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Road access critical when buying cottage

The most important question for anyone buying a cottage property is always, "How do I get there from here?" After all, there's no point spending hundreds of thousands of dollars on a recreational home if the only way to get to it is by helicopter.

Access to cottages was the issue in a case heard by the Ontario Court of Appeal last year. A group of cottagers live year-round on the shores of Lake St. John in Ramara township. The cottage sites are on reserve lands of the Mnjikaning First Nation, and the cottagers pay the Crown an annual rent of $1,400 to $1,500 each.

The only existing motor vehicle access to the cottages is over a road located on an adjacent lot, purchased in 2003 by a numbered company owned by the Mnjikaning First Nation.

The previous owner of the adjacent lot charged the cottagers a $500 annual fee for the use and maintenance of the access road. When the numbered company bought the lot, it advised the cottagers that they would each be required to pay $2,000 annually, but only for seasonal access between May and November.

It wasn't long before the corporation owned by the First Nation band sued two of the cottagers for trespass by snowmobile, and a group of cottagers sued the First Nation corporation for an injunction restraining them from interfering with road access to and from their cottages.

The case involves the interpretation of Ontario's Road Access Act, originally passed in 1978 to resolve disputes that occur when the property of one neighbour is landlocked, and the only vehicle access to it is over a road on property owned by another neighbour.

The act provides that the owner of the access road generally cannot close it without a court order. By implication, the act allows the owner to close the road without a court order if there is "alternate road access."

The court in this case had to decide whether the cottagers had "alternate road access" under the act.

The trial took place in June, 2005 before Justice Peter Howden. The native band argued that it was entitled to close its access road without a court order because the cottagers had two alternatives: They could travel over the existing road on payment of the $2,000 user fee, or they could use a municipally-regulated unopened road allowance.

Under the legislation, an access road is a road on private land that serves as the only motor vehicle access route to one or more parcels of land. An unopened road allowance is a strip of Crown land reserved for the purpose of making a road sometime in the future, but it does not actually exist on the ground. In this case, the unopened road allowance was not useable.

Justice Howden ruled in favour of the cottagers. The roadway was an access road within the meaning of the legislation, and could not be closed or blockaded without a court order.

The cottagers were granted an injunction preventing the land owner from blocking the road, subject to payment of a yearly fee of $500 by each cottager to the landowner. The fee had to be based on the actual maintenance and repair costs of the existing gravel road.

The cottagers were awarded $57,000 plus GST in court costs against the First Nation corporation.

The band appealed and the matter reached the Court of Appeal last summer. Writing for a three-judge panel, Justice John Laskin upheld the trial decision, dismissed the appeal and ordered costs of $8,000 against the First Nation corporation.

He warned the cottagers that although they won the case, they would have no defence to an application by the First Nation corporation to close the access road if the township granted approval to open the unopened allowance. In that event, the cottagers would have to pay an estimated $450,000 in construction costs for the new road.

Road access is perhaps the most critical aspect of buying a cottage. This even applies to island cottages, where access to a place to park a car and launch a boat is vitally important. A cottage is of no value if there's no legal way to get there.

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REPRODUCED BELOW ARE

1. **The trial decision**
2. **The award of costs**
3. **The Court of Appeal decision**

2008795 Ontario Inc. v. Kilpatrick, 2006 CanLII 2182 (ON S.C.)

Date: 2006-01-20

Docket: 04-B-6985

URL: http://www.canlii.org/en/on/onsc/doc/2006/2006canlii2182/2006canlii2182.html

Related decisions

- **Court of Appeal for Ontario**

  2008795 Ontario Inc. v. Kilpatrick, 2007 ONCA 586 (CanLII)

- **Superior Court of Justice**

  2008795 Ontario Inc. v. Kilpatrick, 2006 CanLII 22651 (ON S.C.)

Noteup

[Search for decisions citing this decision]

Legislation cited (available on CanLII)

- Limitations Act, R.S.O., 1990, c. L.15 45(1)(g)
- Municipal Act, 2001, S.O., 2001, c. 25 26 30
- Road Access Act, R.S.O., 1990, c. R.34

Decisions cited

- 553173 Ontario Ltd. v. Bank of Montreal, 1998 CanLII 3047 (ON C.A.) (1998), 38 O.R. (3d) 575
- 553173 Ontario Ltd. v. Bank of Montreal, 1995 CanLII 7246 (ON S.C.) (1995), 26 O.R. (3d) 617
- Eaton v. Abram, reflex (1993), 15 O.R. (3d) 74
- Goudreau v. Chandos (Township), reflex (1993), 14 O.R. (3d) 636
- Roth v. Roth, reflex (1991), 4 O.R. (3d) 740
- Whitmell v. Ritchie, 1994 CanLII 858 (ON C.A.) (1994), 20 O.R. (3d) 424 (1994), 118 D.L.R. (4th) 284 (1994), 74 O.A.C. 317

COURT FILE NO.: 04-B-6985

DATE: 2006/01/20

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
2008795 ONTARIO INC.	)))	Ms. K. Grace, for the Plaintiff/Defendant by counterclaim
	)	
Plaintiff	)))))	
	)	
- and -	)	
	)	
	)	
GORDON KILPATRICK, SYLVIA KILPATRICK, LARRY HASLER, KIM HASLER, GEORGE KOESLAG, JANICE MINO, MARK PURDY, BRIAN WAITES, KAREN WAITES, VINCE SUTCH and TODD RICHARDSON Defendants	))))))))	Ms. P.R. McMurtry, for Kilpatrick et al., Defendants/Plaintiffs by counterclaim
	)	

	)	
	)	
AND BETWEEN:	))))))))))))))))	
GORDON KILPATRICK, SYLVIA KILPATRICK, LARRY HASLER, KIM HASLER, GEORGE KOESLAG, JANICE MINO, MARK PURDY, BRIAN WAITES, KAREN WAITES, VINCE SUTCH, and TODD RICHARDSON Plaintiffs by Counterclaim		Ms. F. Parsons and Ms. A. Bourke for the Attorney General of Canada, Defendant by Counterclaim
-and-		**HEARD: June 27, 28, 29, 2005**
2008795 ONTARIO INC. AND ATTORNEY GENERAL OF CANADA Defendants by Counterclaim		

-

HOWDEN J.:

[1] The combined actions before me arise from the closure of an access road used by a group of cottagers through a privately owned rural property, the ownership of which recently changed. It is, as well, a dispute over the law and due process in circumstances where the land owner asserts there is possible alternate road access which could be developed and, having offered terms of continued use more restrictive than in the past, closes the access road to the cottagers.

Background

[2] The plaintiff corporation purchased lot 18, located within concessions 3 and 4 of the Township of Ramara, in 2003. Prior to purchase by the plaintiff, lot 18 was used primarily for pasturing cattle. The video tape entered in evidence showed it to be mostly cleared, rural land bounded by dense tree growth, with a curving gravel road through it from the end of the public road on the east to the road in lot 19 to the west.

[3] The concession lot to the west, lot 19, is reserve land held by the Crown represented by the Minister of Indian Affairs and Northern Development (Minister). The reserve land is occupied by the Mnjikaning First Nation. Lot 19 is located geographically in the vicinity of Lake St. John, which unfortunately does not appear on any of the surveys submitted in evidence at the trial. Along the shore of Lake St. John, various non-band persons and families have leased parcels of land for terms of 20 years and have built cottages which they use throughout the year. A number of band members also live on parcels of land in lot 19, with some residing there year-round. Both the cottagers (the non-band members) and band members have been using the gravel road over lot 18 to drive to their cottages or homes on Lake St. John, at least since the early 1990 s with one cottager s use extending back to 1983. The access road had been gated and access was acquired by using a key. Prior to closure on November 1, 2003, the cottagers and band residents obtained the key upon paying a yearly fee. In the 1980 s, the access fee was under $100 yearly. By 2002 the fee had increased to $500. This increase had occurred because the prior owner had recently performed work on the road beyond regular maintenance, building it up in places and varying its configuration. In 2003, receipts supplied to the cottagers on payment of the annual fee contained words to the effect that payment was for May to October. The evidence is that the access road over lot 18 was never limited in use to those months, including 2003, until closure in late 2003.

[4] The plaintiff corporation purchased lot 18 on July 31, 2003 from Joseph Carrick. It subsequently advised the cottagers by individual letters dated October 15, 2003 that they could no longer use the road unless they each entered a road access agreement with the plaintiff and paid $2,000 yearly for limited (seasonal) access between May and October. The cottagers did not respond to this offer and the plaintiff closed the road to them on November 1, 2003. Mr. Kilpatrick testified that he and his family went to their cottage by skidoo between November 2003 and the spring of 2004.

[5] The plaintiff sued Mr. and Mrs. Kilpatrick in trespass for an injunction restraining use of the access road and damages. The Kilpatricks entered a statement of defence and counter-claimed against the plaintiff, adding the Attorney General of Canada (Attorney General) as a defendant by counter-claim and alleging breach of covenant in their lease. The other cottagers brought a separate action (Court file 04-B7202) against 2008795 Ontario Inc. and the Attorney General, who have defended both the counter-claim in the first action and the claims in the second. The two actions have been consolidated by pretrial order under Court file 04-B6985 (the first action s file number). Most of the cottagers have been allowed to continue use of the access road since May 20, 2004 by pretrial orders, on payment of $500 per year. The band members residing on lot 19 near Lake St. John continue to use the gravel road over lot 18 without fee.

The Positions of the Parties

(i) The Cottagers

[6] The cottagers claim a limited entitlement to use the road as they have for many years, for the purpose of motor vehicle access to their cottage lots. They rely on two grounds: the *Road Access Act*, R.S.O. 1990, c. R.34 as am., and in the alternative, the equitable doctrine of proprietary estoppel.

[7] The *Road Access Act* (the Act) was proclaimed in force on November 24, 1978. By s. 2(1), no one shall place or maintain a barrier or other obstacle across an access road that prevents all road access to one or more parcels of land, except in the limited circumstances mentioned in the Act. Those exceptions include a closure of the road by court order provided 90 days notice of the hearing is given to all interested parties. Otherwise, obstruction of an access road is permitted in the following very limited circumstances: by written agreement, or temporarily for repair or maintenance work, or for a period no longer than 24 hours once per year (s. 2(1)). Access road is defined in s. 1 as:

> [a] road located on land not owned by a municipality and not dedicated and accepted as, or otherwise deemed at law to be, a public highway, that serves as a motor vehicle access route to one or more parcels of land.

