

CASES
 DETERMINED BY THE
EXCHEQUER COURT OF CANADA
 AT FIRST INSTANCE
 AND
 IN THE EXERCISE OF ITS APPELLATE
 JURISDICTION

BETWEEN:

1945
 Aug. 23 & 24
 Nov. 13

HARRIS H. HIMMELMAN; R. L. CLARK; H. W. MOSHER; FRANK M. BACKMAN; CHARLES WEBBER; HAROLD K. CONRAD; M. M. COX; N. L. CONRAD; M. D. LOHNES; H. BIRD; G. R. G. FENTON; G. J. COOPER; ARTHUR TANNER; R. M. OGILVIE; W. B. KEAN; R. V. SARTY; F. RICHARD; M. M. BLANDFORD; C. T. ORMISTON.....

SUPPLIANTS;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Crown—Petition of Right—Canada Shipping Act 24-25 Geo. V, c. 44—Exchequer Court Act R.S.C. 1927, c. 34, s. 18—Halifax Pilotage District—Pilotage Authority agent of the Crown—Halifax Pilotage Fund—Use of such fund—By-laws enacted by Pilotage Authority—Contract entered into by Pilots' Committee for purchase and insurance of vessel—Repayment of money loaned to purchase vessel for use of Pilots—Loss of vessel—Payment of proceeds of insurance policies—Proceeds of insurance policies are the property of the Crown and not of the Pilots—Allegation that Crown is a trustee—Question not one of Crown's trusteeship but of court's jurisdiction.

The action is brought by the temporary Pilots of the Halifax Pilotage District to recover from His Majesty a portion of two marine insurance policies paid to His Majesty by the insurers following the loss of the pilot vessel *Camperdown*.

By virtue of the Canada Shipping Act 24-25 Geo. V, c. 44, the Minister of Transport is the Pilotage Authority for the Halifax Pilotage District. By-laws 6, 6(a), and 6(b) enacted by him provided *inter alia* that all moneys collected by virtue of these by-laws should be

1945
 HARRIS H.
 HIMMELMAN
 ET AL.
 v.
 THE KING

deposited to the credit of the Receiver General of Canada and be designated as the Halifax Pilotage Fund which should be administered by the Pilotage Authority to pay the general expenses of the Pilotage District including the purchase, charter or hire of pilot boats and their maintenance, operation and repair and after providing for other disbursements the balance to be divided among the pilots in proportion to the time worked each year by each pilot. Other by-laws set up a Pilots' Committee to be recognized by the Pilotage Authority as representing the pilots in all matters affecting them collectively and individually. By-law 7(a) states that "All vessels required for the use of the pilotage service shall be purchased out of the revenue of the District and be owned and registered in the name of the Pilotage Authority." By-law 7(b) enacts: "The handling, maintenance and jurisdiction of the vessels shall be under the immediate and exclusive control of the Pilotage Authority for the Pilotage District of Halifax, and the cost of maintenance, repairs, etc., shall come out of the earnings of the Pilotage District". All by-laws were confirmed by the Governor in Council.

In June, 1941, an agreement was executed by the Pilots' Committee whereby the pilots were to be loaned by the Pilotage Authority a sum not exceeding \$65,000 for the building and equipping of an auxiliary pilot vessel to be repaid during the continuance of hostilities by yearly payments of 7 per cent of the gross revenue of the Pilotage District of Halifax and thereafter by such equal amounts as would effect repayment of the said sum within a period of ten years from the date of the first payment, the money so loaned to be a first charge against the pilots' earnings as provided by by-law 6(a).

The pilots also agreed to keep the vessel fully insured until fully paid for, the policy to be made payable to the Minister of Transport. The agreement provided further that the vessel was to be registered in the name of His Majesty the King represented by the Minister of Transport and to be the property of the Crown.

The money was advanced and the vessel *Camperdown* was constructed and registered after Order in Council No. 5167, July 15, 1941, authorized such action and the loan above mentioned on the part of the Minister of Transport. The vessel was insured in December, 1943, the assured being described as "Minister of Transport of Dominion of Canada and/or the Halifax Pilotage." One policy for \$65,000 was the ordinary hull insurance and another for \$10,000 was described as disbursement insurance. The premiums on both policies were paid out of the Halifax Pilotage Fund. The loan was repaid out of the same fund in full by March 31, 1944.

