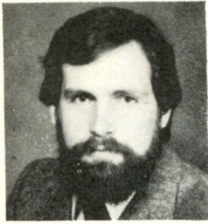

NAVIGABILITY — THE COLEMAN DECISION

BY RONALD J. STEWART, B.Sc., O.L.S.

This paper will address certain issues relating to navigability posed to the surveyor as a result of the recently reported case ***Coleman v. Attorney-General for Ontario et al****, (1983) 143 D.L.R. (3d) 608; 27 R.P.R. 107. The issues are not new; neither is the law that is reported in this case. The judgement merely emphasizes the need to further study the principles. This paper will probably ask more questions than it answers.*

It appears that the issues are gaining importance as land values and recreational activity increase. As a result, surveyors will be forced to acknowledge their increasing responsibilities in reporting to their clients.

INTRODUCTION

PROFESSOR A. M. Sinclair, in his book **Introduction to Real Property Law**, states in his introduction: *"Nowhere else in what we call the common law, is it true to say with Holmes that 'a page of history is worth a volume of logic' as with the law of real property."*[1]

This is quite true with the law of boundaries in Ontario, and surveyors would do well to study it thoroughly. Land ownership in English common law jurisdictions is a complex system of legal principles which have evolved over centuries of time. To try to develop an understanding of this system without reference to history would be a formidable task indeed. Historical research more often than not provides the reasons and logic basic to comprehending concepts such as "tenure" and "estates in land". It is a necessary foundation for a progressive study of boundary law in Ontario (or any other common law jurisdiction).

I think it is essential to first review some of the principles of land ownership and boundaries in Ontario which may help in understanding later discussion.

As most surveyors are aware, reference must be had to case law for the important principles regarding tenures, estates and boundaries. Notwithstanding the **Beds of Navigable Waters Act**, R.S.O. 1980, c.40, this is true concerning navigability determinations also. To my knowledge, navigability has never been defined by statute in any common law jurisidiction.

Land ownership goes beyond that of mere possession; when ownership of land is held in fee simple with absolute title, that owner has the highest form of land tenure or holding available in Ontario. "Title" is the right to possess and enjoy the property. **The Registry Act**, R.S.O. 1980, c.445, a common law registration system, recognizes by implication the effect of the Doctrine of Relativity of Title, an aspect which holds some significance to our later discussion. Under this principle an owner has title which is considered relative as between other potential claimants.

One important point to keep in mind is that English law has been able to distinguish "land ownership" from the "land" itself. "Ownership" in common law jurisdictions means the bundle of rights which compose what is labelled an "estate" in land. The critical point is to see "land ownership" as an abstract as opposed to the tangible "land" itself which can be laid out by technically following title records of registration.

At law boundaries are created by title severances[2], whether documentary or otherwise. The role of the surveyor, then, is to determine where these lines are, and not necessarily where the title documents (or co-ordinate schedules attached to title documents) would purport to put them. When stakes are planted and plans drawn, there must have been completed a thorough search for evidence, both physical and documentary, and consideration given to all potential interests. The problems become quite complex when situations are encountered where those potential interests depend upon decisions which involve authority possibly beyond the scope of the surveyor.

The Association of Ontario Land Surveyors has been given a public trust as the "keepers" of the land boundaries in Ontario. It must be remembered, however, that surveyors do not make boundaries; owners make boundaries. The surveyor must retrace existing title limits and not presume to be establishing line to which existing titles are supposedly bound to refer. In other words, the surveyor does not go out to "make" a boundary, but to "find" a boundary. It is often said that the surveyor's responsibility is to define or determine "extent of title". Sometimes the line of division between "extent" and "quality" is not clear; the determination of navigability is one of those situations. As boundary experts, surveyors are expected, in preparing a survey, to define extent of title after having regard for what was done.

As I see it, there are five possible sets of circumstances that must be examined in the search of title to the beds of watercourses, three of which require determination of navigability for various purposes. It is necessary to find out what was done when the land was granted because navigability may not be an issue in determining land ownership.

First, if the patent from the Crown includes an express grant, then (a) if the stream is navigable, the fee is vested in the grantee but the public has a right to use for highway purposes, or (b) if the stream is non-navigable, then the fee is vested in the grantee and there is no highway.

Second, if the "Waters" or "Bed" were specifically reserved in the grant from the Crown, (a) if the stream is navigable, then it is a public highway owned by the Crown; or (b) if the stream is non-navigable, then it is still public property but probably not a highway.

