

"Roads in lieu of" - original road allowances

Part 1 - Where did the train go off the tracks?

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

DEAL THE CARDS

Right up front I will put my cards on the table. In the past five years there have been two court decisions on the subject of roads being laid out in lieu of original road allowances. Both, in my opinion, were wrongly decided. Yes, the train went off the tracks!

It's a shame one of these cases was not appealed to the higher court where, I am sure, the law would have been put back on the rails. Unfortunately for the losers, the yellow brick road to the appeal courts is paved with cash. As every good poker player knows, there's a time to fold and a time to walk away.

SO WHAT IS THE PROBLEM?

In a nutshell, it is this. There are three sections in the *Municipal Act* (sections 299, 316 and 317) that deal with situations where a road deviates from the original road allowance set out in the township survey and crosses private property.

Although these sections are still in our present *Municipal Act*, the days have long since gone when a municipality or an individual would go on the land to construct a deviation road through private property to bypass the original road allowance. Nevertheless, these sections have been quietly sitting on the shelf gathering dust for decades.

Such was not the case 138 years ago when these sections were first incorporated into the *Municipal Act* in 1857 and 1858. Those deviation roads constructed in the early 1800s, although designated as public highways, were hardly highways as we understand the term today. They were rutted routes, and the conditions of travel were deplorable. In order to keep the roads passable, statute labour was mandatory.

The principal highways in those days were the waterways and canals. Then, in 1853, the first railway was struck north from Toronto¹ and these railways, which multiplied quickly, gave better overland

access to the various water highways. In those early days, municipalities had few funds, and what they did have, were often used, not for roads, but to entice railways to their area.

STAR IN THE EAST

Most of the "roads in lieu of" cases, under these sections had run their course by the early 1900s. Then in 1991, a star rose in the east! A fishing club decided to dust the cases off to prevent Mr. Fraser from using their private lake. Their lawyer revived the sections with artificial respiration and a modern day argument to the court. This led to a very questionable decision. As one of my German friends would say, "these cases will be a sore in the head to municipalities."

The problem for municipalities is this: if there is a main travelled road in a rural township that runs zigzag through the area, and does not follow the road allowances laid out in the original township survey, then you have the makings of a problem.

Those landowners who are serviced from this travelled road, and have at the rear of their properties unopened original road allowances could, under certain circumstances, claim ownership of these allowances, or in the alternative, fence and possess them to the exclusion of everyone save the municipality.

The result could be that the municipality, based on the *Beaumaris* decision, may be denied or hindered from allowing use to be made of their unopened road allowances. You think it will not happen? Last fall, we got our first municipal file dealing with this issue. An adjacent landowner, in an attempt to prevent the municipality from allowing an unopened road allowance to be used for snowmobile purposes, fenced the allowance, and claimed the privileges of section 299 of the *Municipal Act*.

With that introduction, let us get down to it.

THE TARGETS

The two cases that are the cause of my emotional trauma are:

1. *Beaumaris Fishing Club v. The Township of Gravenhurst* (1991).²
2. *Grey-Bruce Snowmobile Trails Inc. v. Morris et al.* (1993).³ This dealt with a snowmobile trail on an original unopened road allowance. Peter Fallis was successful for the private claimants, and wrote an article on the impact of this decision in the January 1994 issue of *Municipal World*.⁴
[Editor's Note: This article was reprinted in the Fall 1995 *Quarterly*.]

