of drafting and of logic.

A service must meet a need and, as the need varies, the service must change. Since pilotage is a service providing experts in local navigation, one of its main characteristics should be sufficient flexibility to meet changing requirements in different places and at different times. After the Act establishes basic principles and the essential structure of the service, including provisions of general application and minimum requirements, the remainder of the legislation should be flexible enough to satisfy the varying requirements of the service. Adaptability and flexibility are two essential characteristics of legislation that will apply successfully to such a diversified service as pilotage in Canada.

The study of the present legislation contained in the first part of the Report exposed defects that ought to be avoided and, at the same time, has pointed out some of the ways the desired simplicity and clarity could be achieved, namely:

(a) Use should be made of statutory definitions to restrict those natural definitions which are not precise enough for pilotage legislation, or to enlarge others to avoid repeated enumeration and a series of qualifying words. Key terms and expressions should be defined, such as "pilot", "navigate", "ship" and "compulsory pilotage" but meaningless, unnecessary or complex definitions should be avoided, e.g., the C.S.A. definitions in the present legislation of "Pilotage Authority" (subsec. 2(60)), "ship" (subsec. 2(98)) and "vessel" (subsec. 2(111)).

(b) The basic plan should be as simple as possible, e.g., the present financial system is unnecessarily complex and subsection (p) of section 329 dealing with the delegation of power, to give an example, is awkward and obscure.

(c) To make the Act easier to understand, principles and rules should be enunciated rather than implied by dealing with consequences or

exceptions, e.g., prior to 1956, the rule that only licensed pilots might be hired had to be implied from section 354 which merely listed the exceptions. No doubt it was found that the rule could not be enforced for lack of an express prohibition and finally, by the 1956 amendment, the rule was expressed in subsection (3) of that section. A similar misunderstanding exists as to the nature and extent of the surveillance rôle of the Pilotage Authority. Since this rôle is merely implied in the Act, there is a danger that it will be misconstrued and that the Pilotage Authorities will adopt a passive attitude toward it. In point of fact, this is precisely what has happened.

(d) The new legislation should be construed logically and not in the haphazard fashion of the present Act. Each subject should be fully dealt with before passing on to the next one. There are two main ways to draw up legislation: (i) subjectively, i.e., by dealing in turn with each authority and its powers; (ii) objectively, by following the organizational structure and by dealing fully with each subject-matter before passing on to the next (as it is now done with the question of exemptions in secs. 346 and 347). A sequence based on the first method is neither normal nor the most logical as the present legislation has proved. This sequence was adopted in the 1873 Pilotage Act but, through subsequent amendments, the second method was introduced with the result that, at present, there is a combination of both with resultant confusion. For instance, in the 1873 Act, section 18 (which is the origin of the present sec. 329) was drafted to include the full extent of the regulation-making powers of the Pilotage Authority. The Act at that time provided only statutory fixed exemptions. When it was decided that there should be more flexibility, the provision allowing the Pilotage Authority to vary some exemptions by regulation was, however, inserted immediately after the section dealing with exemptions (now sec. 346) rather than including it in the former section (now sec. 329) as a further subject-matter of regulations.

The main reason for misinterpreting the subject-matters of the regulations appears to have been the fact that grouping them in one section took them out of the context of the other specific provisions of relevant direct legislation.

(e) The new Act should also be drafted to conform with all statutes of general application, such as the Financial Administration Act (1952 R.S.C. c. 116), Regulations Act (1952 R.S.C. c. 235) and any provisions remaining in the Canada Shipping Act that might affect pilotage. If it is intended to deviate in any way, the exception should be clearly indicated.

The only practical way to achieve the necessary adaptability and flexibility is to delegate legislative power. Parliament should retain exclusive legislative control only over those sections of the Act which are of general application or have a permanent character. It is a practical impossibility to construct an Act which would cover in detail every individual requirement of all the pilotage services that exist, or may be created in the future, in the navigable waters of Canada's coasts, rivers, lakes, harbours and canals. Since a pilotage service is essentially governed by local peculiarities and requirements, it is impossible to set standards which would be applicable throughout Canada except for principles, the general outline of organization and essential minimum requirements. For instance, a service that will meet the relatively brief needs of harbour pilotage has very little in common with river pilotage, e.g., between Les Escoumains and Quebec, where the pilot's time and duty in charge of navigation averages 12 hours and may last much longer; or with coastal pilotage in a District such as British Columbia where the length of trips and the lack of land communications cause many administrative problems not met elsewhere. The structure is influenced by the number of pilots on strength. A very involved organization is needed if there are many pilots, e.g., in Quebec, Montreal and B.C., but such an organization would be meaningless and cumbersome in Districts where pilotage is performed by one or two pilots, e.g., Churchill and most of the small Districts in the Atlantic Provinces. The detailed organization of a pilotage service (and consequently of each District where the service is provided) is governed by local needs which can not be detailed in comprehensive legislation unless Parliament is prepared to approve, at least annually, the numerous amendments necessitated by changing requirements. Furthermore, such an Act would be so voluminous that the rules and organizational principles would be lost in a multitude of details.

The Act should also be drafted not only to meet the requirements of today but should also strive to provide rules, principles and a framework that would continue to apply for the reasonable future without constant change. Experience has shown that frequent amendments tend to be confusing.

However, this principle should not be carried to extremes. Experience has also shown that, unless effective controls are established, it is to be expected that the regulation-making authorities (re meaning of the term, vide C. 8, p. 243) will not fully discharge their legislative responsibility, with the result that legislation at the local level will continue to be incomplete, and administration will be arbitrary and illegal as at present.

From what has been learned from this study of the legislation, including the regulations, it is considered that the problem could be resolved if, *inter alia,* the following rules were observed:

(a) Provisions of general application and permanent character should be covered in the Act and not by regulation. For instance, it is

essential for all pilots to be of sound mind and in good health, to have excellent hearing and eyesight. Again, no pilot should be permitted to practice his profession if he is wholly or temporarily incapacitated by illness or injury or if he becomes the victim of a detrimental habit. Equally, it is no less serious in one District than in another for a pilot to perform his duties while under the influence of drugs or liquor. There is no valid reason for leaving the making of legislation on any of these matters to the discretion of Pilotage Authorities with the possible consequence that they will be overlooked or inadequately covered.

(b) The Act should establish general minimum requirements on any question where the following situation is found:

(i) it is essential that there be a standard of qualifications established by legislation;

(ii) this standard can not be fully covered in the Act because of local variations;

(iii) there is a level below which this standard must not be lowered.

Pilotage Authorities would be authorized to pass regulations raising this standard to meet the special demands of their District but would be powerless to lower it below these minimum statutory requirements.

For instance, if the Act stipulated that a pilot should hold a certificate of competency, second mate coastal, as a minimum requirement for a licence, Pilotage Authorities would be prevented from granting a licence to a person who, although expert in local knowledge, was not qualified to take charge of the navigation of a vessel, a competence which the statutory definition of "pilot" would imply he possessed (vide Recommendation 13).

(c) The Act should contain a set of provisions that are likely to apply in most Districts with the stipulation that such provisions may be varied (but not simply repealed) by regulations passed by each Pilotage Authority, if, and when, necessary, whenever failure to deal with such subject-matters would leave the legislation substantially incomplete. Such statutory provisions would become the law of the District unless amended by regulations.

This is the procedure that was adopted, and which worked well, to deal with the exemptions listed in subparagraph (e) of sec. 346 and sec. 347. Because the reverse procedure was adopted to cover granting exemptions to small vessels (except those registered in the British dominions) that is, the exemptions would be granted only if so provided in the District regulations and to the extent therein provided (subsec. 346(c)), this subject-matter is

inadequately covered (vide C. 7, pp. 227-228). Most Pilotage Authorities failed to make any regulations and the few who enacted legislation covered only a fraction of the problem. The result is that small vessels (except those registered in the British dominions) are subject to the compulsory payment of dues, an obviously ridiculous situation that led, in practice, to the non-enforcement of compulsory payment in these cases despite the resultant legislation. This highly irregular situation could not have developed if the procedure adopted for the exemptions listed in subsec. (e) of sec. 346 had been extended to subsec. (c).

If the Act had provided a standard form of pilot's licence which could have been modified by regulations to reflect whatever limitation the Authority was empowered to impose, instead of leaving the whole question of the form of the licence to be dealt with by regulations (sec. 333 and subsec. 329(e)), the present state of affairs would not have occurred. Since every Pilotage Authority has neglected to make appropriate regulations, no valid official pilot's licences exist, with the exception of those issued prior to the 1934 statute.

(d) Finally, the confirming authority, when confirmation of a regulation is required, should be given a more positive and active rôle (for meaning of the term "Confirming Authority", vide C. 8, pp. 245 and ff.); its powers should be extended:

(i) to provide *proprio motu* a District with essential regulations when its Pilotage Authority has failed to do so;

(ii) to correct and to amend regulations when submitted for confirmation, if they are substantially defective or ultra vires, or contrary to general pilotage and Government policies.

Care should be taken that these powers do not impinge unduly on Pilotage Authorities, and their limitations should be clearly stated in the Act, e.g., there should be no interference with discretionary provisions. (For further details, see Recommendation 19.)

RECOMMENDATION NO. 4

Control over regulation-making to be improved; proposed regulations to be examined for legality by a competent independent authority before submission for approval

The "regulations" herein referred to comprise the legislation made in the exercise of a legislative power delegated by Parliament, as defined by sec. 2 of the Regulations Act. In the field of pilotage, at present, such delegated

legislative power is exercised by two authorities: first, by the Governor in Council when he creates Pilotage Districts, fixes their limits, imposes the compulsory payment system and determines what signal a ship must display to indicate that a pilot is required; secondly, by the Pilotage Authority, principally when it establishes the criteria and rules under which the licensing power and its related surveillance power are to be exercised, but also in other matters, such as tariffs, exemptions, delegation of powers, licence and certificate fees, etc. (vide C. 8, p. 241 and ff.). Such regulations made by a Pilotage Authority are subject to confirmation by the Governor in Council, a requirement which was imposed as a measure of control to prevent misuse or abuse of this important power.

In support of the first part of this recommendation—that control over regulation-making should be strengthened—it suffices to refer to the situation revealed by the study of existing legislation contained in this part of the Report, which reveals that many pilotage regulations are illegal, apparently as a result of a deliberate abuse of this delegated power by the various Pilotage Authorities. The system must be improved, otherwise the same irregularities will continue. (For the proposed regulation-making procedure, vide Recommendation 19.)

It is also obvious that the present system of control is lacking in another area. The question of the legality of a proposed regulation is one among a number of factors which govern the function of approval. Other factors would include whether the proposed regulation is in agreement with general policies and whether, in the opinion of the confirming authority, the proposed modification is warranted for the District concerned. These are factors over which the confirming authority has discretion but, on the question of legality, there is no room for discretion and approval of an illegal regulation can not make it valid. It is essentially wrong that ultra vires regulations should be passed and allowed to stand because this constitutes an illegal usurpation of the powers of Parliament, whether done deliberately or not. Therefore, it is the primary duty of a confirming authority to ascertain that the proposed regulation is legal. The question of its pertinency is second in order of importance.

It is obvious that the confirming authority has, so far, failed to discharge this essential duty. Since it is realized that the Governor in Council, who is at present the confirming authority under Part VI, must be guided in these matters by his advisers, the cause of the error has been that, for one reason or another, these advisers have failed. It may be safely surmised that this has occurred either because they were not competent to judge the legality of the proposed by-law or because they were not in a position to give unbiased advice, or both.

The first alternative requires little discussion. A legal opinion on pilotage matters must necessarily come from a legal adviser who, in addition to his other qualifications, has an expert knowledge of all pertinent legislation.

This is not limited to the Canada Shipping Act but also includes: (a) other miscellaneous statutes like the 1860 Quebec Pilots' Corporation Act or the Quebec Trinity House Act which still has some application with regard to the Quebec Pilot Fund; (b) whatever pre-Confederation provincial legislation is still applicable; (c) other Federal statutes which affect pilotage legislation directly or indirectly. He must also be thoroughly conversant with the existing regulations of the District concerned to ensure that, from the legal point of view, a proposed amendment does not conflict with the rest of the regulations.

It is believed that the second alternative has been the main weakness of the system. The Royal Commission on Government Organization, when dealing with the functions of lawyers holding legal positions in departments, pointed out (Vol. 2, p. 397) that these lawyers "are not always principally concerned, like the Department of Justice lawyers, with determining whether matters referred to them are legal or illegal; rather their function is quite often to devise procedures to implement administrative policies". The confirming authority must have relied too much on these legal advisers, not realizing that they were not in a position to give the disinterested and unbiased opinion the situation required.

It is essential to obtain such an opinion from a legal adviser who, besides being an expert on pilotage legislation, is not part of the pilotage organization but is in an independent position with no responsibility for elaborating the policy being implemented by the regulation. It should be a matter of complete unconcern to him whether the regulation is approved or not.

It is considered, however, that it would be unwise to subordinate the exercise of the regulation-making power to any additional control beyond that of the confirming authority. The report of the legal expert should be considered merely an opinion made available to the confirming authority to assist it to decide what course of action should be taken. Responsibility for approval should rest with the confirming authority but a valid legal opinion should be an essential prerequisite. Whenever an amendment is made to the proposed regulation, even if it is effected by the confirming authority *proprio motu*, a second legal opinion should be obtained. As a means of control, each regulation should carry a certification from the designated legal authority merely to the effect that this formality has been observed without disclosing the nature of the opinion given.

It is considered that the indicated authority for this legal review is the Deputy Minister of Justice and that this requirement should be imposed by an appropriate provision in the Act.

RECOMMENDATION NO. 5

A procedure to be provided to keep pilotage legislation up-to-date

It is considered that there should be an appointed group with the responsibility of ensuring that pilotage legislation does not become out-dated. This group would take note of new and changing needs in pilotage and would scrutinize other legislation passed by Parliament to detect any provisions that might come into conflict with, or indirectly amend, pilotage legislation, so that the appropriate amendments could be submitted to Parliament as soon as necessary. If, in the past, approval had been systematically refused to all regulations (i.e. by-laws) that were ultra vires, and if the need for the measures that were sought had been genuine, the responsible authorities would have been forced to seek from Parliament the appropriate amendments to the Act. In the process, pilotage legislation would have been gradually revised. Therefore, implementation of the foregoing Recommendation No. 4 would have the indirect effect of helping to keep legislation up-to-date.

It is incredible that existing pilotage law has so completely ignored the numerous changes and considerable progress of the past hundred years in the fields of navigation, shipping and communications that most of the provisions of Part VI are verbatim repetitions of those contained in the 1873 Act which were intended for ships of that period.

The problem, however, is not peculiar to pilotage legislation but appears to be a common evil that plagues most types of legislation both in Canada and in most other countries. Jurists have studied the question and have suggested remedies. Some Governments have adopted various kinds of remedial action. For instance, in the United Kingdom, the task of revising the law is now the responsibility of the Law Commission, a standing commission established by the Law Commission Act of 1965 (Ex. 1502). It is reported to be exceptionally successful.

Dr. G. F. Curtis, Dean, Faculty of Law, University of British Columbia, made a special study of the question in a paper he presented at the Third Commonwealth and Empire Law Conference in 1965 (Ex. 1496). He remarked that the Royal Commissions and Minister's committees appointed from time to time to inquire into a particular branch of the law or legal administration "cover, in sum, but a small part of the law, . . . and . . . they are appointed *ad hoc,* and do not supply the element of continuity of review". He added that:

> "Occasionally a Royal Commission or a Minister's committee is empowered to engage a research staff. For the most part, however, the process of statutory amendment has to operate without this sort of assistance. Much legislative change is patchwork, taking form hastily in response to immediate pressures. It is not preceded by study in depth, either as to the form it should take or the effect it will have on the main body of the law. The legislative draftsman under such conditions must do the best he can working from incomplete data. The disordered state of a

> good deal of our statutory law, and its obscurity, is the staple of judicial and professional complaint, not always justified, but at any rate sufficiently well-grounded to warrant efforts being made towards remedy."

He remarked that "The need is for continuity of review and systematization of materials". His review of the revisory experience of the Law Revision Commission of the State of New York, which took final form in 1934 as a permanent agency, led him to the conclusion:

> "Nothing less than an official body, well financed, well staffed, and having as its mandate the review of the whole of the law and its administration, seems capable of meeting the need."

It is realized that the recommendation of Dean Curtis is beyond the scope of the mandate of this Commission but the state of existing pilotage legislation is a clear example of a law that has fallen behind the times. In this field, it is the duty of this Commission to recommend that a procedure be laid down so that any new pilotage legislation passed by Parliament will not be permitted to lose touch with reality and become out-dated and inoperative.

RECOMMENDATION NO. 6

The new Pilotage Act to be fully comprehensive and to contain provisions applicable to all aspects of pilotage

Pilotage in Canada is characterized by its great diversity. In none of the fourteen foreign countries where pilotage legislation was studied (App. XIII) did the Commission find as many different situations as exist in Canada and need to be covered in a comprehensive pilotage law.

Pilotage legislation in Canada should cover, *inter alia:*

(a) the full range of pilotage services;

(b) service provided in organized pilotage Districts as well as in non-organized areas;

(c) pilots of every status: employed by the Government or private companies, quasi-employees and self-employed;

(d) pilotage services provided through private or public enterprise;

(e) pilotage ranging in importance from an essential public service to one provided only for the convenience of shipping;

(f) organizations that are self-supporting and those that are not but which, nevertheless, require to be maintained in the public interest;

(g) existing services and those that are required but do not exist and, hence, should be created and maintained.

The most significant failure of existing pilotage legislation results from the limited and restricted concept of the pilotage service to which it applies

because Part VI C.S.A. is, in fact, no more than *ad hoc* pilotage legislation and, hence, is inadequate when applied to pilotage situations for which it was not devised. In essence, pilotage legislation in Part VI is simply licensing. The only permissible State control is power to debar from the pilotage profession any person whose assessed qualifications do not meet the required minimum standards, and licensed pilots whose qualifications are subsequently found wanting.

The Canada Shipping Act refers only to pilotage services which are in existence and no authority is granted to create a service where none exists, even if it is required in the public interest.

Under the present Act, the service must be financially self-supporting and the compulsory payment system is only a means of raising more revenue. But when dues have been raised to the maximum permissible level and a pilotage service still can not be self-supporting, there is no alternative but to abrogate the District and, therefore, to end the State's administrative control over the service. Direct or indirect expenditure of public money to maintain a local pilotage service is not permissible (vide C. 5). Hence, those Districts which have relied on public funds to meet a large proportion of their expenses, e.g., Halifax, Saint John, N.B., and Sydney, should have been abolished unless appropriate increases in pilotage rates were sufficient to keep them financially independent.

The Act applies only to free enterprise where pilots are self-employed, independent contractors who vie with each other for pilotage clientele and whose sole permissible remuneration is derived from the dues earned, less their operating expenses. The provision of pilotage services to shipping by pilots who are employed either by the State or a private concern, or who are quasi-employees, i.e., they are no longer free to enter into a pilotage contract but are directed by an authority, is completely incompatible with the existing Act.

A Master can not be deprived of his right to choose his pilot except in the exceptional case, provided for in sections 349 and 350 of the Act, when a pilot is imposed on him by chance and not through an ordered assignment.

Compulsory pilotage in the full meaning of the word is inconsistent with existing legislation (C. 7, p. 207), so much so that, when Canada was obliged to make pilotage compulsory in the Great Lakes Basin, legislation of exception (Part VIA) had to be passed. Under Part VI, pilotage always is optional.

The pilotage legislation of Part VI was conceived for port pilotage and its governing aim is the convenience of shipping. Pilotage was not given the status of a public service in which public interest transcends private interest nor was safety of navigation considered, except remotely (vide C. 3, p. 44). With such a limited concept of the rôle and importance of the pilotage service, it is only logical that Pilotage Authorities are guided by what the

shipping interests consider to be to their best advantage. It is a matter of record that Pilotage Authorities have generally yielded to shipowners' requests and have refused them only because the requests were quite unacceptable to the pilots or were considered unjustified to the extent of jeopardizing the efficiency of the service. Most basic changes have been made simply because the shipping interests yielded to the constant, persistent pressure of the pilots which, on more than one occasion, took the form of a strike.

This limited concept was already unrealistic and retrograde when it was introduced in 1873 in the first post-Confederation pilotage legislation. It is completely inadequate today because pilotage now exists principally to facilitate water transportation, to make navigation on Canadian waterways less hazardous and, thereby, to enhance the national economy.

Before Confederation, the vital importance of the St. Lawrence River as a means of communication and transportation was fully appreciated and no effort was spared to make it navigable throughout. In 1849, the Government of Lower Canada, realizing that navigation on the River remained hazardous, despite all the public money spent on improvements and aids to navigation, took a further step toward improving navigation by compelling Masters to turn over the navigation of their ships to Quebec branch pilots between Bic Island and Quebec (12 Vic. c. 114 secs. 53, 54 and 55). In 1864, similar compulsory pilotage was extended as far as Montreal (27-28 Vic. c. 58). In 1860, the free enterprise system was abolished in what was to be the Quebec District and replaced by fully controlled pilotage because both shipowners and pilots realized that the free enterprise system was not capable of providing an efficient and reliable essential service. At their own request, the Quebec pilots were grouped in a compulsory public corporation with full control over operational services, administration, despatching and pilots' earnings.

Ships have undergone great structural changes since 1873. They are now much larger and faster and have less manoeuverable space in restricted waters, with the result that rivers, harbours, channels, canals and locks are frequently used to their extreme margin of safe capacity. Under these circumstances, local knowledge in some areas must now be complete and accurate for all occasions. Masters who do not possess such precise knowledge have a great need for pilots and, in certain areas, can not dispense with their services (vide C. 3, pp. 41 and ff.). It would be unrealistic to continue to make Masters of foreign ships, some of whom may have little or, in some cases, no experience in Canadian waters, responsible for deciding whether or not to take a pilot, thus possibly endangering navigation. Disruption of water-borne commerce is unacceptable. International sea-borne trade is so essential to Canada that, in certain areas, maritime disasters, or the suspension of pilotage operations, or even official acquiescence in a pilotage service of doubtful efficiency and quality, will seriously affect the national interest.

Since 1873, the importance of the various pilotage services to the economy of the country have become progressively more apparent and, for this reason, the Government has felt justified in intervening more and more in the pilotage field, mainly by:

(a) spending public funds for the payment of District operational expenses (vide C. 5, pp. 116 and ff.);

(b) assuming full control in all the main Pilotage Districts over both pilotage operations and the pilots themselves, thereby abolishing the free enterprise system and the right of Masters to choose their pilots (vide C. 4, pp. 76 and ff.); and

(c) centralizing local administration in the Department of Transport in Ottawa (vide C. 3, pp. 58 and ff.).

This intervention, which altered the nature of the service, was taken on the ground of public interest, despite the spirit and the letter of the Act which remained unchanged, with the result that the principles of existing pilotage legislation are in constant conflict with reality and have been the main cause of the many administrative difficulties experienced ever since.

From the service point of view, pilotage has been defined as the ultimate means to enhance safe and speedy transit of ships through confined waters. It is a *public service* in the full sense of the word when it is controlled, maintained or provided primarily to serve the superior interests of the State; it is a *private service* when its main purpose is to serve private needs, but safety remains the principal aim in both cases: in the former, "safety of navigation" through Canadian waterways; in the latter, "safety of the ship", including safety of privately owned port installations.

Whatever the reason for the existence of a given service, the public derives advantages from it, although in varying degrees. As for any other occupation or profession, the extent of State interest is the measure of permissible State intervention in the freedom of the exercise of the pilot's profession. In some areas, pilotage is a public service in its fullest sense and the State is justified in taking complete control; in others, public interest is only incidentally involved and State control should be kept at a minimum.

No other maritime country has a situation such as obtains on the 2,280 mile long St. Lawrence-Great Lakes waterway where safety of navigation and the speedy transit of maritime traffic are so essential to the national economy. The blockage of a channel or canal in one section may well be reflected in a slowing down of traffic throughout the entire system and, in some cases, actual stoppage.

Port pilotage does not attain the same degree of importance but, on the other hand, any given port may assume greater importance than others by being geared to meet government planning for strategic or transportation purposes in the national interest. In that event, the importance of such a port

would become such that everything must be done to ensure safety of ship movement in order to avoid, as far as is possible, any interruption of maritime traffic.

Comprehensive pilotage legislation should provide for all these situations and authorize the extent of control warranted in all circimstances by the interest of the State. In some cases, legislative control will suffice while, in others, varying degrees of administrative control—ranging from licensing to full control of the pilots—will be required.

The extent of the Crown's financial involvement is also governed by the same national interest depending on the circumstances.

RECOMMENDATION NO. 7

The scope of application of the new legislation to be extended to permit the effective use of pilotage as the ultimate means to achieve safety of navigation and safe, speedy movement of ships when required by the country's superior interest

Except indirectly, the original aim of existing pilotage legislation was not to enhance safety of navigation; no vessel plying Canada's navigable waters (except in the Great Lakes Basin through a law of exception, i.e., Part VIA C.S.A.), could be compelled to employ a pilot at any time and under any circumstance. The purpose of the legislation was merely to provide a pre-selection of pilots for vessels which would normally require their services. Hence, it was logical to restrict the application of the law to such vessels and make it inapplicable to a large number of others, i.e., those not originally included in the statutory definition of "ship" which dates from the time of sailing ships. Evolution in the construction of vessels and their means of propulsion have long since made the original distinction between "ship" and "boat" meaningless and, if this distinction is to be retained, a new definition should be found. The exclusion of "boats" from the application of Part VI C.S.A. has become an unrealistic restriction which Pilotage Authorities have tried to correct by using the generic term "vessel" in their by-laws.

As explained earlier (vide C. 7, pp. 213 to 220), the complex but restrictive definition of the word "ship" and the ambiguity of the term "navigate" used in sec. 345 C.S.A., as limited by the terms "remove" and "move" in sec. 357, have caused serious problems of interpretation and the numerous judicial interpretations are often contradictory. This unsatisfactory situation should not be allowed to continue.

For the purpose of new pilotage legislation, the present statutory definition of "ship" is too ambiguous to be retained. Furthermore, legislation governing pilotage which, in given circumstances, is an essential public

service, can not be limited in its application to a restricted group of vessels unless it is unlikely the excluded vessels will become safety risks.

An efficient pilotage service is the most effective means of achieving safety of navigation and the safe speed movement of ships because it provides local experts for Masters who lack the required local knowledge. The scope of application of the Act should be all inclusive so that pilotage may be imposed on any vessel considered to be a safety risk in the local circumstances unless navigated by a competent mariner possessing the required local knowledge where (a) local pilotage is essential, (b) a shipping casualty is likely to interfere seriously with water-borne traffic, and (c) such interference would greatly prejudice public interest. Furthermore, vessels that are not ships should not be deprived of the right to obtain the services of a pilot if the Master so requests and the Pilotage Authority should have the power to fix by regulation the appropriate rates for services rendered by pilots to those vessels. Both this right and this power are at present denied under the legislative provisions of Part VI because its scope of application is limited to "ships". To achieve this, the scope of the Act must be enlarged to apply to all vessels as defined below. This requires, *inter alia*, that such key terms as "vessel", "navigation" and "pilot" be given the widest possible meaning in appropriate statutory definitions.

The generic term "vessel" should be used instead of "ship" and its statutory definition should be broad enough to encompass all water-borne objects being navigated, whether under their own power or moved by other means, i.e., whenever their movement is controlled and directed by man. A vessel should mean the whole unit of navigation, irrespective of the number of its components.

Under such a definition, "vessel" would mean and include for pilotage purposes not only what are now referred to as boats and ships but also any water-borne object that is being towed, such as a boom, raft, barge, scow or even a crib being towed to its position. All the components that participate in a particular act of navigation would be considered one vessel, one unit of navigation at that moment, e.g., the tugs that assist in berthing or unberthing a ship, whether or not the ship's engines are used, would be considered one vessel together with the ship they assist. Similarly, a tug and its tow, whether it is another ship, a barge or a string of barges, or rafts, would be considered one vessel. All such components are, in fact, only one unit of navigation under the direction of one navigator.

A definition of this magnitude would not fit into the composite legislation of the Canada Shipping Act but it has an obvious place in an Act designed to promote safety of navigation. Since all water-borne objects, including rafts and booms whose individual safety is of relatively minor importance, may become serious navigational hazards if they are improperly handled, it is pertinent that provisions to control their navigation should be included in pilotage legislation.

For the same reasons, the terms "navigation" or "navigate" should be given the broadest possible meaning. To avoid past controversy, navigation should be defined as "any movement that a vessel (as defined above) makes or is caused to make under the direction and control of a person in charge" or words to that effect. A vessel would then be considered as being navigated whether or not the vessel is using its own propulsive power. Hence, if the person in charge causes a vessel to be moved by external means—current, winds, mooring lines, or tugs—the vessel is being navigated for the purpose of pilotage legislation. Thus, the only situations when a vessel would not be navigated would be when immobilized, i.e., made fast to the shore or at anchor or aground, or when not under the control of any person, e.g., when adrift and out of control. If it should be necessary to deal with a specific type of vessel, e.g., for compulsory pilotage, or for a specific type of movement, this could be readily indicated in the legislation by the use of appropriate qualifying words.

The statutory definition of the term "pilot" contained in subsec. 2(64) of the Act is adequate as to substance but, as to form, should be modified to remove ambiguity and thus avoid the numerous misinterpretations and controversies caused by the present wording. Specific comments and proposals were made on this subject in C. 2, pp. 21-33. The term "ship" in the definition of "pilot" should be replaced by "vessel" as above recommended.

The definition of pilot, however, should not prevent new legislation from dealing with other types of navigational assistance that can be given to Masters by persons not belonging to a vessel. When and where it is necessary to deal with other types of assistance, appropriate wording should be adopted to avoid any ambiguity.

RECOMMENDATION NO. 8

The Pilotage District to remain the unit of organization

Essentially, an organizational plan is subordinate to the enterprise or service for which it exists and must be drawn up accordingly. Hence, there can be no standard method of organizing dissimilar enterprises and services. Pilotage is no exception to this rule.

A pilotage service is essentially local in character and is subservient to the needs of those vessels for which it is provided. A pilot is differentiated from other competent mariners by the specific knowledge and skill he has acquired to make him expert in the art of navigating in certain waters outside which he ceases to be a pilot. The type of assistance needed by ships in a given locality determines both the nature of the pilotage services provided and the organization which supports them. Except for a few general principles, the system of organization varies from area to area and is materially

influenced by local peculiarities and circumstances, with the result that the rules which are appropriate in one locality may not apply in another.

Hence, the factors which determine the size and organization of each District should be the nature and extent of the pilotage services provided. The more difficult navigation is in given confined waters, the more limited should be a pilot's range of operation in view of the intimate knowledge he must always possess of the peculiarities, hazards and changing conditions of those waters, and the constant experience he needs to maintain his competence. The establishment of a large District suggests either that navigation within its limits offers few serious difficulties or, if this is not the case, that its pilots obtain only general qualifications because, for practical reasons, it is not feasible to train the specialists the term "pilot" essentially connotes.

