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9 November 2016

Standing Committee on Transport, Infrastructure and Communities
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6

Attn. Andrew Bartholomew Chaplin, Clerk of the Committee

Dear Sirs/Mesdames:

Re: Brief on Review of Public Navigation Rights in Canada

For over 40 years the West Coast Environmental Law Association (WCELA) has been a leading voice in Canada for strong environmental laws. We provided support to the Friends of Oldman River case, which in 1992 established that the federal jurisdiction over navigation provided a legal basis for environmental assessment in Canada and have served on the Regulatory Advisory Committee for the Minister of the Environment on Environmental Assessment since its inception in 1995. We were an important critic of Bills C-38 and C-45, and welcome your mandate to review and restore the environmental protections lost as a result of those omnibus bills.

WCELA is pleased to submit this brief to the Committee with recommendations on how to restore lost environmental protection and introduce modern safeguards to the federal law on navigable waters.

Summary

The public right to navigate does not depend on the statute now known as the *Navigation Protection Act*, but is an important public right, with a strong relation to environmental protection, central to the history of this country. That public right, and the *Navigable Waters Protection Act*, played a key role in the creation of the *Canadian Environmental Assessment Act*, with the Supreme Court of Canada confirming the legal authority of the Transport Minister to consider environmental factors in decisions under the *Navigable Waters Protection Act*. Your review must not focus too narrowly on the *Navigation Protection Act* without an appreciation of that statute's role in Canadian environmental law. The public right to navigate is, in fact, a central piece of the Canadian government's authority over the health of Canada's aquatic ecosystems.

The public has the right to navigate, and enjoy environmental amenities, on all navigable rivers and lakes in Canada and significant interference with those rights is still illegal at common law. However, by limiting the previously broad protection to only those rivers, lakes and oceans listed on the Act's Schedule, Bill C-45 has largely eliminated statutory protection for public rights on the vast majority of Canada's navigable waters. As a result, members of the public impacted by violations of their right to navigate face the expensive and problematic option of suing violators of

the public right to navigate. The barriers to such an action include expense, a waste of community and court resources, and uncertainty about the legal test for who can sue on behalf of the public, making that option impractical in most cases.

An example of a scientist who was no longer able to use navigable waters to access his study sites due to a culverting of a stream illustrates that Canadians continue to use small- and medium-navigable waters for socially useful purposes, that these small- and medium- size streams are often most in need of legal protection, and the folly of dismissing some rivers and lakes as unworthy of protection.

Legal amendments are required in the following areas to ensure that the public right to navigate and to enjoy the environmental amenities of Canada's navigable waters will be stewarded for future generations:

a) full protection of navigable waters;
b) consideration of environmental factors in decision-making about navigable waters;
c) protection of public and Aboriginal rights and sustainability as core principles;
d) evaluation of cumulative impacts;
e) co-governance with Indigenous nations;
f) expanded rights and process for the public;
g) coordination with other government agencies; and,
h) coordination with the other environmental law reviews.

Background on Changes to Navigable Waters Protection Act

In 2012 the Canadian Government, with no public consultation, amended the *Navigable Waters Protection Act* (the Act), dramatically scaling back the legal protection for the vast majority of navigable waters, and rechristened the statute the *Navigation Protection Act*. All three opposition parties were opposed to the changes, criticizing them as an attack on Canada's environmental laws, and all three, including the now governing Liberal Party of Canada, subsequently reiterated this view in their election campaigns.[1]

As a result, your Committee has been instructed to: "review the recent changes to the *Navigable Waters Protection Act*, restore lost protections and incorporate modern safeguards."

Our submissions cover the following issues:

(a) The history and nature of the public right to navigate and the Navigable Waters Protection Act, including the related environmental values;

(b) The legal effect of Bills C-38 and C-45 on the public right to navigate;

(c) The practical effects of those Bills;

[1] https://www.liberal.ca/realchange/environmental-assessments/; see also http://xfer.ndp.ca/2015/2015-Full-Platform-EN.pdf, https://www.greenparty.ca/en/media-release/2015-10-05/greens-will-protect-canada%E2%80%99s-water;

(d) Our recommendations on how to restore and modernize environmental protections under the Act.

