Running the Roads

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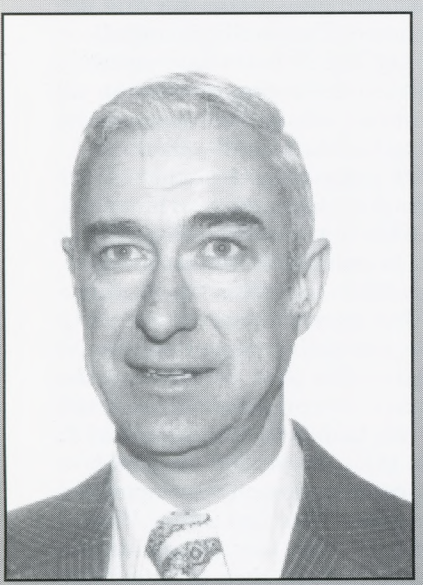
Editor's Note: *The following article is an edited transcript of Rusty Russell's presentation at the 1993 AGM held in Toronto.*



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It's an honour and a privilege to be invited to speak at this, your 101st Annual Meeting. The opportunity to kick the tires on the subject of roads is always good fun.

I can honestly say that when I come to an OLS Convention I get the feeling that I have fallen in amongst friends. I say this because during my university and law school days after the war I spent the summers and part of my winters running surveying crews for a number of years.

So, you can see, surveying is a subject I can honestly say that I know just enough about to be misinformed. So with your permission, I propose to "Run the Roads" on a potpourri of related subjects, so let's get started.

Owner's Certificates on Registered Plans

Everyone here has prepared plans for a subdivision and everyone here knows that a registered plan incorporates an Owner's Certificate, and that is my first subject.

When involved with a registered plan and before it is registered, I read a draft of the proposed Owner's Certificate very, very carefully. Why? An Owner's Certificate has magic in it. Yes, magic. So what's the magic? Let's go back to basics.

Deemed Public Highways

Everyone also knows that by Section 57 of the Surveyors Act, all roads, streets, lanes laid out on a registered plan of subdivision, are "deemed" to be public highways, streets or lanes. Note the word "deemed". The reason is that there's an exception to the rule and the exception is, "Unless there is a contrary intention on the plan."

Over the past several years, when acting for municipalities, I have insisted that the Owner's Certificate on one or two occasions incorporate a contrary intention. In a majority of cases it related to lanes, in some cases roads, that the municipality did not want to own. It didn't want them as "public highways", or "public walkways". In short, they were to continue in private ownership.

Admittedly, this is not a frequent occurrence, but I almost got caught in a court case on one for not looking at the Owner's Certificate. So in considering roads and lanes on registered plans of subdivision, take a careful look to make sure that there is no contrary statement on the plan whereby the roads and lanes will not be public highways.

By way of historical comparison of legislation, everyone is aware that by Section 9 and 57 of the Surveys Act that these words, "deemed", "shall be deemed" are included. We find a statement that all "Crown Roads shall be deemed to be public highways".

In the old days, it used to be: "they shall be public highways". Now that's a mandatory dedication, by statute. About 1849, the statute said "shall be". Yet, if you go back to the Highway Act of 1810, they used the word "deemed." And I believe the word "deemed" has been present since about 1873.

Notwithstanding that mandatory statement in the Surveys Act of 1849, the courts have recognized that an owner can insert a contrary intention by which the roads and streets and lanes would not be public highways. Again, not a frequent occurrence, but always look for the exception.

Reserve Blocks

A second point on the Owner's Certificate. This is usually paragraph 1, and it will be old hat to you folks here. It goes something like this: "This is to certify that Lots 1 to 63 both inclusive, Walkway Block 64 and the common area Block 65 and the 'reserves Blocks' 66 and 67 ...", and then it goes on, you know, "... and the streets named 'Frankly Scarlet' and 'I Don't Give A Damn' have been hereby laid out ..."

