Assumption of Roads
– A Second Look

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This article is a review of a recent Court Appeal decision in Scott vs. The Corporation of the City of North Bay (1978), December 16, 1977, All Canada Weekly Summaries 51. It provides a follow-up to an article, by the same author, published in the June 1977 issue of Municipal World, in which was summarized a lecture given by Mr. Russell at the annual convention of the Ontario Good Roads Association in February, 1977. That lecture reviewed the law with respect to dedication, assumption and the ownership of roads.

This is a 'good news' case for municipalities. Happily, the Ontario Court of Appeal recently reversed the decision of Scott vs. North Bay[1]. Before you say, "What's that all about," let me explain.

This case dealt with the problem of whether or not the City of North Bay had 'assumed' or 'not assumed' a road called Ross Drive, as a result of its employees carrying out certain minor acts of repair. Mr. Justice Hughes of the Supreme Court said "Yes", the road had been "assumed"; — and this decision gave us the willies. Then it was reviewed by three Judges in the Court of Appeal. They said, "No — no assumption." For this decision we would ask that you charge your glasses and stand for a toast to the Court!

Before I go into the details of how much work constitutes 'assumption', let me go back a step or two and lay the ground work. By doing this, I am hopeful that you can see the overall picture and how each case dealing with 'assumption' of roads fits into a certain pattern. Let me first refresh your memory of how title to roads is acquired.

ACQUIRING TITLE TO ROADS

A municipality can acquire title to a road in a number of ways. Some of these are as follows:

By statute — Section 399 of The Municial Act[2] specifically states that allowances for roads on original surveys are automatically public highways to which the municipality has title. But please note — at this stage we are still talking about title, not assumption.

Formal deed — This is a conveyance signed by the owner, in which he formally conveys and dedicates lands to the municipality. Again, the municipality gets title by the deed but this does not mean that they have 'assumed' the road.

Dedication on a registered plan — On a registered plan there is an owner's certificate in which the owner states that he dedicates the roads in the subdivision as public highways. This dedication automatically gives the municipality title to the roads when the plan is registered.[3] But again, this does not mean that the municipality has 'assumed' the road for maintenance purposes. Before assuming the road on a registered plan of subdivision, the municipality will want to make sure that the roads are brought up to municipal standards. This is why letters of credit[4] are lodged with the municipality at the time the subdivision agreement is signed, to guarantee that this work will be done.

THE TOUCHY POINT

The above examples of title are pretty straightforward. The problem of title gets more ticklish when the owner of the land and the municipality cannot agree as to who is the real owner of the road. In most cases, the owner of the land upon which the road is situated is trying to shift the burden of maintenance and responsibility on to the shoulders of the municipality.

THE MAGIC FORMULA

Having reviewed a number of cases on the subject, we develop this Alice in Wonderland[5] magic formula for determining ownership of roads. It goes like this:

DEDICATION + ACCEPTANCE
= OWNERSHIP
or
(assumption)

Now this formula must be satisfied in order to determine 'ownership'. If you go through the exercise with me, I will show you how the 'assumption' argument gets into the act.

CHANGES IN THE LAW

Fifty years ago it took a lot more formality to comply with this formula than it does now. In those days there had to be a 'formal dedication' i.e. the owner signing a formal deed to the municipality, and a 'formal acceptance' by the municipality, i.e. passage of a by-law accepting ownership.

However by the 1940's, the Courts started to take a more liberal approach to the subject. They said that 'dedication' by the owner need not necessarily be by a formal deed, but there could be an 'implied dedication' of the land to public use by the words or actions of the owner. Now we are starting to get into the grey area — what type of acts are necessary to constitute an 'implied dedication'?

To put it another way, if the owner of a road wrote a letter to your council, or attended a council meeting, and publicly stated that he would be prepared to give the road to the municipalty for public use, if they would take over the responsibility for its maintenance, then this would be sufficient 'dedication' by the owner. Therefore, the first part of the magic formula would be satisfied.

Next, what constitutes 'acceptance' by the municipality in the second step of the formula? A municipality can only act by resolution or by-law, and if they refuse to do either of these, how can the owner make the municipality 'accept' his dedication?

This is where the owner goes right for the jugular vein of the municipality. He states that the municipality has done maintenance work on the road, spent public funds on it, so therefore, they have indirectly 'accepted' the road by assuming it. In most cases, this is the normal route taken by the owner and indeed it was the route taken by the owners in Scott vs. North Bay.

