



Administration de pilotage
des Laurentides

Laurentian Pilotage
Authority

BY EMAIL AND BY MAIL

December 11th, 2014

The Honourable David L. Emerson P.C.
Chairman
Canada Transportation Act Review Secretariat
350 Albert Street, Suite 330
Ottawa (Ontario)
K1A 0N5

SUBJECT: Canada Transportation Act Review

Mr. Chairman,

Further to the joint submission of the four pilotage authorities on the above-noted matter, please find enclosed, in English and French, the Laurentian Pilotage Authority's (LPA) own submission on this important subject. Our submission will set out additional contextual information, outline specific challenges facing the LPA that impact directly on the safety and efficiency of the marine transportation system, and propose legislative amendments that are, in our opinion, necessary to fulfill our mandate under the *Pilotage Act*.

We are at your disposal to provide any further information that you may require on this matter, either in writing or in person.

Please do not hesitate to contact me at 514-954-3270 (office) or 514-209-3940 (cellular).

Yours sincerely,

Fulvio Fracassi
Chief Executive Officer



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Submission on the Canada Transportation Act Review

Present to

The Honorable David L. Emerson, C.P.

Chairman

Canada Transportation Act Review Secretariat

December 2014

Canada Transportation Act Review

The Laurentian Pilotage Authority (LPA) welcomes the opportunity to contribute to the recently launched review of the *Canada Transportation Act* (CTA) and related transportation legislation such as the *Pilotage Act*. The LPA is a Crown corporation established in 1972 under the *Pilotage Act*. Our mandate and mission is to establish, operate and maintain, in the interest of navigational safety, an efficient pilotage service to guide vessels safely through waters in and around the province of Quebec which includes the St. Lawrence and Saguenay rivers. Our legislation also accords the LPA, with the approval of the Governor in Council, the authority to make certain regulations for the attainment of our objectives, including the setting of reasonable tariffs.

Our current regulations require compulsory pilotage services for the Port of Montreal, the navigable waters between Montreal and Quebec, and the navigable waters between Quebec and Les Escoumins including the Saguenay River. In terms of distance this covers approximately 494 kilometres between Montreal and Les Escoumins and another 130 kilometre along the Saguenay River. We conduct over 20,000 pilotage missions a year of which over 30% involve tanker vessels. As permitted under the *Pilotage Act*, the approximately 200 pilots providing pilotage services on behalf of the LPA have organized themselves as non-employee contract pilots. The pilots licensed to navigate from the Port of Montreal to Quebec are members of the *Corporation des Pilotes Saint-Laurent Central* and the pilots covering from Quebec to Les Escoumins belong to the *Corporation des pilotes de Bas Saint-Laurent*.

The importance of a modern, safe and efficient marine transportation system to the economic well being of Canada and our region cannot be overstated. It is therefore essentially that we take this opportunity to consider how the LPA can best support Canada's marine transportation system, help industry better face the constantly changing economic, global supply chains and market conditions while at the same time ensuring the safety of navigation and the protection of our waterways and environment. This is particularly important in a context where safety and efficiency of the marine transportation system are intrinsically linked with pilotage. In this regard, it is important to understand that all foreign flagged ships of 35 metres or more and domestic ships of 2,400 DWT between Montreal and Quebec, and vessels of 3,300 DWT between Quebec and Les Escoumin cannot ply the St. Lawrence or Saguenay Rivers without having a licensed pilot aboard. This essentially covers almost all commercial navigation in our region.



We must therefore strive to achieve excellence and identify improvements that can be brought to the current pilotage system and legislation to better equip the LPA in achieving its mandate of contributing to the safety of navigation and the competitiveness and efficiency of the marine transportation system. This can be accomplished by providing the LPA with additional tools and authorities to better promote and contribute to the safety and efficiency of navigation, increase transparency in the current system, and ensure compliance with our legislation and regulations. Modernizing and strengthening the *Pilotage Act* that was first introduced in 1972 and which has remained relatively static since then, is, in our opinion, an essential and required component to achieving the objectives outlined in your review.

In light of the above, we have set out below a number of proposed legislative and regulatory modifications for the panel's consideration that represent a measured and balanced approach to improving the current pilotage regime and address identified gaps in the *Pilotage Act*. The proposals take into account powers or regulations making authorities provided to other similar organisations such as the port authorities under the *Canada Marine Act*, or are based on provisions found in the *Canada Shipping Act*. We have also briefly reviewed practices in other jurisdictions outside Canada.

