Exhibit 5

Ontario (https://www.ontario.ca/page/government-ontario)

Ownership Determination – *Beds of Navigable Waters Act* - policy

This policy outlines the ministry's administrative responsibilities and considerations in determining navigability of waterbodies. It also outlines the effect this determination can have on the ownership of the bed of the waterbody.

- Policy : PL 2.02.02
- Compiled by – Branch : Lands & Waters
- Section : Land Management
- Date Issued : February 26, 2007
- Replaces Directive Title : Same
- Number : Same

1.0 Background

To exercise its responsibilities to manage Crown land, it is necessary for the Ministry of Natural Resources (MNR) to make administrative decisions regarding navigability. The ownership of the bed of a waterway in Ontario frequently depends on the question of navigability through the application of the *Beds of Navigable Waters Act* (BNWA) and in some cases, a reservation or exception in a Crown grant. The *Beds of Navigable Waters Act* is attached as Appendix A for information purposes.

Section 1 of the *Beds of Navigable Waters Act* states:

> Where land that borders on a navigable body of water or stream, or on which the whole or a part of a navigable body of water or stream flows, has been heretofore or is hereafter granted by the Crown, it shall be deemed, in the absence of an express grant of it, that the bed of such body of water was not intended to pass and did not pass to the grantee.

The term express grant mentioned in the *Beds of Navigable Waters Act* refers to Crown land grants and includes statements such as "Lot 16, Concession X, together with the bed of Jones River". General terminology, including the phrase pre-printed on many old patents such as "...together with the woods and waters therein..." does not constitute an express grant.

To determine the existence of an express grant, it is necessary to search for and examine both upland grants and grants of land under water. The Crown may have granted the bed of a watercourse under a separate grant, or as part of an upland grant. It is also possible that as a result of flooding, that portions of original upland grants may now be under water. Such flooded lands remain privately owned.

Where it has been established that no express grant has occurred, it is necessary to determine if the watercourse is navigable. If the watercourse is navigable, the bed of the watercourse is Crown land by virtue of the *Beds of Navigable Waters Act*. The bed of the watercourse will also be Crown land if by virtue of the original Crown grant, the bed of the navigable watercourse has been reserved or excepted to the Crown.

Note: Whether the bed of a watercourse is private land or Crown land, the navigability of the watercourse is unaffected. The right of navigation (refer to PL 2.09.02 Navigation – A Public Right) is protected under the *Navigable Waters Protection Act*, as administered by the federal government.

2.0 Determination of Navigability

While the BNWA states that, in the absence of an express grant, the beds of navigable waters are deemed not to have passed to the patentee (and are thereby Crown), it does not define the test of navigability. This policy attempts to interpret the test of navigability as established by the courts.

To determine the existence of an express grant it is necessary to search for and examine both upland and any supplementary grants (e.g. water lot grants). Since navigability must be initially determined as at the date of the Crown grant, subsequent flooding due to artificial means does not alter the size of the privately held parcel.

Navigability is an issue which can only be legally determined by the courts. It is impractical to refer each case to the courts for a judicial decision. Consequently, the Ministry will continue to make navigability decisions for its administrative purposes to manage public lands.

3.0 MNR's Role in the Determination of Navigability

The sole purpose of MNR reaching a decision on navigability is to determine whether or not the bed of a waterway is Crown land under administration and control of the Ministry, through reliance on a reservation/exception of a navigable body of water or application of the *Beds of Navigable Waters Act*.

Ministry Area Supervisors are responsible for this Ministry's administrative decisions as to navigability of waterways within their respective districts. These administrative decisions may of course be challenged in the courts. Area Supervisors should therefore be confident of all the facts before making an administrative decision on navigability.

The matter of determining navigability on an active or reactive basis is left to the discretion of Area Supervisors. Should Area Supervisors experience difficulty in determining navigability, the Ministry's Legal Services Branch should be consulted for assistance before an opinion is given. Legal Services Branch will if necessary consult with the Office of the Surveyor General.

Ministry field offices are often asked by private landowners for an opinion as to the navigability of a stream and thus the ownership of the bed. These requests arise most frequently in situations where a landowner can take advantage of the fact that if the property is bisected by a watercourse that is deemed to be navigable and if a navigability reservation/exception or Section 1 of the BNWA applies, there is a natural severance, as the property is in essence, separated into two pieces by a thin strip of Crown land.

Where potential for a natural severance exists, the ownership status of a waterbody becomes very important, particularly where municipal zoning might otherwise prohibit a severance from being granted through the normal *Planning Act* approvals process. It is important for Area Supervisors to caution private parties that they should not rely solely on the Ministry's advice for severance decisions and they may also wish to seek legal advice.

MNR navigability decisions will be based upon those principles of navigability established by the courts from time to time.

4.0 Considerations When Making Navigability Decisions for Administrative Purposes

The facts relating to the determination of navigability for the purposes of ownership should initially be considered at the date of inspection. However, for greater certainty, the issue of navigability should also be considered at the date of the original Crown grant. This is due to the most relevant case law in Ontario that has dealt primarily with the interpretation of a reservation of navigable waters in the letters patent, rather than relying on the statutory provisions of the *Beds of Navigable Waters Act*. Had those cases relied primarily on the *Beds of Navigable Waters Act*, it is possible that the issue of navigability would have been considered only in a current perspective.

