A Road Less Travelled: Dedication, Acceptance & the Unwilling Ontario Municipality

By R. W. Jordan, O.S.T. Submitted as a research paper for Erindale Course SUR455H, January 1995

Editor's note: This paper was researched and written prior to the recent amendments to the Municipal Act and as such will not reflect any changes therein. The contents and opinions do not necessarily reflect the opinion or policy of the Association nor does the Association assume any responsibility for the opinions expressed.

INTRODUCTION

A good road system is an asset to any community, but the creation of new highways brings a host of responsibilities for local government - the expenses of road building, repair and snow removal among them. As a general rule, Ontario municipalities can choose where and under what conditions new highways are created. The vast majority of highways, of course, are created in an orderly fashion by statute.

Others are just assumed by the local government without any fuss, but a few are forced upon an unwilling municipality by local residents with the aid of a court decision.

This paper will examine what it takes for a court to find that a road is indeed a highway with its attendant responsibilities, focusing on how the common law doctrine of dedication and acceptance sometimes binds a reluctant municipality.

After defining highways and how they are created in Ontario, the paper will examine the doctrine of dedication as it has been delineated in Ontario courts. The role of the municipal council, and the actors in the cases of alleged dedication and acceptance that reach the courts, will then be examined. The burden of proof in such cases will be discussed as will validity of the process under the *Land Titles Act*, R.S.O. 1990, c. L.5 and the history of dedication and acceptance in Ontario courts. Finally, the question of what does or does not constitute acceptance on the part of a municipality will be examined in light of statutes and court cases.

WAYS: PUBLIC AND PRIVATE

The dictionary defines a way as a track available for travel and a highway as a principal or main track.[1] At law, the term highway has a specific meaning: "All ways are divided into highways and private ways. A right of way strictly means a private way.... A highway is a public passage for the sovereign and all his subjects...."[2] Stated another-way, easements such as rights of way "...must be appurtenant, must benefit adjoining land."[3] "A public right on the other hand, is a right exercisable by anyone, whether he owns land or not, merely by virtue of the general law."[4]

Rights of way can be created by a principle known as the lost modern grant. "If the use of the right could be proven for a period of 20 years, the courts would conveniently presume that at some point the owner... had made an express grant of the easement... (which had subsequently been lost)."[5] Since documents cannot be made in favour of the public at large, courts have held "...where there has been long use of a roadway there must have been a dedication by the landowner and thus have developed a sort of lost modern dedication."[6]

HIGHWAYS BY STATUTE

Which roads are considered highways in Ontario? The *Surveys Act*, R.S.O. 1990, c. S.30 s. 9, reads in part ".... every road, lane, walk and common shown on the allowance, highway, street, lanes, 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" (emphasis added). In similar language and "...subject to the *Land Titles Act* and the *Registry Act* as to the amendment or alteration of plans...", s. 57 of the *Surveys Act* deems the same road allowances, etc., found **on plans of subdivision** to be public (emphasis added).

The *Municipal Act*, R.S.O. 1990, c. M.45, s. 261 states:

> *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 ... are common and public highways.*

Although this section seems straightforward, the courts do not always see it that way. For example in the 1993 appeal case of *Skerryvore Ratepayers' Association v. Shawanaga Indian Band* it was ruled that "the nature of native title, including the feature of inalienability, is inconsistent with the doctrine of dedication being applicable to unsurrendered land."[7] Section 261 of the *Municipal Act* "...can do, no more than declare public highways for valid provincial purposes roads that have become public highways pursuant to the provisions of the *Indian Act* by surrender to the Crown...."[8]

Although an examination of all the relevant legislation is beyond the scope of this paper, it is worth noting that one of the most frequently used methods of creating highways by statute, the plan of subdivision under the *Land Titles Act*, R.S.O. 1990, c. L.5 and the *Registry Act*, R.S.O. 1990, c. R.20, is a formalized version of the act of transferring title by dedication. The owner's certificate on the plan (Ontario Regulation 997, Form 8) states in part 2: "The streets and street widenings and lanes are hereby dedicated as public highways." The signed consent of the Minister of Municipal Affairs or of an officer of the municipal corporation to which the Minister has delegated authority under s. 4 (1) of the *Planning Act*, R. S. 0. 1990, c. P. 13, also appears

on the face of the plan.