History and nature of public right to navigate

We begin by rejecting in the strongest terms the claims by the previous government that the *Navigable Waters Protection Act* was concerned only with economic navigation – the right to use rivers for commercial navigation – and that as such that it was not an environmental statute. The law has long recognized the public's rights in respect of the natural features of navigable waters, alongside the commercial and social values that the law recognized and protected.

It is crucial to understand that the *Navigable Waters Protection Act* did not create legal protection for navigable waters. Rather, the Act provided additional and more flexible legal protection for public rights that trace their roots to Roman times[2] and (at least in Canada) to the use of river systems by this country's Indigenous peoples[3] and the first (mostly European) settlers.[4] By "public rights" we refer to legal rights – with equivalent validity and force to those we associate with private property rights – which are held by the public.[5]

Unlike in England, where the public right to navigate extended only to tidal waters, the Canadian courts, since before Confederation, held that the Indigenous and settler history of this country meant that the right to navigate extended to all rivers and lakes that could, in fact, be used for navigation, holding that such waterbodies were "natural public highways."

While the thrust of these early cases were on human use, that use included a right to the use and enjoyment of navigable waters in their naturally occurring states, as well as for fishing and other recreations that depend upon a healthy aquatic ecosystem. These early cases did not use the term "environmental," of course, but the concerns raised were nonetheless, in modern terms, environmental. Thus in the 1866 case of *AG v. Harrison*, we learn that:

> [T]he rights of the public in navigable waters are correlative [or equivalent to] those of a riparian owner … [including] a clear right to enjoy the river … in exactly the same condition in which it flowed formerly, so that cattle may drink of it without injury, and fish which were accustomed to frequent it may not be driven elsewhere.[6]

In these early cases the public right to navigate was very closely linked to the public right to fish.[7]

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2 *Canadian Forest Products v. British Columbia* (2004), 2004 SCC 38, paras. 74-76.

3 R. v. Meyers, 1852 CarswellOnt 86 (UCCP) at para. 94

4 Ibid.; *Iverson v. Greater Winnipeg Water District* (1921), 57 D.L.R. 184 (Man. C.A.) at 202, quoted with approval in *R. v. Nikal*, [1996] SCR 1013.

5 See the book of former Supreme Court Justice La Forest: G. La Forest. Water Law in Canada -The Atlantic Provinces. (Ottawa: Information Canada, 1973) at 178: "By public rights is not meant rights owned by government, whether federal, provincial or municipal. … [W]hat is here called public rights are those vested in the public generally, rights that any member of the public may enjoy."

6 12 Gr. 466 at 470.

7 *Meyers*, above, note 3; *Iverson*, above, note 4.

The courts often viewed the Crown as having a trust-like duty to protect these rights: "With respect to these public rights, viz. navigation and fishery, the King is, in fact, nothing more than a trustee of the public and has no authority to obstruct, or grant to others, any right to obstruct, or abridge the public in the free enjoyment of them."[8]

The drafters of the *Constitution Act, 1867* were aware of the above case law when they assigned responsibility for navigation and shipping to the federal government.

It is common to view environmental concerns as a modern phenomenon, with the natural world largely distinct from human economic and social concerns. However, the *Navigable Waters Protection Act* and the common law public right to navigate arose in a time when human livelihood was very dependent upon the natural world. Just as the public right to fish gave rise to broader concerns about conservation of fish, so too the public right to navigate has had environmental under-currents running through it since the legislation was enacted. It is rights of this type that the Supreme Court of Canada had in mind when it observed, in 2004 that: "The notion that there are public rights in the environment that reside in the Crown has deep roots in the common law."[9]

Although the early court cases made only passing references to the importance of rivers and lakes for navigation by Indigenous populations as a justification for a broader public right to navigate, it is important to note that in many cases First Nations likelyhave Aboriginal Rights to the use of many of the same rivers and lakes for navigation, fishing and for other purposes. Thus, the public right and the *Navigable Waters Protection Act*, may arguably have served to protect the rights of First Nations in relation to these same waters.

