"Roads in lieu of" - original road allowances
Part 2 - The lessons of history.... ignore them at your peril!

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

In Part 1 (spring 1996 issue), the author set out the facts of this case illustrated by a chart. In essence, 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!

BACK TO THE BASICS

First, terminology. The term "original road allowance" is critically important. It refers only to those allowances for roads laid out in the original township survey. This was a basic grid system where land was divided into lots and concessions in order to identify parcels for conveyances from the Crown to settlers. In southern Ontario most of these surveys had been completed by the 1890s.

There are three sections in the *Municipal Act* dealing with "roads opened in lieu of" other roads. These sections are not new. They first saw the light of day in 1857[1] and 1858[2] when these roads in lieu (also called "deviation" roads) were the burning issue of the day. Reading these sections one after the other, you may think you have had too much wine. They can be confusing. All were argued. The *Beaumaris* case hinges on section 299 and this is the area we will explore.

IT WAS ALL CROWN LAND

Keep this fact in your memory disk. In the *Beaumaris* case, the Crown owned all roads on the original township survey of 1870 and all the surrounding lands at the time they commissioned the construction of these colonization roads, a few years later. The Crown could, therefore, build roads anywhere they darn well pleased, and that is just what they did! These colonization (settlement) roads took the most passable route and, rough as they were, got the automatic designation of a public highway.

The fact is, that no Crown patents (deeds, to private owners) were granted to the public in this area until 1891, some 15 years after the colonization roads were hacked out. So the Crown had two road surveys in the same area. The colonization roads were immediately constructed for settlers to traverse with their wagons. The road allowances on the original township survey in the Muskokas were, for the most part, ignored.

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When we speak of public highways back in the 1800s, we are not talking about the 401 around Toronto. These were mud tracks, poorly maintained, treacherous to travel, but they did provide a somewhat uncomfortable access to the settlers' lands.

PUBLIC HIGHWAYS SACROSANCT!

Public highways are now, and have always been, sacred. The eminent legal writer C.R.W. Biggar, in his *Municipal Manual* of 1900, put it this way:[3]

Highways comprise all portions of land over which every subject of the Crown may lawfully pass.

Even those roads shown on the original township survey, but never laid out on the ground, were nevertheless still public highways.[4]

MONA LISA OF PUBLIC HIGHWAYS

The Mona Lisa of all road legislation in Ontario was the *Public Roads and Highways Act 1810.*[5]

Here is what the Act of 1810 stated:

12 (2) ... all allowances for roads, made by the King's surveyors in any town, township or place already laid out, or which shall be made ... and also all roads laid out by virtue of any Act of the Parliament of this province, or any roads whereon the public money has been expended for opening ... or whereon the statute labour hath been usually performed, or any roads passing through the Indian lands, shall be deemed common and public highways, unless any such roads have been already altered according to law, or until... altered according to the provisions of this Act.

If this section has a familiar ring, you are right on target. It is almost identical to our present *Municipal Act*, section 261.[6]

Why this legislation in 1810? There was good reason. Certainly, the Crown surveys of the late 1700s and early 1800s laid out original road allowances.

However, if after producing the plan, the Crown surveyors decided that changes should be made, they altered and re-routed them. This caused a host of problems to the early settlers, and so by 1810, the legislative council put a stop to it. Roads laid out on a plan by Crown that could only be changed by due process of law.

To drive home the sanctity of a public highway, take the case of *Regina v. Hunt* in 1865.[7] The Crown issued a patent for a parcel of land. However two days prior, a Crown plan had been lodged and part of those lands were now a public highway. The deed was held to be invalid. Even the Crown cannot issue a patent over a public highway without due process.

JURISDICTION OF MUNICIPAL COUNCILS

Anyone who has been around the block on the subject of roads knows this fact. It is the municipal council that has jurisdiction over their roads. They can pass by-laws to stop up and close a road allowance, to open new roads, and if they wish, to "assume" a road for maintenance purposes. The court does not have that jurisdiction.

Although the court can look into council's proceedings to see if they took the correct steps, that does not detract from the fact that the municipality is the boss with respect to roads under their jurisdiction. It has been that way since 1858. This fact seems to have escaped the court's attention in the *Beaumaris* case.

LESSONS OF HISTORY... IGNORE THEM AT YOUR PERIL!

It is time to click on the history channel. This background is necessary to explain my hang-up with the *Beaumaris* decision.