Municipal ownership, accomplished by the registration of the plan, is not acceptance in the sense of opening a new highway, however; "Before assuming a 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 are lodged with the municipality at the time the subdivision agreement is signed, to guarantee that this work will be done."[9] Until such time as the road is accepted, signs are posted warning the public that the road is not a municipally assumed road and that users travel at their own risk. Acceptance generally comes when the municipality passes a by-law under the *Municipal Act*, R.S.O. 1990, c. M.45, assuming the road for maintenance purposes. (The same thing is accomplished with an Order in Council in the case of highways vested in the Crown.)

Under the English common law, highways were owned by adjacent landholders ad medium filum viae (to the middle thread of the road). Not so in Ontario where, under s. 262(l) of the *Municipal Act*, the soil and freehold of every highway is vested in the corporation of the appropriate municipality, with jurisdiction given to the municipal council. Section 262(2) says such vesting is "subject to any rights in the soil reserved by the person who laid out or dedicated the highway." In unincorporated townships in the unorganized territory of the province, these highways are under the jurisdiction and control of the Minister of Natural Resources. In addition to the power to open highways, jurisdiction brings with it responsibility to widen, maintain and stop up highways.[10] The duty to maintain a highway brings with it legal liability in the case of damage or injury due to lack of maintenance.

"The mere obstruction of a highway or the failure of the public to use it will not destroy the rights of the public."[11] As Byles, J. said in *Dawes v. Hawkins*: "It is an established maxim, 'Once a highway always a highway' for the public cannot release their rights and there is no extinctive presumption or prescription."[12] Of course, there are provisions in the statutes to legally close highways by by-law, order in Council or Judge's order. Highways so extinguished may then be leased or sold, and adjacent owners have the first refusal to purchase.[13]

HIGHWAYS BY DEDICATION AND ACCEPTANCE: AN OVERVIEW

Highways may also be created by the common law doctrine of dedication and acceptance.

Dedication may be signalled by the owner of the land through his actions or inaction. For example, he could build a road on his land and either deed it to the municipality or encourage the public to use it. Alternatively, he could fail to object to the public crossing his land or to municipal actions like road building. Acceptance may be signalled by acts of the municipal corporation (e.g., regular road maintenance) or simply by the public using a way in a manner known as public user. Dedication and acceptance has formal and informal variants. A. M. Sinclair describes the relatively rare formal method as using "... the deed of dedication, the actual deed itself showing intention to dedicate and the user showing acceptance by the public."[14] (Presumably Sinclair means a deed to the local municipality.) Much more common is informal or implied dedication and acceptance where the respective acts of the landowner, the municipality and the public may be weighed by the courts. It is upon the question of title that this doctrine runs headlong into the most sacred right of the common law - that of private property. When a new highway is created by statute, the municipal corporation must first hold the fee and this may involve a transfer of title from a private owner to the municipality, for example by the registration of a plan of subdivision. It is well established law that the government cannot take private lands for public purposes if the owner objects except by the strict process of expropriation with the owner receiving fair market value for his property. Therefore a highway cannot "...be created by merely expending ... public money in opening out a road over lands of private individuals, unless such a road is... laid out and established in a lawful manner by expropriation, dedication or otherwise."[15]

THE NATURE OF DEDICATION

It is difficult to separate the twin concepts of dedication and acceptance because evidence of one may rightly be seen as evidence of the other. This summary of the basic principles of dedication is derived from widely-quoted court decisions.

