



Subject <b>OWNERSHIP DETERMINATION - BEDS OF NAVIGABLE WATERS ACT</b>		Procedure <b>PL 2.02.02</b>	
Compiled by - Branch Lands & Waters	Section Land Management	Date Issued February 26, 2007	
Replaces Directive Title Same	Number Same	Dated February 11, 1997	Page 1 of 11

Ministry Area Supervisors are periodically required to determine the navigability of waterways to establish if the bed of the waterway is under the administration and control of the Ministry. This decision, which is only an opinion, is made for administrative purposes of the Ministry and may be challenged in the Courts. Consequently, Area Supervisors must be able to substantiate their opinions with reasonable facts and information.

The Area Supervisor's investigation of navigability is to have regard for Policy PL 2.02.02 Ownership Determination - Beds of Navigable Waters Act and should proceed as follows:

- 1) Determine if there has been an express grant of the bed of the watercourse.

To do this, it is necessary to check both the grant of the upland property and the possible existence of a separate express grant (an express grant separate from an upland ownership) of the bed of the watercourse.

If there has been an express grant, there is no need to consider the question of navigability as the property is granted.

The original township survey and any other available historical records should be reviewed to assist in determining the extent of what was intended to be granted at the actual time of the patent. Such records may be found in MNR district or main office files and from referencing the document and survey records found in the Ministry's Land Index System

- 2) Determine if the patent expressly excepted/reserved the bed of the watercourse, either expressly, or generally as a navigable body of water.

If the bed of a watercourse was expressly excepted/reserved (e.g. the bed of Jones Creek), it is unnecessary to consider the issue of navigability. If however, there is a general reservation/exception (e.g. excepting the beds of navigable waters) or no reservation, it will be necessary to consider the issue of navigability to conclude whether or not the bed of the watercourse is owned by the Crown.

When reviewing a reservation/exception in the Crown grant, it is important to ensure that the clause deals with the bed (e.g. reserving the beds of all navigable rivers, lakes and streams) rather than the use of the water (e.g. reserving the uses, passage and enjoyment of all navigable waters). The latter reservation does not act to hold back the bed(s) of any watercourses. In cases where it is unclear whether the clause relates to the bed of a watercourse, as opposed to the use of the waters, Ministry staff should seek further

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direction from MNR Legal Services Branch.

- 3) Determine if Section 11 of the Surveys Act (Appendix A) applies to the factual situation regarding an original Crown plan. If the section applies (i.e. the watercourse is shown on the plan and a parcel of land shown thereon is given an acreage covering the land area only, such parcel of land does not include any land covered by the water), it is unnecessary to consider the issue of navigability, as the grant of the parcel of land does not include the land covered by water.
- 4) Review MNR files for evidence of navigation or for previous opinions given, including those of the Surveyor General (Main Office File 99161) and consult with local practising Ontario Land Surveyors.

Previous opinions are not necessarily to be taken as conclusive. Case law or Ministry interpretation of that case law may have changed. If the facts suggest that an opinion will contradict a previous opinion, advice of MNR Legal Services and/or the Office of the Surveyor General should be sought.

Local practising Ontario Land Surveyors have considerable knowledge and experience in considering the issue of navigability and may have given previous opinions on the subject or nearby sites. In many cases, they may be interested in offering assistance to the local Ministry field office.

- 5) Consider the physical characteristics of the watercourse, firstly under current conditions, and secondly at the date of letters patent (according to the best available information), as far upstream and downstream as is necessary to substantiate a decision about navigability. This consideration should include sketches, photographs, and/or descriptions that indicate the following:
  - i) depth of water at normal, low and high water levels;
  - ii) width of the natural bed;
  - iii) the presence and type of public access (to meet the requirements for an aqueous public highway the watercourse should normally have a point of public ingress and egress); and
  - iv) physical structures or improvements, if any, influencing or impeding water traffic. When were these structures placed there (especially relative to the date of the patent)? What effect would the removal of the structures have?

Note: A watercourse does not necessarily have to be navigable throughout its length to be navigable in law.

- 6) Investigate the present and past uses of the watercourse and the nature and extent of those uses, as far upstream and downstream as is necessary to reach a conclusion about actual public utility (commercial or recreational use or other "socially beneficial activity)."

