1146726 Ontario Inc. v. National Trust Co.

[2004] O.J. No. 2271, 48 M.P.L.R. (3d) 283, 132 A.C.W.S. (3d) 1141
Ontario Superior Court of Justice
May 26, 2004

FLYNN J.:--

Preface

[1] This Application asks the Court to blow the dust off an old subdivision plan and to consider the effect today of its registration about 111 years ago and, in so doing, to see or make visible the dusty old intentions of developers long since deceased.

[2] When those visionary developers registered County Plan No. 9 to create a cottage enclave called Winona Park in the Township of Saltfleet, on the shores of Lake Ontario, Queen Victoria was still three years shy of her Diamond Jubilee.

[3] It would be more than a dozen years before Irving Berlin published Alexander's Ragtime Band or Manitoba joined Confederation. The Klondike Gold Rush and Teddy Roosevelt's charge up San Juan Hill were four years away and it would be a year before Massey Hall opened or Labour Day became an end-of-summer holiday for the working class.

[4] In 1893, the World's Fair was held in Chicago, the bustle disappeared from Women's fashion and electric street-cars had just replaced horse drawn ones in Toronto, where the population pushed beyond 180,000.

[5] It would not be until later in the 1890's that some single cylinder motor cars were imported as novelties from the United States.

[6] This was still the era of horse and carriage and parasol and high buttoned shoes.

[7] And John Woods and Richard Martin shared a vision of a private cottage enclave on the shores of Lake Ontario where the well-heeled could sport and play.

1. Introduction

[8] The Applicants seek several declarations that certain thoroughfares and other lands contained within a Plan of Subdivision registered in 1893 are public roads owned by the City of Hamilton. They also seek ancillary orders declaring that any previous transfers or conveyances of any part of those thoroughfares or lands are void and ask for orders directing that the land registrar amend all affected parcel registers accordingly.

[9] In the Title of Proceedings, the Respondent City is incorrectly named, and on consent, there shall be an order amending the proceedings by replacing "Corporation of City of Hamilton" with "City of Hamilton" wherever required.

[10] The main purpose for bringing this application is to have the thoroughfare that is known as Winona Park Road declared to be property of the City of Hamilton so that the City of Hamilton would be free to provide such services as it considers appropriate.

[11] Not every landowner on the Plan wants those City services and the City does not want ownership of the disputed lands.

2. Parties

(a) The Applicants

[12] The Application Record was of very little assistance to me in making known the Applicants and their status to bring this proceeding. One would have thought it a primary rule of clear advocacy that once polite greetings are completed, the parties would be properly introduced to one another and to the Court.

[13] Rummaging through the two-foot pile of material filed on this Application, I was able to ascertain the following about the Applicants.

[14] According to the affidavit filed, the Applicant Leonard Giangregorio, is the son of Mario and Lucia Giangregorio, whom I presume to be the other individual Applicant. According to Leonard's affidavit, his parents have owned Lots 13 through 16, inclusive, on Plan 311 since 1964 (or since 1956, as set out in another part of his affidavit).

[15] I have no evidence before me that Mario Giangregorio is not still on title to these lots, nor have I any specific evidence that Leonard Giangregorio owns any land within Plan 311 (though there is one oblique reference in Mr. Giangregorio's affidavit, to his purported status when he deposes, "a few of the registered owners, including myself..."), but that seems contradicted by implication where, in paragraph 48 of the affidavit, he says, "at no time during my parents' ownership of Lots 13 to 16 have I or they been granted...". And I note that Leonard Giangregorio, swore that he owned with his sister Maryanne a property Municipally known as 117 Winona Park Road, upon which there was a barn. There is no evidence before me as to whether 177 Winona Park Road is within Plan 311.

[16] In any event, Lucia Giangregorio appears to me still to be an owner or joint owner of Lots 13 through 16 on Plan 311 and is therefore a person whose rights may be affected by my Ruling and accordingly has status to bring the Application. But the affidavit evidence is not clear on that score either, because at paragraph 28 of Leonard Giangregorio's affidavit, he swears

that his father, Mario, was the purchaser of Lots 13 through 16, and it is Mr. Giangregorio's evidence that his mother, Lucia, is the sole owner of 8 Winona Park Road and 6 Winona Park Road within Plan 311.

[17] The relationship of the Applicant 1146726 Ontario Inc. to the lands in dispute and the issues in this contest proved more of a challenge to me. There is nothing at all contained anywhere in the Application Record that would identify the corporate applicant or the grounds upon which it has status to seek the relief sought.

[18] So I searched through the material again and from the transcript of the cross-examination of Leonard Giangregorio it appears that Mr. Castle represents the corporation and that the corporation is the owners of Lots 46 and 47, but no plan number is given. A further search led me to the Responding Record of the Respondents Clarkson, et al., where there is contained the Motion Record of the Plaintiff 1146726 Ontario Inc. in an action brought by it against National Trust Company (Court File No. 99-2953).

[19] That Motion Record contains the affidavit of one Andrea Castelli, president of 1146726 Ontario Inc. and, as an exhibit to that affidavit, the Statement of Claim, which alleges that on or about August 31, 1998, the Corporate Plaintiff acquired part of lots 46, 47 and 48, Block 3 Plan 243. That Plan is shown in Schedule 3 to these Reasons and it abuts the southern limits of Plan 311.

[20] A review of Plan 243 shows that Lots 46, 47 and 48 in that Plan front onto Winona Park Road, the disputed land shown in yellow on Schedule 1 to these reasons. So, it would appear that 1146726 Ontario Inc. may have an interest in lands that may be affected by my Ruling and accordingly may have legitimate status in this Application, though one could never ascertain that from the Application Record alone, an Application Record prepared and filed by that corporation's solicitors.

[21] As a matter of some interest to these proceedings, that claim of 1146726 Ontario Inc. against National Trust Company seeks a declaration that it has an ownership interest in part of the "Avenue" marked out in yellow on Schedule 1 to these Reasons and in a one-foot strip from the westerly limit of Lot 25 to the easterly limit of Lot 49 on Plan 243. And its seeks a Certificate of Pending Litigation over those same lands, lands which are amongst the disputed lands in the present Application.

(b) Respondents

[22] At the commencement of the hearing, Mr. Higginson appeared for the Respondent, National Trust Company, to indicate that his client was taking no active role in respect of the Application for which it had filed no materials. I am told that National Trust is a Trustee of the

disputed lands on Plan 311 for the registered owners of Lots 15 through 40, Block B, on Plan 311.

[23] If the Applicants succeed in this Application to have the disputed lands declared to be public roads, then the Respondent, City of Hamilton, will be the Municipality with jurisdiction over those roads.

[24] I am advised that the Respondents, Royal Bank of Canada and Canadian Imperial Bank of Commerce, take a “wait-and-see attitude” and that the Director of Titles for the Ministry of Consumer and Business Services will abide by any order I may make.

[25] The Respondents, the Bank of Montreal, Korea Exchange Bank of Canada, and TD Canada Trust, filed no material on the Application and took no part in the proceedings.

[26] In all, 24 homeowners are said to be affected by this Application and 16 of them are said to be represented as Respondents.

[27] Mr. Dunlop, for the Respondents Barbara and Joseph Harrison, appeared only to put before the Court the signed consent of the parties to an order that, notwithstanding any other determination made by me in this matter, the Applicants and all of the Respondents are hereby barred from any interest, including any right of access, to the Harrison lands on Plan 311.

Jurisdiction

[28] It is common ground among the parties that my jurisdiction in this matter comes from Rule 14.05(3)(d), (e) and (h).

3. Facts

[29] Registered Plan 311 is an old cottage enclave situate on the shores of Lake Ontario. Over time, many of the lots on the Plan have been redeveloped with larger year-round homes. Those homes are still serviced by private septic systems, but they are all supplied with municipal water.

[30] The City of Hamilton’s predecessor, the Regional Municipality of Hamilton-Wentworth, approached the cottage association in that enclave for permission to install a new water line and sewers. But the cottagers were deadlocked. Some of them wanted sewer and water services, while others only wanted the water.

[31] In 1956 (or 1964), the Applicant Leonard Giangregorio’s father Mario Giangregorio took title to Lots 15 and 16 on Plan 311 and over the years converted his cottage to a year-round residence. Apparently Leonard Giangregorio later acquired title to Lots 49 and 48 on Plan 243

and obtained a building permit on that property. The Giangregorios want both sewer and water from the City.

[32] The Applicant 1146726 Ontario Inc. owns lots on Plan 243 which front onto Winona Park Road.

[33] Access to the property of all of the Applicants, and indeed of all homeowners within Lot 311 is gained by Winona Park Road (Avenue) after crossing the one-foot reserve. Without a unanimous vote of the registered owners within the Plan, no permission for the installation of services can be granted on Winona Park Road, according to a trust deed held by National Trust which purports to vest ownership of Winona Park Road in National Trust.

[34] There are appended to these Reasons the following schedules, meant to assist the reader:

Schedule 1 -

the aerial photograph showing the disputed lands, which had been marked as Exhibit One to the cross-examination of the Applicant Leonard Giangregorio, conducted August 7, 2003;

Schedule 2 -

Registered Plan 311, registered May 31, 1893 (Winona Park #1), in the former Township of Saltfleet (now City of Hamilton). This Plan was formerly County Plan No. 9;

Schedule 3 -

Registered Plan 243, registered April 28, 1894 (Winona Park #2) in the former Township of Saltfleet (now City of Hamilton). This Plan was formerly County Plan No. 10;

Schedule 4 -

A chart prepared by counsel for the City of Hamilton meant to assist in locating the disputed lands in reference to Schedules 1 through 3 above.

[35] Plan 311 was certified by Cyrus Carroll, Ontario Land Surveyor, at Hamilton on April 18, 1893, and it was made under the instructions and directions and in terms of the Registry Act by the owners, John F. Woods and Richard S. Martin, on April 29, 1893 at Hamilton. That Plan was registered on May 31, 1893 and was originally called County Plan No. 9.

[36] In that Plan, Central Avenue runs south and north to the lake and is now Winona Road. At the most southerly boundary of the lots described in Plan 311 is a thoroughfare that starts at

Winona Road and is called Avenue for part of the way. That thoroughfare is now called Winona Park Road. The Avenue is highlighted in yellow on Schedule 1 and is the subject of paragraph 1(a) of the Notice of Application.

[37] Closest to the shore, at the north of Plan 311, beyond Lots 15 through 40, is the Promenade. It is highlighted in light blue on Schedule 1 and is the subject of paragraph 1(b) in the Notice. Following the lakeshore, it hooks around the northern limit of Block A (Lots 7 and 8) to Central Avenue (Winona Road).

[38] On Plan 311 there is shown a one-foot reserve and a contiguous 20-foot wide strip between the western boundary of Winona Road and the eastern limit of Block A. The one-foot reserve is shown in dark blue on Schedule 1 and is the subject of paragraph 1(f) of the Notice, while the 20-foot strip is shown in green on Schedule 1 and is the subject of paragraph 1(c).

