

Follow The Yellow Brick Road

BY R.CRAIG STEWART, O.L.S.

I INTRODUCTION

Public highways are of special interest to land surveyors. On almost a daily basis in the field, a land surveyor will find himself(herself) determining the boundary of a public road or highway. While boundary retracement is an acknowledged speciality, he will often find himself crossing that grey area into the realm of title determination and attempting to decide if a road is, in fact, a **public** highway. Understanding some of the legal principles behind the birth and death of public highways should assist in this task.

II WHAT IS IT? WHO OWNS IT? HOW DO YOU KILL IT?

Definition of a Public Highway

The *Municipal Act*¹ defines a public highway (hereinafter referred to as a "road"):

"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 alterations and deviations of and all bridges over any such allowance for road, highway or road, are common and public highways."

Examples of roads included in this definition are:

1. All allowances for roads made by the Crown surveyors
 - road allowances established during the original township surveys and shown on the original township plans;
 - road allowances established during the survey of Crown subdivisions, either within or abutting the subdivision;
 - road allowances established during the survey of individual Crown summer resort locations. These roads are usually shown abutting a body of water adjacent to the location;

- shoreline road allowances established during the survey of mining locations.²

With regard to these road allowances, note that the *Surveys Act*³ states:

"...every road allowance, highway, street, lane, walk and common shown on the original plan shall, unless otherwise shown thereon, be deemed to be a public road, highway, street, lane, walk and common respectively."

These roads are regarded as being dedicated by the Crown to the public. The acceptance of this dedication by the public is deemed to have been made by virtue of the *Municipal Act*⁴. The road allowance once laid out is held in trust by the municipality as owners for all persons. Of course, road allowances situate in unincorporated townships remain under the jurisdiction of the Crown in the right of the Ministry of Natural Resources.

It is important to distinguish between road allowances laid out by a Crown surveyor abutting a body of water and shoreline reservations⁵ in Crown patents for land in areas where no road allowances were laid out by a Crown surveyor (and consequently not shown on the original township plan). If identified as a road, these reservations are:

- i) part of the underlying township lot,
- ii) excepted from the Crown grant, and
- iii) roads dedicated by the Crown for public use.

However, proof of user by the public cannot be presumed, and even in incorporated municipalities such reservations remain vested in the Crown until a by-law is passed assuming the road. Provided that no such assumption has taken place, the Crown may issue letters patent for the reservation to the abutting land owner or may, in certain cases, make an order releasing any land already patented from the reservation.⁶

It should also be noted that, in recent years, Crown subdivisions often designated strips of land along the shores of lakes or rivers as "Blocks" or "Reserves". These are not road al-

lowances and do not fall within the definition of a public highway under the *Municipal Act*. They remain as Crown land, even in incorporated municipalities, and can only be conveyed by a Crown patent.

2. All highways laid out or established under the authority of any statute
 - Quarter Session highways;⁷
 - toll roads and bridges;⁸
 - colonization roads;⁹
 - roads for the development of north and northwest Ontario;¹⁰
 - roads established by expropriation;
 - highways established and laid out by by-laws of incorporated municipalities.¹¹

The Ministry of Transportation has various procedures set out in the *Public Transportation and Highway Improvement Act*¹² for acquiring and disposing of land, including public highways. These procedures are not dealt with here, but are contained in the Ministry of Transportation publication "Surveys and Plans Manual".

3. Roads on which public money has been expended for opening them or on which statute labour has been usually performed
 - roads constructed under the *Statute Labour Act*;¹³
 - dedicated roads maintained by expenditure of public funds. (In other words, proof of acceptance of the dedication). Also see example #5.

The *Statute Labour Act* is applicable to incorporated as well as unincorporated townships, unless a by-law to abolish statute labour has been passed by the council of the township. Where statute labour has not been abolished, statute labour is to be performed by every male inhabitant as defined in the Act, when required by the pathmaster or other officer appointed for that purpose.

It should be noted that the expenditure of money or the performance of statute labour on a road, unless dedicated, is not sufficient in itself to open a road and thereby create a public highway. At best, if done over a long period of time, it may be evidence of dedication

by an owner of a road to the public and acceptance by user of the public.¹⁴ A highway established over private property against the will of the owner must be by expropriation with compensation; it cannot be accomplished, without compensation, by merely doing statute labour or expending public money on it.¹⁵

4. All roads passing through Indian lands

Except in so far as they have been stopped up according to law, all roads passing through Indian lands which were constructed by road companies and all other roads passing through Indian lands on which statute labour was usually performed by Indians prior to April 12, 1876¹⁶ are public highways. The *Indian Act*¹⁷ provides for methods of creating public highways through a reserve, with the consent of the federal government.