The two main purposes of a complete body of pilotage legislation are to create the necessary machinery:

(a) to define the qualifications required of pilots, and to determine that pilots meet these qualifications;

(b) to direct and, if necessary, provide pilotage services when and where required in the national interest.

Both aims must be related essentially to the restricted area for which pilots are qualified. The efficiency of the organization is in direct relation to the degree of intimate knowledge the Authority has of the nature, peculiarities, conditions, circumstances and problems of the District. In other words, each District Pilotage Authority, together with its officers and advisers, must be expert in its own field.

Normally, there should be one District for one homogeneous group of pilots, whether the service existed prior to the Crown's intervention or whether it is organized and provided by the Crown, unless more than one group of pilots are engaged wholly within the same, or part of the same, area. In the interest of efficient organization and administration, part or parts of a given Pilotage District might, in certain circumstances, be served by one or more separate groups of pilots, e.g., the Montreal River (upper part) pilots, and the Montreal Harbour pilots, both of whom perform pilotage in the harbour of Montreal. For organizational purposes, both groups must come under the same authority. If, however, the river pilots ceased to be legally competent in the harbour, the harbour area should be segregated and made a separate District. The Montreal District should have been divided into two separate Districts in 1959 (this would have required an amendment to the Act) when the pilotage trip between Quebec and Montreal was divided at Three Rivers to allow the service in each sector to be performed by a separate group of pilots. It is also irregular to issue to the pilots of both groups (as is now done) a licence which vouches for their competency in both sectors, despite the fact that they actually pilot and, therefore, maintain their competency in only one.

The principle of one District for each distinct pilotage service may be departed from in special circumstances for practical reasons. In the organization of pilotage (except for essential basic principles) there should be as few hard and fast rules as possible. One of the main characteristics of good pilotage legislation is flexibility to permit the application to the many different situations that exist.

First, there are small ports where pilotage is required and pilots are available but traffic is only occasional or is insufficient to keep more than one or two pilots reasonably employed. In these ports, pilotage is not an essential public service and the limited administration involved should not extend beyond licensing and its corollary: surveillance, reappraisal, regulation-making and rate-fixing, but not control of operations. In these circumstances, the difficulty and expense of organization do not warrant making each port the separate District it should theoretically be. Provided these ports are in the same geographical area, the merger type of District is indicated, e.g., the system which was adopted in Prince Edward Island for these same practical reasons and which works remarkably well (vide C. 3, pp. 47 and 48). The governing factor as to the extent of the merger is what area the Pilotage Authority can be reasonably expected to control effectively in the light of local circumstances and the extent of the duties and responsibilities imposed upon it. The five P.E.I. port pilotage services are neither integrated nor interconnected but are grouped solely for administrative purposes.

In the merger type of organization:

(a) ports should not lose their physical identity;

(b) their waters should not be artificially connected by stretches of open water where pilotage is not required (which is the defect of the present organization in the Prince Edward Island District);

(c) as far as regulations, licensing and rate-fixing are concerned, ports should be treated as separate service areas, e.g., the Montreal District By-law which contains two separate provisions for harbour pilots and river pilots.

Secondly, there is the situation that obtains when no pilot is available locally and the demand for pilotage does not warrant the establishment of a permanent pilot station because of the required organization, including boarding facilities, e.g., the approaches to Kitimat in the B.C. District. The practical solution in this case is to attach such an area to an existing District whose pilots provide the necessary service until conditions permit the creation of a separate District. Meanwhile, the quality of the service depends on the experience District pilots are able to acquire in that locality; there will be little opportunity to gain experience if the occasional assignments are spread among all the pilots.

Thirdly, isolated areas or ports in the vicinity of a Pilotage District, which have their own pilots (e.g., the lower St. Lawrence ports situated outside the Quebec District), may also be joined to that District (but not the non-pilotage waters between them) for the purpose of licensing and rate-fixing only, thus obtaining all the advantages of a Pilotage District and, at the same time, being relieved of the burden of administration. In such a case, the licence of the pilots of the District would not extend to the attached area or port, and vice versa, and the District regulations should contain *ad hoc* provisions which meet the local needs of these attached ports.

Fourthly, since much of Canada's coastline remains uninhabited, many areas have few, if any, pilotage requirements at present. As long as these conditions prevail, the creation of Pilotage Districts is not warranted in them and they should remain unorganized areas. The nature of the pilotage service in such unorganized areas is the subject of Recommendation 10.

If possible, there should be one pilotage trip inward or outward, provided this does not involve unusual working hours under normal conditions. For longer trips, the pilotage area should be divided into separate contiguous Districts and pilotage performed by different groups of pilots. The criteria governing demarcation lines are:

(a) the area in which the pilots may reasonably be expected to acquire their qualifications and maintain their competence;

(b) the period of duty which is considered normal under the navigational conditions generally encountered.

The problems created by the contiguity of Districts are dealt with in Recommendation 9.

Pilotage is a service and, hence, can not exist where it is not needed. The service is required when the navigation of confined waters poses problems that can be solved only by local knowledge and experience, but in areas where no particular navigational difficulties are found, there is no need for pilotage and such areas should neither be established as Pilotage Districts nor included in an existing Pilotage District. Therefore, open coastal waters and any large body of water—gulf, estuary or lake—where navigation is conducted in its normal manner should not be included in Pilotage Districts. For this reason, it would be unnecessary and unrealistic to include in pilotage waters the open waters off the coast of the Atlantic provinces, the Gulf of St. Lawrence or Hudson Bay. However, in certain cases, stretches of open water must be included in a Pilotage District as a necessary accessory to provide service, but such inclusion is merely incidental because circumstances make it necessary to do so. The most common example is the boarding area which should be located in open water to allow vessels room to manoeuvre in all types of weather when embarking or disembarking pilots. Comparatively long stretches of open water may be included when it

is either impossible or impracticable to provide a boarding area near the approaches to confined waters, e.g., most ports in the northern sector of the B.C. District are in this category at present. This situation should not continue to exist when conditions change and the traffic justifies a boarding area near the approaches to confined waters. Therefore, in these circumstances, whether or not open waters are included in a District depends upon the provision of pilotage services for confined waters.

RECOMMENDATION NO. 9

The Act to provide for the problems of contiguous Districts

Existing pilotage legislation totally ignores the problem of providing ships in transit with uninterrupted pilotage service when they reach the boundary between contiguous Districts. The result is that the Authorities of such Districts are faced with legal issues for which the Canada Shipping Act offers no solution and, at the same time, the pilots are constantly forced to act in an illegal manner (vide C. 3, pp. 48-51).

The Pilotage Authorities of contiguous Districts have no power beyond the limits of their own District and, therefore, can not order their pilots to pilot beyond the limits of their District, even to change over. They also lack the power to extend by agreement their respective jurisdiction to cover a zone adjacent to the common limit of the Districts. The two Pilotage Authorities concerned can not legally come to any agreement to solve these problems because a Pilotage Authority can not make regulations and fix tariffs for pilotage performed either outside its District by its own pilots or within its District by pilots of the other District who are not licensed for its District.

Once a pilot crosses the limit of his District, he is considered unlicensed (C.S.A. subsec. 333(3)). If he continues piloting while waiting to be relieved by a licensed pilot of the other District, he acts illegally and is liable to be prosecuted (sec. 356) unless he decides to do so for the safety of the ship in the absence of a licensed pilot, in which case he is entitled to part of the remuneration of the other pilot for services rendered until he was superseded (sec. 355). However, a pilot is not obliged to stay with a ship even for a question of safety; he has the absolute right to quit a ship "as soon as she passes out of the pilotage district for which his licence extends" (sec. 361) and, therefore, is not obliged to await the arrival of a relieving pilot (vide Recommendation 11).

In addition, both Districts are autonomous and their respective Authorities are quite independent of one another, despite the fact that shipping needs an integrated pilotage service from District to District in order to provide uninterrupted service for ships in transit.

The situation has been well handled up to now by mutual agreement, mainly due to the fact that most contiguous Districts have the same Pilotage Authority, i.e., the Minister. But these are artificial solutions. If the Pilotage Authorities concerned fail to agree, there is no mechanism for reaching a binding decision, to the possible prejudice of the service.

Up to about 1935, the Quebec and Montreal Pilotage Authorities each operated their own independent pilotage station in Quebec City, although the Minister had been the Pilotage Authority of both Districts since 1905. It was realized that, in view of their inter-relation, operational efficiency indicated a single despatching service with one pilot station. Although these were not authorized by the Act and no mention was made of them in their By-laws, unification was effected by combining the two pilot stations at Quebec into one under the authority of the Quebec District Supervisor who then exercised full authority over the pilots of both Districts when they were in Quebec Harbour. This was done as early as 1935, as is evidenced by the case of Gariépy v. Boulay (Ex. 1466(d)), when the Montreal pilot Gariépy appealed against the sentence awarded him by the Quebec District Superintendent for not obeying a despatching order August 30, 1935.

The same situation applies to the other St. Lawrence River Districts which share a district limit and to the Districts of New Westminster and B.C. with the difference, however, that they have no joint territory at their common boundary such as the Act provides for the Districts of Quebec and Montreal. This has created serious administrative problems at St. Regis (vide Part IV Pilotage District of Cornwall) and even at St. Lambert Lock (vide Part IV Pilotage District of Montreal). The legality of the orders given to pilots by a Supervisor of another District or by his staff has not yet been challenged but it would appear that these orders are legally invalid in the absence of jurisdiction and for lack of delegation through By-laws (subsecs. 327(2) and 329(p) C.S.A.). Furthermore, the pilots of each District continue to be governed by their own regulations with the result that both groups, while acting in the same territory, are governed for surveillance and disciplinary purposes by different legislation. In the Gariépy case, the right of the Quebec District Superintendent to assign and judge a Montreal pilot was not questioned; the judgment was quashed, not for lack of jurisdiction, but on account of abuse of power by the Superintendent.

In order to ensure continuity of pilotage service from one District to another, the Act should provide for establishing joint territory at the common boundary and integrating auxiliary services at the changeover point.

The Act should first require the establishment, inside the territory of one District next to the common border, of a boarding zone in which the pilots of the contiguous District may legally navigate to commence or terminate a pilotage trip to or from their own District. For other purposes, the area in question should pertain exclusively to one District, e.g., movages

should be performed only by the pilots of the District in which the territory is located, unless a movage from anchorage to berth or vice versa, or from berth to berth, is merely the continuation or the beginning of a trip from or to the contiguous district.

The Act should provide that the pilots of contiguous Districts come under the authority of the Pilotage Authority of the District in which the joint territory is situated for the purpose of surveillance and despatching. That Authority would then be automatically considered the legal representative of the Pilotage Authority of the contiguous District and, therefore, would be bound by its legislation and despatching rules.

The duplication of auxiliary services at the changeover point should be prohibited; the Act should empower the Pilotage Authorities of the Districts concerned to make agreements for the provision of joint auxiliary services, subject to the approval of the Central Authority. Any disagreement should be settled by the Central Authority and, if the District Pilotage Authorities concerned fail to provide the necessary joint auxiliary services, the Act should provide the Central Authority with power to take the necessary decision in lieu of the District Authorities, after these Authorities and all other interested persons have been given the opportunity to present their views (vide Recommendations 17, 18 and 19).

RECOMMENDATION NO. 10

Non-organized areas to be subject to limited pilotage control

It would be both illogical and impractical to insist that pilotage services be available in all navigable waters of Canada as would be the case if they were all divided into, and completely enclosed in, Pilotage Districts. As pointed out in Recommendation 8, no area of open water should normally form part of a Pilotage District because pilotage services are not required. However, there are other areas where, although pilotage might be warranted because of special local conditions, it is of little economic importance, for the time being, whether or not vessels transit or navigate them speedily or, in fact, can navigate them at all without the services of a pilot. Therefore, until the situation changes, these areas should not be demarcated as Pilotage Districts.

However, neither the Act nor those responsible for its implementation should ignore the private pilotage services that are, or may be, provided in these areas. Reasonable assistance should be extended to encourage those who provide, or may wish to provide, pilotage services in these unorganized areas but, at the same time, minimum control should be exercised to ensure the quality and reliability of the services thus provided. This could be achieved:

(a) in a general way, by providing legislative control through statutory provisions designed to protect both shipping and those who pilot in good faith;

(b) more particularly by extending the administrative control of licensing as far as practicable.

Specific matters that should be the subject of such statutory provisions of legislative control are dealt with in Recommendation 11.

As for licensing, there are practical obstacles that preclude its general application. As recommended in Recommendation 8, when the areas in question are not unduly remote from an existing District, it is considered they should be attached to it for licensing, surveillance and rate-fixing only, thereby granting their pilots the status of licensed pilots with all the privileges this status entails.

When such an affiliation with an existing District is not feasible, every effort should be made to recognize the qualifications of the pilots providing the service. The Act should specify that persons performing pilotage, or willing to pilot, in such areas are entitled to have their qualifications appraised. The appraisal function, as well as the surveillance and reappraisal this entails, should be made the responsibility of an existing (normally the nearest) District Pilotage Authority to be designated by the Central Authority. When a District Pilotage Authority has already been made responsible for one pilot in the area, it should automatically be responsible for other persons in the same area wishing to have their qualifications approved.

It is considered that appraisal and surveillance should be made the responsibility of an existing District Pilotage Authority because the rare cases likely to occur do not justify the creation of a specific organization for that purpose and that the responsibility should be placed with the District Pilotage Authority rather than the Central Authority because the former already is familiar with the problem of licensing and also because such functions do not fall within the ambit of activities of the Central Authority.

Because these are only *ad hoc* cases, the standard of qualifications and the terms and conditions of appraisal should be left to the entire discretion of the appraising authority (i.e. the designated Pilotage Authority) which should base its decision on its experience in that field and the requirements of the services for which the pilot is being appraised. However, this should not prevent the Pilotage Authority concerned from making specific regulations to cover these cases, or indicating, either in regulations or in the appraisal report, that specific regulations apply (vide Recommendation 18).

A distinction should be made between these pilots and those licensed for a Pilotage District so that the former will not be mistaken for the latter,

as is being done by countries where a similar procedure exists. A suitable appellation might be "approved pilots". The appraisal finding, together with its terms and conditions, including the limits of the waters in which the pilot's qualifications apply, should appear on the document of approval.

Such a document will give the pilot concerned only official recognition of his qualifications to navigate in the defined area but will not grant him the privileges pertaining to licensed pilots, e.g., the right to supersede a non-approved pilot. The names of approved pilots, together with a description of the limits of their jurisdiction, the necessary information how to obtain their services and a definition of the term "approved pilot", should appear in all official publications dealing with navigation in the areas concerned. A similar system exists in the United Kingdom with respect to coastal pilotage (vide App. XIII).

RECOMMENDATION NO. 11

The Act to contain legislative provisions of control for the protection of pilots, shipping and the general public

Whenever pilotage is provided, even by a person whose competence has not been officially assessed, either within a Pilotage District when such exceptional action is permissible or outside a District, it always remains a service from which the public derives at least some benefit. Hence, Parliament is justified in intervening generally in the pilotage field by providing legislation of general application aimed at improving the quality and reliability of the service wherever it exists, while also granting protection to those who provide *bona fide* services.

As demonstrated in Chapter 2 (pp. 33-37), Part VI C.S.A. contains such general provisions, but this is not obvious because the language of these provisions does not indicate their general scope and because they are combined with provisions dealing specifically with organized pilotage. It is considered that the new Act should contain such general provisions of legislative control and that they should be drafted so as to leave no possible misunderstanding about their scope of application.

The present statutory definition of the term "pilot" becomes a prerequisite in pilotage legislation designed to cover the whole field of pilotage. The suggested modifications in Recommendation 7 do not alter this basic situation since their aim is simply to improve the existing definition. Hence, when the term "pilot" is used alone (unless the contrary appears from the context), it means any person not a member of a ship's complement who navigates that ship at a particular time. This person, licensed or unlicensed,

registered or approved, deserves official recognition and basic protection when he legally provides pilotage services. Conversely, shipping should be protected against possible misrepresentation and any wrongdoing by those who so act as pilots, whether or not they have an official status.

The main features that should be covered in such legislative control are:

(a) *Statutory provisions for the protection of shipping*
  (i) by defining appropriate statutory offences to protect vessels against misrepresentation, wrongful acts or omissions of a pilot, or persons unlawfully or wrongly claiming to possess the required competency to pilot;
  (ii) by providing means to prevent any person from piloting if he is considered a safety risk;
  (iii) by making it a statutory obligation for a pilot to remain on board a ship as long as necessary for the safety of the ship;

(b) *Statutory provisions for the protection of pilots*
  (i) by limiting their civil liability;
  (ii) by providing added protection to the pilotage claim;
  (iii) by providing a short prescription (time limitation) for claims against pilots;
  (iv) by providing means to enforce the pilots' right to be disembarked on completion of their piloting duties.

Statutory offences applicable to all pilots

For the protection of the public and particularly of shipping, the Act should create statutory offences applicable to all pilots, including the following:

(a) by retaining the indictable offence contained in sec. 369 C.S.A., i.e., for any person acting as a pilot to endanger a ship or the life or limb of any person on board by breach or neglect of duty or by reason of being under the influence of intoxicating liquor or narcotic drugs (vide C. 9, pp. 343 and ff.);

(b) by providing a lesser offence for any person to be under the influence of intoxicating liquor or narcotic drugs when acting as a pilot, or about to act as pilot, or when offering his services, despite the fact that the safety of a ship or of any person on board was not thereby endangered (vide C. 9, p. 395, and Recommendation 33);

(c) by retaining the offence described in sec. 371, i.e., endangering a ship "by any misrepresentation of circumstances upon which the safety of a ship depends";

(d) by making it an offence for a person to make any misrepresentation as to his actual status as a pilot, or the extent and limits of his legal or professional competency, even though such misrepresentation may not have endangered the safety of a vessel;

(e) by creating an offence for any person to offer his services as pilot or to act as such when under a prohibition to pilot, or when his marine certificate of competency or his pilot's licence, approved document or personal pilotage exemption certificate has been suspended on the ground that he was considered a safety risk as a pilot or as navigator of a vessel;

(f) by extending to all pilots the offences listed in sec. 368;

(g) by providing that if a person charged with one of the higher offences listed in (a) or (c) is not found guilty of that offence, he may be found guilty of one of the lesser offences listed in (b) or (d), if proven.

The Act should provide also that a licensed or approved pilot who is found guilty of any of these offences should be subject to reappraisal (vide Recommendation 33); any other type of pilot should be liable on conviction to either a permanent or temporary prohibition to pilot as recommended in the next paragraph.

Extension of jurisdiction of statutory courts listed in Part VIII C.S.A.

It is considered that the jurisdiction of the various courts listed in Part VIII C.S.A. should be enlarged to extend to the conduct of any person who meets the statutory definition of pilot while acting as such. The Court of Formal Investigation and the Court of Inquiry of sec. 579 C.S.A. should be empowered to prohibit any person who is not an officially recognized pilot, i.e., licensed or approved, from acting as pilot if he is found to be a safety risk, under pain of committing an indictable offence.

A pilot to remain on board and provide his services if required in the interest of safety

Present legislation contains no provision to prevent a licensed pilot from ceasing to pilot when his ship has reached a limit of his Pilotage District (sec. 361 C.S.A.), when, by doing so, the safety of the ship may be endangered. Because sec. 361 C.S.A. does not apply to him, an unlicensed pilot may cease to pilot at any time (save his liability for contractual damages if he ceases before reaching the point to which he has undertaken to pilot the ship).

The new Act should provide that a pilot must continue to pilot beyond the point where he would normally be entitled to disembark if safety requires and he is requested to do so by the Master. At changeover points at the

common limit of contiguous Districts, the pilot to be relieved should continue to pilot until the relieving pilot is on board and is ready to take over (vide C. 3, pp. 49-51).

Non-compliance should be a statutory offence involving severe punishment. In addition, the pilot found guilty should be subject to reappraisal or to a prohibition to pilot as recommended above for other proposed statutory offences. The few cases that would arise should be considered normal hazards of the profession which should not call for extra remuneration.

Limitation of pilots' civil liability

It is considered that the principle of the relative limitation of the civil liability of pilots, which was introduced into the Act in 1936, should be retained but that the limit should be substantially raised.

It is normal that every man should be called upon to bear responsibility for his actions and there is no reason why pilots should be an exception to this rule.

Normally, the civil liability of a professional man is an adequate incentive to exercise reasonable care and maintain his qualifications.

However, it must be realized that where pilotage is concerned, an error of judgment or the slightest negligence may, and often does, cause damage far beyond the means of any individual pilot to make good.

It is human to err and no conscientious person can be expected to engage in the exacting profession of pilotage if he must always fear that his slightest error, even after years without blemish, may result in bankruptcy.

There are two ways to deal with the matter, i.e., either placing no limit on civil liability and leaving it to the pilots, either individually or as a group, to take out insurance against such a risk, or placing a reasonable statutory limit on civil liability.

When dealing with a large group of pilots, the first proposal would, at first sight, appear indicated. It would then be the pilots' responsibility to find a reliable insurance company that would undertake the risk. However, if full coverage was to be obtained, the resulting high premiums would then have to be compensated by higher pilotage dues, since they must be considered part of the pilots' operating expenses. In the final analysis, such premiums would be borne by shipping.

Apart from the question of high premiums, the plight of the individual isolated pilot who could not benefit from the division of the risk as a group should be considered. It is quite possible that such a pilot would not be able to obtain full coverage at a reasonable rate and that, therefore, the considerable financial risk involved would discourage him from piloting on the few occasions his services might be required. This system would discourage conscientious, qualified persons from rendering a service from which the

public would benefit and would work particular hardship on non-organized areas which would be deprived of responsible pilotage services that would otherwise be available.

It is considered, therefore, that the solution lies in the second proposal, i.e., fixing a statutory limit on civil liability in an amount commensurate with the financial means of individual pilots. The right attitude was taken in 1936 when the maximum civil liability of pilots was fixed at $300. However, this limitation, which has remained unchanged ever since, is now clearly too low. As pointed out in Chapter 9, p. 393, an aggrieved party never sues a pilot in damages, obviously because the loss of time, the trouble and expense such civil proceedings entail make them unprofitable. The situation should be remedied by a substantial increase in the liability limit. It is further considered that it would be fairer to the pilots and to claimants for large amounts if all claims, whatever their size, against pilots were subject to the same limit. It is suggested that an appropriate limit would be one-tenth of the damages suffered by any party involved up to an aggregate maximum of $25,000 for any one casualty.

As is now the case (subsec. 362(2) C.S.A.), the limitation of civil liability should be restricted to damages occasioned by neglect or want of skill and should not apply to cases of gross negligence or wilful wrongful act or omission. In view of the possible differences between provincial laws on the subject, and in order to avoid any ambiguity, it is considered that this should be fully enunciated in the Pilotage Act. Furthermore, the Act should state clearly that such a limitation of liability is a personal privilege extended to a pilot and that it does not affect the liability of any other party who, either with the pilot or an account of the pilot's fault, may be held liable for damages.

In addition, except where the pilots are Crown employees, it should be made a statutory condition to holding a licence or an approved certificate that a pilot's civil liability be covered by a $25,000 bond of guarantee in order to ensure that civil claims against pilots would not be in vain.

Pilotage claims to be given added protection

If the principle is accepted that all pilots perform a public service, although in varying degrees, this fact should be recognized by giving pilotage claims a preferred rank and by providing a lien against vessels to ensure their enforcement, whether a pilotage claim is payable to a Pilotage Authority or to a pilot himself, or to any organization which provided his services. This should be in addition to the right of any Pilotage Authority to have the clearance of a vessel withheld when dues are owing as per subsec. 344(2) C.S.A. (vide C. 6, pp. 195 and ff.).

The term "pilotage claim" should be defined to include not only pilotage dues but any amount of money that may become owing by a vessel

for pilotage, i.e., indemnities, liquidated damages, penalties and other charges established by legislation, and unliquidated damages that a vessel may be asked to pay a pilot or those who provide his services.

The Act should further provide for the right of a vessel to proceed, despite the non-payment of a pilotage claim when its validity is contested, by providing for the vessel's right to deposit in escrow in the hands of the Court the amount in question plus estimated costs, or a bond to be held by the Court, until the decision is rendered as to the validity of the claim.

Short time limitation for claims against pilots

In order not to leave pilots in a state of uncertainty whether claims in damages would be filed against them (because such uncertainty would be detrimental to their morale and might affect their efficiency), a short prescription should be provided in the Act at the expiration of which any civil claim for damages arising out of acts as pilot, whether contractual or in torts, for which legal proceedings have not been taken, would be time-barred. It is considered that one year would be an adequate period. This delay should be sufficient to allow the completion of official investigations. A shorter delay might have the unwarranted result of unnecessary civil actions being taken against pilots simply as conservatory measures, if the official investigations are not terminated at the expiration of the time limit. At present, this matter is governed by the general legislation of each province regarding torts and contracts, and the time limits vary between provinces. In view of the importance of the question, it is considered that it would be preferable for the Federal Parliament to retain control so that uniform treatment can be given all pilots through appropriate provisions contained in the Pilotage Act.

Right of pilots to be disembarked when services are completed

As a corollary to their obligation to remain on board after the termination of their services, if the safety of the vessel so requires or until relieved when pilots change over, the Act should recognize the right of pilots to be disembarked in the proper disembarkation area when their services are completed, and should provide for the various eventualities that may then occur.

It is one of the contractual obligations on the part of vessels to allow pilots to disembark at the completion of the pilotage service for which they are employed, safety permitting, while, on the other hand, it is the responsibility of the pilots or those who direct the service, to provide for their transportation in the disembarkation area from ship to shore and to arrange for return transportation to their station. The employment of a pilot implies the undertaking on the part of the Master concerned to proceed to regular boarding stations or, in non-organized territory, to whatever place was fixed in the pilotage agreement between the Master and the pilot.

However, a pilot may be overcarried in five situations:

(a) circumstances beyond the control of either the vessel or the pilot;
(b) the pilot's fault;
(c) lack of disembarking facilities;
(d) a mutual agreement between Master and pilot;
(e) the vessel's fault.

The provision of sec. 359 C.S.A. regarding the payment of an indemnity to a pilot who, through causes beyond the control of both pilot and ship, is overcarried beyond the official or agreed disembarkation point should be retained and, moreover, it should be clearly indicated that this provision applies to all pilots. The pilot should be returned at the first opportunity to his station at the ship's expense and, in addition, liability should be assumed during the full period of absence for the cost of his board and lodging plus the payment of the statutory indemnity. Such indemnity should not be commensurate with the average value of a day's pilotage because overcarriage in such circumstances is a normal occupational risk that the pilots must accept. Doubtless, it was for that very reason that the amount of this indemnity has always been very low, i.e., from 1873 to 1934, $2 per day; in 1934, raised to $3; and, finally, in 1952, set at $15. It is recommended that under present circumstances this indemnity should be raised to $25 per day (vide C. 6, pp. 201 and ff.). The day should not be the calendar day but a period of 24 hours beginning when the overcarriage commences and a fraction of a day should count as one day.

When overcarriage is the pilot's fault, a vessel should not be called upon to bear any of the resultant extra expenses. The vessel's obligation should not extend beyond disembarking the pilot at the first opportunity without being required either to detour from the normal route or to incur any undue delay.

When there is no alternative except to over carry the pilot because no disembarking facilities exist on the intended route, a vessel should not be obliged to pay anything in excess of the pilotage dues for the services rendered. This applies *a fortiori* when a vessel is compelled to employ a pilot. Arrangements for disembarking are the pilot's own responsibility or those of the organization providing his services. When, for reasons of internal organization, it is decided not to maintain disembarkation facilities in areas where only occasional requirements are expected, the vessels affected by such an administrative decision should not be required to bear any extra cost as a result. Pilots should then be disembarked at the first opportunity and any expenses incurred for their return to station should be borne by the District as a normal operating expense, just as the cost of operating the disembarkation facilities would have been borne had they been established. Expenses of this kind should be shared by all users through pilotage rates and should not

be charged discriminately to the few vessels adversely affected. In non-organized areas the question should be settled by agreement between Masters and pilots as part of the pilotage contract.

At times, vessels may be prevented from taking shorter alternative routes because they are required to embark or disembark a pilot. The Act should authorize that, in such circumstances, if the exigencies of the pilotage service permits, vessels may be accommodated by allowing pilots to board or disembark outside the District. The Pilotage Authorities of the Districts where this situation may arise should be authorized to provide in their regulations as part of the tariff the amount to be paid as pilotage dues for the time spent by a pilot outside the District for the benefit of a vessel, in addition to the pilotage dues for services rendered, the transportation costs from or to the nearest boarding station and other travelling expenses. In such a case, the daily indemnity to be fixed in the tariff should represent the average amount a District pilot would earn in a day, or such other amount as the Pilotage Authority may deem advisable to fix as the value of the extra service.

In cases where a vessel could reasonably have disembarked a pilot without danger at the disembarkation point, but failed to do so for its own convenience and against the wishes of the pilot, the vessel should be liable to pay the pilot, or those providing his services, either the full amount of the contractual damages occasioned thereby or a severe penalty fixed by statute such as double the statutory indemnity for overcarriage, plus other expenses, whichever the pilot, or those providing his services, choose to claim. In these circumstances, overcarriage is a breach of contract for which the vessel should bear full responsibility.

RECOMMENDATION NO. 12

Licensing to be the essential component of any form of public administrative control over pilotage

Whenever there is any degree of Crown involvement in pilotage, whether total, i.e., the service is provided by Crown employees, or limited to authorizing persons to act as pilots, the Crown's intervention implicitly guarantees to the public and the shipowners that officially recognized pilots or holders of a personal pilotage exemption certificate (vide Recommendation 23) possess the required qualifications to navigate in the confined waters for which the licences or certificates are valid.

This guarantee imposes on the Crown the responsibility of ensuring that licensees and certificate-holders are duly qualified. Since this question is essentially one of fact, its solution can neither be a discretionary, administrative decision, nor be determined by the uncertainties of negotiation between

the parties immediately concerned. A person's competence exists *per se,* and can not be created by anyone else's decision or agreement. The only recourse is to ascertain the extent of the qualifications a person possesses in order to find out whether he meets the minimum standard required. This reappraisal presupposes, first, the establishment of the minimum required standards in legislation and, secondly, a licensing process. Licensing means the quasi-judicial appraisal of a person's qualifications (vide C. 8, p. 300). In pilotage, because a person must not only be qualified when licensed but also must remain qualified, licensing entails duties of surveillance and reappraisal (vide C. 9).

As pointed out in Chapter 8 (pp. 301 and ff.), licensing is the only adequate means of protecting the superior interest of the public, whatever the status of a pilot may be. Therefore, in organized territories, i.e., within Pilotage Districts and ports and areas attached to them for licensing purposes (vide Recommendation 8), a licence should be the prerequisite for anyone to pilot, whether he has the status of an independent contractor, a quasi-employee, or an employee either of the Crown, or a pilots' organization, or a private concern. If a pilot is an employee, the permanent withdrawal of his licence would automatically terminate his employment as pilot, whether or not the situation is covered in the terms and conditions of the contract of employment and any agreement to the contrary would be *ipso facto* invalid as contrary to the public interest. The licensing process is *a fortiori* the only method for granting a pilotage exemption certificate in view of the absence of any contractual relationship between the Master or mate of a vessel and the Pilotage Authority.