The *Camperdown* became a total loss on February 24, 1944, and the insurance money for the policy of \$65,000 was paid by cheques made out to the Minister of Transport and/or the Halifax Pilotage. They were endorsed by the Chief Treasury Officer of the Department of Transport to the Receiver General of Canada, and also endorsed by the Deputy Minister of Finance and the Bank of Canada, prior to the date of the last payment of the loan made to the pilots for the construction of the vessel. The purchaser of the salvage paid direct to the Minister of Transport the sum

of \$10,000. Had the deductions for the return of the money advanced not been made, the balance in the Halifax Pilotage Fund for division among all the pilots would have been increased by \$65,000, and of this sum the suppliants would have received \$28,100.71. The proceeds of the insurance policies were used by the Pilotage Authority for the purchase of a new vessel which the pilots agreed was necessary though objecting to the use of the insurance moneys for such purpose.

1945
 HARRIS H.
 HIMMELMAN
 ET AL.
 v.
 THE KING

Held: That the Minister of Transport as Pilotage Authority by virtue of the Canada Shipping Act, 24-25 Geo. V, c. 44 is an agent of the Crown. *City of Halifax v. Halifax Harbour Commissioners* (1935) S.C.R. 215 referred to.

2. That the question before this court is not whether the Crown may be a trustee but whether the Court has jurisdiction in respect of the execution of the trust since the Exchequer Court Act R.S.C. 1927, c. 34, s. 18 confers jurisdiction upon the court where money belonging to the subject is in the possession of the Crown. *Joseph Henry et al v. The King* (1905) 9 Ex. C.R. 417 followed.
3. That the money advanced was to be repaid in the manner agreed upon and with the insurance premiums such payments were included in the general expenses of the Pilotage District pursuant to the by-laws and the pilots merely agreed to this increase in the general expense of the Pilotage District and did not pay either of these items and had only a right of user in the vessel.
4. That the proceeds of the insurance policies should be treated in the same way as the money in the Halifax Pilotage Fund and be made available for the purchase of a new vessel, the purchase price of which could be taken by the Pilotage Authority either out of the Halifax Pilotage Fund or the proceeds of the insurance policies or out of both.

PETITION OF RIGHT by suppliants to recover money in the possession of the Crown alleged to belong to suppliants.

The action was tried before the Honourable Mr. Justice O'Connor, at Halifax.

C. B. Smith, K.C. for the suppliants.

F. D. Smith, K.C. for the respondent.

The facts and questions of law raised are stated in the reasons for judgment.

O'CONNOR J. now (November 13, 1945) delivered the following judgment:

The suppliants were employed as temporary pilots in the Halifax Pilotage District and claim a portion of the proceeds of two marine insurance policies paid to the

1945
 HARRIS H.
 HIMMELMAN
 ET AL.
 v.
 THE KING
 O'Connor J.

respondent on the loss of the pilot vessel, *Camperdown*. The policies were effected under an agreement whereby the Minister of Transport advanced the sum of \$65,000 for the construction of the said vessel. The suppliants contend that the money was loaned to all the pilots of the District and repaid in full by them out of their earnings, and that the respondent held only the bare legal title to the vessel, and that the pilots effected the insurance and paid the premiums, and the insurance was for the protection of the respondent as creditor and not as owner of the vessel, and that the respondent holds the proceeds in trust for the pilots. The respondent contends that the vessel was the property of the respondent and that the proceeds of the insurance must be used for the purposes of the Pilotage District including the purchase of a new vessel.

The permanent pilots have not joined in the action.

The claim is for "money of the subject in possession of the Crown" under section 18 of the Exchequer Court Act, R.S.C. 1927, c. 34.

The facts in the case are not in dispute.

Pilotage by-laws were originally enacted by the Pilotage Authority under the provisions of the Canada Shipping Act, R.S.C. 1927, c. 186, (now Chapter 44 of The Statutes of Canada 1934), and were confirmed by Order in Council. They have been amended from time to time and the amendments confirmed by Orders in Council.

The Halifax Pilotage Fund was established by By-law No. 6, and 6 (a) provides for payment of the general expenses, and 6(b) for the division of the balance among the pilots.