[39] There is also a one-foot reserve shown along the southerly boundary of Winona Park Road. That is shown in red on Schedule 1 and is referred to in paragraph 1(e) of the Notice.

[40] Paragraph 1(d) of the Notice of Application deals with a 50-foot strip separating Block A from Block B and running between Winona Park Road and the Promenade. It is shown in pink on Schedule 1.

[41] In January, 1940, the National Trust Company, acting as administrator with will annexed of the estate of Richard S. Martin, the developer, purportedly conveyed the one-foot reserves and the land set apart for private roads and promenades within Plan 311 to Fred Hamilton.

[42] By various deeds commencing in about January, 1940, Fred Hamilton, trustee, or National Trust as administrator of the estate of Richard S. Martin, conveyed to the then registered owners of lots 15 through 40, inclusive, block B, plan 311, the lands lying between the northerly boundary of their lands and the water's edge of Lake Ontario subject to the rights of the other owners of lots in plan 311. By these deeds, ownership of the Lakefront Promenade was reportedly conveyed to the owners of lots 15 through 40, inclusive, block B, plan 311. Under the trust agreement administered by National Trust, all the parties must consent to the doing of anything with respect to the provision of services in lots 15 through 40.

[43] Today, National Trust is the registered owner of all of the other disputed lands on Plan 311.

[44] Plan 243 was registered on April 28, 1894, about 11 months after the registration of Plan 311. It was also prepared by Cyrus Carroll, Ontario Land Surveyor, based on instructions received from the same owners, Messrs. Martin and Woods. It was originally registered as County Plan Number 10. The plans were renumbered by the land registrar. The surveyor's

certificate on Plan 243 was made in November, 1893, some six months after the Surveyor's Certificate on Plan 311.

[45] The first conveyance on Plan 311 was registered in July of 1893 whereby Martin and Woods conveyed Lot 29 (Block B) to William Martin. That deed was actually made on February 23, 1893, but it was not registered until after the registration of the Plan. The deed contains no express grant of right-of-away over the one-foot reserve or over the Avenue. By implication there must be access, otherwise this would be a landlocked lot.

[46] Section 65 of the Ontario Land Surveyor's Act, 1887, provided:

> In no case shall any plan or survey, although filed and registered, be binding on the person so filing or registering the same, or upon any person, unless a sale has been made according to such plan or survey, and in all cases amendments or alterations of any such plan or survey may be ordered to be made, at the instance of the person filing or registering the same or his assigns, by the High Court or by any judge of the said Court, or by the judge of the county court of the county in which the land lies, if on application for the purpose duly made, and upon hearing all parties concerned, it be thought fit and just so to order, and upon such terms and conditions as to costs and otherwise as may be deemed expedient. An appeal shall be from any such order to the Court of Appeal.
>
> (2) No part of any street or streets shall be altered or closed up, upon which any lot of land sold abuts, or which connects any such sold lot with or affords means of access therefrom to the nearest public highway (Winona Road).

[47] In 1894, the *Land Surveyors Act* R.S.O. 1887, c. 152, s. 62 read:

> All allowances for roads, streets or commons, surveyed in cities, towns and villages, or any part thereof, which have been or may be surveyed and laid out by companies and individuals and laid down in the plans thereof, and upon which lots of land fronting on or adjoining such allowances for roads, streets or commons have been or may be sold to purchasers, shall be public highways, streets and commons; and all lines which have been or may be run, and the course thereof given in the survey of such cities, towns and villages, or any part thereof, and laid down on the plans thereof, and all posts or monuments which have been or may be placed or planted in the first survey of such cities, towns and villages, or any part thereof, to designate or define any allowances for roads, streets, lots or commons, shall be the true and unalterable lines and boundaries thereof respectively; and all land surveyors employed to make a surveys (sic) in such city, town or village, or any part thereof, shall follow and pursue the same rules and regulations in respect of such surveys as is by law required of them when employed to

make surveys in townships: provided that the municipal corporation shall not be reliable to keep in repair any road, street, bridge or highway laid out by any private person until established by bylaw of the corporation or otherwise assumed for public use by such corporation, as provided in the Municipal Act.

[48] There are at least five subsequent deeds conveyed within Plan 311 which do not express a right-of-way and require the property owners to traverse the one-foot reserve and perhaps the 20-foot lane.

[49] In 1894, after five deeds were registered under Plan 311, Woods and Martin caused the registration of Plan 243. Its northerly limit is on the south side of Winona Park Road. In Plan 243 the southerly one-foot reserve shown on Plan 311 disappears or is merged into the lots or the road.

[50] In 1960, on an Application to amend Plan 311, Justice McCombs made an order whereby the most westerly 89 feet of Winona Park Road was closed. A house was constructed on that part, which is to the south of Lots 38, 39 and 40.

[51] It is common ground that there has been no bylaw by the City of Hamilton or its predecessors assuming the disputed lands as public roads. While the City does not maintain or repair the thoroughfares within Plan 311, it has provided garbage collection to all houses within Plan 311 and has plowed the snow on Winona Park Road throughout the period of time that Leonard Giangregorio's parents owned the lands.

[52] There is no easement registered for the public services in issue, but apparently there is an easement granted by the National Trust Company to Union Gas for the provision of natural gas.

[53] The thoroughfares and roadways shown on Plan 311 have never been assigned property assessment numbers.

[54] In 1902 the successors of Woods conveyed to Martin various lots in Plans 311 and 243, representing all the lands in which Woods had any interest. That is the beginning of the chain of title leading to National Trust. Only after that conveyance do the deeds on Plan 311 start granting rights of way.

[55] In 1920 Martin died. National Trust was the administrator of his estate and it conveyed to Fred Hamilton all of Martin's interest in Plan 311.

[56] Then, in January, 1940, National Trust Company, acting as administrator with will annexed of the estate of Richard Martin, purportedly conveyed the one-foot reserves and the

private roads and promenades on the lands within Plan 311 to Fred Hamilton. That deed was made in September, 1939 but not registered until 1940.

[57] The Applicant says that this is a first reference in registered deeds to “private roads” on Plan 311. That deed is the root of the deeds from Fred Hamilton back to National Trust whereby National Trust became the owner of all lands on Plan 311 set apart for private roads and promenades, together with the one-foot strip reserved on the easterly and westerly boundaries of Plan 311, along with a series of other parcels.

[58] I am told by the applicants that these private roads and reserves were conveyed because Hamilton and Kennedy believed the roads were private for the benefit of Lots 15 through 40 on Plan 311. Apparently they took no notice of Lots 1 through 14 in Block A. There have been no grants of right-of-way to Lots 1 through 7 in Block A allowing the owners’ access to their properties. They must cross the one-foot reserve and the 20-foot lane.

[59] The deed from Kennedy to National Trust conveys the one-foot reserve strip of land shown on Plan 311.

[60] In any event, as a result of various deeds, Kennedy and National Trust conveyed a portion of the Lakefront Promenade to the lot owners. Those deeds are now in land titles and lots 15 through 40 are shown as registered owners of what was the Lakefront Promenade. But the Applicant also is asking me to find that the Lakefront Promenade is vested in the City.

[61] It is the evidence of Leonard Giangregorio that, since his father’s purchase of lots 13 through 16, neither he nor his father have ever observed anyone prohibiting entry onto Winona Park Road or to the lanes lying west of Block A, i.e., there have been no attempts to prevent the crossing of the one-foot reserve.

The Applicants’ Position and Discussion

[62] It is the Applicants’ position that the Regional Municipality of Hamilton-Wentworth (now the City of Hamilton) do not need to get permission from the cottage association to install the sewer and water lines because Winona Park Road has always been owned by the Municipality.

[63] They say that while the roadway has never been assumed by the City, it was vested in the Municipality as a public road by virtue of the registration of Plan 311 in 1893 and by operation of the Surveys Act that declared:

1) all roads on plans are public;

2) municipalities are not responsible for roads until assumed; and,

3) all plans are binding on the sudivider and all other parties once a lot is sold to the public and can only be changed by a judge's order.

[64] In other words, simply by virtue of the registration of Plan 311 and the sale of lots immediately after registration, the allowances for roads described in that Plan whatever they were called vested in the Municipality.

[65] The Applicants also say that the City has a right of limited assumption under the Municipal Act so that the City could assume the road only for the provision of services it chose to provide and not for all purposes.

[66] The Applicants say that the effect of s. 65 and 62 of the Land Surveyors Act, 1887 crystallizes the intent of Martin and Woods in respect of Plan 311 and makes it binding on the owners of the lots once there has been a sale of a lot in the Plan.

[67] They also say that as early as 1960, the order of Justice McCoombs closing up part of the road, showed the public nature of Winona Park Road: there would be no need for a judge's order to amend the plan if it were not a public road.

[68] And the Applicants say that the deed from Kennedy to National Trust in 1955 is a case of *nemo dat non quod habet*, a conveyance of that which Kennedy did not own.

[69] As a result of the registration of Plan 311 and the subsequent deeds, Mr. Castle's position under s. 62 of the Land Surveys Act, 1887, is that all allowances for roads, streets or commons shall be public highways, street and commons. Once a lot on a plan is sold, s. 62 considers as interchangeable "roads" and "public highways"; and the successor 1914 Surveys Act added "lanes" to roads, street, commons, and that carried through to the 1920 Surveyors Act.

[70] In the case of University of Western Ontario v. Wilson [1961] O.R. 69 (H.C.J.), Donnelly J. held that the Act applied to a Plan of Subdivision in a Township.

[71] Mr. Castle argues this has been consistently carried through to s. 57 of the Surveys Act of 1990:

> Subject to the Land Titles Act or the Registry Act as to the amendment or alteration 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.

And that section deems the lanes or streets to be public for the purpose of providing public access for those who need it. And s. 65 of the 1887 *Act* makes the plan (and the public roads thereon) binding, once a sale has been made according to the Plan.

[72] But the flaw with Mr. Castle's argument here is that he applies Donnelly, J.'s reasoning retrospectively to 1893, when a plain reading of s. 62 in the 1887 Act clearly sets out the treatment for the allowances for roads, streets, or commons surveyed in cities, towns and villages while later referring to the surveyors following the same rules as is by law required of them when employed to make surveys in Townships.

[73] Clearly the wording of the section had changed by the time of the 1920 amendment.

[74] Neither Carroll nor Woods and Martin can be retrospectively fixed in 1893 with an intent imputed to the meaning of a 1920 statute, in a 1961 case, especially so, when such an interpretation would result in the diminution or removal of property rights in 2004 of lot owners in the Plan registered in 1893. Mr. Castle seems to argue that because Section 84 of the Registry Act, R.S.O. 1950 provides that any roadway which is the only access to a lot or lots laid down in a Plan of Subdivision shall be deemed a public highway then, if a person sells lots according to a particular map or plan, even though it is not registered, the purchasers acquire an interest in the streets or lanes shown upon it adjoining the lots sold, which places them beyond the vendor's future control to their injury.

