

CITATION: 1394170 O.I. v. Town of Bracebridge et al, 2010 ONSC 2336  
BARRIE COURT FILE NO.: 07-0369  
DATE: 20091118  
CORRIGENDA: 20100421

2010 ONSC 2336 (CanLII)

ONTARIO  
SUPERIOR COURT OF JUSTICE

B E T W E E N: )  
 )  
1394170 ONTARIO INC. ) E.R. Finn, for the plaintiff  
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 )  
Plaintiff )  
 )  
- and - )  
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 )  
THE CORPORATION OF THE TOWN OF ) H.G. Elston for the Corporation of the  
BRACEBRIDGE, FRANCIS JOSEPH ) Town of Bracebridge  
O'CONNOR and MARTHA O'CONNOR )  
 ) D.M. Winnitoy, for Joseph O'Connor and  
 ) Martha O'Connor  
 )  
Defendants )  
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 )  
 ) HEARD: June 9, 10, 12, 25 & 26; July 3,  
2009

REVISED REASONS FOR DECISION

The text of the original Reasons for Decision has been corrected with text of  
Corrigendum (released April 21, 2010) appended.

McISAAC, J.

[1] The plaintiff seeks a declaration that the easterly three-fifths of a bush road that traverses the northerly part of the property owned by the defendants O'Connor is a public highway. This dispute comes to me by way of an Order of Lack, J. dated September 20, 2007 who converted an application into an action.

## **BACKGROUND**

[2] All of the subject properties are located in the Fourth Concession of the former Township of Macauley, now the Town of Bracebridge. The plaintiff corporation owns a hunt camp on Lot 26 and the defendants O'Connor own a recreational home on Lots 23 and 24 which was constructed after their purchase in 1997.

[3] For a period of time after this purchase, the plaintiff's members continued to use the disputed road to access their hunt camp. Unfortunately, unhappy differences arose between them and the O'Connors as to this use and it was barricaded by the O'Connors in 2006 at a point immediately east of their driveway entrance. That action provoked this litigation.

[4] All parties agree that the westerly two-fifths of the road across Lot 24 is a highway up to the driveway entrance heading to the O'Connor residence. The Town of Bracebridge has continually maintained the road to that point where they have erected a large sign that states:

### **END MUNICIPALLY MAINTAINED ROADWAY**

This roadway is not maintained by the Town of Bracebridge.

## **HISTORICAL CONTEXT**

[5] The Township of Macauley was originally surveyed in the mid-19<sup>th</sup> century describing a road allowance between the Fourth and Fifth concessions. There is no dispute that this road allowance was eventually opened and became known as the Kirk Line Road. The 1879 Atlas of the Township shows a church on the property now owned by the plaintiff. Given the inhospitable terrain of the Muskoka District, it was rarely possible to open a road allowance between concessions in a true east-west fashion as routinely occurred in the southern part of the province. Accordingly, the roadway that abutted the northern limits of Lot 24 meandered on and off the surveyed road allowance. In particular, a large granite outcropping existed on this historical road which became known as "Wilson's Hill" being named after a one-time owner of Lot 24.

[6] Municipal records disclose that on five separate occasions between 1880 and 1890 money was paid out for repairs to Wilson's Hill. Having taken a view of the location on June 11, 2009, I have no difficulty in coming to the conclusion despite the significant passage of time that all of these repairs were required to alleviate the effects of erosion on the hill which members of the plaintiff hunt club refer to as the "Berlin Wall". These records also disclose that two payments were made in 1898 to conduct the survey of a new road that was intended to create a bypass around Wilson's Hill and eventually rejoin the concession road at the easterly limit of Lot 24. These payments totalled \$18. This survey is a virtual template of the deviation road that gives rise to this litigation.

[7] The municipal records also disclose five post-1898 payments in relation to Lot 24:

May 25, 1910	a \$20 payment "to be expended opposite Lot 24 in the 4 <sup>th</sup> and 5 <sup>th</sup> Con. in conjunction with statute labour"
August 8, 1910	a \$20 payment to the same overseer "in Deviation 4 <sup>th</sup> and 5 <sup>th</sup> Con."
May 26, 1924	\$5 for repairs "in front of Lot 24, Con. 4-5"
May 27, 1929	\$25 for repairs at "lot 24, Con. 4"
July 30, 1930	\$35 to "repair hill on Con. 4 – Lot 24"

## ANALYSIS

[8] The plaintiff suggests that the sought declaration is supported by statute and common law principles. It firstly relies on s.404 of the *Municipal Institutions Act*, 36 Vic., c.48 which states:

All allowances made for roads by the Crown Surveyors in any town, township or place already laid out, or hereafter laid out, and also all roads laid out by virtue of any Statute, or any roads whereon the public money has been expended for opening the same 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 where such roads have been already altered, or may hereafter be altered according to law. (my emphasis added).