> *Land dedicated to the public for the purposes of passage becomes a highway when accepted for such purpose by the public... (but whether or not) ... there has been a dedication and acceptance, is a question of fact and not of law.*[16]
>
> *In order that a public highway may be established by dedication two concurrent conditions must be satisfied: (1) there must be, on the part of the owner, the actual intention to dedicate; and (2) 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.*[17]

As the following two quotations show, "owner" means owner of the fee and "public" means the general public.

> *There can be no dedication by a person having limited interest, such as a tenancy for life or for years, however long the term.*
>
> *The dedication must be by the owner of the fee. It cannot be made by the mortgagor so as to bind the mortgagee nor by any person having less estate that the fee simple.*[18]
>
> *(A road) ... can be dedicated as a foot-way or a horse-way or a drift-way... (i.e., for cattle)... but it cannot be dedicated only to loggers or hunters...*[19]
>
> *In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate - there must be an animus dedicandi, of which the user by the public is evidence, and no more; and a single act of interruption by the owner is of much more weight, upon a ques-*

tion of intention, than many acts of enjoyment.[20]

In court, the intention to dedicate "is usually inferred from long user by the public, so that user is thus effective to prove both dedication and acceptance. But in order to raise a presumption of dedication there must have been open user as of right for so long a time and in such a way that the landowner must have known the public were claiming a right. User with the landowner's permission or tolerance is not as of right..."[21] In remote or less-developed areas it is more difficult to prove the intention to dedicate. "The needs of the earlier settlers... brought about a fellowship and liberality which gave leave to one another, rights of entry, rights of passage and other rights such as if all were members of one great family."[22]

> *It is not correct to say that early user established an inchoate right capable of being subsequently matured.... The proper way of regarding these cases is to look at the whole of the evidence together, to see whether there has been such a continuous and connected user as is sufficient to raise the presumption of dedication ...*[23]

It is worth noting that the length of public user to determine dedication and acceptance varies with the facts of the case. Megarry and Wade, citing British case law, say: "Where the circumstances have pointed to an intention to dedicate, 18 months has been held to be enough; where the circumstances are against dedication, a substantially greater period may be insufficient..."[24] Evidence against dedication might include proof that the property owner was not of sound mind, that permission (i.e., licence) was sought or given, that user was not continuous or not by the general public, was unknown to the owner or was the result of force, or that taxes on the land had been continued to be paid by the owner.[25]

THE ROLE OF MUNICIPAL COUNCIL

A municipal council cannot be compelled by the courts to open an unopened road, although they may be required to repair or otherwise maintain a highway. This principle was described in *Fawcett v. Township of Euphrasia*: "The discretion of the council as to the opening of... (a) ... road, and as to the expenditure of public moneys, cannot be interfered with.... The ratepayers who provide the public money have, by their votes, elected the council, and have placed it in a (position of) discretion as to the expenditure of such public money."[26] In the words of Osler, J.A. in *Hislop v. Township of McGillivray*: "The council must be best qualified to judge ... having regard to their intimate knowledge of the affairs and wants of the municipality, whether... it is desirable to open any particular road allowance, or whether the needs of the community may not be better served by opening a road in lieu thereof."[27]

As described below, the "intimate knowledge" of the local council must extend beyond the passing of by-laws in at least two key areas in regard to the creation of highways. They must be aware of what lands are being used by the public as roads and they must be aware of the roads on which municipal crews are working.

THE NATURE OF ACCEPTANCE

Even if dedication is proven, it must be accompanied by acceptance in order for there to be a highway.