5. All roads dedicated by the owner of the land to public use

- roads, road widenings, lanes, and walkways shown on a registered plan of subdivision;
- any other road dedicated by the owner (including the Crown).

The *Surveys Act*¹⁸ provides:

"Subject to the Land Titles Act or the Registry Act as to the amendment of plans, every road allowance, highway, street, lane, walk and common shown on a plan of subdivision shall be deemed to be a public road, highway, street, lane, walk and common respectively."

Note that the word "lanes" was first added to the section on June 4, 1920,¹⁹ and thereafter they become public, the 1920 amendment not operating retroactively²⁰, although there is conflicting case law on this point.²¹

Once a plan is registered, the fee in the highways is vested in the appropriate municipality, however case law seems to indicate that roads laid out by the plan do not in fact become public highways until there has been evidence of public acceptance, either by user or by assumption by the municipality.²²

The concepts of "dedication" and the other half of the coin "acceptance", have been the subject of many court cases. A few of the decisions are as follows:

- Dedication of land to the public is a

question of fact. There must always be an acceptance by the public.²³ This acceptance may be shown by by-law of the municipality or by use of the public.²⁴

- Dedication to the public and acceptance by the public may be inferred from the use of the road continuously over a period of a great many years, especially if no objections were ever raised by the owner of the lands so used.²⁵
- The burden of proof that an owner's land is subject to a right of highway, rests on the municipal corporation which asserts such right, and consequently, two conditions must be satisfied: i) there must be, on the part of the owner, the actual intention to dedicate; and ii) it must appear that the intention was carried out by the way being thrown open to the public and that the way has been accepted by the public.²⁶
- Dedication of a road may be absolute or limited, (i.e. a person may dedicate certain lands to the public as a foot-path only, but he cannot dedicate to a limited part of the public, for example, to the inhabitants of a municipality).²⁷
- With regard to travelled roads, commonly called "trespass roads", there must be clear evidence of dedication by the registered owner of the land in order to establish a public highway and thereby vest title to the road in the municipality.²⁸

Title to Public Highways

Once a highway is established, the fee is vested in the municipality having jurisdiction over it (i.e. title passes to the municipality). The *Municipal Act*²⁹ provides:

"Unless otherwise expressly provided, the soil and freehold of every highway is vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under this or any other Act."

In the case of regional governments, a similar vesting provision is found in the *District Municipality of Muskoka Act*³⁰, the *County of Oxford Act*³¹, the *Municipality of Metropolitan Toronto Act*³², and the *Regional Municipalities Act*.³³

When considering jurisdiction over highways, it is essential to understand

the distinction between "organized" and "incorporated". The *Municipal Act*³⁴ defines "unorganized territory" in the following manner:

"For the purposes of this Act, a local municipality is in unorganized territory if it is in a territorial district mentioned in the *Territorial Division Act* and if it is not in the District of Muskoka or the Regional Municipality of Sudbury."

(the remainder of the province being "organized"), and defines "municipality" as a

"...locality the inhabitants of which are incorporated".³⁵

A "local municipality" is defined as

"...a city, town, village and township".

Thus there are incorporated municipalities within the unorganized territory of Ontario (i.e. the northern Districts) that have title to the roads within their jurisdiction. This would include improvement districts.³⁶

Roads in unincorporated townships in unorganized territory are vested in the Crown, normally under the jurisdiction and control of the Minister of Natural Resources. In the case of roads acquired under the authority of the *Local Roads Board Act*³⁷, jurisdiction and control is with the Minister of Transportation.

Closing Public Highways

Before a public highway can be sold or leased, it must be stopped up and closed according to law.³⁸ Provincial legislation contains a number of provisions giving authority to municipal councils in establishing, closing, altering and disposing of public highways. The *Municipal Act*³⁹ enables municipalities to pass by-laws to make changes to highways in their jurisdiction. With regard to closing public highways, procedures may vary depending upon the type of municipality and the type of highway. In some, but not all cases, Ministry of Municipal Affairs approval is required. In those cases where the highway intersects a provincial highway, the by-law requires the endorsed approval of the Minister of Transportation⁴⁰ before it becomes effective. Furthermore, the *Municipal Act* requires the registration of road closing by-laws before they become effective:

"A by-law passed under subsection (1), or any predecessor of subsection (1), for closing any street, road or highway ... does not take effect until it has been registered in the land registry office of the land titles division or the registry division in which the land is situate, and the by-law shall be registered without further proof by depositing a copy certified under the hand of the clerk and the seal of the municipality."