In addition, the Act should contain provisions authorizing a Pilotage Authority to license persons to act merely as pilotage advisers to Masters on local matters pertaining to navigation in areas where:

(a) local conditions are sufficiently safe that Masters can proceed safely without a pilot with the aid of information and guidance; or

(b) there are no qualified mariners available to be licensed as pilots.

In these circumstances, for the greater protection of shipping, if the conditions are deemed not to be such as to require that vessels must be navigated by pilots, the Pilotage Authority should be allowed to grant adviser's licences to persons whose thorough knowledge of the navigational hazards and prevailing conditions in given confined waters, has been ascertained. Once their local knowledge has been proved satisfactory, they should be issued an official acknowledgment, which might be termed "Pilotage Adviser's Licence". Such a licence would carry, *mutatis mutandis,* the same rights, privileges and obligations as a pilot's licence.

This situation prevails in the Prince Edward Island District and in some local Commission Districts on the East Coast where persons holding a suitable certificate of competency are not available locally but mariners with adequate local knowledge, i.e., fishermen and other persons actively navigating small craft in the area, can be and are employed. Thus, it is a service to shipping to place the local knowledge of these persons at the disposal of Masters.

However, if such limited assistance is not deemed sufficient to ensure a vessel's safety, power to issue an adviser's licence should not be granted. Whether or not a given Pilotage Authority should be granted such power and, if granted, whether it should be limited to certain classes of vessels or be confined to only part of a District, should be the responsibility of the superior authority charged with the creation of Pilotage Districts, i.e., the Central Authority (vide Recommendation 17). In an area where pilotage is required in the public interest but such power is denied, and no qualified pilot candidates are available, the only solution is for the service to be provided by pilots employed by the Crown.

A Pilotage Authority with power to license pilotage advisers for certain given waters should automatically have power to grant pilots' licences for the same waters if qualified candidates become available. Pilots' licences and pilotage advisers' licences could exist concurrently. The main governing factors to decide whether to license advisers in addition to pilots are:

(a) the relative advantages to be derived from the services of pilots in view of the higher rates their services warrant;

(b) whether or not the available pilots can meet the demand for their services.

Under present legislation, the authority possessing licensing power is called "Pilotage Authority". All the other powers and functions it possesses are second in importance to licensing. As previously explained (vide C. 8, pp. 237-242), the present statutory definition of the term "Pilotage Authority" is not *ad rem* and may be an unnecessary source of confusion; it is considered that it should be replaced by a new statutory definition identifying the term with the licensing function, thereby clearly indicating that any other person or authority possessing and exercising any other pilotage function or power in the pilotage organization, such as directing the service, can not be "Pilotage Authority" on that account. Normally, all these accessory functions should also be exercised by the Pilotage Authority, but the fact that any of them may have been made the responsibility of another person or authority does not make that person or authority "Pilotage Authority".

RECOMMENDATION NO. 13

The Act to define the basic minimum qualifications required for licensed pilots and approved pilots

The only requirements of this nature in the present Canada Shipping Act are found in sec. 338 which fixes the ultimate age limit at seventy, and sec. 336 which provides that once a pilot is licensed his pilotage activities should not be interrupted over a consecutive period of two years. The formulation of the remaining qualifications is left (with limitations, vide Recommendations 31, 32 and 33) to each Pilotage Authority, presumably to ensure that the qualifications standards meet local requirements.

Because the definition of qualifications required of pilots has been left to be determined entirely by the various Pilotage Authorities through their regulations, and since the Act does not establish any minimum standards, the result is that, in certain Districts, some essential basic qualifications, such as competency to navigate a vessel, are not even required (vide C. 8, pp. 251-253). The seriousness of the situation is compounded when, through a compulsory system, vessels are forced, or at least induced, to employ a pilot imposed upon them by chance through a tour de rôle system. This is tantamount to misrepresentation on the part of the Pilotage Authorities concerned because the very least a Master has the right to expect is that any person who is represented by a Pilotage Authority as being a pilot should meet the basic requirement implied in the statutory definition of the term "pilot", i.e., a person competent to take charge of the navigation of his vessel. Licensing a pilot is an implied guarantee by the Crown to a Master that the licence-holder is both qualified to navigate the Master's vessel (re meaning of the term "pilot", vide C. 2, pp. 22 and ff.) and is also an expert in the navigation of the waters for which his licence is valid.

Because the question of general competence to navigate and handle vessels is common to all navigators and is not determined by local conditions in a District, it should not be left to individual Pilotage Authorities to decide what standards of qualifications are required but rather this should be made the responsibility of a single authority for them all. Such authority already exists and there is no reason why the appraisal of a pilot's general, basic competency as a mariner should be made by any other authority.

To become a pilot a person must be, in fact, a competent navigator, which implies that he not only possesses the required technical knowledge but that he has also had adequate and successful experience as such. The minimum certificates of competency candidates for pilot should hold are those which indicate that they have had both the necessary theoretical training and practical experience.

Therefore, it is considered that the Act should prescribe as a minimum prerequisite to be considered as a prospective licensed pilot or approved pilot, possession of an unrestricted certificate of competency not lower than

Master Home Trade or Master Inland Waters issued by the Department of Transport pursuant to Part II of the Canada Shipping Act. These certificates ensure that the holder has had satisfactory practical experience of navigation when on duty as officer of the watch on the bridge.

Following this system, the Department of Transport and the Pilotage Authority are each left with the responsibility that pertains to their respective jurisdiction and function, the Pilotage Authority being empowered by the Act to add to this minimum requirement whatever further qualification it considers warranted to meet the needs of the service in its District. On the other hand, the recommendation recognizes and respects the jurisdiction and responsibility of the Minister of Transport re the competency of mariners. This system will also make it possible to limit the activities of each of these authorities to its own field of jurisdiction (vide Recommendation 36).

The Act should also list all the other basic minimum qualifications that must be obtained, whether in the field of professional qualifications, physical or mental fitness or reliability (vide Recommendations 31, 32 and 33).

RECOMMENDATION NO. 14

The direction and management of the service at local level to be performed by the Pilotage Authority in Districts where pilotage is a public service

In Districts where the pilots do not enjoy the free exercise of their professional activities and can not perform assignments except as directed by a controlling authority, pilotage is termed *controlled*. Pilots are employees if the Authority's right or power to control is derived wholly or partly from a contract of engagement; pilots are *de facto* employees (also referred to as quasi-employees in this Report) when this power to control is derived entirely from legislation. In the latter case, control may be partial or complete depending upon whether, in addition to being obliged to accept despatching, the pilots are remunerated through a pooling system and the Authority operates or controls auxiliary services, such as pilot vessels and pilot stations.

Controlled pilotage is a factual situation that must be taken into account in any realistic pilotage legislation. It is a fact that can not be ignored that, despite its inadmissibility under existing legislation and despite the loss of freedom it implies for both pilots and shipping, controlled pilotage has completely superseded the free enterprise system in Canada (vide C. 4, pp. 74 and ff. and Comments on p. 95). The fundamental reason for this change is that control of the provision of pilotage services has proved to be a prerequisite if an adequate, efficient, reliable pilotage service is to be maintained. The necessary degree of control increases with the size of the District organization and the requirements of public interest.

Free enterprise can not exist without competition which is the incentive that forces a person to maintain and improve his qualifications in order to attract clients and to work harder in order to increase his income.

At present, competition has disappeared in pilotage and private initiative no longer exists. Pilots have abandoned the calculated risk inherent in the free exercise of their profession, with the accompanying advantages and disadvantages, in favour of increased security guaranteed by their controlled numbers as well as improved working conditions and a reasonably assured income. Since natural incentives disappeared along with free enterprise, measures of control, to the degree required by public interest, must be imposed to ensure the adequacy of the service.

Free enterprise had many disadvantages for the pilots and shipping. In particular, it failed to guarantee the efficient, reliable service the interests of the nation demand.

Controlled pilotage has gradually replaced the free exercise of the pilot's profession ever since the Quebec pilots gained it in 1860 and the last remnant of free enterprise disappeared in 1960 and 1961 with the abolition of the choice pilot system. Controlled pilotage has now become a fact and the only questions that remain are to decide by whom such control should be effected and what form it should take.

At present, control in all Districts is exercised exclusively by Pilotage Authorities. This has been the rule ever since free enterprise was abandoned, with the two exceptions of the early pilotage organizations in the Districts of Quebec and Montreal. At that time, controlled pilotage became a requirement through the exigencies of the service but the Pilotage Authorities concerned were not ready to accept the added responsibilities this system implied and, hence, the pilots had to assume them. The Montreal pilots lost control when their despatcher became the employee of the Pilotage Authority and the Quebec pilots when, for financial reasons, they voluntarily surrendered their powers to the Minister of Marine and Fisheries in 1905, and lost them altogether with the 1914 Act which officially put the Minister in full control. Ever since, in all the most important Districts, the provision of services has been directed by each District Pilotage Authority. This system has worked well. The Commission received no criticism whatsoever of the arrangements made by the various Pilotage Authorities for the provision of pilotage services, and the record shows that this task has been discharged most satisfactorily. It is considered that nothing should be done to disturb what has worked well, unless there are very serious grounds for such action. The Commission can not find any reason to warrant a change.

In their plan for the organization of pilotage in Canada, the Federation of the St. Lawrence Pilots proposes complete local control of operations by the pilots themselves grouped in a corporation under the legislative control and administrative surveillance of the State. They quote as examples the pilotage organizations in France, Italy and West Germany in particular

where, at the District level, the service is, in various degrees, controlled and managed by the pilots themselves. These examples should be accepted with great caution because, in fact, a great deal of control is exercised by the State in each of these countries and, furthermore, because the situations are not comparable. The governing factors are mainly, first, finance, in that each station must be financially self-supporting and, second, a long standing existing factual situation that had to be taken into consideration when the legislation was drafted. In the countries referred to, the trend is toward increased State control. The Federation also made reference to the United States but there are very few valid points of comparison. Pilotage is dealt with on an *ad hoc* basis through legislation by 20 States and one federal act for the Great Lakes Basin. (For more details, reference is made to the study of the legislation of these countries appearing in Appendix XIII.) The situation in Canada can not be compared to the situation in any of these four countries, first, because of the vital importance of pilotage to the national economy, particularly in certain areas where the provision of first class services is required, whether or not they are financially self-supporting and, second, because of the different factual situation, i.e., control is at present exercised satisfactorily by the State through the Pilotage Authorities. It is considered that it would be a retrograde step to replace a satisfactory existing system by one whose efficiency still has to be proven in Canada where the maintenance of an adequate service is a public requirement.

The next question is the extent of such State control, i.e., whether it should be limited to despatching, with or without pooling of pilotage money, or whether wider control should be exercised by an authority who provides services with pilots who are its employees.

Neither in theory nor in practice is there any incompatibility if a Pilotage Authority, in addition to its licensing function, is made responsible for the provision and direction of the pilots' services. Moreover, there would be no incompatibility if the latter function were exercised by a third party, i.e., either another Crown entity, or an independent private organization or even the pilots themselves as a group.

It is considered that the Crown must exercise full control in the following two circumstances:

(a) where pilotage is considered an essential public service;

(b) where no pilotage service exists but, in the interest of the public, one must be provided.

It is considered that, in the first case, the Pilotage Authority must direct the service while, in the latter, the direction of the service may be exercised by a Department or another Crown entity, but such control should cease when there is an adequate alternative. However, to avoid duplication of Crown organizations, such control should be exercised by the Pilotage Authority.

In Districts where the pilotage service is considered an essential public service, i.e., where the existence of the service and its adequacy and efficiency are matters of national concern, it is considered that the service should be fully controlled by the State. A vital national interest should not be a responsibility of third parties over whom the Crown has no control and who are primarily motivated by their own private interests and, even less, of those who provide services, i.e., the pilots themselves (because of the basic conflict of interests this would create). No one should be placed in the position of having to choose between his immediate private interest and the general good of the public. Human nature being what it is, there is reason to believe that the public would suffer. The record shows many instances of such conflicts in all the important Districts. It would appear that the main cause for the withdrawal of the controlled powers the 1860 Quebec Pilots Corporation enjoyed was the abuses that prevailed. (Vide Part IV—Quebec District.) There is also the additional reason that these private parties are not responsible to Parliament.

Accordingly, it is considered that whenever a pilotage service is classified as an essential public service, its control should be entrusted to the Pilotage Authority whose *raison d'être* is the safeguarding of the interests of the State and of the Public. When a service has to be organized and provided by the Crown, it is considered that this responsibility should be entrusted to the Pilotage Authority.

Where a pilotage service is classified as a private service, i.e., principally maintained for the convenience of shipping, there would be no objection if such control were entrusted to a private organization or to a pilots' organization. This is a matter, however, that should be left to be determined by the Central Authority, taking into consideration the circumstances attending each case. Granting such control would, in effect, mean granting a franchise to the organization concerned, which would then incur the responsibility of providing pilots who met the licensing requirements of the Pilotage Authority and in sufficient numbers to meet the demand. If this solution failed, the franchise should be withdrawn and the exercise of the profession left open, under the normal licensing control of the Pilotage Authority.

Wherever the service must be maintained in the public interest but is not classified as essential (but merely a public service) because even a prolonged disruption would not seriously affect the national economy, State control at the operational level is less necessary. Whether this control should be imposed is a question to be decided by the Central Authority, taking into consideration the situation in each case.

The authority for such control, whether it is exercised by the Pilotage Authority itself, or by a private organization, or by the pilots, must be based on appropriate legislative provisions and, therefore, should be clearly established in the new Act. (Vide C. 8, pp. 301 and ff.)

State control does not mean that the pilots should not be interested in the service. In fact, under the State control that now exists in all Districts, the pilots have been actively involved in the decision-making processes regarding policy, management of their District and the provision of services. It is a matter of record that the most progressive pilotage reforms, especially in the St. Lawrence River Districts, have been the result of the pilots' initiative and studies. Since they are the experts in pilotage, they must be consulted and their assistance is necessary, but in view of the possible conflict of interests, responsibility for final decisions must rest with the State.

Whenever the pilots are not free to exercise their profession (except when they are employees and paid a salary), a pool should be established through the District pilotage regulations; earnings should be pooled by the despatching authority and each pilot should be remunerated by a share in the pool. The pooling system should be based on time available for duty with provision for time off, rest periods, leave of absence, and sick leave; equal licenses should command equal remuneration, graded licences should call for graded shares.

As may be seen in the study of the pilotage legislation in other countries (App. XIII), the prevailing system is controlled pilotage with pilots being assigned to duty by a tour de rôle. Despatching is always accompanied by compulsory pooling and some legislation (e.g., France) makes special mention of it. (For further details, vide C. 6, pp. 186 and ff., the recommended rules, p. 194, and C. 4, pp. 84 and ff.)

RECOMMENDATION NO. 15

The principle of decentralization to be retained and fully implemented

The 1873 Pilotage Act established a two-stage administrative control which has never been changed in principle:

(a) a Central Authority responsible for establishing local administrative control units, possessing limited control powers and financed from public funds (this function has always been exercised by the Governor in Council);

(b) autonomous, financially self-supporting control units, i.e., Pilotage Districts under the direction of their respective Pilotage Authorities (vide C. 3 and C. 5).

The limited control powers of the Central Authority were consonant with the principle that the Crown should not become involved in a service which was mainly conceived as a private service to shipping. The principle

that administration and regulation-making should be decentralized was realistic and fully justifiable owing to the very nature of pilotage, particularly in Canada where there is a great diversity of types of pilotage operations and services.

Despite the fact that this legal structure has remained unchanged, the administration of all the main Districts has been centralized in Ottawa in the hands of the Department of Transport. This centralization was effected by the device of replacing a number of Pilotage Authorities composed of local commissions or corporations, by the Minister as the Pilotage Authority for each of these Districts. This step, which was taken in the most important Districts, gave the Department of Transport effective control over both general direction and local administration of pilotage throughout Canada. It is important to note that the nine Pilotage Districts where the Minister is the Pilotage Authority account for 93.8 per cent of the total cost of pilotage in Canada (vide C. 5, p. 126). Parliament intended neither the Government nor any of its departments to play this rôle when pilotage legislation was first introduced in 1873 (vide C. 3, pp. 57 to 59, and C. 9, p. 430).

This centralization developed not because it was in any way a service requirement, but as the unexpected and unwarranted result of overly restrictive legislation based on an unrealistic concept of the pilotage service and its requirements. In 1873, pilotage in certain Districts was an essential public service and, as Canada grew and shipping developed, it became a public necessity in other Districts as well, thus requiring large scale Crown involvement, although this was not permissible under existing legislation. The correct procedure would have been to draft new legislation which empowered the Central Authority to draw up general policies and co-ordinate the activities of the various Districts and, at the same time, provided sufficient funds to support pilotage in areas that could not be self-sufficient. Instead, a Federal Minister was appointed to hold the separate and independent office of Pilotage Authority in a number of Districts.

This appointment actually created a third level in the administration of pilotage since the Superintendent (or Supervisor) at District level became merely a manager acting under orders from Ottawa.

The exception has now become the rule with the result that both local policy and local administration are centralized in the Department of Transport in Ottawa. The Districts concerned are administered and directed from there by officials who can not be expected to be acquainted with the detailed administrative problems and changing needs of each individual District (vide C. 9, p. 429). Although only general principles and basic organization are applicable across Canada, centralization resulted in efforts to standardize local services which are essentially dissimilar.

The remoteness of the Pilotage Authority has proved frustrating because long delays result and inadequate decisions are rendered for lack of

detailed knowledge of local situations. In addition, the overburdened Department of Transport officials lack the time to give more than superficial attention to pilotage and can attend to day-to-day problems only, with insufficient opportunity to carry out studies in depth.

Another result is the detrimental confusion that prevails regarding the functions of the Minister of Transport, as such, and the Minister as Pilotage Authority for the largest Districts, and the misuse of the powers pertaining to each function (vide C. 9). There is also a conflict because the authority responsible for pilotage administration is also the authority charged by the Act with the duty of pilotage surveillance. The consequence is that no surveillance is carried out (vide C. 3, pp. 62 and 63).

The situation might have been somewhat improved if the activities of the Ottawa Headquarters had been limited to establishing policy and making regulations, leaving the implementation of policy and District administration to local delegates. A laudable effort was made in this direction when subsec. 327(2) of the Act was amended in 1933 to authorize the Minister to delegate any of his powers as Pilotage Authority (vide C. 8, p. 290). However, in practice, this legislative provision remained unused.

If a service is regarded as essential in the interest of the State, it should be organized to ensure maximum efficiency and, within reasonable limits, financial considerations should not be allowed to interfere.

It is considered that this aim could be achieved in pilotage only by decentralizing under appropriate controls to the greatest possible extent, i.e., decentralization of regulation-making powers, District administration and local operations.

The quality, efficiency and reliablity of pilotage is in direct relation to the competence, and constant availability of an Authority which is fully conversant with the local situation.

Indeed, centralized control in the Department of Transport in Ottawa has demonstrated that the original concept of decentralization is realistic and experience has proved that the best judges of pilotage requirements in a District are the officials in charge of local operations.

Therefore, it is considered that the principle of a two-level organization should be retained with, however, increased powers for the Central Authority, i.e.,

(a) by appointing an independent Central Authority with power not only to create Districts but also to formulate general policies giving effective control to ensure that (i) each Pilotage District is provided with the system it requires, (ii) each Pilotage Authority discharges its responsibilities, and (iii) each District where pilotage is a public necessity receives the financial assistance needed to maintain an adequate service;

(b) by retaining the concept of Pilotage Authorities recruited locally to administer Pilotage Districts;

(c) by establishing at each level a proper system of surveillance and control, together with appropriate means of appeal to prevent misuse or abuse of authority.

RECOMMENDATION NO. 16

The Central Pilotage Authority to be a Crown agency corporation responsible to Parliament through a designated Minister

Under the limited scheme of administrative control provided by Part VI, C.S.A., the Central Authority has few powers. These powers involve creating Pilotage Districts, fixing their limits, appointing their Pilotage Authorities and deciding whether or not the payment of dues will be compulsory. The power to create Districts is restricted by the implied criteria that pilotage is only a private service to shipping which must be financially self-supporting (vide C. 3 p. 46 and C. 5). The Central Authority also has limited powers of control over the activities of Pilotage Authorities through the replacement of Board members whose office is held during pleasure, and through the requirement that Pilotage Authorities' regulations and expenditures must receive its approval.

Even if these limited powers were fully exercised, they would no longer be adequate for the present requirement of pilotage which, for the most part, has developed into a service of national importance in which the Government has become increasingly involved.

To date, the function of the Central Authority has always been exercised by the Governor in Council but there would be no legal objection if these powers were exercised by another authority. Moreover, from a practical point of view, the Governor in Council should not be overwhelmed with responsibilities which could be effectively discharged by others. The authority exercised by the Governor in Council has been, and is still, merely perfunctory, as is apparent from the number of ultra vires regulations which have been confirmed, thereby defeating the very purpose of this legislation requirement. A further complication is caused by the developing practice of not seeking the Governor in Council's approval for expenditures (contrary to the imperative provision of sec. 328 C.S.A.). The Governor in Council lacks the opportunity to devote to the organization and administration of pilotage the time and attention these duties now require.

Pilotage is a necessary public service in many Districts and is becoming increasingly so in other areas. The constant, active and exclusive attention of an independent Central Authority is required to meet this situation. If this Central Authority is to discharge its responsibilities effectively, in addition to

being granted the necessary powers (vide Recommendation 17), it must be guaranteed by statute freedom of action, a prerequisite of the exercise of true power, not precluding the existence of adequate controls to prevent arbitrary excesses and to ensure the performance of obligations.

It is considered that this aim can best be achieved by:

(a) entrusting the function of the Central Authority to a Crown agency in the form of a Board;

(b) granting this Board corporate status with all the powers such status normally involves (vide C. 8, pp. 239 and ff., pp. 315 and ff.);

(c) making this Board accountable to Parliament through a Minister designated by the Governor in Council;

(d) ensuring the independence of the Board's members through appointments for fixed terms and not during pleasure;

(e) assuring its financial independence by providing that all expenditures for its administration and operation are to be paid by Parliamentary appropriations.

It is considered that the function of the Central Authority should be entrusted to a Board and not to a single appointee because the rôle the Central Authority must play in the proposed new pilotage legislation will be so involved and demanding that it can best be discharged by a Board. A Board has the advantage of affording the opportunity of obtaining a consensus of opinion and thereby guarding against individual errors of judgment. It also has the advantage of being impersonal, which is an additional guarantee of impartiality and lessens the possibility that undue influence and pressure might be brought to bear against an individual. A Board has the further advantage of ensuring the necessary continuity.

It is suggested that an appropriate name for the Central Authority would be the "National Pilotage Board".

It is considered that such a Board should be given corporate status because of the practical advantages to be derived, *inter alia*:

(a) it clearly identifies the Board as a Crown agency with a legal identity rather than a group of people;

(b) it facilitates operations in that a corporation can own assets, enter into contracts, sue and be sued in its own name;

(c) a corporation's existence continues regardless of its individual members.

The status of an independent, autonomous Crown entity also has, *inter alia,* the marked advantage of warding off undue partisan political influence in pilotage. It is a matter of record that such influences have played a major rôle in the past and are still a factor when members of Pilotage Authorities

are being appointed (vide C. 3, pp. 56 and 57). These activities are unacceptable in the administration of a service on which the safety of navigation depends. Such political activities have been reduced considerably since the appointment of the Minister of Transport in lieu of a Board as Pilotage Authority for all the larger Districts, but the ensuing diversion of the local Pilotage Authority's responsibility into the hands of a branch of the Government has resulted in a type of political pressure of another sort aimed at influencing general policies and administration.

The Act should specify the status of the Central Authority as that of a Crown agency thereby, *inter alia,* clarifying the status of its employees and the question of the Crown's liability for the acts and contracts of the Central Authority and its officers and employees.

To ensure its necessary independence, the Central Authority should be made accountable only to Parliament. This does not mean that it should not be subject to the normal judicial control of the Courts nor that all its decisions and orders should be final and without appeal, but rather that no other authority than Parliament (through appropriate amendments to the Pilotage Act) could interfere, either directly or indirectly, with the Central Authority's free exercise of its powers.

In addition to the various reports the Central Authority may be required to table before Parliament, a formal mechanism of control should be established by giving the designated Minister the right to request at any time from the Central Authority any information or report on the activities of the Authority itself or any of the Pilotage Authorities. If an unsatisfactory situation is discovered and not remedied, the matter should be reported to Parliament.

To ensure added independence, the Central Authority should not depend on revenues derived from pilotage operations to finance its operations and administration but should be financed from public funds by appropriations. Such an expenditure of public money is warranted by the public service character of the rôle the Central Authority will be called upon to play. Any pilotage revenue received by the Central Authority, whether pilotage dues or Crown subsidies (vide Recommendation 21), will be held only as a trust fund to be administered and employed for the direct benefit of the various pilotage services but never to pay the Authority's expenses. On this account, there is no change from the present situation, except that the operating costs of the Central Authority will be considerably increased because of its increased activities. This system is followed in practically all the principal maritime countries (vide Appendix XIII).

It is considered that, to begin with, the corporation should consist of three members appointed by the Governor in Council to hold office for a fixed period subject to good behaviour; later this number could be increased if deemed necessary. Their appointment should not be during pleasure

because the resultant insecurity of office would be prejudicial to the independence and freedom of action the members should enjoy. The term of office should be long enough (not less than ten years except for the first appointments) to permit the members to gain the knowledge and experience the discharge of their numerous responsibilities will require. In order to assure continuity and a high degree of competence at all times, it is considered that the tenure of office of the members should be staggered so that when a new appointee arrives there are always two fully experienced members on the Board. Furthermore, members should be eligible for reappointment, thereby retaining their acquired experience and knowledge for the benefit of the service. Their remuneration should be in the form of a fixed salary set by the Governor in Council and guaranteed not to be lowered during a term of office.

It is considered that, if the Central Authority is limited to three members, their employment should be on a full-time basis in order to discharge their numerous duties efficiently.

It is also considered that it would not be desirable for the members to be in any way identified with any parties interested in pilotage, i.e., they should represent neither shipping nor the pilots. Any person with interests incompatible with the discharge of the responsibilities of the Central Authority should be ineligible as a member and a prerequisite for appointment should be an unbiased, disinterested approach to the duties of the Authority. The possession of special technical qualifications should not be made an inflexible prerequisite because the Authority should be at liberty to seek expert opinions, as is the normal procedure followed by Courts whenever an important technical question arises. To specify in the Act definite qualifications members must possess would be an unwarranted limitation imposed on the Government in the selection of those best suited to perform the functions of the Authority.

In this regard, the Government should be guided by the requirements imposed by the duties the Central Board will have to fulfil: the possession of special technical qualifications in the field of shipping, pilotage, law, economics and administration should be among the various qualifications to be considered in the selection. The Federation of the Saint Lawrence Pilots has recommended that the post of Central Authority be filled by a bilingual person so that any pilot and any other interested party, whether English or French speaking, will be able to communicate with the Central Authority in the language in which he is more fluent. Although the Commission recommends a Board instead of a one-man authority, the Federation's proposal retains its merits because a great deal of the Central Authority's time will be spent in public hearings in the various Districts and the witnesses and experts appearing before it should be free to express themselves in either language. It is most desirable that the far from adequate process of translation be avoided.

In addition, it is not considered advisable to impose on the Central Authority an Advisory Committee composed of representatives of the parties directly interested, i.e., pilots, shipowners and Pilotage Authorities, because it is felt that more disadvantages than advantages would occur. First, the Advisory Committee would unduly hamper the activities of the Central Authority which should be free to consult whom it wishes whenever required. It does not seem advisable to insist on mandatory consultation with persons whose main qualification is their involvement with the subjects under discussion. Second, experience with Advisory Committees (vide Part IV of the Report, Quebec District) has shown that they are more likely to cause dissatisfaction because the Committee expects its opinion to become the decision. It is agreed that all interested parties should be given the opportunity to be heard before any important decision becomes final, but it is not believed that an Advisory Committee is the appropriate vehicle. A proposed procedure is contained in Recommendations 19 and 20.

RECOMMENDATION NO. 17

The powers of the Central Authority to be enlarged to meet the new aims of proposed pilotage legislation

The function of the Central Authority is to implement the Pilotage Act. This involves ascertaining what pilotage services are necessary throughout Canada, establishing services required in the public interest, organizing administrative controls, general surveillance of pilotage administration and operations, and enunciation of general policies.

In addition to having power to appoint its own staff, employ consultants, make by-laws covering both its internal operations and the procedure for conducting the affairs of the corporation, the Central Authority should have the following powers:

(a) Original powers to make regulations (hereafter referred to as "Pilotage Orders"):

1. to create Pilotage Districts when one of the following conditions is met and to abrogate them when the condition no longer exists:
   (i) whenever it is considered that the establishment of a pilotage service, or administrative control over an existing pilotage service, in a given area is necessary in the public interest; or
   (ii) whenever it is considered that the establishment of a District is advisable, with three provisos: an adequate service already exists; the organization is expected to be financially self-supporting; a request is made by shipping or other interested parties;

2. to divide or merge Districts to improve efficiency or facilitate administration (vide Recommendation 8);
3. to fix and alter the limits of any District (vide Recommendations 8 and 9); *inter alia,* to establish the changeover zone in contiguous Districts (vide Recommendation 9);
4. to determine the form the Pilotage Authority should take in each District, i.e., whether it should be an *ad hoc* Board, a one-man authority, or an existing public corporation (vide Recommendation 18) and, unless the last named is selected, to appoint the member(s) and fix the remuneration;
5. to classify the pilotage service in each District, or part thereof, according to its relative importance to the national interest;
6. to authorize a Pilotage Authority to license pilotage advisers (vide Recommendation 12) when circumstances warrant;
7. to impose compulsory pilotage, with or without restrictions, on a service, or part of a service, classified as a public service (compulsory pilotage is automatic when a service is classified as an essential public service) (vide Recommendation 21);
8. to define "dangerous cargoes" for the purposes of compulsory pilotage;
9. to define the extent of administrative control to be exercised in each District, and if some control (apart from the licensing function) is to be exercised by an organization other than the Pilotage Authority, to appoint such organization and define its powers (vide Recommendation 13); *inter alia,* whether the Pilotage Authority or such other organization is authorized to provide pilotage services, or operate the pilot vessel service or any other auxiliary service;
10. to determine the status of pilots for each District or part thereof (vide Recommendation 24);
11. to grant a pilots' statutory corporation any of the special powers provided in the Act, if and when required, and to withdraw any of them when deemed advisable in the superior interest of the State and of the service (vide Recommendation 25);
12. to extend administrative control in unorganized areas over the qualifications of pilots, either by attaching ports or areas to an adjacent District, or by charging an existing Pilotage Authority with the responsibility of appraising within an area defined in a Pilotage Order the qualifications of pilots who so request, and with the ensuing accessory responsibilities this appraisal entails (vide Recommendation 10);

13. to establish rules regarding conduct of public hearings under its jurisdiction;
14. to establish general rules governing the reports required from all Pilotage Authorities and to issue any standing orders considered necessary for the discharge of the Central Authority's general surveillance responsibilities;
15. to establish the accounting procedure, i.e., financial regulations, to be followed by Pilotage Authorities regarding the handling of pilotage money and grants (vide Recommendation 20);
16. to fix the form of the contributions from the users to the Central Equalization Trust Fund, and to make rules for the administration of the fund and the requirements for Districts to benefit from it (vide Recommendation 21).

