

# Fencing Unopened Road Allowances

## A "Recipe" for Success

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A review of the case of *Grey Bruce Snowmobile Trails Inc. v. Rouse, Shearer & Morris*  
Ontario Court (General Division) decision dated October 8, 1993

Rural and regional municipalities may lose possession of many unopened road allowances in the wake of a recent precedent-setting decision of the Ontario Court of Justice. The decision of *Grey Bruce Snowmobile Trails Inc. v. Rouse, Shearer and Morris*<sup>1</sup> was handed down on October 8, 1993 at Walkerton by Mr. Justice T.P. O'Connor. The effect: landowners abutting unopened road allowances may now try to claim possession by applying the "possession recipe" set out in the decision. The recipe is based on an interpretation of a small, but powerful section of the *Municipal Act*:

**299(1) A person in possession of and having enclosed with a lawful fence that part of an original allowance for road upon which the person's land abuts that has not been opened for public use by reason of another road being used in lieu of it or of another road parallel or near to it having been established by law in lieu of it shall, as against every person except the corporation the council of which has jurisdiction over the allowance for road, be deemed to be legally possessed of such part until a by-law has been passed by such council for opening it.**<sup>2</sup>

### Recipe for Road Allowance Possession

The learned trial judge found that the "successful recipe" for an abutting owner to acquire possession of an unopened road allowance must contain the following ingredients.

- 1) The unopened road allowance must not have been open for public use by reason of another road being used in lieu of it or of another road parallel or near to it having been established by law in lieu of it.
- 2) The abutting owner must have enclosed a portion of the unopened road allowance immediately abutting his other property.

- 3) The enclosure must be contained with a lawful fence.
- 4) The abutting owner must possess the land within the enclosed portion of the unopened road allowance.
- 5) No by-law has been passed by the municipality to open the road allowance for public use.

### Cost Consequences to Municipalities

Once all of these criteria are met, then the abutting owner has, in law, established a lawful right to possess that road allowance, and has acquired that exclusive right against the whole world, including the municipality. The municipality may acquire possession only by passing a by-law to open the road allowance for public use as a highway. That decision, however, could be an expensive one, for every municipality would have to justify the expense of constructing a new road within that unopened road allowance after the by-law was passed to open it.

Being entitled to lawful possession, an abutting owner may use the land contained within the fenced enclosure for any purpose that the law permits. As it is a separate parcel of land with legal title still in the name of the municipality, there is nothing to prevent the person in lawful possession from applying for a building permit to erect a lawful building on that separate piece of land for any purpose that otherwise complies with local laws. The owner of the enclosed road allowance (the municipality) may be liable for any taxes. Effectively, the adjacent owner, as occupier, may be able to use the land without paying any realty taxes.

### Proximity of Nearby Road

Up to the date of this decision, courts reviewing subsection 299(1) had been limited to facts that involved an adjacent substituted road being considered as a "road in lieu thereof." Those cases typi-

cally involved a deviation road being built around a hill or gully, to avoid using an unopened road allowance. In *Gravenhurst v. Beaumaris Fishing Club*<sup>3</sup>, the Ontario Court of Justice found Highway 69, located several hundred yards away from an unopened road allowance, to have been a "road in lieu thereof." Prior to the *Grey Bruce* case, this was the maximum limit of proximity of a "near road."

In the *Grey Bruce* case, Justice O'Connor found that Highway 6 (in the middle of the Bruce Peninsula) was located approximately 1.25 miles away from an unopened road allowance, and was established by law in lieu of the unopened road allowance. It was a sufficiently "near road" in a rural environment to be construed as a qualifying road within the meaning of subsection 299(1) of the *Municipal Act*. Effectively, the court decided that the next nearest open road allowance running in the same direction as an unopened road allowance may, in fact, be a sufficient qualifier for that subsection.

### No Need to Fence Road Allowance on All Sides

The court also evaluated the quality of enclosure and found that a three-sided enclosure was sufficient where the fourth side was open, allowing the unopened road allowance to form part of a larger fenced enclosure area. This reasoning would allow the door to be opened to consider two-sided enclosures, where both sides of an unopened road allowance are open, but where the allowance is contained within a larger fenced containment area (i.e., an unopened road allowance running through the centre of a fully fenced field).

### Right to Exclusive Possession

The court also considered how the lawful right to possess an unopened road

allowance may be acquired. In this case, one of the defendants, Morris, complained that the *Snowmobile Association* had clear-cut a swath of 100 commercial Christmas trees that he had planted on the adjacent unopened road allowance. He had not then enclosed the adjacent road allowance with a lawful fence. In preparation for trial, and on the advice of his lawyer, he fenced a section of the road allowance for a distance of approximately 400 feet, occupying an enclosed area of 66 feet x 400 feet. The court found that his rights to exclusively possess that enclosure commenced the day he erected the lawful fence, as all other criteria were otherwise met.