6. All moneys collected under and by virtue of these by-laws and remitted to the Department of Marine (now Transport), shall be deposited to the credit of the Receiver-General and shall be designated as the Halifax Pilotage Fund, which shall be administered by the Pilotage Authority as follows:

(a) The Pilotage Authority shall, out of this Fund, pay the general expenses of the Pilotage District, and without restricting the generality of the foregoing, the expenses chargeable shall include among other things, the purchase, charter or hire of pilot boats and the maintenance, operation and repair of same; the payment of necessary help other than salaries and expenses of the clerical staff at the pilotage headquarters, provision for the Superannuation Fund as hereinafter mentioned.

(b) After providing for expenses and Superannuation Fund, the balance shall be divided among the pilots as follows: The Pilotage Authority shall pay to each pilot monthly a certain sum estimated to be not more than his share of the balance. At the end of each fiscal year, after all expenses, salaries and Superannuation Fund have been paid, any balance remaining shall be divided equally among the pilots in proportion to the time worked during the year by each.

1945
 HARRIS H.
 HIMMELMAN
 ET AL.
 v.
 THE KING
 O'Connor J.

Provision was made for a Pilots' Committee,—

27. The pilots in the Pilotage District of Halifax shall appoint (in the month of April of each year) from among themselves a Committee of three which shall be recognized by the Pilotage Authority as representing the said pilots in all matters affecting them collectively and individually.

Pilot boats,—

7(a) All vessels required for the use of the pilotage service shall be purchased out of the revenue of the District and be owned by and registered in the name of the Pilotage Authority.

(b) The handling, maintenance and jurisdiction of the vessels shall be under the immediate and exclusive control of the Pilotage Authority for the Pilotage District of Halifax, and the cost of maintenance, repairs, etc., shall come out of the earnings of the Pilotage District.

The Minister of Transport is the Pilotage Authority for the Halifax Pilotage District.

A vessel was required for the pilotage service, and the following agreement was signed by the Pilots' Committee on the 3rd of June 1941:—

We the Committee of Pilots representing the licensed pilots of the Pilotage District of Halifax, Nova Scotia, do hereby agree with the Honourable the Minister of Transport, as the Pilotage Authority, for the Pilotage District of Halifax, Nova Scotia, to wit, that,

The pilots to be loaned a sum of money not exceeding Sixty-five thousand dollars (\$65,000) for the building and equipping of one auxiliary pilot vessel complete, the plans and specifications for which have been approved by the Board of Steamship Inspection, on behalf of the said Pilotage Authority.

So long as the present hostilities continue, this loan is to be returned in yearly payments of 7 per cent of the gross revenue of the Pilotage District of Halifax. On the cessation of hostilities the yearly rate of repayment shall be such equal amounts as will return the total amount loaned within a period of ten years from the date of the first payment.

The money so loaned to be a first charge against the pilots' earnings as provided by By-law No. 6(a).

Further, during the period of payments the pilots, out of their revenue, also agree to keep said vessel fully insured, the policy to be made payable to the Minister of Transport. The vessel to be kept fully insured until fully paid for.

The handling, maintenance and jurisdiction of the vessel to be absolutely under the immediate control of the Superintendent of Pilots for the Pilotage District of Halifax, and the cost of maintenance, repairs, etc., to come out of the earnings of the Pilotage District, as provided by By-law No. 7.

1945
 HARRIS H.
 HIMMELMAN
 ET AL.
 v.
 THE KING
 O'CONNOR J.

The vessel to be built to requirements of the Board of Steamship Inspection of Canada.

The vessel to be registered in the name of His Majesty the King represented by the Minister of Transport as the Pilotage Authority of the District, and is to be the property of the Crown.

Further, at any time, during the course of payment, that a pilot is incapacitated from duty, or otherwise leaves the service through any cause whatsoever, the amounts paid by him will be the property of the Crown and no further amounts will be exacted from him—he will have absolutely no claim on the vessel.

Dated—Halifax, N.S.,
 June 3rd, 1941.

Signed—E. DeLouchry
 N. L. Power
 R. M. Betts

Halifax Pilots Committee.