[75] However, the majority judgment of Cartwright, J. in the Supreme Court of Canada, [*Vanalstyne, et al. v. Ruck*, 7 D.L.R. (2d) 1, held that the right-of-way in question could not be said to be "an allowance for roads, streets or lanes, within the words of the provision".

[76] Cartwright, J. made it clear that it was common ground that the road in question was a private road, and said: "To construe the subsection as having the effect of creating rights in individuals or the public generally or imposing liabilities as to maintenance and repair upon municipalities seems to me to fail to give effect to the words 'for the purposes of this section'". In other words, s. 84 deals with a method of preparation of plans, their contents and the formalities which attend registration. And it is only for the purpose of that section that any public or private way being the only access to lot or lots laid down on a plan shall be deemed to be a street or highway. In my view, that would be the highest position the applicants could hope to attain.

[77] The 1887 *Surveys Act* predates the registration of Plan 311. Section 62 speaks about allowances which have been or may be surveyed and laid out. By 1920, the Act simply provided that "all allowances for roads, streets and lanes or commons shall be public". The Applicants rely on the 1982 case of *Hahn v. Wash*, [1982] O.J. No. 2321, where County Court Judge Carly says this:

> When s. 57(1) of the Surveys Act is examined in light of s. 10 of the Interpretation Act, it is clear that the legislature intended that the lands shown on a plan of subdivision as a 'road allowance, highway, street, lane, walk or common' be deemed to be a 'public road, highway, street, lane, walk, or common.'

And:

> While such identification can best be achieved by labeling the particular parcel with the specific words to in s. 57 of the Surveys Act, it can equally be done by using other words, such as 'drive', 'avenue', 'place' or less imaginative words such as 'block' or 'part'. As long as the words of identification clearly indicate the intention that it is to be dedicated as a highway.

[78] In other words, the Applicants say, any of the descriptive terms must be taken as within the ambit of the particular section of the Act and we must look at the legislation in 1893 and 1894 to see that a Plan reading shows that s. 62 of the 1887 Act is prospective.

[79] The argument made by the Applicants in this case is that the Lakefront Promenade is a "lane" or a "common" and that the two other thoroughfares are "lanes" [even though they are not labeled as such]. Hence, since the registration of the first sale of a lot on Plan 311 in July, 1893, those "lanes" and "commons" which had not yet been surveyed and laid out have become public roads, title to which is vested in the Municipality, and s. 13(2) of the Surveys Act of 1920 made retroactive the laying out of such "lanes" or "commons" as public roads and commons.

[80] The Applicant argues that the retroactivity continued to be recognized. In the case of *Aihoshi v. St. Thomas (City)*, [1981] O.J. No. 2260, McDermid, the County Court Judge, says this (page 6):

> ...I decline to follow the decision of Lerner J. in *Alfrey Investments* and hold that the 1920 legislation was retroactive in effect and established the lane in question as a public lane.

McDermid, J. then held:

> In my opinion, there is no doubt that the words...include a lane...It follows therefore that the plaintiff cannot acquire title by possession to the lane in question... (because it is a public road)

[81] Mr. Castle uses this line of reasoning to argue that the 20' strip of land abutting the one-foot reserve along Winona Road, the 50' strip parallel to Winona Road on the west side of Block

A and the Lakefront Promenade are to be treated the same as a “lane” and are therefore “public roads”.

[82] The flaw in this part of Mr. Castle’s argument is that nowhere on Plan 311 are there shown any “lanes”.

[83] Mr. Castle then referred me to *Re: Hagen and City of Sault Ste. Marie* [1967] 1 O.R. 364-378 (Algoma District Court Vannini, D.C.J.) for the proposition that the law does not require descriptive terms only such as are set out in the statutes. The unlabelled lanes could be roads and the Promenade could be a common. Mr. Castle’s argument is that given the history of the legislation, where words have expanded, we must give the intent of those words liberal meaning to expand the rights of the public. But the problem with his argument is that there are no words with respect to some of the thoroughfares.

[84] The Applicant further argues that the fact that a Municipality has not assumed a road is not relevant to whether it is public nor can the use to which it is put. They rely upon *Cornwall (City) v. Geneau* 51 O.R. (3d) 460, Polowin, J. (2000). At paragraph 22:

> It may very well be that whole sections of this lane no longer look like a lane. However, the case law establishes that the rights of the public to a public road cannot be lost by adverse possession over the prescription period or by acquiescence or estoppel.

85 But in that case, the Plan “shows streets and lanes, all of which bore names like “Bonneville Lane” or “Holly Lane”.

86 Mr. Castle pointed out that section 62 of the Land Surveyors Act stands for the proposition that while the fee of such roadways are in the Municipality, the Municipality has no liability to keep them in repair until established by by-law or otherwise assumed for public use, as is said to be the ratio of *Re: Westwood Edition, Hamilton* [1945] O.R. 257-266 (O.C.A.) where the head note sets out the proposition:

> The effect of s. 12 of the Surveys Act, read with sections 453 to 455 of the Municipal Act, is that as soon as a Plan of Subdivision becomes binding upon the owner of the lands subdivided (i.e., as soon as a sale is made under the Plan), the Municipality is deemed to be the owner of the allowances for roads and streets laid down in the Plan. But, until these allowances have been assumed by the Municipality for public use, a county judge has jurisdiction, on an application to amend or alter the Plan under s. 88 of the Registry Act, to close such street allowances, and the Municipal Bylaw or the consent of the Municipality is not essential.

[87] Mr. Crossingham, for the Giangregorios, adopted Mr. Castle's submissions and made a few of his own. He conceded that the road has never been assumed by the Municipality. According to him, the sole issue is the underlying fee in the road, so the state of the road is irrelevant.

[88] Mr. Crossingham argues that the expert opinion of Izaak De Rijcke must be limited to the issues of surveying.

[89] He took me to the transcript of Mr. De Rijcke's examination on August 7, 2003, which he says restricts the evidence of Mr. De Rijcke to "the opinion he presents in relation to his surveyor's expertise...and his opinion on the intent of the subdivider. It is quite narrow".

[90] Mr. Crossingham argues that the power of a judge to amend a Plan originates in s. 65 of the 1887 Land Surveyors Act and that is exactly the process that existed in 1960 when part of the thoroughfare was closed by judge's order. He says the owner of Lot 29 on Plan 311 has no way of getting there unless he has access over the road, especially when one considers that no right-of-way was originally granted.

[91] Mr. Crossingham argued that there was a rebuttable presumption in favour of the public designation. For this presumption, he relied upon *Chiswell v. Charleswood, R.M. & Alcrest Golf Club* [1937] 1 D.L.R. 776 Man C.A.), where at page 3 Trueman, J.A., for the majority, says this in dealing with the effect of the Manitoba statute:

> The common law rule is that when a tract of land is plotted into lots and streets, there is a dedication of the streets to the public, provided, however, that the object of the subdivision has been carried out by the acceptance of the dedication through a sale of a lot or lots on the strength of the Plan. So far as the public is concerned, the dedication inures to their benefit by reason of the sale, a dedication made necessary in order that the agreement with the purchaser shall be carried out. The legislation above referred to gives effect to the common law, save that the dedication is effective forthwith upon the registration of the Plan...In reading the language of the controlling legislation there must be taken into account the fact that the legislature, in eschewing the common law qualification that a subdivision plan does not bring about a dedication of streets to the public unless a sale is made, intended that on a Plan being registered pursuant to the Act, the consequences thereof should at once attach. The draftsman of the Act no doubt had before him cognate provisions of the Land Surveyors Act, c. 152 R.S.O. 1887 and the Registry Act, c. 114 of the same revision.

[92] As to the rebuttable presumption contained in s. 57, he says that there can be no other meaning for, "shall be deemed to be public" and the onus is on those who would negate it. For this he cites Rogers on Municipal Corporations, 1999, Release 2, at s. 227.26, page 1179, to say

that means before s. 57 can be invoked, it must be shown that the plan was made in accordance with either of the two aforementioned statutes (*Surveys Act or Registry Act*) and that you must then negative the intention. But I am not at all convinced by this argument nor that Mr. Crossingham has correctly stated the law. I agree with Ms. Smith when she argues that there is no such rebuttable presumption.

[93] Mr. Crossingham goes on to say it does not matter once the Plan became binding what happens, whether there are conveyances, creations of trust or golf on it. If the Plan becomes binding, the roads are public roads. That is the presumption and the onus lies on a subdivider to show the intention that the lands are to be private. This is the rebuttable presumption. He says, for example, the presumption is rebutted on Plan 243 where the word "private" is indeed used. While I do not agree with this proposition, Mr. Crossingham may otherwise be hoisted on his own petard if I find as I must that the intention to create private thoroughfares on Plan was manifest by the unusual use of the one-foot reserves. Then, indeed, Mr. Crossingham's so-called rebuttable presumption would have been rebutted.

[94] But Manitoba law is different than Ontario law. In Ontario there is no dedication to the public unless there is a sale. So I do not see how this argument assists me in any way.

[95] Mr. Crossingham goes on to say that it is common ground between the Applicants and the City's expert that Plan 311 is ambiguous.

[96] In this regard he referred me to the cross-examination of Mr. De Rijcke, where he has Mr. De Rijcke agree that Plan 311 lacks clear evidence on its face as to the owner's intention.

[97] Mr. Crossingham says that a rebuttable presumption cannot be displaced by an ambiguity. There needs be clear evidence of the intention to rebut the presumption that the lands are to be public. Mr. Crossingham says in the case of Plan 311 there is a patent ambiguity on the face of the record, which, he argues, includes the Plan itself and the deeds. For this, he relies upon the following six points.

[98] 1. The word 'Avenue' is used.

[99] 2. Portions of the contiguous strip of land upon which the word 'Avenue' appears vary in width, intersect with another street, bend in direction and are not labeled further to the west. Mr. De Rijcke's view was that these things terminate the "Avenue".

The land is one contiguous strip. The land looks like a road. The land has always been used as a road. The land must be presumed to be public. The curve is not relevant. If it looks like a road it is.

Mr. Crossingham says it is absurd to think that if the Avenue is private, the contiguous nature of the strip prevails, but that some different conclusion should be reached if I find Avenue to be public. He simply asks me to look at the road that starts on the eastern end with Avenue and to ignore the change in direction and width.

[100] 3. The deeds to Lots 15-40 do not grant a right-of-way over the 'Avenue'.

The Applicants say this is key. It is a mirror image of the *Vanalstyne v. Ruck* case [1957] 7 D.L.R. (2d) 1 (S.C.C.).

But in that case, Lot number 3 was granted, together with the use of a right-of-way over the private road to and from Highway No. 2 shown on said Plan. Cartwright, J. at page 6 holds:

> In the case at bar, the conveyances on which the respondents rely define their rights to use the strip of land in question. We do not have to decide what the rights of the parties would have been if their deeds had simply described their lots with reference to Plan 338 and had made no mention of the 20-foot strip.

