

Subject <b>Exercise of Percentage Reservation for Roads</b>		Policy <b>PL 3.01.01</b>
Compiled by - Branch Lands & Waters	Section Land Management	Date Issued February 10, 2006
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## **1.0 DEFINITIONS**

In this policy,

“private property” means patented land that is privately owned;

“township” means a municipality that had the status of a township on December 31, 2002 and is therefore listed in Ontario Regulation 8/03, under the Highway Traffic Act.

## **2.0 BACKGROUND**

Prior to 1866, access to private property was generally provided by existing roads which fronted on the land granted, through the possible use of road allowances (e.g. road allowances laid out in a 1,000 acre section survey system), or through the use of navigable bodies of water (deemed to be aqueous public highways).

On August 6<sup>th</sup>, 1866, an Order-in-Council directed that the 5% reservation system be adopted in Northern Ontario. The system required that Crown grants reserve a percentage of the lands granted for road requirements. This practice was adopted because the topography of land in northern Ontario did not generally lend itself to the establishment of road allowances to allow for potential future access.

Following the adoption of this system, 5% of the area granted has generally been reserved for roads. For smaller parcels (e.g. summer resort locations), or for parcels granted under the Mining Act, a 10% reservation may have been made.

The practice of reserving, and where necessary exercising, a percentage reservation for roads has been used as the only practical means of providing access for settlement much of the province, as it was simply impossible at the time of the grant to foresee what land would be required for future public uses.

This practice is supported today by the following provisions of the Public Lands Act:

- a) subsection 64(2), which directs that every patent, lease or licence of occupation issued under the Act shall reserve to the Crown such percentage, if any, of the surface rights of the land as the Minister considers necessary for road purposes;
- b) subsection 65(1), which directs that all dispositions of public or mining lands shall reserve to the Crown the right to construct any road without making compensation therefore, and such right whether or not it is expressly reserved shall be deemed to be so reserved;
- c) subsection 65(2), which provides that wood and gravel and other materials required for the construction or improvement of roads may be taken without compensation, where letters patent have contained a reservation of any area for roads; and

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- d) subsection 65(3) which provides that the rights mentioned in subsection 65(1) and (2) may be exercised by the Minister or by any person authorized by him to exercise them on behalf of the Crown.

A percentage reservation for roads (i.e. 5 or 10%) contained in letters patent may be exercised by:

- a) the Minister of Natural Resources, or any person authorized by the Minister to exercise the reservation on behalf of the Crown (per subsection 65(3) of the Act);
- b) any other Minister of the Crown (Ontario) lawfully exercising the reservation on behalf of the Crown;
- c) the council of a township in respect of areas within its boundaries where the original survey of the township's boundaries were surveyed without road allowances, but in which 5 percent of the area is reserved for roads (authority – subsection 64(1) of the Municipal Act, 2001); and
- d) a Road Commissioner elected under the Statute Labour Act (authority – subsection 22(1) of the Statute Labour Act).

The following groups may apply to the Ministry of Natural Resources to exercise the road reservation:

- a) the owners of private property, who do not have other available access to their property; and
- b) the council of a municipality that is not empowered to exercise the reservation (i.e. a municipality that is not a township)

### **3.0 PROGRAM DIRECTION**

#### **3.1 Goal**

To facilitate road access across private land for where required for MNR programs and to provide access to private property where no other option exists.

#### **3.2 Objectives**

- A) Ensure that when the percentage reservation for roads contained in letters patent is exercised, it is done in a fair and equitable manner.

Subject to the approval of the Minister, the Ministry may exercise a percentage reservation for roads where:

- a) access is required for the program purposes of the Ministry (e.g. provide access for forest management) and;
- b) there is no other option for access (e.g. access via a road allowance or unalienated Crown land, or the provision of access is protected through the Road Access Act) except over private property.

Where the area of surface rights and mining rights to a property differ (i.e. where surface rights exclusions have including highways or navigable water course), the Ministry will only exercise the reservation in respect of the area of the surface rights.

The Ministry will have regard for the effect that severances and subdivisions have had on the parcel granted by the Crown when exercising a percentage reservation. Notwithstanding that the whole area of the percentage reservation may be taken up from a smaller portion of the granted parcel, all reasonable attempts should be made to confine the exercise of the reservation to the pro-rated area of an individual ownership.

MNR staff are to attempt to negotiate a mutually agreeable location of the area to be exercised, with the registered owner(s) of the affected parcel(s).

- B) Ensure that other options to facilitate private access are fully explored.

The Ministry will only exercise the percentage reservation for roads, for private purposes, where no other options exist.

The Ministry will not exercise the percentage reservation for roads:

- a) within a township, except where required for MNR program purposes;
  - b) for private purposes, if other access is available (including water access where properties have been disposed of on a water access basis); and
  - c) where existing access is available on a road on which the provisions of the Road Access Act apply, unless the road has been lawfully closed in accordance with the Act or is required for MNR program purposes.
- C) Ensure that the costs, both administrative and non-administrative (e.g. surveying), of exercising the reservation are borne by the beneficiary(ies) of the right.

All costs associated with the exercise of the reservation will be borne by the party requesting the action. MNR will recover its costs by assessing an administrative fee per PL 6.02.01 – Administrative Fees for Public Land Transactions.

The boundaries of the area to be taken for new roads shall be surveyed prior to exercising the reservation and, if required (as in the case of encroachment onto lands not indicated by survey), subsequent to any required road construction.

- D) Dedicate roads created by exercise of a percentage reservation to public use.

Where the percentage reservation is exercised by the MNR, the road shall be deemed to be a road as defined under Section 48 of the Public Lands Act and will be open for public travel per Section 49 of the Act. Where the reservation is exercised by a municipality the road is deemed to be a highway per the Municipal Act, 2001.

## **4.0 REFERENCES**

### **4.1 Legislative Cross References**

- Municipal Act, Section 64(1)
- Ontario Regulation 8/03, under the Highway Traffic Act
- Public Lands Act, Sections 49, 50 and subsections 65(1), (2) and (3)
- Road Access Act
- Statute Labour Act

### **4.2 Case Law Cross References**

- Palmatier vs. McKibbon (1894) 21 O.A.R. 441
- Crane Lumber Co. V Brission et al, 1936, OR 45
- Cooper and Stuart, 1889, 14 AC.286 on appeal from the Supreme Court of New South Wales, Australia

### **4.3 Directive Cross References**

- PL 6.02.01(POL) Administrative Fees for Public Land Transactions
- PL 3.01.01(PRO) Exercise of Percentage Reservation for Roads