Witness:

Sgd. Chas. L. Waterhouse,
 Supt. of Pilots,
 Halifax, N.S.
 Sgd. W. H. Ahern, Pilotage Clerk.

Order in Council No. 5167 was passed on the 15th of July 1941, and after reciting that the pilots of the District were not financially able to build or purchase a vessel and that the pilots had repaid all previous loans and that \$65,000 was available under Certificate of Encumbrance No. 4725 against Appropriation No. 390, the Minister of Transport recommended that he be authorized to advance the pilots a sum not exceeding \$65,000 on the following conditions among others:—

4. That the sum expended under this authority shall be refunded by the pilots in the following manner:

So long as the present hostilities continue, the loan shall be returned, without interest, in yearly payments at the rate of 7 per cent of the gross revenue of the Pilotage District of Halifax, and after the cessation of hostilities, the yearly payments shall be at such a rate as will provide for payment of the balance then owing within a period of ten years from the date of the first of such payments.

5. That the sum so advanced to the pilots under this authority, together with the costs of keeping the vessel insured, shall be a first charge on the earnings of the pilots, in accordance with the provisions of By-law No. 6(a) of the By-laws of the Pilotage District of Halifax.

6. That the said pilot vessel shall be registered in the name of His Majesty the King in right of the Dominion of Canada, represented by the Minister of Transport, as owner thereof.

The money was advanced and the *Camperdown* was constructed and registered in accordance with paragraph 6 of P.C. 5167 and was put into service.

Pursuant to the agreement, the vessel was insured. It was again insured in December 1943 with the Boston Insurance Company, and the assured was described as "Minister of Transport of Dominion of Canada and/or the Halifax Pilotage." One policy for \$65,000 was the ordinary hull insurance and another policy for \$10,000 was described as disbursement insurance.

1945
 HARRIS H.
 Himmelman
 ET AL.
 v.
 THE KING
 O'Connor J.

The *Camperdown* was wrecked on the 24th day of February, 1944, and declared to be a total constructive loss, and the Boston Insurance Company issued cheques payable to the Minister of Transport of Dominion of Canada and/or the Halifax Pilotage for the sum of \$65,000, and the purchaser of the salvage, J. P. Porter & Sons Ltd., under an arrangement with the Insurance Company and the Minister, paid the Minister the sum of \$10,000. The cheques were endorsed by the Chief Treasury Officer of the Department of Transport to the Receiver-General of Canada, and bear the endorsement of the Deputy Minister of Finance and the Bank of Canada.

The Pilots' Committee by a letter dated the 18th day of October, 1944, approved the repurchase of the *Camperdown*, which was being salvaged and rebuilt. The Minister of Transport as Pilotage Authority entered into an agreement with J. P. Porter & Sons Ltd., on the 7th day of November, 1944, to repurchase the *Camperdown*. Counsel for the respondent admitted that while the pilots agreed to the purchase of a new vessel, they objected strongly to the insurance money being used for that purpose and stated that the consent and agreement were tendered for the purpose of proving only that there was need to purchase a new vessel.

The premiums on both policies were paid out of the Halifax Pilotage Fund.

The loan was repaid out of the same fund as follows:—

Repaid in first year of loan, fiscal year April 1/41-March 31/42	\$33,978 82
Repaid in second year of loan, fiscal year April 1/42-March 31/43	\$27,838 43
Repaid in third year of loan, fiscal year April 1/43-March 31/44	\$ 3,182 75
	<hr/>
	\$65,000 00
	<hr/>

1945
 HARRIS H.
 HIMMELMAN
 ET AL.
 v.
 THE KING
 O'Connor J.

The final payment was made as at the 31st March, 1944. This was subsequent to the payment of the insurance moneys to the Crown. The books and accounts of the Pilotage District of Halifax were operated on the same fiscal year as that of the Department of Transport, namely April 1st to March 31st.

If the deductions for the purpose of returning the advance had not been made, the balance in the Halifax Pilotage Fund for division among all the pilots would have been increased by \$65,000 and of this sum the suppliants would have received \$28,100.71.

The services of the temporary pilots can be terminated on thirty days' notice and their services have or will be shortly terminated.

