A Public Highway . . . is it or is it not?

By W. D. (Rusty) Russell, Q.C. of the law firm of Russell, Waite, Christie & Miller, Orillia, Ontario.

A review of the case of The Missionary Church, Canada East vs. The Corporation of the Township of Nottawasaga and Gertrude Ainley.[1]

THE PROBLEM

THINK ABOUT this. In 1960, the Township of Nottawasaga accepted a deed to some 66 foot strips of land in a farmer's field upon which it was agreed roads would be constructed.

Now here is the question. Did the township hold these strips of land as "public highways" (as part of its road inventory), or was it just a deed to an ordinary parcel of land without the stigma of a "public highway" being attached to it?

And why is this important? Well suppose the township subsequently decides to sell off a portion of that 66 foot strip of land. If it is a "public highway" then it must first go through the road closing procedures of the *Municipal Act*.[2] If it is not a "public highway" then the township can sell the land after reciting in a by-law that it is no longer required for municipal purposes.[3]

Now this is precisely the technical question which arose in this case and the court experienced difficulty trying to categorize these strips of land. If you too have had problems trying to get the handle on such terms as "public highways" or "ownership of roads" or "assumption of roads", etc., then take comfort - you are in good company!

Now let us get down to the facts.

THE FACTS - PART 1
CONVEYANCE TO THE TOWNSHIP

Mr. Wyant owned some land in the Township of Nottawasaga immediately to the north of the Town of Stayner. After some negotiations, he agreed to convey to the township certain strips of land, 66 feet wide, for road purposes.

The deed was registered on April 7, 1960. May I draw your attention to two points:

1. The deed from Mr. Wyant to the Township of Nottawasaga contained this provision:

"SUBJECT ALSO to the use of the hereinbefore described lands by the Grantees herein (the township) for road purposes only and which is a condition of this grant that the said lands shall be used for no other purposes whatsoever."[4]

Now just between us girls - that is a very strong indication that the grantor (Mr. Wyant) intended that the township use the strip only for road purposes. It could not be clearer.

2. The second point is that the township accepted the deed, had it registered, and threw a copy in the vault.

That is good evidence of acceptance of a parcel of land for road purposes.

THE ROAD FORMULA

Let us now consider how this conveyance fits into our "Alice in Wonderland" road formula:

Dedication
plus
Acceptance
(or assumption)
equals
Ownership

Formal Dedication - A formal deed from Mr. Wyant to the township. This is certainly the purest form of dedication.

Formal Acceptance - Acceptance by the municipality of a registered deed. The purest form of acceptance.

Presto - The municipality owns the 66 foot strips of land.

IN WHAT CAPACITY DID THE TOWNSHIP HOLD THESE STRIPS OF LAND?

Let us get down to the fine tuning.

We know the township owned the strips of land, the question now is, did the municipality own this land as a "public highway" (part of its road inventory) or an ordinary parcel of land?

The test is the "intention of the parties". As I mentioned above, I do not think the intention could be clearer. Mr. Wyant, in signing the deed in effect said "I am granting you land for public use as a highway." The municipality in accepting the deed in effect said "We accept this for a public highway."

Let us now look at section 257 of the *Municipal Act*.[5]

". . . 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 of them or on which statute labour has been usually performed . . . *all roads dedicated by the owner of the land to public use*, and all alterations and deviations . . . *are common and public highways." (italic emphasis added)*

So these lands appear to fit clearly into section 257. It would be my submission that if the municipality were to sell a portion of these lands - say the very next day - they would be obligated to go through a road closing procedure under the *Municipal Act*.

THE FACTS - PART 2 - STATUS OF LAND IN 1975

In the 15 years after the 66 foot strips of land were conveyed to the township, much happened. Let me review it with you.

1. The township built roads on the lands.

2. The strips of land were given the names of *Lock Avenue, Thomas Avenue*[6] and *Pine Drive*.

3. Several houses were built on these streets.

4. The built upon portion of the streets had been assumed by the municipality as part of their road maintenance program.

5. One exception - that portion of *Thomas Avenue* lying south of *Pine Drive* (the hatched area on the plan) was never constructed as a road. It remained as vacant land. In other words, it had never been "assumed" by the municipality for maintenance purposes. It was unimproved.

If there was doubt in your mind as to whether or not this was a "public highway" on the "day after" it was conveyed by Mr. Wyant to the township, surely this doubt is completely erased by 1975.