(b) Supplementary or suppletory power to make District regulations, either when regulations made by Pilotage Authorities are submitted for approval, or when the Pilotage Authority concerned fails to make a necessary regulation (vide Recommendation 19).

(c) The following administrative powers:

1. when the Pilotage Authority is defined by Pilotage Order as an *ad hoc* Board or a one-man authority, to recommend to the Governor in Council demotion in case of misconduct, gross incompetence or physical or mental inability (vide Recommendation 18);
2. to carry out studies and research as deemed necessary for the formulation of policies or the discharge of responsibilities;
3. to act as approving authority of District regulations (vide Recommendation 19), and as Appeal Board on questions of approval of Pilot Corporation By-laws (vide Recommendation 25);
4. to approve, with or without modification, the budget of Pilotage Authorities and, from time to time, to authorize expenditures not covered in the budget (vide Recommendation 21);
5. to administer the Central Equalization Trust Fund (vide Recommendation 21);
6. to exercise, either directly or through delegation, full powers to hold judicial inquiries, as required, in the discharge of its general surveillance responsibility;
7. to cause a Pilotage Authority or any other organization to which any control power has been granted, to be temporarily

suspended and the District to be administered by a temporary Pilotage Authority, or the control power to be exercised by someone appointed for that purpose, pending the result of the investigation of suspected irregularities by seeking authorization, when required, from the Governor in Council.

There is no objection if other responsibilities and functions are attributed to the Central Authority by appropriate legislation, provided this neither alters the Authority's basic character nor infringes on the principle of decentralization of local administration.

It is considered that the pilotage service in each District (or in each part of a District when the service is divided within the District) should be classified according to the degree of importance to the national interest, thereby determining the maximum permissible degree of control that can be imposed both on pilots and on shipping. The main classifications should be:

(a) an essential public service,

(b) a public service, and

(c) a service maintained for the convenience of shipping or of private interests.

It is a *public service* when it is controlled, maintained or provided primarily to serve the superior interests of the State; it is a *private service* when its main purpose is to serve private needs and interests (vide Recommendation 6). As a public service, it is to be classified as an *essential public service* where the existence of the service, its adequacy and efficiency, are matters of a national concern, and as *public service only* when the public interest requires that it be maintained but its disruption even over a prolonged period would not seriously affect the national interest (vide Recommendation 14).

Where the Central Authority has reason to believe that there are serious irregularities in the discharge of any of the responsibilities of a Pilotage Authority or of any of the organizations to which control powers have been granted by Pilotage Orders, the Pilotage Authority or the organization concerned should be temporarily deprived of its powers or part of its powers, as a preventive measure in the interest of the service, and an *ad hoc* Authority should be appointed to exercise these powers while the matter is investigated and appropriate remedial action taken. When the Pilotage Authority is involved, such action should take the form of an order issued by the Governor in Council pursuant to a recommendation by the Central Authority but, in the case of another organization, the instrument should be a Pilotage Order. The control powers which are temporarily withdrawn should be exercised by the *ad hoc* Authority appointed by the Governor in Council Order, or by the Pilotage Order as the case may be, but should never be exercised by the Central Authority itself.

RECOMMENDATION NO. 18

The function of the Pilotage Authority to be entrusted in each District to a locally self-governing public corporation answerable as such to the Central Authority

The real purpose of pilotage legislation is to impose measures of control which will ensure the quality and reliability of the service and in any pilotage organization the most important element is the Pilotage Authority. The most effective means of control is administrative, i.e., licensing, which is the essential function of a Pilotage Authority (vide Recommendation 12). The effectiveness of pilotage legislation is in direct relation to the competence and efficiency of the Pilotage Authority in each District. Licensing is an administrative function of a quasi-judicial nature which presupposes the existence of standards and guide lines established by appropriate legislation, and an informed, unbiased, independent Authority to appraise pilots, exercise constant surveillance and take immediate action to maintain and ensure the quality of the service. This requires constant availability, freedom of action and independence within stated terms of reference, all of which can be guaranteed only if the function of Pilotage Authority is exercised by a locally self-governing federal agency. This function may be entrusted either to an *ad hoc* corporate Crown agency, or an existing local public corporation, whether created under federal or provincial authority.

The reasons stated in Recommendation 16 in favour of a Board (as opposed to a one-man authority), corporate status and its inherent powers for the Central Authority apply, *a fortiori, mutatis mutandis,* to the Pilotage Authority.

The general rule should be that the Pilotage Authority is an *ad hoc* Pilotage Board. This was the concept in the 1873 Pilotage Act but in today's context the rule should be relaxed when warranted by circumstances (providing the quality of the service would not suffer) to prevent over-organization and the unnecessary proliferation of State agencies.

The function of the Pilotage Authority should not be entrusted to an existing public corporation, but to an *ad hoc* Pilotage Board, unless the following conditions are met:

(a) it is a local corporation;
(b) it is independent and self-governing;
(c) its activities are related to the pilotage service;
(d) its territorial jurisdiction corresponds approximately to the Pilotage District;
(e) there is no incompatibility or conflict of interest between the corporation's original functions and those of the Pilotage Authority;
(f) the organization required for the pilotage service will not be overly complicated.

For port pilotage, the authority of the port, if a public port, is the indicated Pilotage Authority since pilotage is an essential feature of the successful functioning of the port. However, the authority of the port should be locally self-governing (as are the Harbour Commissioners) because, otherwise, it would not meet the essential prerequisites of a Pilotage Authority. Furthermore, the responsibility to act as Pilotage Authority should be freely accepted, it being understood that it would be immediately withdrawn if not properly exercised.

On the other hand, the size and complexity of the necessary pilotage organization, combined with the other activities of the available local public corporation, may require that a separate Pilotage Authority be established. It is a prerequisite that a Pilotage Authority have sufficient time available to fulfil the exigencies of the function.

The authority of a port should not be appointed Pilotage Authority when the pilotage service extends materially further than the port limits and its immediate approaches. The authority of a port principally concerned with what directly affects the efficiency of the port organization might neglect what does not naturally fall within the original jurisdiction, e.g., such was the experience when the Quebec Harbour Commissioners and the Montreal Harbour Commissioners were respectively the Pilotage Authorities for the Districts of Quebec and Montreal, i.e., their jurisdiction as Pilotage Authority extended over the River as well. (Vide Part IV of the Report, *History of Legislation,* especially the Montreal District).

Similarly, for canal and lock pilotage, the canal authority is also the indicated Pilotage Authority with the same reservation when territorial jurisdictions do not coincide.

When, for any reason, the Authority of a port or a canal can not serve, unless another convenient public corporation exists, the Pilotage Authority should be an *ad hoc* Board on which local port or canal authorities should normally be represented to ensure the necessary liaison and co-ordination. If the activities of a port are directed by an officer of a central authority, this officer should normally be a member of the Board.

However, in both cases the Central Authority should be free to decide the advantages and disadvantages, the avoidance of possible conflicts of interests being the criterion.

Where the appointment of a board is not warranted because it would be too involved for the number of pilots, the extent of the service existing at the time or about to be provided, and the duties of the Pilotage Authority, the Central Authority should be empowered to form a Pilotage Authority consisting of a single member. In this event, the person so appointed would still constitute a Crown agency corporation when acting as Pilotage Authority. This method should not be adopted, however, unless, for practical reasons, it is not considered advisable to appoint a three-man board.

When the Pilotage Authority is an *ad hoc* Pilotage Board, or a one-man corporation, the principle of decentralization and local self-government should be safeguarded by the procedure of appointing its members and by appropriate statutory provisions which guarantee their independence and freedom of action.

In the same way as a Pilotage Authority's jurisdiction should not extend over more than one Pilotage District, no individual should be permitted to serve as a member of more than one Pilotage Authority to avoid the danger of indirect centralization. Since the competence of a Pilotage Authority is the sum of the competence of its members, the criteria that apply to the Pilotage Authority as a body should also apply to its members. For that reason, they all must, *inter alia,* be residents of, and constantly available in, their District.

The Act should provide that appointments of members are during good conduct and for a fixed term of sufficient duration to allow members to acquire the detailed knowledge of their District necessary for the effective discharge of their responsibilities. It is considered that ten years (except for the first appointments) should be the minimum term. Here again, the termination dates of terms of office should be staggered so that members with the necessary experience always remain on the Board when a new appointee takes office. For the same reason members should be eligible for re-appointment. Members should be subject to dismissal by the Governor in Council for cause, i.e., misconduct, gross incompetence, physical and mental disability. Equally it should be possible to terminate their appointment on account of basic changes in the pilotage organization, e.g., merger, division or abolition of District(s), or when a change is made in the form of the Pilotage Authority, e.g., when it is considered advisable to appoint an existing public corporation and, hence, abolish the existing Board. Such a change should be initiated by an appropriate Pilotage Order which, after any appeal is disposed of (vide Recommendation 19), becomes effective only when confirmed by the Governor in Council. This requirement is warranted to preserve the acquired rights of the members and to protect their necessary independence.

A person should not be barred from appointment because he is a Crown officer or a Crown employee; in certain circumstances, the appointment of such an official may well be a requirement. Here again, the criteria should be that there is no conflict between the two functions, that the member resides in the vicinity and that his other occupations leave sufficient time to fulfil his pilotage responsibilities.

To date, members of Pilotage Authorities have been expected to serve without remuneration. This situation was reasonable when pilotage was organized merely as a service for the private convenience of shipping and when the extent of State administrative control was limited to licensing and

its attendant responsibilities. At that time, Pilotage Authorities generally consisted of representatives of the parties immediately concerned and their pilotage duties involved only a fraction of their time. In addition, the management of the District was generally carried out by a full-time, paid Secretary. However, the situation is very different today. Pilotage Authorities are given the responsibility of not only ensuring but, in some cases, providing an adequate, efficient, reliable pilotage service to protect the superior interests of the State and the public. Hence, this situation requires that the representatives of the parties directly interested should not serve as members of Pilotage Authorities and that adequate remuneration should be provided.

However, all the different situations that may occur must be covered in general pilotage legislation. It is considered that the members of a Pilotage Board should continue to serve without pay where pilotage is classified as a service for the convenience of private interests. In such cases, Board members may be representatives of the private interests concerned and should not be remunerated. On the other hand, if the members are not drawn from these groups they should receive remuneration proportionate to their responsibilities and the time they are expected to devote to the exercise of their functions. If Crown officers or employees are appointed, they should receive an additional remuneration commensurate with their added responsibilities. The members should be employed full-time or part-time, depending on the requirements of the local organization, as determined from time to time by the Central Authority through Pilotage Orders. However, any modifications should not affect the rights members acquire during their term of office, unless they consent or, after any appeal has been disposed of (vide Recommendation 19) the Pilotage Orders concerned are confirmed by the Governor in Council.

The remuneration of the members of Pilotage Authorities should be fixed through Pilotage Orders by the Central Authority which is in the desirable position to appraise the value of the services expected in those offices. As an additional guarantee of the independence of local authorities from the Central Authority, although such remuneration should be liable to be increased from time to time as required, it should never be possible to decrease it during a term of office. Since these payments must be met out of pilotage revenue, they should form part of the administrative expenses of the District.

In addition to the power to make by-laws governing corporate operations and the internal organization of the Pilotage Authority's activities, as well as the normal powers inherent in corporate status, each Pilotage Authority should have the following powers:

(a) to make, by regulations, all necessary local legislation (including legislation for attached areas [Recommendation 8], approved

pilots [Recommendation 10], and contiguous Districts [Recommendation 9]) within the subject-matters defined in the Act (vide C. 8, pp. 241 and ff.) including rate-fixing and all that this implies, i.e., the permissible numbers of pilots (pilot establishment), target income based on defined working conditions if earnings are pooled (vide C. 6), and setting the conditions governing compulsory pilotage and personal exemptions where this is permissible (vide Recommendations 22 and 23);

(b) licensing, including reappraisal of the pilots in its District (vide Recommendations 12, 26 27, 28, 29) and in areas attached to the District (vide Recommendation 8), or of pilotage advisors (Recommendation 12) or of shipmasters and mates for personal pilotage exemption certificates (vide Recommendation 23), the partial licensing involved in the approval of pilots outside organized areas (vide Recommendations 8 and 10) together with the surveillance power this requires (vide Recommendations 26, 27, 28 and 29);

(c) if so authorized by Pilotage Order, the power to direct the pilotage service and to employ pilots, if necessary (vide Recommendations 13 and 24);

(d) if so authorized by Pilotage Order, to operate a pilot vessel service and any other service auxiliary to the provision of pilotage and, in the case of contiguous Districts, to operate such services in cooperation with the other District or for the benefit of both (vide Recommendations 9 and 14);

(e) to act as approving authority for the internal by-laws of the statutory corporation(s) of the pilots in its District (vide Recommendations 25).

In addition, a Pilotage Authority might be required by proper legislation to fulfil any other function, provided it is not inconsistent with its licensing power and with any other power it may be required to exercise under the Act.

A Pilotage Authority should have the power to delegate its powers, except those of regulation-making and licensing, to the extent specified by its regulations and according to the procedure and conditions established therein. Since a Pilotage Authority is located in its District, the delegation of power should always be a case of exception to be resorted to only when required to achieve the maximum efficiency of the organization (vide C. 8, pp. 289 and ff.). For example, delegation would be justified for an investigation while discharging the surveillance responsibility (vide Recommendation 28), at the Pilotage Authority's discretion, the investigator could be vested with full judiciary powers of investigation. Normally, it would also be

justified to entrust an Examination Board with the responsibility of ascertaining the competence of qualified candidates in local knowledge and ability to navigate, handle, berth and unberth ships within the District but the final decision should be taken by the Pilotage Authority after considering the report of the Examination Board and representations by other parties. For some members, the criteria for membership on such a Board should be special competence in the matters being investigated and, for others, general competence, in order to prevent biased opinions when an expert is too closely connected with the service. It is essential that pilots sit on such an Examination Board, but it is equally important that qualified mariners, unconnected with pilotage, should also be members. It is not considered that shipowners, as such, should be represented; the argument that they pay for the service is not accepted as valid. Shipowners are part of the public which the Pilotage Authority is charged with the responsibility of protecting. There would be no objection if a fully qualified mariner recommended by the shipowners was appointed to the Board but the final decision should rest with the Pilotage Authority which must remain at liberty to appoint any other person deemed more competent or suitable in the circumstances.

RECOMMENDATION NO. 19

Responsibility for making the necessary regulations to be shared between the Central Authority and Pilotage Authorities, according to their respective jurisdiction, and to be exercised under proper control

Regulation-making is legislation by delegation, done in lieu of, and at the request of, Parliament or a Legislature. It is the normal practice in legislation-making for Parliament to delegate its legislative power to those charged with implementing statutes because the provisions to be so enacted either are impermanent or not of general application. The very nature of pilotage demands such delegation because it is a service whose organization varies widely from time to time and from place to place as the requirements of navigation and public interest change.

Legislative power is delegated by Parliament by defining in an Act the subject-matters of the regulations delegates may make and by defining the procedure for regulation-making, thus establishing the extent of delegated jurisdiction (vide C. 8, pp. 241 and ff.).

It is desirable to establish a system which ensures:

(a) regulations of the highest standard are made;

(b) regulations are consonant with, and promote, general pilotage and Government policies;

(c) all those whose interests are affected are given an opportunity to be heard;

(d) satisfactory remedies exist against inappropriate, discriminatory or abusive regulations.

The regulations made by the Central Authority pursuant to its original regulation-making powers should be given a distinctive name so as to avoid confusion with the regulations emanating from Pilotage Authorities. It is considered that the term "Pilotage Orders" used in the United Kingdom is most appropriate for the former, and that the latter should be called "District Regulations". The term "regulation" should not be confused with the term "by-law" which should be used to refer to the rules made by the Central Authority and the various Pilotage Authorities to govern their internal activities and corporation administration. These by-laws do not affect third parties (pilots and shipping included) and, therefore, need not be under any form of control other than being available to any one who wishes to consult them.

This division of regulation-making powers between a Central Authority and local Pilotage Authorities was adopted in the 1873 Pilotage Act and has remained unchanged to date. Since each District Pilotage Authority must acquire detailed local knowledge in order to exercise its licensing powers, it is the best qualified and most logical authority to be entrusted with regulation-making for *ad hoc* local pilotage legislation.

In general, Pilotage Authorities have discharged this responsibility satisfactorily, but the Central Authority has lacked effective powers to ensure that complete legislation was provided and, while it could refuse approval, it had no means to force a Pilotage Authority to make a regulation that was considered essential (vide C. 8, p. 245). The number of ultra vires regulations made by Pilotage Authorities does not reflect adversely on their competence in this regard but demonstrates that the existing system of control is inadequate and that present statutory legislation does not meet the requirements of the modern pilotage service.

While the fact that a regulation is ultra vires connotes that it does not fall within the ambit of delegated powers, this does not necessarily mean that it fails to meet a service need. Pilotage Authorities have generally made the additional legislation required to make the pilotage service in their District more effective. Normally, an active Central Authority with sufficient knowledge and time to devote to pilotage problems should be able to detect the illegality of such regulations and, at the same time, realize their value and necessity. The Central Authority's course of action should then be to inform Parliament by submitting appropriate amendments to the Act.

The existence of many ultra vires regulations not only emphasizes the necessity for a complete new statute but also the need for a full-time Central Authority. This conclusion is even more valid since Pilotage Authorities are now often directly involved in providing pilotage services and are no longer in their former disinterested position (vide C. 8, pp. 242-243). In addition, the interests of the State must also be protected.

A system must be devised whereby each District is assured of adequate legislation to meet its needs within overall State requirements. It is considered that this aim could best be achieved by leaving regulation-making powers over local requirements as original powers of the Pilotage Authority but increasing under proper control the Central Authority's powers in this field to the extent of:

(a) modifying District regulations submitted for approval;

(b) acting *proprio motu* to make District regulations in lieu of the Pilotage Authority when the latter fails or refuses to do so;

(c) providing an appeal against such decisions of the Central Authority to an existing administrative tribunal or one created for that purpose (hereunder referred to as the *Pilotage Regulations Appeal Board*).

The first means of control over regulation-making is exercised by Parliament when defining the subject-matters of regulations. Any regulation that does not fall within these limits is automatically ultra vires. This control is implemented by the regular courts at the suit of any aggrieved or interested party.

It is considered that an adequate administrative control over District regulations could be achieved as follows:

(a) District regulations should be made by the District Pilotage Authority.

(b) Such regulations can not become effective unless approved by the Central Authority.

(c) Any proposed regulation should be advertised in the District concerned a prescribed number of days before approval can be granted.

(d) Any person not in agreement with a proposed regulation should have the right to register an objection with the Central Authority and, unless the objection is withdrawn beforehand, the Central Authority must hold a public hearing in or near the District so that all interested parties, including the Pilotage Authority concerned, have reasonable opportunity to be heard.

(e) If no objection has been registered within the allowed period, the Central Authority must approve the regulation unless it intends to disapprove or modify it. In such an eventuality, the regulation should be treated as opposed and a public hearing should be

called. The public notice should indicate the reason for the hearing and, if the intention is to modify the regulation, the text of the proposed modification should appear thereon.

(f) After such a hearing, the Central Authority should have the power to render whatever decision it considers in the best interest of the service, i.e., to approve, disapprove, or modify.

(g) The regulation should become effective as soon as the Central Authority's decision is rendered and should remain subject to the transmission and publication requirements of the Regulations Act.

(h) There should be a right of appeal within a prescribed period to the Pilotage Regulations Appeal Board against any decision of the Central Authority following a public hearing as a result of which a regulation is approved or made. There should be no appeal against a decision denying a proposed regulation or approving a regulation whose approval was not contested.

(i) The power of the Pilotage Regulations Appeal Board should be limited to the right to maintain or reverse the Central Authority's decision; if a regulation has been modified by the Central Authority, an adverse decision would not have the effect of an approval of the regulation as originally proposed; the resultant situation would be that no regulation is made.

(j) The Central Authority should have the power to make District regulations (including amendments to, and abrogation of, existing regulations) in the name of a Pilotage Authority, if such regulations are considered by the Central Authority to be essential for the District, and provided the Pilotage Authority concerned has been required by the Central Authority to make regulations but has neglected or refused to comply.

(k) In this case, the same procedure as described above will apply, i.e., publication of the proposed regulation, a public hearing if any objection is received either from the Pilotage Authority concerned or from any other interested party, approval by the Central Authority and appeal to the Pilotage Regulations Appeal Board.

(l) A public hearing should be held by the Appeal Board before an appeal decision is rendered so that any interested party is given the opportunity to be heard before the final decision is made. Application of the regulation concerned may be suspended pending the final decision of the Appeal Board, provided it is so ordered by the Appeal Board.

It is considered that public hearings before the Central Authority should be held in or near the District concerned because a *venue* at the Central Authority's headquarters or elsewhere away from the District would

defeat the main purpose of the hearings, i.e., to consult all interested parties before a decision is rendered. The same requirement, however, does not apply to hearings before the Pilotage Regulations Appeal Board whose public hearings should be held in Ottawa, unless the Appeal Board decides otherwise.

In the past, the regulations (called the General By-law) of many Pilotage Districts have not been as complete or adequate as they should have been, first, because the Pilotage Authority was more concerned with its administrative duties and, therefore, failed to include in legislation rules that were unanimously and voluntarily accepted by all concerned; second, because the Pilotage Authority's close working relations with the pilots induced it not to make any regulations that would not meet their approval. (Pilotage certificates are an obvious example of this tendency.) One reason for extending the powers of the Central Authority is to remedy this situation by allowing the Central Authority to modify proposed regulations or to act *proprio motu* to protect the superior interests of the State.

It is for the same reason that some means should be provided to ensure that pilotage regulations do not conflict with the general policies of the Government. This explains the recommendation that a Pilotage Regulations Appeal Board appointed by the Government be given the right to affirm or reverse the Central Authority's decisions which result in regulations being approved or made. This Board, however, should not have more extensive power, first, because it does not have the required knowledge of pilotage affairs, either in general or at the District level and, second, because by so doing it would, in fact, supersede and render ineffective the function of the Central Authority.

It is considered that the mandate given by Parliament to the newly created Canadian Transport Commission (National Transportation Act, 14-15-16 Eliz. II c. 69), makes it the indicated Crown entity to discharge the function of the proposed Regulations Appeal Board. Because it is responsible for regulating and co-ordinating transportation in Canada, it is the Crown entity to which Government policies regarding transportation are conveyed and which is charged with implementing these policies. If, however, it is considered advisable to entrust this function to a Board specially appointed for the purpose, it is considered that such a Board should be composed of Government representatives with the designated Minister (vide Recommendation 16) as Chairman, *ex officio,* and the other members being senior officers not lower than the rank of Deputy Minister, appointed by the Governor in Council.

It is considered that public hearings are not indicated at the level of the Pilotage Authority, first, on account of the Pilotage Authority's intimate knowledge of its District and, second, because it is not in the disinterested position required to render an unbiased decision. However, each Pilotage

Authority is at liberty to seek advice and consult, and should encourage any interested party to make suggestions. An efficient Pilotage Authority should make a reasonable effort to eliminate possible objections beforehand —local consultation is one way to achieve this aim.

In order to discourage dilatory appeals, any regulation approved by the Central Authority should become effective immediately, notwithstanding appeal, unless an order to the contrary is issued by the Regulations Appeal Board.

The delay occasioned by the publication of a proposed regulation and by a public hearing before the Central Authority, when required, is justified because legislation should be the result of a deliberate process and should not be made hastily.

The right of the Central Authority to act *proprio motu* at any time is a means to ensure that local legislation remains adequate and does not become obsolete. This power will give any interested party the opportunity to complain to the Central Authority and, should the Central Authority consider the complaint serious enough, it has the power to have the situation remedied.

With regard to Pilotage Orders, a similar procedure with appropriate modification should be adopted:

(a) A Pilotage Order should be published a certain number of days before it becomes effective and be automatically effective if no objection is received by the Central Authority before the expiration of this period.

(b) If an objection is filed, the Central Authority should hold a public hearing, unless the objection is withdrawn earlier, and the Pilotage Order should become effective only if it is approved by the Central Authority after the hearing.

(c) The Central Authority's decision following a public hearing should be subject to appeal within a given number of days to the Regulations Appeal Board, subject to the same limitations which apply to District regulations.

(d) An Order by the Governor in Council will also be required if a Pilotage Order adversely affects the acquired rights of any member of a District Pilotage Authority (vide Recommendation 18).

Because neither the Central Authority as approving authority nor the Regulations Appeal Board has the right to act arbitrarily and because public interest requires that Pilotage Authorities and all other interested parties be made aware of the policies which guided their decisions, it is considered that the Act should make it mandatory for these decisions to be rendered in writing and, except where only an approval is involved, the grounds on which decisions are taken should be fully enumerated.

RECOMMENDATION NO. 20

Pilotage Districts to be self-accounting units under the control of the Central Authority and subject to audit by the Auditor General

Pilotage dues and all other monies officially received by a Pilotage Authority are public monies for a special purpose and, therefore, come under the Financial Administration Act. It is true that Part VI C.S.A. contains some provisions concerning the handling of these funds but, according to the rules of interpretation of statutes, these provisions no longer apply because they predate the general provisions of the Financial Administration Act which makes no exception concerning pilotage dues and pilotage monies (vide C. 5).

In practice, the situation is very different. Each District is treated as a self-accounting financial unit and its funds are not credited to, or deposited with, the Receiver General of Canada, except those belonging to the Consolidated Revenue Fund which are first handled by the Pilotage Authority and later remitted to the Crown. In other words, Pilotage Authorities consider the Crown a third party.

This view is so general that absolutely no control is exercised over the handling of money in Districts where the Pilotage Authority is a local commission. Their books are not audited by the Auditor General and the Government is satisfied if each District renders an annual report which includes a financial statement. On the occasions when a report is not filed, no action is taken except to send a reminder. For instance, the annual report for the District of Richibucto, N.B., has been outstanding for the past five years, i.e., from 1963 to 1967 inclusive, in spite of frequent reminders, which have been ignored. Failure to file a report is not taken as an indication that there is inefficiency in the District or that money may have been mishandled. No investigation is made. When these reports are received, they are considered merely for the information of the Minister of Transport (sec. 332); they are verified casually, if at all, and no effort is made to learn whether or not any funds have been improperly handled. The matter is dealt with as if it were not the Government's concern but merely the internal affair of a private organization unrelated to the Crown.

There is very little difference in Districts where the Minister is the Pilotage Authority. Their annual statements are much more detailed and their books are subject to audit by the Auditor General, but only because departmental officers are involved. Beyond this, each District is considered an independent, self-accounting unit whose Pilotage Authority exercises full and final control over its funds.

It is obvious that no effort was ever made to subject the handling of pilotage money to the provisions of the Financial Administration Act because this would not have met the administrative requirements of the

pilotage service. Pilotage Districts have always been autonomous, self-accounting entities—a status they should enjoy—but the present situation should be regularized, *inter alia,* by making them corporations, as recommended (vide Recommendation 18).

But even the few financial provisions of the Canada Shipping Act applicable to pilotage money are not followed. The only control imposed by the Act is that operating expenses are to be approved by the Governor in Council (sec. 328). As seen in Chapter 5 (pp. 110 and ff.) and in Chapter 8 (pp. 317 and ff.), this requirement is no longer followed (if it ever was) and, therefore, Pilotage Authorities are left free to spend pilotage monies as they see fit. Funds are frequently disposed of, generally judiciously, but, nevertheless, in contravention of the law. The main reason for this state of affairs is that expenditures (other than pilots' remuneration) paid out of pilotage revenues are small. In the most important Districts the main operating expenses, of which the largest item is the maintenance and operational deficit of pilot vessels, are paid by the Crown through indirect subsidies (vide C. 5, pp. 125 and ff.). Furthermore, the illegal application of these funds is made openly under the authority of ultra vires by-laws (vide C. 5, p. 104).

The basic reason for the imperative provision of sec. 328 C.S.A. is still valid because pilotage dues belong to the pilots who have earned them and an authority is needed to authorize the payment of District expenses out of these earnings. The sanction of the Governor in Council replaces the unanimous consent of the pilots concerned and his intervention is viewed as a check against possible abuses by Pilotage Authorities by giving him the opportunity to decide whether or not expenditures are being made in the interest of the service.

Since operating expenses have increased considerably, it is considered the system provided in sec. 328 is both cumbersome and inadequate (vide C. 5, pp. 112 and ff.).

The numerous technical irregularities which exist indicate the need for an adequate system of surveillance and control in which the Central Authority should play an important role in view of the nature of its functions. Such a system is increasingly desirable because of the greater involvement of most Pilotage Authorities in the control of pilotage which results in increased operating expenses and, in many cases, handling the pilots' own money through pooling.

It is considered that, apart from the question of pre-approval of expenditures (which is dealt with at the end of this Recommendation), the desired improvements in financial control could be achieved by the following statutory provisions:

(a) authorizing the Central Authority to provide through Pilotage Orders (vide Recommendation 17) a financial procedure including a uniform bookkeeping system;

(b) authorizing Pilotage Authorities to deposit pilotage monies in their own name in one or more accounts in any chartered bank in Canada;

(c) authorizing Pilotage Authorities to write off uncollectable debts, subject to prior approval of the Central Authority;

(d) requiring each District to file with the Central Authority a complete detailed annual financial report in the form prescribed by the Central Authority in its financial regulations;

(e) prescribing an audit of District annual reports by the Auditor General who should be required to submit a report of his audit to the Central Authority indicating, *inter alia,* any financial transactions effected contrary to any statutory or regulatory provisions, or without following the prescribed procedure or obtaining the required authorization;

(f) requiring Pilotage Authorities to submit additional reports providing specific information requested by the Central Authority and to place their books, records and supporting documents at the disposal of the Auditor General whenever he so requests;

(g) providing a procedure, as stated in Recommendation 17, for the temporary suspension of a Pilotage Authority pending investigation as a means of enforcing the Central Authority's power of surveillance in this field.

The new Pilotage Act should also state that the Financial Administration Act does not apply to the handling of pilotage monies by Pilotage Authorities, except for certain provisions which should be listed in the Pilotage Act, e.g.,

(a) the definition of such expressions as public money, fiscal year and the powers of the Auditor General;

(b) the provisions pertaining to Crown corporations (Part VIII, F.A. Act), with the reservation that the Pilotage Authority's budget should be submitted to the Central Authority for approval with or without modification by the Central Authority subject to a right of appeal to the Pilotage Regulations Appeal Board;

(c) the provisions regarding civil liability and offences (Part IX, F.A. Act).