Mr. Crossingham used Carroll's Plan in 1873 in Teeswater, Ontario to demonstrate that he had written the word "street" in many circumstances only at one end of a thoroughfare and that that is consistent with his style.

But on that Plan, in my view, the streets are laid out as straight roadways. There are no curves or change of width. It is clear that what he intended there were public streets. There are no words like "Avenue" or "Lakefront Promenade" on that Plan, but Mr. Crossingham still argues from this that I ought to extend the word "Avenue" to mean the whole of the yellow strip on Plan 311.

Mr. Crossingham says it matters not whether the ambiguity is in the deed or on the plan. By the deeds of 1940 and 1945 the road effectively became the property of the trustee for the benefit of lot owners 15 through 40 and there is no mention of lots 1 to 14, for which there is no access unless by way of the strip of land which the Applicant argues must be deemed to be a public road.

[101] 4. The one-foot reserve around the thee land sides of the subdivision is irrelevant to the Applicants' submissions. It does not matter what a piece of land is called, if it connects to the road it is a street, based upon s. 78 of the *Registry Act*. The Applicants say that whether or not the road is public or private, the one-foot reserve is there, and it has never been enforced, and moreover, municipal services, including sewers, have been constructed across it along Winona Road and at the west end of the lane for Lots 39 and 40 without permission or consent and without objection.

But it seems to me important that Mr. De Rijcke is of the view that the one-foot reserve:

> ...speaks to the intention of the original subdivider as to whether or not a thoroughfare or a means of ingress and egress is on the face of what is actually surveyed and subdivided meant to become a public road vested in a municipality," regardless of the fact that lot owners have to and do cross it to get to their lots.

[102] 5. The Municipality did not consent to the creation of roads less than 66 feet wide, even though the Municipal Institutions Act of 1873 purported to legislate a minimum width of 66 feet for public roadways. Mr. De Rijcke is of the view that one factor pointing to their private nature is the fact that the thoroughfares on Plan 311 are less than 66 feet wide.

[103] 6. There is no dedication of the road signed on the Plan.

But it is Mr. De Rijcke's evidence that the practice of plans containing a statement dedicating roads to the public only began appearing in the early 1900's.

[104] Mr. Crossingham argues that the ambiguity is therefore patent and that no extrinsic or parol evidence is admissible to explain it and he relies upon Gibbs v. Grand Bend (Village) 26 O.R. (3d) 644 (C.A.) for that proposition and for is corollary, that extrinsic evidence may only be introduced to ascertain the intention of a grantor where there exists a latent ambiguity, i.e., one that arises only when the deed is applied to the land it purports to describe.

[105] Then, Mr. Crossingham says that the rules about admitting extrinsic evidence to resolve ambiguities in deeds apply equally to plans. He says this is a patent ambiguity, apparent on the face of the plan. But on this score, Mr. De Rijcke does not agree. He gave a qualified "no" when asked if the ambiguity on Plan 311 was patent:

> My answer to questions 169 and 170...outline various factors which point to the public or private nature of the thoroughfare shown on registered Plan 311. In and of itself, the thoroughfare is not labeled as a road, street, highway, or otherwise. Accordingly, the ambiguity is latent since the obvious intent on the face of Plan 311 is that it not be a road, street, highway, or otherwise. The latent ambiguity, as it was characterized by Mr. Crossingham, only arises when an attempt is made to apply Plan 311 to the ground. And the question of public or private nature needs to be addressed. That latent ambiguity requires a consideration of the various other factors which are summarized in my report and in part in my answer to question 170 on page 41.

[106] To understand this answer, one must look to the transcript of Mr. De Rijcke's cross-examination:

Question 168: How important to your opinion regarding the public or private nature of the thoroughfare is the annotations on Plan 243, regarding 'private road for the access of lot owners - - - private road for the use of lot owners?

Answer: It's an important consideration.

Question 169: Without that annotation, what would you have to support the conclusion you've reached?

Answer: ...everything else that remains. I talk about that in my report.

Question 170: Okay.

Answer: The fact that there's a one-foot reserve around the whole of Plan 311 appearing to be evidence and intention to create a self-contained private community of residential lots, the non-labeling as a road or a street of the thoroughfare itself, the word 'avenue" appearing only in a very small or limited section of the whole segment. When I see the words on Plan 243, the kind of ambiguity that Plan 311 could be accused of creating because of perhaps legislation or practice or what you have in place at the time in 1894, when you see the words on the subsequent Plan 243, and I mean subsequent by only matter of months within the same calendar year, you have a very unique opportunity in the combination of these two plans of subdivision to see how both Carroll as the subdivider/surveyor as well as the subdividers themselves, do try and resolve this ambiguity and try to clarify where something may have been unclear before.

[107] Mr. Crossingham then argues that all of the six points he made show that the ambiguities on Plan 311 are patent, are highlighted by the fact that:

(i) there is no indication on the Plan that they are private; and,

(ii) there is no grant of the right-of-way in the deeds.

[108] If I reach a conclusion that the ambiguity is latent, then the Applicant's position on Plan 243 with respect to the use of the words "private road", is that the implications are covered in the rationale of *Board of Trustees of Wasaga Beach v. Fielding* [1947] O.R. 321-333, LaBelle, J.:

Where a plan shows a street, not as forming part of the lands subdivided, but merely as marking the boundary of those lands, as required by s. 83(5) of the Registry Act, the street so shown does not become one by registration of the Plan.

[109] In other words, the designation of 'private' on Plan 243 with respect to the road on 311 does not make it so. That case stands for the proposition that an owner cannot dedicate to public use a street located beyond the limits of his land, which he does not own.

[110] The flaw in applying that reasoning here is that Messrs. Woods and Martin did own the lands on both Plans 243 and 311. It is true that by selling lots on Plan 243 they could not have dedicated any road shown on Lot 311. And it would also be true that they could not "undedicate" or make private a public road on Plan by showing it on 243.

[111] But the same owners developed the lands in both plans and the Respondents argue that the use of that labeling on Plan 243 shows the intention of the subdividers with respect to the whole enclave. And I tend to agree with them on this point.

[112] Mr. Crossingham asks me to find that Carroll was not a member of the Association of Ontario Land Surveyors and so did not know of the minutes of their proceedings. There is no clear evidence of that but I am prepared to find that Carroll ought to have known the then-standards of practice for Ontario Land Surveyors which those minutes reflected.

[113] Mr. Crossingham also argued against a finding for a vision of Winona Park #1 and #2 because he says that the writing of these words on the plans is not in the same script as that of the rest of the Plan. There is no evidence of that. Plans 311 and 243 came from the Registry Office with those labels and I am going to take them as having existed all of this time for all of the property owners who are before me and all of their predecessors on title.

[114] Mr. Crossingham finally argues that there is no harm to the Respondents: none to the Municipality because there is no onus on the Municipality to assume the road (he is right about that as matters currently stand); none to the Lot owners because this is not about access. They already have access. I agree with that too.

[115] He says I can deal with the Lakefront Promenade and the encroachments on it by either encroachment agreements or by granting title to the closed Lakeside Promenade. I find that to be an interesting twist in Mr. Crossingham's argument: are the Applicants not asking that the Promenade be dedicated as a public street? I fail to understand how this argument can apply to one thoroughfare and not to others. Either the argument succeeds such that all of those thoroughfares not called "streets", "roads" or "highways" on the Carroll Plan 311 are streets, public roads or highways because of the registration of the plan and the sale of one lot there, whether they are called "avenue" or "lakefront promenade" or they are not.

[116] Mr. Crossingham concluded if the application succeeds there is no prejudice to the lot owners if some choose to obtain services but there is a great problem if the standoff continues:

for water and sewer to be provided by the Municipality to the Lot owners, 100% consent of the Lot owners inside the Plan is required.

Respondent's Position and Discussion

(a) The City

[117] In summary, the City's position is this:

a) In 1893, Plan 311 created a private enclave with private thoroughfares. When it was registered and the first lots were sold, the Surveys Act was not invoked. The thoroughfares did not vest in the Municipality.

b) The so-called rebuttable presumption of s. 57 advocated by Mr. Crossingham does not exist in Ontario. In Ontario, whether s. 57 is invoked or not is determined by ascertaining the subdivider's intent.

c) This case is not about access - it is about ownership of disputed lands.

d) What the parties intended to do and what they did do in 1893 was to create a self-contained private community of cottages accessible by a private road.

[118] Ms. Smith correctly points out that I heard neither evidence nor argument from the Applicants about the dark green strip on Schedule 1, set out at paragraph 1(c) of the Notice of Application. That is the 20' strip that runs from the thoroughfare marked "Avenue" (in yellow) to the Promenade (in light blue). It lies between Block A and the dark blue of the one-foot reserve that runs from the north to the south of Plan 311 on the eastern edge of the Plan at the western edge of Winona Road. It is clear that one has to cross both of those strips of land (dark blue and dark green) from Winona Road to get to the actual lots contained in Block A.

[119] The light blue Lakefront Promenade over most of the lots (15-40), runs on the northern limits of those lots from the western limit of the Plan to cross the pink strip and abuts against block A when it takes a curved trip north towards the lake and curves round again, coming west to east to abut against the dark blue strip just at Winona Road.

[120] Ms. Smith says that all of the parties agree in law that if the applicants are correct that s. 57 was invoked in 1893, then the thoroughfares vested after the first transfer in the Municipality and 110 years of paper title would be void. She concedes that the registration of Plan 243 cannot change the ownership of the lands marked out in the thoroughfare, marked in yellow on Schedule 1 (now Winona Park Road).

[121] She also concedes that if the Applicants are right that s. 57 was invoked in 1893 and that the lands vested in the Municipality after the first transfer of a lot in Plan 311, the fact that the road is well below Municipal standards is irrelevant.

[122] And whether or not the Saltfleet or any of the other Municipalities in which this land was situate prior to its annexation by the City of Hamilton serviced those lands is not relevant.

[123] That is true as well with respect to the fact that the disputed lands were not assigned assessment role numbers.

[124] Those matters are irrelevant. Counsel for the City says the Surveys Act was either invoked or it was not. If it was, she concedes, the thoroughfares are public streets or roads, vested in the Municipality.

[125] Ms. Smith also agrees that Izaak De Rijcke can assist the court only with surveyor opinion evidence to guide the court's eye.

126 Ms. Smith disagrees with the Applicants that Plan 243 is extrinsic evidence. She says that cases on extrinsic evidence do not apply here. Plans 243 and 311 were owned by the same owners and were laid out by the same surveyor. When one sees the designation of "private road for use of lot owners" at the bottom of Plan 243, drawn by Mr. Carroll for Mr. Martin and Mr. Woods within six month of Plan 311, that is the best indication of the intention of the developers we have. It shows Winona Park Road to be a "private road for use of lot owners". I agree with the Respondents on this point.