The various approvals required are set out in Table 1 following:

TYPE OF ROAD	TYPE OF MUNICIPALITY	APPROVAL REQUIRED	STATUTE REFERENCE*
All roads	Area Municipality	County**, District, or Region council	Specific County, District, Metropolitan, or Region Act
All roads	Township in a county	County council	S.297(4)
Roads connecting with provincial highway	All municipalities	Minister of Transportation	S.24(3) The Public Transportation and Highway Improvement Act
Any closing affecting federal interest	All municipalities	Federal government	S.297(4)
Original road allowance on, or leading to water	All municipalities	Minister of Municipal Affairs	S.297(3)
Road on registered plan of subdivision reg'd after Mar. 27, 1946	All municipalities	Minister of Municipal Affairs	S.297(10)***

Table 1.

* References are to the *Municipal Act* unless otherwise indicated.

** County of Oxford only.

*** A special case exists for roads shown on a registered plan of subdivision which have **not** been assumed by the municipality (see example #5 under "Definition of a Public Highway"). In this instance the municipality has no power to pass a by-law and must apply to a county or district judge under section 88 of the *Registry Act* (or section 146 of the *Land Titles Act*) for an order to close the road. Such an order requires the prior written consent of the Minister of Municipal Affairs where the plan was registered after March 27, 1946.⁴²

To re-state the principle involved:

1. If a road allowance, laid down on a plan of subdivision, has not been assumed by a municipality for public use, it may be closed **only** under the provisions of the *Registry Act* (or *Land Titles Act*).
2. If a road allowance, laid down on a plan of subdivision, has been assumed for public use by a municipality, it may be closed **only** by municipal by-law.⁴³

In order to become effective, a municipal road closing by-law must be registered in the proper land registry office, either under the *Registry Act*⁴⁴ or the *Land Titles Act*. Many land registry offices have both systems available and, if the by-law deals with unregistered land, it should be registered

under the same Act as the lands abutting the road, although local practices may vary. Of course, if there have been previously registered dealings with the road, the by-law must be registered under the same act as the previous dealings.

Public highways located in a territorial district not within an organized municipality are closed by the Lieutenant Governor in Council.

III THINGS ARE NOT ALWAYS WHAT THEY SEEM

This brief article cannot be considered exhaustive, but it should be clear at this point that the subject of public highways in Ontario is a complex one and that a good deal of research

may be necessary on the part of the land surveyor in determining the status of a particular road. Is it public? Is it private? Has it been established by statute, by-law, trespass, or the like. Has it been closed? An old legal maxim states: "Once a highway, always a highway" (until it has been legally closed). It would be prudent to keep this in mind when stumbling across that old bush road on your client's "back 40".



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continued [references]

IV STATUTE AND CASE REFERENCES

1. *Municipal Act*, R.S.O. 1990, c.M.45, Section 261.
2. Between 1869 and 1906, mining lands were patented in blocks called "Mining Locations" pursuant to the *General Mining Act of 1869*, *The Mines Act, 1892*, 55 Vic., and *The Mines Act*, R.S.O. 1897, c.36. Provisions in these Acts required a road allowance, one chain in width, to be reserved in front of any "Mining Location" which bordered upon any lake or river in the unsurveyed territory within the districts of Algoma, Thunder Bay, and Rainy River, and that part of the District of Nipissing which lies north of the French River, Lake Nipissing and the Mattawa River. The original plans, notes and descriptions of "Mining Locations" surveyed under these Acts were deposited with the Department of Crown Lands.
3. *Surveys Act*, R.S.O. 1990, c.S.30, Section 9.
4. *Badgely vs. Bender* (1833) O.S. 221.
5. The wording may vary in the letters patent:
 - "reserving an allowance for road one chain in perpendicular width along the shore of _____".
 - "excepting an allowance one chain in perpendicular width for a road along the shore of _____".
 If the reservation or exception is not identified as a "road", it remains as unpatented Crown land.
6. *Public Lands Act*, R.S.O. 1990, c.P.43, subsection 66(3).
7. - 33 Geo III, c.4.
- 50 Geo. III, c.1, (1810), provided for the appointment of "Surveyors of Highways" for each district then existing. These surveyors were empowered to lay out roads, to close roads, and direct the construction of roads. The surveyors' reports were submitted to the quarterly meetings of the appointed Justices of the Peace for each district. The Justices approved these reports by by-law and the roads so laid out and approved became vested in the Crown.
The Act of 1810 was amended several times during the period 1812-1828, and the procedure continued until 1841 when district councils were set up as the administrative authority by the *Municipal Act* of that date. The district council had the same authority as the Justices until the *Municipal Act* of 1850 established the county system.
8. *Toll Roads Act*, R.S.O. 1914, c.210.
9. - An Act respecting Colonization Roads, 7 Edw. VII, c.17, (Apr. 20, 1907).
- *Colonization Roads Act*, 3-4 Geo. V, c.11, (May 6, 1913), repealed by *Statute Law Amendment Act, 1947*, 11 Geo. VI, c.101. During the period 1841-1907, roads were constructed by the provincial government for opening up the public lands of the province for settlement in the newer or more sparsely occupied portions. Funds were provided annually as voted on by the legislature.
10. *Northern and North-Western Development Act*, 1912, 2 Geo. V, c.2,

Northern and Northwestern Ontario Development Act, 1924, 14 Geo. V, c.14,
Northern Development Act, 1926, 16 Geo. V c.10, (repealed in 1973).

