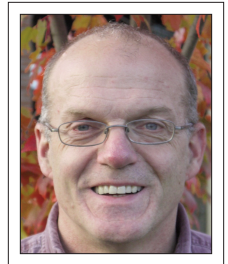


NAVIGABILITY OF WATERCOURSES AND NATURAL SEVERANCES: IMPLICATIONS FOR LAND SURVEYORS

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There are many streams and waterways in Ontario which have the potential of being found “navigable”. The difficulty for both lawyers and land surveyors is in the making of a correct determination when the potential owner, Crown Ontario, does not have a ready answer or a catalogue of what it considers to be Crown land as a result of the Beds of Navigable Waters Act. The question of navigability and best practices in making such a determination is addressed. Arriving at a determination is not always an easy process and there are many factors to consider – including cost. This article will not only review the general criteria, but also turn to a number of practical examples which illustrate approaches that may be helpful to surveyors. At a basic level, this is not only a boundary issue, but also directly impacts title. It also has implications for ownership of two parcels of land rather than just one.

Il existe de nombreuses voies d'eau et de nombreux cours d'eau en Ontario qui pourraient être qualifiés de « navigables ». La difficulté des avocats et des arpenteurs est de prendre une décision correcte lorsque la propriétaire potentielle, la Couronne de l'Ontario, n'a pas de réponse toute prête ou de catalogue de ce qui est considéré comme étant une terre de la Couronne en vertu de la Loi sur le lit des cours d'eau navigables. La question de la navigabilité et des pratiques exemplaires pour prendre une telle décision sera abordée. Le processus permettant d'en arriver à une décision n'est pas toujours facile et il y a de nombreux facteurs à prendre en considération – y compris les coûts. Le présent article examinera non seulement les critères généraux, mais se penchera également sur un certain nombre d'exemples pratiques qui illustrent les approches qui peuvent être utiles aux arpenteurs. À un niveau de base, ceci n'est pas seulement une question de frontières, mais cela a une incidence directe sur le titre. Ceci a également des répercussions sur la propriété de deux parcelles de terrain plutôt que d'une seule.



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Introduction

It is the land surveyor who is said to have the responsibility of determining the boundaries of the parcel. The simplicity of this statement suggests that the title need be of no concern. However, if the boundaries are to be properly retraced and shown, there must be an implicit statement made about the land within the parcel. But what if it belongs to the Crown?

Every boundary retracement is a puzzle; some seem like a 10-piece puzzle while others seem more like a 10,000-piece puzzle. The size of the puzzle depends on many factors, and surveyors could easily share many anecdotal situations of complex boundary retracements. This paper is intended to explore one such issue which surveyors must occasionally address: a boundary along a waterway which may be navigable or, if a property is traversed by a waterway, what happens if that waterway is navigable.

The law of ownership of the bed and the impact of navigability is somewhat strange in that,

in an historical context, it was not until 1911 that legislation was passed (*Beds of Navigable Waters Act*) that made it clear that the bed of navigable waterways were not transferred from the Crown when the original Crown Patents were issued many (sometimes +100) years earlier. If a river is navigable, the Crown still owns its bed.

Most of the original Crown Patents did not address whether or not the navigable waterway was included with the lands being transferred to the first owner. They did not state with such clarity as, “Lot 1, Concession 3 of 100 acres (which does not include the navigable creek within this Lot)”. Ideally, the title record should have included a more precise description such as “the portion of Lot 1, Concession 3 north of the navigable river”, with the other parcel described, as “the portion of Lot 1, Concession 3 south of the navigable river, and the navigable river is not included in this land”. (Please note that the river is not part of Lot 1, Concession 3,