What constitutes acceptance? Duff, J. in the oft-cited Supreme Court of Canada case *Bailey v. City of Victoria* said, "... acceptance by the public can only be evidenced by public user or by the act of some public authority done in the execution of statutory powers."[28] Although a by-law assuming a road as a highway fits neatly into the category of an act of public authority done in the execution of statutory powers, "...it is well settled law that acceptance can be established without being dependent upon a by-law or resolution of the municipality against which acceptance is asserted...."[29] However, "the assumption of a road or street for public use can be effected only by a corporate act of the municipal corporation... (which may be)... inferred from work done by municipal employees, or other expenditure of public money in improving or maintaining the road or street."[30] "The acts required ... (for)... assumption must be ... such as clearly and unequivocally indicate the intention of the corporation to assume the road."[31] If the expenditure of public moneys is of a trivial nature and not regular, the courts may view them as "...rather to be ascribed to courtesy than to responsibility which the municipality realized it had."[32]

One question that has only been recently addressed by the Ontario Court of Appeal is whether or not the municipal council must be aware of or authorize these expenditures of public money. Linden, J. in *Rorabock v. Township of Sidney* in 1977 stated that the fact that expenditures may have been done "...without the knowledge or authorization of council is irrelevant..."[33] following on the 1976 trial decision of *Scott v. City of North Bay*[34] as his authority. The latter case, however, was appealed and the Court of Appeal ruled that the small amount of work done "...which clearly was not authorized by the Council..." was evidence of non-acceptance of the road in question.[35] The subject apparently has never been ruled upon by the Supreme Court of Canada, so there is not yet a definitive answer. Both the *Scott* case and the *Rorabeck* case are discussed in greater detail below.

THE ACTORS IN COURT: WHO MUST BE INCLUDED AND WHY

The Court of Appeal decision in *Bateman and Bateman v. Pottruff*, [1955] O.W.N. 329 concerned a dispute about the ownership of the most northerly 12 feet of a lot in the City of Belleville. Although the Batemans held paper title, it was uncertain just where the lot boundary lay and, in any case, lawyers for Pottruff argued, the 12 feet had become a public lane by dedication and acceptance.

The ruling of Anderson, Ct. Ct. J., at trial was upheld on appeal: there was not sufficient evidence for either dedication or acceptance. "Even if the evidence had been such as to prove that the lane had become dedicated to the use of the public... it is doubtful ... I could have given a declaratory judgment to that effect because any such judgment would certainly affect the Corporation of the City of Belleville, and would perhaps even

affect the Crown in the right of the province of Ontario, and neither the City nor the Crown was made party to the action."[36] Anderson cited the well known case of *Williams and Wilson Ltd. v. City of Toronto*, (1946) O.R. 309, which concerned a similar disputed line. In this case, the City of Toronto claimed a 6-foot strip was a part of Scott Street. The plaintiffs who wanted (and got) a declaration of their ownership of the strip, joined the Attorney-General for Ontario as a defendant. Lawyers for the Attorney-General objected but in his judgment, Schroeder, J. stated that;

> *...a municipal corporation is a statutory body, and enjoys only such rights, powers and privileges as are conferred upon it by statute, and while the statute... (i.e., the Municipal Act) ... vests the soil and freehold of every highway in the municipal corporation exercising jurisdiction over them, the statute has not gone so far as to say that a municipality should represent the Crown as parens patriae to protect and enforce the paramount right of all His Majesty's subjects to pass and repass over lands which have become common or public highways. ...The declaratory remedy which is sought by the plaintiff in this action is sought bona fide to establish for all time, and not only against the Corporation of the City of Toronto, but also against the public at large, its claim to the lands in question freed and discharged of any claim of a right to a highway thereon.*[37]

Since this case, plaintiffs in many similar cases have joined the Attorney-General for Ontario as a defendant. There is, of course, no guarantee that the Attorney-General for Ontario will actually be represented in court (as he is often NOT represented), but the court decision nevertheless will be binding on the public at large.