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- 7) Review the capability or potential capability for public utility of the watercourse as an aqueous public highway, and the nature and extent of that capability, as far upstream and downstream as is necessary to reach a conclusion about capability of use.

Capability for public utility should not be restricted to a singular activity, nor should winter activities be considered in isolation of "normal" navigational activities. Activities such as the landing of an aircraft would not, in themselves, render a water body navigable.

- 8) Consider all of the findings in Steps 1 through 6 of this Procedure inclusive and prepare a report documenting the investigation and the evidence which leads to a conclusion of navigability/non-navigability. It is necessary to consider the issue of navigability from both the current perspective and as it would have existed at the date of letters patent because.

If evidence suggests that the watercourse has the capability, or potential capability for public utility, based upon the physical characteristics of the watercourse both at the time of letters patent and under current prevailing conditions, the watercourse should be considered to be navigable for the purpose of giving effect to a general reservation/exception of a navigable body of water and for the application of the Beds of Navigable Waters Act.

Where a private landowner is represented by an Ontario Land Surveyor, lawyer or other expert, it is advisable to consult with those parties to share information and evidence in determining the question of navigability of the water body at the subject location. It is also advisable to share with those parties the criteria contained in this Policy and Procedure PL 2.02.02 which MNR relies on in formulating opinions on navigability.

If the facts suggest that the watercourse is currently navigable, but was not navigable at the date of letters patent, or vice versa, the assistance of MNR Legal Services Branch should be sought by MNR field staff. Legal Services Branch will if necessary review the situation with the Office of the Surveyor General.

- 9) Area Supervisors are to consult with MNR Legal Services Branch and the Office of the Surveyor General, if knowingly taking a position which is contrary to one taken previously by a practising Ontario Land Surveyor.
- 10) When providing a copy of the Ministry's opinion to the public, Ministry comments about navigability should be restricted to that portion of the waterway that is being discussed. All replies will follow the example shown in Appendix B.
- 11) Maintain a copy of the Ministry's navigability report and any related consultation with Legal Services Branch and the Office of the Surveyor General on file for future reference.

Attached as Appendix C are five diagrams that illustrate examples of navigability and non-navigability as they relate to the Crown ownership of the bed of a waterway.

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## APPENDIX A

### SURVEYS ACT

Where land  
covered by water  
not included

**11.** – (1) Where a lake or river is shown on an original plan of Crown lands and a parcel of land shown thereon is given an acreage covering the land area only, such parcel of land does not include any land covered by the water of the lake or river.

Certain rights not  
affected

(2) Subsection (1) does not affect the rights of any person where such rights were determined by a court before the 8<sup>th</sup> day of July, 1913. R.S.O. 1990, C.30 S.11

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## APPENDIX B

**SUBJECT:                    Navigability of            in, or adjacent to,  
                                  Lot , Concession , Township of**

In response to your question, this is to advise that it is the opinion of this Ministry that {NAME OF WATERCOURSE} at the above noted location is/is not a navigable body of water. This opinion is based on a review of all evidence and documentation available to us. Accordingly, it is the conclusion of the Ministry that because of [the reservation of navigable waters contained in letters patent for the above noted property, and] the Beds of Navigable Waters Act, the bed of {NAME OF WATERCOURSE} did not pass with the Crown grant.

Ministry records do not indicate that the bed of {NAME OF WATERCOURSE} has been subsequently granted.

This letter of opinion should not be relied on for land use planning matters, such as determining the existence of a natural severance of land under the Planning Act.

Navigability is often a difficult issue to determine and the only way to obtain a conclusive legal decision when required is through a ruling by the courts.