Navigation Safety Rules Applicable to the Provision of Pilotage Services

The mandate accorded to the LPA to ensure the safety of navigation through the provision of efficient pilotage services is set out in section 18 of the *Pilotage Act*. Despite this broad mandate, the legislation provides the LPA with few and limited tools and powers to achieve its mission. Moreover, the LPA is also faced with the added challenge of managing contract pilots, which under the law are not considered employees. As a result, we have far less control, when compared to other Canadian pilotage authorities, in ensuring that the work is carried out in a manner that is satisfactory and meets our requirements and expectations and those of industry.

In our opinion, a key component of achieving our mandate requires that we not only regulate when pilotage services are required but that we also have the clear authority to establish safety rules and practices applicable during the provision of pilotage services. This would ensure that safety rules, practices and procedures are subject to the rigours of regulation or rule making process, are fully transparent, and are based on appropriate consultations and risks assessments that are in the public interest and respond to navigational safety and efficiency needs.

However, the *Pilotage Act* does not appear to provide the LPA with clear and express powers to set out general safety rules, procedures or practices that would apply to contract pilots and ships during the provision of pilotage services. The current regulation making authority found in section 20 is concerned principally with the establishment of obligatory pilotage areas, prescribing ships subject to mandatory pilotage and the

qualifications and emission of pilotage licences and certificates. Ensuring the safety of navigation and the provision of efficient pilotage services requires more than this basic framework.

As a result of this uncertainty and legislative gap, a number of safety related rules, requirements or practices have been either set out in guidelines, left to the discretion of pilot corporations, or have been addressed to a limited extent through privately negotiated confidential service contracts. Safety related rules and procedures have also been set by arbitral decisions when decisions of the LPA have been challenged by the pilot corporations or have been the subject of the final offer selection process mandated under our current legislation. This lack of clarity and uncertainty in terms of who is authorized to address these kinds of issues has recently led one of the private pilot corporations to communicate directly by way of letter to stakeholders and the marine industry that it would put in place additional restrictions to navigation unless certain issues were addressed. The LPA finds this unacceptable.

Providing express legislative authority to the LPA to establish navigation safety rules and practices of general application that are applicable during the provision of pilotage services would remove any ambiguity and make clear that the development and implementation of such rules are the purview of the LPA, and not that of the private pilot corporations. It would also allow us to regulate and establish practices and procedures currently applied by way of private contract between the LPA and the pilot corporations. For example, our contracts with the pilot corporations establish and contain rules regarding restrictions on night time navigation during the winter period, year round night time restrictions to navigation for larger vessels, and rules regarding maximum draft limits etc.

These types of rules have a direct impact on safety and efficiency of navigation in our region and we are contractually bound to apply them. The marine industry and the marine transportation system is directly impacted by these types of rules yet the confidential nature of contract negotiations with the pilot corporations, the confidential nature of the contract itself and the arbitral process means that there is no adequate mechanism to ensure that industry and other stakeholders are fully consulted and their views taken into account to ensure that such rules are in the public interest.

We firmly believe that rules related to the safety and efficiency of navigation should not be the subject of private contract negotiations where these issues can become intertwined with questions of compensation and remuneration of pilots. Nor should such rules be left to the discretion of the pilot corporations. Rather, safety and efficiency rules of general application should be subject to the rigours of regulation and rule making to ensure that such rules are subject to appropriate consultation, risk analysis and transparency and ultimately once adopted have the force of law.

The ability to regulate and establish binding practices and procedures would also allow the LPA to better respond to Transportation Safety Board recommendations aimed at improving the safety of navigation during the provision of pilotage services, allow for prescribing the use of the latest navigational safety technologies and better respond to efficiency concerns raised by industry. In addition, having clear and express authorities of the type described above would also be of assistance in putting in place standard safety practices and procedures that would apply during the provision of master docking services for tankers arriving or departing from docking stations between Montreal, Quebec and other locations. Regulations or binding practices prescribing the criteria for use of tugs would also provide greater transparency, clarity and help ensure the safety of navigation.

It is important to note that under the above proposals, pilots would continue to make decisions related to the navigation of ships under their conduct, apply their local knowledge and expertise, while at the same time respecting the general safety regulations, rules, practices and procedures established by the LPA and other relevant agencies (such as Transport Canada, the Canadian Coast Guard etc).