The key word in that paragraph is the word "reserves", where it says "... and the reserves Block 66 and 67 ...". The word "reserves" also has magic in it because it automatically lifts the mortgages when you put the word "reserves" in front of it. Of course, it only does that when the plan is registered and the mortgagee's consent is also filed at the same time. But it lifts the mortgage.

So in reviewing a proposed Owner's Certificate, I make darn certain that the 0.3 meter blocks going to the municipality, the areas for road widening going to the municipality, that even an area for parkland, are called Reserve Blocks.

Requirement for a Deed/Transfer

Please note: Even though the mortgage is lifted by this word "reserve", the municipality will still require a deed from the registered owner for those blocks, notwithstanding that the mortgage is lifted, title still has to transfer on a reserved block.

Caveat - "To the Municipality"

Now there is one caveat to this rule. It is this: "The mortgage is only lifted on a reserve if the reserve is being conveyed to that municipality." If the land is to be conveyed to MTO, the word "reserve" is ineffective. MTO will require both the discharge of the mortgage and a deed.

Dedication of Roads

Let me shift gears for a moment and go to the subject of "dedication of roads" on a registered plan. Now this is a different cat. The dedication of roads automatically lifts the mortgages and automatically conveys title to the municipality the moment the plan is registered and no deed is required.

"Sale of a Lot" Provision

Now I know what some of you are going say, "Starting with the Registry Act of 1868, there was a requirement that a sale or mortgage of a lot on a Registered Plan was required before the plan became in force". That is true, however, this provision was wiped out in an amendment to the Registry Act, effective as of January 1, 1980.

Summary

In summary therefore, where roads are dedicated as public highways on a Registered Plan, the title, free of all mortgages, automatically passes to the municipality upon registration of the Plan.

Older Plans - No Dedication

Now although I have not researched this in depth, I believe that your current format for the Owner's Certificate, which involves dedications, came in about June of 1964. Now you may say to me, Well, Mr. Russell, if that word "dedication" only became mandatory in 1964, how did municipalities get title to roads on Registered Plans prior to that date? Good Question!

All the Surveys Acts back to the 1800's (1849 being the first one) always treated roads as being dedicated and conveyed to the municipality automatically. So even though there wasn't a "dedication clause", the registration of the plan, and the sale of a lot or mortgage of a lot, automatically transferred those roads over to the municipality. As a rule, you won't find the word "dedication" prior to 1964.

"A municipality in their municipal road ditches does not have to accept storm water run-off from privately developed lands."

Storm Water From Developments

Although the handling of storm water in developments is basically an engineering matter, the surveying profession gets into the act, particularly on draft plans of subdivision, and on reference plans for severance applications. In smaller urban and rural areas, I find that surveyors often appear with their developer client before the municipal council or before the Land Division Committee where the handling of storm water is being questioned these days with greater frequency.

Let me make a couple of points on the subject. Every severance is a development and every development, no matter how small, will create additional quantities of storm water. In urban and rural areas, where severances have been granted, houses and garages have been built, parking areas cleared, driveways have been paved -- you know the story -- and the storm water conveniently drains into the municipal ditches.

Every developer I know, whether it be for a couple of severances or a large subdivision, has one major interest when it comes to storm water -- that is, to get it off his development where it is his problem and get into the municipal storm drainage system where it is the municipality's problem.

So what is my point? A municipality in their municipal road ditches does not have to accept storm water run-off from privately developed lands. In most cases, the municipal road ditches are the lower lands, so the water runs naturally into those ditches and, if they are not the lower lands, you can just bet your next lottery ticket that the developer is going to build the lot up so the water will run downhill into the municipal ditches.

It is the law of the Province of Ontario that the lower land owner does not have to accept the development storm water from higher lands.

On-Site Containment

We are reaching the stage where every development, no matter how small, will soon be the subject of a condition that the additional storm water be controlled, to some degree, on site. So more and more, in your surveys, topographic data dealing with elevations for storm water purposes is becoming more important and more of a requirement.

Many municipalities are now requiring that detention ponds be placed on site and that the flow from these detention ponds, which is usually going into the road ditches some place, is of no greater intensity -- and I'll add the words "poorer in quality" -- than it was on the pre-development days.

