



November 28, 2016

Via email: TRAN@parl.gc.ca

The Honourable Judy A. Sgro
Chair, Committee on Transport, Infrastructure and Communities
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Dear Ms. Sgro:

Re: Navigation Protection Review

The Maritime Law Section of the Canadian Bar Association (the CBA Section) appreciates the opportunity to provide comments in relation to the Government of Canada's Navigation Protection Review. Our comments on review questions 1 to 6 are set out in this letter.

The CBA is a national association of over 36,000 members, including lawyers, notaries, academics and law students, with a mandate to seek improvements in the law and the administration of justice. The CBA Section comprises lawyers with an in-depth knowledge of domestic and international law and practice affecting shipping and navigation.

1. Which criteria do you believe should determine the navigable waters subject to the *Navigation Protection Act*?

It is not clear to the CBA Section whether this question represents a request for suggested criteria to determine whether a body of water meets the definition of "navigable water" under section 2 (the interpretation section) of the *Navigation Protection Act* (the Act); or whether the question is referring to the factors that the Minister must consider in adding navigable waters to those listed in the Schedule to the Act, as set out in subsection 29(2)(b).

Those factors include that an addition to the Schedule:

- a. is in the national or regional economic interest;
- b. is in the public interest; or
- c. was requested by a local authority.

If the question is referring to the factors set out in subsection 29(2)(b), then the Section recommends that factor “c” should be assessed in relation to public interest “b”. In other words, there should be more required than a request from a “local authority” before a navigable water is added to the Schedule – the addition should also be in the public interest. Similarly, factor “a”, the requirement for a national or regional economic interest should also be considered in light of broader public interest “b”.

2. Do you believe additional protections are needed under the *Navigation Protection Act*, and if so, why?

No, the CBA Section does not believe that additional protections are needed under *Navigation Protection Act*. The Section does, however, believe that existing protections should apply to *all* navigable waters. Please see our responses to review questions 4,5 and 6 below.

3. Is the authorization process under the *Navigation Protection Act* sufficiently streamlined, clear, and transparent to the public?

The process under the Act appears to be sufficiently streamlined and clear. However, because there is no requirement that a proponent advertise a proposed project, there is an argument that the transparency of the process is not being observed. The public may not be aware of a project until it has been commenced.

4. to 6. Are the obstructions provisions in the *Navigation Protection Act* sufficient to protect navigation safety in Canada's waterways? Are the appropriate activities prohibited in the Act in order to safeguard navigation? Which navigable waters do you believe the Act should apply to, and why?

The CBA Section sees questions 4 to 6 as related questions, and the following comments are applicable to all three.

The Section does not believe that the current obstructions provisions in the Act are sufficient to protect navigation. The creation of a schedule aimed at removing the necessity of determining navigability in listed waters (and requiring federal authorization for works that interfere with navigation in those waters) should *not* reduce the authority of the Minister to manage and remove obstructions found in unscheduled, though navigable, waters. The public right to unimpeded navigation is lessened if stakeholders are required to seek out a private Common Law remedy in order to preserve their right of navigation in unscheduled navigable waters.

The Section notes that the Minister of Transport has retained the authority to prohibit activities, such as throwing or depositing deleterious material into all navigable waters or any waters flowing into them, and has added the power to prohibit the “dewatering” of navigable waters, and believes that these prohibitions are appropriate to safeguard navigation. The Section recommends that the Minister retain the power to remove or destroy objects, such as wrecked or abandoned vessels, causing an obstruction to navigation in *all* navigable waters.

The Section recommends that the Act should continue to apply to *all* navigable waters with respect to obstructions and prohibited activities in order to effectively protect navigation safety in Canada's waterways.

We appreciate the opportunity to provide our comments, and would be pleased to discuss them with you in more detail.

Yours truly,

(original letter signed by Kate Terroux for M. Robert Jette)

M. Robert Jette, Q.C.
Chair, CBA Maritime Law Section