11. *Municipal Act*, R.S.O. 1990, c.M.45, Section 297.
12. *Public Transportation and Highway Improvement Act*, R.S.O. 1990, c.P.50.
13. *Statute Labour Act*, R.S.O. 1990, c.S.20.
14. *Fulton vs. Creelman* (1931) S.C.R. 221.
15. *St. Vincent vs. Greenfield* (1887) 15 O.A.R. 567.
16. *Point Abino Association vs. Bertie* (1928), 61 O.L.R. 610.
17. *Indian Act*, 1876, Section 99 repealed 12 Vict. c.84 and 22 Vict. c.81 except only as to things done, rights acquired, obligations contracted or penalties incurred before the Act came into force.
18. *Indian Act*, R.S.C. 1985, c.I-5, Section 35.
19. *Surveys Act*, R.S.O. 1990, c.S.30, Section 57.
20. *Surveys Act* 1920, 10 & 11 Geo. V, c.48, Subsection 13(2).
21. *Re Alfrey Investments Ltd. and Shefsky Developments Ltd. et al.* (1974), 6 O.R. (2d) 321.
22. *J. Hisaji Aikoshi vs. The Corporation of the City of Thomas* (1981) unreported.
23. *Household Realty Corp. Ltd. v. Hilltop Mobile Home Sales Ltd.* (1982) 37 O.R. 508 (C.A.)
24. *Schraeder vs. Gratton* (1945) O.R. 657.
25. *O'Neil vs. Harper* (1913) 28 O.L.R. 635.
26. *Fulton vs. Creelman* (1931) S.C.R. 221.
27. *Williams and Wilson Limited vs. The City of Toronto and the Attorney-General for Ontario* (1946), 21 O.R. 309.
28. *Baldwin vs. O'Brien* (1917) O.L.R. 24.
29. *Maccoomb et al vs. Town of Welland* (1907) 13 O.L.R. 335.
Reed vs. Town of Lincoln (1974) 6 O.R. (2d) 391.
30. *Municipal Act*, R.S.O. 1990, c.M.45, Section 262.
An exception to the vesting provision of the *Municipal Act* is found in the *Provincial Parks Act*, R.S.O. 1990, c.P.34, Subsection 3(4), which provides that unopened road allowances within a provincial park, that have not been closed and conveyed, are vested in the Crown.
31. *District Municipality of Muskoka Act*, R.S.O. 1990, c.D.14, subsection 29(4).
32. *County of Oxford Act*, R.S.O. 1990, c.C.42, Subsection 29(4).

32. *Municipality of Metropolitan Toronto Act*, R.S.O. 1990, c.M.62, subsection 75(3).
33. *Regional Municipalities Act*, R.S.O. 1990, c.R.8, subsection 23(4).
34. *Municipal Act*, R.S.O. 1990, c.M.45, Subsection 1(2).
35. *Municipal Act*, R.S.O. 1990, Subsection 1(1).
36. *Municipal Act*, R.S.O. 1990, Subsection 10(2).
37. *Local Road Boards Act*, R.S.O. 1990, c.L.27.
38. Sections 316 and 317 of the *Municipal Act*, R.S.O. 1990, c.M.45, provide for two situations where a closing by-law is not required prior to a municipal conveyance of an original road allowance. They are not normally seen and are often the subject of a court order.
39. *Municipal Act*, R.S.O. 1990, Section 297.
40. *Public Transportation and Highway Improvement Act*, R.S.O. 1990, Subsection 24(3).
41. *Municipal Act*, R.S.O. 1990, Subsection 297(11).
42. *Registry Act*, R.S.O. 1990, c.R.20, Section 88(3).
43. re *City of Toronto Plan M-188* (1913), 28 O.L.R. 41, 11 D.L.R. 105.
re *Jones and Township of Tuckersmith* (1914), 5 O.W.N. 759, 25 O.W.R. 680 and (1915) 33 O.L.R. 634, 23 D.L.R. 569.
44. This has been the case since March 29, 1873.
45. *Municipal Act*, R.S.O. 1990, Section 318.

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