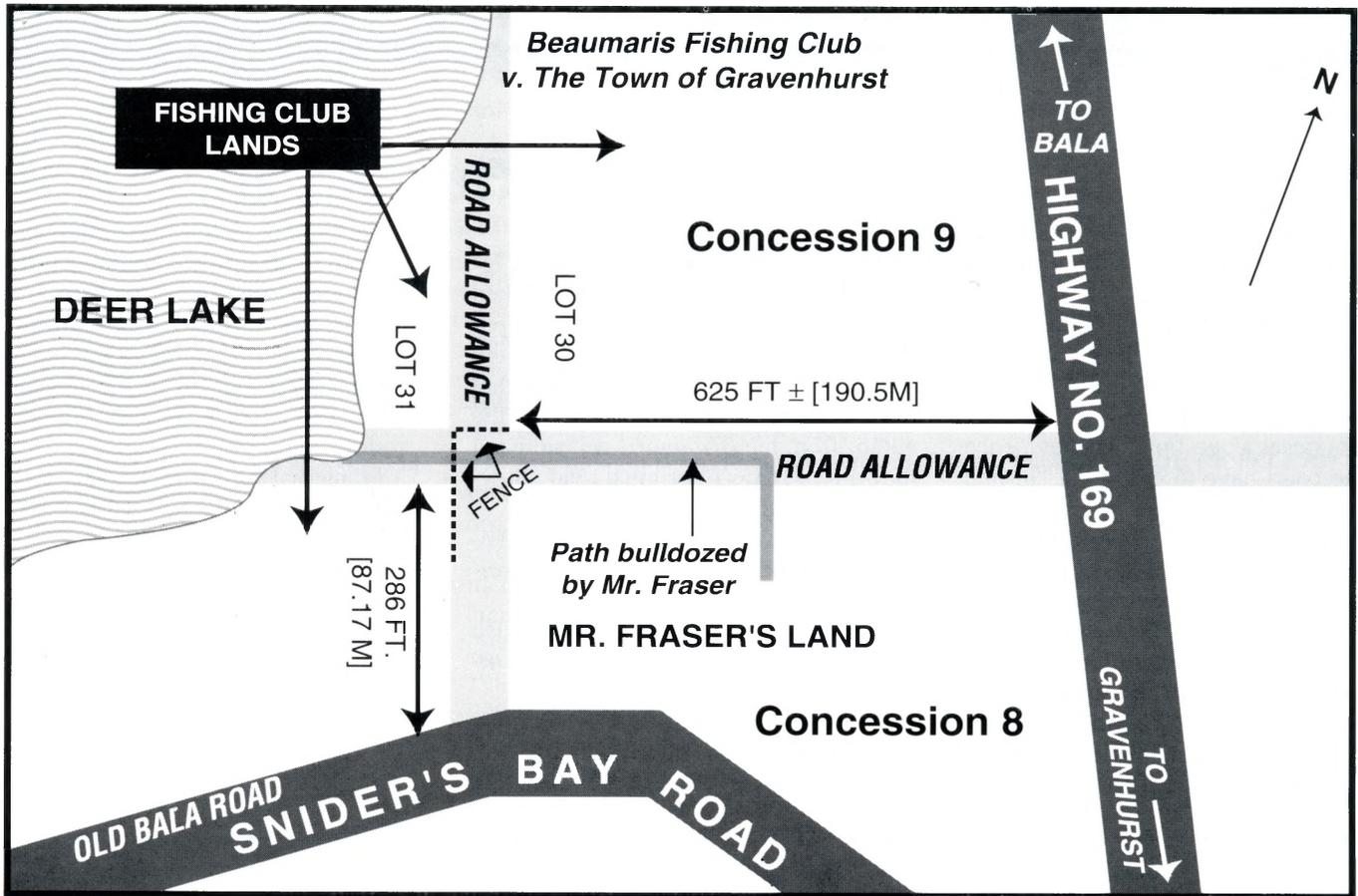
Since the *Grey-Bruce Snowmobile* case adopted the reasoning in the *Beaumaris* case, I will direct my fire at *Beaumaris*. Like a standing deck of cards, if one falls they all fall!

THE FACTS - THE BEAUMARIS CASE (GONE FISHING!)

Since 1918 (some 72 years before this case), the *Beaumaris Fishing Club* owned all the land around several lakes northwest of Gravenhurst in the outback part of Muskoka. In excess of 3,000 acres I believe. Now that club had privacy!

This privacy, however, had an Achilles' heel. At the south end of Deer Lake there was an unopened east-west and north-south road allowance laid out on the original township survey in 1870 that gave access to the lake. With the exception of this (and other original road allowances in the area), the fishing club owned all the land surrounding these lakes.

Mr. Fraser, the owner of lands southeast of the intersection of the original road allowances (see diagram), was of the opinion that there would be some mighty good fishing in these lakes. In May of 1989, his curiosity could be contained no longer. He bulldozed a path along the east-west road allowance for the purpose of launching his pontoon



boat, and hung up the sign "Gone Fishing." To say that the fishing club was upset over this intrusion is to put it mildly. But wait! There is more to come.