Third, section 11 of the **Surveys Act**, R.S.O. 1980, c.493 is a special statutory provision which applies in certain cases where the "Bed" was not specifically reserved in the Crown grant. This application is not dependent on navigability.

Fourth, if there is no mention of the "Waters" or "Bed" in the patent from the Crown, then (a) if the stream is navigable, the **Beds of Navigable Waters Act** applies, ownership remains with the Crown and the public is free to use the stream as a highway; or (b) if the stream is non-navigable, the "ad medium filum" presumption applies, conferring title to the riparian owners. Of course, there is no highway in this case.

Fifth, if "navigable waters" only were specifically reserved, then (a) if the stream is navigable, it is a public highway with public ownership; or (b) if it is non-navigable, "ad medium filum" applies with, of course, no highway.

For purposes of land ownership, navigability need only be addressed in the fourth and fifth conditions outlined above.

It is important therefore to determine first of all what was patented and how. Only then can navigability be considered as affecting interpretation of the patent.

Where property is bounded by a stream or creek, or if the stream or creek passes through the property, determination of navigability may therefore dictate ownership of the bed. As a result, the location of the boundary or extent of title is dependant on navigability to the extent outlined above. But navigability may be interpreted to be an inherent aspect of "quality". In essence, a determination of "quality" may be necessary before extent can be defined. The surveyor then may have to resolve title before his boundary survey can be completed. Keep this in mind - it will be discussed again later.

REVIEW OF CASE

It often happens that when a judge is presented a case in which he takes particular interest, he ends up writing a "textbook" or treatise on the subject of his decision. The judgement here reviewed is one of those and fills a long needed void. The case is an instructive one; Mr. Justice Henry has presented a comprehensive analysis of both Canadian and American law. I am informed also that Counsel for the Attorney-General asked the court specifically for a modern definition of navigability.

The Colemans own a parcel of land through which flows Bronte Creek (also known as Twelve Mile Creek). They made application for the court "to determine what interest they have in the bed of this stream which bisects their lands". If the stream could be declared as Crown Land, the Colemans would have the opportunity to transfer part of their lands without consent pursuant to section 29 of the **Planning Act**, R.S.O. 1980, c.379 (i.e. the stream bisects the property). The patent from the Crown specifically reserved "all navigable waters" when the land was originally granted.

Mr. Justice Henry correctly stated that the critical issue in deciding ownership is the determination of whether or not the stream was navigable in law at the date of the Crown patent. It was then that title to the bed of the stream either passed with the patent or remained with the Crown. It is a small point, but it should be mentioned that this specific reservation in the grant from the Crown was the operative which excluded the bed if the stream was navigable; the **Beds of Navigable Waters Act**, R.S.O. 1980, c.40 had only a "retrospective effect" but did not, in fact apply.

Mr. Justice Henry states that navigability "is a question of law and also fact"[3], and "It is an essential attribute of a waterway that is navigable in law that the public may use it as of right for purposes of passage as a public waterway or highway, even if the title to the bed is in the riparian owner or owners"[4] This is an early indication of the direction of his logic. This becomes more clear in the analysis of the "obiter dicta".

These are the "leading jurisprudence" principles in determining navigability according to Mr. Justice Henry:

1. "A stream to be navigable in law, must be navigable in fact";
2. "In the context of the Canadian economy . . . 'navigable' also means 'floatable' in the sense that the river or stream is used or is capable of use to float logs, log-rafts and booms";
3. "A river or stream may be navigable over part of its course and not navigable over other parts";
4. "To be navigable in law a river or stream need not in fact be used for navigation so long as realistically it is capable of being so used";
5. "To be navigable in law, according to the Quebec decisions, the river or stream must be capable of navigation in furtherance of trade and commerce; the test according to the law of Quebec is thus navigability for commercial purposes . . . So far as the law of Ontario is concerned, the commercial test was alluded to in **Gordon v. Hall**, supra, per McRuer C.J.G.C. obiter, but as I shall indicate, I do not consider the 'commercial' test an element of the law of Ontario";[5]
6. "The underlying concept of navigability in law is that the river or stream is a public aqueous highway used or capable of use by the public";
7. "Navigation need not be continuous but may fluctuate seasonally";
8. "Interruptions to navigation such as rapids on an otherwise navigable stream which may, by improvements such as canals be readily circumvented, do not render the river or stream non-navigable in law at those points";
9. "It would seem that a stream not navigable in its natural state may become so as a result of artificial improvements."[6]

Bronte Creek, in this section, varies in depth from one to five feet, is fast-moving, contains rapids, falls, boulders and varies from 26 to 60 feet wide. Apparently, the Creek at one time was used to float logs to mills at certain locations lying upstream from the Coleman property. This logging activity was upstream from the Coleman lands where presumably the river is smaller.