Prior to 1882, action against those who violated the public right to navigate – through dumping waste into navigable waters, by damming rivers or through other means – had to be sued for public nuisance in the courts. In addition to the cost, under the restrictive rules of public nuisance standing, the plaintiff would need to either have the permission of the provincial Attorney General or be able to prove that he or she had suffered "special harm" from the nuisance. What the 1882 *Navigable Waters Protection Act* did was to ensure that works which had the potential to harm the public right to navigate were evaluated before a public nuisance was created. It delivered on the trust obligations that the courts had previously pointed to.

Given the ecological importance of mid- to large-scale waterbodies, it is hardly surprising that the environmental values protected by the *Navigable Waters Protection Act* have taken on increased importance over the years.

In 1992 the Supreme Court of Canada, in *Friends of the Oldman River*,[10] ruled that the federal government had the constitutional jurisdiction to consider the environmental impacts of dams

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8 *R. v. Lord* (1864) 1 P.E.I. 245 (P.E.I. S.C.) at 257. See also *R. v. Robertson* (1882) 6 S.C.R. 52 at 132; *Harrison*, above, note 6 at 473; *R. v. Tweedie* (1914), 15 Ex. C.R. 177 at 183-184. This concept gave rise to the public trust doctrine in the U.S., and was cited with approval by the Supreme Court in *Canfor*, above, note 2, para. 79 (quoting the Supreme Court of the United States on the significance of public lands alongside navigable waters): "It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."

9 Above, note 2.

10 [1992] 1 SCR 3.

under the *Navigable Waters Protection Act*. In doing so the Court noted, with approval, that the federal government "likely … always did take into account the environmental impact" of projects in issuing or refusing to issue approvals under the Act.

That case led directly to federal environmental assessments in Canada, which were formalized when the *Canadian Environmental Assessment Act* (CEAA)[11] became law in 1995, explicitly requiring Transport Canada to consider environmental impacts in deciding whether or not to issue approvals under the Act (referred to as a screening level environmental assessment under CEAA).[12] In the case of larger projects, a full environmental assessment was required prior to issuing such approvals.

This broader view of the mandate of the NWPA was reflected on Transport Canada's website, which until 2010 confirmed that the Navigable Waters Protection program was "responsible for the protection of the public right to navigation and the protection of the environment through the administration of the *Navigable Waters Protection Act*."[13]

Legal effect of Bills C-38 and C-45

In 2012 Parliament enacted Bill C-38, replacing the 1995 *Canadian Environmental Assessment Act* with a new *Canadian Environmental Assessment Act 2012* (CEAA 2012). The combined effect of CEAA and the NWPA had been, for the vast majority of projects, to require Transport Canada to consider a range of environmental factors before approving works. As a result of Bill C-38 and CEAA 2012 consideration of environmental impacts would no longer be required under the NWPA (although the government could still choose to consider such factors).

It is important that the Committee evaluate not just the *Navigation Protection Act* in isolation, but the role of the NWPA as an integral part of Canada's environmental laws – and consider how best to ensure that the environmental impacts of interference with navigable waters are once again evaluated.

Later in 2012, Bill C-45 overhauled the NWPA, renaming it the *Navigation Protection Act*. The most notable change was to create a schedule of rivers, lakes and oceans that would receive legal protection under what would now be called the *Navigation Protection Act*. There continue to be some legal provisions that apply to all navigable waters (notably provisions related to the deposit of substances into navigable waters and a generable prohibition against "dewatering" of navigable waters).

