



COMMENTS ON BILL C-97
(PROPOSED AMENDMENTS TO THE PILOTAGE ACT)

Submitted to the House of Commons Standing Committee
on Transport, Infrastructure and Communities

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INTRODUCTION

The Shipping Federation of Canada, which was incorporated by an Act of Parliament in 1903, is the voice of the owners, operators and agents of the ocean ships that carry Canada's imports and exports to and from world markets. Those ships make thousands of voyages between Canadian ports and international markets every year, carrying hundreds of millions of tonnes of cargo, ranging from dry bulk commodities such as grain and coal – to liquid bulks such as crude oil and oil products – to containerized consumer and manufactured goods. Our members operate throughout Canada, and are the primary users of pilotage services in Canadian waters both in terms of the number of assignments and the amount of pilotage fees paid. In 2017, the total revenues from Canada's four Pilotage Authorities (generated almost exclusively from pilotage fees) amounted to \$238.9 million, the majority of which was paid by foreign flag vessels.

Other than one set of substantial amendments in 1972, the *Pilotage Act* has remained largely frozen in time since being passed in 1972. This despite the tremendous strides in navigational technology, vessel design, and communications that have occurred since then, and the significant developments that have shaped the evolution of world trade at both a national and international level. In 2017, Transport Canada undertook a comprehensive review of the *Pilotage Act* which included extensive consultations with shipowners, shippers, pilotage authorities and pilots. That process resulted in the delivery of a report to the Minister of Transport last May, which set out 38 recommendations for updating the Act in order to "reflect the realities of today and the possibilities and innovation of the future,"¹ and (presumably) contributed to the development of the proposed amendments to the *Pilotage Act* contained in Division 11 of Bill C-97.

Given our firm belief that changes to the current pilotage framework are long overdue, we welcome these proposed amendments and believe that they will provide a solid basis from which to continue the much-needed task of modernizing pilotage services in Canadian waters. We therefore urge members of this Committee to ensure these amendments are passed into law as soon as possible.

We also wish to note that the existing *Pilotage Act* has served as an excellent tool for ensuring safe navigation in Canadian waters, and the amendments contained in Bill C-97 will in no way detract from this essential and fundamental value of Canada's pilotage system.

DEFICIENCIES OF THE CURRENT PILOTAGE FRAMEWORK

In Canada, pilotage services are mandatory and delivered under a dual legislated monopoly with a "for profit" component. More specifically, under the existing *Pilotage Act*, pilotage authorities are solely responsible for the administration of pilotage services, while pilots are responsible for delivering those services either as employees of the authorities or as "for-profit corporations" that are linked to the authorities on a contractual basis. This model lacks adequate mechanisms for ensuring accountability or transparency, or for ensuring the use of sound business practices (e.g. cost-competitiveness, responsiveness to user needs, pursuit of continuous improvement) in the delivery of pilotage services. As a result, the uptake of new technologies has been less than optimal, and the system has been unable to control costs or consistently provide users with the level of service they require in a highly competitive marine transportation economy.

¹ 2018 *Pilotage Act Review Report*, tabled in May 2018 by the Chair of the Review, Mr. Marc Grégoire, T86-45/2018E-PDF

As an example, over the last decade, the total cost per pilotage assignment has increased by between 5 percent and 7.4 percent annually. The foregoing is also highlighted in the *2018 Pilotage Act Review Report*, which notes that the structure of the pilotage system is such that its various elements have created a “snowball effect” that impacts tariffs in the following way:

- Pilots are able to set their fees at a level higher than the cost of delivering the service;
- Pilotage Authorities set their tariffs in consideration of all costs, including the fees set by pilots; and
- Because pilotage is mandatory, shippers must pay the tariffs set by the Pilotage Authorities.²

The inability of the current pilotage framework to counteract the effects of the monopoly structure under which the system operates, or to recognize and mandate the use of a sound business approach to the delivery of pilotage services, is an issue of longstanding concern, particularly for a trade-dependent country such as Canada, which relies so heavily on ships – and a modern, fully-optimized transportation system – to carry its imports and exports to and from world markets.