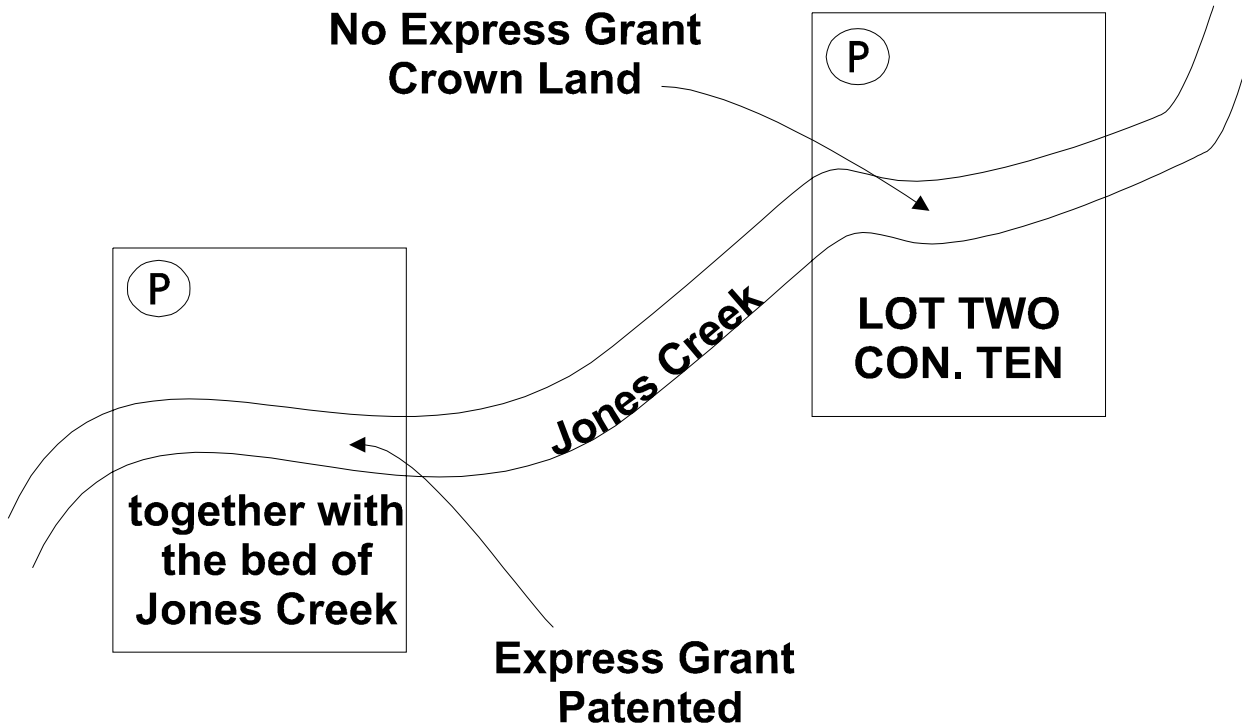
The opinion being expressed in this letter is an administrative one confirming the position this Ministry will take when managing the bed of the waterbody. Should you require a legal ruling on the navigability of this waterway for your own purposes, we would suggest that you seek legal advice.

Should you have any further questions, please contact \_\_\_\_\_.