The proposed legislative changes to achieve the above objectives could include amending s. 20(1) of the *Pilotage Act* to add the following specific authorities:

- Regulating or prohibiting the navigation, anchoring, mooring or berthing of vessels for the purposes of promoting the safe and efficient navigation of vessels and protecting the public interest and the environment during the provision of pilotage services;
- Prescribing a quality and safety management systems and procedures applicable to pilots and vessels during the provision of pilotage services;
- Prescribing the use of electronic aids to navigation by pilots; and
- Prescribing the use of tugs;

Regulations are blunt instruments and may not always respond to operational needs or realities. Having other appropriate instrument choices and tools at our disposal are essential to meet our operational needs. For these reasons, we would also propose to include in the *Pilotage Act* a legislative authority similar to that accorded to port authorities and found in paragraph 56(1)(b) of the *Canada Marine Act*. This would authorize the LPA to establish binding practices and procedures to be followed by pilots during the provision of pilotage services. The ability to establish binding practices and procedures would provide the LPA, which has contract pilots, powers similar to those that can now be exercised by other pilotage authorities over their employee pilots.

Such a provision as set out in the *Canada Marine Act* could read as follows:

- a pilotage authority may, for the purpose of promoting safe and efficient navigation or environmental protection in the waters under its jurisdiction establish the practices and procedures to be followed by pilots and ships during the provision of pilotage services.

To ensure appropriate consultation and transparency for impacted parties, we would propose that the same notice and consultation requirements as set out in section 57 of the *Canada Marine Act* be included in the *Pilotage Act*.

The *Pilotage Act* and Regulations are of Public Order

The legislation should also make clear that the *Pilotage Act* and its regulations, in particular the safety and efficiency related provisions, are of public order and cannot be modified by contract or by a ruling of an arbitrator. This issue is of particular and paramount concern to us as we have had imposed upon us by way of contract and arbitral decisions requirements and restrictions to navigation that go beyond those required under the Act and regulations. These types of decision have had a direct impact on the efficiency and cost of rendering our services to the marine industry.

This particular problem was noted both by the Minister of Transport in his letter to the LPA dated November 15, 1999 and by the Canadian Transportation Agency (CTA) in its decision of November 29, 2002 (Decision No. 645-W-2002). In that letter, the Minister stated, inter alia:

... The inclusion of issues subject to regulation in pilotage service contracts would make it appear that the Authority has circumvented the federal regulatory process....

Provisions, such as these, which require regulatory approval should not be included in any future service contracts.

The CTA in its decision commented that the Minister of Transport had indicated clearly that the LPA should not include any provisions in its service contracts that relate to the regulatory powers accorded to it under the *Pilotage Act*. It then stated that the Authority should:

*...conduct a thorough review of all contract provisions to ensure that all clauses relating to regulatory powers are removed in accordance with the Ministerial directive. The inclusion of such clauses in the service contracts is an improper delegation of the Authority's powers to the pilot corporations. In so doing, the Authority has limited itself as to actions or changes that it can make through regulatory amendments which it is mandated to do under the *Pilotage Act*.*

We fully agree with these directives but have not been provided the powers necessary to fully achieve and implement them. Stripping our existing contracts of these types of provisions requires the consent of the pilotage corporations. Moreover, arbitrators and the courts have accepted these types of provisions as being valid contractual clauses. For example, the power to set and determine double pilotage requirements is specifically accorded to the LPA under the *Pilotage Act*; however, in a relatively recent arbitration decision the arbitrator substituted his views for those of the LPA and imposed a double pilotage requirement for vessels above a certain size. These types of decisions effectively usurp the powers granted to the pilotage authority and may result in added costs and inefficiencies to the system.

Also of note, our past and current service contracts would require the LPA to compensate the pilots for any economic loss that they may incur due to a change in the *Pilotage Act* made by Parliament or any regulatory change approved by the Governor in Council.

For these reasons, the legislation should be amended to clearly state that all matters covered under the regulation or rule making powers set out in the *Pilotage Act* (example: safety, efficiency regulations or practices or procedures established under the proposed new powers) cannot be covered or modified by way of a service contract and are outside the mandate and jurisdiction of an arbitrator. We would also propose a new legislative provision stating that the authority of an arbitrator under the *Pilotage Act* is limited to considering and deciding issues of compensation and working conditions.

