

# **Association of Canadian Port Authorities**

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**Formal Response to the Canada Gazette – Part I  
EXTRA Vol. 138, No. 7, June 21, 2004  
RE: Toronto Port Authority Regulations**

**Ottawa, Ontario  
July 12, 2004**

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## Executive Summary

The Association of Canadian Port Authorities, representing the 19 Canada Port Authorities comprising Canada's National Ports System, respectfully asks the Minister of Transport to withdraw the proposed regulation pre-published in the **Canada Gazette** on June 21, 2004. This regulation seeks to legislate out of existence a Board-approved project of the Toronto Port Authority. This proposed regulation is not in accordance with Canada's overall National Marine Policy and other statements of transportation policy of the Government of Canada, all of which argue for effective commercialization of the ports system. In fact, the National Marine Policy states clearly and emphatically that, "Commercialization, in all cases, means eliminating unnecessary regulation and outdated legislation (p. 3)." The proposed regulation is 'unnecessary regulation' and overlooks the major objectives of the Canada Marine Act. It also seems to abort longstanding federal regulatory procedures.

The Association is concerned about a seemingly arbitrary decision of the Government of Canada to use the regulatory power of the Canada Marine Act to cancel a \$21 million project. This is a project that had already received all governmental approvals. This is a project that is essential for the Toronto Port Authority to live up to the mandate imposed on it by the Canada Marine Act, that is, to be fully 'commercial' and 'self-sufficient'. These two basic tenets of the Act appear to be ignored. The immediate result of this has been one major lawsuit already launched - by one Toronto Island Airport operator - against the Toronto Port Authority with more expected.

Should the regulation be permitted to stand it will very likely have a negative impact on all Canada Port Authorities in future. There are many special, local interests across Canada that deem it more important to use valuable port lands for activities other than commercial activities. These special interests do not seem to understand the significant economic impact of Canada's 19 Port Authorities from St. John's to Prince Rupert. These 19 CPAs handle in excess of \$100 billion worth of goods and people annually. These major ports are important gateways to busy trade corridors. All of these ports have a positive economic impact on the communities in which they do business.

## Supremacy of Canada's National Marine Policy

Canada's *National Marine Policy* was given life in the form of the *Canada Marine Act* (CMA) in 1998. Primary among the objectives of the Marine Policy was the need for 'commercialization' of certain federal entities including Canada's major ports. The *Canada Marine Act Review Panel* in its report, *Beyond Tomorrow*, re-emphasized this fundamental aspect of the Act when it re-stated that, "Commercialization, in all cases, means eliminating unnecessary regulation and outdated legislation (p.3)." There are many other elements of the *National Marine Policy*, including the subsequent *Canada Marine Act* that further strengthens the case for sound business practices for newly created enterprises, such as Canada Port Authorities (CPA). All of which were established under the rubric of 'commercialization'. The draft regulation pre-published in the *Canada Gazette* on June 21<sup>st</sup>, namely, "FIXED LINK TO TORONTO CITY CENTRE PROHIBITED" is diametrically opposite to these key federal policy objectives.

The draft regulation takes 'one' phrase of 'one' subset of 'one' clause - of an Act of Parliament with 200 clauses - to rationalize its move to limit the future business plans of a Canada Port Authority (CPA), that of the Toronto Port Authority. Why would such a thing be done when the two basic tenets of the *Canada Marine Act* are to have Canada Port Authorities be both 'commercial' and 'self-sufficient'? How can an Act of Parliament - and those charged with the duty to oversee the Act - on the one hand decree that a business be 'self-sufficient', and on the other, proceed with severe actions to limit the ability of the CPA to be self-sufficient? The Toronto Island Airport is under the management of the Toronto Port Authority and is a key component of its overall future business success. There is therefore a fundamental contradiction between the proposed regulation and the future business success of the Port Authority.

Canada's *National Marine Policy* is in jeopardy if the operations of a Canada Port Authority are to be subject to the political whims of a municipal government. In fact, it must be noted that the Toronto City Council resolution referenced in the *Canada Gazette* is simply a 'request' for the three parties to the contract to amend the contract. This 'request' has no legally binding impact on port business nor does

it represent "... a decision by Toronto City Council to reverse its support for the fixed link" as the *Regulatory Impact Assessment Statement* says in Part I of *the Canada Gazette*. It is indeed a stretch to suggest that this resolution represents the wishes of the entire community of Toronto. The *Canada Marine Act* is an Act of the Parliament of Canada and it therefore must be administered as such. It must consider the impact of regulatory actions in one locale as potentially having an impact in another because it is national public policy.

This draft regulation completely ignores the fact that the business case related to the bridge construction was well advanced. It is our understanding, in fact, that all building approvals were in place from all three levels of government. This sends an extremely negative message to the business community, both in Toronto and across the country; and to the legal profession and others, working on behalf of those who seek to have changes to the *Canada Marine Act*. This Act was designed to improve the ability of Canada's major ports to compete in both the domestic and global market. The proposed regulation for the Toronto Port Authority sets a dangerous precedent whereby the activities of any Port Authority may be curtailed or prohibited - at any time - by the municipality within which it exists.