Road is defined to mean, "land used or intended for use for the passage of motor vehicles .

[8] The cottagers claim that the gravel road over lot 18 is an access road as defined by the Act. In addition, they assert that its closure prevents all road access to their parcels of land on lot 19. They submit that, therefore, the *Act* should be held to apply to this case and that the plaintiff acted in contravention of s. 2(1) by closing the road to them. The cottagers claim a permanent injunction restraining the plaintiff from interfering with their use of the road without complying with s. 2(1) of the Act on payment of a $500.00 annual fee for maintenance and repair of the lot 18 road.

[9] If the Act is held not to apply, in the alternative the cottagers claim an irrevocable licence to use the road, relying on the doctrine of proprietary estoppel. This term refers to the equitable jurisdiction of a court to prevent the assertion of strict legal rights in unconscionable circumstances where the landowner has induced or somehow encouraged the claimant to believe that they have acquired an access way across the owner s property; *Eberts v. Carleton Condominium Corp. No. 396*, [2000] O.J. No. 3773 (C.A.).

[10] The cottagers claim damages against the Attorney General on behalf of the Minister of Indian Affairs and Northern Development. The cottagers lease the land on which their cottages stand from the Crown. The cottages are all located on lot 19, the reserve land of the Mnjikaning First Nation. The cottagers point out that they relied on the lease terms regarding access, which granted them a right of ingress or egress to and from the demised land over access roads and rights of way in common with others legally entitled thereto . They allege that the Minister is in breach of these leases due to the plaintiff s denial of ingress and egress over the gravel road on lot 18, alleging that the leases amount to a guarantee of continued road access to the cottages. The cottagers claim against the Minister is for payment of the annual fee.

(ii) The Plaintiff 2008795 Ontario Inc.

[11] The plaintiff 2008795 Ontario Inc. is the owner in fee simple of lot 18 since July 2003. It is a corporation owned by the Mnjikaning First Nation. The band chief is a director. The manager of the Mnjikaning First Nation is the corporate treasurer and a director. All of the shares are held by the Mnjikaning First Nation. Daniel Shilling, a respected member and official of the band who is the plaintiff s treasurer, gave evidence regarding the plaintiff s purpose and intentions for lot 18. It is summed up in the plaintiff s counsel s written submissions (at paras. 19 and 20):

19. 20008795 Ontario Inc. purchased lot 18 to increase the Mnjikaning First Nation s land holdings and to ensure that their reserve on the adjacent land, lot 19, was not landlocked.

20. The purpose of the land purchase was for the betterment of the Mnjikaning community. The purchase was also made with the intent of facilitating access and services for the sick and elderly Mnjikaning First Nation s band members currently residing on the reserve land in the Lake St. John area and for those band members who may choose to move there in the future.

[12] The plaintiff sees this litigation as the means to assert its right as a private landowner to enjoy its land without interference (plaintiff s submissions, para. 8). 2008795 Ontario Inc. seeks a permanent injunction restraining the cottagers from using the road over lot 18 except with the plaintiff corporation s consent. It claims damages for the difference between the $500 and the $2,000 annual fee required by the plaintiff since November 2003.

[13] The plaintiff s position is that the *Road Access Act* does not apply so as to prevent closure of the lot 18 road. The plaintiff submits that the cottagers have not met the onus of proof placed on them to establish that there is no alternate access to their land within the intent and meaning of the legislation. In the plaintiff s submission, the *Road Access Act* should apply only in the narrowest of circumstances and not in situations where there is possible alternate access by development of a road on unopened road allowances.

[14] The plaintiff argues that the evidence in this case negates the grounds for invoking the alternative equitable relief claim and, even if equitable rights were found to have been established before the plaintiff s purchase of the land, it had no notice of them. The plaintiff submits that it acted reasonably in determining the terms of use of the access road and the cottagers chose to decline them.

(iii) The Attorney General for Canada

[15] The Attorney General submits through counsel that there is no claim in breach of contract, no detrimental reliance, and that the action in contract is barred in any event by the statutory limitation period. It is submitted that the cottagers leases are integrally linked to the statutory scheme of the *Indian Act*, R.S., 1985, c. I-5, as am. (Indian Act). The access provision in their leases relates only to reserve lands and does not extend the Crown s obligations beyond those lands so as to guarantee rights over property that it does not own. In the Attorney General s view, the cottagers evidence indicates that, until institution of this litigation, they simply assumed that they could continue to cross lot 18 on similar fee terms to those in the past. None of the cottagers looked seriously at whether they had any legal or equitable right to do so. The Attorney General s counsel submits that the cottagers simply did not turn their minds to the fact that no guarantee of access existed, and that the leases, when read as a whole, cannot and do not support the cottagers recent re-interpretation.

[16] The Attorney General s further submission is that the cottagers claim ignores their situation as lessees of reserve land within a statutory scheme. Land within a reserve under the *Indian Act* is held for the benefit of the First Nation as a whole, but a right of possession of individual parcels may be allocated by way of certificate of possession to individual band members or locatees. In this case, the locatees are Mark Douglas (in regard to all but one of the lots leased to the cottagers) and Sharla Peltier. Mr. Douglas and Ms. Peltier had the right to request these leases and they were issued pursuant to the Minister s authority under s. 58(3) of the *Indian Act*. The cottagers properties are required to be appraised every five years to determine the rent to be charged. These lots were appraised on the basis that they were landlocked, with water access only. Thus, in the Attorney General s submission, the cottagers enjoy lakefront properties at very reasonable rent due to the lack of land access; there is no guarantee that the leases will be renewed in the future and no entitlement granted by the leases from the Crown to the use of an access road over non-reserve, privately owned land.

[17] Finally, the Attorney General relies on the *Limitations Act*, R.S.O. 1990, c. L.15, s. 45(1)(g). It is submitted that, because access was always conditional on payment of a fee since the early to mid 1980 s and the leases were entered more than ten years ago, the claim for breach of contract is barred.

The *Road Access Act* Claim

i) Approach to Statutory Interpretation

[18] The issues before me in respect of the *Road Access Act* resolve themselves largely into one of statutory interpretation. The starting point in Canada is the modern approach to statutory interpretation enunciated in *Driedger on Construction of Statutes*, 3d ed. by Ruth Sullivan (Markham, Ontario: Butterworths Canada Ltd., 1994). See *Barrie Public Utilities v. Canadian Cable Television Assn.* [2003] S.C.R. 28 (S.C.C.) at para. 20; *118143 Ontario Inc. v. Mississauga (City)* [2004] O.J. No. 4143 (C.A.) at para. 12. The modern approach is described in the following except from the *Driedger* text s 3rd edition (at p.181):

There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of a) its plausibility, that is, its compliance with the legislative text; b) its efficacy, that is, its promotion of the legislative purpose, and c) its acceptability, that is, the outcome is reasonable and just.

[19] Counsel for the plaintiff appropriately commenced her submissions on the *Road Access Act* by addressing its overall meaning and significance. There is no doubt that the fundamental issue to be addressed in this case is whether there is alternate road access and, more specifically, whether the unopened road allowances running northerly from the existing public road and thence westerly to meet the road into lot 19 should properly be found to constitute alternate road access. However, to address that question, the court must arrive at a just and informed understanding of the meaning and scope of the Act, in light of its intent and purpose, and having regard to the acceptability and appropriateness of the outcome.

[20] The plaintiff casts the cottagers claim as an invasive one i.e. the cottagers claim to be entitled to unfettered use of the road on lot 18 pursuant to the *Road Access Act* . Reference is made at several points in the plaintiff s submissions to this Act as an extraordinary exception that encumbers the rights of private owners (plaintiff s submissions, para. 54); a drastic and extraordinary measure (plaintiff s submissions, para. 53, citing *Atkins v. Carter*, [2004] 23 R.P.R. (4th) 311 (Ont. S.C.J.), 2004 CarswellOnt 2109, at para. 14:); and a severe infringement on the rights of private land owners (plaintiff s submissions, para. 85). The conclusion urged by the plaintiff is that the court should adopt a restrictive approach to the application of the Act, limiting its application to:

> only the narrowest of circumstances. For these reasons, it simply makes sense that courts have concluded that the Act does not apply in situations where it is simply more convenient or a less costly alternative. Private land owners are not required to bear the burden of trespass created by the Act unless there is absolutely no alternative ; (plaintiff s submissions, para. 54).

[21] From this perspective, the requirement that the obstruction must prevent all road access is not met wherever there is a possibility of constructing a vehicular access road in the future, no matter whether it is on land owned by the parcel owner or someone else or a public authority.

[22] On the other hand, the cottagers weight their submissions more to the purpose and intent of the legislation as a generalized attempt to avoid the confrontation and potential violence where one vehicular access route exists and it is subsequently barred. In other words, this perspective would appear to allow persons a right over another s land without any clear time, condition, or frequency of use standards to be met, without any clear end, and where no right in law exists (such as a right of way acquired after 20 years of open notorious use).

[23] In approaching whether and how this Act applies in the circumstances before me, the court must look not only at its effect and purpose. The court must consider the words used by the legislature, their context, the legislative purpose and intent, as well as the reasonableness and fairness of the interpretative result. In doing so, the court may consider extrinsic aids. Both sides have seen fit to put such references before me. Decided cases, particularly appellate authorities, are also an important experiential source for reaching a considered approach to the application of statute law.

ii) The Legislation and its History

[24] The scheme of the present Act is traditional: first, the definition of key terms, followed by the prohibition against arbitrary closure, the process required to apply for closure, the remedy in urgent circumstances, appeal rights, offence/remedial orders, and provision for emergency forestry road closings.

[25] The *Road Access Act* categorizes the kinds of roads to which it is aimed in two ways. It defines an access road and a common road . The definition of access road contains the following essential elements:

> (i) a road , which in turn is defined in s.1 as land used or intended for use for the passage of motor vehicles ,
>
> (ii) located on land that is not owned by a municipality and not a public highway,
>
> (iii) that serves as a motor vehicle access route,
>
> (iv) to one or more parcels of land.

A common road is simply an access road maintained by public money. The road in question here has not been maintained by public money and is clearly not a common road.

[26] Section 2 identifies the conduct at which the Act is aimed:

> 2.(1) No person shall construct, place or maintain a barrier or other obstacle over an access road that, as a result, prevents all road access to one or more parcels of land or to boat docking facilities therefor, not owned by that person unless,
>
> (a) the person has made application to a judge for an order closing the road and has given ninety days notice of such application to the parties and in the manner directed by this Act and the judge has granted the application to close the road;
>
> (b) the closure is made in accordance with an agreement in writing with the owners of the land affected thereby;
>
> (c) the closure is of a temporary nature for the purposes of repair or maintenance of the road; or
>
> (d) the closure is made for a single period of no greater than twenty-four hours in a year for the purpose of preventing the acquisition of prescriptive rights.