It appears to me that Mr. Justice Henry has very cleverly written his judgement. In preparing this rather lengthy discourse, he has made it difficult to determine exactly where the "ratio decidendi" ends and the "obiter dicta" begins. In this way he has been able to expound his opinions and conjectures as regards the "public character" of watercourses in Ontario so that they appear to be critical to the decision and therefore new law. In fact, at least in my opinion, the "ratio" can be found in the following paragraph:

"I conclude that at the time of the Crown grant of the Colemans' lands Bronte Creek, at that site, was commercially floatable; it is probable that it was also capable of seasonally moving farm produce and articles of commerce in shallow boats, scows or rafts, had the developing road system not provided a better alternative. The stream was therefore navigable in law and the title to its bed did not pass to the grantee from the Crown."[7]

But he doesn't stop there. He then suggests a more modern test based on recreational uses. The "obiter" contains his commentary on American law including the following noteworthy quotation from **Ne-Bo-Shone Ass'n. Inc. v. Hogarth**, (1934), 7 F.Supp. 885, aff'd. (1936), 81 F (2d) 70. District Judge Raymond:

"Much of the difficulty in analysis of the various cases and in application of the principles announced arises from the failure in some instances to distinguish between the so-called "test" and the object of the test. The human mind is prone to confuse definitions with the thing defined, symptoms with the disease, theology with religion, and descriptions with the thing described ... the public character of the river was in process of time lost sight, ... The description of a public navigable river was substituted in the place of the thing intended to be described. ... The distinction sought by the variously stated tests is that between public and private waters."[8].

Surveyors might well consider these statements in light of description interpretation; but that is not an issue in this paper.)

Mr. Justice Henry repeatedly refers to the purpose of all tests; i.e. "to distinguish between public and private waters". In other words, the "commercial test" is not to be taken too restrictively in light of modern uses of Ontario waterways. The actual issue is this: Is the watercourse navigable in fact? A river or stream is not

necessarily non-navigable if it is not used commercially; the commercial test is "simply evidence that the watercourse was navigable in fact; it was not an essential condition of navigability in law."[9]

He equates the Ontario test of navigability in law with the "public character" of the watercourse. "Public character", however, still remains to be defined in real terms. Mr. Justice Henry infers that this definition may include recreational uses such as canoeing, rafting, and also winter uses such as snowmobiling and cross-country skiing.

But the important point is this: as he makes all these statements, obiter, he finishes with the words "I conclude therefore . . .". It is the use of these words which make the "obiter" appear to be "ratio". Of course, it is possible that there is more than one "ratio" in the decision, but the vagueness of what I call "obiter" in my opinion precludes the possibility of precedent-setting law.

As we have already found, Mr. Justice Henry decided that the Colemans had no interest in the bed of Bronte Creek and that it in fact was owned by the Crown. It should be emphasized that Mr. Justice Henry clearly stated that the "decision is confined to that portion of the stream that abuts and bisects the Colemans' lands".[10] Of course this is entirely predictable.

It would be interesting to speculate as to what Mr. Justice Henry would have said had there been a contest; but this was only a referral to the Courts for a particular order. The adversary system was not in effect and while it is acknowledged that Mr. Justice Henry was careful to obtain more evidence than counsel originally offered, it seems to me that the decision was one that made all parties happy. Without questioning this particular decision, the significance of the case as precedent holds some doubt, especially the "new law" aspect. I rather expect the case to be distinguished in future, not because of any error in law, but probably because there was no trial of an issue by parties adverse in interest.

THE MINISTRY OF NATURAL RESOURCES POSITION

In the recent past, surveyors have found that when a query was put to the Ministry of Natural Resources regarding the navigability of a particular stream, the answer was consistent: the river or stream was considered navigable for "administrative purposes". It seems from this answer that the Ministry was not sure of the facts, but would be favourable to any interpretation which would give it title to the bed. Since navigability has never been defined by statute, the Ministry's position was therefore understandable, in that previous case law would limit considerably the public ownership of Ontario watercourses, a result contrary to the Ministry's interests.