This proposed amendment to the CMA has serious implications for all Canada Port Authorities. If it proceeds it will impact their ability to conduct the business in which they are involved – that of encouraging trade and commerce. The Association of Canadian Port Authorities strongly recommends that this draft regulation be withdrawn.

### **Negative Impact on Business: Misguided Regulatory Policy**

ACPA's second recommendation to the *CMA Review Panel* asks the federal government: "...to ensure that a comprehensive business impact test be undertaken with respect to all regulatory amendments to the CMA." This is also a specific requirement of central agencies overseeing Canada's regulatory policy as detailed below. This current draft regulation is about business and the impact on business. The cancellation of a project in excess of \$20 million - after all governmental approvals are in place - will have a significant, negative

impact on business in Toronto immediately - and likely many other cities later. One has only to look at the current \$500 million lawsuit launched by one of the businesses operating on the port lands in Toronto – with more expected to come - to understand the extent of the impact of this proposed regulation. The impacts will be much more severe if this regulation is permitted to stand leading to likely lawsuits against the Government of Canada resulting in unnecessary costs to Canadian taxpayers.

This draft regulation appears deficient with respect to proper protocol as it relates to federal regulatory policy. First and foremost, regulatory policy dictates that central agencies require input from industry and states that, “In pursuing regulatory cooperation, governments have realized that progress requires industry and public involvement. Input from business with a broad range of interests and expertise is needed to make sure that government officials are aware of all the issues at stake” (Business Impact Test, Government of Canada). It further notes that, “When a regulation is being analyzed we send out invitations to businesses that could be affected and ask for their time in completing a comprehensive impact test.” With respect to this draft regulation none of this was done. In fact, this is acknowledged in the *Regulatory Impact Analysis Statement (RIAS)* in the *Canada Gazette* announcing this draft regulation, wherein it states: “There have been no consultation to date with respect to this regulatory proposal (p. 2)”. Who approved it within the Privy Council Office?

Canada’s major port system, recognized in the *Canada Marine Act* as the 19 Port Authorities from St. John’s to Prince Rupert, handle over \$100 billion in goods and people annually. These Port Authorities, including Toronto, were “deemed vital to domestic and international trade”. They are also widely considered to be economic engines within their respective communities and are an important part of Canada’s transportation system.

There is no question that desires for urban encroachment on port lands used for commercial activity has increased in recent years. Should such a regulation be permitted to stand, every developer and special interest group across the country could seek to have various clauses of the *Canada Marine Act* changed because an Act of

Parliament will be considered subordinate to local government resolutions and special interests. This will further erode the position of Canadian ports and could eventually lead to the closure of important gateways to trade and key trade corridors – gateways that provide the most environmentally-friendly and cost-effective mode of transportation. The worse case would be the full closure of important economic gateways that are an integral part of trade corridors handling a third of Canada's trade.

### **Key Canada Marine Act Objectives Overlooked**

The balance of Section 4 of the *Canada Marine Act* contains several key objectives as noted below. The draft regulation in the *Canada Gazette* bases its rationale on Section 4 (f) and elevates one aspect of that section above all others in Canada's '*National*' Marine Policy. It focuses on being responsive to 'local needs and priorities' and presupposes that those needs and priorities are manifest solely in one resolution of Toronto's municipal government. Local needs and priorities are indeed important and that is what the Toronto Port Authority, including its Board with a broad representation, are mandated to do. It must be remembered that under requirements of the *Canada Marine Act*, Canada Port Authority Boards have representation from all three levels of government as well as from user groups. It was never anticipated that an Act of Parliament would be subordinate to the wishes of Canadian municipal governments.

One could rightfully ask why were the other major objectives of the Canada Marine Act completely ignored? Based on the other parts of Section 4 (f) alone, which states that Canada Port Authorities must 'manage the marine infrastructure and services in a commercial manner' this regulation would appear to be completely misguided. If allowed to stand, the regulation will put the Toronto Port Authority in breach of the Act, as it will prevent its quest to be 'self-sufficient'. This draft regulation, if permitted to stand, will also raise many more troubling questions as follows:

- What will be the business impact on TPA's short and long-term commercial interests and those with whom it does business?

- What will be the impact on those who have bona fide contracts with the TPA for the construction of the bridge, as well as other affected service providers?
- What about the impact on users and the CMA-mandated need to obtain relevant ‘input from users’?
- Have the ‘users’ been fully and accurately consulted’?
- With all those unanswered questions how could such a draft regulation be pre-published?