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11 S.C. 1992, c. 37.

12 Critiques of the original CEAA and its relationship with the NWPA often emphasize the number of environmental assessments conducted. In actual fact, the vast majority of these assessments were "screening assessment," which required simply that certain environmental questions be considered and that a report on those environmental factors be prepared prior to making a decision. In practice, for most projects CEAA merely required the decision-maker to direct his or her mind to the environmental impacts and record the basis for his or her decision as it related to environmental impacts. Ibid., ss. 16, 18-20.

13 Archived copy - https://web.archive.org/web/20100409133058/http:/www.tc.gc.ca/eng/marinesafety/oep-nwpp-menu-1978.htm.

However, most legal protections in the Act do not apply to water bodies that do not appear on the Schedule. In particular, no prior approval would be required before works that could interfere with navigation can proceed.

The Schedule includes Canada's largest and economically significant lakes and rivers (97 lakes and 64 rivers), but the vast majority of Canada's navigable waters are excluded. For example, not a single lake or river on Vancouver Island is included in the schedule.

As discussed above, the public right to navigate does not depend, as a matter of law, on the NWPA/NPA. Consequently, the public still has the right to navigate on non-Schedule rivers and lakes and significant interference with those rights will still be illegal at common law (as a tort of public nuisance). However, since the Act no longer provides for statutory protection, remedying the illegal act will require a member of the public to sue the offending party.

There are major barriers to such an action. Not only is it an exceptionally expensive process, representing a wasteful use of community and court resources, but, as noted above, there is a lot of uncertainty about the legal test for who can sue on behalf of the public (unless the provincial attorney does so).

While the members of the public who are concerned about a violation of their rights have limited legal options, the owner of a work on a non-Schedule waterbody has flexibility. He or she may choose to risk the unlikely possibility of a lawsuit, or may – if faced with the threat of a public nuisance action – seek to "opt in" to the requirements (and legal protections) that apply to Schedule waterbodies.[14] It is then possible to seek approval for those works under s. 6 of the Act, likely shielding the owner from any legal action by the public.

An example of restrictions on public navigation rights since the amendment of the Act

One of our lawyers was contacted by a fisheries biologist who has for some years used a canoe to access remote fish habitat to conduct his research. On a recent trip up a smaller stream, he discovered that a farmer had diverted the river through a culvert, rendering the stream impassible. As a result he his studies were compromised.

This example illustrates a few important points.

First, it is difficult to see that a lone fisheries biologist could afford to bring litigation against the farmer to have the culvert removed. Nor is it obvious that it would be a good use of anyone's resources (the courts and the farmer included) if he were to do so.

Second, it demonstrates that small- and mid-sized rivers and lakes continue to be used by Canadians – for science in this case, but equally for recreation, fishing, Indigenous resource use, etc. Government should not declare some public rivers as worthy of protection, and essentially write off others as unimportant, allowing them to be privatized.

Third, it illustrates that small- and mid-sized rivers are most in need of protection under Canada's navigation laws. The Skeena, or St. John River, or any of the other rivers in the Schedule are huge

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14 *Navigation Protection Act*, s. 4(1).

and their navigability would be difficult to destroy (short of large-scale dams). They could not be culverted or easily diverted. If there were a significant threat to their navigability, Canadians would be up in arms. It is easier to imagine a public nuisance lawsuit being brought to defend the Fraser – not so easy to imagine a case brought to defend a culverted stream used by a scientist.

Right now, as in this example, the law is not protecting the public right of this scientist, or others like him, travel on these smaller rivers. In his case that means that he cannot do work which will enhance our collective knowledge of salmon.