THE BURDEN OF PROOF

John T. Dowdell in *Highways in Ontario* cited *Williams and Wilson Ltd. v. City of Toronto* as to the onus in proving a case of dedication and acceptance and wrote: "The burden of proof that an owner's land is subject to a right of highway rests on the municipal corporation, which asserts that it is subject to such a right, notwithstanding that the municipal corporation may be the defendant in the action."[38] Although Dowdell accurately summarized what was said by Schroeder, J., there is not a special rule for municipalities placing the burden of proof upon them in cases of dedication and acceptance; the words of Dowdell are misleading because they tell only part of a much larger truth.

> *The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When that party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof.... (His opponent must then)...adduce evidence to rebut the presumption.*[39]

Therefore, it would be more accurate to state that any party, not just a municipal corporation, who asserts that land is subject to a right of highway must prove it in court. The proof, however, does not need to be absolute (as in criminal law "beyond a reasonable doubt") but, as in other civil cases, can be merely by the balance of evidence or the "preponderance of probability."[40]

DEDICATIONS AND ACCEPTANCE IN THE LAND TITLES SYSTEM

In Ontario, there are two title administration systems, one regulated by the *Registry Act*, R.S.O. 1990, c. R.20, the other regulated by the *Land Titles Act*, R.S.O. 1990, c. L.5. Under s. 51 of the latter act "... no title to and no right or interest in land registered under this Act that is adverse to or in derogation of the title of the registered owner shall be acquired hereafter or be deemed to have been acquired heretofore by any length of possession or prescription." This raises two questions: 1) Does first registration of lands under the *Land Titles Act* have an extinguishing effect on any possible common law highways; and 2) Can new highways be created over lands under the Act by dedication and acceptance?

The answer to the first question may be found in s.44 (l) of the *Land Titles Act* which states: "All registered land, unless the contrary is expressed on the register, is subject to such of the following liabilities, rights and interests as for the time being may be subsisting in reference thereto... (including) ... any public highway...." In other words, the act does not seek to extinguish any common law rights of highway that may exist over the lands at the time of their first registration. This provision has been written into every Ontario *Land Titles Act* since it first appeared as s. 22 in the original *Land Titles Act*, S.O. 1885, 48 Vic., c. 22.

The second question has yet to be answered conclusively in Ontario courts. The creation of highways by implied dedication and acceptance is not specifically addressed by the *Land Titles Act* but one would presume that it would not be possible because informal dedication involves an unregistered transfer of title from the registered owner to the local municipality.

A municipality can apply to be entered in the register as the owner of a highway created through informal dedication and acceptance provided: 1) The municipality can produce evidence of ownership sufficient to satisfy the Land Registrar; and 2) The registered owner, once notified, does not object. If the registered owner of the land does object however, the application must be refused until a court vesting order is obtained by the municipality in accordance with s. 69 of the *Land Titles Act*.[41]

The question of dedication and acceptance over lands with registered title was addressed in the New South Wales case *Vickery v. Municipality of Strathfield* in 1911.[42] In this case, a landowner with a certificate of title sought an injunction to prevent the local municipality from trespassing on a footpath on his land and a declaration that he owned the disputed strip. Rich, A.J. ruled (at 363): "... The existence of a clean certificate of title does not prevent the dedication of ... the land comprised therein as a public highway... and ...

although the transferee... is not affected by ... any trust or unregistered interest, he is none the less subject to any public rights of highway that may exist on the land comprised in the certificate of title, whether the highway be indicated thereon or not."

A HISTORICAL PRESPECTIVE

When looking at court cases involving dedication and acceptance since 1850 in Ontario, it is striking how the courts' view of this doctrine has changed. In the words of lawyer W.D. (Rusty) Russell: "Up to the early 1940's it was generally thought that a municipality could only be saddled with the ownership and responsibility of a road if it had passed a formal by-law accepting it as such."[43]