[27] Subsection 2(2) prohibits blockage of use of a common road and only two exceptions are allowed:

> (a) by court order on notice to all parties, or
>
> (b) for maintenance or repair.

Subsections 2(3), (4), (5) and (6) direct how notice of an application to close an access or common road is to be given. Sections 4 and 5 deal with interim closing orders and appeal rights.

[28] Section 3(1) provides the grounds on which a court may grant an order to close a road. It is discretionary in that the court may grant a closing order on grounds of:

(a) reasonable necessity in order to prevent substantial damage or injury to the applicant s interests or in the public interest,

(b) no legal right to use an access road, or

(c) no legal right to use a common road.

Subsection 3(2) importantly stresses the court s ability to impose conditions in a closing order as may be found reasonable and just . No provision is made for the imposition of conditions should the closing order not be granted; see *Whitmell v. Ritchie* 1994 CanLII 858 (ON C.A.), (1994), 20 O.R. (3d) 424 (C.A.) at para. 14 where the Court of Appeal found no authority for the imposition of conditions of gated entry requiring payment of a yearly fee related to road maintenance cost; the application must be either allowed or dismissed and conditions cannot be imposed on a dismissal.

[29] Section 6(1) importantly limits the reach of the Act in the following terms:

6(1) Nothing in this act shall be construed to confer any right in respect of the ownership of land where the right does not otherwise exist at law and nothing in this Act shall affect any alternative remedy at law available to any applicant or other person.

This provision confirms, and has been upheld in so doing, that the Act confers no right of ownership on an access user; it subjects the land to the limited use of vehicular access only. *Deluca v. Paul Guilho Trucking and Construction Ltd.* (1984), 46 O.R. (2) 634 (C.A.) (Deluca); *Cook s Road Maintenance Association v. Crowhill Estates* (2001) 17 N.P.L.R. (3d) 146 (Cook s Road Maintenance).

[30] Section 7 provides that contravention of s. 2(1) or (2) is a chargeable offence and upon conviction, the removal of the barrier may be ordered.

[31] The Act as it presently stands is much the same as when it was first passed in 1978. On introducing the legislation, the Minister stated that the government s intention was to prevent the arbitrary closing of private roads, especially in cottage country where owners or tenants are totally dependent on these roads for access to their property .

[32] In *Cook s Road Maintenance Assoc.*, Justice Borins quoted the above excerpt (at para. 41) and found:

The legislature intended the act to relieve against the precise situation which the cottagers were encountering in 1980 as a result of the appellant s attempts to impede their use of the road.

The 1980 situation referred to by Justice Borins involved an obstruction by the landowner of the cottagers use of the access road through his property, which had been used by them for some decades. The cottagers commenced an action for a declaration that the road was an access road within the *Road Access Act*. The action was settled for a time by an agreement permitting use of the road and the assigning of responsibility for maintenance, with closure to be only as permitted by the Act. In the end, an injunction reflecting the terms of the agreement was ordered; see *Cook s Road Maintenance,* paras 4 to 7 and 48.

[33] The original bill on which the *Road Access Act* was based was introduced in 1977, the year before the Act came into force. According to the plaintiff s submissions, the member who introduced the Bill, Lorne Maeck, stated his reasons for supporting it and at one point referred to cases in which alternate access is possible, perhaps by developing an existing road allowance. His concern was said to be cases where no other road access is feasible (plaintiff s submissions, para. 57). This is some indication of Mr. Maeck s intention but not necessarily the corporate purpose of the legislature in later enacting the *Road Access Act*. As enacted, the Act contains no reference to feasibility as a test, or to an unopened road allowance constituting an access road or access for purposes of s. 2(1). Such road allowances are found throughout cottage areas and other less developed areas. It is these very areas with which the Act is most concerned.

[34] In 1989, the legislative purpose for the *Road Access Act* was considered and restated on introduction of an amendment to ss. 2(1) and (2). The former wording of section 2(1), no person shall construct or place , was before the Court of Appeal in a case where the land owner was not proven to have constructed or placed the barrier; he simply left it in place; *R.. v. Gilbert Schauer* (1982), W.C.B.J. LEXIS 12716, 8 W.C.B. 385 (Ont. C.A.). Sections 2(1) and (2) of the Act were amended to read, No person shall construct, place *or maintain* a barrier . The following was the explanation for the amendment, which restated the legislative purpose of the Act (excerpted from Hansard, session 34:1, February 21, 1989):

Problems frequently arise with these roads when new owners purchase a property and find that the people using the road over their property appear to have no legal right to do so. This often results in a barricade being erected by the new owners to prevent the continued use of the road.

The *Road Access Act* has successfully addressed this situation by prohibiting anyone from placing a barricade over a common or access road unless the person has been granted a judge s order to close the road. This cooling-off period allows the road to remain open while the legal issues are settled in court. In practice, the Act has given police officers an effective means of persuading individuals to remove barricades before charges have to be laid.

A recent Ontario Court of Appeal judgment undermined the effectiveness of the Act by ruling that the legislation does not make it a continuing offence to maintain a barricade. The decision means that unless the barricade is discovered and legal proceedings are commenced within six months, the provisions of the *Road Access Act* cannot be used. Chief Justice Howland made it clear in his judgment that if the prohibition in the Act had included maintaining a barrier, he would have been satisfied that the intent of the Act was to create a continuing offence.

The proposed amendment will make it clear that this is the intent of the Act by prohibiting both the placing and the maintaining of a barricade over a common or access road unless a judge s order has been obtained.

[35] Finally, in 2001, the present s.3 was enacted. The former s. 3 had outlined, in a more summary form, the grounds for granting a closing order now contained in s. 3(1)(a). The 2001 amendment added an additional ground for closure of an access road or a common road no legal right to use the road. Section 3 remains discretionary. I do not mean to imply that a closure order automatically flows from the establishment of one of the enumerated grounds. But the Act now includes, as a ground for closure of an access or common road, a no legal right consideration in addition to the substantial damage and public interest grounds which continued in place. Regarding imposition of conditions, the former s. 3 had provided that the judge may impose such conditions as are considered to be reasonable and just under the circumstances, including a requirement that a suitable alternate road be provided . The underlined phrase was not repeated in the 2001 amendment enacting ss. 3(1) and (2). Section 3(1) now provides:

3. (1) The judge may grant the closing order upon being satisfied that,

(a) the closure of the road is reasonably necessary to prevent substantial damage or injury to the interests of the applicant or for some other purpose in the public interest;

(b) in the case of an access road that is not a common road, persons described in subsection 2 (3) do not have a legal right to use the road; or

(c) in the case of a common road, the persons who use the road do not have a legal right to do so. 2001, c.25, s. 483.

(2) The judge may impose such conditions on a closing order as he or she considers reasonable and just in the circumstances.

iii) **Seeking the Appropriate Interpretation of the Act**

[36] Despite the limitation on the scope of remedy for breach of s.2 already noted in *Deluca* and *Cook s Road Maintenance,* there is concern expressed in some trial decisions over the degree to which the *Road Access Act* impinges on private rights and land ownership. One response has been to impose a heavy onus on the access user to show circumstances that trigger the prohibition against terminating an existing access road over private property under s. 2 and to give an expansive interpretation to alternate access for purposes of s. 2(1). The problem with that approach is that it tends toward a subjective and highly variable level of adjudication and to judicial amendment of the legislation in order to discourage perceived undue interference with private rights. It appears to me that a careful scrutiny of the words and meaning of the provisions within the Act as a whole and in the context of the legislative purpose, produces an acceptable, more objective and appropriately restrained approach to applying the Act.

[37] It is settled law that the party seeking to continue access must show that circumstances exist which trigger the application of s. 2; *Ebare v. Winter* [2005] O.J. No. 14 (C.A.) at para 22. The onus of proof on the access claimant is to the civil standard, by a preponderance of evidence or a balance of probabilities. It is for the access claimant to show as the first part of the threshold test that an access road is in place that contains the following four elements constituting the definition in the Act:

(i) that a road exists as defined in s. 1

(ii) that the road is on land not owned by a municipality and not a public highway

(iii) that the road is used as a motor vehicle access route, and

(iv) that it is used as access to one or more parcels of land.

[38] In each case in which an access road has been found to exist across a land owner s property, its use for vehicular traffic from and to the access claimant s land has been established for some years prior to purchase by the objecting land owner (or prior to a significant change of attitude of the land owner); *Deluca v. Paul Guilho Trucking & Construction Ltd.,* supra; *Roth v. Roth* reflex, (1991), 4 O.R. (3d) 740, 1991 CarswellOnt 44 (Gen. Div.); *Whitmell v. Ritchie*, supra; *Eaton v. Abram* reflex, (1993), 15 O.R. (3d) 74 (Gen. Div.); *553173 Ontario Ltd. v. Bank of Montreal* 1995 CanLII 7246 (ON S.C.), (1995), 26 O.R. (3d) 617 (Gen. Div.), affirmed 1998 CanLII 3047 (ON C.A.), (1998), 38 O.R. (3d) 575 (C.A.); *Cooks Road Maintenance Assoc. v. Crowhill Estates*, supra; *Grodecki v. Collins*, [1999] O.J. No. 4185 (S.C.J.); *Atkins v. Carter,* supra. In all of these cases, the access road originated by permission or consent of the land owner over whose land the access road passed, or as in *Deluca*, by acquiescence of the owner.

[39] In several of the recent cases in which relief was not granted, the ground for rejection was that the access claimant failed to prove that no alternative access existed. There were suggestions in those cases that the presence of unimproved, unopened road allowances abutting the claimant s land may be accepted as alternate road access for purposes of the Act. In most of those cases, no finding was made that the first part of the threshold test was met, i.e. whether the court was dealing with an access road as defined by the Act. For instance, in *Bogart v. Thompson*, [2002] O.J. No. 1986 (S.C.J.), 2002 CarswellOnt 1659, the trial judge found no reliable history of use by the access claimant s predecessors in title and considerable doubt as to the location of the alleged roadway; see paras. 13-16.