HOW MUCH WORK — CONSTITUTES 'ASSUMPTION'

This is where you get down to the nitty-gritty. In Ontario we had two cases on the subject and both appeared to have close to identical facts, yet the judgements were exactly opposite. After reading both cases many times, I could not for the life of me figure out how the courts came to different conclusions. The case of Reed vs. The Town of Lincoln[6] was a decision we could live with, but when Scott vs. North Bay came along, it sent us all back to the drawing board!

THE GOOD CASE — REED VS. THE TOWN OF LINCOLN

This case, as I mentioned, was one which lawyers felt comfortable about. The facts are quite straightforward. A church had a summer camp in the area of the Niagara Escarpment called Cave Springs Camp. From the facts of the case. it appears the camp was serviced by a narrow road which went through the Reed's farm property. The former owner of the farm was the one who conveyed the camp land to the church.

The case does not tell us why, but it seems that the Town of Lincoln was bound, bent and determined to have the courts declare this right-of-way as a 'common public highway' and therefore

owned by the municipality. In this respect, it is an unusual case because most municipalities do not want ownership and assumption responsibilities. However, this is what makes life interesting and in this particular case, it appears that the Reeds took the position that this was a private road through their property and the town had no interest in it!

So the town rolled up their sleeves and marched into the Supreme Court. When the trial opened, the onus was on the town to prove the Alice in Wonderland magic formula.

DEDICATION + ACCEPTANCE
= OWNERSHIP
or
(assumption)

Right from the start the town was in trouble. When they tried to prove 'dedication' by the owner, they indeed had a sticky wicket. The Reeds replied — no way!

There was no formal deed from the Reeds to the municipality and certainly the Reeds had not by any acts or behaviour, given any indication to the town that they intended that the town should own the road. In fact, they told the town that they had no business on the road. When the owner of the land takes this position, the municipality has a pretty big hurdle to get over because the courts are reluctant to disposses an owner without proper expropriation procedures and the payment of reasonable compensation. In this case, the municipality was not able to prove 'dedication'.

The court then took a look at the 'acceptance' side of the formula. They considered if the work done on the road by the municipality was sufficient to constitute 'assumption', such that they had in fact 'accepted' the road. Actually the court need not have gone this far because once they decided there was no 'dedication', then there was no way the formula could be completed. However, they did go on to review the situation and we are glad that they did so, because the court gave us a detailed insight as to what we should look for in determining what constitutes and what does not constitute assumption.

The facts were that the town had installed a 12 foot culvert across the road at one time, and at irregular intervals, members of council had arranged for the town to do some minor grading as a goodwill gesture. Also, certain sections of the road had been snowplowed in the winter[7].

The court looked into the municipal records and found that no statute labor had been performed on the road, there was no resolution or by-law of council authorizing expenditures of public monies, and there was no evidence of vouchers, correspondence or records to show the expenditure of public money on the road. The court concluded that the minor acts of assistance were done for goodwill purposes and did not constitute 'assumption'.

CONCLUSION FROM THE REED VS. THE TOWN OF LINCOLN CASE

After this decision, we lawyers interpreted it to mean that minor acts of repair or grading by municipal employees, at irregular and infrequent intervals, and without any formal resolution or by-law of council, did not automatically saddle the municipality with the burden of having 'assumed' the road. However, there was another aspect of the case which seemed important, namely, the road into the camp was not one which was generally used by the public. I gather it had certain private aspects about it, and perhaps this was the additional point so to speak, which caused the decision to go in favour of the Reeds.

THE PROBLEM CASE — SCOTT VS. THE CITY OF NORTH BAY

This is the usual type of case[8] where the owner tries to burden the municipality with the responsibility for the road, and no doubt it will ring a familiar bell with a great number of municipalities. The facts are as follows. In 1948, Mr. Ross laid out a registered plan of subdivision on Trout Lake, and at the rear of the lakeshore lots a 66-foot road called Ross Drive was laid out. Ross Drive did not have direct access to the highway but it connected to another narrow road, which I gather was originally a hydro construction road, and this in turn led to the highway.

Now let me emphasize this point. The municipality had title to the road. I say this because it was a road on a registered plan. The road was dedicated on the plan, and lots were sold off accordingly. However, the point of the case was — did the municipality, by doing minor works of repair, 'assume' the road?

Now in the early days, these lots were mainly used for cottage purposes. Gradually they were converted from summer residences to permanent homes, and the original inconveniences of this unimproved road, which the cottagers were prepared to live with at the beginning, were wholly unacceptable to people living permanently in the area. No doubt about it, they wanted the municipality to 'assume' the road. The township refused (this was before annexation to the City of North Bay) so the ratepayers marched into court saying that the township had 'assumed' the road.