THE FACTS - PART 3 - ENTER AN OFFER TO PURCHASE

Mrs. Ainley was the owner of the property on both sides of the hatched area of *Thomas Avenue* (171 feet by 66 feet) which had never been constructed and assumed. Mrs. Ainley applied to the township to purchase the strip and look what happened. The township prepared a by-law, drew a deed and conveyed the property to Mrs. Ainley *without* going through the road closing procedures of publishing the intention to close in a newspaper, posting notices, and hearing persons who may be prejudicially affected as required by the *Municipal Act*.

The Missionary Church, who owned lands to the south, questioned this conveyance. Although they had other means of ingress and egress, they occasionally made use of this 66 foot strip of land. Consequently, they brought an action in the Supreme Court to have the Ainley deeds declared invalid because the township did not comply with the road closing procedures of the *Municipal Act*.

THE FACTS - PART 4 - WAS THIS STRIP A STREET?

The township certainly considered the subject land as part of *Thomas Avenue*. The by-law authorizing the sale to Mrs. Ainley came out as large as life and said so. Look at the wording used in the by-law.

"WHEREAS Gertrude Ainley appeared before Nottawasaga Township Council at their meeting held on October 6, 1975 and requested to purchase the portion of *Thomas Avenue* south of *Pine Drive*.

"AND WHEREAS that portion of *Thomas Avenue* ends at the boundary line between the Town of Stayner and the Township of Nottawasaga and can proceed no further southerly.

"AND WHEREAS a by-law had not been passed assuming this portion of *Thomas Avenue* as a public road.

"AND WHEREAS no public money has been spent on the roadway nor has same been travelled by the public.

"AND WHEREAS Gertrude Ainley is the owner of the lands immediately east and west of *Thomas Avenue* south of *Pine Drive*.

"THEREFORE BE IT ENACTED by the Municipal Council of the Township of Nottawasaga, in the County of Simcoe, and it is hereby enacted as follows:

"1. That the portion of *Thomas Avenue* south of *Pine Drive* to the boundary between the Town of Stayner and the Township of Nottawasaga be conveyed to Gertrude Ainley, for the sum of $300.00 plus all legal costs."

Now if that is not enough evidence to prove my point, let me give you two further tidbits.

1. The deed to Mrs. Ainley incorporated a copy of the attached survey plan. It was prepared by an O.L.S. and note that the survey identifies the streets by name.

2. The Land Transfer Tax of the municipality attached to the deed contained the words *"Deed given to convey and close a road allowance." (italic emphasis added)*

Even the court in its decision, recognized this fact because it made the following statement:

"It is obvious that from the time of the conveyance to Nottawasaga to the time of the conveyance to the Defendant Ainley, the land in question was thought of or described as being part of a road or street."

Later in the Judgement, the court also said:

"As I have said above, counsel for the defendants (the township and Mrs. Ainley), does not contest the characterization of the land as a road, nor the obvious intention which has existed that the land form part of the road, and that it was for that purpose for which it was originally acquired."

Now stop right there for a moment. If the south end of *Thomas Avenue* is not classified as an unimproved "public highway" after all this - then I am a Tasmanian devil!

THE COURT DECISION

Now for the surprise. The court concluded that this hatched portion of *Thomas Avenue* was not a "public highway" within the meaning of the *Municipal Act* and said that a road closed by-law was not required. It is a decision which very nearly knocked me off my chair.

Obviously, the court did not pull this decision out of thin air, so before studying it, let me review the subject of roads for a moment.

Every municipality owns a number of road allowances (highways) which have never been opened. These may be road allowances on original surveys, or on old registered plans, or roadways deeded to, and accepted by the municipality. In Ontario you also have a number of 66 foot shore road allowances (sometimes referred to in the courts as "marine roads"). These all have a designation of a "public highway" under section 257 of the *Municipal Act*. They are therefore part of the municipality's "road inventory" (even if the roads are unimproved) such that if the municipality proposes to sell a portion of the roadway, it must go through a road closing by-law.

For more than 150 years the courts have said "once a road, always a road".[7]

THE CASE THAT SWAYED THE COURT

In the Nottawasaga case the court seemed to be pursuaded by a statement of Mr. Justice Duff in the Supreme Court of Canada. It was a B.C. case of *Bailey vs. City of Victoria*[8] which went to trial in 1911.

Let us look at this statement.