In the early days of the province, two factors were operating that weighed heavily against the informal dedication and acceptance of roads. The first was the fact that the road system was not fully developed and roads crossing private property were generally looked upon as existing in a spirit of neighbourly tolerance. In other words there was implied consent for public use, but not implied consent for public ownership. The second factor was the conservative nature of the courts, especially courts at higher levels, which held private property sacred. A number of appeal cases held before Chief Justice John Beverley Robinson are so predictable in their form as to be almost humorous: A road is found to be a highway by a judge and jury of local yeomen farmers who have, shall we say, republican tendencies and who regard the public interest as outweighing the privilege of private property. The case is appealed and Robinson, C.J. (of Family Compact fame) promptly quashes the lower court ruling.[44]

Today in Ontario, as we shall see, the doctrine of informal dedication and acceptance is alive and well.

SOME COURT CASES

When considering all the cases of dedication and acceptance that have reached Ontario courts in the past 100 years, the scenario where local residents try to force a municipality to assume the upkeep for a road is decidedly rare. Much more common is a private landowner fighting a municipality to keep a road on his lands from becoming a highway. The following Ontario cases are only a sample of those involving dedication and acceptance. They raise many points to be considered when judging whether or not a road has been accepted by a municipality.

In the first case, *Fawcett v. Township of Euphrasia*, (1949) O.R. 610, some local residents wanted the municipality to keep open an alleged highway so they could haul timber off their land. Barlow, J. ruled the by-law opening the alleged highway invalid for lack of a proper description of the lands required. Evidence of dedication and acceptance was then examined. The judge ruled (at 616) that "... not only was there no expenditure of public money or statute labour on the alleged line of road, but no user was ever made of it by the public.... Furthermore, the onus in upon the plaintiffs and their evidence falls far short of satisfying the required onus." There was no highway and the court refused to order the municipality to open one. The action was dismissed with costs.

The appeal court decision of *Bateman and Bateman v. Pottzuff*, (1955) O.W.N. 329 was discussed above - an adjacent owner claimed that disputed lands formed a public lane. There was strong evidence of public user "...but mere use does not amount to dedication. It may, however, be evidence from which dedication can be inferred."[45] Here, it was ruled to be tolerance by the property owners since many of the users of the lane were their tenants and their tenants' visitors. Although public money had been spent on repair and snow removal, there was "...no evidence of regular expenditure of public money and such repairs ... were trivial... and are therefore...to be ascribed to courtesy...."[46] That the lane was in a state of disrepair and that taxes had been assessed and paid on it were seen by the court as evidence that there was no acceptance. In the end, the lands were judged not to be a public lane.

The Court of Appeal decision in *Read v. Town of Lincoln* (1974), 6 O.R. (2d) 391 is a thorough examination of dedication and acceptance and has been widely quoted in subsequent cases. The case concerned a dispute over a road on private property. The municipality claimed it was a highway. On the question of dedication it was found that user was only by persons visiting a nearby camp, not by the public at large and could be ascribed to neighbourly tolerance in an area with a poorly developed road system. There was no formal acceptance by by-law and the court ruled (at 399) that expenditures of public funds for the installation of a culvert, some gravelling and snow-ploughing were "...consistent with the municipality extending a courtesy to a public service group (i.e., the camp) as with the assumption of responsibility for the maintenance of the road as a public highway." As well, taxes were assessed and paid on the road. The ruling of the trial judge was upheld - there was no highway - and the appeal was dismissed with costs.

The case of *Scott v. City of North Bay* (1977), 18 O.R. (3d) 365 raised a few eyebrows before the decision of the trial judge (who declared a certain road was a highway) was reversed by the Court of Appeal. In this case, dedication was not an issue. The fee was in the city as successor to the Township of West Ferris which had approved a plan of subdivision without assuming the road which was not up to its construction standards. Evidence of acceptance included public user and, on the part of the township and city, expenditures in the nature of two loads of gravel to fill a hole, the removal of a protruding rock, some grading and the laying of some calcium chloride to keep down the dust. The appeal court ruled (at 369) "...it cannot be said that the small amount of work done by municipal employees ... which was clearly not authorized by the council of either municipal corporation, indicated the intention of either corporation to assume... (the road) ... for public use."