[9] Since \$18 was spent to open the deviation road in 1898 when it was surveyed, the plaintiff submits that it became a "common and public highway".

[10] Counsel for the O'Connors referred me to the judgment of the Ontario Court of Appeal in *St. Vincent (Township) v. Greenfield* [1887] O.J. No. 18: see Tab 1C, p. 89 of the Supplementary Book of Authorities being an excerpt from *Russell on Roads*, 2<sup>nd</sup> ed. That case adds a gloss to this interpretation requiring that the municipality undertake some form of legal appropriation of the property in question such as "expropriation, dedication or otherwise" before the expenditure of public monies can transform it into a public highway: see para. 16. See as well *Point Abino Assn. v. Bertie (Township)* [1928] O.J. No. 150 (Sup. Ct. – App. Div.) at para. 12.

[11] Counsel for the plaintiff attempted to avoid the consequences of this interpretation of s.404 by suggesting that in 1894 the owner of lot 24 acquiesced in the construction of this deviation by reference to an entry from the municipal records which suggests he was involved in statute labour of that location. However, I agree with the witness John Hiley that this note is ambiguous and equally consistent with work done on the historical road along the concession as on the new deviation road. I am not satisfied that this provision assists the plaintiff.

[12] The plaintiff next relies on common law principles of dedication and acceptance. Although I have already rejected the contention that there was an implied dedication of the deviation road by the owner of Lot 24 on or before the completion of the survey in 1898, the

plaintiff relies on a presumed dedication subsequent to that date from user, that is, long-term acceptance by the general public: see *Reed v. Town of Lincoln* [1974] O.J. No. 2185 (C.A.). At para. 24 of that judgment Martin, J.A. stated:

Evidence of the use of the road by the public is merely evidence from which the intent to dedicate may be inferred (per Lord Kinnear in *Folkestone Corp. v. Brockman*, at p. 352). Such an intention ought not be too readily inferred from the use by members of the public of a road traversing private property in a rural community, especially in a locality where the normal system of roads did not develop. In these circumstances the owner of the property may well, in a neighbourly spirit, permit local residents to use a way across it for their convenience without having any intention of dedicating the road as a public highway. The inference of neighbourly tolerance is the more likely when dedication is sought to be established at a period when the area is in a relatively early stage of its development: (authorities omitted).

[13] I find these observations particularly apposite to the case at bar.

[14] Although there is some evidence of occasional use of this disputed road for the purpose of lake access, deadfall collection and the like beginning in the 1970's, I am far from satisfied that such anecdotal use is sufficient to overcome the presumption against a gift in favour of the public. In my view, it is more consistent with the instances of neighbourly tolerance referred to in *Reed*, supra. Insofar as expenditure of public monies following 1898, the municipal records disclose only one isolated allocation of \$20 in 1910 which is referable to the deviation road. There is nothing to suggest the four other charges were not related to the original historical road. This single minimum payment is, in my view, an extremely slender reed upon which to find a public acceptance of this bush road for all time.

[15] I have not found the aerial photography helpful in resolving the legal status of this disputed road. Although the photographs taken in 1927 could support the continuing existence of the deviation road, there is nothing compelling to suggest that those traces emanated from continual public use of it. They are equally explained as artifacts from the survey commissioned in 1898.

[16] There was never any formal acceptance on behalf of the public of the deviation road by municipal by-law or resolution. It was never deeded to the municipality although other deviation roads were so conveyed such as the one on the plaintiff's property. None of the assessment maps support the existence of the deviation road as tax exempt.

[17] In summary, although there are certain aspects of the evidence that tend to support an acceptance by or on behalf of the public, they are insufficient in my view to overcome the presumption against gift in a "cogent or substantial" manner: see *Reed*, supra, at p. 39.

## CONCLUSION

[18] For all of these reasons the plaintiff's claim is dismissed. Counsel are invited to file brief written submissions on the issue of costs, those of the defendant Town of Bracebridge, within 30 days of the release of these reasons, those of the defendants O'Connor, 15 days thereafter and those of the plaintiff, 15 days thereafter.

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McISAAC, J.

Released: April 21, 2010

**CORRIGENDA**

1. Page 3, para. 9, comma added: ....when it was surveyed, the plaintiff submits...
2. Page 4, para 14, final sentence now reads: ...an extremely slender reed upon which to find a public acceptance of this bush road...