However, with this new case as "precedent" the Ministry has changed that previous stand (which has been labelled "unfortunate") and now insists that all watercourses falling within the capabilities outlined in Mr. Justice Henry's "obiter" are public lands (except, I presume, where an express grant of the bed exists). This is expressed in a directive bulletin to Regional Directors in which the following statements appear:

"The Judgement clearly establishes that navigability is both a question of law and fact. Navigability in fact is demonstrated if a waterway is used or capable of use by the public as an aqueous highway for activities such as boating, canoeing, the use of paddle-boats, inflatable rafts, kayaks, white-water canoeing and rafting, as well as, in winter, cross-country skiing, snowshoeing and snowmobiling. A waterway which is navigable in fact, for purposes of transportation or public travel, is navigable in law."[11]

One would question the validity of these statements in light of their reliance on "obiter" and especially when the concluding statement by Mr. Justice Henry restricts the decision to that portion of Bronte Creek abutting the Coleman lands. The Ministry is but one party with possible interests, but a stand has been taken. The question now is "How do we as surveyors deal with the situation?"

THE FORENSIC QUESTION

As we have already discussed, the position of the boundary is inherently dependent on a determination of navigability. Again, this may be a "quality" determination and may be beyond the "extent" aspect of the surveyor's quandary. The problem is this: the surveyor must prepare a plan and advise the client regarding the extent of his ownership. Before he can do this he must have a decision on navigability. Is there a practical solution?

It would be presumptuous to give a "procedure" for surveyors to follow in determining boundaries in such cases; surveyors must decide their own procedures based on the professionalism of their practise, and then accept the ensuing responsibilities. I will, however, give the three options which I feel are available.

If the surveyor decides to make that decision himself (which would be a pragmatic approach in a logistic sense) then he must consider the scope of his jurisdiction. It may be that a surveyor, in his quasi-judicial capacity, has legal authority to make such a decision, which can be subsequently challenged in court. The surveyor makes such decisions often in his everyday function, but we may be discussing "title" in this case, not just "extent". In making a decision one way or another, he may be incurring liability responsibilities in a legal sense. It may be interesting to pursue the implications of this, especially if the surveyor is deemed to be giving legal opinion - which in fact is the case. It was suggested that perhaps a riparian proprietor, or the surveyor as his agent, could put forward a position and wait for a challenge, relying on the Doctrine of Notice. In other words, can navigability (or non-navigability) be presumed by a riparian proprietor and subsequent actions construed as "constructive notice" or "actual notice" (e.g. transfer by referral to a Reference Plan). This is not a question addressed by the Coleman case, but American law seems to indicate that public waters do not lose their public character due to claims or assertions of private ownership. Therefore, no reliance should be put on what was done by surveyors before. Each case should, at least, be pursued on its own merits.

It has been suggested by legal counsel that another option would be for the surveyor to obtain legal opinion regarding ownership of the bed before making the determination of extent. This, at first glance, appears to be a safe approach and would indicate a respect for the jurisdiction of the legal profession. This concept may not be expedient if there is any demand for early reporting, which is often the case when transfer or mortgaging is involved. It also may appear to be a professional approach, but in fact is an attempt to delegate responsibilities to others and is a demise to the surveyor's image. One questions, however, if even the legal profession has jurisdiction in this area. Further, the surveyor is ultimately responsible for that which is on the plan that he signs. One might consider including some sort of caveat in the written report which accompanies the plan.

A third option (being relatively abstract in its approach) would be to advise the client regarding extent of title to the limit of dry land, and add that he may have a "common law" interest in the bed of the watercourse. Quoting from **MacLaren v. Attorney-General for Quebec** (1914) A.C. 258, per Lord Moulton:

". . . it is settled law that no description in words or by plan or by estimation of area is sufficient to rebut the presumption that land abutting on a highway or stream carries with it the land ad medium filum merely because the verbal or graphic description describes only the land that abuts on the highway or stream without indicating in any way that it includes land underneath that highway or stream."

The Doctrine of Relativity of Title is relevant here. A riparian owner can prima facie or by presumption claim a common law title to the bed of the adjoining watercourse, but his title is relative to any claim that the Province may have by statute, conditional reservation, or otherwise.

It seems obvious that only a court can make a final determination of whether or not a watercouse is navigable. The courts seem consistent in restricting their decisions to the "locus in quo" rather than making general rulings. The surveyor then, perhaps not having jurisdiction to determine title to the bed, may not be able to tell the riparian owner whether he owns the bed or not, and therefore may not be able to define a precise boundary. To my understanding, this is an anomaly in the land survey law in Ontario; another problem testing our purview in our attempts to reconcile land ownership with a precise fixed boundary survey system. One interesting question worthy of further study is this: is the watercourse to be considered a general boundary, the precise location of which is uncertain and may only be fixed by judicial decision?