There are even more questions raised about this draft regulation in the context of the major objectives of Canada’s *National Marine Policy*, as defined in the other six objectives in Section 4 of the CMA as noted below – and completely ignored in consideration of this regulatory amendment to the CMA:

- Does this draft regulation provide Canada with the marine infrastructure that it needs to achieve economic objectives and safeguard Canada’s competitiveness and trade objectives?
- Does it base marine infrastructure and services on international practices consistent with that of Canada’s major trading partners?
- Does it ensure that transportation services are organized to satisfy the needs of users and are available at reasonable costs to users?
- Does it provide a high degree of autonomy for local or regional components of the system of services and facilities?
- Does it coordinate with other marine activities and surface and air transportation systems?

The answer to all of the above as it relates to the draft regulation is a resounding NO. For the specific objectives, as referenced in the questions noted above, Section 4 of the *Canada Marine Act* is provided for reference below.

#### **Section 4, Canada Marine Act**

(a) implement a National Marine Policy that provides Canada with the marine infrastructure that it needs and that offers effective support for the achievement of local, regional and national social and economic objectives and will promote and safeguard Canada's competitiveness and trade objectives;

(b) base the marine infrastructure and services on international practices and approaches that are consistent with those of Canada's major trading partners in order to foster harmonization of standards among jurisdictions;

(c) ensure that marine transportation services are organized to satisfy the needs of users and are available at a reasonable cost to the users;

(d) provide for a high level of safety and environmental protection;

(e) provide a high degree of autonomy for local or regional management of components of the system of services and facilities and be responsive to local needs and priorities;

(f) manage the marine infrastructure and services in a commercial manner that encourages, and takes into account, input from users and the community in which a port or harbour is located;

(g) provide for the disposition, by transfer or otherwise, of certain ports and port facilities; and

(h) coordinate with other marine activities and surface and air transportation systems.

#### **The Regulatory Process Aborted**

Given the inconsistencies of this draft regulation with many statements of federal government policy as noted above, there would appear to be no basis on which the *Privy Council Office* (PCO) could provide its endorsement, in its capacity as the secretariat supporting Treasury Board's role in Governor in Council decision making. The

PCO must review the proposal ‘for consistency with the Regulatory Policy, broader government initiatives and government directives’ (p. 3, *PCO Regulatory Process*). This has not been done with respect to this proposed regulation as it relates to significant federal policies as in the *National Marine Policy, Canada Transportation Act, Canada Marine Act, and Straight Ahead* (Transport Canada’s Transportation Policy Statement).

There are many unanswered questions related to both overall Regulatory Policy and statements of broader government initiatives. This raises a fundamental issue as to how such questions were answered by the Privy Council Office prior to the draft regulation going before the Treasury Board. It is critical that PCO’s analysis be provided, ie. the analysis allowing this draft regulation to proceed to the Treasury Board of Canada as required under the federal government’s regulatory policy.

As well, it would be most informative to know the Treasury Board’s rationale for approval of the Minister’s request for pre-publication of the draft regulation in the *Canada Gazette*. Until this is known, the draft regulation must be considered to be in limbo by those stakeholders who were NOT consulted as per the RIAS requirements, notably the requirement to, “...describe the major anticipated impacts; summarize the consultations undertaken; and explain the procedures and resources that will be used for compliance and enforcement” (RIAS Policy).

Even more persuasive than general government directives, and recent statement of federal policy with respect to transportation, are the federal Transport Minister’s own inspiring words with respect to the need for a vibrant transportation system in Canada. All of which seem to be in support of a positive initiative such as a fixed link to the Toronto Island Airport. At a speech to the Board of Trade in Halifax on April 13, the Minister noted the following:

*“Our goal should be to unleash the potential of our assets — our ports, airports and other infrastructure — and our people, through new initiatives in the transportation sector. This will require a recognition, for example, that our major ports and airports are economic generators, not merely sources of revenue. That they are*

*critical to creating dynamic urban centres that are magnets for investment and talent.”*

*“But its not just government that needs to change. To succeed, I think industry too needs to change its perspective. I would like to see, for example, a greater openness on the part of industry to explore and experiment with intermodalism. We need to create more intermodal connections that make it easier for people and goods to move within our cities and among all regions of Canada.”*

*“In the marine sector, we need to provide greater flexibility and more economic opportunities for the industry and port authorities in particular. Ports have told us that it is a challenge for them to raise capital. That they need better mechanisms to do it. We also need to make strategic investments in key intermodal linkages and look at options for governance of federally provided marine services.”*

## **Conclusion**

The Association applauds such statements by the Minister of Transport as they do, indeed, build on key statements of transportation policy already ingrained in federal legislation. Arbitrarily prohibiting construction of one bridge - and the sound business case supporting such construction - must not represent a reversal of all that has gone before it in terms of sound transportation policy for Canada, specifically as it relates to Canada Port Authorities. This recent, seemingly arbitrary decision does not bode well for the ongoing mandatory review of the *Canada Marine Act* begun last year and we strongly urge the Minister to reconsider the introduction of this unfortunate amendment to the CMA.