Message from the

Deputy Surveyor General

Returning Lands to the Crown

By Dave Swaile, BCLS
Deputy Surveyor General

Returning areas to the Crown on *Land Title Act* plans generates a number of questions to the Surveyor General Division and to the Practice Advisory Department. The two most common questions seem to be:

1. When am I required to return a watercourse to the Crown?
2. Do I use section 107(1)(b) or 108(1) of the *Land Title Act* to return land to the Crown?

The answers to both of these questions need to be determined on a case-by-case basis by the land surveyor in consultation with his or her client, and possibly with input from the approving officer or a legal professional. This document seeks to provide some guidelines, from my experience, that might help inform the decision made.

When am I required to return a watercourse to the Crown?

I would suggest that the first question to ask is whether the watercourse is *currently* owned by the Crown or not. This question is well beyond the scope of this document, but the land surveyor needs to closely examine the Crown grant, Dominion Patent or other root of title document; the various survey plans that have dealt with the parcel since; and the effects of legislation such as sections 55 and 56 of the *Land Act* and sections 107 and 108 of the *Land Title Act*.

Where a watercourse passing through, or lying adjacent to, a parcel under survey is found to be owned by the Crown, the land surveyor should generally be returning to the Crown any areas that have lawfully eroded, so that the extent of ownership on title matches the extent of ownership at common law (likewise, any areas that have lawfully accreted, or are found to be depicted in error on the prior plan, should be dealt with as appropriate under section 94 of the *Land Title Act*).

Where a land surveyor's research determines that a watercourse is indeed owned by the Crown but it is not shown as being excluded from the parcel under survey, then the watercourse should be returned to the Crown.

Where a watercourse passing through a parcel under survey is found to form part of the parcel, I am not aware of any *requirement* to automatically return it to the Crown. However, an approving officer might ask that it be returned to the Crown as a condition of subdivision approval.

When a watercourse is owned by the upland owner (and there is no requirement to return it to

the Crown), one should proceed cautiously in considering whether to retain ownership of the watercourse for his or her client. There may, for example, be potential liability issues with being the owner of the bed of a watercourse. It would be wise to discuss this carefully with the client and seek legal advice as appropriate.

Do I use section 107(1)(b) or 108(1) of the *Land Title Act* to return land to the Crown?

For many projects that involve a return to Crown area, it may well be perfectly fine to use either section 107(1)(b) or section 108(1), and the land title offices will generally leave it to the professional to determine which is appropriate for a given project. However, there are some situations where one section may be more appropriate than the other.

On a subdivision plan, there is no need to state the particular section being used, but a reference plan requires the applicable section to be noted in the "pursuant to" statement.

Generally speaking, and in most common cases, a return to Crown of submerged land, where the Crown is the owner of the adjacent submerged land, either s.107 or s.108(1) will be equally acceptable to the land title office. Note that in either case, the approving officer will need to sign the plan (even if it is a reference plan) indicating his or her consent for the return to Crown area.

Note also that there are subtle differences between sections 107 and 108 in their impact on third party rights such as subsurface charges. The land surveyor is encouraged to seek legal advice where this may be a consideration.

In all cases, a land surveyor must not rely on s.108(2) to return lands to the Crown of submerged areas; all lands being returned must be shown within the bold outline and labelled "Return to Crown". For more information on section 108(2) of the *Land Title Act* and its retroactive effect, the reader may refer to *Circular Letter 468*.

Section 107(1) reads as follows:

***107** (1) The deposit of a subdivision, reference or explanatory plan showing a portion of the land*

(a) as a highway, park or public square, that is not designated on the plan to be of a private nature, or

(b) as covered by water and as lying immediately adjacent to a lake, river, stream or other body of water not within the land covered by the plan, and designated on the plan to be returned to the government,operates

(c) as an immediate and conclusive dedication by the owner to the public of that portion of land shown as a highway, park or public square, or to be returned to the government, for the purpose indicated on or to be inferred from the words or markings on the plan,

(d) to vest in the Crown in right of the Province, subject to any other enactment, title to the highway, park or public square, or to the portion to be returned to the government, except any of the following that are registered in the name of a person other than the owner:

(i) minerals and placer minerals as defined in the Mineral Tenure Act;

(ii) coal;

(iii) petroleum as defined in the Petroleum and Natural Gas Act;

(iv) gas or gases, and

(e) to extinguish the owner's common law property, if any, in the portion of land referred to in subsection (1) (a) or (b).

From reading this section, one can see that s.107 will generally be acceptable any time the lands being returned are submerged and lying immediately adjacent to a watercourse.

Section 108(1) reads as follows:

***108** (1) Except as provided in section 107 (1), if, on the subdivision of land, a subdivision or reference plan is deposited in the land title office, and a portion of the land subdivided is designated on the plan "Returned to Crown in right of the Province", the deposit of the plan is deemed to be a transfer in fee simple by the registered owner in favour of the government.*

Note that there is no mention in the above section about submerged lands, whereas s.107(1)(b) explicitly mentions lands "covered by water". Thus, s.108(1) will generally need to be used if the lands being returned to the Crown are not submerged (i.e., dry land is being returned).

Likewise, s.108(1) does not require the lands to be "lying immediately adjacent" to a watercourse, so it should be used when an entire watercourse (such as an internal lake or creek) is being returned.

Further information on returning lands to the Crown may be found in the Land Title Practice Manual and from resources on the LTSA website. ✣