A Pilotage Authority should enjoy the full financial powers of a Crown Corporation. It should be required to have its operating budget authorized annually by the Central Authority and special authorization should be required for extraordinary and unforeseen expenditures. The procedure for the approval of expenditures should be the same as is recommended for the approval of District regulations (vide Recommendation 19), i.e., publicity,

public hearings if objections are received, and right of appeal to the Pilotage Regulations Appeal Board, together, at this stage, with the Central Authority's right to modify proposals. Neither the Central Authority nor the Pilotage Regulations Appeal Board should have any authority to intervene *proprio motu* to reduce or modify a budget already approved, but the Central Authority should have the power to act in lieu of a Pilotage Authority which neglects or refuses to present a budget, or to seek a special expenditure authorization, to the prejudice of the service and public interest.

RECOMMENDATION NO. 21

A central pilotage equalization trust fund to be created to finance authorized operational deficits incurred by Pilotage Districts

Under Part VI of the Canada Shipping Act, a Pilotage District must be financially self-supporting and, if one which has been created fails to support itself, it must be abrogated. There is no provision for supporting Districts financially, e.g., by subsidies, and, since each such District is considered a separate, independent unit, no District can be required to finance a less fortunate District.

This principle was consonant with pilotage conceived as a private service to shipping when the State was prepared to exercise control and surveillance without cost to the public. This is a relic from the past when each sea port was left to fare for itself and when pilotage was considered a local convenience only.

Such a concept is now outdated. Although each pilotage service is essentially local in character, it remains part of a national system aimed at enhancing the effectiveness of our navigable waters as part of the overall transportation system on which the economy of the country depends. The criterion for the creation or retention of a District is no longer whether it is financially self-supporting, but whether the national interest warrants its existence. If this is the case, funds must be provided. The old principle remains that when a service is not required in the national interest but is maintained solely for the convenience or protection of private interests it must pay its way.

The question of financing Pilotage Districts is complex because local requirements are the deciding factors. All things being equal, essential services in one District may produce a deficit while the same services in other Districts may yield a profit, e.g., (apart from extreme situations such as Goose Bay and Churchill) the Saint John, N.B., District compares unfavourably with the Cornwall District.

While pilotage services must be provided in Saint John for the full twelve months of the year, the greatest demand occurs during the three winter months and, although traffic diminishes during the other nine months, the number of pilots required is determined by the winter demand. In addition, their operational costs are comparatively high, mainly because sturdy, well found pilot vessels are required to provide uninterrupted service in the boarding area where severe conditions prevail. By contrast, in the Cornwall District the flow of traffic requiring pilots is more evenly spread throughout the nine-month season, with the result that a smaller number of pilots is required to meet the same average demand. Furthermore, operating expenses are minimal because no pilot vessels are required since the pilots embark and disembark at wharves or in the locks.

If the present legislation was strictly followed, the Saint John District would be abrogated, unless the pilots were satisfied with very little remuneration. In this event, either the quality of the service would suffer, because the expert pilots which the Saint John Harbour and its approaches require would not be attracted or, if the dues were fixed at the level required to bring in the necessary revenue, the rates would be so discriminatory that most ships would by-pass Saint John, if at all possible, and those that did call would bear a disproportionate burden of rates. On the other hand, in the Cornwall District, either the rates would be comparatively too low, or the pilots' remuneration unduly high, with no professional justification when compared with the remuneration of pilots in other Districts.

The compulsory payment of dues, which was adopted by the 1873 Pilotage Act and has since remained unchanged, was merely a device to permit a District to raise more money locally when normal revenue was insufficient. The fact that this is indirect taxation is apparent from the absolute exemptions granted by statute on the basis of a vessel's ownership and flag, with no consideration for the safety of navigation. Additional revenue is secured by withdrawing relative exemptions as requisite. Hence, local traders who do not require pilots complain that they are required to pay dues in some Districts but are exempt in others (vide C. 7, p. 228). It is interesting to note that the same device is used in other countries where the principle that the service should be self-supporting is the rule. They often call the system compulsory pilotage but the only penal sanction is the payment of dues.

Such a system, even as a means to raise funds, is of doubtful value since it has major inherent weaknesses: first, the need for the service and the extent of that need are obscured; second, the aggregate costs in a District are often unwittingly increased. One unwarranted consequence is to create an artificial demand for pilotage services, e.g., non-exempt ships which do not require a pilot employ a pilot as a rule simply because they have to pay dues, thus often forcing an increase in the number of pilots and, hence,

creating additional pilots' remuneration derived from aggregate District earnings. It is essentially wrong to use direct or indirect compulsory pilotage merely to create employment for pilots. In each District, the number of pilots should remain at a level sufficient to meet the true demand, and safety of navigation should be the sole criterion for imposing compulsory pilotage (vide Recommendation 22).

In order to avoid discrimination against certain ports or areas and to ensure that adequate pilotage service is available at reasonable cost wherever needed in the national interest, financial aid must be provided for Districts and areas which are not self-supporting. This aid might be provided either by shipping, or the Government, or both, i.e., from operational surpluses of, or contributions from, more privileged Districts, or through subsidies. It is considered that both sources should be utilized.

Since the cost of a service should be borne by those who benefit from it, the expenditure of public money for the organization, maintenance and operation of a service is justified only if, and to the extent, the public at large benefits. It is unjustified to spend public money to subsidize a service which serves a private interest only. On the other hand, to withhold subsidies from a service from which the public benefits, with the result that it is wholly financed by the users through inordinately high rates, amounts to indirect, discriminatory taxation against the users.

In this connection, "the public" connotes those to whom public monies belong, i.e., the Canadian people. When an appreciable number of foreigners benefit from a service, a method should be found to ensure that contributions from Canadian public funds serve only the interests of the Canadian public, unless a direct contribution is compensated by a reciprocal agreement or by services provided by another country from which the Canadian public derives an equal benefit free of charge. In the field of pilotage, this situation arises especially on the St. Lawrence-Great Lakes system where a large number of vessels are merely in transit in Canadian waters; it exists also, but to a much lesser extent, on the Pacific Coast.

It is considered that the users should contribute to the maintenance of the service as a whole, i.e., considered on a national basis. The concept that the pilotage revenues of a District should not be used for the support of another District is outmoded and has no place in the organization of modern pilotage. Vessels which normally take pilots derive great advantage from the availability of an adequate pilotage service wherever the contingencies of trade require them to proceed. Hence, it is reasonable not only that they pay for pilotage services rendered but also that they contribute to the overall organization which makes these services possible.

The permissible extent of such contributions from shipping is determined by the rates which can reasonably be charged for services and the total amount required to maintain pilotage as an organization. "Reasonable

rates" are established on the basis of normal charges elsewhere for comparable service (i.e., prevailing rates taking into consideration the local circumstances of each case, such as cost of living) or what can be charged without harming the national economy.

The extent of the contribution from the public should be the amount necessary to meet any aggregate deficit. The fact that the public derives a substantial advantage from services classified as essential or in the public interest does not imply that a contribution in support of such services must be made out of public funds but merely that the State should be required to meet that part of the cost that can not reasonably be charged to the users. On one hand, the State assumes a substantial burden when it finances the Central Authority and its activities; on the other hand, the pilotage dues paid by the users are passed on to the public as part of the price charged by the carriers for transportation. The ultimate responsibility of the State is to ensure that the adequacy of such services is not adversely affected by financial factors. A mere guarantee that the State will make good any net aggregate deficit is in itself an adequate contribution, even if no actual disbursement is eventually made. It is not considered advisable that Crown assistance to such a fund should ever take the form of a loan, thereby committing future contributions from shipping.

The application of the foregoing principles requires the creation of a central fund, which might be referred to as the Pilotage Equalization Trust Fund. Its handling and administration should be entrusted to the Central Authority which, as a result of its supervisory position, its financial independence, and its detailed, up-to-date knowledge of the overall pilotage situation, is the indicated administrator and trustee.

The revenues of the fund should be derived from:

(a) contributions of the users through the participating Districts according to applicable rules established by Pilotage Orders;

(b) fines and penalties of any nature paid by vessels, pilots or any other person pursuant to any provision of the proposed Pilotage Act;

(c) amounts appropriated from time to time by Parliament for this purpose out of public funds.

In view of the Central Authority's detailed knowledge of pilotage, the control it exercises over District expenditures and contributions from the users, and its functions as administrator and trustee of the fund, it should be responsible for seeking the required financial assistance from Parliament. Although federal assistance may take the form of an outright statutory grant, it is considered that the adoption of the estimates procedure is more realistic and provides more flexibility. Estimates simply guarantee that money is available on the basis of expected costs, and public funds are expended only if and when the occasion arises.

To manage such a fund it is necessary to determine the contributors and the extent of their contributions, and the beneficiaries and the extent of the benefits they may derive.

By determining the participants the question of beneficiaries is automatically solved. Contributions by the users (in reality a form of tax) and the State's contribution are permissible only to support services in the general interest and should not be used to maintain those which serve private interests primarily and from which the State derives only indirect benefit.

Therefore, the participants, including both the Districts that are called on to contribute to the fund and those which draw benefits from it, should be only those Districts where pilotage is classified as either a "public service" or an "essential public service". As seen in Recommendation 17, this classification should be made by the Central Authority through Pilotage Orders. The rights of all interested parties and of the Crown are well protected by the procedure for making Pilotage Orders as recommended in Recommendation 19.

It is a very complex problem to establish the definition of contributors and beneficiaries and to determine a scale of contributions and benefits because there is not, and can not be, uniformity throughout the various Districts with respect to the status of pilots, the form of their remuneration, their conditions of work and the value of their services.

Many solutions may be devised but there appears to be no single, simple formula and, therefore, a combination of methods is indicated so that every status of pilot can be included.

The principal methods appear to be:

(a) To determine the contribution from users as a uniform, general percentage surcharge applied on a national basis, i.e., on all pilotage dues to be paid by all participating Districts. To ascertain the extent of the benefits the Districts in financial need require, it is necessary to fix for each District individually an appropriate guaranteed minimum income for its pilots. The required contribution from the Equalization Fund would then be the aggregate of the difference between the guaranteed minimum income and the actual remuneration received by the pilots of the District. In all other respects this method retains the feature that the pilots' remuneration consists of the net earnings of the District. Hence, there is no question of maximum remuneration. Therefore, the criteria for fixing rates must not be prevailing rates but the total amount needed to meet the total cost of the District, with the proviso that the resultant rates must not place an inequitable burden on the users.

(b) To fix the rates at the value to the user without considering the financial requirements of the District, thereby causing an operational surplus or deficit. This method requires fixing in each District where the pilots are not Crown employees an adequate minimum and maximum remuneration for the pilots so that an operational deficit or surplus may be calculated. A deficit determines the amount of the benefit receivable while a surplus determines the contribution to be made by the District to the fund. This system works well in Districts where the pilots are employees and, therefore, are paid a remuneration which is unrelated to the total dues collected and which is based, not on work done, but on time available for duty. It may also be adequate in Districts which operate a pooling system as long as provision is made for the pool to run a deficit and for a pilot's share to be computed without taking into consideration the amount available in the pool. To achieve this, the pilots' remuneration would have to be fixed by regulations, in the same way as a salary, on the basis of time available for duty and according to the same rules, i.e., a fixed remuneration for a basic period of work with extra remuneration for overtime or for work in special conditions as an incentive to meet the demand in peak periods.

(c) By adopting the same method as in (b) with the difference that the pilots' remuneration is paid from a different source of revenue than District operating expenses. Under this method, the price paid by the users for pilotage comprises two distinct charges, one called "pilotage fees", which constitute the pilots' remuneration, and the other called "pilotage dues", which are applied to the payment of both District and service operating expenses other than the pilots' remuneration. If this method is adopted, the Equalization Fund system does not apply to the pilots' remuneration but only to financing District operations. There is no question of establishing a minimum or maximum remuneration for the pilots. All that is required in this regard is to establish the fee rates at such a level that the total fees produce the aggregate target income. Then the dues represent the difference between the permissible charge to users for each service and the share attributed to the fees, with a resultant deficit or surplus in the operating expense fund of the District. It is considered that normally such a system would only add complications without material advantages because the basic problems are merely transferred. The pilots do not receive the guarantee and security provided by a fixed minimum remuneration; if their actual remuneration unexpectedly falls substantially short of the target income, the pilots will receive no compensation and the fee rates will not be adjusted the following

year unless it can be established that the discrepancy was not due to non-recurring events but to a basic change in the situation on which the calculation of the rates was made. This method also has the disadvantage of being applicable only where the aggregate District earnings are at least sufficient to provide the pilots with adequate remuneration, e.g., this would not be the case in Churchill and Goose Bay. Furthermore, this method does not apply when the pilots are employees.

(d) Another method is to arrange to collect the users' contributions through the pilots' own remuneration. With this system, the aggregate pilots' remuneration corresponds to the net earnings of the District; therefore, there is no question of an operational surplus or deficit. Pilots who are in receipt of remuneration exceeding a certain level are required to contribute to the Equalization Fund while those whose remuneration falls below a certain level are entitled to benefit from the fund. This is the method adopted in Denmark. All Danish pilots who receive an annual income in excess of the salary provided for the 23rd grade in the Civil Service are required to contribute to the fund 27% of the excess. On the other hand, pilots on stations where the remuneration is below a certain level are entitled to receive benefits from the fund, if they so request, and as determined by specific regulations (vide Appendix XIII). In the Danish system, the conditions governing contributions allow for a wide variation in remuneration between Districts. This is equitable because the pilots in different Districts with comparable time of availability for duty are not necessarily entitled to the same remuneration, e.g., remuneration should be higher in Districts where pilots are regularly employed, where pilotage is more exacting and requires a higher degree of qualification, where responsibilities are heavier because of the size and class of ships involved (the same finding was made in the United Kingdom, vide Appendix XIII). With such a system it is considered that, in order to avoid contention, the conditions governing contributions should be uniformly fixed for all Districts and should commence at a common average level. Any adverse effect resulting from such an arbitrary rule could be corrected by taking into account the contribution to the fund when fixing the target income for each District. Here again, this system does not apply where the pilots are employees. If this system was adopted, care would have to be taken that the pilots' remuneration for the purpose of income tax would be the net income after deducting compulsory contributions.

Of all these systems, it is considered that the most flexible and the most equitable is method (b) which is based on the operational surpluses and deficits of Districts. *Inter alia,* it has the marked advantage of disassociating the pilots' remuneration from charges made to users and is also more realistic in that essentially most contributions and benefits are governed by the local peculiarities and requirements of each District.

However, from the point of view of simplicity of procedure and ease of application, a variable system based on method (b) for Districts where the pilots are employees of their Authority, and on method (a) for the remainder, has considerable merit. In the present context of the organization of pilotage in Canada, the inequalities inherent in method (a) would be negligible in practice, as may be ascertained by referring to the analysis of indirect subsidies paid in 1965 (vide Chapter 5, Table "A", p. 126 and Comments, pp. 127 and 128). If such a fund had existed in 1965 and a surcharge of 14 per cent had been made, the net contribution of the following main Districts would have been: Montreal, 5.7 per cent, Quebec, 2 per cent, British Columbia, 0.2 per cent and Cornwall, 4.9 per cent. These four Districts accounted for 83.9 per cent of the total cost of pilotage in Canada (excluding the Great Lakes Districts). On the other hand, the following Districts would have benefitted as follows: Halifax, 23.6 per cent, Saint John, N.B., 34.8 per cent, Sydney, 22.4 per cent. These three Districts accounted for 9.5 per cent of the total cost.

Other methods may be devised. It is considered that establishing the system under which users are required to contribute is essentially a practical problem based on a situation of fact which should be a responsibility of the Central Authority to solve. Whatever method is adopted, it should be reasonably practical, simple and equitable.

The Central Authority possesses all the necessary powers to control the expenditures of Pilotage Authorities and to avoid unwarranted demands on the fund. The number of pilots, target income or salary, as the case may be, will be controlled by the requirement that regulations must be approved, and actual spending ratified by the procedure for approving budgets and unforeseen expenditures. In exercising such controls, the Central Authority should ensure that a Pilotage Authority does not exceed its financial means, including any expected grant from the Equalization Fund, bearing in mind that the permissible amount of a grant is determined by the extent of public interest. Hence:

(a) Where pilotage is classified as an essential public service, financial considerations should never be an obstacle to prevent any step needed to provide the best pilotage service local circumstances require, and any operational deficit that remains after the users are charged an equitable price must be met from the fund.

(b) Where pilotage is classified merely as a public service, grants from the fund should be issued only to the extent necessary to maintain a service which is adequate to protect public interest.

(c) Where pilotage is classified as a private service and the public derives only indirect benefit, care should be taken before approving expenditures to ensure that the Pilotage Authorities concerned can afford them from their own resources because such Districts can not draw benefits from the Equalization Fund.

RECOMMENDATION NO. 22

Compulsory pilotage to be imposed when, where and to the extent required in the interest of safety of navigation

For safe navigation in confined and difficult waters, local knowledge and experience are essential. The *raison d'être* of organized pilotage is to provide local experts for vessels whose Masters and mates do not possess the required knowledge and experience of navigating confined waters. Pilotage becomes compulsory when such local experts, i.e., pilots, are imposed on vessels by appropriate legislation.

There are degrees of compulsory pilotage. Pilotage is compulsory in the full sense of the term (referred to hereunder as "compulsory piloting") when a vessel must be navigated by a licensed pilot. There is also a modified form (referred to hereunder as "compulsory taking of a pilot") when a Master is required to have on board a licensed pilot while his ship is being navigated, whether or not he makes use of the pilot's services or advice. The foregoing is not new in Canadian legislation. Part VIA C.S.A., which was enacted in 1960 as special pilotage legislation for the Great Lakes, imposes "compulsory piloting" for vessels in "designated waters" and "compulsory taking of a pilot" for those in "undesignated waters". For reasons of clarity the new Act should provide statutory definitions for these terms.

Since compulsory pilotage is interference by the State with the liberty of individuals, it should never be resorted to unless the superior interests of the State so require and should always be limited to the extent of that requirement.

When vessels must navigate in confined waters the superior interests of the State may be jeopardized and, hence, compulsory pilotage may be imposed where:

(a) a maritime casualty would seriously disrupt navigation to the marked disadvantage of the national economy; or

(b) safe, speedy transits and movements which must be effected in the national interest can not be achieved unless vessels are navigated by mariners with adequate local knowledge and skill.

Hence, the main character of the method adopted should be flexibility, bearing in mind the rapid progress now being made in the field of electronic navigational devices and communications. Compulsory pilotage which may be necessary in certain areas to-day may not be necessary to-morrow; the reverse may also be true, *inter alia,* on account of the ever increasing size of vessels.

Appraising the national importance of a pilotage service is a task within the competence and responsibility of the Central Authority since it forms the criterion which authorizes the Central Authority both to create Districts that are not financially self-supporting and to help finance them afterwards. Such an appraisal will be automatic if, as recommended in Recommendation 17, the Central Authority is required to issue Pilotage Orders classifying the various pilotage services in Districts and areas according to their degree of importance in the national interest. Various services within one District may draw different classifications, more particularly in merger type and coastal Districts. Hence, the compulsory system should not necessarily be applied on a District basis but should have flexibility to permit the degree of compulsion to vary from place to place within a given District, according to the requirements for safe navigation.

It is considered that the Act should stipulate that:

(a) Where a pilotage service is classified as essential, compulsory pilotage should apply automatically.

(b) Where a service is classified merely as a public service, the compulsory rule should apply only if specifically imposed by the Central Authority in a Pilotage Order and subject to any general restrictions the Central Authority may impose.

(c) Where a service is classified as being primarily a private service, compulsory pilotage should never be imposed.

Where compulsory pilotage applies in accordance with this method, the next question is to determine which vessels are potential safety risks in a given local area unless they are navigated by mariners possessing local competence. The fact that this is essentially a local problem can be readily appreciated by comparing the great difference in the governing factors, e.g., navigating a large vessel in Halifax is much simpler than in Courtenay Bay, Saint John, N.B.; conducting a vessel through the Railway Bridge on the Fraser River requires a much higher degree of local knowledge and experience than in the rest of the New Westminster District; the limitations and problems of navigation posed by the St. Fulgence Channel are altogether different to those which obtain on the Saguenay River up to Port Alfred; a vessel considered small for Halifax or the Quebec District might well pose problems of navigation in St. John's, Newfoundland, and in various ports along the New Brunswick coast; manoeuvrability in confined waters, quick

response, underkeel water clearance, length and beam are among the many factors which may make a ship a safety risk in one locality but would have little significance in others.

Therefore, the question to be resolved is whether local competency is needed to navigate a given vessel in the prevailing or expected conditions during a trip on a given route. The ideal procedure would be to appraise every case separately but this would be impractical in view of the unwarranted delays it would cause and, therefore, a more practical solution must be found, i.e., to make legislative rules based on acquired experience and possibly leave the relatively few exceptions for appraisal on a case basis by the Pilotage Authority concerned.

Two methods may be adopted to impose compulsory pilotage:

(a) the method used in Part VI C.S.A. whereby the compulsory system applies to all vessels unless they are specifically exempted either by statute or by regulations;

(b) the reverse method to the effect that the vessels affected are those subjected to compulsory pilotage by a specific provision in the statute or the District Regulations.

It is considered that method (b) should be adopted. The nature of method (a) and the unsatisfactory results derived from it are strong arguments in favour of method (b). Since compulsory pilotage interferes with basic freedoms, it should not be imposed indiscriminately but only when necessary and to the extent warranted as the result of positive, deliberate judgment. Under such conditions, any abuse becomes apparent and is likely to be challenged. Under method (a), there is a danger of a passive attitude being taken with the result that the matter will be only partially covered. If the ensuing incomplete legislation is enforced (a matter in which the Pilotage Authority has no discretion when discharging its administrative functions), certain parties may be gravely prejudiced. The manner in which permissible exemptions for small foreign vessels (subsec. 346(c) C.S.A.) were dealt with in the various District By-laws, together with the failure of Pilotage Authorities to enforce the obviously inequitable legislation that ensued, is a fair example of the unsatisfactory situation that may develop (vide C. 7, pp. 227 and 228).

Although the full extent of the application of compulsory pilotage varies from place to place and, therefore, can not be defined in legislation of general application, some vessels regularly employ a pilot because neither the Master nor the mates possess the necessary local competence while, at the same time, other vessels should always be required to employ a pilot because public interest demands that no undue risk be taken. It is considered that to avoid repeating the same provision in all District Regulations, and also to prevent possible opposition and contention on a subject that should be beyond question, these cases should be specially covered in the Act itself,

leaving to the Pilotage Authority in each District the task of completing the scope of application of compulsory pilotage through District Regulations.

Therefore, it is considered that the Act should contain the following *minimum* statutory requirements for the application of compulsory pilotage in Districts, or parts of Districts, where compulsory pilotage applies:

(a) compulsory taking of a pilot by all foreign-going vessels employed in overseas trade or voyages whose gross tonnage exceeds 1000 tons;

(b) compulsory piloting imposed on vessels carrying cargoes that, for the purpose of safety of navigation, are defined in Pilotage Orders as dangerous cargoes;

(c) compulsory piloting imposed on vessels over 1000 tons gross when navigated as dead ships.

By the nature of their profession, the Masters and mates of foreign-going vessels engaged in overseas trade or voyages (i.e., not regularly engaged in home trade or inland coastal voyages) seldom travel regularly enough in any confined waters to acquire and maintain the necessary local knowledge and experience to navigate their vessels in such waters expeditiously and safely (vide C. 3, pp. 41 and ff.). The exceptional cases where this is not so should be assessed on an individual basis through the issuance of personal exemption certificates.

The size of vessels is a factor that must be considered. Vessels under a certain tonnage can not reasonably be considered to create any serious hazards to navigation under normal conditions. In Part VI C.S.A., a very low limit of 250 tons net was set; to fix an absolute minimum in to-day's context, it is considered that 1000 gross tons would be more appropriate. Gross tonnage should be used instead of net tonnage because gross tonnage is more closely related to the size of vessels (vide C. 6, p. 171). A corresponding minimum in displacement tonnage should be stipulated for vessels not possessing a gross tonnage certificate.

Vessels carrying dangerous cargoes, whether local traders or not and irrespective of their size, are a great potential danger not only to the safety of navigation but also to the safety of the communities surrounding the confined waters through which they pass. The interest of the public requires that these vessels be forbidden to navigate unless conducted by a person fully competent to navigate them in the confined waters in question. The statutory definition of "dangerous goods" contained in subsec. 2(21) C.S.A. is not adequate for this purpose. The proposed Pilotage Act should contain its own definition which pays due regard to the safety of the public and of navigation. What constitutes a dangerous cargo for the purpose of compulsory pilotage should be made a subject-matter of the regulation-makings powers of the Central Authority, i.e., to be determined through Pilotage Orders.

Vessels being navigated as dead ships always constitute a serious navigational problem in that they and the assisting tugs must operate together as navigation units. It is most important that navigators fully trained in such teamwork and competent in local navigation be in charge of such units.

The Pilotage Authority of each District where compulsory pilotage applies should be responsible for completing this general minimum scheme of compulsory pilotage by extending its scope of application to other types and classes of vessels and by lowering the tonnage limit below 1000 tons gross as warranted by local safety requirements. However, it should have no power to modify the statutory rules otherwise, e.g., by raising the tonnage limit to 2000 tons gross. This should be done realistically and not theoretically. As stated earlier, compulsory pilotage is essentially a question of local fact. Past experience should be considered, e.g., a class of ships which have regularly navigated without pilots in the past should not be arbitrarily subjected to compulsory pilotage because of an occasional accident. There must be specific and realistic reasons for imposing compulsory pilotage. It must be borne in mind that pilots themselves are occasionally involved in shipping casualties. Although accidents raise questions of doubt, they do not necessarily establish that a class of ships is a safety risk. The circumstances surrounding each casualty should be investigated to reveal the real cause; any doubt should be resolved in favour of safety of navigation and regulations should be elaborated on the basis of experience so gained. This implies that, where compulsory pilotage exists, the Pilotage Authority should have power to carry out complete investigations into shipping casualties, even when no pilot is involved, in order to establish the cause of the casualty. There should be coordination if the casualty is to be the subject of an investigation under Part VIII C.S.A. (vide Recommendations 28 and 36).

Pilotage Authorities should resort to compulsory piloting only in exceptional circumstances, i.e., for vessels that are considered to be extreme safety risks, either on account of their size or because they are large passenger vessels, or for other reasons, always bearing in mind the added responsibilities such a move implies (vide C. 2 p. 29).

However, the Act should also stipulate the right of a pilot to demand at any moment he be given charge of the navigation of a vessel which he has boarded on account of the "compulsory taking of a pilot" requirement when, in his opinion, he should take charge for the safety of navigation (but never solely for the safety of the vessel). This is consonant with the very purpose of compulsory pilotage; a pilot should be the guardian of the public interest when he is on board. But this is an extraordinary power which should not be resorted to except when a pilot has grave reasons for taking such action.

The classifications contained in secs. 346 and 347, C.S.A. should be avoided, e.g., nationality of vessels and identity of owners, since such criteria, which are consonant with a system where compulsory pilotage is a

form of taxation, are inconsistent with a system which requires the employment of pilots to promote the safety of navigation. There is no valid reason for excluding from the application of compulsory pilotage certain vessels simply because they are warships, or hospital ships, or because they belong to the Crown. Such characteristics do not *ipso facto* endow their navigators with the required local knowledge and experience.

Neither does the fact that vessels are engaged in special voyages (of the type mentioned in sec. 346 C.S.A.), in fishing, or in salvage operations, or are entering a harbour for refuge, alter the situation. Most fishing vessels would normally not be obligated because of their size, but not to obligate them as a group merely on account of their occupation is wrong from the point of view of safety. Vessels engaged in salvage operations or entering a port for refuge may well be serious safety risks on that account and only a grave emergency should release them from compulsory pilotage. This should not be taken to mean that fishing vessles should be subjected to compulsory pilotage; most fishing vessels will not fall within the categories of vessels subjected by statute to compulsory pilotage and whether any category of them should be subjected through regulations would be (as for any other category of vessels) a question of safety of navigation in the light of local conditions. When safety is the main factor, there should be no room for preference or discrimination.

Since safety of navigation is the sole aim of compulsory pilotage, there will always be *sui generis* cases which can not be covered in legislation without causing grave injustice to others but which should be subject to compulsory pilotage if the safety of navigation so requires. The only solution is to deal with these cases administratively as they occur. The Act should give power to Pilotage Authorities to require normally non-obligated vessels to take a pilot whenever there are grounds to believe that, without a pilot on board, such vessels might be an unwarranted safety risk in the prevailing circumstances. If a vessel would not otherwise have taken a pilot and the owner refuses to pay the pilotage charge(s), the dispute should be submitted for adjudication to the Admiralty Court; the vessel should be made to pay only if the Court finds that the Pilotage Authority's decision was justified in the circumstances; if such proceedings are unsuccessful, the costs should be borne as an operating expense of the District.

With the proposed system, any aggrieved or interested party has ample means at his disposal to oppose any unwarranted decisions. Aside from the required reference to the Admiralty Court mentioned in the preceding paragraph, compulsory pilotage is enforced through the regular courts where an aggrieved party is given full opportunity to defend his rights. Furthermore, because the sole criterion for compulsory pilotage is the safety of navigation, regulations that are not justified on this ground will be ultra vires and, therefore, can not be enforced before any court if their validity is attacked. Since the provisions defining the nature and the extent of compulsory

pilotage form part of the regulations, its application will be governed by the various means of control to which District Regulations and Pilotage Orders are subject (vide Recommendation 19), thereby ensuring that compulsory pilotage is not wrongfully imposed.

Under the proposed method, there are no exemptions as normally understood because the rule is that no vessel is subject to compulsory pilotage unless it falls within one of the categories of vessels specified in the Act, or in the District Regulations. There are no "exempt vessels", only "obligated vessels". Hence "exemptions" refer to the special circumstances where an "obligated vessel" is relieved of compulsory pilotage:

(a) personal exemption;

(b) unavailability of licensed pilots(s);

(c) emergency.

The question of personal exemptions ((*a*) above) is dealt with in Recommendation 23 which follows.

With reference to the non-availability of pilots (vide C.7, pp. 230 and ff. and *Comments,* p. 235), it is the responsibility of each Pilotage Authority to keep a sufficient number of pilots at any pilot station to meet the expected demand. Vessels that have complied with all requirements should not encounter costly delays because a Pilotage Authority fails to fulfil this responsibility. If a Pilotage Authority does not provide a pilot when a vessel arrives within the prescribed boarding area, the Master should be entitled to employ an unlicensed pilot, if one is available, or to proceed without a pilot, unless the vessel is one to which "compulsory piloting" applies.

If there is a shortage of pilots, those available should be assigned to vessels that have arrived at the pilot station, or are about to arrive, by an order of precedence determined by the requirements of safety of navigation: first, vessels subject to "compulsory piloting"; second, vessels which are merely required to take a pilot on board; and, finally, the "non-obligated" vessels which have requested a pilot.