The suppliants submit that the same procedure should be adopted by the Minister of Transport as was adopted, first, in regard to the insurance money collected on the pilot vessel *Hebridean* lost in 1940. This money was applied, first, to the unpaid balance on the *Hebridean*, and the balance divided among the pilots in proportion to the contribution of each to the repayment of the loan, and secondly, on the distribution of the proceeds from the sale of the *Sambro*, a pilot vessel, among the pilots.

The suppliants tendered evidence as to the procedure in these cases, and submitted that it was admissible on three grounds: (1) in order to show circumstances in which this agreement was entered into; (2) as showing a course of dealing present in the minds of the parties when this agreement was entered into; (3) to explain the expression in the agreement, "the pilots agree to keep the vessel insured", and "the vessel is to be kept fully insured until paid for", because of the ambiguity in the name of the insured in the insurance policies. I allowed the evidence to be taken subject to objection but reserved the question of its admissibility.

I hold that the evidence is admissible, but, because the agreements between the parties were not put in evidence this evidence is without any value. It may have been that the procedure followed in those cases was based on express provisions in the agreements, or that the distribution in both cases was *ex gratia*.

Based on these facts the suppliants submit that:

(1) The Crown had the bare legal title and no proprietary interest, whereas the pilots were the equitable owners and had the right of user in perpetuity, and the provision that the cost of maintenance and repairs was to be paid out of their earnings, reaffirm their ownership in the vessel.

(2) By the agreement the pilots were required to effect the insurance, keep it in force and pay the premiums. The insurance was solely for the protection of the Minister *qua* creditor and not *qua* owner of the vessel.

(3) The insurance moneys cannot be used to purchase a new vessel because Section 318 of the Act limits the Funds of the District to pilotage dues and fees for licenses, and the power of the Pilotage Authority to pay out of the Fund is limited by the provision that payment shall be made "with such sanction and out of such Funds", i.e., pilotage dues and licenses, and that "all moneys collected" as set out in By-law 6 and "revenue" in By-law 7 (a) are limited to pilotage dues and fees for licenses.

(4) The loan having been repaid, the Crown has no interest in the insurance moneys and holds them in trust for all the pilots, including the suppliants, who repaid the loan.

(5) That the policies are payable to the "Minister of Transport and/or the Halifax Pilotage" and that "Halifax Pilotage" means the pilots.

(6) That the policy on disbursements covers the disbursements of the pilots because the respondent had no insurable disbursements.

The respondent submits that:—

(a) The Crown was the sole owner of the vessel and of the insurance policies and holds the money for the use of the Pilotage District and has obtained a new vessel with the proceeds of the policies.

(b) The agreement expressly provides that the vessel is to be the property of the Crown. The pilots made an agreement as a matter of policy and are bound by its terms. That the pilots have not a perpetual use of the vessel by reason of By-law 7(b) and that they are not the

1945
 HARRIS H.
 HIMMELMAN
 ET AL.
 v.
 THE KING
 O'CONNOR J.

1945
 HARRIS H.
 HIMMELMAN
 ET AL.
 v.
 THE KING
 O'Connor J.

equitable owners and no individual pilot had any interest in the vessel nor has any interest in the insurance moneys.

(c) The Crown is the owner by reason of By-law 7(a) which provides that all vessels shall be purchased out of the revenue of the District and be owned by the Pilotage Authority. That the insurance moneys take the place of the vessel and "revenue" in By-law 7(a) would include insurance money. That the essential purpose of the insurance was to protect the pilot vessel and the service so that if the vessel were damaged or lost she could be repaid or replaced.

(d) The Pilotage Authority under By-law 7(b) determines whether insurance shall be maintained or not and that he effects the same and that the premiums are a proper charge on and should be paid out of the Funds of the District and that the pilots have no right to the gross revenue.

(e) It is doubtful if the Crown can be a Trustee and almost impossible to establish a case of constructive trust against the Crown.

(f) That the insurance was to cover the Crown in respect to its loan and also in respect to its ownership of the vessel and the insured described in the policy as "and/or the Halifax Pilotage" is not the pilots.

(g) In the alternative the Pilotage Authority is not an agent of the Crown and does not act on behalf of the Crown.

First as to the alternative argument of the respondent that the Minister of Transport as Pilotage Authority is not the agent of the Crown. This point determines not only whether this action should have been brought against the respondent, but must be determined in order to ascertain the position of the parties on the construction of the documents.