In August 1989, Mr. Fraser organized a bass fishing derby on the three lakes with access along this east-west road allowance. That was the last straw! The fishing club, the Town of Gravenhurst, Mr. Fraser and everyone north of the 44th parallel got into a rhubarb.

FENCE THE INTERSECTION!

The fishing club looked at section 299 of the *Municipal Act* and decided to breathe life into it. They erected a fence across both road allowances at their intersection, thereby cutting off access to Deer Lake (see diagram below). Outraged to the limit, they took their stand on section 299.⁵

What does this section say?

299(1) - Possession of Unopened Road Allowance

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. [Emphasis added.]

SOUND THE TRUMPETS!

The fishing club then trumpeted their message across the land: "We are in possession of the original unopened road allowance that abuts our land. We have enclosed it with a lawful fence (it was up for about two years while the feud was heating up). *The allowance has not been opened for public use by reason of another road near to it having been established in lieu of it, and so we possess it against everyone except the municipality!*"

"Therefore, until council passes a by-

law to open it under section 299 (most unlikely because of its rocky terrain), we are legally possessed of this road allowance to the exclusion of everyone - except the township!" The battle lines were etched in granite.

THE ROADS IN LIEU?

So where are these mysterious "roads in lieu"? (See diagram.)

The first was Snider's Bay Road (formerly "Musquash Road") located some 286 feet south of the war zone (the fenced intersection). It was the location of an early Crown colonization road constructed from Gravenhurst to Musquash Falls, (Bala) in 1872, some two years after the original township survey that was completed in 1870.

The second was Highway 169 (originally Pine Point Road, now the main road to Bala) located 626 feet east of the war zone. It too, was an early colonization road from Long Point south to connect with the Musquash Falls Road. It was constructed in 1876, six years after the original survey of the Township of Muskoka.

SITTING PRETTY

So there you have it. All the fishing club needed to do was prove that these colonization roads, contracted some years after the original township survey of 1870, were "opened in lieu of the original road allowances shown on the township survey, and presto they would win! And by golly they did! That's just what the court held. As a result, the public in general, and Mr. Fraser in particular, were prohibited from using this access to Deer Lake! Oh my goodness!

WHAT EVIDENCE

This raises a question. What evidence did the court have to base their "in lieu of" conclusion?

First, it said that the fishing club had exclusive possession of this road allowance area for more than 70 years. This causes me problems. The area had never been fenced, never used for pasturing livestock.⁶ It was just one of the many thousands of miles of unopened road allowances across the province.

Secondly, the court was impressed

with a surveyor's affidavit saying these colonization roads of the 1870s were opened in lieu of the roads in the subject intersection.

Was that evidence sufficient? Not for the girls I dance with!



Part 2 - The lessons of history, ignore them at your peril! was published in the June 1996 issue of *Municipal World*. It will go back to the basics and describe the historical background that impacts on the conclusions drawn by the author from the *Beaumaris* decision and the current status of original road allowances in Ontario.

Part 3 - The law is not a fool! appeared in the July 1996 issue of *Municipal World*.

Editor's Note: These articles will also appear in upcoming issues of *The Ontario Land Surveyor Quarterly*.

References

1 In June 1853, the first steam engine

puffed its way from Toronto to Machel's Corners (now Aurora).

- 2 *Beaumaris Fishing Club v. The Town of Gravenhurst* (1991), 4 O.R. (3d), 774.
- 3 *The Grey-Bruce Snowmobile Trails Inc. v. Morris et al.* (1993), 19 M.P.L.R. (2d) 91.
- 4 This author also had an article in the same issue entitled "Municipal Road Allowances, Who's the Boss." In a subsequent issue, Mike Fitton of Bracebridge, Ontario took issue with Peter's assessment of the impact of his *Grey-Bruce Snowmobile* decision.
- 5 Municipal Act, R.S.O. 1980, c. 302, s.300. Now see R.S.O. 1990, c. M.45, s.299.
- 6 Webster's Unabridged Dictionary, second edition: "exclusive" - excluding all others, not shared or divided, having the power to exclude others; "possession" being possessed, ownership, occupancy.