"Roads in lieu of" - original road allowances

Part 3 - The law is not a fool!

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A review of the case of *Beaumaris Fishing Club v. Township of Gravenhurst* (1991), 4 O.R. (3d) 774.

Part 1, in the spring 1996 issue, set out the facts of this case, illustrated by a chart. A private fishing club owned all the land surrounding three lakes, except an unopened original road allowance leading to one of the lakes. Mr. Fraser, a landowner in the next concession, bulldozed a path along this unopened road allowance, launched his boat and went fishing in this private domain. To stop the intrusion, the fishing club fenced off the road allowance. The feud was on!

Part 2 in the fall 1996 issue reviewed the sanctity of "public highway," the lessons of history with respect to municipal jurisdiction, and the significant changes in legislation in the 1850s which, for the most part, apply today.

COLONIZATION ROADS

(How did they get invited to the party?)

Colonization roads were a horse, wagon and axe of another colour. Their birth notice appeared in the *Public Lands Act*, 1853. It announced the setting up of a colonization road fund ($30,000) for the purpose of constructing (hacking out) access roads for new settlers. Between 1853 and 1860, some 481 miles (775 km) of these roads, such as they were, were opened under the administration of Crown agents.[1]

Municipal councils had absolutely no jurisdiction over colonization roads until the great "road flip" of 1913.[2]

The Crown lands department had absolute jurisdiction over these roads. Keep in mind that these were not just roads on paper. They were contracted out and constructed for the sole purpose of getting settlers into the area by way of the least difficult route.[3] In the Haliburton and Muskoka areas, they ignored, for the most part, the location of the original road allowances in the township surveys.

OTTAWA-HURON TRACT

A major area for colonization roads was between the Ottawa Valley and Lake Huron, called the Ottawa-Huron Tract. It was constructed between 1853 and 1860, and included parts through the Muskoka area. Free grants were laid out on each side of these roads. These grants generally had a frontage of twenty chains (402 metres or 1,320 feet).[4]

EARLY COURT DECISIONS

By the 1860s, questions regarding these "in lieu of" claims began to dribble into the courts. This dribble soon became a small stream that continued until the early 1900s, and then rapidly diminished, and for good reason. Subsequent generations of the original settlers either moved elsewhere and could not care less, or those that stayed, did not know why their grandfathers permitted these deviation roads through their property. In the 1800s, a road through your property was highly desirable. How times have changed!

LEGAL PRINCIPLES OF A PUBLIC HIGHWAY

Closing and conveying a public highway has never been a simple matter. The courts have often stepped in to review the actions of council. Since the early 1850s, certain principles have been laid down. Let me illustrate.

Mr. Justice Burns in *Purdy v. Farley* (1853),[5] put it this way:

I take it to be a clear principle of law that every intendment is to be made in favour of the public, and against the individual who seeks to deprive the public of the right which it is confessed the public once had ... and that it is incumbent upon the individual who asserts a private right acquired over a public one which has once vested that he shall do so upon clear irrefragable evidence, (yes his words) and that nothing shall be left to depend upon conjectural inference and assumption...

It by no means follows that because it was more convenient to the public generally to have a road varied or altered, it must be necessarily assumed that the old road became unnecessary, and the fact of a new road, laid out through a man's farm ipso facto entitled him to the option of saying that he would take the old road in lieu of the new one taken off his property...

I think there was something more required than the mere fact of taking from his property a new road, even if we should feel satisfied in our own minds that it was thought at the time of the act being done the public allowance would never be used, or could not be made into a road.

Chief Justice Harrison of the Ontario Court of Appeal, in *Cameron v. Wait* (1878),[6] noted:

A highway once established must so con-

1. Richard F. Lambert, *Renewing Nature's Wealth*, p. 89.
2. The Great Road Flip of 1913. *The Municipal Institutions Act*, 1913, c. 43, s. 433, where the soil and freehold of every "public highway" (save those retained by the province) were transferred to the area municipality.
3. Although widely advertised in Europe, this area and these roads attracted few settlers. They preferred the open lands of the American west, where there were few trees to fell, and the land provided immediate pasture for cattle.
4. Footnote 1, *supra.* One hundred acre lots were 20 chains by 50 chains (1,320 feet by 3,300 feet).
5. *Purdy v. Farley* (1853), 10 U.C.R. 545 at 568.
6. *Cameron v. Wait* (1878), 3 O.A.R., 175.

tinue until altered or put an end to by some competent authority. Mere non-use of a highway is clearly not enough to destroy its character as a highway.