[127] The Respondents' position on dedication can be summarized as follows:

1. At common law, in order to declare that a road is public, it is necessary that a court find:
    a) that an owner of the land on which the road is situated had formed the intention to dedicate the land to the public as a public road;
    b) that the intention was carried out by the road being thrown open to the public; and,
    c) that the road was accepted by the public.
2. Whether land has been so dedicated by the owner for use as a public highway is a question of fact and dedication must not be too readily presumed.
3. No inference of dedication arises from the use by persons traveling to and from their private cottages of the road which the owners of the fee in were obliged to afford them.

4. The onus of showing dedication is upon those alleging it to prove upon a preponderance of probability that ownership of the land has become subject to a right in the public.

5. The applicants have failed to meet the burden of proof in establishing an intention to dedicate by the original landowners and subdividers Martin and Wood.

[128] Ms Smith says that the common law has been incorporated (interpreted) into s. 57 dealing with highway creation: (*Surveys Act*, R.S.O. 1990):

> 57. Subject to the Land Titles Act or the Registry Act as to the amendment or alteration 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.

[129] And she argues that Mr. Crossingham has it backward when it comes to the so-called rebuttable presumption. The Manitoba legislation has different language and Mr. Crossingham's clients would be in a better position if this land were in Manitoba. Section 56 of the *Real Property Act*, R.S.M. 1902, as amended by c. 52 of the Acts of 1908:

> 1(h) Whenever upon any plan of subdivision now filed or registered, or hereafter filed or registered, in any land titles office or registry office in the Province of Manitoba, any portion of such subdivision is shown as a street, lane, avenue, road, highway, park or public square, and is not designated thereon to be of a private nature, the marking or indicating on any such plan or any street, lane, avenue, road, highway, park or public square shall be deemed to be a dedication to the public of such portion thereof for the purpose and object indicated on or to be inferred from such marking on such plan.

This is exactly the situation that the Applicants ask me to find.

[130] But out our statute does not have that language. It does not set up the reverse inference, nor does the case law, which calls for a clear intention before s. 57 can be invoked. She said that s. 57 of the Surveys Act does not deal with generic access. Specific terms are used. She argues that this provision and its predecessors merely instruct surveyors in the creation of public thoroughfares by Plan of Subdivision registration. It should not be enlarged by liberal interpretation to interfere with the creation of private thoroughfares.

[131] It is clear when one looks at the index of the 1887 predecessor Act that it governs surveyors. Its title is "an Act respecting land surveyors in the survey of lands." It legislates who may act as land surveyors, examiners for surveyors, the admission of apprenticeship, the qualifications for, and the examination of, candidates for admission to practice, certificates of admission, oath of allegiance and of office, suspension of surveyors, fees. And it deals with the

establishment of boundary lines, standard of measure, powers to pass over lands and discharge of duty. And s. 62, which deals with road allowances, is found in the section called "Private Surveys in Cities, Towns and Villages". The marginal note to s. 62 sets this out:

> As to allowances for roads or streets in cities, towns or villages laid out by private owners.

[132] The Respondents argue therefore that we must put s. 57 of the 1990 *Surveys Act* into context. Section 57 finds itself in the part of the Act called "Plans of Subdivisions". This section and the predecessor act must be taken in the context of the "how to" Manual, which is the *Surveyors Act of 1887*. That Act tells surveyors how to create highways on Plans of Subdivision. Section 57 neither has anything to do with access, nor does it create property rights.

[133] The cases that deal with these issues are evidence driven. The *Brett v. Toronto Railway* case [1909] 13 O.W.R. 552 affirmed 14 O.W.R 74 deals with what was then s. 39 of the *Surveys Act*, which provides that allowances for roads, streets and commons in cities which have been laid out by private owners on plans thereof, and with reference to which lots have been sold shall be public highways, streets and commons... The history of that section is given in the *Brett* case by Chancellor Boyd, who says:

> This is a somewhat new provision, first introduced by the *Surveyors Act of 1887*...In my opinion, it does not apply to the place now in question, which is a lane, 14 feet wide, at the rear of the plaintiff's lot, over which the defendants have made their track and run their cars without her permission. A lane is not within the meaning of the words 'roads, streets, or commons', nor is it within the purview of the section...
>
> The Act itself distinguishes between road and street, which may be regarded as synonymous, and lane, a narrow way which is less and other than a street in the city. This is also a distinction observed colloquially and the legislation is not of that character as interfering with private lanes which should be enlarged by liberal interpretation.

[134] Ms. Smith argues that this sets the stage for the interpretation of s. 57 and to demonstrate that language is important. She argues that the Surveys Act is a code, a "how-to" manual of creating surveys.

[135] Since the Brett case there have been statements in the law that the subdivider's intent is the key. The Brett case was affirmed in the Court of Appeal for the reasons of Chancellor Boyd.

[136] In support of her proposition that the subdividers intent is paramount, Mrs. Smith cites *Re: Tremaine and Corbett* (1975), 10 O.R. (2d) 129 (H.C.J.), which dealt with a Plan of

Subdivision registered in 1954 in Guelph. The Plan of Subdivision shows a 66-foot “road” with the marking “fee in road not dedicated”. The Plan also shows a 27-foot “lane-way” running between Lots 3 and 4 from the road allowance to Puslinch Lake. Justice O’Driscoll relied upon the affidavit of the Applicant developer Howard Tremaine, who alleged that the laneway was a private laneway subject to the use of the owners of Lots 1 to 6, but not dedicated to the Township, whereas some of the owners of those lots were claiming that the lane was a public highway.

Justice O’Driscoll concluded that:

> ...the applicant did not intend to dedicate and did not dedicate either the road or the laneway as public thoroughfares. I conclude that s. 11(2) of the Surveys Act, and the cases earlier cited in these reasons are not applicable to the factual situation here because in this case the road and laneway were described as a right-of-way and it is clear that the right intended to be given was in the nature of an easement.

[137] In *Hahn v. Wash* [1982] O.J. No. 2321, the issue is set out on the first page:

> 1. Whether at the date of a conveyance of the subject lands to a predecessor in title of the vendor Block ‘C’ shown on a registered Plan of Subdivision, Plan 405 (SUB) was owned by the Township of Hamilton, notwithstanding the absence of a deed of a conveyance thereof to the Municipality.

And Justice Carley concludes in paras. 23 and 24 of that Judgment:

> 23. When s. 57(1) of the *Surveys Act* is examined in light of s. 10 of the Interpretation Act, it is clear that the legislature intended that the lands shown on the Plan of Subdivision as a ‘road allowance, highway, street, lane, walk or common” be deemed to be a ‘public road, highway, street, lane, walk or common’.
>
> 24. While such identification can best be achieved by labeling the particular parcel with the specific words referred to in s. 57 of the *Surveys Act*, it can equally be done by using other words, such as ‘drive”, ‘avenue’, ‘place’, or less imaginative words, such as ‘block’ or ‘part’ as long as the words of identification clearly indicate the intention that it is to be dedicated as a highway.

[138] Ms. Smith also referred me to *Re: Johnston, et al. v. Township of Bastard and Burgess South, et al.* [1979], 25 O.R. (2d) 385, a decision of Justice Osborne. This case was an application by putative title holders to declare invalid a bylaw which purported to assume for public use a strip of land on the assumption that it was a highway. The Applicant succeeded in this case

because the Court found that it was not the intention of the developer to cause the 25 foot strip of land in question to be dedicated to the municipality.

[139] Osborne, J., at p. 394, writes:

> The township takes the position that no notice was required because title to the reserved strip was vested in it by reason of s. 57(2) of the Surveys Act, R.S.O. 1970, c. 453...
>
> The intention of the legislature seems to be clearly and broadly expressed in s. 57. The section expressly refers only to road allowances, highways, streets, lanes, walks and commons. The nomenclature referred to on the Plan of Subdivision established by the late Mr. Willis was, as previously indicated, 'reserved'.
>
> ...

And at p. 396:

> The plain ordinary meaning that I attach to the word 'reserved' as used on the 1906 Plan of Sub-division, when considered with the other evidence in this case, causes me to conclude that it was not the intention of the late Mr. Willis, in 1906, to cause the 25' reserve strip to be part of the Township's assets. The use of the word 'reserved' itself is suggestive of the fact that the late Mr. Willis intended to keep to himself that area of land, although he quite clearly had no objection to others in the geographic area using the reserved strip. I do not feel that the area marked 'reserved' on Mr. Willis' plan can be held to be a road allowance, highway, street, lane, walk or common as referred to in s. 57(1) of the *Surveys Act*.

[140] In the present case, there are not found words like "reserved". Rather, there are found "Lakefront Promenade" and "Avenue". And after the bend in "avenue" there is no label, nor is there any label on the pink strip (1(d), nor on the dark green strip (1(c)). But, tellingly, the one-foot reserves on Plan 311 are clearly labeled as such.

[141] Ms. Smith argues that in some cases, the intent of the subdivider is self-evident on the face of the plan, given the words of identification used. Where the words of identification used fall within the scope of s. 57 of the Surveys Act, a public highway is created and she gives these examples:

> "lane" *Aihoshi v. St. Thomas (City)* [1981] O.J. No. 2260 p. 1
>
> "The streets and Block 'c' are hereby dedicated as public highways"
>
> *Hahn v. Walsh* [1982] O.J. No. 2321 p. 4

“Holly Lane/Bonneville Lane” *Cornwall v. Geneau* [2000] 51 O.R. (3d) 460 at 461

“Centre Street” *Kovacs v. Aurora (Town)* [1994] O.J. No. 3052 p. 2

“Bissonette Avenue/Archambault Street” *Hay (Township) v. Bissonette* 17 O.W.R. 321 (1910) p. 3, Tab 11

So in those circumstances where those exact words are used, a public highway is created.

[142] And she argues that where the words of identification used to do not fall within the scope of s. 57 of the Surveys Act, it does not apply and a public highway is not created.

And again, Ms. Smith provides these examples from the cases:

“lane” *Brett v. Toronto Railway* [1909] 13 O.W.R. 552 (affirmed on appeal 14 O.W.R. 74)

“reserve” *Re: Johnston at el. v. Township of Bastard and Burgess South, et al.* [1979] 25 O.R. (2d) 385 at 392

“right-of-way” *Van Alstyne v. Ruck* [1957] S.C.R. 142 at 147

“fee and road not dedicated” *Re: Tremaine and Corbett, et al.* (1976) 10 O.R. (2d) 129.

[143] Courts have considered secondary indicators to discern the subdivider’s intent. In Tremaine v. Corbett, the affidavit evidence of the developer Howard Tremaine was clear evidence that he did not intend to dedicate that as a public road.

[144] In the *Township of Cornwall v. McNairn, et al.* [1946] O.R. 837, the contents of a lost deed was used to ascertain intent. While this case is not about the interpretation of a deed, it is about ascertaining intent so as to apply a statutory provision. The Cornwall case came to interpret s. 12 of the Surveys Act with reference to words in the deed called “an historic site and public park” to determine that the land in question is not an allowance laid down as a “common” upon the plan of the subdivision.