KEY ELEMENTS OF BILL C-97 & PROPOSED AMENDMENTS

In view of these concerns, we are pleased to note that the amendments to the *Pilotage Act* proposed under Bill C-97 will provide a number of important tools for addressing the above-noted issues and modernizing the delivery of pilotage services in Canada. Such tools include the introduction of a requirement to publish pilot service contracts, the development of a mechanism to ensure the primacy of regulations over pilotage service contracts, and the transfer of enhanced licensing and regulatory powers to Transport Canada – all of which will provide a solid basis from which to continue the much-needed task of modernizing pilotage services in Canadian waters.

Another essential tool provided under Bill C-97 is the addition of an explicit “Purpose and Principles” clause to the *Pilotage Act*. This clause will do much more than simply serve as a high-level statement, as it will directly shape the manner in which pilotage services are delivered and how legislative, administrative and judicial powers are exercised under the Act. This is particularly true with respect to the following key elements:

- **Mandate of the Pilotage Authorities:** The Pilotage Authorities will be required to fulfil their mandate and exercise their powers in accordance with the principles set out in the “Purpose and Principles” clause (section 18 of the *Pilotage Act* as amended by section 234 of Bill C-97);
- **Pilot Service Contracts:** The Arbitrator will be required to take into account the principles set out in the “Purpose and Principles” clause when settling contractual negotiations in pilotage service contracts through Final Offer Arbitration (Section 15.2 as amended by section 231 of Bill C-97);
- **Pilotage Tariff:** The “Purpose and Principles” clause will provide an important context within which the Canadian Transportation Agency will assess whether a proposed pilotage tariff to be imposed on users is “fair and reasonable” (section 33.2(1)(d) as amended by section 238 of Bill C-97);

² Page 23, *2018 Pilotage Act Review Report*, footnote 1

- **Regulatory Powers and Enforcement:** The exercise of regulatory and enforcement powers by Transport Canada and the implementation of management systems by the Pilotage Authorities will be done in a manner that is consistent with the Act's Purposes and Principles.

Given the central role that the "Purpose and Principles" clause will play in guiding the manner in which pilotage services are delivered and how the system is enforced, we believe that the addition of a handful of targeted amendments to that clause would further strengthen the framework that Bill C-97 already provides, particularly as it relates to the issues we raised earlier. More specifically, we would recommend that the clause be amended in order to clearly articulate the "regulated monopoly" context within which pilotage services in Canada are delivered; and to reflect the importance of providing pilotage services and exercising statutory power under the Act in accordance with sound business practices (including transparency and accountability, continuous improvement, and responsiveness to user needs).

Although the current wording of the proposed "Purpose and Principles" clause already introduces the concepts of "cost-effectiveness" and "efficiency" with respect to the delivery of pilotage services, we believe there is an opportunity to expand further on those concepts. This is important in a context where pilotage services are provided under a legal monopoly without competition, and where the *Pilotage Act* has historically been implemented (and interpreted by the Courts³) through a lens which views safety as the Act's sole purpose and too often obscures the need to manage and deliver the service in a way that incorporates sound practices and values from a business perspective, without compromising safety.

Given the above, we recommend that the following wording be added to the proposed "Purpose and Principles" clause of Bill C-97 (additional text is in red and underlined):

The purpose of this Act is to set out a framework for the provision of pilotage services under a regulated monopoly, in accordance with the following principles:

(a) that pilotage services be provided in a manner that promotes and contributes to the safety of navigation, including the safety of the public and marine personnel, and that protects human health, property and the environment;

(b) that pilotage services be provided in ~~an efficient and cost-effective manner~~ a manner that is efficient, cost-effective, responsive to the needs of users and delivers continuous improvement of service;

(c) that transparency and accountability be achieved in all aspects of pilotage services;

~~(e) (d)~~ that risk management tools be used effectively and that ~~evolving technologies be taken into consideration~~ the use of new technologies be optimized in keeping with safety of navigation;

and

~~(d) (e)~~ that an Authority's pilotage charges be set at levels that allow the Authority to be financially self-sufficient.

³ There is no doubt in my mind that the main purpose of the Act and the Authority's main mission is to ensure the safety of navigation. (...) Far from being an end in the same way as safety, efficiency is only one component. *Laurentian Pilotage Authority and Corporation des Pilotes du Saint-Laurent Central Inc.* 2019 CAF 83, page 20.