The evidence showed that over the period of several years, two loads of gravel had been put on Ross Drive as an emergency measure, and the township had removed a protruding rock, where I gather Ross Drive connected with the hydro road. It was shown that some of the local property owners were periodically members of council or friends of members of council, and arranged at irregular intervals for some minor grading, and the laying of some calcium chloride. Now the Supreme Court Judge who heard the case, concluded that these acts were sufficient acts of 'assumption' so the municipality was saddled with the responsibility of maintaining the road. No doubt about it, this decision had all of us scratching our heads.

REVERSAL OF DECISION — SCOTT VS. NORTH BAY

Now for the good news. The Court of Appeal followed the principles set down in the case of Reed vs. the Town of Lincoln and reversed the Scott case[9] They said that these acts of minor maintenance were trivial, infrequent and not sufficient to show that the township had intended to 'assume' the road.

With this decision we are certainly back on track. But the next question is how far can a municipality go in its goodwill gestures by doing minor acts of repair and maintenance, without stepping over the line which indicates they 'assumed' the road. Only time will tell!

CONCLUSIONS — FOR BOTH SIDES OF THE FENCE

If acting for the municipality — In this situation, I would recommend that you not rely on these two cases by thinking you can do minor acts of maintenance and repair without being burdened with the obligations of 'assumption'. It is true that these cases are a comfort to municipalities, but I certainly would not lean on them. It would still be my recommendation that the road superintendent be informed that he should not even spit on the road to keep the dust down. To put it another way, I would not touch the road with a ten foot pole — having a 20 foot extension!

If acting for the ratepayers, you can have a lot of fun and games. Attend at the council meeting and urge council to do some courtesy maintenance on your road as a goodwill gesture to the ratepayers. If there is an election coming up in the fall, I am sure some of the local councillors will be interested in preserving your goodwill right up to the ballot box. Also, you can remind council that the courts have said that such courtesy accommodation does not saddle them with the responsibility of assumption.

Now if the municipality does do

some goodwill work, then by all means get out your polaroid camera. Take a picture of their grader doing the grading, and if a culvert is being repaired, or if municipal trucks are on the scene for other purposes, just be sure that when you take the picture, it includes the door of the truck which states the name of the municipality. Now the next year, again request council to do some courtesy work. If you get it done two years in a row you are getting close to the point where you can step over the Town of Lincoln case and the North Bay case and saddle the municipality with the responsibility for assumption.

One final word to municipalities and ratepayers — do not assume too much about assumption!

1. Scott et al vs. City of North Bay (1976) 12 O.R. 730 (first decision).
2. The Municipal Act, R.S.O. 1970, chapter 284, section 399 which provides "Except in so far as they have been stopped up according to law, all allowances for roads made by the Crown surveyors, all highways laid out or established under the authority of any statute, all roads on which public money has been expended for opening them or on which statute labour has been usually performed, all roads passing through Indian lands, all roads dedicated by the owner of the land to public use, and all alternations and deviations of and all bridges over any such allowance for road, highway or road, are common and public highways."
3. Subject to a couple of minor qualifications, i.e. there must be a conveyance or a mortgage of one of the lots on the plan to make everything complete. See The Registry Act, R.S.O. 1970, chapter 409, section 78 (10). See also The Surveys Act, R.S.O. 1970, chapter 453, section 57 (1).
4. For a discussion on this subject see the article "Letters of credit in lieu of performance bonds," Municipal World, August 1975, page 207.
5. I have been asked why I referred to this as the "Alice in Wonderland" magic formula. You will recall in that story, Alice stepped through the looking glass and found everything reversed and upside down. After reading a number of the decisions in this area of the law, including the first decision in the case of Scott vs. City of North Bay, I shared Alice's feeling that everything was all mixed up.
6. Reed vs. Town of Lincoln (Court of Appeal) (1974) 6 O.R. 391 (decision October 21, 1974).
7. A number of my municipal colleagues have been of the opinion that an act of snowplowing of an unopened road allowance or private road, or private lane was not an act of "assumption". I believe it could well be considered as such. The section 429 of the Municipal Act, R.S.O. 1970, chapter 284, says that no liability attaches to the municipality for snowploughing, but it does not say that this could not be considered as an act of assumption. The section reads as follows: "Where a municipal corporation clears or attempts to clear snow from an unopened road allowance, private road or private lane by means of a snow plough or otherwise, no liability attaches to the corporation in so doing."
8. Scott et al vs. City or North Bay (1976) 12 O.R. 730 (first decision).
9. Scott et al vs. The Corporation of the City of North Bay (Court of Appeal decision December 16, 1977) (1978) All-Canada Weekly Summaries 51 (as yet the case has not been reported in the Ontario reports.)