I do not believe it is a problem unique to Ontario; other common law jurisdictions recognize and live with abstract concepts such as general boundaries. Perhaps we need to recognize some of those principles in Ontario also. The mathematically trained mind finds it difficult to accept the abstract as easily as the legal profession does; this is one challenge that surveyors must address in order to protect the integrity of the profession.

In conclusion, surveyors must realize their band in the spectrum of property law. Our mathematical systems must work within the law; we must not presume that the law is subject to our systems.

QUESTIONS AND ANSWERS ON NAVIGABILITY

If no specific reservation for the bed of the watercourse(s) is made in the original patent, is navigability still determined as of the time of the original patent?

Yes. It was then that title either passed or did not pass to the patentee. The Beds of Navigable Waters Act only legislates interpretation of the patents; it was not statutory expropriation.

At the time of the original patent, a given watercourse is not navigable because of a lack of water, condition of the river (sinuosity), or lack of use. If the river later becomes navigable through actual use, or perhaps upstream improvements, does title revert to the Crown?

No. There is no statutory or common law authority for transfer of fee simple due to various changes in the navigability of a watercourse. The important issue is whether the stream is navigable at the time of patent.

Is it possible that a Reference Plan, deposited on title and used as a description for a severance of land, which bounds the severance along the edge of a potentially navigable body of water, can be construed as sufficiently rebutting the "ad medium filum" presumption?

No. The deed must have a specific reservation of the bed of the watercourse (see the quote from the MacLaren case in the paper).

When a patent states "together with all the Woods and Waters", does the title to the "bed" of the river or creek pass to the patentee?

I would say yes. The "water" itself cannot be granted by the Crown because of its public nature. Therefore, "Waters" must refer to the land covered by water.

How does this judgement affect the "navigability status" of watercourses in Ontario? Does the fact of this particular judgement imply that all similar (or perhaps even smaller) watercourses are navigable in law? How far up river can this be applied?

As the paper suggests, it is my opinion that this decision should not be binding on future judgement. The fact that there was no trial of an issue supports this opinion. Further, I believe that there is such a thing in Ontario as a non-navigable watercourse, although it is certainly not clear where the dividing line is between "navigable" and "non-navigable" waters.

Does the new policy of the Ministry of Natural Resources (stating that all beds of water meeting the criteria set in the Coleman case are publicly owned) comprise "Public Notice"? How do the Land Titles Act and the Registry Act interpret "Notice"?

It seems that one of the requirements of "Public Notice" is that the information be published in a newspaper or journal of general circulation. The fact of internal Ministry policy alone would not be sufficient. While the Land Titles Act and the Registry Act do specifically deal with "Actual Notice" as applied to registered documents, I believe that one would be hard put to deny the effect of a deposited Reference Plan. Although not technically registered, the plans are noted in the Abstracts and originals are filed in the Registry Offices. I suspect that this may be construed as "Constructive Notice". ●

1 Sinclair, A. M., 1969, Introduction to Real Property Law, Butterworths, p 1
2 Lambden, D. W., 1982, Materials for Introduction to Survey Law, University of Toronto, Erindale
3 Coleman et al v. Attorney-General for Ontario et al, 27 R.P.R. 107 at p 110
4 Ibid. p 111
5 Gordon v. Hall, (1958) O.W.N. 417, 16 D.L.R. (2d) 379 (H.C.)
6 Ibid. pp 111,112
7 Ibid. p 113
8 Ibid. p 114
9 Ibid. p 116
10 Ibid. p 120
11 Ministry of Natural Resources, Land Management Branch, Public Lands Section, Policy No. LM 703 02, 24 05 1983

OUR LEGISLATORS AT WORK

BUGS HONOURED

Bill 159 **1983**

Insect Emblems Act, 1983

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. The insect popularly known as the black fly is adopted as and shall be deemed to be the insect emblem of Northern Ontario	Insect emblem of Northern Ontario
2. The insect popularly known as the mosquito is adopted as and shall be deemed to be the insect emblem of Southern Ontario	Insect emblem of Southern Ontario
3. This Act comes into force on the day it receives Royal Assent	Commencement
4. The short title of this Act is the *Insect Emblems Act, 1983*	Short title