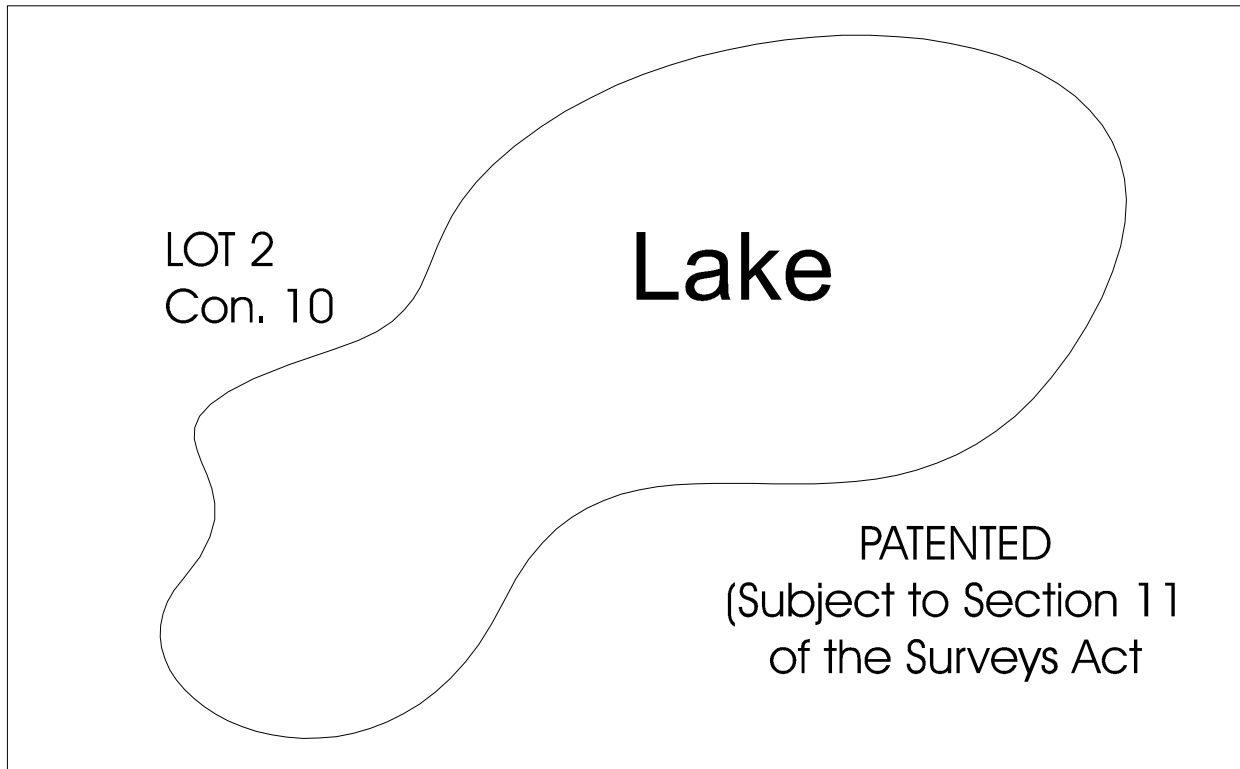
Yours truly,

\_\_\_\_\_  
 Area Supervisor

APPENDIX C - 1  
***OWNERSHIP OF RIVER BED***  
NAVIGABLE WATERWAY



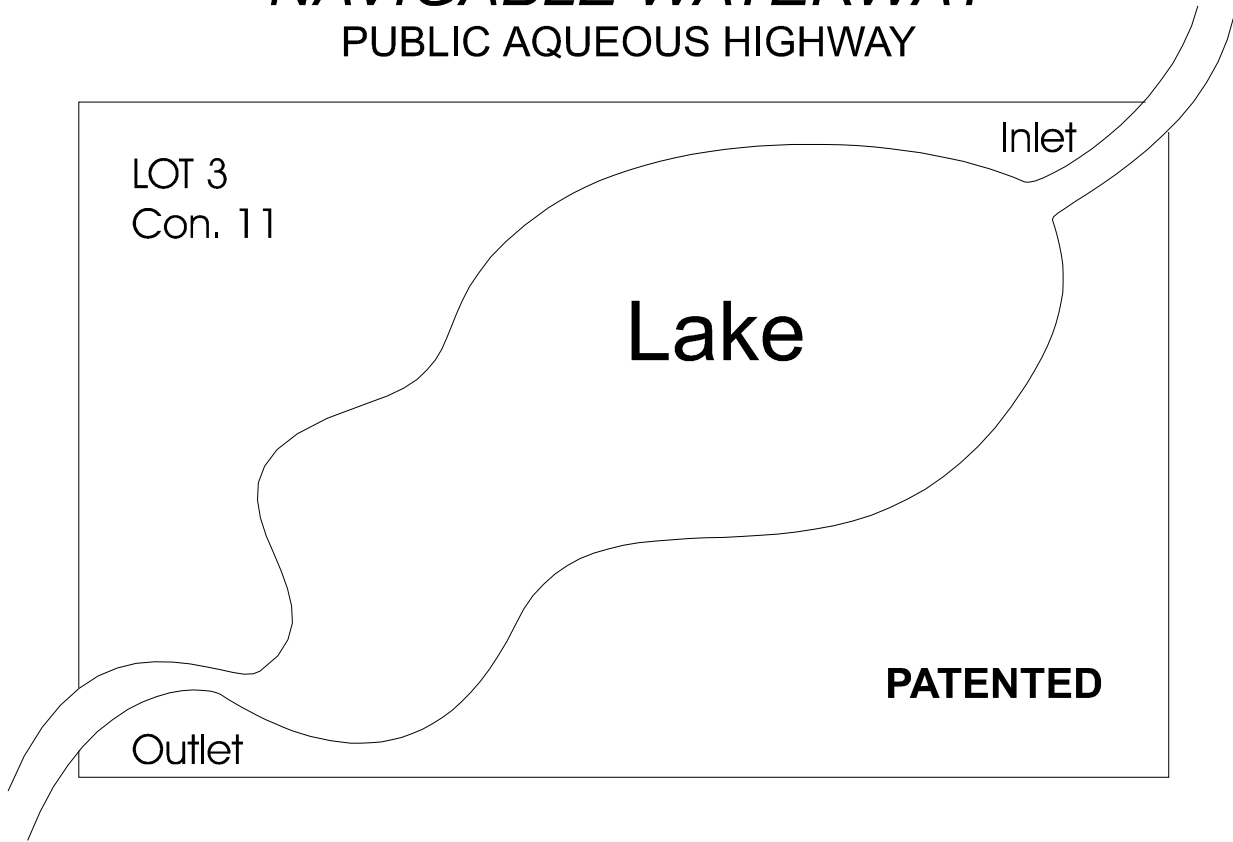
APPENDIX C -2  
***NON-NAVIGABLE WATERWAY***  
NO PUBLIC ACCESS



