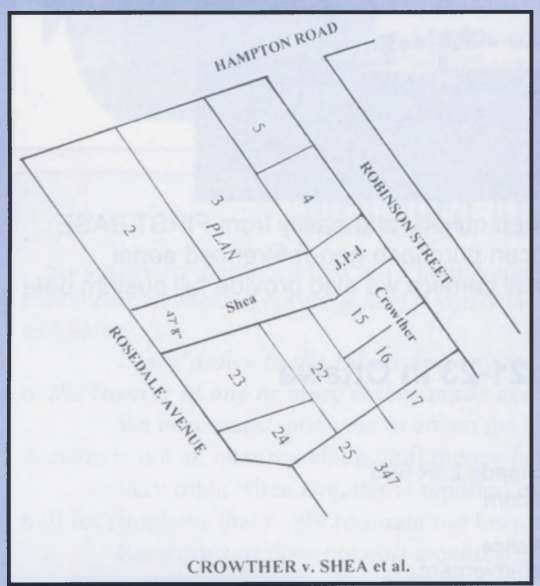
# GEOMATICS AND THE LAW
# Abandonment of Easement

By Alec McEwen – This article appeared in Geomatica, Vol. 60, No. 3, 2006 and is reprinted with permission. 

When an easement, such as a right-of-way, is created, whether expressly, by implication or by prescription, the failure of the dominant owner to exercise the right does not by itself constitute abandonment of the easement. It is for a person claiming such abandonment to prove that the dominant owner has ceased his or her intention to preserve the right to the easement. Nonetheless, the long-continued suspension of use of a right-of-way, in circumstances where other persons have reasonably assumed that the dominant owner no longer claims the right and who themselves have acquired ownership of the land subject to the right-of-way and have spent money to improve it, should not allow the dominant owner to resume the use of the easement in a manner that causes damage or injury to those persons. Nor is the dominant owner, upon resuming use of the right-of-way, entitled to any greater enjoyment of it than is necessary for ordinary purposes of access and passage.

In Crowther v. Shea et al. (2005), 283 N.B.R. (2d) 109, the Trial Division of the New Brunswick Court of Queen's Bench dealt with issues concerning the alleged abandonment of a right-of-way over a strip of land and the effect of its physical development upon an owner who claimed an easement over it.



CROWTHER v. SHEA et al.

In 1992, the applicants Rodney and Judith Crowther acquired Lots 15 and 16 in the Town of Rothesay, as shown on Plan 347 filed in the Kings County registry office on November 26, 1947. Their conveyance included the following words:

> … together with a right of way for all lawful purposes in common with all others lawfully entitled to use the same over the roads and streets as designated on that part of the plan which shows the complete layout of the lots thereon …

This right-of-way was first created in a 1947 deed from Mr. and Mrs. Dobbin, owners of the subdivided property, to a predecessor in title of the Crowthers.

The respondents each own part of a strip of land, 47' 8" in perpendicular width, adjoining the northern limit of Lots 15, 22 and 23 and extending from Robinson Street to Rosedale Avenue. The eastern portion of the strip belongs to J.P.J. Enterprises Ltd. and the western portion is owned by Patrick Joseph Shea and Sandra Jean Shea.

In 2004, the Town of Rothesay approved an application by Patrick D. Shea, son of the Shea respondents, to build a day-care centre on Lots 4 and 5, both of which are owned by J.P.J. Enterprises Ltd. Some of the 28 parking spaces approved by the Town are situated wholly or partly on the Shea and the J.P.J. portions of the 47" 8" strip, leaving a single lane for one-way traffic running throughout the length of the strip. The application included a proposal to rezone the land in question from residential to commercial use.

The Crowthers, who had unsuccessfully opposed Shea's application, brought an action to determine:

a) the meaning of the right-of-way set out in their deed;
b) whether or not they have a subsisting right-of-way over the disputed parcel; and
c) whether or not the respondents' proposed development interferes with or deprives them from their right-of-way.

The Crowthers also requested a permanent injunction to prevent the respondents from developing the disputed parcel or, in the alternative, an injunction prohibiting them from:

a) removing vegetation or soil from the disputed parcel;
b) paving it;
c) parking or allowing anyone to park on it; and
d) limiting traffic flow on it to one way.

The respondents submitted that the words in the Crowthers' deed do not convey a right-of-way over the 47' 8" strip. They argued that since those words give the Crowthers a right-of-way only over "roads and streets as designated on…the plan" and since the strip is not so designated, the words cannot be interpreted as granting a right-of-way over it. On Plan 347, the streets now known as Robinson Street and Rosedale Avenue are each designated solely by the word "Street," and what is now called Hampton Road is

shown as "Paved Highway." The 47' 8" strip is not designated either by name or number and there is nothing on Plan 347 to indicate its intended purpose.

To counter this argument, Mr. Crowther produced two deeds by which the Dobbins had separately conveyed Lots 22 and 23. Both deeds grant a right-of-way over a "reserved road" adjoining the northern limit of the lots, described respectively as having a width of 47' 8" and 50', though the 50' apparently refers to the slope distance along the western end of the strip. Despite the lack of precision in the Crowther deed, Mr. Justice Grant was clear as to the Dobbins' intention and held that one of the "roads and streets" referred to in that deed is the 47' 8" strip.

In reply to the respondents' argument that even if a right-of-way over the strip had been created it had since been abandoned, the judge stated that

> in order to prove abandonment of a right-of-way created by express grant, the party alleging abandonment must also prove that the owners of the dominant tenement, the Crowthers or their predecessors in title in this case, intended to abandon it. Mere non-use will not suffice.

To support their allegation of abandonment, the respondents submitted four affidavits from local residents each of whom declared that the strip had never been used as a road or right-of-way. One of them, the respondent Patrick J. Shea, also asserted that until he cleared some trees and brush from it in 2004, it was not possible to take a vehicle over the strip or even to walk along it without difficulty.

Notwithstanding this evidence, Mr. Justice Grant repeated his observation that non-use is insufficient to prove abandonment and held that the easement over the strip that the Dobbins deed created in 1947 remains in full force and effect and is now vested in the Crowthers.

The Crowthers then argued that the proposed development constituted a substantial interference with their right-of-way because the parking spaces would occupy more than half the width of the strip and leave only a narrow lane for one-way traffic. Mr. Justice Grant, citing well-established judicial authority, pointed out that the grant of a right-of-way is not exclusive to the grantee but is simply a right of reasonable use in common with others. Whether or not an obstruction to part of a right-of-way amounts to an interference with that reasonable use is a question of fact that must be determined from the circumstances. The judge found that the development proposed by the respondents would enhance and not interfere with the Crowthers' enjoyment of the right-of-way for its intended purposes. He therefore dismissed their application for injunctive relief.

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