Pilotage authorities are, in the exercise of all their powers, subject to the control of the Crown through the Governor in Council. The pilotage authority fixes the rates for pilotage dues by by-law, but the by-law must be confirmed by the Governor in Council.

The pilotage authority may with the sanction of the Governor in Council appoint a secretary and treasurer

and pay him such salary or remuneration out of pilotage dues or fees for licences received by it as it sees fit, and may, with such sanction and out of such funds, pay any other necessary expenses of conducting the pilotage business (Section 318, Canada Shipping Act).

1945
 HARRIS H.
 HIMMELMAN
 ET AL.
 v.
 THE KING
 O'Connor J.

Under Section 329 (2) where the Minister is the Pilotage Authority, fees on renewals of licences shall be paid into and form part of the Consolidated Revenue Fund of Canada.

In the Halifax District where the Minister is the Pilotage Authority, under By-law 6 all moneys collected are remitted to the Department of Marine (now Transport) and deposited to the credit of the Receiver-General of Canada, and designated as the "Halifax Pilotage Fund".

In the *City of Halifax v. The Halifax Harbour Commissioners* (1) Duff C.J., after considering the powers and rights of the Halifax Harbour Commissioners, and the rigorous control of the Crown over revenues and expenditures, reaches a conclusion that the Commission occupied the property "for the Crown".

At page 230 he states:—

The position of the respondents cannot, I think, in any pertinent sense, be distinguished from that of the Commissioners whose status was in question in *The Queen v. McCann* (1868) L.R. 3 Q.B. 141. Indeed, if, instead of three Harbour Commissioners to be appointed by the Crown, holding office during pleasure, the statute had made provision for the appointment of a single Harbour Commissioner, that Commissioner to be the Minister of Marine, or the Deputy Minister of Marine, for the time being, we should have had a substantially identical case.

And on page 231 adds:—

If the Corporation had been constituted as above suggested, as consisting of a single Commissioner, to be the Minister of Marine for the time being, it would not have been disputed that a proposal to levy a tax upon the Corporation's occupation of the harbour property was virtually a proposal to tax the Dominion Government, or the property of the Dominion Government.

The power to appoint the Minister as Pilotage Authority by the Governor in Council, is given under Section 317 (1). Provision is made in case of absence by Section 317 (2):

Whenever the Minister is appointed as Pilotage Authority for any district, his successors in office or any Minister acting for him or, in the absence from Ottawa of the Minister, or of any Minister acting for

1945
 HARRIS H.
 HIMMELMAN
 ET AL.
 v.
 THE KING
 O'Connor J.

him, his lawful deputy, shall be the Pilotage Authority, and any such Pilotage Authority may by by-law confirmed by the Governor in Council authorize the Superintendent of Pilots in the district to exercise any of his functions, and, for such time or such purpose as he may decide, authorize any person to exercise any particular function or power vested in the Pilotage Authority by this Act or any by-law made hereunder.

It is clear from this that the Minister as Pilotage Authority is not *persona designata* or "a corporation sole". I hold that the Minister of Transport as Pilotage Authority is the agent of the Crown.

The next submission of the respondent raises the question of whether the Crown can be a trustee and if so whether the Court has jurisdiction in respect of the trust.

Section 18 of the Exchequer Court Act provides:—

18. The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be subject of a suit or action against the Crown and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown.

These questions were dealt with by Burbridge J., in *Henry v. The King* (1), and he states at page 440,—

But the real question in any such case is not, it seems to me, whether the Crown may or may not be a trustee but whether the Court has jurisdiction in respect of the execution of the trust. Where jurisdiction to grant relief sought is expressly given by statute, no difficulty arises in respect of either question.

And again at page 441,—

If the subject's money is in the possession of the Crown the Court has undoubted jurisdiction to declare that he is entitled thereto, and the amount so awarded him is payable out of any unappropriated moneys forming part of the Consolidated Revenue Fund of Canada.

I am of the same opinion that the question is not whether the Crown may or may not be a trustee but whether the Court has jurisdiction in respect of the execution of the trust. In this case the money claimed is in the possession of the respondent and if the money is the money of the suppliants, then the Court has jurisdiction under Section 18 of the Exchequer Court Act.