[145] So the question I am asked is this: does s. 57 apply to Plan 311? If I look at Plan 311 on its face with no other assistance, I can see that it was prepared in April, 1893, and registered in May, 1893. The owners are Wood and Martin. The surveyor was Cyrus Carroll. The word “avenue” is used in that one small strip of land. The words “lakefront promenade” are used in the strip of land shown in blue and the word “Central Avenue” is shown as the original road allowance (now Winona Road).

[146] There are seen on the Plan heavy lines (the one-foot reserves) and the words “Winona Part No. 1”. And that is all. Of course, it is divided into lots and blocks and then there are these

obvious thoroughfares. Based on those indicia on the face of the Plan itself, the Respondents say that I may not be able to divine the subdivider's intent and therefore I need a surveyor to inform and guide me, to be my eyes, to interpret for me.

[147] That surveyor, Izaak De Rijcke, was the only expert called by either of the parties. With respect to the word "avenue", consider the cross-examination of Mr. De Rijcke on August 7, 2003:

> Question 35: Your position is that the word 'avenue' only relates to that portion of the road upon which it is written and not the continuum of that road throughout its length?
>
> Answer: Yeah, absolutely, it's quite clear on the plan.
>
> Question: What is it that divides the section marked 'avenue' from the remainder of the plan?
>
> Answer: Three separate things, an intersection with another street, a bend in direction and a change in width.
>
> Question: And all of those things in your opinion terminate 'avenue'?
>
> Answer: Had 'avenue' be meant to be labeled for the whole of the thoroughfare, one would have expected the word to have been repeated further over to the west.
>
> . . .
>
> Question 56: If it were laid out on a plan of subdivision, if the roads are laid out on plans of subdivision and they're marked 'avenues', they are not subject to being public roads because of the operation of s. 62? Is it the name, choice of 'avenue' that you're relying upon?
>
> Answer: My understanding from Mr. Carroll, the name was critical. His practice was to consistently use the word 'road' and 'street'. I haven't come across any instance in which he's used the word 'avenue' for a public street or road laid out on the plan.

[148] Izaak De Rijcke's report sets out that with respect to the methodology used, it was to focus at a "micro" level on Plan 311 itself, including the circumstances of Plan 311, the certificates registered on that Plan and a contrast between Plan 311 and Plan 243. At a macro level Mr. De Rijcke conducted research into the practices of surveyors of the day, other plans of subdivision prepared by Mr. Carroll during the course of his career and a consideration of the legislation in force in or about the year 1893 in Ontario. He set out some biographical details about Cyrus Carroll and the fact that during years in prior decades in which Mr. Carroll was more active in practicing his profession, numerous Plans of Subdivision were prepared by him.

He selected six plans of subdivision randomly from the Registry Office at Walkerton for a span of a period from 1868 to 1877. Those plans document his typical drafting style, his handwriting and approach to laying out of streets and lots. Mr. De Rijcke says that with the exception of Plan 51 and Plan 206, all of the streets laid out are one chain in width, that is, 66'. This is what he concludes:

> Despite the anomalies referred to above, there is no doubt whatsoever that all of the thoroughfares are clearly labeled as roads or streets. Owners' certification blocks on the various plans of subdivision in this time period also speak to the fact that the roads and streets are laid out in accordance with the instruction of the owner. Words which are found in newer plans of subdivision in the early 1900's will often speak of dedicating parks, blocks, or roads for public use but such language is conspicuously absent on plans of this vintage in general and also survey subdivisions by Mr. Carroll in particular (p. 5).

[149] Nowhere on Plan 311 is there the use of "street" or "road" except for Winona Road, which is the original highway divider or concession road that the Plan abuts. Instead, what is shown is for the short top width of Block A is the word "avenue" and for the strip at the more southerly end of lots 15 through 40 closer to the waterfront the word "lakefront promenade".

150 In 1894 the *Municipal Institutions Act*, s. 423 read as follows:

> No council shall lay out any road or street more than one hundred nor less than sixty-six feet in width, excepting when an existing road or street is widened, or unless with the permission of the council of the county in which the municipality is situate; but any road when altered, may be of the same width as formally, and no highway or street shall be laid out by any owner of land of a less width than 66 feet, without the consent of the council of the municipality.

[151] This section is referred to in the 1891 minute proceedings of the Annual Meeting of the Association of Provincial Land Surveyors of Ontario. In one of the committee reports, there is a question regarding width of roads. That section is cited and the question is this:

> 5. Is there anything in above section to prevent a town council paying money to an owner of land in consideration of his laying out a 40' street through his property and registering a plan thereof with resolution of town council attached consenting thereto. If not, what is the use of the first part of the above section where it requires permission from county council where town council is out street less than 66' in width?
>
> Answer: In case of the town being connected with the county and town council wishing to lay out a street less than 66' wide, they must get consent of county council.

[152] Mr. De Rijcke's report shows that general information and knowledge about roads, streets and Registered Plans of Subdivision among practicing land surveyors from 1888 to 1898, topics such as roads and streets, numbering of Lots, width of roads and their designation or status were brought up frequently at annual meetings of the Association of Provincial Land Surveyors and the Association of Ontario Land Surveyors. The above noted section of the Municipal Institutions Act was specifically discussed, in 1891, indicating an awareness of its contents by the surveyors of the day.

[153] Mr. Carroll was commissioned as a Dominion Land Surveyor on April 14, 1872, and at that time did not appear to be a member of any Provincial Land Surveyors' Association. But by 1893 and 1984, when these Plans went on, Cyrus Carroll is specifically shown on the Plan 311 as an Ontario Land Surveyor. While there is no evidence before me that he was or was not a member of the Ontario Land Surveyors Association in 1893 or indeed in 1891 when the minutes to which I have referred were made or the annual meeting was held, I am satisfied that he was sworn in as a Provincial Land Surveyor in 1860.

[154] Carroll was a practicing surveyor at the time the plans went on and had been registered as such for some 33 years by that time in Ontario. I am satisfied that he either knew or ought to have known of the practice of the day with respect to land surveyors and the requirement for roads less than 66 feet to have Municipal consent before they could be laid out in a Plan of subdivision as public roads or streets.

[155] The thoroughfares on Plan 311 are all less than 66 feet and there is no evidence of any Municipal consent.

[156] Plan 311 is surrounded by a one-foot reserve on all sides except for Lake Ontario. Mr. De Rijcke was of the view that the use of one-foot reserves in this manner is unique. He reports at pages 5 and 6:

> The Test
>
> My understanding is that the determination as to the intent of subdivider in laying out and dedicating a street as a public highway is that of a subdivider at the time of preparing the plan of subdivision. It is not generally possible for a subdivider to change his or her intention once the subdivision has been registered. Likewise, it is not possible to resile from an initial dedication with a subsequent retraction. Ultimately, in the absence of clear evidence on the face of the plan as to the intention or non-intention as to dedication, same appears to be answerable by having regard to secondary indicators which are close to, if not contemporaneous in time, with the subdivision survey in question. For this reason, information from Plan 234 (should read 243) appears relevant

in obtaining better insight as to the subdivider's intention for the disputed strip on Plan 311.

Conclusion

In view of all of the above, it would appear that the intention of the two owners was to lay out a 40' strip for access to the various lakefront lots but, to do this within the self-contained community known as Winona Park. This is further supported by the fact that the lands subdivided are isolated from surrounding property initially through use of a 1' reserve. There is also distinction made between lands that are initially laid out as a 'promenade' or 'avenue' but then not to extend this designation to the whole of the 40 strip in question. The subsequent plan later prepared and signed in the same year further supports a characterization of the 40' strip as a private thoroughfare. Certainly the legislation found in the *Municipal Act* of the day, surveyors' understanding of the significance of width of roadways on Plans of Subdivisions, as well as the apparent comprehension of Mr. Cyrus Carroll as to the significance of these issues all point to and support a finding of the 40' strip as being private land and not dedicated as a public highway.

[157] In his cross-examination, Mr. De Rijcke makes it plain:

> Question 147: The 1' reserve along Central Avenue is part of a 1' reserve that surrounds all of the Plan 311 lands that are subdivided. And given that rather unique set of circumstances, I would tend to view the 1' reserve as evidence supporting a finding that all of the thoroughfares within Plan 311 are part of a self-contained private residential community.

[158] This evidence is quite compelling for me. Mr. De Rijcke says that at that time the use of the 1' reserve was unique and clearly to surround all of the lands with the 1' reserve was a unique factor. That is more evidence of the subdivider's intent of a private enclave. In my view, the subdividers and their surveyor were saying, "look, this surveyor knows not to use 'road' or 'street', otherwise a thoroughfare might become a public road or street, so instead he uses other words, like 'avenue', 'lakefront promenade' to reflect a clear intention not to dedicate, and then to doubly confirm this, he drew the 20-foot strip in at the westerly side of the one-foot reserve on Winona and separated the whole block of land from the roadway and the subsequent plan by a 1' reserve - on the west - on the south, and on the east. The lake is on the north.

[159] The Respondents argue that there are other secondary indicators shown on Plan 243. That Plan is marked "Winona Park No. 2", while Plan 311, is marked as "Winona Park No. 1". The Plans had the same owners, Woods and Martin, the same surveyor, Cyrus Carroll, they

were prepared within six months of each other and they were registered less than a year apart. It so happens that when these plans were originally recorded in the County, Plan 243 (Plan 10) came after 311 (Plan 9).

[160] The Respondents, relying upon Mr. De Rijcke, argue that one cannot interpret Plan 311 in isolation from Plan 243. I agree. This is an obvious example of a phased development. Plan 243 does not amend 311, but the references in Plan 243 are indicative of the intent of the owners and the surveyor on Plan 311. It is patent that Plan 243 sets out a private residential community. Within the confines of that Plan, the subdivision is divided in by a thoroughfare called “Private Avenue”, which runs from south to north and intersects with another “Private Avenue” which runs west to east along the southern edge of the yellow-marked “Avenue” on Plan 311. Lots 15 through 40 on Plan 311 are shown at the very northern edge of Plan 243, though they are not part of Plan 243 and they are there only for location with respect to the boundaries of Plan 243.

[161] It is most informative that that thoroughfare, Avenue, which is the subject of dispute in Plan 311, is marked by the surveyor in his hand on Plan 243 as “private road for use of lot owners”. I agree with the Respondents’ position that it would have been extremely odd if the intent was for the first phase of the phased development (Winona Park No. 1, Plan 311) to contain public roads while the second phase keeps its thoroughfares private, and refers to the Avenue in Plan 311 as private. One can easily infer that the owners had a vision which united in Winona Park No. 1 and Winona Park No. 2. I am satisfied to make that inference.

[162] Ms. Smith reiterated that this case is not about access. It is about ownership. And that is clear from the Application itself, which does not claim access except as an alternative remedy, claimed in paragraph 1(f), for a declaration that the one-foot reserve is subject to a prescriptive easement in favour of the general public.

[163] There was before me no evidence of any present access problems, except that I was told that there is elsewhere an existing claim for access by Mr. Castles’ client, 1146726 Ontario Inc. That is the Motion Record where 1146726 Ontario Inc. is Plaintiff and National Trust Company is Defendant. The motion is for an order authorizing the issuance of a Certificate of Pending Litigation with respect to the property described on the grounds that the Plaintiff claims an interest in the property for unrestricted use from the public street (Winona Road) to the Plaintiffs’ land.

