The Intruding Right of Way
FACTS

These interesting sets of facts are particularly relevant to developers wanting to develop lands which are subject to a private right of way to an existing residence in the middle of the proposed subdivision. The owner of the right of way and existing home, whom we will refer to as "W" is willing to sell his lands to the developer, but only at a grossly inflated price. The developer "M" is concerned that it may have to accede to the excessive demand in order to register the plan of subdivision and have the municipality assume public streets.

The relevant more technical facts are as follows.

- The right of way in favour of W was created in 1958. The sole purpose of the right of way is as a 'laneway'. There are no restrictions as to use other that it is obviously for vehicular and pedestrian traffic from a public street.

- M wishes to obtain final approval to a plan of subdivision and to register same against title to its lands that include the said right of way. M has the wish to either use the said laneway or part of it as a public street that would be dedicated to the municipality on registration of the plan, and/or to cross or use part of the right of way with a public service such as sewer, and water, services that would also have to be assumed by the municipality.

ISSUES:

1. Can M register a plan of subdivision which includes any part of the right of way without the written consent of W?
2. Can the municipality be compelled to assume municipal services that are subject to a private right of way?
3. Does the right of way, as described in the 1958 conveyance, considering the intent of the granting of the right of way, allow for the interruption or interference with the right of way, by either:

    (a) the conversion of any part of the right of way to a public street, or
    (b) the installation of municipally owned services beneath any part or all of the right of way?

THE LAW:

Issue Number One

If you review the 1982 Decision of *Matthews v. Township of Plympton* [1982]O.J. No.2567 at pages 1 – 3 you will see this is the first issue considered by the Court. The court refers in paragraph 8 to Section 73(5) of the Registry Act as it then was (now Section 78). As this case states it is fundamental law that the Registrar cannot register a Plan of Subdivison against lands that are subject to a right of way without the written consent of the dominant tenement (Wally). This section of the Registry Act simply enshrines the Decision of the Supreme Court of Canada in *Abell v. Corp. of County of York (1920) 61 S.C.R. 345* that the Courts will not **interfere** with the property rights of owners of rights of way unless the legislation clearly allows for such.

Section 44(1) 2 and 45.2 of the Land Titles Act similarly recognize the rights of owners of rights of way. However, there is an important distinction in as much as the equivalent of Section 78 does not exist in the Land Titles Act. When M makes application to have the lands entered into the Land Titles system, M must recognize the Wally right of way, otherwise the Registrar of Titles will not accept same.

However, once the lands are in Land Titles (absolute), unlike the Registry Act, M will not require W's signature on the Plan nor his written consent to register the plan. The only encumbrancer required by the Land Titles Act to consent in writing to the registration of the Plan is a mortgagee.

I have spoken to the Land Titles Registrar in the municipality and have advised of M's fact situation. She advises that if M attempted to register a plan of subdivision that clearly interfered with W's right of access, she would not accept the plan. However, as confirmed in the Matthews decision, if M's proposal does not interfere with the right of way, she has the discretion to register the plan without the consent of W. The type of *'works'* M is contemplating is the installation of a municipal service under the right of way and/or constructing a municipal street under all or part of the right of way. In the first instance, the construction of a municipal service under the right of way would not permanently interfere with his right of way. In the second instance W would have the right of passage over a public street, and on a much better road. Accordingly his right of passage would be improved. The only issue for W would be that he had a certain level of privacy with the 1958 right of way as the only other parties contemplated using the right of way were the '*Grantors'.* However, that issue was considered by the Court in *Matthews* (above) whereat the Dominant tenements received the right of way for access to a beach, which did not contemplate such being used by cars of the general public. What was proposed was that a part of the right of way be used as a public street to provide a collector link to 2 subdivisions. The Court found that such did not amount to a 'substantial interference' (that being the common law test) and as such allowed for the road to be built on the right of way.

Issue Number Two

The second issue relates to whether or not a municipality can be compelled or can voluntarily agree to assume a public utility under lands which are subject to a private right of way and/or can be compelled or voluntarily assume a public street that is subject to a private right of way.

Compulsion

The recent amendments to the Municipal Act provide in section 31 (3) that after January 1, 2003 a municipality cannot assume a municipal service or public street without passing a By-Law. The municipality's previous acts, such as maintaining the road cannot be used to conclude that a municipality has assumed a road as a public street. The question arises however regarding whether or not a municipality can be compelled by the OMB or a Court to pass such a by-law requiring it to assume the roadway. The recent Decision of the Divisional Court in *Mattamy v. City of Toronto* (in which I acted for Mattamy) confirmed that neither a court nor the OMB can compel a municipality to assume such services and to adopt such a by-law (unless perhaps if the municipality clearly agreed in a subdivision agreement to do so).

Voluntary Assumption

The next issue is whether or not a municipality, which wishes to assume a (a) a roadway, or (b) a public utility, which is subject to a private right of way, has the legal ability to do so.

(a) Roadway

Section 30 of the Municipal Act provides as follows:

> "***30. Ownership.-*** *A highway is owned by the municipality that has jurisdiction over it subject to any rights reserved by a person who dedicated the highway or any interest in the land held by any other person" (my emphasis).*

It is therefore assumed by the legislation that a municipality may own a public road or highway notwithstanding
It is subject to a private right of way for passage.

(b) Public Utility

The Municipal Act provides as follows:

> "**79.(2) Entry on common passages –** If a municipality has the consent of an owner…to connect a public utility to land and the owner …shares a…. common passage with owners …of neighbouring lands, the municipality may, at reasonable times, without consent, enter the common passage and install, construct and maintain pipes, wires equipment, machinery and other works necessary to make the connection."
>
> "**91(9) Right to repair utilities –** Subject to any Court order under this section, a municipality may enter upon any land to maintain and repair any of its utilities"

It can therefore be concluded that if Mason conveys to the Municipality the fee simple interest in any portion of the lands which are subject to the W right of way, there is no impediment to the Municipality assuming the public utilities, as they have a legal right of ownership to the lands and a legislative right to enter and maintain the utility.

Issue Number Three

The test of interference with a private right of way is **substantial interference**, as the *Matthews* Decision (supra) concludes. *Matthews* simply followed the Decision of the Supreme Court of Canada in *Cohen v. Boone [1921] O.J. No. 217*. It is certainly arguable the interference M is contemplating not 'substantial' and is indeed beneficial

Conclusion

There is no legal impediment to the municipality assuming public services constructed beneath lands that are subject to the Wally right of way. Similarly, there is no legal impediment to the municipality assuming a public street that is subject to the Wally right of way.

The question is whether there is a concern of the Municipal engineering department or of the elected Council. As to the question of 'need' and 'public interest' the results of circulation have demonstrated that the Fire Department would find access to the existing public street, highly desirable. Similarly, the municipality's Traffic Department have expressed the same opinion.