Exception to the Rule

Now there's one exception to this rule. The lower land owner has to accept the water from the higher lands, if it is in a creek or a defined stream. It doesn't matter if it is dry part of the year, but if it's in a creek or a defined stream the lower land owner must accept the water.

Water Quality and Quantity

However, the lower land owner downstream is a riparian owner with certain legal rights with respect to the quantity and quality of the water ("ripa" comes from the Latin word "bank" so a riparian owner is an "owner at the bank of the waterway"). If the "quantity" of water in a creek or stream

becomes excessive or causes damages or, if the "quality" of the water is radically changed, the lot owner can bring an action in the courts for damages for nuisance. This is happening with greater frequency.

The Scarborough Golf Club Case

A few years ago, we had the Scarborough Golf Course case where a creek meandering through the golf course was, to the golfers, picturesque. As development expanded with urbanization in all around the surrounding areas, more and more storm water was being put in the creek. Upstream, the municipality had even widened and deepened the creek to accommodate the increased storm water. After a heavy rain this picturesque meandering stream became a raging river which cut right through the golf course causing enormous damages.

In a court case that ensued, it was found that the upper riparian owner, being the municipality, had increased by artificial means the volume of water in the creek. So the golf club being the lower riparian owner, had the right to the natural flow of the water, and a right to the quality of the water. The municipality had to pay millions of dollars of damages to the golf course owners.

Now I've just flirted with this subject so that you can remind your clients of the importance of this topographical data in the early stages of your work. Wherever I go on developments around the province, be it Kenora or Timmins or anywhere in Southern Ontario, storm water management is a major, major problem. And you can expect municipal councillors to take a harder look at storm drainage problems than has been their custom in the past. Remind your clients: excessive storm water flows which floods storm sewers and open ditches and spills water onto roads isn't a situation that makes councillors happy.

The Great Crown Road Flip (1913)

Many of you will recall, in the early 1980s there was a great apartment flip in Southern Ontario in which some 12,000 apartments located in numerous buildings throughout Southern Ontario flipped in ownership overnight. It made the headlines in the Globe and Mail. You may also recall that there was an extensive police investigation and that some of the boys were rewarded with a trip up the river for their efforts.

That flip was chicken feed compared to the Great Crown Road Flip of the 1st day of July, 1913. Now, my friends, we're talking prime time. On that day, on the 1st day of July, 1913, all Crown Roads on original Crown Surveys were flipped -- were transferred to new owners -- to the municipalities in which they were situated. Think about that!

This involved thousands and thousands of miles of roads. We're talking about original Crown road allowances, which includes all shore road allowances, which includes quarter sessions roads which were quite prominent up to 1850. That, my friends, is some flip.

Now I don't have to consult the Oracle at Delphi to anticipate your next question. Why this great transfer of ownership? The genesis of the problem came to light in the early Municipal Acts -- in the 1850s, 1860s, 1870s. Sections of this act contained conflicting provisions which just about drove the courts crazy for the next 30 years.

> *"... resurrecting Jones v. the Township of Tuckersmith is like bringing Elvis Presley back from the dead."*

Municipal Act Problems

One section of the Municipal Act said that the freehold of original Crown road allowances is vested in the Crown. If you're vested with something, you control it, you own it, it's yours. But another section of the Municipal Act said that the municipality had jurisdiction over the roads.

Now what the devil is the distinction? When the cases came into the courts in the late 1800s, involving the closing or conveying of original road allowances, numerous theories were put forth to distinguish between these two things -- "vesting" and "jurisdiction". Frankly, none of them were satisfactory. Some cases went one way on the basis of jurisdiction. Others went the other way on the basis of vesting and freehold.