The final case, *Rorabock v. Township of Sidney* (1977), 16 O.R. (2d) 296, involved a family who moved to a fairly remote farm and built a house. When they found their access road cut off by a neighbour, they went to court for a declaration that the road was a highway. Although taxes had been paid on it and the title records indicated that the road

was in private hands, there was a great deal of evidence that the municipality had done regular road repair and maintenance work from 1940 to 1960. As well, there was much evidence of public user during this period. Linden, J., ruled (at 302) that since "for at least 20 years, all adjoining owners treated the roadway as public and permitted extensive daily use for private and business purposes and no steps were taken to disabuse anyone of that belief", there was sufficient evidence of dedication. This, coupled with public user and the expenditure of public funds from 1940 to 1960, was judged sufficient evidence for acceptance. The fact that the road had not been maintained or much used after 1960 was considered but the dictum "once a highway, always a highway" was found to apply. The road was declared a highway.

CONCLUSION

The ultimate power to create local highways actually resides with the municipal council. If a new highway is needed, they have been given powers to acquire land through purchase or expropriation and to open highways through municipal by-laws. Likewise, if there is an unassumed road that they do not want to become a highway, the council can have signs posted informing the public that the road has not been assumed and then make sure that municipal road crews do no work on it.

In the words of W.D. (Rusty) Russell, the municipality cannot "rely on thinking you can do [even] minor acts of maintenance and repair without being burdened with the obligations of 'assumption'. ...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."[47]

R. W. Jordan is currently working at Teranet and can be reached at (416)360-5263.

REFERENCES

1. *The Shorter Oxford English Dictionary*. 3rd ed. by C. T. Onions (Oxford: Clarendon Press, 1972), at 2396.
2. *Jowitt's Dictionary of English Law*. 2nd ed. by J. Burke (London: Sweet and Maxwell, 1970), at 1890.
3. Sinclair, A.M. *Introduction to Real Property Law*. 3rd ed. (Toronto: Butterworths, 1987), at 39. It is worth noting that under a relatively new provision of the Municipal Act, R.S.O. 1990, c. M.45, s. 194(2) "A municipal public utility easement does not have to be appurtenant or annexed to or for the benefit of any specific parcel of land to be valid."
4. Megarry, R. and H. R. Wade. *The Law of Real Property*. 5th ed.(London: Stevens and Sons Limited, 1984), at 844.
5. Dobbin, James S. "Real Property Law in Common Law Provinces" in *Survey Law In Canada*. (Toronto: Carswell, 1989), at 39.
6. Ibid. at 40.
7. *Skerryvore Ratepayers' Association v. Shawanaga Indian Band* (1993), 16 O.R. (3d) 390 at 399.
8. At 402.
9. Russell, W.D. "Assumption of Roads - A Second Look" in *The Ontario Land Surveyor*. (Scarborough:The Association of Ontario Land Surveyors, Fall 1978), at 16.
10. The Municipal Act, R.S.O. 1990, c. M.45.
11. Megarry and Wade at 847.
12. *Dawes v. Hawkins* [1860], 8 C.B. (N.S.) 848 at 858.
13. The *Municipal Act*, R.S.O. 1990, c. M.45, s. 300.
14. Sinclair, A.M. at 40.
15. Per Osler, J.A. in *Township of St. Vincent v. Greenfield* (1887), 15 O.A.R. 567 at 571, (Ont. C.A.).
16. Per Clute, J. in *O'Neil v. Harper* (1913), 28 O.L.R. 635, at 643, (Ont. C.A.).
17. *Williams and Wilson Limited v. City of Toronto and the Attorney-General for Ontario* (1946), 21 O.L.R. 309, (H.C.) citing Bailey v. City of Victoria (1920), 60 S.C.R. 38, (S. C. C.) .
18. Per Mathers, C.J.K.B. in *Taylor v. Rural Municipality of Clanwilliam*, [1924] 2 W.W.R. 1153, at 1159,, (Man. C.A.). Mathers vas the trial judge and this verdict vas upheld by the Manitoba Court of Appeal.
19. Per Addy, J. in *Reed v. Town of Lincoln* (1974), 6 O.R. (2d) 391, at 397, (Ont. C.A.).
20. Per Parke, B. in *Poole v. Huskinson* (1843), 11 M. & W. 827, at 830, (Exchequer).
21. Megarry and Wade at 844 citing several well-known British cases.
22. *Hunter v. Richards* (1913), 26 O.L.R. 267, at 270, (Ont. D.C.).
23. *Turner v. Walsh* (1881), 6 App. Cas. 636, at 642.
24. Megarry and Wade, at 845.
25. *The Surveyor and the Law*. Ed. by J. A. McRae (Wellington N. Z. : New Zealand Institute of Surveyors, 1984), at 8.5.5.02.
26. *Fawcett v. Township of Euphrasia.*, [1949] O.R. 610 at 617, (H. C.) .
27. *Hislop v. Township of*