Mr Justice Burton of the Ontario Court of Appeal, also in *Cameron v. Wait* (1878), put it this way:

What evidence is there that the new road was in lieu of or, in substitution for, the original allowance?

OK - WHAT EVIDENCE DID THE BEAUMARIS COURT HAVE?

In *Beaumaris,* the court acknowledged that these roads (both the colonization roads and the original road allowances) were public highways. The court had reference to the cases mentioned above - but none of these cases dealt with colonization roads. Every case I have read relates to "original road allowances" being by-passed by deviation roads, as in the *Marlborough* case[7] not colonization roads. I would have thought that the court would have requested some strong evidence that the provincial Crown, back in the 1870s, intended that these two colonization roads were to be "in lieu of" the original township roads. As substitutes for the original roads, they were not. All evidence indicates they were additional roads.

The judge in the *Beaumaris* case appears to have made no such inquiry! On what then, you may ask, did the court base their decision? This is where it gets interesting. The judge accepted the affidavit evidence of an Ontario Land Surveyor, who stated that it was his belief that the colonization roads (constructed in the 1870s) were "in lieu of" the original road allowances.

SURVEYOR'S AFFIDAVIT

Scratching my head, I concluded that that must be one high octane affidavit. So I called Russell Black, the Bracebridge lawyer who took the case for the Town of Gravenhurst, and arranged to borrow the trial documents. He handed these to me in a large banker's box with the parting shot, "Have a nice weekend!" I did!

Searching through the box I found the surveyor's affidavit. Hmm! Only four pages with photos as exhibits attached. The contents, I thought, must be dynamite! Read on. I did, and Holy Toledo, did I get a surprise. The affidavit was fluff! Granted, the facts recited were absolutely correct, but the conclusion that the Crown intended the colonization roads to be "in lieu of" the original road allowances was, in my opinion, a giant leap of faith.

What concrete evidence did the surveyor have from either the township or from the Crown to support this conclusion? I can find none.

The affidavit stated (my summation):

1. **That the surveyor travelled to the subject area and examined the location of the old Crown colonization roads and the unopened original road allowances in the township survey.**

2. **He reviewed the title documents, municipal records, the affidavits of people who lived in the area for many years as to which roads were used, took note of the areas of flat terrain and rocky terrain, and from this reached his conclusion as to why the colonization road was "in lieu of" the roads on the original survey.**[8]

Comment - An exhaustive search by municipal staff of the old Township of Muskoka records from 1870 to 1915 revealed no resolutions or by-laws referring in any way to control over the two colonization roads. All evidence with respect to these roads is found in the files of the Surveyor-General of Ontario.

The surveyor, in paragraph 4 of his affidavit, states:

In my opinion, in the vicinity of the said Lots 30 and 31 in Concession 8 and 9 in the Township of Muskoka, the Musquash Road (also known as the Old Bala Road, and now as the Snider's Bay Road), and the Long Point Road (now Highway 169) are colonization roads laid out and opened in the place of a part of the said original road allowances.

Oh my goodness!

The surveyor's affidavit continued:

The following facts lead me to this conclusion [paraphrased]**:**

1. **Prior to the township's survey of 1870, no roads existed in the area. These roads in the original surveys often were unfeasible or impractical to use. New roads constructed in the area (colonization roads) were laid out using the best terrain available. My examination of the terrain in question indicates that this is exact what happened with respect to the Snider's Bay Road and the Long Point Road.** [See illustration in the spring issue].