[40] In *Cates v. Salamon*, [1998] O.J. No. 3060, 1998 CarswellOnt 3041 (Gen. Div.), the trial judge ruled that the access claimant had failed to prove that the alleged road ever served as a motor vehicle access road to her property. The court was not satisfied that the plaintiff or anyone else had ever used the access road to, or parking lot of, an adjacent landowner to access the plaintiff s property, and if it had been used in that way, it was not of sufficient use to be caught by the statute , or the (rare) use was by a route not supported by the topography and done without the landowner s permission; at para. 7.

[41] In *553173 Ontario Ltd. v. Bank of Montreal*, the trial judge found that no access road existed. She held that, because the landowner prevented access from being established from the time the claimant s parcel came into existence as a separate lot, no access road as meant by the Act had been proven to exist. The trial judge found that, to be an access road, there must be evidence of the use of the road as a motor vehicle access route to a parcel of land; at para. 42. In that case she found no evidence that this was in fact the case. Although lack of permission by the landowner is referred to, I see no reason for inferring that permission by the owner should be the only prerequisite to the establishment of an access road . Acquiescence for a significant period in the road s use as a motor vehicle route to the access claimant s parcel, or permission, are common features of each case where an access road has been found. As the definition states, an access road must be a vehicular route, which infers that it has been used and recognized as such for a significant time, and originated or continued by the permission or acquiescence of the owner over whose land it passes.

[42] If it is found that the four requirements of an access road are met, and that the access road originated or continued for a significant time by permission or acquiescence, there is another statutory hurdle which must be cleared. That is, proof that closure of the access road prevents all motor vehicle access to the claimant s parcel or parcels of land. In other words, closure must be shown to cause the parcel of land of the access claimant to be landlocked. *Ebare v. Winter,* supra. It is this final part of the threshold test on which the parties in this case actively join issue.

[43] The purpose of the Act appears to be two fold: to prevent the arbitrary closure of a vehicular access road where no other vehicular access exists, without prior judicial authorization; and to provide a summary process for those concerned to access the courts where the issues, interim and final, can be dealt with judicially. *Deluca* indicated the evil to which the statute is addressed the serious problems so often encountered in disputes of this nature including risks of violence to persons and property. *Cooks Road Maintenance* refers to one aspect of the *Road Access Act,* the prevention and arbitrary closure of private roads (para. 41). With respect, the Act as a whole leads me to conclude that there is a dual purpose here to prevent arbitrary action without prior judicial authorization, and to direct those involved to a fair process to decide or resolve the conflict.

[44] I find that the *Road Access Act* is driven by practical concerns and is straightforward legislation with a well-defined and narrow application. It deals with existing facts using historic realities, while providing for future change. It aims at ensuring that closure of an operating access road that provides the only existing motor vehicle access to the access user s parcel of land or a boat docking facility is not accomplished by arbitrary, self-help means. The Act provides a means to set the interim obligations of the disputants regarding an access road, and to address judicially whether the road should be closed or not. It aims to de-escalate the dispute and reduce the likelihood of violence or other serious conflict.

[45] In the end, and in the narrow situations to which it does apply, it creates no proprietary right or interest in the land over which the access road passes. It provides an interim status to the access user whereby the access user is immunized from an action in trespass when travelling on the access road in a motor vehicle for purposes of access only (see *Deluca*; *Cook s Road Maintenance).* He or she may not walk on it, use it for their own purposes (except vehicular passage for access purposes only), play on it, or disrupt it. The access user cannot grant the use of the road to others. The access user cannot convey any right to the road on a sale of the parcel of land; *Whitmell v. Ritchie*, supra. The *Road Access Act* does not affect property rights, but subjects them to the continued limited use of the road unless and until the owner obtains, after proper notice and hearing, a court order closing the road on whatever conditions are imposed; *Cooks Road Maintenance*, at para 45. And, if another access road is subsequently provided, the access user s continuing status under s. 2 ceases because alternate access would then exist.

[46] In summary, the test under the *Road Access Act* requires the access user to establish, on the civil standard, that (i) the road is an in-use access road as defined under the Act; (ii) its use originated or continued by permission or acquiescence of the landowner; and (iii) its closure prevents all motor vehicle access to a parcel or boat docking facility. If these threshold requirements are met, the road cannot be closed unless the landowner applies to the court under s.3 for a closure order. On such application the landowner must establish, to the civil standard of proof, that a ground for closure in s. 3 applies and that the court s discretion to close should be exercised in the circumstances. Each case will be decided on its own facts.

(iv) The Alternate Road Access Issue

[47] The principal issue between the plaintiff and the defendant cottagers arises out of the words in s. 2 which require that closure of the access road prevents all road access to the land in question. Section 2(1) reads:

No person shall construct, place or maintain a barrier or other obstacle over an access road, not being a common road, that, as a result, prevents all road access to one or more parcels of land or to boat docking facilities therefore, not owned by that person unless,

(a) the person has made application to a judge for an order closing the road and has given ninety days notice of such application to the parties and in the manner directed by this Act and the judge has granted the application to close the road;

(b) the closure is made in accordance with an agreement in writing with the owners of the land affected thereby;

(c) the closure is of a temporary nature for the purposes of repair or maintenance of the road; or

(d) the closure is made for a single period of no greater than twenty-four hours in a year for the purpose of preventing the acquisition of prescriptive rights.

[48] The road in question in this case has been proven to be an access road on the evidence before me. It serves as a motor vehicle access route to the cottagers and other residents parcels of land over private land that is not a public highway, and has so served since at least 1983. It meets all four elements of an access road under the Act. The cottagers have also proved that it originated and continued to be used for vehicular access for at least 15 years by permission of the prior owners whose land it crossed. The party seeking to invoke the Act must also demonstrate that there is no alternate access. The burden of proof is to the civil standard, on a preponderance of the evidence; *Ebare v. Winter*, supra. In this case, therefore, the onus is upon the cottagers to show that there was no alternate vehicular access when the lot 18 road was closed to them on November 1, 2003.

[49] The plaintiff submits that alternate road access is possible using the unimproved and unopened road allowances running northerly from the end of the public road up the easterly side of lot 18 to its northeasterly corner and thence westerly along the northern perimeter of lot 18 to its northwestern corner where the road to the parcels in question takes over and that the cost of requiring the cottagers to build a road is irrelevant. The plaintiff cites the Court of Appeal judgment in *Ebare v. Winter* and trial court judgments in *Bogart v. Thompson*, supra, *Vanalstyne v. Legg*, [2001] 42 R.P.R. (3d) 302, 2001 CarswellOnt 2249 (Ont. S.C.J.), and *Kanhai v. Elliott Lake Textiles & Draperies Inc.*, [2005] 29 R.P.R. (4th) 133, 2005 CarswellOnt 649 (Ont. S.C.J.) for the proposition that the existence of these unopened road allowances constitutes alternate vehicular access. Therefore it is submitted that the cottagers cannot meet the final part of the threshold test under the *Road Access Act*.

[50] In *Bogart* at para. 18, the trial judge stated:

Between lot 4, concession IV and the Concession A lots to the east, there is an unopened road allowance. There is also an unopened road allowance between Concessions IV and V to the north of the Defendants properties as well as an unopened road allowance between lots 5 and 6 extending north from Camel Lake Road between Concessions II and III to the south. I have received anecdotal evidence about swamps and rocky bluffs that would appear to make vehicular summer travel difficult by way of those road allowances to the boundaries of the Defendant s land and from there to the locations on his land where he has planted and built shelter. At the present time there is no other route by which the Defendant could drive a vehicle to his lots.

This comment was part of a series of references by the presiding judge to problems with the application before her. Those problems included the following, in addition to the reference to unopened road allowances:

no reliable history of use by the defendant s predecessors in title;

the roadway claimed by the defendant for access was not in the same location as an historical road nor was there evidence that any such road existed;

there was much evidence about snowmobile trails and logging routes seen or not seen by various witnesses;

there was evidence that the unopened road allowance was within the legal box around the parcel ; the trial judge used the term legal box for the legal boundary of the parcel and rights of the access claimant, as distinguished from the physical box within the legal boundary wherein topographical impediments are the problem of the access claimant;

there was evidence accepted by the court of reasonable alternatives for access that were physically possible;

there was evidence that on purchase, the access claimant knew that he had no access to the parcel of land;

a single passage of a motor vehicle over land was rejected as sufficient to bring the subject land within the definition of access road .

[51] In *Vanalstyne*, the trial judge referred, at paras 11 14, to a definition of road allowances as strips of crown land reserved for the purpose of making roads when and as roads may be required . He ruled that, as defined, they would fall within the definition of a road in s. 2 of the *Road Access Act* and therefore the application was incorrectly brought on the ground that there was alternate road access available.

[52] In *Kanhai*, the trial judge dealt with whether an unopened road allowance running northerly to the corner of the plaintiff s lot was an alternate route for access to the subject lands. He could not conclude that alternate road access did not exist. This was after he had decided that access was provided by means of a prescriptive easement, which had been proven.

[53] The problem with the plaintiff s references in these cases is that they are incomplete, misleading and do not represent the actual findings of the court in each case. For example, *Bogart* turned on the onus or burden of proof and the trial judge was not satisfied as to the unavailability of alternate road access. The initial part of the threshold test whether evidence established that an access road existed was not addressed. As to the reference by the plaintiff that the test of an alternate route is impossibility and not inconvenience and expense, all that I can take from it is that this is a reference to the existence of physical impediments to construction within the parcel which could be overcome. It cannot be taken to refer to off-parcel impediments to construction; paragraph 28 of that judgment held that `no alternate access applies to the legal box around the parcel and not to physical inconveniences .

[54] *Vanalstyne* dealt with a road constructed for the most part on a road allowance but which deviated from it in three locations. There was a natural barrier across the road allowance where the greatest deviation occurred. The trial judge was asked to determine preliminarily whether the *Road Access Act* applied. The matter was dealt with using a short agreed statement of facts and a definition of road allowance from a legal text. The definition assumed that road allowances are Crown land reserved for the purpose of making roads when and as required. The trial judge ruled out the *Road Access Act* as an issue because the road allowance over which the parties had permission to build, and where they had built a road albeit erroneously in places, came within the definition of road in the *Road Access Act* and formed alternate access. This case did not deal with the status of unopened road allowances as under the ownership, control and jurisdiction of the municipality whose discretion is to be exercised in the public interest. (*Municipal Act, 2001*, S.O. 2001, c. 25, ss. 26 and 30). Furthermore, as the road allowance was primarily the location of the access road which was the subject of that case, it is difficult to see how the road allowance could form an alternate access. In my view, and with respect, it is a case limited to its own facts and narrowly confined record and may stand for nothing more than the proposition that errors in road construction do not per se invoke the protection of s.2 of the *Road Access Act*.