In order to make a determination of navigability at the date of letters patent, particularly in older grants, in addition to researching the historical use and physical characteristics of the waterbody, MNR field staff must research the original patents, original surveys, and field notes before making an administrative decision on the navigability of a waterbody. Interpretation of survey plans and field notes should be done in consultation with the Office of the Surveyor General. If after having

considered the issue of navigability both under the current situation and at the date of patent, different conclusions of navigability prevail (e.g., because of artificial improvements or impediments to navigation; or a drying up of a river bed), Legal Services Branch staff should be consulted before developing a Ministry position. Legal Services Branch will if necessary review the situation with the Office of the Surveyor General.

Navigability is both a question of law and of fact. To be navigable in law, the watercourse must be navigable in fact. Navigability in fact is demonstrated if a waterway is used, or is capable of being used by the public as an aqueous highway. For a waterway to be navigable in law, it must have real or potential practical value to the public as a means of travel or transport, generally from one point of public access to another point of public access.

In the Canoe Ontario vs. Julian Reed case of navigability, Justice Doherty made several statements which will likely be quoted in the future as the test of navigability:

> In essence, the test of navigability developed in Canada is one of public utility. If a waterway has real or potential practical value to the public as a means of travel or transport from one point of public access to another point of public access, the waterway is considered navigable...navigability should depend on public utility. If the waterway serves, or is capable of serving, a legitimate public interest in that it is, or can be, regularly and profitably used by the public for some socially beneficial activity, then, assuming the waterway runs from one point of public access to another point of public access, it must be regarded as navigable land as within the public domain.

Justice Doherty accepted the following seven conclusions reached previously in the Coleman Case:

i. navigability in law requires that the waterway be navigable in fact. It must be capable in its natural state of being traversed by large or small craft of some sort;

ii. navigable also means floatable in the sense that the river or stream is used or is capable of use for floating logs or log rafts or booms;

iii. a river may be navigable over part of its course and not navigable over other parts;

iv. to be navigable, a river need not in fact be used for navigation so long as it is realistically capable of being so used;

v. a river is not necessarily navigable if it is used only for private purposes or if it is used for purposes which do not require transportation along the river (i.e., fishing);

vi. navigation need not be continuous, but may fluctuate with the seasons; and

vii. where a proprietary interest asserted depends on a Crown grant, navigability is initially to be determined as at the date of the Crown grants (in this case, 1821 and 1822).

Based on the Canoe Ontario ruling, the Ministry of Natural Resources, in addition to considering the above noted seven conclusions, will be guided by the following key points when making navigability decisions for administrative purposes:

1. For purposes of determining navigability, the Ministry position will only be finalized after considering the issue of navigability from the perspective of both the date of inspection and the date of letters patent. The necessity to consider navigability from both perspectives arises because the courts have historically considered navigability at the date of the grant, but it is possible, but not certain that future decisions will reflect only the current situation.
2. Navigability depends on public utility.
3. Public utility means actual or potential commercial or recreational use, or other socially beneficial activity.
4. Generally, the waterway should run from one point of public access to another point of public access.
5. Seasonal limitations do not detract from navigability as long as there is some use (or potential use) which is regular and which has practical value.

5.0 References

5.1 Legal

- *Beds of Navigable Waters Act*, RSO 1990
- Canoe Ontario vs. Julian Reed (1989) 69 OR 2d 494
- Coleman vs. A.G. For Ontario (1983) 143 DLR (3rd) 608

5.2 Directive Cross References

- PL 2.09.02 Navigation – A Public Right (Bulletin)

Appendix A

Beds of Navigable Waters Act

R.S.O. 1990, Chapter B.4

Amended by: 2002, c. 18, Schedule L, s. 2.

Grant to be deemed to exclude the bed

1. Where land that borders on a navigable body of water or stream, or on which the whole or a part of a navigable body of water or stream is situate, or through which a navigable body of water or stream flows, has been or is granted by the Crown, it shall be deemed, in the absence of an express grant of it, that the bed of such body of water was not intended to pass and did not pass to the grantee. R.S.O. 1990, c. B.4, s. 1.

Saving as to certain cases

2. Section 1 does not affect the rights, if any, of a grantee from the Crown or of a person claiming under the grantee, where such rights were, before the 24th day of March, 1911, determined by a court of competent jurisdiction in accordance with the rules of the English Common Law, or of a grantee from the Crown, or a

person claiming under the grantee who establishes to the satisfaction of the Lieutenant Governor that he, she or it or any person under whom the person claims has, before the 24th day of March, 1911, developed a water power or powers under the reasonable belief that he, she or it had the legal right to do so, provided that the person may be required by the Lieutenant Governor in Council to develop such power or powers to the fullest possible extent and provided that the price charged for power derived from such water power or powers may from time to time be fixed by the Lieutenant Governor in Council, and the Lieutenant Governor in Council may direct that letters patent granting such rights be issued to the grantee or person claiming under the grantee under and subject to such conditions and provisions as are considered proper for insuring the full development of such water power or powers and the regulation of the price to be charged for power derived from them. R.S.O. 1990, c. B.4, s. 2.

Act not to apply to a certain locality

3. This Act does not apply to the bed of the river in Lot 8 in the 6th Concession of the Township of Merritt in the District of Sudbury. R.S.O. 1990, c. B.4, s. 3.

4. Repealed: 2002, c. 18, Schedule L, s. 2.

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