



An Ontario township in lake-studded Muskoka has lost a court bid to have the government recognize the public's right to portage a historic canoe route at Bala Falls.

(Matthew Sherwood for The Globe and Mail)

Muskoka township loses court bid to recognize the public's right to portage

RENATA D'ALIESIO

The Globe and Mail

Published Monday, Jul. 21 2014, 9:50 PM EDT

Last updated Monday, Jul. 21 2014, 9:50 PM EDT

An Ontario township in lake-studded Muskoka has lost a court bid to have the government recognize the public's right to portage a historic canoe route at Bala Falls.

In an Ontario Court of Appeal ruling released on Monday, a panel of three judges concluded that the protection of public safety trumps canoeists' access to portages and shorelines on Crown land. The decision marks one of the few times Canadian courts have examined whether carrying a canoe between waterways is a right in a country explored and settled by paddlers.

The canoe helped build scores of communities across Canada. Bordered by the Moon River and Lake Muskoka, the area's water highways once drew cartographer David Thompson in 1837, according to a journal of his. He was travelling upstream in search of a water route from Georgian Bay to the Ottawa River.

The right to navigate Canada's waters has long been protected under federal legislation and common law. But in the Township of Muskoka Lakes' case, the Appeal Court found that this right does not include transporting a canoe over "another's land."

Moreover, the judges concluded that the Ontario Minister of Natural Resources can prohibit passage over portages if the area is deemed hazardous under the province's Public Lands Act.

Two men drowned near the north Bala Falls in 2009 after diving into the Moon River to save a child.

The province blocked off part of the area last year, using section 28 of the Public Lands Act after the township erected a bright yellow portage sign beckoning canoeists to use the route.

The ministry had "serious concerns with the township encouraging the use of potentially dangerous lands for portaging," said Jolanta Kowalski, a spokeswoman for Natural Resources.

The Township of Muskoka Lakes had maintained an outright ban was unnecessary and unreasonable, noting a study commissioned by the province after the drowning deaths had not recommended prohibiting public access to Crown land.

The appeal court disagreed: "Given the safety concerns, the Minister's decision was reasonable, even if a portage protected by" another section of the act existed, the judges wrote.

The ruling is a setback for opponents of a proposed water power plant at Bala Falls, a picturesque spurt on the Canadian Shield about a two-hour drive north of Toronto.

If the township had won, the Ontario government would not have been allowed to disturb the portage and the 4.5-megawatt hydroelectric project would likely have been halted.

An old water power plant south of the north falls was demolished in the 1970s. The Liberal government wants to harness that energy again in its aggressive plan to expand renewable sources such as water, solar and wind.

The Bala Falls hydroelectric project, awarded to Swift River Energy in 2005, has encountered strong resistance in the community of Bala. In other parts of the township, some residents have expressed frustration with the amount of public money spent on the legal battle.

Swift River Energy welcomed Monday's court decision, noting on its Twitter account "several SAFER portage routes" are nearby. In a brief note, project manager Karen McGhee said the company hopes to begin work on the site in the fall.

Swift River still requires a land lease from the province and other municipal and federal approvals. The company estimates it has spent about \$2-million on the proposal so far.

In an e-mail Monday, the Ministry of Natural Resources did not indicate when – or if – that land lease will be granted.

Township Mayor Alice Murphy said the community will seek to identify another portage route. The township could request an appeal to the Supreme Court of Canada.

“Any consideration of a further [legal] application would be premature at this time,” Ms. Murphy said.

Bala resident Sandy Currie thinks the country’s top court should weigh in – that the issue of public access to shorelines and historic portages on Crown land is of national importance. He hopes other municipalities and organizations consider joining this legal fight.

“The fact is that the federal government controls the right to navigate, not the province,” Mr. Currie noted. “Is the right to portage included somehow in the right to navigate?”

Mr. Currie, president of the Moon River Property Owners’ Association, vowed to keep battling the water power project. Bala is peppered with signs that say “Stop the hydro plant.”

“This is setback for sure,” Mr. Currie said, “but I don’t think this should be taken as a final straw in the matter.”