**LAKE IS LANDLOCKED**

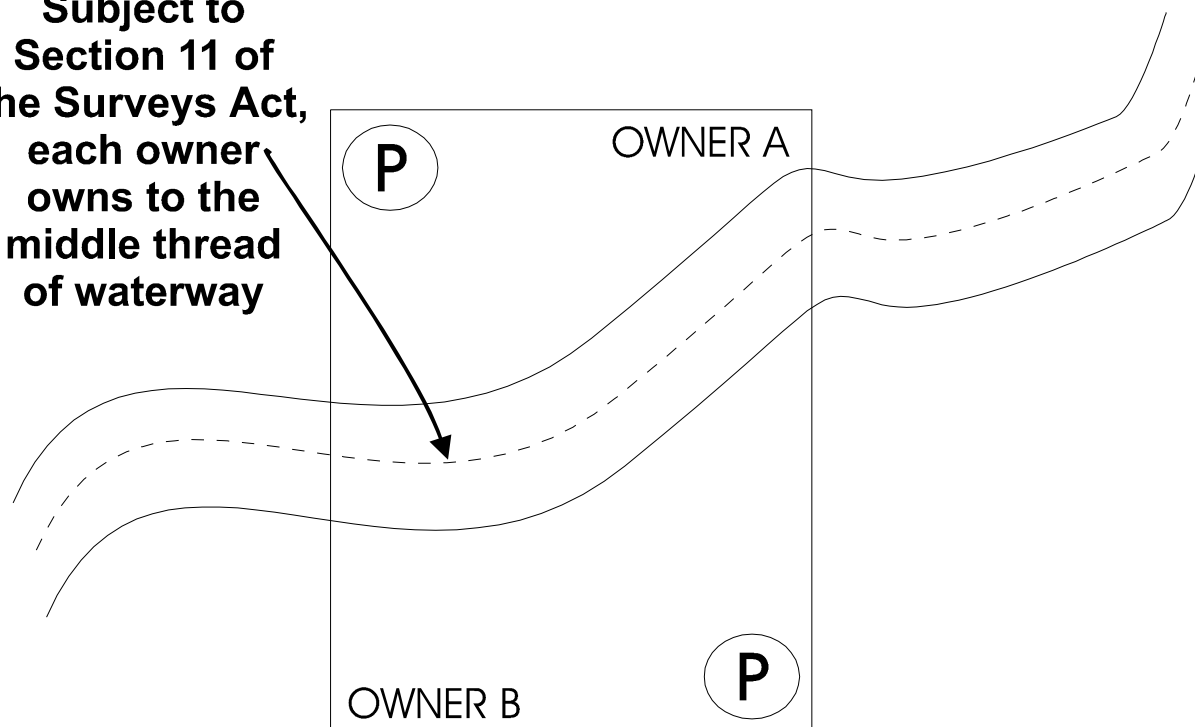


APPENDIX C -3  
***NAVIGABLE WATERWAY***  
PUBLIC AQUEOUS HIGHWAY



APPENDIX C - 4  
***OWNERSHIP OF RIVER BED***  
NON-NAVIGABLE WATERWAY AT DATE OF PATENT

**Subject to  
Section 11 of  
the Surveys Act,  
each owner  
owns to the  
middle thread  
of waterway**



## APPENDIX C - 5 *NAVIGABLE WATERWAY*