Under Section 318 of the Canada Shipping Act, the revenue of any pilotage district other than the Pilotage District of Quebec is from pilotage dues and fees for licences.

(1) (1905) 9 Ex. C.R. 417.

Under Section 319 of the Act, the Pilotage Authority may by By-law confirmed by the Governor in Council, *inter alia* fix the pilotage dues and the mode of remuneration of the pilots, and the amount and description of such remuneration.

1945
 HARRIS H.
 HIMMELMAN
 ET AL.
 v.
 THE KING
 O'Connor J.

Under By-law 6 of the By-laws of the Pilotage District of Halifax, all moneys collected under and by virtue of the By-laws, shall be deposited to the credit of the Receiver-General and shall be designated as the Halifax Pilotage Fund.

Under By-law 6(a) the general expenses of the Pilotage District shall be paid out of this Fund.

Then under By-law 6(b) the balance left in the Fund at the end of each fiscal year shall be divided equally among the pilots in proportion to the time worked during the year by each.

While the pilots receive the entire net profits on the operation of the service, By-law 7(a) provides that if a new vessel is required, it shall be purchased out of the revenue of the District, and be owned by and registered in the name of the Pilotage Authority; and By-law 6(a) provides that the general expenses of the Pilotage District shall be paid out of the Halifax Pilotage Fund and without restricting the generality of the foregoing, the expenses chargeable shall include, among other things, the purchase etc., of pilot boats, etc.

From this it is clear that the Pilotage Authority having no expectation of either loss or gain, engages the pilots on the basis that they are to receive the net income of the District, provided, however, that if a new vessel is required, it must be paid for out of revenue, by making the purchase price an expense of the District and deducting it from the revenue. The vessel so purchased is to be owned by and registered in the name of the Pilotage Authority.

The difficulty in carrying out this procedure is that the revenue in any one year will not permit of the deduction of as large a sum as the purchase price of a vessel, and still leave a balance sufficient to provide the pilots with a reasonable remuneration for that year.

1945
 HARRIS H.
 HIMMELMAN
 ET AL.
 v.
 THE KING
 O'CONNOR J.

The agreement was made to overcome this difficulty. The respondent advanced the cost of constructing the vessel and this sum was to be returned in annual instalments of 7 per cent of the gross revenue of the District; the advance to be a first charge against the earnings of the pilots as provided by By-law No. 6(a). And By-law 6(a) provides for the payment of general expenses, and expenses shall include the purchase of a new vessel.

By-laws 6(a) and (b) set out the mode of the remuneration of the pilots. All moneys collected by the District are placed in the Halifax Pilotage Fund (By-law 6) and from this all general expenses including the purchase of a new vessel are made 6(a) and then the balance is divided among the pilots 6(b).

The suppliants contend that anything purchased belongs to them or they have the equitable interest in the article purchased because the purchases are made out of money which would otherwise have come to them.

Based on that contention:—

(1) They claim the equitable interest in the vessel because the advance was repaid out of the Fund as an expense, and that only the bare legal title was conveyed to the Crown by the term in the agreement that the vessel was to be the property of the Crown.

(2) They claim that the fuel and food on the ship belongs to the pilots and that the respondent had no insurable interests in these disbursements.

(3) And that the payments of the insurance premiums were payments made by the pilots.

Their contention is supported by the language of P.C. 5167, which describes the advance as a "loan" to the pilots and provides that the sum advanced and the cost of keeping the vessel insured shall be a first charge on the "earnings" of the pilots in accordance with the provisions of By-law 6(a).

I cannot agree with this contention.

In my opinion the vessel, fuel and food purchased out of the Fund as expenses under 6(a) are not the property of the pilots and they have only a right of user in them.

The arrangement was made to overcome the hardship that would fall on the pilots if the entire purchase price of the vessel were taken out of the Fund in any one year as an expense. If the vessel had been paid for out of the Fund in one year the pilots would not have owned the vessel. Their only right in the vessel would have been the right of user. The agreement does not increase or add to their interest in the vessel.

1945
 HARRIS H.
 HIMMELMAN
 ET AL.
 v.
 THE KING
 O'Connor J.

They are not the owners of the money in the Halifax Pilotage Fund and they do not own the chattels required in the operation of the service and paid for as general expenses. Under their mode of remuneration provided by By-law 6, they were entitled to only the balance left after the payment of expenses out of revenue.