Georgie Anne Geyer, a distinguished Washington correspondent, recently wrote an article entitled "Flunking History." She makes the statement that you can have no understanding or control without knowledge, particularly historical knowledge. She added:

Without historical knowledge, you don't know where you are, or why you are, much less where or why anybody else is ... you're easily taken in ... and even more easily fooled.

With these words of wisdom, let us go back to our early history books and see how these road situations developed.

ONTARIO HISTORY THE EARLY SETTLERS

New settlers, in the 1700s and 1800s, were no different from us folks of the 1990s. They wanted a piece of the land! Consequently, a grid system called the township survey was laid out. Thus, every piece of land and road could be identified. (Northern Ontario was the exception.)[8]

In many areas, the roads laid out in the township surveys were impractical to traverse; so the early settlers, for whom life was hard and neighbours few, took the most convenient routes available.

With the Baldwin Act, these magistrates in quarter sessions got their pink slips! (No golden handshake in those days!)

They took no exception to strangers, and in fact welcomed them through their land, for they brought news and provided rare opportunities for social contact. In the early part of the 1800s, travel routes through one's property were not a concern. Survival was!

STATUTE LABOUR

As these deviation roads became the accepted routes, their use increased, and so did the need for maintenance. Section 15 of the *Public Roads and Highways Act, 1810*[9] incorporated a provision for statute labour, whereby owners in a division area were required to contribute labour and materials (horse, wagon, axe, etc.) to maintain these roads. That Act provided that roads on which statute labour was usually performed were automatically public highways.

POPULATION EFFECTS

By the 1840s, population in southern Ontario, along the shores of the St. Lawrence, Lake Ontario and Lake Erie, was rapidly expanding. In 1832, the figure was close to 400,000, and by 1842, 740,000.[10] So much of the good land was patented. Land became more valuable and as it did, line fencing greatly increased. Many rural folk made use of, or fenced, adjacent unopened original road allowances. Where deviation roads (now public highways) went through a settler's property (with no compensation) the settler felt he had a legitimate claim to the adjacent unopened road allowances. By 1850, the number of settlers making such claims was increasing.

MAGNA CARTA OF MUNICIPAL INSTITUTIONS

This leads us to a critical turning point in the history of Ontario.

The *Municipal Act* of 1849 (also known as the Baldwin Act)[11] was a monumental reorganization of municipalities in Ontario. The districts, used in Upper Canada since 1793 for judicial and other purposes, were abolished. It organized counties, villages, towns and townships, and introduced for the first time representative (popular) government. This Act has been referred to as the "Magna Carta of municipal institutions in Canada," and deservedly so!

At first blush, you may yawn at this reference to the Baldwin Act, but to illustrate what a giant step for Ontario this was, permit me to go back a further step. From 1793 to the 1840s, local affairs in the rural areas were under the administration of magistrates sitting in quarter sessions. These were people appointed for life, usually retired military personnel, or folks of means, looking for a place to hang out.[12]

They had extensive powers over local affairs, including the power to open new roads under the *Public Roads and Highways Act, 1810*. But, and note this, they did not have the power to close or convey original road allowances. Consequently, they could not settle these "in lieu of" claims when they arose. This