2. **Snider's Bay Road is located on relatively flat terrain and took the most practical route between Deer Lake and Pine Lake to the south.**

3. **Long Point Road (Highway 169) is located on the best terrain in that immediate vicinity, whereas the unopened road allowances on the original survey, immediately to the west, are rocky, uneven ... it was obviously more practical to construct the colonization road in the terrain best [suited]...**

FINAL CONCLUSION (PARAGRAPH 5 OF THE AFFIDAVIT)

In conclusion, it is my opinion that the Snider's Bay Road and Long Point Road were laid out and opened in the place of that part of the original allowances for road passing between Concession 8 and 9 in the vicinity of Lot 31, and between Lots 30 and 31 in Concession 9 in the Township of Muskoka, respectively. [See illustration in the fall issue].

And that was it! The court was persuaded. Oh my goodness! What happened to the principle stated by Mr. Justice Burns (*Purdy v. Farley,* 1853), about the need for clear irrefragable evidence to assert a *private* right over a *public* right! (The right of the fishing club to have possession of this public highway to the exclusion of Mr. Fraser.)

What happened to the law that states that it is the municipality that has jurisdiction over these original surveyed roads? The township passed no by-laws closing or altering or assuming the original road allowances in this intersection. Now, just between you and me and the two birds on the telephone wires, if the *Beaumaris* case is allowed to stand, then 133 years of precedent has gone up in smoke!

LET'S BE PRACTICAL

7. *Burritt vs The Corporation of the Township of Marlborough* (1869), 29 U.C.Q.B. 119 (C.A.).
8. The earliest property owner in the immediate area got title in 1891, some 15 years after the colonization roads were constructed. These were the only roads available.

One does not need to be a rocket scientist to ask this simple question. If colonization roads were opened "in lieu of" the original road allowances, then surely there must be a document somewhere stating this to be so. No evidence of such a document was presented at the trial. (I could find none!) When collecting evidence, there is a golden rule. You get the best evidence at the scene immediately after the act was committed - not 113 years later!

THE LAW IS NOT A FOOL

In every case that I have read on the subject of "roads in lieu of," at issue was a specific measurement of the unopened road allowance. For instance, in the *Marlborough* case, it was the unopened road allowance in Concession I between Lots 20 to 25. The *Beaumaris* case did not consider distance. The court just said, "part of the said original road allowance" and that was it! What part?

If the *Beaumaris* decision is good law, then I ask, for what distance on these original road allowances was Mr. Fraser denied access to Deer Lake or the other lakes? Is it for a distance of say 100 m or 1/2 km or 5 km? Does it apply to all original road allowances in this township within "x" metres of the colonization roads? This decision makes a mockery of the law.

HURON TRACT

Let me take the exercise one step further. If the *Beaumaris* decision is applied to the Ottawa-Huron Tract, more interesting questions arise! Does this mean that every township original road allowance within "x" distance of any colonization road is now available for exclusive possessory claims by abutting owners who fence original road allowances? Oh my goodness!

EARLY CROWN PATENTS-EXCLUSIONS

It should be remembered that the surveyors of the original township did not necessarily lay out every road allowance. Many are just marks on a plan. So, how would the builders of the colonization roads even know (or care) where these were? It was for this reason that many of the early Crown patents (deeds) contained a clause expressly "reserving any public or colonization roads *should they pass* through the lands granted."

Another interesting point. In some areas, the colonization roads were constructed first. Some years later, road allowances on the original township survey were laid out. Is the reverse situation now true? Are the subsequent original road allowances now "in lieu of" the previously constructed colonization roads? Not for a split second!

DEALING THE LAST HAND

Throughout the judgment, the court seemed oblivious to:

1. the fact that municipal councils have absolute jurisdiction over their roads;
2. the true significance of the term "original road allowances," and
3. the difference between the original road allowances and colonization roads.

So there you have it, the lessons of history! In my opinion, these two court decisions (*Beaumaris and Grey-Bruce Trails Inc.*[9] cases) have as much chance of survival as an ice cube in the Sahara Desert. Some day, in some court, the train will be put back on the tracks!

9. *Grey-Bruce Snowmobile Trails Inc. v. Morris et. al.* (1993), 19 M.P.L.R. (2d), 91.

Wagstaff- hidden by a flying Olympian - waits to measure a long jump during the women's heptathlon event. (See next page).