So, in the early 1900s, you would need a seeing-eye dog to work your way through the court cases. Finally, the legislature of Ontario said, "Enough is enough." And so they passed legislation (the 1st day of July, 1913, it's effective date) saying that the ownership of all original Crown road allowances were to be transferred to the municipalities in which they were situated. With this legislation, the law was settled. Roads were now "vested" in municipalities and municipalities had "jurisdiction" over them. Municipalities could then elect (as they can today) to leave them as unopened roads. They could construct roads on them, make them public roads, or they could close the roads and convey them to the adjacent owners.

Provincial Roads Not Included

Now, there is one exception to that flip. The province did not flip those roads which were going to be used for provincial highways.

Old Case Law

Now, may I suggest a caution to you. Should you have referred to you an old road case, inquire if the facts occurred prior to the 1st day of July, 1913. If it's a case with facts prior to that date, treat it with suspicion. I'm not saying the decision is wrong, but there's a lot of them that are on both sides of the fence prior to 1913.

Jones v. The Township of Tuckersmith

Perhaps the most famous of all these road court cases about that time was the case of Jones v. the Township of Tuckersmith. The case did not get to the Supreme Court of Canada until 1917, but it was based on facts that occurred prior to July the 1st, 1913.

Occasionally, we still see lawyers and writers quoting Jones v. the Township of Tuckersmith to support some theory on roads. After all, it's the Supreme Court of Canada. To this I say, resurrecting Jones v. the Township of Tuckersmith is like bringing Elvis Presley back from the dead. The case is dead and should be loaded into a hearse and driven to the cemetery at Boot Hill. I guess you know where I stand on that.

Possessory Title

It was in 1919, after the Great War, that municipalities got back down to business. They started to take stock of things, particularly these hundreds and hundreds of miles of unsurveyed roads whose precise location was unknown. What alarmed the municipalities was the possibility of a claim of possessory title -- squatters rights against the roads if you will.

All road allowances could be the subject of the squatters rights by adjacent owners, who built upon them, not

knowing probably where the lines were. Ten years would give that person possessory title against the municipality.

So municipality rushed to Queen's Park for help. They got it, in June of 1922. That's the ninth year of their ownership. That was the year, in 1922, when the provincial legislature amended the Statute of Limitations Act to say, in effect, that a person could not obtain prescriptive rights, squatters rights, against any municipal road allowance or street. This legal doctrine was cut off at the pass, and I might add, just in the nick of time. That's still the law to this day.

You'll recall that prior to the flip date, of July the 1st, 1913, these roads were owned by the Crown as Crown original road allowances. In order to get possessory title against the Crown, you needed 60 years continuous possession.

Example

Let me give you an example. Suppose a person had a built a house which encroached on original Crown road allowances in the year 1900. By the year 1913, when the flip took place, the person only had 13 years of possession against the Crown; a far cry from the 60 years required.

Now from the flip date in 1913 to the new legislation in 1922, the owner could only acquire nine years possession against the municipality. The result. This house on the road allowance can never get legal title.

Now that I've got that off my chest, there is one situation that you must look out for. Prior to the flip date of 1913, there were two types of public roads in municipalities. Two types. There were the Crown surveyed roads, which were original Crown road allowances, but secondly, there were those roads which were public roads owned by the municipality in their own right. These were roads and streets which had been laid on private surveys as opposed to Crown surveys. Or alternatively, maybe the township got it by virtue of a deed and constructed a road on it. There are any number of ways it could have acquired title. So these streets and roads already owned by the municipality prior to 1913 could be subject to the ten-year possessory title rule.

Now let me go back to our example of the house which was built in 1900, which encroached on the road allowance. Now there are two considerations. Was the road an original Crown road allowance in 1900? If so, then you couldn't get title because you had to have 60 years possessory title. But if the road was municipally owned and was not an original Crown road, then that's a different story, because they would have possessory title by 1910.

Summary

In summary, when an old road problem crosses your desk, the first objective is to determine its category. Was it a Crown road allowance flipped in 1913 or was it a municipal-owned road allowance owned by the municipality prior to 1913? You have to watch that one, it's a tricky point.