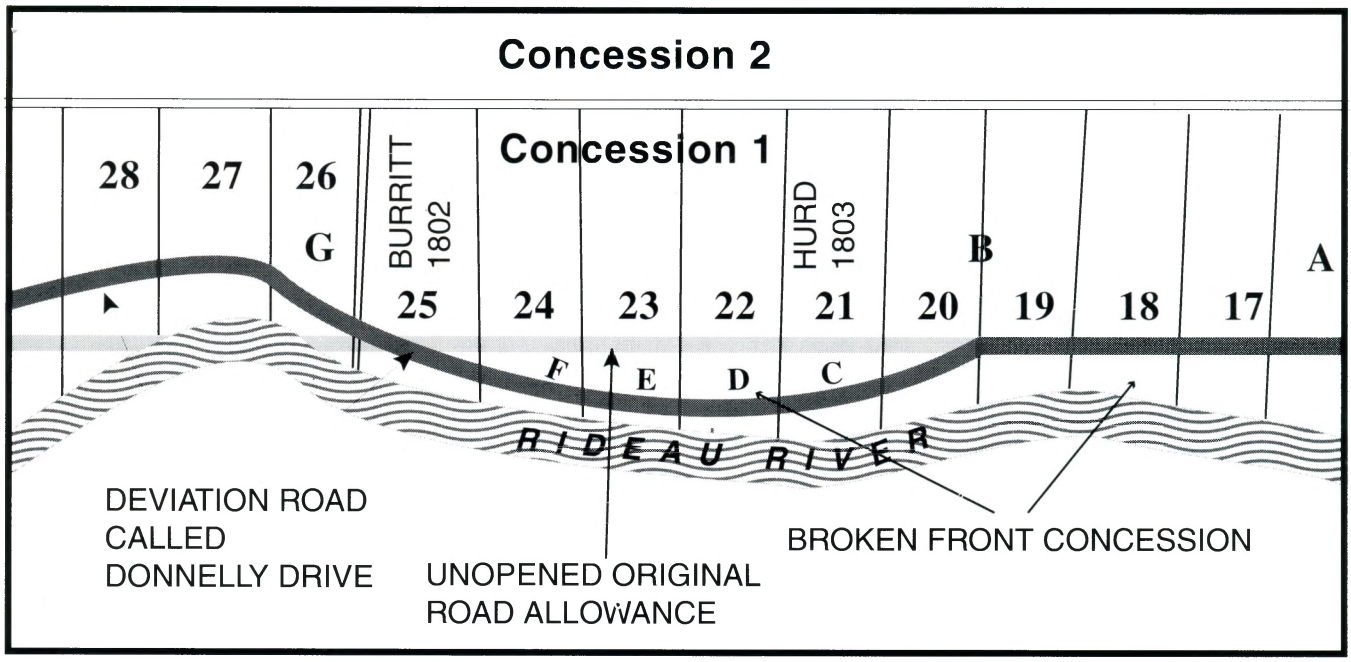

Chart 2 - Burritt v. The Corporation of the Township of Marlborough (now Township of Rideau) [19]

was the prerogative of the Legislative Council.

GOODBYE MAGISTRATES!

With the Baldwin Act, these magistrates in quarter sessions got their pink slips! (No golden handshake in those days!) Their powers were transferred to municipal councils. This was a bold step as these new rural councillors had no administrative skills, very little education, little or no understanding of law, and few (if any) lawyers to drive them bananas.

The former magistrates in quarter sessions were shocked at their dismissal, and were quite convinced that these uneducated councillors would surely lead the province to destruction.[13]

NEW POWERS TO MUNICIPAL COUNCILS

Initially, the Baldwin Act specifically prohibited municipalities from closing and selling original road allowances.[14] By 1857, the number of claims by settlers against unopened road allowances had further increased. It was these pressures that caused the legislative branch to pass amendments to the *Municipal Act* in 1857, [15] downloading these problems to the municipalities. (Yes, they downloaded in those days too!)

With these amendments, municipal councils now had the power to close and sell original road allowances provided that:

a) the township surveyor must confirm to council that the new deviation (or trespass) road was "sufficient for the purposes of a public road";
b) council must determine that the original road allowance was useless to the public; and finally,
c) the township by-law had to be confirmed by county council.

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In 1858, the *Municipal Act* was further amended. It addressed, for the first time, situations where an adjacent owner was not only in "possession," but had also "fenced" the original unopened road allowance by reason of another road being used "in lieu thereof." They could possess it against any private person until opened by by-law of the council.[16]

SO, WHO DECIDES IF IT IS "IN LIEU OF?"

By 1858, local municipal councils had jurisdiction over these original road allowances. (The title to the soil and freehold remained in the Crown until 1913, but that is not material for our purposes.) True, for closing and conveying, they first had to comply with the prerequisites listed above, but that was procedural.

Municipal councils had absolutely no jurisdiction over colonization (settlement) roads. These roads were not original road allowances. Municipalities did not get title to these until the "great road flip" of 1913 - *The Municipal Institutions Act*.[17]

ENTER THE COURTS

Occasionally, these "in lieu of road" issues got to the courts. Usually, it was a case where the township passed a by-law to open an original road allowance, and the adjacent owners, living on a deviation road, objected.

A decision always quoted in these cases is *Burritt v. The Corporation of the*

Township of Marlborough (1869).[18] This leading case was referred to in the *Beaumaris* decision, but somehow its true significance seems to have been lost on the court. This case is typical of those most frequently taken to the courts.

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THE FACTS

Since the early 1800s, settlers in the Township of Marlborough had road access to their lands along the original road allowance. This was between Concession I and the Broken Front Concession bordering on the Rideau River. From Lot 1 (designated A) to Lot 19 (designated B) the road followed the original road allowance, but then it deviated to the south closer to the Rideau River as shown by C, D, E, F and G.