Since vessels can now communicate with the shore at almost any distance, Pilotage Authorities should be empowered to make regulations adapted to every local situation which require vessels to order pilots a fixed number of hours in advance. Such orders would enable Pilotage Authorities to make the necessary number of pilots available. A penal sanction might be provided for failure to comply with the requirement for advance notice, and, in addition, the Act should provide that a vessel which had not complied should be required to bear any inconvenience caused by its own failure, i.e., the stipulated period of advance notice would commence either when it arrived in the boarding area or when the overdue message (if sent) was received. The result would be that such a vessel would be unable to benefit

from the exemption for non-availability of pilots until the required delay had expired, and, in the meantime, available pilots would be assigned by priority to all vessels that had complied with the regulation. But under no circumstances should such a vessel be delayed if, without creating a shortage of pilots, a pilot was available or became available, nor should such a vessel be delayed as a means of arbitrary punishment.

In an emergency involving safety, a vessel should proceed without a pilot or, if a pilot is on board, under another navigator, if circumstances warrant, e.g., obvious unfitness, but the regulation should apply as soon as the emergency ceases. The onus of proof that an emergency exists must rest on the vessel.

Since compulsory pilotage is imposed because the interest of the State requires it, proper means of enforcement should be provided:

(a) For failure to take a pilot on board there should be a severe penalty, such as double the pilotage dues the vessel would otherwise have been called upon to pay. Such a penalty should be considered a pilotage claim for the purpose of collection.

(b) In addition, if compulsory piloting applies, a vessel should be subject to arrest and detention until its navigation is placed under the control of a licensed pilot, together with all necessary means of enforcement (vide C.S.A. Part XV).

(c) When a pilot is taken on board and either compulsory piloting applies or, with good reason, a pilot has demanded he be given charge of the navigation, if the vessel is not navigated by the pilot, the Master should be liable to a considerable fine (e.g., $500). (This is at present the penal sanction, *inter alia,* for failure to comply with the compulsory pilotage requirement on the Great Lakes, vide C.S.A., sec. 375D.)

RECOMMENDATION NO. 23

Personal exemptions to be an essential feature of any compulsory pilotage scheme and the Act to guarantee the right to such personal exemptions to Masters and mates who are competent to navigate their vessels safely in District waters

Since the reason a pilotage service exists is to remedy a situation of exception with regard to navigation, a service should never be established unless it is clearly required. This principle, which applies to the creation of Districts, is *a fortiori* valid when the question arises of compelling vessels to employ a pilot.

From a safety point of view, the ideal situation is for a Master or his mate(s) to navigate a vessel but this is not always possible in confined waters where local knowledge and experience are essential.

To be a Master or mate requires considerable knowledge of navigation and seamanship, and the additional knowledge and competence required to navigate in confined waters can be readily acquired with experience. However, since opportunities to acquire the necessary experience are generally infrequent, the best alternative is to accept the services of a pilot who has the necessary local competence.

The navigation of a vessel under the direction of a pilot demands teamwork. For his part, the pilot contributes general experience in handling vessels plus expertise in local navigation, while the Master or his representative, i.e., one of the mates, oversees the pilot's orders, provides him with particulars of the vessel, her manoeuvring performance and peculiarities, and offers advice as occasion demands (vide C. 2, pp. 26 to 29). Therefore, if the Master or mate possesses the required local knowledge for safe navigation in the waters concerned, it is unwise and unnecessary to compel the vessel to take a pilot whose services are not required and may not be used. Because the basic aim of pilotage legislation is to promote safety of navigation, it should never be distorted by being used as a means of either justifying an unnecessary number of pilots or exacting from shipping payment for services that are not required. Here again, the right of the State to deprive a person of part of his freedom can be justified only if a superior interest of the State is involved; otherwise, individual rights should remain inviolate.

Application of the foregoing principles requires a licensing procedure (with all the responsibilities the term connotes) in order to ascertain which Masters or mates possess the required local competence before they are exempted from pilotage and to ensure that their exemptions are withdrawn if there is any reason to doubt that they are no longer qualified. Furthermore, because each Pilotage Authority is responsible for licensing its pilots, it should perform this similar function for Masters and mates.

In Part VI C.S.A., the official document issued pursuant to such licensing is called "pilotage certificate". It is considered that the term is misleading and that it should be replaced by "personal exemption certificate" or other appropriate term (vide C. 8, p. 307).

However, personal pilotage exemptions can not be granted unless, and until, a system which makes full use of Pilotage Authorities' competence is devised and implemented. The past record has shown that, despite the basic injustice entailed in the denial of personal exemptions and the fact that in such exemptions lay the only legal solution to a number of their problems, Pilotage Authorities yielded to the pilots' objections and failed to make the necessary regulations, with the result that it was impossible to examine

applicants and issue pilotage certificates. Since 1934, the question of pilotage certificates as provided for in the Act has remained a dead letter because the legislation in this field was delegated to the regulation-making powers of Pilotage Authorities. This was most unrealistic, since it was to be expected that Pilotage Authorities would be reluctant to take action. The only solution is to deal with the question in the Act itself leaving little discretion to District Authorities. It is believed this could be achieved as suggested in Chapter 8, p. 307, i.e., by including in the Act all the general basic provisions and making it a statutory right to obtain a personal exemption certificate. Pilotage Authorities should be given the right to supplement the provisions of the Act through Regulations (vide Recommendation 19) by additional requirements they consider justified in their District. However, whether or not they take such action, the exercise of this licensing function would not be rendered impossible on this account as is now the case (vide C. 7, pp. 232 and 233). It is also necessary for the protection of the public and the efficiency of the pilotage service that such personal exemptions be obtained only by *bona fide* Masters and mates of specified vessels and that holders of exemption certificates remain competent, both generally and in local expertise.

Therefore, it is considered that personal pilotage exemptions should be provided for in the Act as follows:

(a) The Act should stipulate that it is an absolute statutory right for any person who possesses the required competency and meets the prescribed conditions to obtain a personal pilotage exemption certificate.

(b) Such certificates should be issued only to persons who are and continue to be *bona fide* Masters or mates of the complement of a vessel.

(c) Candidates should possess a Canadian certificate of competency, or a special certificate of equivalence (as explained hereafter) not lower than Master home-trade or Master inland waters for the type of ship to which they belong, and the validity of the personal exemption should be conditional on the retention of such a certificate.

(d) The validity of each personal exemption should be restricted to the vessel named on the certificate.

(e) The certificate should be either valid for all District waters or restricted to a given route, depending upon the request made by the applicant and the extent to which the applicant is qualified.

(f) Except for age limit, apprenticeship and basic certificate of competency, all other requirements (as modified from time to time by District Regulations) applicable to pilots' professional competency,

physical and moral fitness and reliability should apply *mutatis mutandis* to exemption holders, unless reduced prerequisites are specifically stipulated for them.

(g) The Act should establish the minimum local experience required to obtain and retain an exemption certificate. Pilotage Authorities should be authorized to increase the prescribed minimum by District Regulation.

(h) Licensing should be performed by the Pilotage Authority of the District concerned following the same procedure as exists for licensing pilots. Holders of exemption certificates should remain under the control and surveillance of the Pilotage Authority to the extent necessary to ensure that they remain qualified.

(i) The Act should provide that personal exemption certificates remain valid as long as the various terms and conditions imposed by the Act and the regulations continue to be met, subject to review at all times.

(j) All applicants should pay an examination fee and, in addition, the exemption certificate holder should be required to pay an annual certificate fee. Both charges should be defined in the Act.

A personal exemption must be restricted to a vessel named on the certificate in order to ensure that the exemption remains valid only as long as the holder is *bona fide* Master or mate of the vessel he navigates. A certificate valid for a class of vessels or for all, or a number of, vessels belonging to one owner would, in fact, be tantamount to creating another group of pilots in addition to the licensed pilots in a District, a situation which is neither intended nor warranted. However, the Act should provide for the situation when a personal exemption holder is appointed from one vessel to another. Once the Pilotage Authority is satisfied that the applicant is a member of the complement of the new ship in the capacity of Master or mate, it should be required to issue a new certificate, provided the circumstances (except the ship) remain the same.

A personal exemption holder should be obliged to substantiate his official capacity on board whenever requested by a Pilotage Authority or its duly authorized representative, observing that this fact is readily ascertainable from the vessel's articles.

Wherever the safety of navigation requires that compulsory pilotage be imposed, it is essential to make certain that those who benefit from a personal exemption meet the Canadian standard of competency for Master or mate of their vessel. This fact might be established by the Pilotage Authority at the time of licensing but, as recommended in the case of pilots (Recommendation No. 13), it is considered that such appraisal should remain the responsibility of the Minister of Transport. Therefore, applicants

holding a foreign certificate of competency should be required to obtain a special Canadian certificate valid only for the purpose of obtaining an exemption certificate. The Minister of Transport should be authorized by the Act to establish by regulations a list of Canadian equivalents of the various certificates of competency issued by other countries, when and to the extent they meet Canadian standards, in which case the procedure for issuing special Canadian certificates would merely amount to verification. For cases not so covered, applicants should be required to take an examination before the Department of Transport examiners of Masters and mates to qualify them for Canadian requirements.

The jurisdiction of the various courts under Part VIII should be extended to cover such special certificates of competency and, when warranted, these courts should have the power to order their cancellation or suspension, thus automatically invalidating the personal pilotage exemption (vide Recommendation 36). Similarly, the cancellation or suspension of a certificate of competency in a foreign country would automatically invalidate a special Canadian certificate and a personal exemption certificate issued on the basis of the foreign qualification.

The extent of local knowledge and experience should be determined by District Regulations to meet local needs but the requirements for obtaining and retaining a personal exemption should not exceed those prescribed for a pilot's licence or for navigating a vessel of the class named in the certificate. Where applicable, a restricted personal exemption certificate might be issued for a particular route. In this case, the examination on local knowledge should be limited to that route and its immediate surroundings and the certificate, when issued, should be restricted to the area in question. Otherwise, the certificate should be general and the examination on local knowledge should extend to the whole District, as for pilots.

Because experience is needed to acquire and maintain local competency, it is considered that the Act should establish a minimum standard leaving it to the Pilotage Authorities to increase it if considered necessary in the light of District peculiarities. It is suggested that a reasonable minimum for any District where pilotage is compulsory should be five round trips or ten one-way trips through District waters or on the particular route for which the exemption is requested during the two years preceding the application, it being understood that such trips were made with the Master and/or mate on the bridge accompanied by a licensed pilot or a holder of a personal exemption. To retain his exemption, any holder should be required to make a minimum of five one-way trips per year as Master or officer of the watch on the bridge. The exemption would automatically lapse if this minimum was not completed, subject, however, to renewal whenever the prescribed number was completed with a licensed pilot or a certificate holder, provided the Pilotage Authority was satisfied the former holder remained qualified.

The theoretical and practical examination on local knowledge should be carried out by the same board that examines pilot candidates in order to ensure uniform standards and maximum efficiency. Granting a personal exemption is, in fact, licensing and, therefore, imposes upon the Pilotage Authority the duty of surveillance as well as responsibility for reappraisal when necessary. In all respects (with due consideration for any incompatibility with their status as ship's officers) exemption holders should have the same privileges, rights, obligations, duties and responsibilities as pilots, and this should be stated in the Act.

With reference to fees, it is considered there should be an examination fee high enough (e.g. $50) to discourage frivolous applicants but there should be no fees for a mere transfer nor when a holder whose certificate has lapsed because the minimum number of trips were not made seeks reissuance of his former certificate. It is reasonable that any individual for whose personal benefit these examinations are held should make a contribution to assist the District to meet the extra expenses incurred on his behalf. The circumstances surrounding these examinations should not be confused with those which prevail when pilot candidates are examined (vide C. 8, p. 260).

In addition, it is considered that a certificate fee should also be charged against the vessel on a yearly basis (e.g. $100) as was previously the practice (vide secs. 469 and 470, 1927 C.S.A.). Since granting personal exemptions entails additional responsibilities (including surveillance and reappraisal) and administration for Pilotage Authorities, it is reasonable that these be borne by those who benefit and not be made a charge, through District general expenses and pilotage dues, against the vessels who make use of the services of pilots. In order to prevent abusive charges being imposed through regulations and the unnecessary disputes which may result, it is considered that the amount of both the examination fee and the annual certificate fee should be fixed in the Act itself.

In order to obviate unnecessary inconvenience where the safety of navigation is not involved, it is also considered that the recommended new Pilotage Act should dispense with examinations on local knowledge and skill for applicants who can prove that immediately prior to the entry into force of the new Act, or the imposition of compulsory pilotage, they have navigated ships as large as, or larger than, the one for which they are applying for exemption in the waters of the District, or the route concerned, without the assistance of a licensed pilot for at least ten one-way trips during the two previous years.

It is believed that the proposed system would provide the necessary guarantees. Whether or not appropriate regulations have been made, Masters and mates possessing the required general and local competency will always be able, even against the will or despite the possible inertia of Pilotage Authorities, to obtain and retain their personal exemption, if necessary with

the aid of a court order. If a Pilotage Authority makes regulations that prove to be discriminatory, abusive or intended to defeat the purpose of the Act, a number of appropriate remedies are available to any aggrieved party through the proposed regulation-making procedure by making use of the power of the Central Authority to act *proprio motu,* and in the case of ultra vires regulations, through a court order declaring their illegality. For relief against erroneous appraisal or reappraisal, an appeal should lie before the Admiralty Court (vide C.7, pp. 232 to 236 and C.8, pp. 305 to 307).

RECOMMENDATION NO. 24

Where pilotage is classified as an essential public service, the status of licensed pilots to be that of Crown employees or quasi-employees of the Crown, the former being preferable

From the licensing point of view, the status of pilots is immaterial since the standards of qualifications required of pilots remain the same for a given area, whether or not the service is deemed to be an essential public service. The degree of expert knowledge required is determined by the local conditions that affect navigation, and licensing is always a prerequisite whatever the status of the pilots may be (vide Recommendation 12).

The situation, however, is totally different when the Crown's intervention is extended beyond licensing and the Pilotage Authority is required to control the provision of services (vide Recommendation 14). When such intervention is justified on the ground that the service is an essential public service, private considerations, whether of the pilots or of other interested parties, must yield to measures intended to promote efficiency and reliability.

As recommended in Recommendation 14, where a pilotage service is classified as an essential public service, the State's control must be complete. As far as the pilots are concerned, such control excludes free enterprise and the free exercise of their profession, and presupposes that they are employees or the equivalent (referred to in this study as quasi-employees or *de facto* employees).

In the context of the present factual situation, this is not a novel concept because, in fact, in all the main Districts the pilots are fully controlled and are all at least *de facto* employees of their respective Pilotage Authorities (vide C.4, pp. 74 and ff.).

The question is whether, in such a case, the pilots should be required to become actual employees or should be allowed to retain their *de facto* status. It is considered that the preferable status is employee. However, if the majority of the pilots desire to retain their status of *de facto* employees they should be allowed to do so. Although the status of quasi-employee involves a considerable increase in administrative problems, the pilots should be given

this option because this is the situation that now generally prevails and also because these administrative problems are not likely to affect the quality of the service.

The status of employee is ideal (vide C.6, pp. 140 and ff.) because when the provision of services to shipping is governed by considerations which override the private interests of both shipping and the pilots, their intervention in pilotage administration and organization must be limited to their direct concern and respective fields of interest which should be segregated as much as possible. As employees, the majority of the most pressing administrative problems that now exist would be solved, and any new problems created by the new status could be dealt with in a more orderly fashion.

If the pilots become Crown employees, they gain considerable benefits and enjoy security that no other status can provide. They are assured a definite remuneration because they have minimum guaranteed employment irrespective of the amount of work they actually perform. Any extra assignments they may be required to accept during peak periods mean higher additional pay. Their income is no longer affected by economic upheavals such as strikes by seamen, waterfront workers or industry, which in recent years have seriously affected the income of the St. Lawrence River pilots and, to an even greater extent, the remuneration of the British Columbia and New Westminster pilots. Moreover, they are protected against the consequences of a slow down in the economic activities of the region on which the harbour(s) they serve depend, such has been the case in the Sydney District during the last few years. Furthermore, this status makes the pilots eligible for the advantageous welfare privileges all Crown employees enjoy (vide Recommendation 39).

From the administrative point of view, the status of employee has the marked advantage of limiting the pilots' material interest in administration to their working conditions, the amount of their income and the manner in which they are paid, thus ending the standing problem which has proved the most serious source of contention between pilots and shipowners and, at times, even the Pilotage Authority. Continuing disputes are to be expected in a system where the pilots' remuneration consists of the net earnings of the District since these are directly dependent upon rates, operating expenses and the way the provision of services is organized in the District.

It is a matter of record that shipping has very few complaints about the quality of the service and the competence of the pilots. What few shortcomings there are can easily be remedied by reform at the Pilotage Authority level, mainly as recommended in Recommendations 26 to 38. The numerous disputes during recent years have all been of the same nature because they resulted from repeated efforts by the pilots to improve their financial and working conditions against the vigorous opposition of the shipowners who,

more often than not, objected only as a matter of principle. The narrowly avoided strike of the Quebec pilots in 1960 and the 1962 strike of the St. Lawrence River pilots, which the Saint John and British Columbia pilots threatened to join, are self-evident examples of this state of affairs; clashes were frequent and were carried even to the extent of magnifying petty details into major issues, e.g., whether the strength of the Quebec pilots should be slightly increased, or whether such a minimal item of revenue as the detention charge should be increased or redefined.

On the other hand, the pilots successfully opposed administrative measures that would have resulted in loss of revenue or in increased operational expenses and smaller net earnings. For instance, pilotage certificates are not issued because the pilots believe they would cause a loss of income; in most Districts the dues that are paid as a result of the compulsory payment system are credited at the pilots' request to the pilots' earnings, contrary to the specific provisions in the Act regarding the application of funds; the British Columbia pilots have always objected to stationing pilots in the northern region because they would contribute less to the pool. Again, the Quebec pilots do not perform port pilotage in Rimouski and in the other small ports situated east of Les Escoumains but allow unlicensed pilots to provide the service (although the area is still within the limits of the Quebec District) because such assignments are not financially attractive.

However, it should be realized that pilots who are Crown employees do not fit into any existing category of civil servants but are in a special situation which must be treated on an *ad hoc* basis. Failure to recognize their special situation will cause unending trouble, contention and dissatisfaction and may, in fact, defeat the intent of the new legislation and render the status of employee unacceptable. There is no reason why this should be but it will be the case if a realistic view is not taken and if attempts are made to standardize by forcing the pilots to fall into already existing cadres. A completely new classification of Crown employees must be created whose working conditions and terms of employment are determined by the nature and circumstances of their service, i.e., local circumstances and the needs of each District; this classification must have flexibility within itself, e.g., to mention only one point, it is unrealistic not to consider pilots' employment on a yearly basis simply because pilotage is not performed during the winter months; it is illogical to consider for any purpose that the pilots are engaged in a part-time profession, because the facts prove the opposite. In a pilotage organization where serious efforts are made to improve the pilots' qualifications, the winter months, aside from being the period for annual leave, should be employed to provide pilots with special courses and training and could be used to perform any indicated routine medical examinations or examinations on professional competency, if or when required.

As stated above, when the majority of the pilots in a District desire to retain their status as *de facto* employees, they should be allowed to do so,

provided any conflict of interests is not prejudicial to the superior interest of the public. Nevertheless, the control of the Authority must be complete, i.e., in addition to being in charge of despatching, it should also pool the pilots' earnings, as is now done by the Pilotage Authorities of all Districts where the pilots are despatched by the Pilotage Authority, except, as seen earlier, in the three St. Lawrence River Districts where this privilege was denied to them, forcing them to create and operate their own pooling system (vide Cs. 4 and 5). Control of pooling is required, *inter alia,* to make despatching more equitable by regulating the pilots' remuneration according to availability for duty rather than work performed. Experience has shown that, despite the complicated rules elaborated in the St. Lawrence Districts, pilotage assignments and workload can never be shared equally. An additional advantage of such control is that duplication of administration is avoided as occurs when dues are handled by two separate authorities, e.g., the pilots in the St. Lawrence Districts are thus obliged to bear considerably more administrative expenses then their fellow pilots in the other Districts.

Where pilotage is not classified as an essential public service, the pilots may be given any one of several possible forms of status, such as self-employed, members of a pilots' partnership, employees of a third party or of a pilots' organization, *de facto* employees, or employees of the Pilotage Authority. The Central Authority should make this decision through Pilotage Orders when it determines the extent and nature of control to be imposed on a given service and what status is indicated in the particular circumstances of each case (vide Recommendation 14).

It is considered that there should be a cardinal rule that only one status is permissible for pilots performing a given service, in other words, if there is only one service in a District, all the pilots in that District should have the same status, but if more than one pilotage service is provided in a District, each by a separate group of pilots, it is not necessary, but highly desirable even then, that all the pilots belonging to different groups in the same District should have the same status. A fair example of what may happen is the situation that has developed in Great Lakes Districts 2 and 3 where pilotage services are provided under one authority in each District by two groups of pilots with different status (vide Report, Part V). It is worth noting that the joint international pilotage operations shared by the Netherlands and Belgium in the Ghent Canal and on the Scheldt River, which have been in operation for over 125 years, are based on identity of organization and pilots' status in both countries (vide Appendix XIII).

It is considered that, in order to dispel any ambiguity and to establish legal rights (vide C.4, p. 82), the status of quasi-employee (or *de facto* employee) should be clearly defined in the Act. This definition should indicate that the terms and conditions of employment of such employees are defined *in toto* by legislation, that there is no civil contract of employment

between them and the Pilotage Authority and that their remuneration is normally governed by the amount of earnings they make individually or the aggregate earnings of the group.

As a result of the clarification of this status some adjustments will have to be made; for instance, care should be taken that all operational expenses incurred by pilots are reimbursed to them because otherwise these will not be allowed as permissible deductions for such purposes as income tax. This will also remedy the discrimination that otherwise results because the actual amount of these expenses varies between pilots. Pilots with a *de facto* status should not be required to assume expenses that Crown employee pilots are not required to pay.

RECOMMENDATION NO. 25

All pilots in a District, or each distinct group of pilots within a District, to be a statutory corporate body

As demonstrated in Chapter 4 (pp. 82 and ff.), where the exercise of the pilot's profession is no longer performed on an individual competitive basis but is controlled by a superior authority, there must be an organization to represent the pilots as a group in order to defend and promote their interests. To be truly representative, total enrolment is necessary. A multiplicity of organizations should not be permitted to exist, especially where the service is essential in the public interest, because their conflicting views and aims will inevitably lead to dissension to the grave prejudice of the efficiency of the pilotage service. To be realistic and effective, such an organization should be provided with statutory powers to ensure that it plays the rôle for which it is created.

Before attempting to define the powers of such an organization, it is necessary to appreciate fully its nature and purpose. Professional organizations in general may be divided into two groups: professional licensing bodies and trade unions. For certain professions and trades over which, in the interest of the public, a certain amount of State control must be imposed, the legislature has delegated to corporations it has created for that purpose, composed of members of the profession or the trade concerned, the task of exercising such control on behalf of the State. As a rule, the powers and responsibilities of these organizations consist primarily of licensing to ensure a high standard of qualifications of the members of the profession, the establishment of tariffs of professional fees within the framework of the liberal practice of the profession or trade, and also the power and duty to impose disciplinary sanctions to the extent the exercise of these powers is required for the protection of the public. These professional corporations partake of the functions of the State and form an integral part of public administration. Their sole preoccupation is to protect public interests.

The purpose of the second type of professional organization is to defend and promote the profession or trade concerned, i.e., the collective, professional and economic interests of the group. Such an organization becomes necessary whenever the exercise of professional activities assumes a collective character. While, in their own interest, these organizations tend to improve the quality of the services rendered by their members, they are principally organizations whose purpose and mandate are to negotiate with employers, or other controlling authorities, the working conditions of their members as well as their remuneration, normally for the purpose of reaching an agreement which will be binding on all parties, including its members.

It is clear that the two types of organizations are incompatible since the first is of a public character acting in the public interest while the second exists to promote and defend private interest. Any organization which attempted to assume both rôles would find itself in a perpetual conflict of interests.

The local nature of pilotage, necessitating different methods of operating the service in various Districts, as well as the particular importance of pilotage to the State, have doubtless been the reasons why Parliament has retained licensing control, entrusting that function to Crown entities created for the purpose, i.e., Pilotage Authorities. It was also logical that any additional control required in the national interest over the organization and direction of the service should also be exercised by Pilotage Authorities (vide Recommendation 14).

The requirement is for the second type of pilots' organization, i.e., one whose prime purpose is to promote and defend the private interests of the pilots of a District as a group; corporate status for this pilots' organization is also indicated. There appears to be no objection to entrusting also to this corporate organization limited powers of control over the freedom of its members to practise their profession, provided there is no danger of conflict between the interests of the pilots and the superior interests of the public. But under no circumstances should such an organization be assigned any of the essential functions that pertain to the Pilotage Authority.

Therefore, it is considered that the Act should stipulate that the pilots of each District as a group, whatever their status may be, Crown employees or otherwise, are a corporate body, and, if more than one homogeneous and distinct group of pilots exists in a District including attached areas (vide Recommendations 8 and 10), each group forms a separate corporate body, e.g., the Montreal District has river pilots and harbour pilots, each with its own interests which may often be in conflict.

The same rule should apply to a merger type District which, by definition, is a grouping of separate, unconnected pilotage services, each provided by its pilot or pilots. However, it is considered that this rule should

not automatically apply unless there are at least five pilots in a group. If the Central Authority considers that there would be an advantage in granting a corporate status to a group of less than five pilots, or to group in one corporation the pilots of all the various groups in a merger type District, it should have the power to do so through Pilotage orders.

The Act should also provide for the dissolution, division or merger of these corporations which would automatically follow the abrogation or division of a District, or the merger of Districts or of the services within a District.

The Act should provide for the following original powers to belong automatically to such a corporation:

(a) to be the official representative of its members in matters of common group interest, mainly *vis-à-vis* its Pilotage Authority but also the Central Authority, the Pilotage Regulations Appeal Board, government authorities, shipping interests and any public or private bodies or persons, with particular emphasis on the working conditions of the pilots, their remuneration and other matters affecting their income and welfare;

(b) to promote the pilots' common interests, to conduct studies and research, and to foster educational and training programmes designed to raise the standard of professional qualifications of its members;

(c) to advise the Pilotage Authority, when required, on technical matters in the field of pilotage and also to bring to its attention any matter that might be of interest in this field, without implying, however, that the Pilotage Authority would not have the right to seek the advice or opinion of any other expert, or any pilot in particular, at its sole discretion;

(d) to designate the pilot or pilots who are to sit as pilot member(s) on boards or to act as assessor(s) when legislation requires that they be appointed by the pilots;

(e) except where the pilots' status is that of Crown employees, to organize or arrange for health, welfare and insurance protection in the common interest of the group, with mandatory participation when imposed through District Regulations (vide Recommendation 39);

(f) to hire the necessary professional or clerical help and to own the assets required for the discharge of its corporate responsibilities;

(g) to raise finances through membership dues fixed at a general meeting of the corporation by special resolution adopted by a substantial majority stipulated in the Act, e.g., a two thirds majority of the members with the statutory right to have these

corporation dues deducted at source automatically either from the pilots' salary, the pilotage dues or the share of the pool belonging to its members as the case may be;

(h) to make by-laws governing its internal organization, carrying penal sanctions, when required, in the form of a fine, or preferably a penalty (but in no case should the corporation have the power to act as a tribunal); such fines or penalties to be credited to the Pilotage Equalization Trust Fund as recommended in Recommendation 21.

All the pilots in a group should automatically be members of the corporation, and a pilot's licence should grant automatic membership. If a pilot's licence is suspended, he retains his membership but automatically loses it if his licence is cancelled.

Furthermore, the Act should cover the question of the ownership of the corporation's assets in order to prevent a recurrence of the unfortunate situation which developed after the creation of the 1860 Quebec Pilots Corporation. Because the special Act which created that corporation did not cover the matter, the pilots acted as if the corporate assets were jointly owned in equal shares by all the pilots on strength and the corporation only had the use of them. Therefore, it developed that no pilot, irrespective of his competence, could be appointed pilot by the Pilotage Authority unless he had the financial means and the opportunity to buy a share of the joint assets. It is charged that this resulted in nepotism in that the pilots reserved their shares for relatives and friends. When the corporation was forced to abandon most of its activities in 1922, the assets were sold and the proceeds distributed among the pilots then on strength although the corporation continues to exist and is still operating (vide Report, Part IV, Quebec District, *History of Legislation*). Therefore, the Act should stipulate that such statutory corporations are non-profit organizations and should provide for the disposal of their assets in case of dissolution. It is suggested that one possible solution is as follows: because a corporation normally ceases to exist *ipso facto* on the dissolution of the District or when the number of members drops below five (unless it is kept in being by an appropriate Pilotage Order), it is considered that the Act should provide for its survival for a given period, e.g., 30 days, for the sole purpose of disposing of assets. These assets should be distributed as directed by the members to similar statutory pilot corporations but, if the members fail to do so in the given period of grace, distribution should be effected by the Central Authority.

Because of their nature, these corporations should not have the power to discipline their members. Since this power would necessarily have to be restricted to breaches of provisions aimed at promoting the private interests of the group, it would be inconsistent to make the most interested parties,

i.e., the pilots themselves, members of a disciplinary tribunal. It follows that because such corporations are necessarily deprived of the right to expel members, a penal sanction must be provided for any breach of a corporation's valid by-laws. It is considered that the best solution is either to provide for a fine, or preferably a penalty, and to require that any breach of a corporation's by-laws which carries a penal sanction be prosecuted by the corporation before the regular courts.

The corporation should have the power to represent a pilot and to act in any circumstances as spokesman for an individual pilot, always subject to the pilot's consent. Observing that a pilot may have personal interests opposed to those of the group, he should never be deprived of his privilege to protect his own rights but, equally, the corporation should be empowered to intervene and to oppose or promote the pilot's action if the interest of the group is involved. At the same time, a Pilotage Authority should always have the power to deal with a pilot directly.

The Act should also deal with the question of general meetings. The nature of the pilotage service precludes the advisability of holding a general meeting which all members are required to attend (unless it is possible to schedule it after the navigation season closes) because complete attendance amounts to a stoppage of work. Therefore, the Act should state that pilots who are prevented from attending on account of their pilotage duties may be represented by proxy, provided a sufficient number of members attend in person. It is considered that an adequate quorum would be 40 per cent of the members.

The Act should also provide for a minimum system of control over the corporations' activities so that any irregularity, abuse or discrimination can be either prevented or corrected without encroaching on their autonomy. In this regard the following provisions appear desirable:

(a) Corporation by-laws (vide p. 552, subpara. (h) of this Recommendation) should be subject to the approval of the District Pilotage Authority. The Pilotage Authority should have no power to modify proposed by-laws and it should be provided that by-laws automatically become effective unless they are disapproved within a given period (e.g., 30 days) after their transmission for its approval. The only reason for refusing approval should be that the proposals are inconsistent with the pilotage legislation governing the District or are ultra vires. The Pilotage Authority should also have the power to cancel at any time any by-law provision as amended from time to time; a disapproving decision or an order cancelling a by-law provision should be in writing and the grounds on which it is based should be stated. In all such cases, the pilots' corporation should have a right of appeal to the Central Authority.