[164] Ms. Smith argues that the supporting Affidavit of Andrea Castelli in that motion attests to the fact that the Plaintiff acquired certain lands that are accessed by a private roadway (Winona Park Road). In order to obtain the Certificate of Pending Litigation, the allegations in

that Statement of Claim must be taken as true. The Affidavit is of the President of the Plaintiff company in that action which is the Applicant in this one, who swears that:

> The allegations contained in the Statement of Claim are true and I verily believe that the Plaintiff has an interest in said lands.

In paragraph 3 of that Statement of Claim the Plaintiff says that:

> At all material times [the Defendant National Trust Company] was and is the registered owner of lands more particularly described in Schedule A attached hereto, (which is the Avenue that is marked in yellow and the 1' reserve that is marked in red).

[165] That Statement of Claim claims that the Plaintiff and its predecessors in title have had the unrestricted use of those lands, the yellow strip and the red strip, for the purpose of ingress and egress from the public street (Winona Road) to the Plaintiffs' land since the time of the transfer to the Defendant by deed registered on May 18, 1955. The corporate Plaintiff commenced that action on December 21, 1999. It commenced this Application on May 22, 2002, three years later.

[166] Ms. Smith argues that the Municipality would not be a party to an access claim between private owners. The Applicant, she says, put forward the ownership of the thoroughfares to claim access and that is the only claim for use by the "public" that it can make. But this application is not for access, it is for ownership. And Ms. Smith says that the corporate Applicant cannot have it both ways. I agree. There are common law rights of owners to get to their lots and statutory rights of access that are set out in s. 78 of the Registry Act, neither of which matter in this proceeding because the Applicants did not claim access.

[167] Ms. Smith simply argues that it has been settled law in Ontario for one hundred years that to determine whether s. 57 is invoked to convert private land to public without compensation I must look at the subdividers' intent.

[168] And when I do look at Plan 311 and I look through the eyes of De Rijcke's helping evidence, the intent is overwhelming. Moreover, if I look at Plan 243, then there is absolutely no question that these thoroughfares were never intended to be dedicated as public roads or highways. I also agree with the Respondents that no rebuttable presumption in Ontario law in this regard.

[169] Mr. Thompson responded for the Respondents Clarkson and others representing the majority of the lot owners between Lots 15 and 40 and supported the City's position that there was never an intention of the original landowners and subdividers to dedicate the private lands

to the Municipality and accordingly the operation of s. 57 of the Surveys Act or its predecessor was never, and cannot now, be invoked.

[170] In the alternative, and in addition to that position, Mr. Thompson went on to argue that even if the private lands vested in the Municipality in 1893 by operation of law, the landowners abutting the private lanes adversely possessed the private lanes for a period of ten years or more prior to 1922 and, accordingly, acquired possession of the lands by adverse possession, relying upon s. 16 of the *Limitations Act.*

[171] In the further alternative, Mr. Thompson argued that the Applicants and their predecessors in title have accepted and agreed that the disputed lands were private lands held in trust for the benefit of the abutting landowners for the past 110 years and accordingly he asked me to exercise my discretion, decline to grant the Application on the basis of acquiescence and delay.

[172] In my view, the delay is one of the compelling reasons not to grant the application.

[173] Mr. Thompson agreed that in determining intention of the subdivider, one must consider all the relevant circumstances, and he also concludes if I find that the owners did not intend to dedicate, there is no statutory presumption to save the Applicant's case and that the matter is at an end.

[174] Mr. Thompson adopted the City's position that Mr. De Rijcke's evidence is the best secondary evidence of the intention of the owners, not only with respect to the practice of the day, but also with respect to the actual intention of the owner and shows us the surrounding circumstances.

[175] Mr. Thompson argued that the statutory provision derived from the common law, where the onus is on those seeking it to show dedication. In *Reed v. The Town of Lincoln* (1975), 6 O.R. (2d) 391 (C.A.) the headnote says it all:

> In order that a public highway be established by dedication there must be, on the part of the owner, actual intention to dedicate and that intention must have been carried out by opening of the way for and its acceptancy by the public. Although intention to dedicate may be inferred from evidence of use by the public, that intention ought not to be too readily inferred from use by the public in a rural community...
>
> The onus of showing dedication of a road as a public highway is on the Municipality when it asserts such dedication. Although the Municipality must establish dedication only by proof by a preponderance of probability, the cogency of the evidence to satisfy that burden may vary according to the nature of the issue raised. Accordingly, where

> the circumstances giving rise to the alleged dedication indicate the unlikelihood of an intention to dedicate upon the part of a previous owner, cogent and substantial evidence is required to overcome that likelihood.

[176] Mr. Thompson says that the *Brett v. Toronto Railway* should reminds me that we ought not to be invading the Respondents' rights by interfering with private lanes. It is not the intention of s. 57 to remove the rights of private landowners where the owner did not intend to dedicate to the public.

[177] So the question is, was there any intention at all to dedicate.

[178] Mr. Thompson argued that the issue of patent versus latent defects only arises if there is a prima facie intention to dedicate. Here, there is no prima facie intention to dedicate. What there is, is a prima facie intention of the owners for a private cottage enclave. The clearest expression of that intention is shown in the words found on Registered Plan 243 ("private road for use of lot owners") to describe the Avenue on Plan 31. He also says that Winona Park #2 leads us inevitably to Winona Park #1. Moreover, the one-foot reserve and the Lakefont Promenade isolate the community. The later grants of right-of-way were consistent with the thoroughfares being seen as private.

[179] Mr. Thompson referred me to *Cornwall v. Geneau* [2000] 51 O.R. (3d) 460, at p. 468, in support of his adverse possession argument, where there is quoted this sentence from The Law of Canadian Municipal Corporations by Rogers, 1983, para. 230.1:

> Prior to 1922 it was possible for an individual to acquire title to an unopened road allowance dedicated by private plan of subdivision vested in the municipality by reason of adverse possession for ten years.

[180] Moreover, *Gardiner v. Canada Trust Co.* (1989), 2 R.P.R. (2d) 246 [1989] O.J. No. 395 (H.C.J.) shows that the Respondents' position on pre-1922 circumstances is really confirmed by the language of s. 16 of the *Limitations Act*, which protects even now any right, title or interest acquired before June 13, 1922.

[181] That is the key to Mr. Thompson's adverse possession case. He says that this land was acquired by lot owners before 1922. And if the thoroughfares vested in the Municipality in 1893 after the sale of the first lot on Plan 311, then there could have been adverse possession for more than ten years, certainly well before 1922.

[182] Even if the fee in the Lakefront Promenade vested in the Municipality, Mr. Thompson argues that Martin and Woods or their successors reacquired them by adverse possession for ten years before 1922.

[183] While it is settled law that for a successful claim of adverse possession, the possession must be open, notorious, peaceful, adverse, exclusive, actual and continuous, there is absolutely no evidence before me of the user of the lands.

[184] Mr. Castle had argued that the 24 householders who use the roadway are successors in title to Martin and Woods and they use the road called Avenue to get from their homes or cottages to the main road. There is no evidence whatsoever that it is used for the public to go anywhere else and it goes nowhere. It ends in the western end at the house built on the land after the 1960 closing order. And even if that had not happened, it would terminate at the one-foot reserve on the western end.

[185] The Applicants argued that there is simply no evidence of adverse possession by Martin and Wood or their successors and that Respondents have not established the basis for a successful deployment of the adverse possession shield. I agree. On that score the Respondents must fail.

[186] As to delay and acquiescence, Mr. Thompson referred me to *Nilson v. Zagrodney*, 52 O.R. (3d) 106 [2000] O.J. No. 4839 (O.C.A.), which applied *Immeubles Port Louis Lee. v. Lafontaine (Village)* [1991] 1 S.C.R. 326, where the Supreme Court of Canada rejected the proposition that there was no discretion to refuse the remedy in an appropriate case. The Court of Appeal ruled that the declaration should have been refused on the basis of delay. That case stands for the proposition that in an appropriate case a court may decline to grant a remedy on the basis of delay, even to declare a sale void.

[187] Mr. Thompson argued that for 110 years all of the parties believed until recently that all of the lands were private. That was the position set out in the Castelli affidavit and in the Statement of Claim which supports it in the motion seeking a certificate of pending litigation. And the Respondents argue that because the same party on the sworn evidence in the earlier proceeding accepted that the lands were private, it cannot now claim that they are public.

[188] In response to that position, the Applicants argue that granting relief to the Respondents on the basis of acquiescence and delay is an equitable remedy and that those seeking equity must come to court with clean hands. The Applicants then say that the Respondent lot owners are acting inequitably by enforcing their will upon the Applicants and do not deserve relief.

[189] I see no inequitable behaviour on the part of land owners who insist on keeping the rights and privileges appurtenant to their ownership. There is nothing here to bar the exercise of my discretion.

[190] As to delay, Mr. Castle argued that the corporate Applicant acquired the property it owns in 1988 and it cannot be visited with the 110-year delay in bringing this complaint to the courts. I do not know how that could hold: a corporation cannot have a greater rights or be held to a lesser standard regarding delay simply because it is a successor on title. The corporate Applicant must have the same title rights and obligations with respect to pursuing this matter as had all of its predecessors on title.

[191] The Respondents' acquiescence and delay argument is most compelling.

192 For the past 110 years, the Applicants and their predecessors in title, the Respondents and their predecessors in title, the City of Hamilton and its predecessors, and lawyers, agents and land surveyors, all appear to have acted on the belief that the disputed thoroughfares and other lands have been held in trust for the benefit of abutting land owners. Until the present Application, no one has ever asserted that these disputed lands vested in the Municipality and were and are public lands.

[193] The uncontradicted evidence shows that:

a) the private land owners expended their own monies to maintain the disputed thoroughfares;

b) some acquired legal rights-of-way over some of the thoroughfares;

c) some acquired title to portions of the Lakefront Promenade;

d) some constructed homes and developed their properties on the portion of the promenade lands acquired; and,

e) the owners in the enclave entered into a Trust Agreement with National Trust in 1955, the terms of which they have abided by for almost fifty years;

[194] It is reasonable to infer that all of the Respondent land owners were bona fide purchasers for value without notice of the Applicants' claim that the disputed thoroughfares are public. The effect on bona fide purchasers without notice merits serious consideration in the exercise of this Court's discretion. And I am compelled in all the circumstances of this case to exercise that discretion so as to refuse to grant the remedies the Applicants seek.

[195] When I analyze the balance of harm and convenience, I find that there is a significant prejudice to the Respondents if this Application were to be granted.

[196] Were the Application to be granted, the Municipality would have to decide whether or not to assume the thoroughfares and to provide services. National Trust is dissolved. The

private lot owners might have claims against the Municipality. It would be a veritable Pandora's Box.