Recommendations on restoring lost environmental protections and modernizing the Act

The division of powers in the *Constitution Act, 1867* makes no reference to the environment, or ecosystems, or water. The Courts have held that the environment is jointly managed by the federal and provincial governments, with the federal government's environmental powers being grounded in other heads of power listed in s. 91 of the *Constitution Act*. As noted above, the federal government's authority over navigation led directly to the first Canadian requirements to conduct an environmental assessment in the Supreme Court of Canada's decision in *Friends of Oldman River v. Alberta*.

Taking a narrow interpretation of the purpose of Canada's authority over navigable waters does not protect the public's right to navigate (including the environmental aspects of that right, as interpreted by the courts), and it does not protect the environment.

Rather, considered in conjunction with the federal authority over fisheries, it is clear that the federal government has broad authority over Canada's aquatic ecosystems and that it should exercise that authority in ways which protect the public's use and environmental rights, as well as the rights of First Nations.

Our first two recommendations below are related to the government's stated intention to restore lost environmental protections, and the other six relate to how the Act could be modernized.

We recommend amending the law to address:

1. **Full legal protection for navigable waters** - Ensure that small- and mid- size navigable waters receive full legal protection and development on navigable rivers cannot proceed until any impacts on public navigation rights and the associated environmental amenities are addressed.

2. **Consideration of environmental factors -** Clarify the relationship between navigation and the *Canadian Environmental Assessment Act* and that environmental impacts on navigable waters be fully evaluated. Prior to 2012, interference with navigation was a "trigger" for either "screening" consideration of environmental impacts or, for larger projects, for a more comprehensive assessment. Environmental factors must once again be considered under the NWPA and, where appropriate, that must give rise to comprehensive environmental assessments.

3. **Protection of public and Aboriginal rights, sustainability are core objectives:** While the public right to navigate has always been central to the Act, a modern Act should be clearer that its purpose is to ensure the sustainable public right to the use and enjoyment of navigable waters as well as protecting and sustaining Aboriginal rights related to navigable waters.

4. **Evaluation of cumulative impacts -** The Act has always focussed on individual works that might compromise navigation. In many cases, however, navigation suffers a death of a thousand cuts, with a host of factors which individually compromise the health of the waterbody and its usefulness for navigation. Cumulative effects assessments, whether done through CEAA or in respect of specific rivers or lakes under the Act, can help identify how to protect and enhance the aquatic health of navigable waters and their utility for navigation. The Act could empower Transport Canada to actively pursue proactive measures identified through such assessments.

5. **Co-governance with Indigenous nations -** Where First Nations are interested in taking on a co-governance role in relation to navigable waters, the government should explore collaborative decision-making processes based on nation-to-nation relationships, reconciliation and the obligation to secure the free, prior and informed consent of Indigenous peoples.

6. **Expanded citizen rights/process –** Given that the public's rights are at stake, the Act should provide for fair process for members of the public. This must include a process to seek recourse – other than through litigation – when the public right has been compromised. Citizen enforcement tools in the Ontario Environmental Bill of Rights and the Canadian Environmental Protection Act may provide a useful model.

7. **Coordination with other government agencies -** Other federal, provincial, local and First Nations agencies are on the land monitoring the health and use of rivers and lakes. At a minimum there should be a coordinated approach to compliance and enforcement, but there may be other opportunities to collaborate, while ensuring that the underlying requirement to protect navigable waters is met.

8. **Coordination with other reviews –** Your review must be considered in tandem with reviews of other environmental statutes by other agencies – with an aim to developing a coherent and strong environmental law regime protecting Canada's navigable waters and other environmental values.

Conclusion

The *Navigable Waters Protection Act* has been called Canada's first environmental law. While there is truth to that, the Act has not lived up to its full potential as a tool to maintain the aquatic health of Canada's aquatic ecosystems and to ensure public use and enjoyment of the right to navigate.

We hope that your review will give rise to new and innovative ways to strengthen Canada's environmental laws, including ensuring that the public right to navigate, and to enjoy the environmental amenities of Canada's navigable waters, will be stewarded for future generations.

Sincerely,

Andrew Gage,
Staff Counsel