Since waterways were the highways of the day, it is understandable why the owners of Lots 20 to 25 would want to be closer to the water. The early purchasers of lots in Concession I also got title to the land in the Broken Front Concession on the river.

Mr. Burritt purchased Lot 25 in 1802, and Mr. Hurd, Lot 21 in 1803.

In 1868 (some 65 years later), the township passed By-law No. 44 to open the unopened road allowance from B to G. Burritt and others shouted: "Stop the music. We gave up land for the deviation road, and that is now a public highway on which statute labour has been performed. Our homes have been built along the river road, we have occupied, farmed and possessed the unopened road allowance as part of our farm holdings for more than 60 years, and we believe we are entitled to a conveyance of it as compensation for the deviation road through our lands." (In *Beemer v. Village of Grimsby* possession had been for 80 years.)[20]

The court agreed with Burritt. They threw out By-law No. 44 saying that Burritt and his colleagues had sufficient evidence to go before a jury to substantiate their claim for ownership. I do not know if they ever did start a case claiming ownership, but in light of this decision, ownership was virtually conceded. That situation is a far cry from the *Beaumaris* case, where the subject road allowances had only been partially fenced at the intersection for less than two years (when the dispute arose), and it had never been visibly occupied or controlled or possessed by the fishing club. Nevertheless, the court held that the fishing club had "exclusive possession." Oh my goodness!

REFERENCES

1. (1857) 20 V., c. 69, ss. 5, 6, 7 and 8. An Act to provide for the disposal of road allowances in the rural municipalities of Upper Canada, June 10, 1857. Relates to possession and ownership of unopened road allowances where new "in lieu of" roads were opened without compensation to the owner.
2. (1858) 22 V., c. 99, s. 318. Amendment to the Municipal Institutions Act of Upper Canada. Where a new "road in lieu" is used (the circumstances of which are unknown), the adjacent owner who has possessed and fenced the allowance, holds it against everyone save the municipality.
   In the consolidated Statutes of Upper Canada 1859, 22 V., c. 99 these became sections 318 and 319.
3. C.R.W. Biggar, *Municipal Manual*, 1900, pp. 806 and 814.
4. *Palmatier v. McKibbon* (1804), 21 A.R 44, C.R.W. Biggar, *Municipal Manual*, 1900, p.815.
5. Statutes of Upper Canada, 1810, 50 Geog. III. First Session. Section 12. Later repealed by the Municipal Act of 1849, with the exception of s. 12, and I believe s. 15.
6. Now see R.S.O. 1990, c. M. 45, s.261.
7. *Regina v. Hunt* (1865), 16 U.C.C.P. 145.
8. In northern Ontario many surveys did not provide for roads between concessions and lot lines. The Crown patents reserved 5% of the land for road purposes (another interesting subject).
9. See footnote 5. The section provided: "every person liable to work ... shall bring with him, one pick-axe, bar, or other tool or instrument ... and every year allowing eight hours to each day's work ... and every person keeping a cart, wagon, or team of two horses, oxen ... shall send them on every day appointed by the overseers."
10. Confession! I cannot locate my memorandum of source material for this statement. I suspect it might have been Robert A. Harrison's, *New Municipal Manual* of 1859.
11. The Municipal Act, 12 V., c. 81 assented May 30, 1849. In force January 1, 1850.
12. We should not be too hard on these folks. Many contributed much as school teachers and librarians.
13. C.R.W. Biggar in his *Municipal Manual* of 1900 commented, "It must at first have been difficult for those as members of the courts of Quarter Session having so long been accustomed to considering themselves ex-officio the governing class."
14. The Municipal Act, 12 V. c. 8 1, s. 187.
15. See footnote 1.
16. See footnote 2.
17. The Great Road Flip of 1913. The Municipal Institutions Act, S.O. 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.
18. *Burritt v. The Corporation of the Township of Marlborough* (1869), 29 U.C.Q.B., 119 (C.A.).
19. My thanks to J. David Ball, Clerk of the Township of Rideau, for helping me to locate the road that was the subject in the Township of Marlborough case.
20. Re *Beemer v. Village of Grimsby* (1886), 8 O.R. 98. The possession of the lot owners had continued for 80 years, and the by-law attempting to open the unopened road allowance was quashed.