"The substantive question for a decision is . . . whether . . . a public highway has been established by dedication. For this purpose two concurrent conditions must be satisfied, 1st - there must be on the part of the owner the actual intention to dedicate . . . and 2nd - it must appear that the intention was carried out by the way of being thrown open to the public and that the way has been accepted by the public . . . I can find nothing in the Legislation of British Columbia *relating to municipalities giving the municipality authority on behalf of the public to accept a dedication by the mere acceptance of a deed or grant of land for the purpose of creating a highway, and in my opinion, acceptance by the public can only be evidenced by public use or by the act of some public authority done in the execution of statutory powers." (italic emphasis added)*

In the Nottawasaga case, the Judge stated:

"I accept that this statement of the law applies to the present case and that accordingly, the position urged on me by counsel for the plaintiff (the church) cannot be accepted."

Please remember that the court is referring to a statement as to the law of British Columbia in the year 1911. Generally speaking, the law of Ontario in 1911 was similar, however, the law of Ontario has changed very materially in the intervening 70 years. Let me give you two illustrations.

Example No. 1

The first was an important legislative change in July 1, 1913. It was an amendment to the *Municipal Institutions Act*.[9] This amendment is substantially the same as the present wording in section 257 of the *Municipal Act*. This addition was:

". . . all roads *dedicated by the owner of* the land for public use . . . are common and public highways." (italic emphasis added)

You must admit that this is a very substantial change!

You will note that the section speaks of roads being "dedicated" by the owner, but it does not say what constitutes "acceptance" by the municipality in order for it to be a "public highway". In the past 70 years there have been a host of legal cases on roads in which the courts have moved away from the need of "public use" or the rigidity of strict procedural acts of acceptance (i.e. passing of a by-law to assume a road), to the new test of "what was the intention of the parties as determined by their actions."

In considering the Nottawasaga case, let us look again at the points to establish the "intention" of the parties.

1. the stipulation in the grant that it was to be used for road purposes;

2. acceptance of the deed by the municipality;

In 1919, Mr. Justice Middleton of the Ontario Supreme Court said (and this was subsequently approved by the Supreme Court of Canada):

"It is well settled law that where there is a dedication by the owner of lands, the public must accept the dedication on the terms in which is was given."[10]

3. the naming of the streets;

4. the building of homes on the streets;

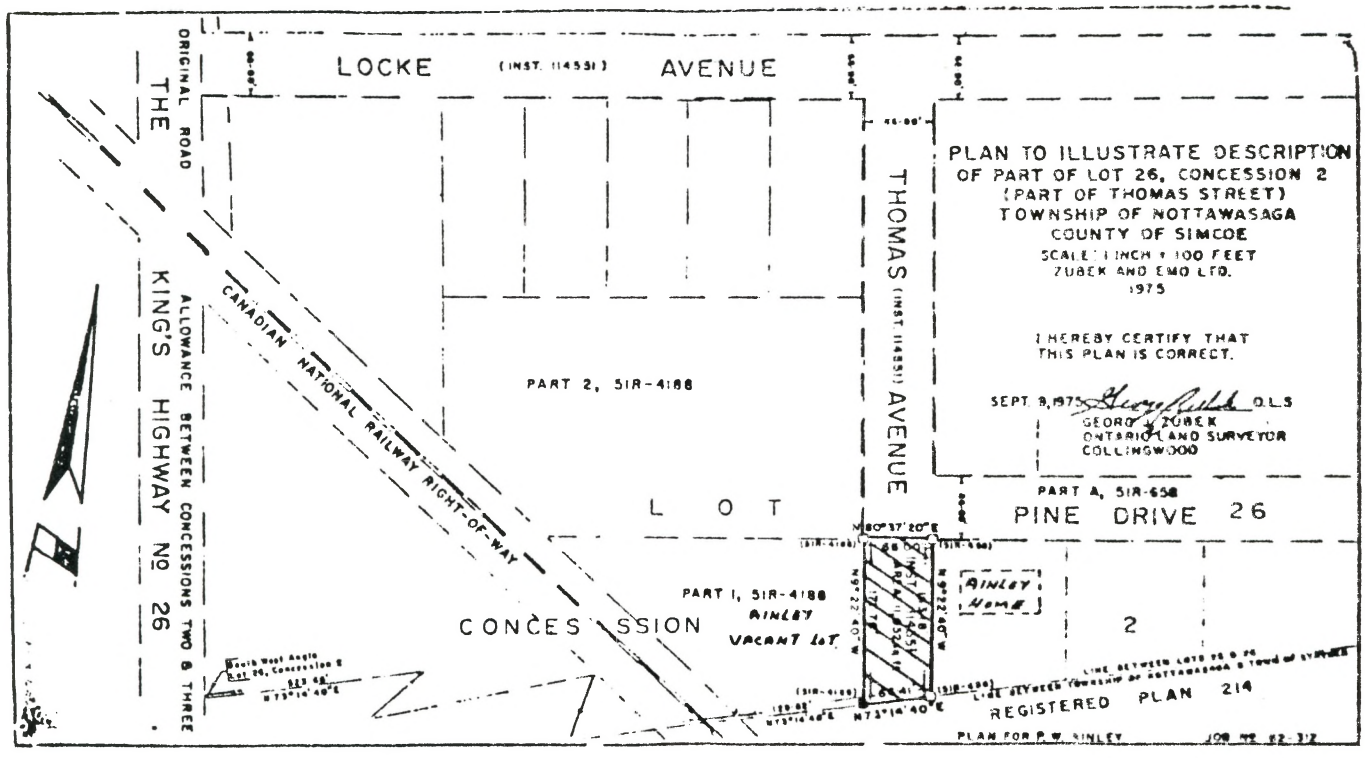
5. naming of the streets in the recitals to the selling by-law;

