

## WHAT IS "NAVIGABILITY"?

By Clifford H. Bloom

Attorney at Law

Law, Weathers & Richardson, P.C.

*Date Last Updated: 08/21/98 (Bwb)*

Some lakes, rivers and streams in the state of Michigan are "navigable", while others are not. What does it mean to be "navigable"? Whether or not a body of water is navigable can have major implications for adjoining riparian property owners. Unfortunately, the concept of navigability in Michigan is widely misunderstood and is often misapplied, even by the courts. Generally, the public has no right to use non-navigable waterways, and such waterways can only be used by the adjoining riparian property owners. Conversely, if a body of water is navigable, the public has the right to use the waters for certain limited purposes.

Due to different legal issues and for simplicity's sake, I will not address navigability in this article as it relates to the Great Lakes (excluding Lake Champlain!) and major bays or waterways tied into the Great Lakes.

In the past, the concept of navigability was used almost exclusively for business and commerce. Throughout the 20th century, however, navigability has evolved to encompass the limited recreational activities of fishing and boating.

If a body of water is navigable, the property rights of adjoining riparian owners are subject to certain rights of the public to use the water. In essence, members of the public have an easement (technically, a "servitude") to use the waters for certain limited purposes such as boating and fishing. If a waterway is non-navigable, the public generally cannot use the water, and in some cases members of the public may not use the water even if the public has lawful access to the body of water.

Navigability has not been governed by statutes passed by the Michigan Legislature, but rather by the Michigan common law. Michigan common law is comprised of all appellate court decisions over the years addressing a subject. In Michigan, there are generally two alternate tests for determining whether or not a body of water is navigable. First, if a body of water has been used in the past or is presently used by larger commercial vessels (such as tankers, fishing boats, tug boats, etc.), the body of water is navigable. Second, the "floating log" test has long been recognized by Michigan courts. Pursuant to this test, if a body of water (particularly a river, stream or creek) was used during the late 1800's for floating commercial grade logs, the body of water was deemed navigable. Even if a body of water was never actually used during the lumbering days for floating such logs, it can still be

deemed navigable today if the flowing body of water is sufficiently wide and deep that commercial grade logs could be freely floated today.

In the 1982 case of Bott v Natural Resources Commission, 415 Mich 45 (1982), the Michigan Department of Natural Resources attempted by judicial action to expand the definition of navigability for flowing bodies of water to make many theretofore private lakes, creeks and streams public by arguing that a recreational boating test should be substituted for the traditional log floating test. That attempt was decisively defeated by the Michigan Supreme Court, which held in Bott in part as follows:

One must question whether there is an overriding need justifying adoption of a new test of navigability.

\* \* \*

The argument based on public need assumes that recreational value should be given paramount consideration and makes no attempt to consider competing public values. Recreational use has a cost. The inland waters aid the nesting of wild fowl and the propagation of aquatic life. An expansion of public use would also affect the communities where the waters are located.

\* \* \*

The proposed changes in law would not have a purely theoretical effect. It is said that adoption of the recreational-boating test will respond to the asserted increase and public's need for access to recreational waters and yet not produce quantitatively different results from the log-flotation test. These two propositions are irreconcilable. If the new test is adopted to meet a need which the former test is not able to satisfy, there necessarily must be some quantitative difference when the two tests are actually applied or there is no need for a new test.

\* \* \*

Recreational boats, such as kayaks and canoes, displace far less water than logs, are highly maneuverable, and can travel through waterways unfit for floating logs to market. Michigan is a state of numerous inland waters, characteristics similar to those of the creeks connecting the lakes in the instant cases. Adoption of a recreational boating test would subject many formerly private inland waters to what are in essence recreational easements.

\* \* \*

Fishing is a quiet sport. General boating and water recreational can, however, be intrusive and jarring.

\* \* \*

Public access to these previously non-navigable waters will diminish enjoyment of surrounding property. Many of those who own such property are vacationers who acquired the property for peaceful retreat. A rule which opens these waters to curious boaters and enterprising fishermen

may render the property unfit as a refuge or retreat. Even if these interests are thought to be too intangible to warrant protection, it cannot be denied that some landowners have invested their savings or wealth in reliance on a long-established definition of navigability. It also cannot be denied that the heretofore private character of the waters adjacent to their property significantly adds to its market value.

(Bott at pages 61, 62, 66, 73, 74, 78 and 79.)

Recently, the Michigan United Conservation Clubs ("MUCC") has attempted to broaden the definition of navigability and to make many formerly private lakes, creeks and streams public by supporting Senate Bill 767 in the Michigan Legislature ("SB 767"). Although the proposed definition of navigability contained in SB 767 is being sold as an attempt to "clarify" navigability rights, it would in fact overturn 100 years of common law and would make virtually every creek, stream and trickle of water in the state of Michigan public. It would also make many previously private lakes with only one small inlet or outlet public.

What does it mean for a river, stream or creek to be navigable? Does that mean that such flowing bodies of water can only be used by a person floating on the water and that the person cannot set foot on the river bottom? No. Once a flowing body of water is deemed "navigable", members of the public can use the body of water extensively and need not use it only to the extent that it can be floated upon. For instance, a small navigable river or stream can be traversed by the public in canoes or kayaks, but fisherman can also wade on the bottomlands of the river and even go out of the water and onto the banks to avoid obstructions such as trees, holes and fences. In other words, fisherman can wade the stream and need not limit themselves on a navigable body of water to only floating without touching the bottom. While the public's rights regarding a small navigable river or stream are generally limited to fishing and wading, SB 767 would not only dramatically expand the definition of navigability, but also the public's rights incidental to navigation. If SB 767 passes, the rights of the public to use a navigable body of water would also include all recreational activities such as hunting, trapping and motor boating, as well as fishing and wading.

Why should riparian owners on lakes or ponds be concerned about navigability, since navigability issues seem to affect flowing bodies of water (such as rivers, streams and creeks) more? A revised definition of navigability would impact any private lake or pond which has an inlet or an outlet, no matter how small. Based on longstanding common law definitions of navigability, a lake or pond which is predominantly surrounded by private property is considered private unless it has both a navigable inlet and outlet which would make it part of a "commercial highway." If the definition of navigability were expanded as proposed by SB 767 from a "commercial" or "log floatation" test to a "recreational" test, any presently private lake or

pond which has either a small inlet or outlet would be deemed navigable and hence, public. Please keep in mind that once an inlet or outlet to a lake or pond is deemed navigable, members of the public can wade through the inlet or outlet to reach the lake (including carrying a boat or canoe for ultimate use on the lake or pond)□members of the public would not be required to float in a watercraft the entire way. Under an expanded definition of navigability, once members of the public are able to reach a previously private lake or pond, they could use the body of water for many purposes such as boating, fishing, trapping, swimming, hunting and ice fishing. Under the laws that presently exist, most of those activities would not be permitted.

Although the long-standing common law definitions of navigability in Michigan are somewhat confusing, they have served us well for the better part of a century. In practice, the overwhelming majority of rivers as well as large streams are already in fact, navigable. To overturn a century of accepted law and countless property owners□ reasonably held expectations regarding privacy and the status of their water-related property rights would be unwise, unfair, unnecessary and probably an unconstitutional taking of private property without due process and just compensation. To the extent that you are concerned about efforts to change the definition of navigability, you should contact your local Michigan legislator.