(b) Each corporation should be required to submit to its members, with a copy to the Pilotage Authority, a financial statement of its own corporate financial activities within a prescribed period of time after the end of the calendar year, and at any other time when requested by the Pilotage Authority. The Pilotage Authority should have the power to have the statement audited by a designated person, the cost being shown as an operating expense of the District.

Subject to Recommendation 14 (to which specific reference is made), it is considered that the Act should provide for the possibility of these statutory corporations participating in the provision of pilotage services. As long as this mandate is accepted by the majority of the pilots in the corporation, the Central Authority should be authorized to make Pilotage Orders granting to such corporations any or all of the following operational powers:

(a) to establish and administer the pooling and sharing of the pilotage earnings of its members and, for this purpose, to take charge of the collection of pilotage earnings unless the Central Authority wishes to reserve this function to the local Pilotage Authority;

(b) to direct and manage the provision of pilotage services by its members;

(c) to operate pilot vessel services and other transportation services that are required by its members in the course of their duties.

If a pilots' corporation exercises any of these functions it would do so under the authority of the Crown, from which it would draw its authority and to which it would be answerable for its mandate. The mandate should be conferred by a Pilotage Order but the necessary rules of operation should be contained in District Regulations. The procedure laid down in Recommendation 19 should apply, with the additional requirement that, before these regulations can be approved by the Central Authority, they must first be accepted by the majority of the pilots (and not by a decision of the Board of Directors of the corporation); the preamble to the District Regulations should indicate that this requirement has been complied with.

The corporation should be required to account for its mandate both to its Pilotage Authority and to its members. First, it should be required to produce annually, within 30 days after the close of the calendar year, a detailed financial statement of its special operations and should provide at any other times any other financial return or information that the Pilotage Authority may require; in addition, it should be obliged at any time to have its financial operations audited by the Auditor General of Canada or by any other person appointed for that purpose by the Pilotage Authority.

As recommended in Recommendation 17, if irregularities are suspected, the Central Authority should have the authority, to be exercised by Pilotage Orders, to deprive the pilots' corporation of these special powers and to appoint a trustee to exercise them while the matter is being investigated and appropriate remedial action taken.

Because a pilots' corporation exercises any of these functions on behalf of a Pilotage Authority, any costs incurred should be considered District expenses to be met out of pilotage revenues. Therefore, the prior approval of the Central Authority is necessary, just as if they were incurred by the Pilotage Authority itself, as recommended in Recommendation 20. Whatever assets are required for these purposes should belong neither to the corporation nor to the pilots in joint ownership, but to the Pilotage Authority, to be used, administered and maintained by the pilots' corporation as long as its mandate lasts. In case these special powers are withdrawn, its rights to the possession of these assets are automatically transferred to the Pilotage Authority. If the District is abrogated, these assets should be liquidated and the proceeds handed over to the Pilotage Equalization Trust Fund. This procedure will end the argument that is always put forward whenever such an auxiliary service is taken over by the Pilotage Authority (vide C. 5, pp. 113-115, C. 8, p. 320). It could not be argued that these assets have been acquired and maintained with money that belonged to the pilots. In fact, it would have been paid by shipping because the disbursements that were required as part of the authorized operational cost of the District would have been taken into consideration when the tariff was fixed so that ensuing dues would yield sufficient revenues to meet both the District operating expenses and the aggregate amount required to meet the pilots' salaries or, in the other eventuality, their target income.

If the corporation is authorized to pool the pilots' earnings, the District Regulations should list the various deductions the pilots' corporation, as trustee for the pool fund, is authorized to effect and should also establish the rules that govern sharing. In this regard, reference is made to C. 6, pp. 192 to 194 and Recommendation 39. The cost of operating the pool should not be a charge against the corporation's own revenue, i.e., it should not be met out of corporate dues but should form part of the operating expenses of the District just like any other expense arising from the exercise of these operational powers. Conversely, the corporation's own activities should be financed only from corporate dues, and never through the pool or through earnings derived from the operation of an auxiliary service.

While statutory corporations of pilots at District level are indicated, it is considered that a national federation of these corporations should not be imposed by statute. Such a federation has never existed in Canada because there has been no need for it. Any artificial need that may have been created on a regional basis when several Districts were given the same Pilotage Authority in the person of the Minister of Transport will disappear if the

Recommendations of the Commission are implemented and pilotage administration is effectively decentralized. In that event, all matters of District organization and administration will either be settled, or at least debated, in the District area, since the Central Authority is required to hold its public hearings in the locality concerned. Furthermore, because the various Pilotage Districts in Canada are located so far apart, the operational cost of such a federation would be considerable and, in the present context, it does not appear justifiable that such a financial burden be imposed by statute on Canadian pilots.

RECOMMENDATION NO. 26

Increased statutory surveillance and reappraisal powers to be granted to the District Pilotage Authority

The Commission's study of the evidence indicates that pilotage is an essential public service in Canada and, in certain areas, even vital to our national economy. Reference is made to the preamble of Chapter 9 which states that the value of pilotage as a safety factor is in direct relation to the qualifications and competency of each pilot. Pilotage Authorities bear the responsibility for ensuring that adequate standards are provided and maintained.

A Pilotage Authority's responsibilities increase considerably when it is required to administer and provide a pilotage service. It is then no longer the licensing authority of a free profession but the authority responsible for maintaining an efficient, adequate and reliable service. As shown in Chapter 9, the limited surveillance and reappraisal powers now possessed by Pilotage Authorities under Part VI of the Act are so lamentably inadequate that correction is urgently required. (Re meaning of the term " reappraisal" see C. 9, p. 352.)

Increased surveillance and reappraisal powers are also required because the state is committed to considerable pecuniary liability when it provides pilotage services. In a system where the Crown merely licenses pilots, it has few obligations but when, through its officers and servants, it also takes responsibility for administering the service and assigning pilots, it may be required to assume liability for damages caused by pilots when piloting, either because the Pilotage Authority, or one of its representatives, assigns an unfit pilot or through the principle of law that a master is responsible for the wrongdoing of his employee when acting within the scope of his duties. The latter is the case when the pilots are Crown employees and possibly also when, to all intents and purposes, they are *de facto* — if not *de jure* — employees of the Authority. Hence the necessity for effective means of

surveillance to prevent the assignment of a pilot who is unfit, and for adequate reappraisal powers to avoid retaining incompetent or unreliable pilots.

Since damages resulting from a maritime casualty are frequently extensive, one solution might be for Parliament to limit or deny Crown liability for the wrongdoing of pilots by statutory provisions. However, for many years, Parliament has adopted the principle that the Crown is liable for the wrongdoing of its servants when on duty. In the field of pilotage, the Government has already assumed this risk in certain areas by employing pilots to provide pilotage services, i.e., at Goose Bay, in Great Lakes Districts No. 2 and No. 3 and, since 1966, in the Sydney Pilotage District. The Commission approves this approach but considers the risk of liability should be minimized by all reasonable means, *inter alia,* by providing those in charge of the service with sufficient control to enable them to vouch for the pilots they assign to ships.

Although there is no legal objection if some of these powers are concurrently exercised by other Authorities, it is considered most important to grant each Pilotage Authority full and undivided power to ensure freedom of action. The situation provided for in the present Canada Shipping Act was not contemplated when pilotage legislation was originally drafted but was brought about by subsequent amendments which, in their enactment, created conflict with the autonomy of District Pilotage Authorities on which existing legislation is based.

These powers must be statutory, whatever the status of pilots and the nature of the legal relationship between each Authority and its pilots may be (vide C. 8, pp. 291 and ff.), first, because some powers are extraordinary (e.g., power to compel witnesses) and can not be granted other than by statute; second, because a system based on licensing offers no alternative, since licensing is a method of control established by legislation, and any power or right a licensing authority may possess must be founded on a provision in applicable legislation. In an organization where pilots are Crown employees, ordinarily the rights and powers over them can be derived from the contract of hire, the terms of a contract being the law of the parties. But when public interest is involved, it is the duty of the responsible legislature, in this instance the Parliament of Canada, to intervene by defining by statute those aspects of the contract which can not be left to the hazards of negotiations and private agreements. Public interest transcends the immediate interests of the parties involved in pilotage, and matters which directly affect the superior interests of the country must be dealt with in legislation. These include the minimum standard of qualifications that pilots of a given locality must possess to ensure an adequate, reliable pilotage service, and the powers and means to ascertain that, after pilots receive their licence, they remain trustworthy experts in the navigation of their District waters and that only fit, competent pilots are assigned to duty.

Since powers of surveillance and reappraisal are relative, care should be taken to define them in new legislation so that they apply to every possible status pilots may have *vis-à-vis* their Pilotage Authority, e.g., the aim of reappraisal is to prevent a pilot who has become a safety risk from piloting. In a District where the pilots are Crown employees, if licences have not been issued to them, the expression "withdrawal of the licence" would then mean "dismissal from the service", and "suspension of the licence" would mean "suspension from duty". This difficulty would not arise if, as recommended earlier (vide Recommendation 12), licences were issued in all cases and a licence was a prerequisite to employment.

The foregoing remarks and the following recommendations apply, *mutatis mutandis,* to all categories of persons to whom the Pilotage Authority may be authorized in future legislation to issue licences, certificates or equivalent documents even when no specific reference is made to them.

RECOMMENDATION NO. 27

Legislation to establish special methods of keeping Pilotage Authorities informed of the competence, fitness and reliability of pilots

Pilotage Authorities can not discharge their reappraisal responsibilities properly unless they are alerted to every situation or occurrence that may indicate lack of qualifications on the part of pilots.

The present Canada Shipping Act provides no special means of information for Pilotage Authorities. This omission was consistent with the limited rôle they were originally assigned but the situation has changed and, as seen in Chapter 9 (p. 331 and ff., and p. 336 and ff.), Pilotage Authorities have tried to provide themselves with sources of information by their regulations, most of which are of doubtful validity and, at times, are clearly ultra vires for lack of supporting authority in the statute.

In a field where safety of navigation is directly concerned, it is essential that every reasonable means be taken before casualties occur to detect any deficiencies in pilots that may make them safety risks. All those connected with the pilotage service who are in a position to furnish pertinent information should be obliged to report any situation or occurrence they witnessed concerning the competency, fitness or reliability of pilots. Such extraordinary provisions should not be extended to reporting disciplinary cases unless the offence committed is one of the serious offences listed in legislation as giving rise to reappraisal of the offender's reliability.

These obligations should be specified in legislation. Those of general application should be stipulated in the Act itself; the others should be made subject matters of regulations. To be capable of enforcement, these impera-

tive provisions should carry a punitive sanction. Normally, non-compliance should be an offence carrying a fine; for instance, it should be made a statutory offence:

(a) for the person in charge of a pilot vessel, or for an officer or employee of a Pilotage Authority, not to report a pilot proceeding on duty or liable to be called for duty who, for any reason, appears to be unfit to pilot;

(b) for a pilot whose vessel was involved in a shipping casualty or in an incident affecting navigation, not to report the matter to the Pilotage Authority or its local representative immediately by the quickest available means (i.e., radiotelephone, wireless or land telephone) to be confirmed in writing as soon as possible thereafter;

(c) for a pilot to fail to report before proceeding on duty any impairment he may suffer whether of a temporary or permanent nature that might render him unfit to perform pilotage duties.

Because it is essential for shipping to co-operate by reporting all instances where a pilot has appeared unfit or incompetent, the Act should require, as suggested in Chapter 9 (pp. 331-332) for:

(a) the Master of a ship to report any such instance immediately upon discovery by radiotelephone, wireless or land telephone to the Pilotage Authority through the pilotage office and by further reporting the matter in writing on the pilot's source form;

(b) source forms to provide a space for the Master's written report.

As a means of enforcement, the Act should decree for failure on the part of the Master to comply, the loss on the part of the ship of any claim or defence in civil litigation with the pilot, the Authority, or the Crown, based on the pilot's alleged impairment.

RECOMMENDATION NO. 28

Pilotage Authorities to possess full powers of investigation to conduct administrative inquiries within their reappraisal jurisdiction and responsibility for the safety of navigation

When a suspicion arises concerning the adequacy of a pilot's or other licensee's qualifications or competency or when a shipping casualty occurs in a compulsory pilotage area, even if no pilot is involved (Recommendation 22), the Pilotage Authority should possess full powers of investigation to carry out, or to have carried out on its behalf, administrative inquiries, in view of the superior interests involved.

There is no objection if an administrative investigation takes the form of a formal Court of Inquiry with the publicity usually given to the proceedings of courts of justice if the Pilotage Authority so decides, but as a rule such fact-finding exploratory investigations should be held informally without publicity. The investigator should make use of his special powers of investigation only occasionally, for instance, when it is deemed preferable to have certain testimonies taken under oath, or if co-operation is withheld, e.g., the necessary information is not volunteered, or access to premises or to ships is not allowed.

The Act should specifically provide for two types of exploratory investigations; first, the inquiry to gather evidence, i.e., testimony and documents; second, the appraisal of a situation, i.e., an examination or survey. The special investigatory powers required are those granted by sec. 556 C.S.A. to an investigating officer holding a Preliminary Inquiry under Part VIII of the Act, plus the power to require a pilot to submit to examination by experts, both in the field of his professional qualifications and also of his physical and mental fitness. For instance, in an alleged case of impairment due to alcohol or drugs, the pilot concerned must submit immediately to a medical examination and to any test that the physician may require.

To avoid unnecessary argument and for the purpose of Pilotage Authorities' administrative inquiries, as well as for their reappraisal function, it is recommended that provision be made in the Act to compel pilots as witnesses, but that any statement they may be compelled to make may not be used against them at a penal trial (except in a case of perjury). It is the responsibility of each pilot to maintain his qualifications and competency and, whenever such an investigation is required by legislation or whenever a suspicion arises, it is his duty to extend full co-operation during the investigation.

As a means of enforcing these powers of investigation, the Act should:

(a) define as statutory offences all cases of non-compliance with lawful orders given pursuant to the exercise of these special powers of investigation, including:
  (i) failure to comply with a summons to appear;
  (ii) refusal to give evidence as required, whether or not under oath, wilfully giving false information, or omitting to give full information;
  (iii) failure to submit to an examination as to competency, or to a medical examination and tests;
  (iv) withholding permission to board or inspect a vessel;

(b) provide that any such offence committed by a pilot becomes a case for reappraisal;

(c) enact that refusal on the part of a Master, when duly required for the purpose of the investigation, to allow the investigating officer

to board his vessel or the person so charged by the Authority to inspect it, also renders the vessel liable to arrest until the order is complied with.

The use of these special powers of preliminary investigation should be limited to cases within the Pilotage Authority's reappraisal jurisdiction and to shipping casualties in compulsory pilotage areas. They should not be extended to the pre-trial investigation of a suspected pilotage offence unless the offence comes under the Authority's reappraisal jurisdiction. Since these powers are exceptional, their use should be restricted to cases which directly involve public interest and the safety of navigation, excluding, for instance, incidents of a minor disciplinary nature.

The Act should also provide for automatic, compulsory examinations of pilots to be held as provided in the Act, or in regulations the Pilotage Authority should be authorized to make, in fields where it is expected that competence and qualifications may deteriorate with the passage of time:

(a) periodical eyesight and hearing test;

(b) periodical physical examination, e.g., every five years after reaching 40 years of age and every year after reaching 65 years of age;

(c) examination of professional competency before a pilot returns to duty after an extended period of absence, e.g., over six months;

(d) periodical examination of professional competence in fields where knowledge is liable to deteriorate due to lack of practice or by not being au fait with current local knowledge and methods, e.g., the use of communications, radar, and other electronic and shipborne navigational devices and possible new practices in the berthing and unberthing of vessels in difficult waters.

Such administrative investigations should be held with the least possible delay: first, in order not to cause any unnecessary hardship to the pilot if he is under preventive suspension; second, in certain cases, to obtain the testimony of witnesses on board vessels which are expected to make an early departure from Canadian waters.

The Act should allow considerable flexibility in the conduct of the investigation. The inquiry should normally be carried out by one man, but it should be possible for any number of investigators and experts to be employed at the same time to cover different aspects within the District and elsewhere.

To avoid abuses of these extraordinary powers and as proof of the investigator's appointment and powers, the Act should:

(a) require that, unless the investigation is carried out by the Pilotage Authority itself, the investigator or expert be supplied with a written appointment issued on a case basis which specifies that he is vested with all the investigatory powers provided by the Act (a

telegram emanating from the Pilotage Authority or its duly authorized representative may be considered sufficient written authority;

(b) set out the forms of summons and orders that may be issued by the investigator or expert, provided that in cases of urgency the order may take any form, and when the person to whom the order is intended is present, a verbal order after the investigator or expert has shown his appointment is sufficient.

With a little planning, a Pilotage Authority should be able to obtain quickly any required information from anywhere in Canada. Pilotage Authorities should give assistance to one another by placing their investigators at the disposal of the others. Within its District, each Pilotage Authority should arrange to have available in the vicinity of each boarding station persons who, in case of urgency, could be contacted by telephone or telegraph and be required to carry out immediately all or part of an investigation, e.g., to take the testimony of witnesses on board a vessel about to pass the boarding station. Arrangements should be made for the services of a physician residing in the vicinity of every boarding station to be available to verify without delay the condition of a pilot reported to be under the influence of alcohol or drugs, or to be physically impaired for any reason when on duty or about to proceed on duty.

In order to deal with the special situation created by the fact that vessels to which pilotage service is provided are likely to leave Canadian waters before the necessary remedial process is completed, the Act should provide for a procedure whereby testimony obtained at such inquiries is admissible during the reappraisal process even without the pilot's consent, if the witness can not be compelled to attend, e.g., when he has left Canada and is not expected to return within a reasonable period of time. The Act should require that such testimony be given under oath and in the presence of the pilot concerned unless the pilot, having been given reasonable opportunity to be present, failed to appear. The pilot, if present, should be given full opportunity to cross-examine witnesses. In such a case, the pilot should also be given the opportunity to obtain in a similar way the evidence of other witnesses whose presence is not likely to be obtained later. Unless these witnesses can be made available, these testimonies are admissible evidence at the reappraisal, but not at the prosecution of any pilotage offences.

As a consequence of the power to summon witnesses (whether for an administrative investigation or for reappraisal), the Act should give witnesses the right to be paid travelling and living expenses arising from such attendance, plus compensation comparable to that being paid by the civil courts of the locality, unless a higher amount is fixed by regulations. Such expenses should automatically become part of the District's operating expenses, unless these costs, when incurred during reappraisal, are awarded against the pilot concerned and recovered from him.

RECOMMENDATION NO. 29

The Act to affirm the right, and make it an obligation, not to despatch when unfitness is suspected, and give the Pilotage Authority the right to impose preventive suspension when reappraisal has been, or is about to be, initiated

In view of the responsibility and consequences despatching entails, the Act should contain a provision stating that, notwithstanding any rules or regulations regarding despatching, the Pilotage Authority and/or its officers or employees have the right not to assign a pilot whenever they have reason to suspect that he is not fit for duty at the moment of despatching (vide C. 9, pp. 345 and 347).

As a corollary, the Act should make it a statutory offence for a person actually charged with despatching duties to assign a pilot who, for any reason, does not appear fit to pilot at the time.

When a pilot is not despatched on that account and taken off the tour de rôle, the Authority should proceed immediately to examine the suspicion and take the indicated administrative action. If the cause is not self-evident, an administrative investigation should be carried out immediately; in most cases this would take the form of a medical examination. When the cause has been ascertained, at least *prima facie,* the Pilotage Authority, or its representative duly authorized for that purpose, should take the indicated administrative decision, e.g., if the cause is merely an illness of a temporary nature, the pilot should be kept off the tour de rôle until he has fully recovered; if, on the other hand, the despatcher's suspicion is dispelled (with or without administrative investigation), the pilot's name should be reinstated on the roster without delay; if, however, the factual situation indicates a case that falls within the reappraisal jurisdiction of the Authority, the reappraisal process should be initiated forthwith.

When reappraisal is initiated, it should always be accompanied by the imposition of a preventive suspension. (Re meaning of "preventive suspension", vide C. 9, p. 343.) Reappraisal is undertaken because a Pilotage Authority has reason to believe that a pilot has become a safety risk by endangering navigation. In such circumstances, the Authority would be derelict in the discharge of its responsibilities if it allowed such a pilot to continue to perform pilotage duties.

A similar course of action should be taken whenever a Pilotage Authority acquires information indicating a pilot's unfitness.

The Act should define those situations which would automatically cause preventive suspension. These would include:

(a) an unfavourable result from a compulsory exploratory examination;

(b) the alleged commission of an offence giving reappraisal jurisdiction.

A shipping casualty should be defined as an occurrence which raises a suspicion of unfitness. The pilot or pilots involved should be kept off the list until the Authority is reasonably satisfied that the casualty was not due to the wilful act, gross negligence, incompetence, or physical unfitness of the pilot(s); in other words, reappraisal would not be necessary. However, if the Pilotage Authority is not satisfied, the same process described earlier should apply—starting with the administrative investigation, if necessary, followed, when indicated, by the reappraisal process.

While removal from the tour de rôle and preventive suspension are measures imposed for the protection of the public, care should be taken to ensure that the pilot involved suffers as little inconvenience as possible. Although these measures may be considered occupational hazards of the pilot's profession, all cases involving them should be heard with the utmost celerity. To mitigate inconvenience to the pilots, the Act should provide that, in Districts where the pilots' earnings are shared through a pooling system operated by the Pilotage Authority, or when the pilots are Crown employees:

(a) time off duty resulting from removal from the roster and preventive suspension should be considered time on duty for the purpose of pooling if, as a result of the investigation or of the reappraisal process, the suspicion is found to be groundless and the pilot is reinstated;

(b) a finding of professional incompetency or unreliability which results in the cancellation or suspension of the pilot's licence should be retroactive to the date the pilot was relieved from duty, whether it began by removal from the tour de rôle, or by the imposition of preventive suspension;

(c) when the suspension or the cancellation of a licence is due to physical or mental impairment, the period off duty preceding the Authority's decision should be treated as sick leave.

In Districts where the Pilotage Authority does not operate a pooling system, but controls despatching, provision should also be made for a pilot to have the right to make up his lost turns if he is reinstated.

The Act should clearly indicate that preventive suspension is a measure which forms part of the reappraisal process and may not be used in any other circumstances.

RECOMMENDATION NO. 30

The existing distinction between the reappraisal and penal judicial functions to be maintained, together with the allocation of each to different authorities

As demonstrated in Chapter 9, these two functions are dissimilar in nature and have different rules and aims. The connexity of their field of application and the dependence of the reappraisal function on the judicial function in relation to pilots' reliability may easily cause confusion if both functions are exercised by the same authority, as has frequently happened in the past when Pilotage Authorities tried to exercise both powers. In the disorder which followed, the principles of administering penal justice were applied to the exercise of the reappraisal function, and penal judicial powers were used in the field of reappraisal, with prejudicial results both to the efficiency and reliability of the service, and to the enforcement of discipline. The best practical way to prevent such confusion is to attribute each of these functions to distinct, independent authorities and to draft the Act so that there can be no possible misunderstanding.

Furthermore, to grant Pilotage Authorities penal jurisdiction over pilotage offences committed by pilots would solve only part of the problem of enforcing pilotage legislation because an additional process of enforcement has to be provided for offences committed by non-licensees. There is no satisfactory reason for the same offence to come within the jurisdiction of separate courts depending whether it was committed by a pilot or by another person.

In addition, the Pilotage Authority is not a proper authority to exercise penal judicial powers to enforce pilotage legislation because its involvement in the organization and direction of the service removes it from the disinterested, unbiased position that is a prerequisite to dispensing justice. In the scheme of organization provided in the 1873 Pilotage Act (which has so far remained unaltered), despite the fact that the Pilotage Authority was to be unconnected with the provision of pilotage services, it was granted no penal judicial power. When, under previous legislation, Trinity House of Quebec was elevated to a pilotage court, care was taken to keep the court unbiased by requiring that those Wardens who were in direct relation with the potential offenders should be deprived of the right to sit with the Corporation when it acted as a court of justice. *A fortiori,* each District Pilotage Authority is now in a position that would require a judge to disclaim competence and, hence, can not act as a court.

On the other hand, the Pilotage Authority, despite its involvement in the service, remains the best qualified authority to exercise the reappraisal function because this is part of the licensing function. It is desirable that reappraisal be carried out by the same authority which granted the licence in

order to provide the same basic criteria (C. 9, p. 353). Furthermore, the Pilotage Authority, through its intimate knowledge of the service in its District, is in the best position to appraise the performance of a pilot and his required standard of competence and fitness.

To prevent possible abuse of authority, the Act should define precisely the extent and nature of each reappraisal power (although as recommended later these powers should be greatly expanded) and should avoid using general and ambiguous language. The right of appeal to a regular court from the reappraisal decision should also be provided. It is considered that the Admiralty Court should be the appeal court in pilotage cases for three main reasons:

(a) it is interested in shipping matters generally;

(b) there are Admiralty Court Divisions in all the larger Pilotage Districts;

(c) it already has jurisdiction over appeals from the reappraisal decisions of Courts of Formal Investigation (subsec. 576(3) C.S.A.).

As an additional method of making a clear distinction between the two functions, the Act should not use the terminology belonging to the penal judicial process when dealing with the reappraisal function. For instance, it should avoid the terms "charge", "accused", "guilty", "sentence", and "punishment", except to refer to the penal process. Suitable expressions include "information", "pilot being reappraised" or "the reappraised", "incompetent" or "unfit", "reappraisal decision", and "corrective or remedial award", and other expressions to the same effect which are unlikely to cause confusion with the penal process.

RECOMMENDATION NO. 31

Pilotage Authorities to be authorized to modify and increase the minimum standard of professional qualifications required of licensed pilots (and other licensees) during the tenure of their licence, and granted reappraisal powers in that field

Chapter 9 (pp. 357 and ff.) shows that at present a Pilotage Authority has no power whatsoever over a pilot's professional qualifications once his licence is issued, no matter how obviously incompetent he may be. Furthermore, in the discharge of its despatching responsibilities, it has no right not to assign a pilot when his turn comes because, under existing legislation, all pilots once licensed are considered equally qualified, and to refuse to assign a pilot on the ground of incompetence deprives him illegally of a right conferred by his licence. This situation, as explained in Chapter 9, must be corrected.

The Act should contain provisions giving Pilotage Authorities the power to vary and increase, where necessary, the minimum standard of professional qualifications required of licensed pilots during the tenure of their licence, so that their knowledge and qualifications keep pace with technological progress.

Time and again the record shows that, while some pilots are eager to learn all they can about new devices which are placed at their disposal, and make full use of them, others simply continue to pilot as before, ignoring new aids or, even worse, trying to employ them despite the fact they lack competence. This is particularly true of the use of radar by pilots who had insufficient training in its use and limitations. Several disasters have resulted. One means of achieving progressively higher standards is for each Pilotage Authority to be authorized by the Act to organize the necessary courses or training programmes, or to take advantage of existing ones, and compel licensed pilots to attend. Failure either to attend or to pass an examination at the conclusion of such a course or training period would automatically entail preventive suspension of the licence (Recommendation 29) followed by the indicated reappraisal action.

The Act should also empower each Pilotage Authority to compel a pilot to submit to an examination on his professional qualifications, both as to knowledge and competence, whenever it has grounds to believe that the pilot's professional qualifications are not up to the minimum required standard, as amended from time to time. The Act should state that such a presumption will be raised, *inter alia*:

(a) by failure to pass routine examinations following a prolonged absence from duty, or in certain fields where competence is apt to deteriorate with lack of practice, or failure to keep up with technical progress (Recommendation 28);

(b) by failure to attend training programmes or courses as directed by the Authority by regulations, or to pass examinations, if any, at the end of such instruction or training;

(c) by suspension of the licence or certicate of competency when this is a prerequisite to holding a licence, resulting from the decision of a Court of Formal Investigation or a Court of Inquiry under sec. 579 C.S.A.;

(d) following an event where the lack of professional qualifications is not clearly ruled out as a possible cause, such as in a shipping casualty where failure to interpret radar correctly may have been the cause, or one of the causes, of the casualty.

The reappraisal powers of a Pilotage Authority (and of the appeal court) are of a quasi-judicial nature and, therefore, its appreciation of the competence of a pilot will be limited by the minimum standard of qualifications as defined in the statute and regulations, and that a pilot can not be

deemed incompetent if he meets such standards. Hence, it is of prime importance for each Pilotage Authority to keep its legislation covering professional qualifications constantly up-to-date.

RECOMMENDATION NO. 32

The Pilotage Authority's reappraisal power over physical and mental disability to be extended to include jurisdiction over temporary disability

As demonstrated in Chapter 9 (pp. 361-363), the right of a Pilotage Authority to prevent a pilot from exercising his profession on medical grounds is limited at present to the right to retire a pilot compulsorily after it has been established that his impairment is of a permanent nature that renders him unfit for pilotage duties.

This limited power is inadequate in today's context. Each Pilotage Authority should have full power to prevent its pilots from piloting whenever they are found physically or mentally unfit for duty, whether the impairment is temporary or permanent.

As proposed in Recommendation 29, whenever a pilot is suspected of having a physical or mental impairment, the Pilotage Authority or its duly authorized representative should have power to take his name off the roster and hold an administrative investigation, unless the cause of the impairment is self-evident.

Every time a pilot appears to be protractedly or permanently unfit for duty he should be reappraised. If his condition is only temporary, reappraisal should not be resorted to unless he refuses to cease piloting until he is fully recovered. In that event he should be reappraised in order to give him the opportunity to prove his fitness. If he is not successful, temporary suspension should be imposed until he demonstrates that he can resume his duties. If he has not recovered within a period specified in legislation, e.g., two years, he should be permanently suspended.

In the following cases, the Act should provide that a presumption of physical or mental disability automatically arises and that, therefore, the Pilotage Authority is authorized to reappraise the pilot concerned unless it is satisfied that the situation is temporary or does not affect his ability, or that he does not object to having his name removed from the tour de rôle during the recuperative period:

(a) after a period of absence due to illness or injury;
(b) after an unfavourable report on eyesight, hearing, physical or mental condition;
(c) whenever there is reason to believe that a physical or mental impairment may have been the cause, or one of the causes, of a shipping casualty.

The situation should be considered from the point of view of safety and not from the individual point of view of the pilot concerned; it is not a question of sick leave that a pilot might apply for, but solely a matter of preventing an unfit pilot from piloting.

Whenever given standards must be maintained, especially when they may vary depending upon a pilot's age or the type of service he is called upon to perform, they should be stipulated in legislation. In the absence of express standards, a general requirement that a pilot is not to suffer any impairment that will render him unfit for pilotage duties will always be difficult to enforce, except in self-evident cases.

It is considered that the procedure provided in sec. 338 C.S.A. should be altered substantially in that annual licences should no longer be issued to pilots over 65. Instead, permanent licences should continue until pilots reach the final age limit of 70 provided in the Act (or an earlier age between 65 and 70 as defined in regulations), provided they continue to meet the required physical and mental standards.