Follow up after an Incident or Accident

The hall mark of a modern and responsive pilotage system also includes the ability to effectively review events leading up to an incident or accident and taking appropriate measures to address shortcomings to reduce the risk of reoccurrence. Currently the LPA has very few tools and powers at its disposal to properly review and address accidents to determine if a pilot involved in an accident is fit or competent to return to active duty. This lack of clear authority is further aggravated by the fact that our pilots are not employees of the LPA. In this regard, our authority to implement an effective review mechanism has already been questioned by one of the pilot corporations in our region. Waiting 6 months to a year for a Transportation Safety Board Report is not an option given that the pilot implicated in the accident would return to navigate ships during this period. The potential implications and impact this may have on the safety of navigation are serious and require that the LPA take immediate and appropriate measures to ensure the safety of navigation.

For these reasons, the legislation should be amended to expressly mandate and authorize the LPA to conduct reviews of incidents or accidents in its territory prior to a pilot being permitted to return to active duty. Expressly providing these types of authorities in the

legislation is consistent with most other legislative and regulatory regimes that accord agencies or other organisations the power to conduct inspection, investigation or reviews.

We would therefore also propose that the *Pilotage Act* include the express authority to require pilots involved in an incident or accident to attend a follow up meeting with the LPA, provide all relevant documentation and Portable Pilot Units for review by our organisation. Legislative authority requiring the captain of the vessel and ship owner to provide relevant information regarding the incident/accident including any written report and access to the ship's black box is also essential in helping determine what corrective measures, if any, need to be taken. The legislation and regulations should also provide clear authority, where appropriate, to require a pilot to undergo mandatory training and re-evaluation, approved by the LPA, prior to returning to active duty. In our opinion, these powers are necessary in order for the LPA to conduct an effective and efficient review of incidents and take the necessary action to ensure the safety of navigation.

The powers of suspension set out in the *Pilotage Act* also need to be modified to expressly allow the ongoing suspension of a pilot pending a hearing. The current law suggests that the initial 15 day suspension can only be extended after a hearing. This creates a gap in the law that could result in an unfit pilot returning to active duty and potentially endangering the safety of navigation pending a hearing taking place. We believe that such an interpretation would lead to an absurd result and runs counter to the intent of Parliament. However, the current wording of the legislation leaves us open to legal challenges and should, in our opinion, be amended.

The proposed legislative changes to achieve the above objective could include amending the *Pilotage Act* to add the following specific authorities:

- Mandate to conduct incident/accident reviews related to pilot competency;
- Create positive duty to cooperate with pilotage authorities during an incident/accident review;
- Allow the removal of a pilot from active duty after an accident to assess the causes and determine if any remedial actions are required before the pilot may return to duty;
- Compel the appearance of the pilot and master to respond to questions and provide all relevant documentation related to the incident;
- Provide access to the black box and portable pilot units;
- Prescribe training and evaluations that must be successfully completed by the pilot following an incident/accident prior to returning to active duty; and

- Authorize the suspension of a pilot for competencies and safety reasons beyond the current 15 days to permit sufficient time to hold a hearing prior to allowing the pilot to return to active duty.

Pilot Training and Evaluation

The maintenance of skills levels through training and periodic re-evaluation of pilots is fundamental to ensuring competence levels remain adequate and is a key component of what constitutes, in our opinion, a world class pilotage system.

The *Pilotage Act* and regulations should therefore be amended to provide clearer authority to require mandatory training and periodic re-evaluation of licensed pilots to ensure that they continue to maintain an adequate level of skills and competencies related to their class of licence or pilot certificate. Under the current legislation, once a person obtains a pilot licence it is not clear whether the Pilotage Authorities have the legislative power to require mandatory training and periodic re-evaluation of licensed pilots. It appears that new requirements for the original licence may need to be introduced before additional training requirements may be prescribed. Our objective is not to add new requirements to the existing licences but rather ensure that competency levels for the previously granted licence have been maintained.

For these reasons, the legislation and regulations should be amended to clarify and provide express authorities to prescribe specific training and re-evaluation requirements that would be made applicable to licensed pilots. To achieve this objective we would propose the following amendment to section 20 of the *Pilotage Act*:

- Authority to prescribe the circumstances under which a licensed pilot or holder of a pilotage certificate shall be required to take further training and re-evaluation; and
- Prescribing the training and evaluations that must be successfully completed by the pilot as part of ongoing training and periodic evaluation.

An Efficient, Timely & Flexible Tariff Setting Mechanism

The *Pilotage Act* requires that pilotage tariffs be fixed at a level that permits the Authority to operate on a self-sustaining financial basis, and that the tariffs set be fair and reasonable. To achieve self-sufficiency, tariff adjustments are made based on the financial and operational requirements. The Authority relies on projections of future traffic levels and the corresponding revenue and expenses to determine appropriate revenues and tariffs levels to maintain its financial self-sufficiency. The LPA must also have sufficient cash liquidities to be able to replace its assets, maintain its operations and support major and unforeseen situations.