[55] The references to *Kanhai* in respect of the *Road Access Act* are references to a discussion which was obiter. The court found that an access easement was created by prescription in that case, and therefore no determination was required under the *Road Access Act* (paras. 89 and 90). In obiter remarks, the court found itself unable to set aside an

unopened road allowance leading to the claimant s parcel of land as a potential alternate road access. The court did not appear to have considered the statutory purpose or appropriateness of that interpretation.

[56] It is important to consider the jurisprudence regarding the *Road Access Act* in light of the onus on the claimant and the wording and intent of the Act. If there is another existing useable road connecting directly or via a right of easement to the access seeker s parcel of land, the *Road Access Act* simply cannot be invoked to preserve a private road over a neighbour s land. Section 2 quite clearly refers to an access route to a parcel or parcels of land, meaning a tract or tracts of land under common ownership and control. Costs of construction of a road within the access claimant s own property, in order to connect with an existing public road or access road, is simply not a relevant consideration under the Act. The problem is not in such cases access to the parcel of land, but rather, connection within the access claimant s property from his/her home or business premises to an existing public road or road legally useable by the claimant which abuts the parcel. Resort to a metaphorical, indistinct notion such as a legal or physical box is, with respect, not necessary. It is up to the access claimant to connect their home or business site(s) within the claimant s parcel of land to an existing abutting road and it is in that context that the issue of construction and impossibility vs. cost, and inconvenience, arose in the cases. With respect, I do not see the *Road Access Act* as requiring access users otherwise coming within its limited protection to submit to a means test to determine whether the person or persons could build and maintain a road beyond their own lands to municipal standards.

[57] For instance, in *Atkins v. Carter* the access seeker could not use the *Road Access Act* as a way to avoid the expense of clearing land located within an existing easement lawfully granted to the access claimant and useable with some effort for vehicular access from and to her own parcel of land. The fact that a neighbour had given permission to use an access road that was more convenient did not diminish the significance of the existence of the right of way for purposes of the test of alternate access. The judge in *Atkins* had no evidence before him that use of the easement necessitated more than minor clearance of the land. The lands within that right of way were found to be in much the same condition as most cottage roads used in Muskoka (paras. 27-28).

[58] I do not accept the plaintiff s submission that alternate road access is present simply because an unopened road allowance exists in a location such that it could, if it were developed, provide alternate road access. It is suggested that the Court of Appeal in *Ebare v. Winter* expressly or implicitly supports the proposition that the mere existence of an abutting unopened road allowance immunizes the lot 18 road from the Act. *Ebare* does not hold that alternate road access, for purposes of s. 2, encompasses such road allowances, which are owned and regulated by a public authority. In this case, the municipality not only owns the road allowances under s. 26 of the *Municipal Act, 2001*; it can, under s. 30, actively require whether, at what time and to what standard, a road on any such unopened road allowance is built. *Ebare* held that the appellants had to show that there was no alternate road access to their parcel of land. The court went on to find that alternate access meant alternate legal access and that legal access can be achieved over private property by permission or as access roads under the *Road Access Act*. As the appellants failed to show that legal access, in that case, was unavailable over several private roads referred to by the respondent surveyor, their action and appeal failed. Several private roads used by logging trucks in the past were in evidence in that case. As well, *Ebare* was found by the Court to be another instance, like *Bogart*, of an aggressive access seeker who simply disregarded concerns over access when he purchased the property to remove wood. His method was to assess a prospective property for logging use, and the access thereto, by consulting solely with himself and then deciding, I m goin loggin . No one had contested his right to do so in the past. It was a misuse of the Act as a sword rather than for its intended function as a temporary shield.

[59] The evidence of the chief administrative officer and clerk of Ramara Township before me was that the Township is the trustee of lands comprising unopened road allowances within its boundaries. For an unopened road allowance to be used as a road, the Township would require an application to do so and either grant or refuse it after considering all of the circumstances as well as its land use planning and other policies. If the Township were to grant the application, the clerk s evidence was that it would require the applicants to build it to municipal standards. The applicants would have to pay for the engineer, survey, environmental scan, design plans, construction, i.e. everything. Evidence from the town clerk as well as an engineer and a road builder indicated a design and construction cost of over $450,000.00, plus an ongoing, yearly share of the maintenance costs.

[60] In *Ebare* and *Bogart*, there was no evidence as to the ownership, jurisdiction and regulation, let alone cost, of developing an unopened road allowance. It appears that the court in *Bogart* was asked to simply assume that the road allowance could be used as a road after physical clearance work made it useable.

[61] In most areas of this province, municipalities actively regulate and control the use and development of unopened road allowances in the public interest, as does Ramara Township. In *Goudreau v. Chandos (Township)* reflex, (1993), 14 O.R. (3d) 636, 1993 CarswellOnt 59 (Gen. Div.), Justice Weekes dealt with an application to determine rights in law respecting an unopened road allowance. He was asked to determine whether a member of the public who used an unopened road allowance for access purposes had the right to cut trees, remove or grade soil and clear natural obstructions in order to permit vehicular use, without the municipality s permission. He held as follows (at para 11-12):

> There is a sound policy basis for coming to the conclusion that municipal consent is required to improve an unopened road allowance. The province has a great number of unopened road allowances. To rule that consent is not required would make available all of these road allowances for unregulated development. The chaos and destruction that could ensue is frightening to contemplate. There would be no standards. Protection of wetlands and other areas of natural significance would be more difficult, if not impossible, to ensure. With the consent of the municipality being required, there will be the control essential to ensure that proper environmental standards are adhered to, and that the opening of such road allowances is done after consideration is given to the greater public interest.
>
> I am supported in this approach by the holding of our Court of Appeal in *Scarborough (City) v. R.E.F. Homes Ltd.* (1979), 9 M.P.L.R. 255, that in a broad general sense a municipality is the trustee of the environment for the benefit of the residents in the area of the road allowance and, indeed, for the citizens of the community at large. Bearing in mind that ownership of the soil and freehold of the road allowance is vested in the municipality by s.262 of the *Municipal Act*, it would seem logical that even if there were no trees on a particular road allowance, municipal consent to develop the road allowance would be required so that the municipality could properly perform its obligations as trustee of the environment.

Justice Weekes held that a member of the public who wants to use an unopened road allowance for access does not have the right to cut trees and remove or grade other natural obstructions without the express permission of the municipality. The application was dismissed.

[62] Given that unopened road allowances are owned and regulated in use by the local municipality, can it be said that their existence on the periphery of lot 18 in this case constitutes alternate access within the meaning and purpose of the *Road Access Act*?

[63] Section 2 of the *Road Access Act* requires that there be no alternate access to the parcel of land in question, i.e. that closure of the access road prevents all vehicular access to it. In my view, having considered the meaning, purpose and intent of the Act, section 2 is referring to existing alternate vehicular access, or, as in *Atkins*, a right of access available to, and useable by, the claimant, as in the case of most cottage roads. This reading meets the test of plausibility because the Act in s. 2 is speaking to the present: access road is one that serves as a motor vehicle access route , not one that has the potential of doing so in due time. It is noteworthy, in this regard, that despite the sponsoring member s remarks about unopened road allowances perhaps serving as feasible or possible or eventual alternate road access in 1977, the Act as enacted in 1978 contained no suggestion to that effect despite the presence of such road allowances virtually everywhere in rural and cottage areas. It seems clear that that issue must have been considered at the time of passage by the legislature.

[64] In conclusion, I find no support in the *Road Access Act* or its jurisprudence to date nor in the evidence before me to find that the mere existence and alternate configuration of unopened road allowances, which cannot be used for vehicular traffic without municipal approval in the broad public interest and without construction and maintenance to municipal standards, constitute alternate road access within the *Road Access Act*.

[65] In my view the road in question over lot 18 meets all of the requirements of an access road as defined, closure of which prevents all road access to the parcels of land of the cottagers. The evidence led by the plaintiff established that it purchased lot 18 for this very reason; the evidence of Mr. Shilling disclosed that the plaintiff purchased lot 18 because it feared that certain band members who lived near Lake St. John would be landlocked but for the road over lot 18. He admittedly knew of the use of the road across lot 18 before the plaintiff corporation purchased it. The plaintiff continues to allow the band members to use this road now and apparently in the future. There is no other alternate access by vehicle to the properties on Lake St. John and lot 19.

[66] The plaintiff, in closing the road as it did, ignored the requirements of the *Road Access Act* in barring the cottagers from access to their leased properties. Section 2(1)(a) indicates that it was open to it to make an application to a judge to close the access road. Section 3 now permits a judge, within his or her discretion, to grant a closing order on being satisfied that a) the closure of the road is reasonably necessary to prevent substantial damage or injury to the interest of the applicant or for some other purpose in the public interest; or b) in the case of an access road, that those using it do not have a legal right to use the road. As the Court of Appeal in *Cooks Road Maintenance* held, s. 2(1) does not affect the property rights of the plaintiff; it merely allows the cottagers to continue to use the road on lot 18 for the purposes of vehicle-only access upon payment of a fee related to the cost of maintaining the road.

[67] Pursuant to the *Road Access Act*, the use by the cottagers of the road over lot 18 for vehicular access does not render them trespassers on or since November 1, 2003. There is no evidence that Mr. and/or Mrs. Kilpatrick caused damage, as claimed. The action by the plaintiff in trespass is therefore dismissed; *Deluca*, supra at paras. 14-15, *Cooks Road*

Maintenance, supra. The cottagers request for an injunction subject to payment of a yearly fee of $500 to the plaintiff, or such other fee as is directly related to the actual maintenance and repair costs of the existing gravel road, is granted. The fee suggested by the plaintiff prior to closure was fixed taking into account costs far beyond maintenance of the gravel road and was arbitrarily set. This judgment does not intend to address in any way other issues such as whether a fee is to be charged to band members who use the road access lot 18. The First Nations corporation has stated that they purchased lot 18 for the benefit of the Mnjikaning First Nation and, specifically, to provide access for band members to the reserve on lot 19. Whether a fee is charged to band members, none of whom are parties to this action, remains within the discretion of the plaintiff corporation s board of directors.

[68] The cottagers claim via proprietary estoppel was put forward in the alternative, if I found the *Road Access Act* not to apply. In view of my finding that the Act does apply, there is no need to deal with the alternative claim.

