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## Water right of way threatened ~ Patrick Brown

The ancient common law right of citizens to travel Canada's waterways may have been permanently damaged, particularly if they travel in small craft. Changes to the federal *Navigable Waters Protection Act* (NWPA) will give the Minister of Transport the power to exempt waterways and specific projects from the *Act*, and consequently from environmental review.

The changes are buried in the federal *2009 Budget Implementation Act*, and are intended to remove what BC Premier Campbell has termed outdated legislation. In his throne speech, he asked that the federal NWPA 'be repealed and replaced by legislation that meets the legitimate needs of the 21st century'.

The NWPA was adopted in 1882 to legislate what had for centuries been a common law right-of-way, the right to navigate on the nation's streams and rivers. The legislation required government approval for any 'works' (particularly named were bridges, booms, dams and causeways) which might interfere with water transportation on any 'navigable' waters. In those days, canals, rivers, and lakes were important transportation routes, and canoes and shallow draft boats were still much used, so the definition of navigable waters became very broad.

The legislation still exists today (or at least until the *Budget Implementation Act* is implemented) but in recent years it has taken on new importance as a 'trigger' for federal environmental review of projects.

This is what led to its inclusion in the federal budget legislation, for this environmental review is seen by Premier Campbell and project developers as a major source of delay in the approval of infrastructure projects; and such projects are a major part of the 'stimulus' proposed by the federal government.

Briefly, the changes proposed to the *Act* would provide broadly inclusive definitions of 'vessel' and 'works' but would at the same time leave to the Minister of Transport's discretion the decision as to whether a particular waterway or particular

works were subject to review under the *Act* (and hence environmental review). The result would probably mean that projects that impact smaller waterways would no longer be reviewed, but since the Minister's decisions to exclude would not be publicly debated, it remains unclear where he would draw the line: size of waterways (navigable by oil tankers, or vessels over one metre draft, for example?), or size of projects (run-of-river power, aquaculture, roads and bridges, dyking?).

In June 2008, the House of Commons Standing Committee on Transport, Infrastructure and Communities deliberately recommended that the government 'ensure that the 'trigger' mechanisms contained in other pieces of relevant legislation for environmental assessment and fisheries habitat assessment are not done away with or impeded'.

The committee also recommended that the government 'amend the definition of navigable waters to exclude minor waters and clearly define what constitutes a navigable water' but the budget proposals clearly shrink from this, leaving it to the Minister, again with no public consultation. It also recommended increased enforcement and fines, but this was not mentioned in the budget.

The federal government does not appear to intend to bring the legislation into the 21st century, only to weaken it, because of its potential to 'delay' projects. That 'delay', of course, is the time required to assess not only whether proposals may impede navigation, but also to assess their wider environmental effects.

In order to avoid 'delay' to stimulative infrastructure projects, the federal government had a clear alternative—to provide more resources for environmental review, possibly targeted towards the needed projects. The federal government chose not to provide more resources and Premier Campbell has actually cut funds for BC's Environment Ministry.

Impediments to navigation are generally permanent, which is why the *Act* was adopted in the first place. In today's rush to 'stimulate' the economy, projects just might escape both government and public oversight. ☞

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