McGillivray (1888) 15 O.A.R. 687, at 694; affirmed (1890), 17 S.C.R. 479, (S.C.C.).

28. *Bailey v. City of Victoria* (1920), 60 S.C.R. 38, at 53, (S.C.C.).

29. *Rorabeck v. Township of Sidney* (1977), 16 O.R. (2d) 296, at 303, (Ont. H.C.J.).

30. *Scott v. City of North Bay* (1977), 18 O.R. (2d) 365, at 367, (Ont. C.A.).

31. *Hubert v. Township of Yarmouth* (1889), 18 O.R. 458, at 467, (Q.B.)

32. *Bateman and Bateman v. Pottruff* [1955] O.N.N. 329, at 335, (Ont. C.A.).

33. *Rorabeck v. Township of Sidney* (1977) 16 O.R. (2d) 296, at 303, (Ont. H.C.J.).

34. *Scott v. City of North Bay* (1976), 12 O.R. (2d) 730, at 741, (Ont. H.C.J.).

35. *Scott v. City of North Bay* (1977), 18 O.R. (2d) 365, at 369, (Ont. C.A.).

36. *Bateman and Bateman v. Pottruff*, [1955] O.W.N. 329, at 333, (Ont. C.A.).

37. *Williams and Wilson Limited v. City of Toronto*, [1946] O.R. 309, at 324-5, (H.C.).

38. Dowdell, John T. *Highways in Ontario*. (Toronto: Ministry of Consumer and Commercial Relations, 1978), at 40.

39. *Osborne's Concise Law Dictionary*. 7th ed. by R. Bird. (London: Sweet and Maxwell, 1970), at 267.

40. See *Reed v. Town of Lincoln* (1974), 6 O.R. (2d) 391, at 400-402, (Ont. C.A).

41. Correspondence with R. Craig Stewart O.L.S., Land Registrar with the Ministry of Consumer and Commercial Relations, Land Registry Office 35, February 8, 1995.

42. *Vickery v. Municipality of Strathfield*, [1911] S.R. Vol. XL 354.

43. Russell, W.D. "Roads" in *Municipal World* magazine. (St. Thomas: June 1977), at 144.

44. See, for example, *Roglna v. Rankin* (1858), 16 U.C.R. 304, (C.A.) and *Regina v. Plunkett* (1862), 21 U.C.R. 536, (C.A.).

45. From the decision of the trial judge, which was upheld on appeal, at 332.

46. Ibid. at 333.

47. Russell, W.D. "Assumption of Roads - A Second Look" in *The Ontario Land Surveyor*. (Scarborough: The Association of Ontario Land Surveyors, Fall 1978), at 19.