The Cottagers Claim for Damages Against the Crown

[69] Each of the cottagers have use of their parcels of land on Lake St. John under a lease from the Crown in right of Canada represented by the Minister. The leases recite the reserve land of which the leased parcels are part, the name or names of the locatees (the band members in lawful possession of the particular parcel), and the resolution by which the council of the Rama First Nation Band consented to each lease. The leases describe the parcel to which each applies as being part of the Chippewas of Rama First Nation Reserve #32, with the particular lot number within the Canada Land Survey records, Ottawa. The reserve is referred to in the preamble to the lease as the lands set aside for the benefit of the Rama (now Mnjikaning) First Nation. The usual covenants follow thereafter dealing with term of the lease, rent payment and review, taxes, renovations, fire standards, compliance with applicable laws, etc. At para 14(a) the following appears: the lessee shall have the right of ingress or egress to and from the demised land over access roads and rights of way in-common with others legally entitled thereto.

[70] In their submissions, the cottagers defined the first issue as: did the Minister breach its lease agreements with the cottagers? Their counsel s submissions argue that the doctrine of contra proferentem should apply, requiring any ambiguity to be interpreted against the Minister whose staff drafted the leases. The submissions of the cottagers refer to, and recite, para. 14(a). They refer to the evidence of Ms. Simcoe, the First Nation land manager who approved the leases, and Mr. Brant, manager of lands and resources for the Ministry. The submissions go on to state that the cottagers interpreted para. 14(a) to mean that it provided them with access over lot 18. Finally, the cottagers submission is that the lease refers to the right of ingress or egress from the demised land and that this somehow extended beyond the reserve land to include privately owned land beyond the control of the Minister.

[71] There is no submission by counsel stating that the interpretation of the cottagers rests on facts established in evidence or how this interpretation is consistent with their own knowledge and conduct to which they testified. Each of the cottagers knew that lot 18 was privately owned. Several dealt before 1993 with the lessee of lot 18, Mr. Snider, and after 1993, the immediate past lot owner, Mr. Carrick. Each cottager-family always paid an annual fee in order to access the gravel road through lot 18. Several cottagers assisted with the maintenance of the road over lot 18 and met Mr. Carrick in the course of doing this. There is nothing in the lease or in the known facts on which to base the cottagers present interpretation of paragraph 14(a): that they possessed all along an unrestrained right of access through leases unrelated to lot 18. The bounds of the lease as set out expressly in it are the reserve lands which are entirely in lot 19. Neither the Minister nor the First Nation represent in the leases any assertion of control or right over privately owned lands situate beyond the reserve land. The lease deals only with rights of access in common with others on the reserve. While para. 14(a) of the lease is broadly worded when looked at completely alone and isolated from its context, in view of the cottagers own dealings over access with the prior owners and their labour contributions to, and payment of a yearly fee for, maintenance of the gravel road, and upon a reading of the leases themselves, I find no basis for the claim of breach of contract against the Minister. That claim is dismissed.

[72] I thank all counsel for their very able assistance to the court and their willingness and ability to keep the evidence within the bounds of relevance and the scheduled time. Their written submissions were complete and useful. I regret that the court s schedule and the requirements of the case have not enabled this judgment to issue until some five months following receipt of the final submission.

[73] If costs are not agreed, counsel may make written submissions to me within thirty days. Counsel may address me regarding the form of the order, as well.

HOWDEN, J.

Released: January 20, 2006

2008795 Ontario Inc. v. Kilpatrick, 2006 CanLII 22651 (ON S.C.)

Date: 2006-07-04

Docket: 04-B-6985

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COURT FILE NO.: 04-B-6985

DATE: 20060704

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 2008795 ONTARIO INC. v. KILPATRICK et al.

BEFORE: The Honourable Mr. Justice P.H. Howden

COUNSEL: Ms. K. Grace, for the Plaintiff/Defendant by Counterclaim

Ms. P.R. McMurtry, for Kilpatrick et al., Defendants/Plaintiffs by Counterclaim

Ms. F. Parsons and Ms. A. Bourke for the Attorney General of Canada, Defendant by Counterclaim

ENDORSEMENT

[1] I have reviewed the submissions of counsel.

[2] The cottagers succeeded in their principal claim for relief against the plaintiff/defendant by counterclaim 2008795 Ontario Inc. (2008795). There is no reason to deviate from the usual principle that the successful party should be awarded costs.

[3] 2008795 submits that the scale of costs should not go beyond partial indemnity because the cottagers did not beat their offer under rule 49.10. The cottagers pre-trial offer included substantial indemnity costs and the judgment did not cap future road fees.

[4] I do not accept that submission. The road use fee set by the judgment is less by one-third than that proposed in the offer, $500.00 instead of $750.00 per year. The judgment limits any increase to the actual cost of maintaining the access road as a gravel road, and there was no evidence at trial that any increase is yet warranted, let alone to the $750.00 per year level. A yearly increase above the $750.00 was offered by the cottagers based on the CPI. As to the costs requested in the offer, the proposal was that each party bear their own costs but that if the offer was not accepted within 5 days, thereafter substantial indemnity costs were proposed. The offer remained open until trial commenced on June 27, 2005. In my view, the judgment obtained was less favourable to 2008795 than the offer it could have settled for prior to May 2, 2005 and thereafter because costs at that time would not have included 3 days of trial. Correspondingly, the judgment was more favourable for the cottagers than their offer. The offer of 2008795 was clearly not achieved in that it required a seasonal limit on use yearly, a much higher road use fee without any rational connection to the actual road maintenance cost, and future use after three years to be at the sole discretion of 2008795. The cottagers defended all claims of 2008795 successfully. They shall have their costs on a partial indemnity basis to April 27, 2005 and thereafter on a substantial indemnity basis.

[5] The Attorney General for Canada seeks costs resulting from dismissal of the cottagers action against the Crown. The Attorney General seeks partial/substantial indemnity costs against the cottagers. The claim of the cottagers at trial was for damages limited to the annual fee for use of the road. It was an obviously weak claim and it failed. The Crown s claim of well over $100,000.00 in costs to defend this claim in a 3-day trial is out of all proportion to the subject matter. On the other hand, it was not a tenable position for the cottagers to suggest that the crown pay for access that they knew full well it had no control over and, though the cottagers did propose to stay their claim until the claim against 2008795 was determined, that offer came very late in the process and after much of the trial preparation had been completed.

[6] The cottagers counsel submits that the Crown should be denied its costs because the cottagers offered to stay the action pending determination of the claims between them and 2008795. In the alternative, the cottagers ask that any costs to be awarded to the Crown should be paid by 2008795, in other words, they claimed a Bullock order.

[7] The test for a Bullock order is whether it was reasonable to join the successful defendant and keep it in the action until judgment. *Orkin, Law of Costs*, 2nd Ed. (Aurora, Canada Law Book, 2001), cited in *Wicken (Lit. Guar. of) v. Harssar* (2002), Carswell Ont. 2410 (SCJ). Orkin s *Law of Costs* describes the Bullock order as appropriate where a plaintiff is in doubt as to which of two persons in responsible for the act that caused the injury . (at para 209.2)

[8] In regard to the claim against the Attorney General, I found that to the knowledge of the cottagers, there was no basis for their claim. The source of the access issue was the owner of lot 18 and its action in barricading the access road, not any action of the Crown which had nothing to do with passage of persons through lot 18. Therefore a Bullock order is not appropriate in this case.

[9] The cottagers were unsuccessful at trial against the Attorney General. However, I fail to see why it was necessary for the Crown to participate in the trial of the claim and counterclaim in respect of 2008795. The claim against the Crown was dependant on how the liability issues between 2008795 and the cottagers were decided. The cottagers position that the claim against the Crown should be stayed until after the disposition of the main claim would have saved the Crown the costs of trial attendances. Unfortunately, the motion by the cottagers was brought only 5 days before the scheduled trial date and 1 months before the trial actually began. The Crown opposed it and the motion was abandoned. Costs on the abandonment were awarded to the Crown in the sum of $2,751.00. I find that the Crown s opposition to the stay motion was not warranted but that the Crown is entitled to costs up to and including some trial preparation.

[10] As to the quantum of costs, the terms partial and substantial indemnity refer to making the successful cost claimant partially or substantially whole, not full indemnity. Therefore, the actual rate charged is important, and even in the case of substantial indemnity, there is not an inference of full reimbursement. The goal in fixing costs is to arrive at a fair and reasonable amount for the work done, taking into account the particular scale which is applicable. Fixing of costs is not a detailed line by line assessment. In regard to the cottagers counsel s bill of costs, I have reduced the rates attributable to Ms. McMurtry to $120.00 and $170.00 per hour respectively on partial and substantial indemnity scales. The proportionate reduction for the work on the claim by the Crown, which is not separated from the total bill, should be 20%.

[11] The claim of the cottagers involved an undecided point of law under the *Road Access Act*, i.e. whether unopened road allowances could be regarded as alternate road access for purposes of the *Act*. The facts and evidence were detailed but were not seriously in issue. In fact, the parties expert witnesses were in complete agreement as to the feasibility and costs of building a road to municipal standards. The legal issues made it a more complex case. I have not allowed recovery for the injunction motions, costs of which were dealt with. As for the examinations, I have reduced the amount by removing costs (i) for the June 16 attendance which resulted from late amendments to the pleadings by the cottagers as

well as (ii) for the injunction cross-examinations.

[12] As for the Crown s costs claim of $184,442.63 on a substantial indemnity scale and $139,972.86 for partial indemnity, I find these claims to be out of all proportion to the issues which, for the Crown, were not difficult. As well, opposition to the cottagers stay motion was not warranted and I do not allow any costs of the trial which were not a necessary expense for the Crown. I fix the costs of the Crown on a partial indemnity basis at $18,329.96 including disbursements of $3,329.96. Regarding the costs claimed on behalf of the cottagers, I make the following findings:

Preliminary Matters	$ 5,000.00
Pleadings	$ 4,400.00
Discovery of Documents	$ 1,050.00
Examinations	$ 4,300.00
Trial Scheduling and Pre-trial Conf.	$ 1,620.00
Offers to Settle	$ 650.00
Trial Preparation	$18,400.00
Trial-Counsel Fee $2,750.00 per day x 3	
Legal assistant at $60.00 per hour	$10,290.00
Bill of Costs	$ 1,525.00
Total Fees	$46,235.00
Total Disbursements	$10,770.00
Total	**$57,005.00 plus GST**

[13] Accordingly, 2008795 is ordered to pay the costs of the cottagers fixed at $57,005.00 plus GST. As well, the cottagers are ordered to pay the costs of the Attorney General of Canada fixed at $18,329.96 (not including GST).