Leading Cases in Ontario

In Ontario, there is a leading case on this very point. It dealt with a home that was built on a municipal road allowance. At the trial, the facts established that the house was built in 1903, and the question then came up: Was it on an original Crown road allowance or was it on a road allowance already owned by the municipality? It was held that the municipality owned the road allowance. So the decision was in favour of the owner, he had 10 years possessory title: he owned that portion of the road allowance.

That case is the case of Household Realty Corporation v. Hilltop Homes and it's a Court of Appeal decision in 1982. There's a second case on a similar point very close to it, called DiCenzio Construction Limited v. Glasson and the City Hamilton, which was in 1978.

Road Closing By-laws

Let's take a run at this one. Periodically, we see an older registered plan with a notation on it, "Road closed by By-law 261 of the Township of Taxfree." When we do a search at the Land Registry office, the by-law is nowhere to be found. Pity! Pity! (That's beginning to sound like a Red Rose commercial.)

The Municipal Act states that no road closing by-law can take effect until a certified copy has been registered in the Registry Office. Cannot take effect. This is not a new law. It first saw the light in March 29th, 1873. In the majority of cases, the missing road closing by-law cannot be found usually because of a fire in the old municipal offices, or they just can't find the records. What do you do about it when you can't find these records?

That question reminds of the story of Mr. Crump, the former president of the Canadian Pacific Railways who was describing how to capture a porcupine at the cottage. He said, "You get one of those great big, round wash tub drums, like we used to have on the farm, and you sneak up on the porcupine and you clamp the drum over top of him." And then he said, "Now you have something to sit on while you figure out what the hell you're going to do next."

I can tell you what you're going to have to do next when you can't find the original road closing by-law and it isn't registered. It's going to have to be closed all over again, especially if the land is going into Land Titles. That's usually where you run into the problem.

Original Road Allowances Separating Two Municipalities

This is an interesting subject. Act I, Scene I. Picture, if you will, an original road allowance running north and south and separating a town on the left from the township on the right. All of you are familiar with a similar situation.

These concession roads are usually referred to as the townline. These road allowances have a very special significance. They are "joint" roads, which means they are jointly owned by the town on the left and by the township on the right.

Joint Ownership

Now, joint ownership means that each municipality has an undivided interest in the whole of the road -- something like the joint interest of husband and wife in a home. I mean, you can't say that she owns the front part and he owns the back part. They both have an undivided interest in the whole. The same goes for a townline road.

Now let me turn to an actual file on this subject a file which literally caused skid marks across my desk. Act I, Scene II. The township on the east, to the right, received an application from an adjacent owner to close half the townline road -- namely, 33 feet. Now I should explain that this was an unopened road allowance laid out in the original Crown survey; so it was part of the flip in 1913.

Geographically, it had high rocks, bush, swamp and all those things that go with it. The township on the east side approved the application to close half the road and the surveyor surveyed off the easterly 33 feet of the road, notices were posted, council held the prerequisite meeting, the by-law was passed, the 33 feet was conveyed to the adjacent owner, and so they lived happily ever after. Not so fast.

"... when you can't find the original road closing by-law and it isn't registered. It's going to have to be closed all over again ..."

This procedure, the deed and the road closing, are invalid. To be valid, each municipality would be required to pass a by-law to close their joint interest in the whole of the 66 foot road -- not half of it, the whole of it because it's a joint interest. Yes, both municipalities must go through parallel road closing procedures before they can convey the land to the adjacent owners.

Now, let me move to Act II, Scene I. When the town on the west learned of my opinion, they passed a by-law saying that they consented to the procedures being taken by the township on the east. In other words, they were issuing the Good Housekeeping Seal of Approval, "Oh, it's okay, guys, don't worry about it."

The road closing procedure is still invalid. The town on the west cannot deprive its ratepayers of the right to use an unopened 66 foot road without going through parallel road closing procedures in tandem with the township. I have feeling that I haven't heard the last shot on that subject.

You've been a very generous and courteous audience. My time is running short, so I say to you, "My mother thanks you, my father thanks you, my sister thanks you, and I thank you."