As to the vessel, By-law 7(a) provides that it shall be purchased out of revenue and owned by the Pilotage Authority. By-law 6(a) sets out the method to be followed, i.e., by including in the expenses the purchase price of the vessel.

I hold that the true construction to be placed on the agreement is that:—

(1) The respondent advanced the money to pay for the construction of the vessel.

(2) This sum was to be returned in annual instalments equal to 7 per cent of the gross revenue and these annual instalments and the insurance premiums were to be included in general expenses pursuant to the provisions of By-law 6(a).

(3) The vessel was to be registered in the name of and owned by the Pilotage Authority for use in the Pilotage District.

(4) The vessel was to be insured during the term of repayment.

I hold that the effect of this was:—

(a) The advance was to be repaid out of the Halifax Pilotage Fund as part of the general expenses of the District.

(b) The pilots merely agreed to the increase in the general expenses of the District to the extent of the annual payments and the insurance premiums. They did not “pay” either of these items.

- 1945
 HARRIS H.
 HIMMELMAN
 ET AL.
 v.
 THE KING
 O'CONNOR J.
- (c) The pilots agreed that a vessel was required for use in the District.
- (d) The pilots had only a right of user in the vessel.
- (e) The insurance secured the repayment of the money advanced and indemnified the pilotage service against loss of the vessel.

The insured in the policies was described as "Minister of Transport and/or the Halifax Pilotage". The suppliants contend that this means the pilots of the District and the respondent contends that this means the Pilotage Authority. I think that it was probably intended to describe the entire service in the same way that "Halifax Pilotage Fund" describes the Fund of "The Halifax Pilotage". The expression is not clear and I hold it to be meaningless. The Minister of Transport as Pilotage Authority was the insured in the policies.

While there was no evidence of insurable disbursements on the vessel, it is clear that there must have been disbursements for fuel, food, etc., to have enabled the vessel to remain on station. For the reasons which I have already set out, I hold that the Pilotage Authority had an insurable interest in these disbursements, including the payment of the insurance premiums. The proceeds of the policy on disbursements should therefore be treated in the same manner as the proceeds from the policy on the hull for \$65,000, and were available to the Pilotage Authority for the purchase of a new vessel and to replace the fuel and food that was lost.

It was the duty of the Pilotage Authority, by statute, to maintain the pilotage service. The Pilotage Authority decided that a new vessel was required. The pilots subsequently agreed that a new vessel was required. I hold that the proceeds of the insurance were available for that purpose.

While the limitations in Section 318 of the Canada Shipping Act and in By-law 6, do not permit the proceeds to be deposited in the Halifax Pilotage Fund, the proceeds could be placed, in trust or for a special purpose, in the Consolidated Revenue Fund and be paid out under Section 22 (2) of the Consolidated Revenue and Audit Act, Chapter 31, Statutes of Canada 1931. The pro-

ceeds should be treated in the same way as the money in the Halifax Pilotage Fund and out of the combined totals would come the general expenses, including the purchase of a new vessel.

The suppliants contend that because the insurance was effected as security for the repayment of the loan, the balance owing to the respondent should have been paid out of the proceeds of the insurance and not out of the Halifax Pilotage Fund.

A new vessel was required and the Pilotage Authority could therefore take the purchase price out of either the Halifax Pilotage Fund or out of the proceeds of the insurance, or out of both. That being so the position of the suppliants was not affected by the procedure followed. If the Pilotage Authority had repaid the balance of the advance of \$3,182.75 out of the insurance proceeds and if the full sum of \$75,000 was required for the purchase of a new vessel, then the Pilotage Authority could have taken \$3,182.75 from the Halifax Pilotage Fund for that purpose. The balance for division among the pilots would then have been the same balance that was actually divided among them.

There will be judgment that the suppliants are not entitled to any of the relief sought by them in their petition of right herein, and that the same be dismissed, but, under the unusual circumstances, the dismissal of the petition will be without costs.

Judgment accordingly.

1945
 HARRIS H.
 HIMMELMAN
 ET AL.
 v.
 THE KING
 O'Connor J.