OTHER ISSUES FOR THE COMMITTEE'S CONSIDERATION

In addition to recommending that the "Purpose and Principles" clause of Bill C-97 be amended as per above, we also respectfully urge the Committee to consider providing comments on the issues highlighted below when reporting on the Bill, with a view to appropriately framing and guiding the implementation of the new legislation.

Transparency and accountability: As previously mentioned, transparency and accountability are critical in a context where mandatory pilotage takes place under a legal monopoly – and even more so when one considers that pilotage services in the St. Lawrence River and on the West Coast are delivered by "for profit" pilot corporations operating as monopoly service providers under the respective purview of the Laurentian and Pacific Pilotage Authorities. In order to counteract some of the effects of the above, the 2018 *Pilotage Act Review Report* recommended that the pilot corporations' service contracts and financial statements be made publicly available and that the corporations themselves be subject to financial audits and access to information requests.

We are pleased to note that Bill C-97 takes an important first step in the above-noted direction by requiring pilot service contracts to be made publicly available.⁴ As we move forward with the implementation of the Act, it will be important to ensure that Transport Canada continues to work towards greater transparency and accountability from the pilot corporations, given their status as legally imposed monopoly service suppliers.

Development of the regulatory framework: Division 11 amends the *Pilotage Act* to transfer all of the regulation making powers from the Pilotage Authorities to the Governor in Council, on the recommendation of the Minister of Transport (section 52 as amended by section 254 of Bill C-97). In implementing this new approach, it will be important to ensure that the Government of Canada provides Transport Canada with the necessary resources to develop these regulations and build on its oversight capacity.

Furthermore, as the regulatory framework is consolidated under Transport Canada, Pilotage Authorities should also be provided with the necessary management tools – including in their dealings with the pilots. The authorities have an important role to play in the modernization of pilotage services in Canada through initiatives such as the implementation of technological advancements and the pursuit of continuous improvement in service delivery at a regional level.

ADDITIONAL COMMENT

Finally, we must object to one element in Division 11 which goes beyond the core discussion on mandatory pilotage services. Under Bill C-97, Transport Canada proposes to transfer the full costs of administering a legislation within its portfolio onto the private sector. More specifically, through new "Financial Provisions" of the *Pilotage Act*, the Minister would be in a position to impose on the Pilotage Authorities the payment of "an amount" for the purpose of defraying the costs of administration of the Act – which amount would ultimately be fully recovered from users through pilotage tariffs (given the self-sufficiency mandate under which the authorities operate). In our opinion, this proposed amendment raises a series of public policy questions regarding the role of government and the implementation of cost recovery.

⁴ Section 15.5 as amended by section 232 of Bill C-97.

Although we recognise that under the administration of the current Act, Transport Canada already charges the Pilotage Authorities for some regulatory drafting costs, the department is now suggesting the formalization of much broader cost recovery powers. From our side, we are not aware of other activity-specific legislation which would enable a Minister to broadly pass on the costs of administration related to his/her Act to the private sector.

Rather, it seems to us that Canada's policy approach to cost-recovery is specifically defined under the government-wide legislative scheme set forth under the *Service Fees Act*, which provides the framework under which departments can recover costs for services rendered to users. To our knowledge, the *Service Fees Act* is very explicit regarding the types of activities that can be subject to cost recovery, and even more importantly, provides safeguards to users by requiring the departments to establish and meet "performance standards" (to ensure efficiency in service delivery), to report on the cost of services, and to track and report on performance results.

Transportation is a service industry, and marine transportation in Canadian waters provides a key service that facilitates the competitiveness of – and directly benefits – Canadian exporters and importers (and therefore the Canadian economy). Given that the provision of pilotage services is an essential component of the marine transportation system from both a safety and efficiency perspective, the Minister's proposal to pass the costs of administering the Act to users fails to acknowledge the public good component involved in legislating pilotage services in Canada, and falls outside the essential framework and safeguards provided under the *Service Fees Act*.

Given the foregoing, we urge the Committee to reject this approach and to delete section 37.1 as introduced by section 240 of Bill C-97 and section 52(1)o) as amended by section 255 of Bill C-97.

We thank the Committee for the opportunity to comment on the amendments to the *Pilotage Act* proposed under section 11 of Bill C-97, and look forward to providing further input as the amendments make their way through Parliament and move to the implementation stage.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "M. H. Broad". The signature is written in a cursive, flowing style.

Michael H. Broad, President
SHIPPING FEDERATION OF CANADA