6. reference to this being a street in sworn affidavit attached to this deed.

Example No. 2

The second important step took place in the year 1916. That was the case of *Sanderson vs. the Township of Sophiasburgh*[11] in which the court said:

"In Ontario, as the highway is vested in the municipality, it is necessary to find an assent on the part of the municipality to the dedication. This assent may be presumed from the expenditure of public money upon the road, *but it may be shown in other ways,* and I think the resolution now in question, [resolution accepting the road] which, being under seal, is as already said, equivalent to a



by-law, amounts to such an assent on the part of the municipality; . . ." (italic emphasis added)

Consequently, in Ontario, as early as 1916 there was recognition by the courts that the expenditure of public monies and/or the use by the public, was not the only means by which a municipality was presumed to have "accepted" the dedication of a "public highway".

ONTARIO CASE HISTORY

In the last 7 or 8 years, the Court of Appeals has on two occasions reversed a Supreme Court Judgement and straightened out the law with respect to the questions of determining "ownership of a road" and "assumption of a road". The key to these cases was the "intention" of the parties.

Both these decisions were referred to in the Nottawasaga case, but with the greatest respect, the Supreme Court Judge mistook the rationale behind these cases.

Let us take a look at them.

REED VS. THE TOWN OF LINCOLN[12]

A church had a summer camp in the area of the Niagara Escarpment and it was serviced by a narrow lane which went through the Reed's farm property. It seems that the Town of Lincoln was interested in having this right-of-way declared a "common and public highway" and therefore owned by the municipality. The Reeds said "not so . . . it is a private lane through our property and the township has no legal interest in it!" The Supreme Court said it was a "public highway" because the municipality had done some work on the road.

The Court of Appeal quickly overruled this decision and here again, let me refer to the road formula:

Dedication
plus
Acceptance
(or assumption)
equals
Ownership

They said: "Where was the dedication by the Reeds?" They gave no deed, they gave no implied consent that they were prepared to release their title. Consequently this part of the formula is missing.

Secondly, did the work on the road (i.e. replacing of a culvert and minor gravelling), constitute assumption? The Court of Appeal said, no; an isolated act of maintenance does not by itself show an "intention" on the part of the municipality to permanently assume the road. Consequently, the town could not complete the formula and so lost the case.

In the Nottawasaga case, we know there was **Dedication** and we know there was **Acceptance** by the municipality. Whether or not work had been performed on the south end of *Thomas Avenue* was a matter of no consequence. It was already a "public highway".

SCOTT VS. NORTH BAY[13]

This was a subdivision on a lake and at the rear of the lots was laid out a 66 foot road allowance called "Ross Drive". On the registered plan, the owner dedicated "Ross Drive" as a "public highway". Lots were sold off, and so the road was automatically owned by the township as a "public highway" by virtue of the *Surveys Act*.[14] It was now an unimproved highway. It seems that the municipality did some minor maintenance on the road by removing a protruding rock and the ratepayers rushed to the court to say this constituted "assumption" by the municipality such that they were responsible for its maintenance forever and ever.

The Supreme Court said, yes, the municipality had "assumed" the road as a result of the acts of maintenance. The Court of Appeal said, nothing doing, this was an isolated act and did not indicate any "intention" on the part of the munici-

pality to assume permanent responsibility for maintenance. In summary therefore, the Scott case does not apply to the Nottawasaga case because there is no argument as to whether or not this part of the street had been "assumed". Everybody knew it was not!

CONCLUSION

Why, you may ask, did the court place so much faith in this 1911 B.C. case? The reason lies in the fact that all judges - like you and me . . . are human beings . . . and that is part of the problem. No one person can know everything about everything, but that is just about what we expect from our Supreme Court Judges.

