

Vanishing Canadian waterways

by Ole Hendrickson

Many people are asking what is behind the Harper government's replacement of the *Navigable Waters Protection Act* by the *Navigation Protection Act* in the recent “omnibus” budget bill, and how it will affect our use of lakes and rivers in Canada.

Parliament passed the *Act* in 1882 at the end of Sir John A. MacDonald's third term as prime minister. For 130 years the federal government used the *Act* to regulate construction of bridges, dams or other structures that might interfere with movement of watercraft.

Neither the original *Act* nor subsequent amended versions precisely defined a “navigable waterway”. However, in 1906, the Supreme Court of Canada held that that any water that was navigable and could float a canoe – or a log - was within the *Act's* scope. This gave federal protection to the Ottawa Valley log drives that were so important to Canada's early commercial development and international trade.

The Ontario Superior Court of Justice summarized these previous legal rulings in 2011. A waterway must be capable in its natural state of being traversed by watercraft such as a canoe. The waterway could be used to float logs, log-rafts and booms. The waterway could be navigable over part of its course and not navigable over other parts. And it need not be actively used for navigation as long as it had the potential to be so used.

The new *Act* makes radical changes. It lists 97 lakes and 62 rivers (or parts thereof) that will receive federal oversight: a vanishingly small fraction of Canada's millions of lakes and tens of thousands of rivers. Transport Canada describes three criteria used to develop the new list: the waterway must support heavy commercial and/or recreational navigation, only actively used portions can be listed, and it should be accessible by ports and marinas in proximity to heavily populated areas.

Exactly how many lakes and rivers were dropped from federal protection? A Natural Resources Canada website formerly said that more than 30,000 lakes greater than 3 square kilometers in area are found in Canada. However, “To better serve Canadians, the Atlas of Canada recently re-organized its website... As a result, many pages have been removed...”

The few remaining federally protected waterways include the Petawawa River from the Barron River to the Ottawa River. One wonders, did Transport Canada officials bring canoes to Petawawa and shoot the rapids to prove this can be done? The Ottawa River itself is the only other Renfrew County waterway listed. In practical terms, this means that the dam currently proposed for the Petawawa will receive federal scrutiny, but the one proposed for the Bonnechere will not.

Other Ontario waterways that made the list include Kemptville Creek, Big Duck Pond, Pollywog Lake, Lovesick Lake, and Dow's Lake in Ottawa, a small widening of the Rideau Canal.

A November 2012 backgrounder from the Ontario Federation of Anglers and Hunters lists five major concerns with the new *Act*. Notably, the *Act* fails to acknowledge “the importance of

navigation to recreational fishing and hunting and devalues the overall socioeconomic importance of the recreational fishing and hunting industry in Canada.”

Why did the government make these changes? A federal website says that the *Act* was “one of Canada’s most antiquated pieces of legislation, and that Transport Canada was even reviewing projects on “a temporary creek created by spring run-off that dries up within a month or two.” According to CBC News, the Saskatchewan Association of Rural Municipalities led the 10-year effort to replace the *Act*. Members were fed up with the red tape imposed by Transport Canada in replacing old bridges with culverts. Their lobbying efforts continued even after the government brought in amendments in 2009 that excluded such “minor works”. The *Act* now applies to only three Saskatchewan waterways and the rural municipalities are “ecstatic”.

But not all analysts agree that this is about eliminating what Transport Canada refers to as “pointless assessments”. Elizabeth May, leader of the Green Party of Canada, characterizes the *Act* as Canada’s “first environmental law”: one that created “Canadians’ historic right to navigate the lakes, rivers, and streams of Canada without being impeded by pipelines, bridges, power lines, dams, mining and forestry equipment, and more.” A Green Party backgrounder notes that before the federal government changed the *Act*, “any body of water deemed navigable could be accessed to the high water mark without that being considered trespassing.”

This opens up a whole new area for legal wrangling. If the federal government hasn’t listed a waterway do you still have a right to use it? Was the new *Act* justified? Will it change the way you use Renfrew County waterways?

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