Thus it appears that the lawful right to possess an unopened road allowance commences the day a lawful fence is erected. If all other criteria are met, there are approximately five acres for every abutting 100 acres along unopened road allowances that are up for land grab and free for the taking. Sixty-six per cent of the road allowances in Lindsay Township in Bruce County remain unopened. That represents about 100 miles of roads or the equivalent of 800 acres. Consider the area of all the unopened road allowances in the municipalities across Ontario. The figures would be staggering!

#### Trees on Road Allowances Belong to Adjacent Owners

Under subsection 312(3)<sup>4</sup> of the *Municipal Act*, the court would have granted Morris his counterclaim if it had not found the trees to be a crop. That subsection states:

**Every tree upon a highway shall be appurtenant to the land adjacent to the highway and nearest thereto.**

Effectively, every tree along and within a road allowance, whether opened or unopened, and which is not a part of a crop, belongs to the nearest adjacent owner, and accordingly, does not belong to the municipality. Urban owners may benefit more from this section than rural owners. This decision may also serve as a reminder to all municipalities that they are at risk in removing trees within a road allowance when they do so without the consent of the nearest property owner. The court's reconfirmation may have restored an arrow to the property rights quiver of landowners that many may have overlooked.

#### Only "Ratepayers" May Seek Injunction Under Municipal By-law

The trial judge also found that an attempt by the *Snowmobile Association* to qualify as a ratepayer of the Township of Lindsay to enable it to bring an action for an injunction under a municipal by-law, failed, as it could only be brought by a "ratepayer" and the *Snowmobile Association* was not a "ratepayer" within the meaning of the *Municipal Act*. The *Snowmobile Association* had rented a vacant piece of land for \$5 a year plus taxes. It further had its name put on the municipal assessment rolls in the Township of Lindsay as a tenant occupant, and received a notice of assessment from the Ministry of Revenue. The court found that to be a "ratepayer" there must be an obligation in law to pay rates to a municipality, and that, with respect to the *Snowmobile Association*, there was no such obligation in law.

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#### Municipal By-law to Prohibit Fence Obstruction - Ineffective

In this case, the Township of Lindsay previously passed a by-law in 1989 under the alleged authority of the *Municipal Act* to protect public use of unopened road allowances. The operative words of By-law 1268 are as follows:

**The Corporation of the Township of Lindsay hereby prohibits any person, persons, corporation or association from obstructing the use of public highways, opened or unopened in the Township of Lindsay.**

**The Corporation of the Township of Lindsay hereby declares that anyone can and may use public highways, opened and unopened, without hindrance in the Township of Lindsay.**


The court found that By-law 1268 could not be construed as meaning that any fence erected within an unopened road allowance, by an abutting landowner, in professed compliance with an entitlement to do so under subsection 299(1) of the *Municipal Act*, would constitute an "obstruction" within the mean-

ing of By-law 1268, and would thereby be an unlawful fence, which would negate the right of an adjacent owner to acquire possession of any adjacent unopened road allowance under that subsection. It would now appear to be the position of the courts that, as the legislature gave adjacent property owners the right to acquire lawful possession of an unopened road allowance, only the legislature can take that right away. Indeed, it seems that an attempt to do just that by By-law 1268, was found to be ineffective in the eyes of the court.

#### Future Effects of Decision

The practical effects of this court decision are as yet unknown. However, it will encourage landowners adjacent to unopened road allowances to exercise the rights granted to them by the legislature, under subsection 299(1) of the *Municipal Act*, namely to try to acquire possession of adjacent unopened road allowances.

For the *Bruce Trail Association* and the *Niagara Escarpment Commission*, their troubles may just be beginning. Adjacent landowners may now be able to lawfully acquire unopened road allowances through which the trail passes because of the inability to secure private treaty trail rights on the adjacent lands of those same landowners. It may have the further effect of denying public access to rivers, streams and lakes, otherwise landlocked by private holdings. Hikers, cross-country skiers and snowmobilers also may risk loss of trails.

Perhaps, this case is the leading edge of a tide in favour of, property owner rights. Politicians, both municipal and provincial, had better seek the cooperation of landowners, rather than continue to ride rough-shod over property rights, without any prior advice, negotiations or compensation to landowners. The days of the *regulatory takings without compensation* may be numbered in  the law of property rights.

1. Grey Bruce Snowmobile Trails Inc. v. Rouse Shearer and Morris.
2. Municipal Act, R.S.O. 1990, c. M.45, s. 299(1).
3. Gravenhurst v. Beaumaris Fishing Club, 1991, 4 O.R.(3d) 774
4. See footnote 2 supra, ss. 312(3).