Let me explain. The judges of the Supreme Court (44 in number), although based in Toronto, travel the Supreme Court circuit. A judge may spend four weeks on cases in Ottawa, then two weeks in Thunder Bay, then two weeks in Barrie and thereafter four months in the Supreme Court sittings in Toronto, etc.

At these sittings, the Supreme Court Judge hears the next case on the list. It may be a murder trial involving all the complexities of criminal law. It may be an automobile accident with serious injuries and detailed medical evidence relating to the intricacies of the law in that field, or it may be an issue involving a large corporation debenture with all the technicalities of the field of corporation law. Complicated? You bet it is!

In each of these trials, lawyers specializing in their field are quoting legal cases to the court at a mile a minute. The judges have to make decisions on some very complicated issues without the benefit or opportunity of doing detailed investigation themselves. If they took as much time to consider cases as they would like, they would never get through the court list. The result is that they cannot always hit the nail on the head on the first swing. Frankly, I marvel at their excellent batting average.

Let me give you an illustration. It is not difficult for me to spend several hours in my library researching a single point of law. A judge does not have this luxury of time. After a two or three day trial, then in the space of perhaps three hours, he must hear arguments on all the facts of the case, consider several judgements being quoted to him on the issues raised, and then be expected to deliver a logical, well reasoned decision on the spot. And that my friends is known as being in the pressure cooker!

It is because of this that we have a Court of Appeal. This court is composed of some 17 members and permanently sits in Toronto. They hear no witnesses, but they do examine all the trial evidence and review the lower court decision in light of logic and law.

If ever there was a case that should have been appealed to the Court of Appeal, it is this one. However, we all know that money does not grow on trees and litigation (court proceedings) is very expensive. There are only two types of people who can afford litigation - the very rich (because they have the money) and those who have spent all their money (because they can milk the legal aid cow). The Missionary Church did not fall into either of these categories.

It may be a few years until a case with similar facts comes along which will have the effect of overruling this decision. In the meantime, however, Mrs. Ainley has the comfort of this decision in her favour - but in my opinion - her deed is about as valuable as last year's lottery ticket!

1. Missionary Church, Canada East v. Township of Nottawasaga, et al (1980) 32 O.R. (2d) 88, 120 D.L.R. (3d) 489.
2. The Municipal Act, R.S.O. 1980, c. 302, ss. 298(1), 299(1) and 301(1) (formerly R.S.O. 1970, c. 284, ss. 443(1), 444(1) and 446(1)).
3. The Municipal Act, R.S.O. 1980, c. 302, s. 193(1), (formerly R.S.O. 1970 c. 284, s. 336(1)).
4. At page 496 of the D.L.R.'s the Court held that this condition in the deed was void as offending the rules against perpetuities. Even if this is so, it still indicates the "intention" of the parties to create a public highway, and it is the "intention" factor that the Courts look to for "dedication".
5. The Municipal Act, R.S.O. 1980, c. 302, s. 257, (formerly R.S.O. 1970, c. 284, s. 399).
6. In some places the decision speaks of Thomas Street and others Thomas Avenue. At one time is was known as Elm Street. In this article it is referred to as Thomas Avenue throughout.
7. Di Cenzo Contruction Co. Ltd. v. Glassco et al 21 O.R. (2d) 186, at page 193 (February 178).

Also see Household Realty Corporation Limited v. Hilltop Mobile Home Sales, a Court of Appeal Decision released June 24th, 1982. Not yet reported but referred to in 14 A.C.W.S. (2d), Case 14, 1114.

8. Bailey v. City of Victoria (1920) Vol. LX S.C.R. 38. Split Decision. (Case commenced in 1911.)
9. See the Municipal Institutions Act, R.S.O. 1914, c. 43, s. 432.
10. Abell v. Village of Woodbridge and County of York 45 O.L.R. (1919) pg. 79 at pg. 83. Subsequently considered by the Supreme Court of Canada, 61 S.C.R. 345.
11. Re Sanderson and Township of Sophiasburgh (1916) 38 O.L.R. 249 at pg. 252.
12. Reed v. Town of Lincoln (1974) 6 O.R. (2d) 391 and 53 D.L.R. (3d) 14.
13. Scott et al v. City of North Bay (1977) 18 O.R. (2d) 365 and 82 D.L.R. (3d) 573.
14. The Surveys Act, R.S.O. 1980, c. 493, s.57 (formerly R.S.O. 1970, c. 453, s. 57). ●