[197] But, if I refuse it, the lands remain private, there is no significant prejudice to befall anyone. Access would be as access was.

[198] The corporate Applicant says that the case is about sewers, but the City's manager for the building division reviewed the affidavit of Leonard Giangregorio, and he disagrees that dependence on septic waste treatment facilities in the area is foolhardy. As in all of Ontario, all septic systems must comply with the applicable provincial standards and that that all systems are reviewed for suitability and capacity prior to building permits being issued. He also disagreed with Mr. Giangregorio's statements about modern septic systems in terms of their accommodation size and life. He gave evidence contrary to Mr. Giangregorio about which properties have properly functioning septic systems. This is just one example of many where the facts appear to be in dispute even thought this Application was brought on the basis that there were no facts in dispute.

[199] So Mr. Thompson, on behalf of 16 lot owners, asked me to dismiss the Application because the statutory provision requires an intent to dedicate that is absent, and because it is within my discretion to refuse the Applicants their remedy on the basis of delay.

Postscript

[200] After the oral argument of this matter, and without any request for leave of the court or any consultation with the other parties, I received a letter by facsimile on October 1, 2003, from Mr. Crossingham said to be on behalf of all of the Applicants to concede a point raised in argument by Mr. Thompson for the Respondents, Clarkson, et al. The letter was copied to counsel for the Clarksons and the City and the Harrisons.

[201] Later that day I received a faxed letter from the City's counsel indicating she was not consulted by Mr. Crossingham before he sent his. She suggested his communication to the court was inappropriate and asked me to decline entertaining Mr. Crossingham's concession. She suggested that Mr. Crossingham ought to withdraw certain claims in his Notice of Application.

[202] That was followed by a letter the next day from Mr. Thompson expressing his surprise at Mr. Crossingham's letter and suggesting, as well, that Mr. Crossingham ought to make a formal withdrawal of his claims or of his letter. He then suggested that if I were prepared to entertain Mr. Crossingham's submissions I ought to allow oral argument.

[203] his course of correspondence closed with Mr. Crossingham's faxed letter to me on October 3, 2003 which expresses the writer's disbelief at his adversaries' responses.

[204] Clearly, Mr. Crossingham acted inappropriately in not consulting with counsel opposite and in not seeking leave from me to carry on with the argument, in writing or otherwise.

[205] But given my ruling on the balance of the application, including my disposition of the Respondents' adverse possession argument, dealing with the concession made by Mr. Crossingham may bring law into alignment with practical reality "on the ground", so to speak. As I understand Mr. Crossingham's concession, it really deals with three parts of the puzzle on Plan 311:

1. the unlabelled strip of land which the applicants call a "lane or road" extending from the southerly limit of the Lakefront Promenade to the northerly limit of the Avenue on the east side of lots 1-7, Block A, abutting the one-foot reserve on the westerly limit of Winona Road [Applicant's Notice paragraph 1(c) - dark green (Schedule 1)];

2. the same one-foot reserve along the westerly limit of Winona Road [Applicant's Notice paragraph 1(f) - blue (Schedule 1)]; and

3. the Lakefront Promenade [Applicant's Notice paragraph 1(b) - light blue (Schedule 1)] except that part within the northerly extension of the laneway between Blocks A and B [Applicant's Notice paragraph 1(d) - pink (Schedule 1)].

[206] This concession is said to have made in the context of remarks made by me in the course of the hearing that suggested that whatever I decided about the unlabelled laneway [1(c)] would also govern the one-foot reserve [1(f)]. The concession excluded the Harrison property which was the subject of a consent order.

[207] As I said earlier in my ruling, there was not sufficient evidence for the Respondents to establish adverse possession over any of the lands.

[208] But when one looks at Schedule 1, there seems to be some practical merit in giving effect to the concession, subject to this caveat: I simply do not understand Mr. Crossingham's exemption from the concession for the part of the Promenade within the northerly extension of the lane (pink schedule 1) between Blocks A and B. While there is evidence that the lane between Blocks A and B is used as a driveway by abutting property owners, there is little or no evidence about the small portion of the Promenade within that lane's northerly extension.

[209] If the parties are agreed, I would be prepared to make an order that, whether on the basis of adverse possession or otherwise, those portions of the disputed lands set out in the Notice of Application at paragraph 1(b) the Lakefront Promenade - (light blue Schedule 1);

Paragraph 1(c) the unlabelled lane - (dark green Schedule 1); and,

Paragraph 1(f) the one-foot reserves - (blue Schedule) 1, be declared to be subsumed into the right, title and interest of the land owners contiguously abutting them, such that the property of lot owners:

a) 1-7 in Block A shall each subsume those portions of the lane [1(c)] and the one-foot reserve [1(f)] found within the easterly extensions of their lot lines; and,

b) 15-17 in Block B shall each subsume those portions of the Promenade [1(b) - light blue Schedule 1] found within the northerly extensions of their lot lines.

Conclusion and Disposition

[210] There has been neither evidence nor argument about the green strip lands (Notice paragraph 1(c)) nor about the pink strip lands (Notice paragraph 1(d), except for Leonard Giangregorio's cross-examination evidence that the pink strip is used as a parking area for two of the lot owners. So, not matter whatever else I have determined, subject to my remarks in the Postscript above, the Application must surely fail as regards the claims set out in paragraphs 1(d) and 1(c) and necessarily on paragraph 1(f) - the dark blue one-foot reserve between the green strip and Winona Road.

"A Rose is a Rose"

[211] Surely in 1893, the word "Promenade" was much more closely understood in accordance with the dictionary definition as a place for strolling - for "walking about" - not as a public road or street. I find that it was not the intention of the surveyor or of the developers to dedicate that Lakefront Promenade to the public in the sense of the Municipality - but rather to create a beachfront strolling are for the residents of the private cottage enclave that was Plan 311 (Plan 9).

[212] That may have changed by the time of the introduction of the current wording of s. 57 of Surveys Act (1990):

> 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.

[213] But that can hardly be an intent retrospectively visited upon Messrs. Woods, Martin and Carroll. While the legislature has recognized "lane" as a kind of public highway, Carroll, a seasoned surveyor by the time the plan was prepared, avoided words like "lane" or "commons" and used in one case, the exotic "Lakefront Promenade" and in the other the word "Avenue",

which in 1893 could well be understood by the Oxford dictionary definition employed since the mid-seventeenth century to import the chief approach to a country house usually bordered by trees.

[214] It may be that by 1893 American usage had come to accept “Avenue” as a broad roadway, but that definition would not appear appropriate in circumstances where the portion of roadway marked “Avenue” here (in yellow) is shown to be only 50’ wide, the same width as the driveway (in pink) between Blocks A and B, at a time when public municipal streets and roads were to be a minimum 66’ wide. So the Avenue shown on Plan 311 would not be considered by Cyrus Carroll to be a wide street for the passage of the public in their horse drawn carriages. It is, rather, a use consistent with the notion of an approach to country houses or cottages for the well-heeled denizens of some city within a reasonable horse ride.

[215] I find that all of the Respondent lot owners are bona fide purchasers for value without notice of the Applicants’ claims that all of the disputed lands (even lands to which the Respondents now have title) are public streets, roads, lands or commons vested in the Municipality.

[216] I find that s. 62 of the *Land Surveyors Act*, as it was in 1893, when Plan 311 was registered, was a legislative code regarding the practice of surveying. That section instructs surveyors to follow the boundary line rules and regulations already existing in respect of surveys in the Township when laying out allowances for public roads or streets in cities, towns or villages on Plans of Subdivision. At the time of the registration, Plan 311 (then County Plan No. 9) was not a subdivision of lands in any city, town or village. Rather, this land was part of the broken front concession within the Township of Saltfleet.

[217] Those cases which dealt with this section and s. 57 of the Surveys Act to determine whether the laid out road allowances were public roads, streets, or highways have heretofore never made that determination in the absence of the intention of the developer to invoke the s. 57 deeming mechanism.

[218] I conclude that Messrs. Woods and Martin did not intend any of the thoroughfares or other disputed lands on Plan 311 to be dedicated to the public.

[219] All of the evidence clearly demonstrates the opposite: that it was the owners’ intent to create a private cottage enclave, with private thoroughfares allowing all of the lot owners access to the public highway and a private “lakefront promenade” for the enjoyment of the lot owners in Winona Park.

[220] I am convinced of that intent by:

a) Cyrus Carroll's deliberate use of the labels "Avenue" and "Lakefront Promenade" for the only thoroughfares which he did mark on Plan 311, thoroughfares which were considerably narrower than was the minimum 66 feet for public roadways of the day;

b) the non-labeling of the other disputed lands adjoining Winona Park and separating Block A from Block B on the plan; and most tellingly, by

c) Mr. Carroll's most unusual use of the one-foot reserve on all sides of Plan 311 not bounded by the lake.

[221] This last unique feature connoting the developer's intent to keep the lands private is reinforced when one looks to the markings on the almost contemporaneous Plan 243, prepared by the same surveyor and registered on behalf of the same developers. There the draftsman indicates at the northern limits of the Plan that the one-foot reserve shown along what is now Winona Park Road has now been merged into the lots abutting the road and into the road itself.

[222] And the descriptors for that very road, which is shown only to locate the Plan relative to adjoining lands and is not part of Plan 243, reflect the best evidence of the owners' intent for Winona Park Road, namely that it was meant to be a "Private Road for Use of Lot Owners".

[223] In my view, this is so, even though Plan 243 (County Plan No. 10) was registered after the first sale of a lot on Plan 311.

[224] The merging or vanishing one-foot reserve clearly demonstrates the owner's vision or intention for a phased development of an exclusive and private cottage enclave whereby Winona Park #1 is quickly followed by the creation of Winona Park #2.

[225] There can be no mistake about the private nature of Plan 243, the second phase, where Mr. Carroll perpetuates his use of the term Avenue in respect of the two Private Avenues running through Winona Park #2, both of which appear to be set out fifty feet wide, just as is the Avenue on Plan 311.

[226] I therefore conclude that the disputed lands on Plan 311 are not public roads, highways, streets, lanes or commons.

[227] But even if I am wrong about that, and it could be said that those disputed lands somehow vested in the predecessor Municipality upon the sale of the first lot on the Plan in July, 1893, I would refuse the Application on the basis of some 110 years of acquiescence and delay on the part of the Applicant lot owners and their predecessors on title.

[228] Just as this was a private cottage enclave with private roads in the fifth decade of Queen Victoria's reign, so it remains in the fifth decade of the reign of Queen Elizabeth II. And so shall it remain.

[229] The Application is dismissed.

Costs

[230] The Respondents shall have their costs which shall be fixed by me following the receipt of the parties' written submissions, delivered to my chambers in Kitchener as follows:

a) the Respondents shall each deliver written submissions, not exceeding four double-spaced typewritten pages, together with their Bills of Costs, on or before June 28, 2004; and

b) the Applicants shall each deliver their written submissions, also not exceeding four double-spaced typewritten pages, on or before July 30, 2004.

FLYNN J.