Pilots who reach the age of 65 should be subject to compulsory physical and mental examinations annually, and any unfavourable report should initiate reappraisal.

RECOMMENDATION NO. 33

Reappraisal of moral fitness to be adjusted to the new pilotage organization but to remain subject to conviction by a regular court for a specified pilotage offence

Because moral fitness is a state of mind, an imponderable which can only be inferred from an individual's behaviour, and because all acts of misconduct which are serious enough to arouse a presumption of unreliability should be defined as pilotage offences, it is considered that the procedure adopted by Parliament in Part VI C.S.A. (vide C. 9, p. 370) to assess moral fitness is wise and adequate, and should be retained. It has the advantages of forcing a distinction between reappraisal and discipline and requiring the enforcement of discipline, which is overlooked when reappraisal can be effected independently as currently happens in cases dealt with under Part VIII. This irregular situation should be discouraged.

From the procedural point of view, it has the advantage of being simple and adequate, and preventing unnecessary duplication of trials and the possibility of embarrassing contradictory decisions. It simplifies reappraisal proceedings in that the factual situation need not be established (vide C. 9, p. 370). The Pilotage Authority has only to decide whether, in the light of the pilot's past record, the evidence he may adduce and the pleading he may

make, the presumption of unreliability created by the conviction has been refuted or not, and to award the appropriate corrective, if remedial action is indicated.

The list of statutory offences which come under the reappraisal jurisdiction of Pilotage Authorities should be revised to meet the requirements of the new organization: all offences of general application should be statutory and only those of a truly local character should be defined by regulation.

For the most serious offences, the Act should settle the question of reappraisal by decreeing automatic forfeiture of a pilot's licence upon his conviction; in other words, when there is a clear case of unreliability, there is no reason to require reappraisal which can be no more than perfunctory. The Act should provide automatic forfeiture upon conviction of any indictable offence, whether under the Criminal Code or pilotage legislation, or of other serious offences such as impairment caused by intoxicating liquor or narcotic drugs while a pilot is on duty or about to go on duty (which, *inter alia,* ought to be a statutory offence) (vide Recommendation 11).

RECOMMENDATION NO. 34

The Pilotage Authority and the appeal court in the reappraisal process to be untrammelled by rules of evidence and procedural requirements, provided the pilot is afforded an opportunity for full defence; any doubt to be resolved in favour of the safety of navigation

Because of the special nature of the pilotage service, speed and flexibility of procedure are essential if Pilotage Authorities are to discharge their reappraisal responsibilities efficiently. A reappraisal decision is only an administrative decision and the fact that it must be reached in a quasi-judicial manner does not mean that the process should be given the publicity nor be governed by the rules and procedural requirements that accompany the dispensing of justice, but only that the reappraisal authority has no discretionary power and must be guided, on one hand, by legislation and, on the other, by the factual situation. The only part of the process that may cause some difficulty is ascertaining the facts and, in this respect, the important point is not the manner in which the facts are ascertained but whether the true factual situation is brought out. Since public hearings entail lack of flexibility by requiring a formal procedure, full discretion on the matter should be left to the Pilotage Authority concerned to ensure efficiency and freedom of action.

One principle which applies generally is the right of the pilot to an adequate opportunity to defend his rights. Also, in view of the potentially serious consequences for the pilot, the Act should assert his right to be

assisted by counsel. This does not mean that testimony must be given under oath or taken during the course of reappraisal or in the presence of the pilot and his counsel. To meet the *audi alteram partem* requirement, it is sufficient if, at any time during the reappraisal before the final decision is rendered, the pilot is informed of the material the reappraisal authority intends to use as evidence and then is given full opportunity to challenge any part of it, and to produce any further evidence or argument on his own behalf.

In order to expedite proceedings, all pertinent evidence already in the Pilotage Authority's possession prior to the beginning of the reappraisal, together with all existing evidence obtainable from other sources (whether it consists of testimony, statements or reports on examinations), should be considered admissible evidence (preconstituted evidence). The reappraisal process should not be assimilated to a trial before a court of justice, where the judge is a stranger to the case until it is brought before him. In a reappraisal case, the reappraisal authority has, in fact, been involved as licensing authority and in the discharge of ensuing surveillance responsibilities ever since the pilot's licence was granted. Reappraisal is, in reality, merely a continuation of the licensing process and consists of bringing it up to date. It would be unrealistic and unreasonable to require a Pilotage Authority to put aside what it already knows about a case, just as it would be to select another body or person as reappraisal authority. No one is in a better position that the District Pilotage Authority to appraise a pilot's qualifications.

The following information, *inter alia*, should form part of such preconstituted evidence:

(a) the complete record of the pilot as contained in his official file to the extent it is related to the matter under investigation;

(b) the conviction which gave rise to reappraisal, if it is a case of moral fitness, together with all pertinent material including the transcript of evidence contained in the docket of the penal tribunal which heard the case;

(c) testimony under oath, obtained prior to reappraisal, but for the purpose of reappraisal, of witnesses who are unlikely to be available (Recommendation 28);

(d) the full report, together with supporting documents and testimony, of the administrative investigation that may have preceded reappraisal and on which the decision to proceed with reappraisal was based, except opinions expressed by an investigator charged with obtaining testimony;

(e) the written report of experts who carried out a survey of the situation to the extent it is pertinent to the case;

(f) the written report of those who examined the pilot for physical or mental fitness or professional competency, if pertinent to the matter under investigation.

Because reappraisal is, in effect, an administrative function to enable a Pilotage Authority to discharge its personal responsibilities, the Authority's freedom of action should never be hampered by a requirement that a complaint must be laid as a prerequisite to reappraisal. The Act should stipulate that a District Pilotage Authority must act *proprio motu* when it has reason to believe that a pilot is a safety risk. It is the personal responsibility of each Pilotage Authority to guarantee the fitness of the pilots it assigns to ships and it would be an unrealistic restriction on its freedom of action to make the exercise of this function conditional on a complaint by a third party. As seen in Chapter 9, this was one of the failings of the former regulations enacted under subsec. 319(j), 1934 C.S.A., which in practice rendered the regulation inoperative (vide C. 9, p. 368). In earlier legislation, this point was clearly understood; for instance, sec. 99 of the Pilotage Act of 1886 made special mention of it (sec. 100 contained a similar provision regarding the District of Quebec). The pertinent part of this section reads as follows:

> "99. Whenever any ship sustains damage through the fault of any branch pilot for and above the harbor of Quebec the pilotage authority of the pilotage district of Montreal may, in its discretion, and 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; . . .".

Because reappraisal is a process relating to a trial, the pilot is entitled to know when the case commences and when it finishes. It is considered that the Act should prescribe as procedural requirements that the beginning of the process should be marked by serving the pilot with a document (which might be referred to as "a letter of intent") wherein the nature and cause of his reappraisal is stated, and that the final decision as well as any interim decision should be in writing and become part of the record.

The Act should state that when reappraising a pilot's qualifications any doubt should be resolved in favour of public interest, i.e., in favour of the safety of navigation. The aim of the reappraisal process is to establish whether a pilot is, or is not, a safety risk. If a *prima facie* case of unfitness is established and, after the pilot has been given an opportunity to refute the presumption thus created, the evidence is inconclusive and reasonable doubt remains, the pilot should be treated as a safety risk. The interest of the public transcends the personal interest of individuals in an essential public service. Because of the potential danger to waterborne traffic which is vital to Canada, the lives of people and the safety of valuable ships and cargoes should not be placed in the hands of a pilot who is unable to prove his competence and for whom his Pilotage Authority can not positively vouch. Once the facts of a situation or an event involving a pilot creates a

presumption that he is a safety risk, it should be the pilot's responsibility to demonstrate that he is not, and that he remains the expert he is expected to be.

In order to enable the Pilotage Authority to unravel the factual situation while still guaranteeing the pilot the means to defend his rights, the Authority (in the exercise of its reappraisal function) must be endowed with all the extraordinary powers of investigation granted to a court of justice (those proposed in Recommendation 28 for administrative investigations), i.e., *inter alia*, to force the production of documents; to compel witnesses, including the pilot concerned, to attend and give evidence under oath; if necessary, to board and inspect vessels; to cause surveys to be carried out by experts; to compel the pilot to submit to a medical examination and an examination as to his professional competency.

The very nature of the service demands flexibility in the procedure to be followed and in the ways and means of obtaining necessary information and providing the pilot with ample opportunity to make his defence. Additional evidence, other than the preconstituted evidence, ought to be obtained at the request of the Authority or the pilot, either directly by the Authority or indirectly through investigators or experts duly appointed by the Authority for that purpose (the pilot may or may not be given the opportunity to attend) and by the most expedient means in the circumstances such as oral testimony, affidavits, written statements obtained by correspondence, telegrams, teletype messages or recorded telephone conversations.

In order to give the pilot involved a reasonable opportunity to defend his rights, he must be made aware of all the preconstituted evidence the reappraisal authority intends to use, and also of the testimony and other evidence obtained during the reappraisal. At the pilot's request, the reappraisal authority should obtain statements from other witnesses or, in reply to questions the pilot wishes to ask those who have already filed statements, obtain additional statements and, if necessary, summon the attendance of witnesses or experts to allow the pilot to examine or cross-examine them under oath.

To prevent abuses by a pilot having witnesses summoned without just cause, the Pilotage Authority—no matter what its decision in the case may be—should be empowered by a provision in the Act to award against the pilot any costs incurred as a result of his unreasonable requests.

The Act should provide the pilot with the right to appeal against any decision of the reappraisal authority. As proposed in Recommendation 26, it is considered that this appeal should take place before a regular court and that the Admiralty Court is the indicated tribunal for the purpose. The appeal court should not be limited to the evidence used and obtained by the reappraisal authority. The preconstituted evidence, together with affidavits and documents filed before the reappraisal authority, and any record of evidence obtained by the reappraisal authority should form the record to be

placed before the appeal court. Thereafter, the appeal should take the form of a trial *de novo*. The appeal court should have the power to award appeal costs against either the Pilotage Authority or the pilot at its discretion, including the costs of the other party, the amount of these costs being liquidated by the court unless a tariff is provided by appropriate legislation.

To sum up, it is considered that, for the sake of clarity and to avoid any possible argument, the Act should enunciate the following principles applicable to the reappraisal process:

(a) the right and duty of the Pilotage Authority to initiate *proprio motu* the reappraisal process whenever there is reason to believe that a pilot has become a safety risk, whether it be for lack of professional competency, or for physical, mental or moral unfitness;
(b) the right of the pilot involved to full defence and assistance by counsel;
(c) mandatory procedural requirements to be limited to those essential in order to provide the flexibility and freedom of action needed for the efficient performance of the reappraisal process in the various types of cases;
(d) the reappraisal authority to be vested with full investigatory powers;
(e) the reappraisal authority not to be bound by the rules of evidence applicable to courts of justice;
(f) once a *prima facie* case of unfitness is established, the onus of refuting the presumption to rest upon the pilot involved;
(g) in addition to the power to award the appropriate corrective (Recommendation 37), the reappraisal authority to be authorized to impose reappraisal disbursements on the pilot concerned if they were caused by his unreasonable actions or requests;
(h) as a check against injustice and error, the pilot to have the right to appeal to the Admiralty Court against an adverse reappraisal decision.

RECOMMENDATION NO. 35

Penal jurisdiction to remain with regular courts; a penalty system to be adopted as a summary procedure for dealing with minor offences

Without effective means of enforcement, a law becomes meaningless and the powers it is intended to confer are, in effect, denied. If pilotage is to function properly as a necessary public service, there must be a simple, efficient method of enforcing legislative provisions and lawful orders. In view of the special circumstances in which the service operates, it should be possible to deal with everyday disciplinary problems without unduly disturbing normal administrative arrangements.

It is considered that the present system of resorting to regular courts for the prosecution of pilotage offences is the only adequate, practical method of enforcing pilotage legislation and the powers derived therefrom. Since Pilotage Authorities have a major interest in the provision of services and wield extensive control over their pilots, it is improper, and even repugnant, for them to possess any judicial penal jurisdiction. The degree of importance of an offence does not alter the basic principle that the dispensation of justice must be by an unbiased and disinterested court.

On the other hand, an obligation to prosecute every single minor offence before a penal court might prove detrimental to the enforcement of discipline for two reasons: the number of cases might occupy both pilotage officials and the court unnecessarily; serious delays might be incurred unless a special court is created for the purpose. This course of action is not recommended because pilotage courts might have to be created in many Districts—an unwarranted step in view of the availability of regular tribunals.

It is considered that a system of penalties imposed by legislation is the correct solution to the problem of dealing with minor offences. During the Commission's study of subsec. 329(g) C.S.A., it was thought that, on account of the presence of the term "penalty" considered in the light of sec. 709, a similar system had been adopted in 1934 but this interpretation was discarded because it did not agree with the context of the Act (vide C. 9, p. 380 and ff.). It is believed, however, that herein lies the answer to the problem of enforcing day to day problems of discipline.

Under the usual penal process, the sentence of a court creates the punishment and a debt exists only as the result of, and from the date of, a sentence which imposes a fine. Therefore, under this system, the process of a penal trial must be resorted to in every single case, no matter how minor. On the other hand, as explained in Chapter 9 (p. 380), a penalty is a pecuniary punishment in a fixed amount which is imposed by legislation; it is a debt which is automatically owed when the offence is committed, a debt which is recoverable by civil proceedings unless paid voluntarily. Under the system of penalties, a pecuniary punishment is automatically imposed when a breach of disciplinary regulations is committed and the only responsibility of the Pilotage Authority is to collect the amount due. In most cases, the pilot complies voluntarily and pays the debt, with the result that the whole question is settled out of court; if he refuses, the enforcement powers of the regular courts have to be resorted to and the rôle of the court is limited to ascertaining the existence of the debt and establishing the pilot's refusal to pay voluntarily. An affirmative judgment is then enforced through the normal means of execution pertaining to the court.

Under this system also, the Pilotage Authority has no discretion whether to apply punishment or not; once the offence is committed, a debt to the

Crown exists and the Pilotage Authority has no discretion but to collect. Sec. 709 C.S.A. stipulates the procedure to be followed for collecting such penalties if the pilot refuses to pay voluntarily, that is, "either by summary conviction or by civil action or proceeding . . . before any court having jurisdiction in the amount of the penalty". Neither the Pilotage Authority nor the court has any discretion as to the amount of the judgment, which is fixed in applicable legislation. At the hearing, the plaintiff, i.e., the Pilotage Authority, has the onus of establishing the claim, i.e., that the defendant committed the breach which caused the indebtedness. On the other hand, the defendant has every opportunity to present his defence. Whether an appeal lies against the judgment so obtained at the suit of either party is governed by the laws defining the rights of appeal from the judgment of the court concerned.

Under this procedure, the Pilotage Authority never sits in judgment; its only rôle is to ascertain, or at least to satisfy itself, that the offence has been committed and, therefore, that the debt is owing. The system also has the advantage of providing a speedy method of disposing of minor disciplinary cases. Generally, the facts are self-evident and the pilot involved will pay voluntarily without letting the case go to court and making himself liable for costs in addition to the penalty. This means also that if the pilot does not comply voluntarily or contests his liability, the punishment can not be enforced against his will without a court order which can not be obtained except through due process.

No special procedure needs to be established or followed before recovery procedure of penalties is instituted, except that payment should be demanded in order to be able to establish before a court refusal on the part of the pilot to accept liability or to pay. At this stage, the Pilotage Authority is not acting as a tribunal but merely in an administrative capacity as a creditor trying to establish whether a debt exists. Therefore, any communications and discussions between the Authority and the pilot concerned need not be carried on in any particular way. Before taking the administrative decision to launch recovery proceedings, the Pilotage Authority should be reasonably sure of its ground, bearing in mind that it has the burden of proof as plaintiff. Since such a recovery is a civil case, the pilot (as defendant) is a compellable witness.

This method has the advantage of preventing arbitrary action while providing a speedy, effective disciplinary procedure with the least inconvenience for all concerned.

The application of this summary procedure should be restricted to minor disciplinary cases involving pilots and other licensees, and possibly also to other minor offences, whether created by statute or by regulation, that might be committed by other persons. Serious offences should continue to be under the exclusive jurisdiction of penal tribunals and subject to the principles governing the administration of penal justice. The Act should contain a

provision placing under the exclusive jurisdiction of regular penal courts all offences for which conviction gives reappraisal jurisdiction to the District Pilotage Authority. Such a provision is warranted because only serious offences should be deemed to create a presumption of unreliability and the grave consequences for the pilot concerned warrant that the commission of such offences should be legally established beyond reasonable doubt. Furthermore, as stated earlier, this method has the marked advantage of clearly dividing the two fields of jurisdiction: penal and reappraisal. This distinction is an absolute necessity.

The penalty system requires that both offences and penalties be specifically defined in legislation without discretion because, otherwise, the debt would not automatically exist, but would be the result of an administrative or judicial decision which would amount to a fine. There is no objection, however, if a scale of penalties is provided for subsequent offences of the same nature, as long as the amount owing after the commission of each offence can be definitely ascertained merely by referring to the applicable legislation.

As pointed out in Chapter 9, it is not necessary to cover all possible offences exhaustively for the sake of discipline and respect for the law. Normally, the imposition of penalties would be the subject-matter of regulations and it is easy to create an appropriate new offence by enacting a covering regulation. It should be borne in mind that by multiplying offences, the Pilotage Authority multiplies its obligations because it is bound by the legislation it has created. For instance, an exhaustive set of disciplinary regulations obliges the Pilotage Authority to undertake punitive action every time any of these regulations is breached, no matter how minor the case may be. These regulations should be kept to the necessary minimum to assure the maintenance of discipline and their provisions should be clear and realistic.

There might be an objection to the rigidity of a system of automatic punishments which makes no allowance for extenuating circumstances but it should be borne in mind that extenuating circumstances mean that the person charged is guilty of the offence and the importance of the circumstances is negligible in view of the small penalty imposed. In extreme cases, however, there will always remain the possibility of obtaining a remission of all or part of the debt through an *ex gratia* gesture by the Crown or by the Central Authority, if so empowered by the Act.

The proposed system has the advantage of being equally applicable to all types of organization the pilotage service may adopt.

Furthermore, in order to preserve the District Pilotage Authority's freedom of action, the Act should clearly stipulate the power of the Authority to act as plaintiff for the recovery of penalties, and as complainant in the prosecution of pilotage offences.

Costs, whether judicial or extra-judicial, incurred through either process and not recoverable as part of the judgment, should automatically form part of the administrative expenses of the District.

Furthermore, under the proposed system, in both processes the pilots —as they have repeatedly requested—are guaranteed full protection, a right which was denied them by the methods of enforcement previously adopted by Pilotage Authorities.

RECOMMENDATION NO. 36

The remedial power of courts created under Part VIII C.S.A. to be directed against pilots' certificates of competency and not their licences

The Commission is only indirectly concerned with Part VIII of the Canada Shipping Act, but considers it appropriate that the Minister of Transport, who has the overall responsibility for safety of navigation, should have the legal authority to prevent any person considered a safety risk from taking charge of the navigation of a vessel in Canadian waters. On those occasions when a pilot is involved, the Minister should be untrammelled because it is a pilot, or by any action a Pilotage Authority may take with regard to the pilot. Conversely, the Pilotage Authority should not be influenced in its action by a decision the Minister of Transport may or may not make.

With regard to remedial action, a problem arises because neither the Minister as such nor the courts of Part VIII have any control over the issuance of licences to pilots. These courts may cancel or suspend a pilot's licence, but there is nothing to prevent the Pilotage Authority concerned from issuing a new licence.

If approval is given to the Commission's Recommendation 13, which provides that possession of a Master's or mate's certificate of competency issued under Part II of the Act is a prerequisite to holding a pilot's licence, the remedial action of these courts should be changed by appropriate amendments to subsec. 552(2) and sec. 568 of Part VIII to provide for judgment against the certificate of competency held by the pilot but not against his pilot's licence. In that event, cancellation of the certificate would automatically entail forfeiture of the licence, and prevent the issuance of a new one, unless the now ex-pilot succeeded in having his certificate of competency restored by the Minister of Transport, as provided by sec. 142. This, however, would not be done unless the Minister was fully satisfied that from his point of view the pilot was no longer a safety risk. Similarly, suspension of the certificate would automatically cause suspension of the licence and, if the provisions of secs. 568 and 579 are appropriately

amended, as recommended in Recommendation 37, such courts could then impose whatever remedial action they considered indicated as a condition to lifting suspension of the certificate.

Reviving the certificate of competency or ending its suspension would not, however, automatically cause reinstatement of the licence, which would then be governed by the pertinent provisions of the pilotage legislation of the District concerned.

This recommendation respects and confirms the exclusive jurisdiction and independence of both the Minister of Transport and the Pilotage Authority and, it is believed, is in the interest of the safety of navigation.

RECOMMENDATION NO. 37

Power to impose suspension *per se* or pecuniary penalty following reappraisal to be denied; reappraisal award to consist only of cancellation of the licence or appropriate remedial action

The basic purpose of reappraisal is not to punish an offender or a negligent pilot but to prevent a person considered a safety risk from piloting (vide C. 9, p. 411).

If a pilot is considered no longer qualified to act as such because he is unfit and his condition can not be cured, or the offence of which he was found guilty is extremely serious, or on account of his past convictions he no longer can be trusted, the only remedial action that can be taken by the reappraisal authority is to cancel his licence. If, however, there is hope that the situation may be corrected, the only proper award is a conditional suspension of his licence, the condition being that the deficiency be made good.

A mere term of suspension or a pecuniary penalty can not guarantee that, when the term has expired or the amount paid, the pilot will possess the qualifications he lacked thus making him a safety risk. No amount of money or period of suspension will *per se* make a fit pilot out of an unfit pilot. In a case of moral unfitness, a punishment may possibly serve as a deterrent by making the pilot realize the gravity of the situation, but there are many other ways to achieve the same end and, at the same time, attempt to increase his general qualifications. A prolonged term of suspension is likely to be professionally detrimental to a pilot because it deprives him of the regular experience he needs to maintain and improve his qualifications. Instead, it is considered that the Act should authorize reappraisal authorities, whether the Pilotage Authority or one of the administrative courts of Part VIII, to impose the remedy which is deemed appropriate in each case, with suspension being imposed as a preventive measure until the decision is implemented.

If unfitness is caused by lack of a required qualification in a certain subject of the pilot's professional knowledge or competence, he should not be allowed to pilot until the deficiency has been overcome. This situation should normally call for the suspension of his licence until he has passed an examination establishing this aspect of his competence. If he does not succeed within a given time, the suspension should be made permanent. As an additional requirement, the reappraisal authority might require the pilot to take a special course in a given subject or take special training, or undergo a certain period of apprenticeship, provided that these are part of the normal training a pilot requires to obtain and, later, to retain, his licence. Where a grade system exists, the award may take the form of lowering, without suspension, the licence to a grade for which the pilot is still qualified despite his deficiency, and either leaving his promotion back to higher grades to the normal course stipulated in the regulations, or providing an earlier opportunity, such as successfully passing the required examination in the subject in which he was deficient.

The same principle applies to physical and mental fitness. If the condition is curable, the pilot should be given a reasonable period in which to establish that he is no longer suffering from the impairment. If he is successful, his licence can be reinstated; otherwise, the suspension becomes automatically permanent after a specified lapse of time. In cases where the impairment is due to detrimental habits, such as alcoholism, a pilot should not be reinstated until proof is given that he is cured, or that he has been abstinent for at least a year and, also, that, during that year, he has followed the regular training of apprentices or has undergone training with other pilots in order to maintain his competence. It is interesting to note that the Trinity House Act of 1849 (12 Vic. c. 114) contained a provision to that effect. Sec. 25, which was repealed in 1873 by 36 Vic. c. 54, reads as follows:

"Pilot disbranched for drunkenness may be reinstated.

XXV—And be it enacted, That a Pilot deprived of his Branch for drunkenness, may recover it by proving by good and valid certificates that he has conducted himself with sobriety and steadiness during two consecutive years, after the date of his interdiction."

The question of reliability (moral fitness) is somewhat more difficult, since reliability can be tested only by a person's actions, behaviour and performance. If a pilot is considered unreliable but not a hopeless case, he should be given a chance to prove that he can still be trusted. One solution might be to revert the pilot to the status of apprentice, or, if the grade system exists, to lower his licence for a probationary period to a grade, if any, where his unreliability is not likely to cause damage, and to review his status at the expiration of the probationary period.

RECOMMENDATION NO. 38

The Act to grant the District Pilotage Authority and the Central Pilotage Authority emergency powers to provide reasonable temporary pilotage service through alternative plans in case of a strike by pilots where the service is deemed essential in the public interest

The grounds for this recommendation are enunciated in Chapter 9, Comment (b), (pp. 430 to 433) to which reference is made.

In order to preserve the intended effectiveness of these emergency powers and to maintain their character as safeguards of public interest, they should be fully enunciated in the Act and none of them should come under the regulation-making power of District Pilotage Authorities. The inclusion of the necessary provisions in District regulations would be liable to cause unnecessary contention and, if at a time of crisis they were lacking, hasty legislation would be required, thus providing an additional source of irritation while, at the same time, delaying unduly the exercise of emergency measures.

Whether the pilotage service in a District or in a given part of a District is, or is not, essential in the national interest is for decision by the Central Pilotage Authority and should normally have been taken in advance, since it is the main criterion that determines the constitution and organization of the District. In certain circumstances, in time of crisis, other services or parts of them that are normally non-essential might prove to be vital. The Central Pilotage Authority should have power to make a decision to that effect so that the necessary temporary measures can be taken.

Alternative plans should be the prime responsibility of the District Pilotage Authority, both for enunciation and implementation. The Act should empower the Central Pilotage Authority to supersede a District Pilotage Authority if, in time of crisis, the latter fails to act or to take all measures required in the circumstances.

RECOMMENDATION NO. 39

Pilot fund legislation to be abrogated; existing pilot or pension funds to cease as a responsibility of Pilotage Authorities and to be disposed of in such a way as to respect and guarantee acquired rights; in Districts where pilots are not Crown employees, welfare and insurance schemes to be imposed by District regulations if required by a substantial majority of the pilots

Chapter 10, to which reference is made, examines the nature of pilot funds as an institution, analyses the governing statutory provisions and reviews the changes that occurred both in the social environment and in

legislation from the time pilot funds were introduced into pilotage legislation. This study led to the conclusion that pilot funds, as such, are outdated and now serve no useful purpose because any financial protection pilots need can more easily and effectively be provided by other means.

Neither is there a need for compulsory pension funds whose sole purpose is to provide a source of revenue after retirement. This amounts to compulsory saving and, therefore, is an infringement on individual freedom which can not be justified as being in the public interest because a basic minimum pension is now guaranteed through the Old Age Security Act and the Canada Pension Plan, and additional assistance is provided under other welfare legislation.

Hence, it is considered that pilot funds should be abolished as an institution and all statutory provisions governing them should be abrogated.

Similarly, Pilotage Authorities should be obliged to desist from creating, providing and administering pilot and pension funds and should be relieved of all the responsibilities they now bear relative to existing District pilot or pension funds which should be discontinued forthwith.

Care should be taken, however, that acquired rights to the benefits of such funds are fully protected. If the pilots wish to obtain pension protection in addition to what is now provided under the Old Age Security and the Canada Pension legislation, it should be their responsibility, either as individuals or as a group, to so provide.

Nor is there any valid reason for making an exception of the Quebec Pension Fund whose financial position, although gradually improved in recent years, still shows an actuarial deficit of over $6,000 per active pilot. Its governing legislation provided for a pilot fund that was never supposed to be in deficit and not for a pension fund. The misuse of these provisions enabled pilots to obtain pension benefits disproportionate to the solvency of the fund and their contributions, at the expense of their successors, thus leading to the present unsatisfactory situation.

When pilots become public servants the question of future protection is automatically settled most adequately because they become eligible for the extensive pension, health and welfare privileges provided by the Crown to its employees. No pension plan or group insurance benefits that the pilots can obtain from private enterprise can equal in cost, benefits and other advantages the assistance provided by the Crown to its employees. The principal reasons are:

(a) the Crown makes substantial financial contributions;
(b) the very large number of participants permits beneficial averaging;
(c) the Crown offers a firm guarantee of solvency;
(d) although neither private nor Crown plans contain an escalation clause, there is always the possibility that the Crown will increase its benefits to offset the rising cost of living and the lower purchasing power of the dollar.

With reference to existing District pilot or pension funds, the Commission fully endorses the disposal of the Sydney District pension fund when the Sydney pilots became public servants. In consideration of a transfer of the District fund assets to the Crown, the pilots were given retroactive benefits for the purpose of the Superannuation Act based on a formula which took into account their aggregate contributions to the District pension fund and their previous years of service in the profession. In addition, the Crown assumed the District fund liabilities that had accrued up to the date of the surrender of the assets.

When pilots are not Crown employees, the Crown should bear no responsibility for future pension benefits or welfare, health and other protection. However, the new pilotage Act should stipulate that, for the purpose of statutes such as the Canada Pension Plan Act, Workmen's Compensation and similar legislation, the Crown is considered the employer of all pilots and responsible for the employer's contribution. These contributions should be considered part of District operating expenses (vide in this regard the different attitude taken by various Pilotage Authorities concerning contributions to the Canada Pension Plan, C. 4, pp. 81-82).

Existing pilot or pension funds might be individually entrusted to the Crown for liquidation, i.e., acquired rights to benefits should be honoured as they mature and until they are exhausted, and the District concerned should be required to continue to contribute as necessary to maintain the solvency of the fund. According to the latest actuarial evaluation and unless the situation has deteriorated in other Districts since that time, only the Districts of Halifax and Quebec should be required to continue contributions to these holding funds. An even better solution would be to allow the pilots to dispose of a fund as was done by the pilots of the Districts of New Westminster and British Columbia, provided acquired rights to pension benefits are undertaken by the trust or insurance companies and the Crown receives adequate guarantees that these acquired rights will be honoured as they become due.

When the pilots as a group have agreed to subscribe to pension, health, security or welfare plans, provided the decision was reached by a substantial majority of the group members, e.g., two-thirds as recommended in Recommendation 25, it is considered that the agreed plan should be made compulsory for all members of the group and power should be granted to deduct individual contributions at source. This should be made a subject-matter of District Regulations which the District Authority should be required to include in its regulations when it has been so decided by the required majority of the members, unless the proposal is totally unreasonable or unjust. Similarly, where the pilots' earnings are pooled, authority should be granted to pay from the common fund group contributions to plans and schemes recognized by District Regulations or, if the contributions are on an individu-

al basis, from the share accruing to each pilot. The Act should also authorize the pilots to establish a similar procedure to provide out of the pool for holiday privileges and sick leave remuneration.

Under the proposed system, all pilots who are not Crown employees will have the right to decide whether or not they will be provided with financial protection and the nature of such assistance. Whether they form part of a large or a small District, they will all have a reasonable opportunity to make provision for their own welfare, in contrast to the District pension fund formula which denied this right to the pilots of small Districts.