Howden J.

DATE: July 4, 2006

2008795 Ontario Inc. v. Kilpatrick, 2007 ONCA 586 (CanLII)

PDF Format

Date: 2007-08-30

Docket: C44949

Parallel citations: (2007), 86 O.R. (3d) 561 (2007), 284 D.L.R. (4th) 392

URL: http://www.canlii.org/en/on/onca/doc/2007/2007onca586/2007onca586.html

Related decisions

- **Superior Court of Justice**

  2008795 Ontario Inc. v. Kilpatrick, 2006 CanLII 2182 (ON S.C.)

- 2008795 Ontario Inc. v. Kilpatrick, 2006 CanLII 22651 (ON S.C.)

Noteup

Legislation cited (available on CanLII)

- Road Access Act, R.S.O., 1990, c. R.34

Decisions cited

- 553173 Ontario Ltd. v. Bank of Montreal, 1998 CanLII 3047 (ON C.A.) (1998), 38 O.R. (3d) 575
- 553173 Ontario Ltd. v. Bank of Montreal, 1995 CanLII 7246 (ON S.C.) (1995), 26 O.R. (3d) 617
- 992275 Ontario Inc. v. Krawczyk, 2006 CanLII 13955 (ON C.A.) (2006), 268 D.L.R. (4th) 121 (2006), 209 O.A.C. 302

CITATION: 2008795 Ontario Inc. v. Kilpatrick, 2007 ONCA 586

DATE: 20070830

DOCKET: C44949

COURT OF APPEAL FOR ONTARIO

LASKIN, CRONK and LANG JJ.A.

BETWEEN:

2008795 ONTARIO INC.

Plaintiff (Appellant)

and

GORDON KILPATRICK, SYLVIA KILPATRICK, LARRY HASLER,
KIM HASLER, GEORGE KOESLAG, JANICE MINO,
MARK PURDY, BRIAN WAITES, KAREN WAITES,
VINCE SUTCH and TODD RICHARDSON

Defendants (Respondents)

AND BETWEEN:

GORDON KILPATRICK, SYLVIA KILPATRICK, LARRY HASLER,
KIM HASLER, GEORGE KOESLAG, JANICE MINO,
MARK PURDY, BRIAN WAITES, KAREN WAITES,
VINCE SUTCH and TODD RICHARDSON

Plaintiffs by Counterclaim (Respondents)

and

2008795 ONTARIO INC. and ATTORNEY GENERAL OF CANADA

Defendants by Counterclaim (Appellant)

M. Philip Tunley for the appellant

Paula McMurtry for the respondents

Heard: January 30, 2007

On appeal from the judgment of Justice Peter H. Howden of the Superior Court of Justice dated January 20, 2006, with reasons reported at (2006), 46 R.P.R. (4th) 78.

LASKIN J.A.:

A. OVERVIEW

[1] This is another in a spate of recent cases in this court under Ontario s *Road Access Act*, R.S.O. 1990, c. R.34. The Act was passed to resolve disputes between neighbours that occur when the property of one neighbour is landlocked, and the only motor vehicle access to it is over a road on property owned by another neighbour. The Act stipulates that the owner of the access road generally cannot close it without a court order. Implicitly, however, the Act allows the owner to close the road without a court order if there is alternate road access to the landlocked property. This appeal raises the question what constitutes alternate road access under the Act?

[2] The respondents are a group of cottagers who live year-round on a lot on the shores of Lake St. John. The sole existing motor vehicle access to their cottages is over a road located on an adjacent lot. The appellant, 2008795 Ontario Inc., now owns the adjacent lot. The previous owner of the adjacent lot charged the cottagers a $500 annual fee for use and the maintenance of the access road. 2008795, however, demanded a four-fold increase in the user fee. When the cottagers refused to pay it, 2008795 closed the road to them.

[3] 2008795 sued two of the cottagers in trespass for an injunction restraining them from using the access road. The cottagers, in turn, sought an injunction preventing 2008795 from interfering with their use of the road to go to and from their cottages. The two actions were consolidated and tried before Howden J. He dismissed 2008795 s action for trespass, and granted the cottagers request for an injunction on condition that they continue to pay a $500 annual user fee (or another fee directly related to the maintenance and repair cost of the existing road).

[4] On its appeal, 2008795 argues that it was entitled to close its access road without a court order because of the existence of alternate road access to the cottagers properties. It contends that the cottagers have alternate road access to their properties in one of two ways: over a municipally regulated unopened road allowance, or over the existing access road on payment of the user fee sought by the appellant. I disagree. In my view, the trial judge correctly concluded that alternate road access means motor vehicle access over another existing road. I would therefore dismiss the appeal subject to 2008795 s right under the Act to apply to close the road.

B. BACKGROUND FACTS

a) The Lots in question

[5] The two Lots in question are Lots 18 and 19 in the Township of Ramara. The cottagers live on Lot 19 which is reserve land of the Mnjikaning First Nation. The cottagers lease their properties from the Crown and pay an annual rent between $1,400 and $1,500. For many years the cottagers have driven to and from their leased properties over a gravel road that runs through Lot 18.

[6] Between 1994 and 2003, Lot 18 was owned by Joseph and Joan Carrick. The Carricks fenced and gated their lot and gave each cottager a key which allowed access to the road on Lot 18. Each cottager paid the Carricks an annual fee of $500 for the use and maintenance of the road.

b) 2008795 acquires Lot 18

[7] 2008795 bought Lot 18 from the Carricks in 2003. 2008795 is owned by the Mnjikaning First Nation. 2008795 bought Lot 18 to increase the First Nation s landholdings and to ensure that its Reserve on Lot 18, where some of its band members also live, was not landlocked.

c) 2008795 asked the cottagers to sign an access agreement

[8] In October 2003, 2008795 asked each cottager to sign an access agreement. Under the proposed agreement, each cottager would pay 2008795 an annual fee of $2,000 in exchange for the right to use the road on Lot 18 between May and October and the appellant s undertaking to maintain the road. The evidence on how 2008795 arrived at the figure of $2,000 is vague. The appellant claims that the fee is related to the cost of acquiring and maintaining the property. However, the trial judge found at para. 67: The fee suggested by the plaintiff prior to closure was fixed taking into account costs far beyond maintenance of the gravel road and was arbitrarily set.

[9] All of the cottagers refused to sign the access agreement, apparently for two reasons: they claimed the fee was excessive and they required the use of the road not for only half the year but year-round.

[10] On November 1, 2003, 2008795 closed access to the road by changing the locks on the gate to Lot 18. Litigation ensued. On January 20, 2006, in a thorough and well reasoned decision, the trial judge granted judgment in favour of the cottagers.

C. THE ACT

[11] The Act was passed in 1978 to address confrontations that arise between those who use private roads and those who own them. As the trial judge noted at para. 31 of his reasons, in introducing the legislation, the Honourable Mr. D. McKeough stated that the government intended to prevent the arbitrary closing of private roads, especially in cottage country where owners or tenants are totally dependent on these roads for access to their property : Ontario, Legislative Assembly, *Hansard*, No. 75 (1 June 1978) at 3015. My colleague, Juriansz J.A., also referred to the Act s purpose in this court s recent decision in *Blais v. Belanger* (2007), 54 R.P.R. (4th) 9 at para. 43: a primary purpose of the Act is to prevent landowners from resorting to self-help measures by providing a judicially supervised process for resolving disputes.

[12] The Act is a short statute containing just eight sections. Only sections 1, 2, 3 and 6 are germane to this appeal.

[13] Section 1 defines an access road as:

[A] road located on land not owned by a municipality and not dedicated and accepted as, or otherwise deemed at law to be, a public highway, that serves as a motor vehicle access route to one or more parcels of land.

[14] The trial judge found and correctly so that the road over Lot 18 is an access road. It meets all the requirements of the definition. The road is on land not owned by a municipality; it is not a public highway; and, it serves as a motor vehicle access route to one or more parcels of land.

[15] Section 2(1)(a), on which this appeal turns, provides that the owner of an access road requires a court order to close it if doing so would prevent all road access to another person s property:

2(1) No person shall construct, place or maintain a barrier or other obstacle over an access road, not being a common road, that, as a result, prevents all road access to one or more parcels of land or to boat docking facilities therefor, not owned by that person unless,

(a) the person has made application to a judge for an order closing the road and has given ninety days notice of such application to the parties and in the manner directed by this Act and the judge has granted the application to close the road.

[16] In other words, even though another person s use of the access road amounts to a trespass, the owner of the road cannot act unilaterally under section 2(1)(a). In this case, 2008795 did unilaterally close the access road over Lot 18. The question on this appeal is whether that closure prevented all road access to the cottagers properties.

[17] Although the owner of an access road cannot unilaterally close it under section 2(1)(a) if doing so would landlock another property, the owner need not tolerate its use or trespass by another in perpetuity. The statute simply requires that the owner of the access road obtain a court order to close it. The obvious purpose of requiring judicial authorization for closure is to avoid self-help measures and potentially violent confrontations among neighbours.

[18] Under section 2(3), the owner of an access road must give notice of an application to close it to all persons served by the road who would be deprived of motor vehicle access to and from their land if the road were closed.

[19] Section 3(1) sets out the grounds on which a judge may order the closing of an access road. Section 3(1)(b) is the ground potentially relevant to the dispute between 2008795 and the cottagers.

3(1) The judge may grant the closing order upon being satisfied that,

(a) the closure of the road is reasonably necessary to prevent substantial damage or injury to the interests of the applicant or for some other purpose in the public interest;

(b) in the case of an access road that is not a common road, persons described in subsection 2(3) do not have a legal right to use the road; or

(c) in the case of a common road, the persons who use the road do not have a legal right to do so.[1]

[20] Importantly, persons using an access road, such as the cottagers in this case, cannot claim a legal right to do so under section 3(1)(b) for the sole reason that the road is an access road. A legal right under section 3(1)(b) must be a legal right that exists apart from the Act. Section 6(1) of the Act confirms this to be so.

Nothing in this Act shall be construed to confer any right in respect of the ownership of land where the right does not otherwise exist at law and nothing in this Act shall affect any alternative remedy at law available to any applicant or other person.