Pursuant to section 33 of the *Pilotage Act*, pilotage tariffs are set by regulation, with the approval of the Governor in Council. The regulatory making process for setting tariffs has repeatedly proved itself to be cumbersome, lengthy, costly and unresponsive to both the needs of the LPA and the marine industry.

In order to address this situation, the four pilotage authorities propose that sections 33 and 34 of the *Pilotage Act* be replaced with provisions similar to those found in sections 49 to 52 of the *Canada Marine Act*. In this regard, we refer the panel to the joint submission sent to you by the four pilotage authorities under separate cover.

Modern Compliance and Enforcement Powers and Penalties

Ensuring that the pilotage legislation and regulations are respected is critical to achieving our stated objectives and mission of providing, for the safety of navigation, efficient pilotage services. In our opinion, the current compliance and enforcement provisions are inadequate and do not reflect modern best practices. More specifically, enforcement tools under the Act are limited to criminal proceedings for the imposition, on summary conviction, of small fines ranging from a maximum of \$5,000 to \$10,000. It is difficult to envisage a scenario where it would be in the public interest to galvanizing public resources to prosecute a person in the hope of obtaining a maximum fine of the amount mentioned above.

Consistent with modern compliance and enforcement policies and procedures we would propose legislative authority to issue administrative monetary penalties (AMPS) for a violation of the Pilotage Act and regulations by any person subject to the legislation. This type of enforcement tool can be found in a variety of legislation including the *Canada Shipping Act, 2001*. The benefits of this type of modern enforcement tool was recently recognized by the Government in the amendments made to the *Canada Shipping Act, 2001* which extended the application of AMPS to provisions of the Pollution Prevention and Response portion of the Act. We would also propose the addition of clear authority to enter into compliance agreements and the ability to refuse to provide services if the legislation and regulations are not respected. This would allow for a measured and graduated approach to compliance enforcement with criminal/penal prosecution being the last resort.

Given the importance that pilotage plays in contributing to the safety and efficiency of navigation, it is also important to consider increasing the applicable offence penalties for violations of the *Pilotage Act* to ensure they reflect modern levels found in other similar marine legislation. For example, the modernization of the *Canada Shipping Act* led to substantial increases in penalties under the *Canada Shipping Act, 2001* for numerous offences, including those relating to pollution prevention. In our opinion, the same re-examination of the penalty and enforcement provisions should be undertaken in the case our legislation to ensure that there is sufficient disincentive to anyone considering not complying with the *Pilotage Act*.

Conclusion

The challenges of navigating the waterways of our region and the diversity of its coastlines make pilotage an essential component to the safety of navigation, the protection of the environment and the efficiency of our marine transportation system. It is therefore important that we continuously strive for improvement and excellence. For these reasons, modernizing and strengthening the *Pilotage Act* and its regulations, is a key component to ensuring that the LPA and our pilotage system is fully equipped with the necessary powers and tools to deal with operational challenges related to safety and efficiency of navigation and can continue to contribute to the competitiveness of the marine transportation system.

As we highlighted in our submission, to achieve this requires legislative changes that will ensure that safety rules, practices and procedures related to the provision of pilotage services are subject to the rigours of the regulation making process, are fully transparent, are based on appropriate consultations and risks assessments, and are in the public interest. According the LPA with the clear authority to establish these types of rules and limiting the jurisdiction of an arbitrator to issues related to compensation and working conditions would also finally allows us to fully implement the directives first issued on this matter by the Minister of Transport in 1999 and the Canadian Transportation Agency in 2002.

Equally essential to meeting our mandate and achieving the stated objectives of your review will require that the LPA be provided with clear authority to: review marine incidents or accidents involving pilots; take appropriate measures to reduce the risk of reoccurrence; regulate training requirements; and ensure the periodic evaluation of pilot skills and competence.

We also wish to reiterate in these final concluding remarks the importance of modifying the current tariff setting process with one that is more efficient, flexible and better responds to the needs of the LPA and the maritime industry and ensuring that the LPA is equipped with modern compliance and enforcement tools.

We very much appreciate this opportunity to make the above submission and remain at the disposal of the panel to answer any questions that you may have.



Fulvio Fracassi
Chief Executive Officer
Laurentian Pilotage Authority