[21] Indeed, if the users of an access road could defend an application for closing it on the ground that the Act gives them a legal right to use the access road, then section 3(1)(b) would be rendered meaningless. Our court made this very point in *992275 Ontario Inc. v. Krawczyk* 2006 CanLII 13955 (ON C.A.), (2006), 268 D.L.R. (4th) 121 at para. 25:

Finally, we note that if a finding that a road is an access road created a legal right to use the road within the meaning of s. 3(1)(b), the condition in s. 3(1)(b) would make no sense. Under s. 3(1)(b), a landowner may apply to close an access road if the persons entitled to notice of the application to close the access road do not have a legal right to use it. If the fact that the road is an access road itself established a legal right to use the access road, the condition in s. 3(1)(b) could never be met.

[22] Thus, the Act confers on users of an access road only a very limited and temporary right to use the road to go to and from their properties. At para. 45 of his reasons, in a passage with which I entirely agree, the trial judge summarized the limited statutory right given to users of an access road:

In the end, and in the narrow situation to which it does apply, it creates no proprietary right or interest in the land over which the access road passes. It provides an interim status to the access user whereby the access is immunized from an action in trespass when travelling on the access road in a motor vehicle for purposes of access only (see *Deluca; Cook s Road Maintenance*). He or she may not walk on it, use it for their own purposes (except vehicular passage for access purposes only), play on it, or disrupt it. The access user

cannot grant the use of the road to others. The access user cannot convey any right to the road on a sale of the parcel of land; *Whitmell v. Ritchie*, supra. The *Road Access Act* does not affect property rights, but subjects them to the continued limited use of the road unless and until the owner obtains, after proper notice and hearing, a court order closing the road on whatever conditions are imposed; *Cooks Road Maintenance*, at para. 45. And, if another access road is subsequently provided, the access user s continuing status under s. 2 ceases because alternate access would then exist.

[23] Here, the record does not disclose that any of the cottagers has a legal right under s. 3(1)(b) to use the access road over Lot 18. Thus, the cottagers would not seem to have a defence to an application to close the road. 2008795 has not, however, applied for a court order closing its access road. Therefore, I will refrain from deciding whether if an application were brought, the presiding judge would have discretion to refuse the order even though the cottagers could not claim a legal right to use the road. I turn to the issues on the appeal.

D. ANALYSIS

[24] As I said in the overview, the Act implicitly allows the owner of an access road to close it without a court order as long as doing so does not prevent all road access to another piece of property in short, as long as there is alternate road access to the other property. The trial judge correctly noted that those seeking to use the access road, here the cottagers, bear the onus of showing that no alternate road access exists.

[25] This appeal, however, does not turn on onus. Instead, it turns on what constitutes alternate road access under the Act. Both sides agree that there is no other existing road access to Lot 19. 2008795, nonetheless, contends that the cottagers have alternate road access to their properties in one of two ways: over an as yet unopened road allowance controlled by the Township of Ramara, or over the existing access road on payment of the $2,000 annual user fee sought by the appellant. Whether either or these ways amounts to alternate road access raises a question of statutory interpretation.

1. Does a municipally regulated unopened road allowance constitute alternate road access?

[26] An unopened road allowance is a strip of Crown land reserved for the purpose of making a road when it may be required. The evidence at trial showed that there were unopened road allowances around Lot 18 that if opened would provide alternate access to Lot 19. Experts from both sides agree that a viable road to Lot 19 could be built.

[27] The Township of Ramara controls and regulates the development of these unopened road allowances. Opening them would require the Township s permission and the passing of a by-law. The cottagers have not sought the Township s permission.

[28] If the cottagers did obtain the Township s approval for opening one of these road allowances, they would be responsible for all of the costs of constructing the road. The expert evidence suggested that the cost of construction would exceed $450,000.

[29] 2008795 makes two submissions on these unopened road allowances. First, it says that an unopened road allowance can amount to alternate road access. The trial judge, it contends, erred by holding that alternate road access must be on an existing road.

[30] Second, 2008795 says that for an unopened road allowance not to constitute alternate access, the cottagers must show that it is impossible to open the allowance and construct the road; mere cost, even substantial cost, or mere inconvenience is not enough. 2008795 contends that the Act is not intended to sanction what is otherwise a trespass because Lot 18 provides a more convenient route to the properties on Lot 19. Here, the experts agree that a viable road could be built, albeit at a significant cost, and thus the cottagers cannot demonstrate that the closing of the access road on Lot 18 would prevent all road access to their properties.

[31] I do not reach the appellant s second submission on whether the appropriate test should be impossibility or substantial cost. I do not do so because I agree with the trial judge that under the Act, alternate road access must be access over an existing road; an as yet unopened road allowance does not qualify. The trial judge put his conclusion this way at para. 64 of his reasons:

In conclusion, I find no support in the *Road Access Act* or its jurisprudence to date nor in the evidence before me to find that the mere existence and alternate configuration of unopened road allowances, which cannot be used for vehicular traffic without municipal approval in the broad public interest and without construction and maintenance to municipal standards, constitute alternate road access within the *Road Access Act*.

[32] I agree. Two strong indicators of legislative intent, both referred to by the trial judge, support this conclusion. The first indicator is the use of the present tense of the verb to serve in the definition of access road in section 1 of the Act: Access road means a road located on land not owned by a municipality that *serves* as a motor vehicle access route to one or more parcels of land. [Emphasis added.] A road that might be built in the future but does not now exist, does not serve as a motor vehicle access route.

[33] The second indicator of the legislature s intent is the complete absence of any reference in the Act to the possibility that an unopened road allowance might constitute an access road. Unopened road allowances are quite common in this province. Indeed, they are common enough that, had the legislature intended for road allowances to qualify as alternate access roads, the scope of the legislation would have been restricted considerably. Thus, if the legislature had intended that a potential future road might now qualify as an access road, I would have expected some statutory reference to this possibility, and to the consideration, such as feasibility and cost, under which it might so qualify.

[34] The one indicator of legislative intent that might lend some support to the appellant s position is the definition of road in section 1 of the Act: [R]oad means land used *or intended for use* for the passage of motor vehicles. [Emphasis added.] However, in the context of the other provisions of the Act, especially the definition of access road, I do not think that the phrase intended for use refers to an unopened road allowance. Instead, it likely refers to an existing road that has not or is not currently being used, but is intended for use in the future. If the legislature had intended the more expansive meaning presumably it would have said so expressly.

[35] Moreover, that an unopened road allowance might amount to alternate road access seems contrary to the overall purpose of the Act. The Act attempts to prevent confrontations between neighbours that may result from the arbitrary closing of an access road, and thus requires a court ordered closing. Permitting the owner of an access road to close it without a court order because there is some unopened road allowance nearby would undermine the Act s purpose. This is a brief statute, which aims for a simple solution to the problem of the unilateral closing of access roads.

[36] 2008795 argues that if alternate road access refers only to existing roads, the Act potentially forces a private land owner to endure an ongoing trespass even though a viable alternative is possible, albeit at some expense and inconvenience. The answer to this argument lies in section 3 of the Act. The private land owner need not endure a trespass; the owner may apply to the court to close the road.

[37] 2008795 also pointed to several trial decisions, which it claimed supported the proposition that an unopened road allowance can constitute alternate road access. See, for example, *Kanhai v. Elliott Lake Textiles & Draperies Inc.* (2005), 29 R.P.R. (4th) 133 (S.C.J.); *Atkins v. Carter* (2004), 23 R.P.R. (4th) 311 (S.C.J.); *Bogart v. Thompson* (2002), 1 R.P.R. (4th) 199 (S.C.J.); *Vanalstyne v. Legg* (2001), 42 R.P.R. (3d) 302 (S.C.J.). The trial judge analyzed these decisions in detail and I do not propose to redo his analysis. I agree with him that each case differs factually from this case. Also, unlike the trial judgment in this case, none of the judgments in these cases considered the key question of the legislative intent of the Act.

[38] Perhaps more significantly, this court has not adopted the appellant s proposition. On the contrary, although this court has not considered the issue directly, our previous jurisprudence does offer some limited support for my opinion. In *Blais v. Belanger*, *supra*, at para. 36, Juriansz J.A. interpreted the phrase used or intended to be used in the definition of a road under the Act to require that the road exists contemporarily . Although Juriansz J.A. was specifically referring to an access road, presumably the definition of an access road should inform the definition of alternate road access. It too should require contemporaneous existence: see also *553173 Ontario Ltd. v. Bank of Montreal* 1995 CanLII 7246 (ON S.C.), (1995), 26 O.R. (3d) 617 (O.C.G.D.), aff d 1998 CanLII 3047 (ON C.A.), (1998), 38 O.R. (3d) 575 (C.A.).

[39] In my view, on basic principles of statutory interpretation, an alternate access road must be an existing road. It cannot be an as yet unopened road allowance. The remaining question is whether it may be the same road, but on payment of a user fee.

2. Does access over the existing access road on payment of a user fee constitute alternate road access?

[40] In oral argument in this court, 2008795 submitted that use of the existing access road on Lot 18 on payment of the requested $2,000 annual fee can constitute alternate road access under the Act. Thus, 2008795 argues that when the cottagers refused to pay the fee, it was entitled to close the access road without a court order. I disagree with this submission.

[41] In my view, alternate road access must be access over an existing and different road. If access on the same access road but on payment of a fee could be considered alternate road access, then the owner of an access road could simply demand an excessive fee on threat of closing the road without a court order. That appears to be one of the

very situations the Act was passed to prevent.

[42] Of course, parties can avoid the application of the Act by entering into an agreement for use of an access road, for example along the lines of the proposed access agreement tendered by 2008795 to each of the cottagers. Indeed, the cottagers may be well advised to try to reach an access agreement with the appellant, because, as I said earlier, it does not appear that they have any defence to an application to close the road. However, I do not regard use of the existing access road on payment of a fee to constitute alternate road access.

E. CONCLUSION

[43] Neither an unopened road allowance nor access over the existing access road on payment of a user fee can constitute alternate road access under the Act. The trial judge was therefore correct in enjoining 2008795 from closing its access road over Lot 18 without a court order.

[44] I would dismiss the appeal subject to 2008795 s right to apply under the Act for an order closing its access road. The respondents are entitled to their costs of the appeal, which I would fix in the amount of $8,000 inclusive of disbursements and G.S.T.

RELEASED: AUG 30 2007

JL John Laskin J.A.

I agree E.A. Cronk J.A.

I agree S.E. Lang J.A.

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[1] A common road is defined as an access road in s. 1 of the Act on which public money has been expended for its repair and maintenance. The access road over Lot 18 is not a common road.