



Real Estate News

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An Unopened Road Allowance Is Not an Alternative Access Road

The *Road Access Act* was passed in 1978 “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 properties”. An “access road” is 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”. Section 2(1) prohibits anyone from blocking an access road that, as a result, prevents all road access to one or more parcels of land not owned by that person unless the person has obtained a court order. But a landowner can block an access road without a court order if there is an “alternative road access”.

In *2008795 Ontario Inc v. Kilpatrick* (2008), 86 O.R. (3d) 561 (ON C.A.) the Court of Appeal had to decide what constitutes “alternative road access”. A group of cottagers had to pass over a private road that crossed a neighbour’s property. The previous owner charged each cottager \$500 a year for the use and the maintenance of the road. The new owner insisted that each cottager pay \$2000 and limited access to just part of the year. When the cottagers refused, the new owner blocked the passage. The new owner argued that there was an alternative access road, being the

unopened road allowance that led directly to the cottages, and because they could use the existing road provided that they pay the new fee.

The Court of Appeal agreed with the trial judge’s summary of the effect of the *Road Access Act*:

It creates no proprietary right of interest in the land over which it 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 the purposes of access only...He or she may not walk on it, use it for their own purposes...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 a parcel of land...The...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...And, if another access road is subsequently provided, the access user’s continuing status under s.2 ceases because alternative access would exist.

There was an unopened road

allowance which, if opened, would provide access to the cottagers but the cost of construction would be in excess of \$450,000. The new owner argued that the cottagers would have to prove that it is impossible to open the allowance and construct the road. Mere cost or inconvenience should not be enough. But the Court disagreed: “under the Act, alternative road access must be access over an existing road; an as yet unopened road allowance does not qualify”. Nor did the Court agree that alternative access could be the existing road provided that the cottagers would pay the higher user fee. “If access on the same access road but on payment of a fee could be considered alternative road access, then the owner ...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 that the Act was passed to prevent.” Accordingly the new owner was ordered to reopen the road. But, the Court encouraged the cottager owners to negotiate an agreement with the new owner because if the owner did bring an application to close the road it did not appear that the cottagers had a defence.

Sometimes a Court Order Can Bind Non-Parties

Waechter v. Tozer, 2008 CanLII 5588 (ON S.C.) is a “must read” case for those interested in how to draft an effective restrictive covenant (page 5) or when a court may modify or discharge a restrictive covenant (page 8). But, for this article, we will restrict our review to a comparison to a court order vesting lands in persons and their successors and a court order between parties which purports to bind successors.

The Dyers owned 52 acres which they operated as a trailer park and an

informal junk yard. The Tozers owned a personal residence located next to a portion of the Dyers' property. The Dyers agreed to convey a small parcel to the Dozers but subsequently refused to close. The Tozers wanted the land, in part, to serve as a buffer between their lands and their neighbours.

The Tozers commenced an action for specific performance which was settled through minutes of settlement. The original order called for a vesting order to be issued and further provided that the Dyers **and their successors** would be restrained from using that part of their lands adjacent to the lands to be vested for the purpose of storing or parking derelict vehicles, boats or machinery and prohibiting any open storage on those lands. No vesting order was **ever** issued or registered (presumably because the lands to be conveyed had to be severed first and a new reference plan deposited) but, in due course a further order was issued, omitting the vesting portion but incorporating the prohibitions against the Dyers **and their successors** and this second order was registered against the Dyers' lands.

Eventually all parties passed away. The new owner of the Dyers' lands sought an order that the order be struck from the parcel register. The Tozers' daughter, now the owner of her parents' home, argued that the minutes of settlement constituted both a transfer of land and a valid restrictive covenant. The successors of the Dyers' lands argued that the original court lacked the authority to make an order binding on non-parties to the original action.

The Court agreed that "Minutes of Settlement are a contract that can subsequently be embodied in an order or judgment of the court". The Court also agreed that the wording of the

minutes clearly indicated that the parties intended that the Dyers and their successors were to be restrained from using their lands in certain ways.

The Dyers' successors argued that the parties to the original settlement agreement lacked the authority to bind people who were not party to the original contract. The Court pointed out however that "an agreement to create a restrictive covenant differs from a conventional contract. In this limited area, provided that it is done correctly, the law allows parties to a contract to bind a specific group of people not party to a contract, namely their successors in title. In essence the court acts as the parties' agent to do what the parties themselves may do." However, the court pointed out, the second order which was registered on title, was not the vesting order and was not therefore a conveyance:

In general a court order cannot bind individuals who are not parties to the action in which the order was made, had the matter gone to trial, and had the Tozers been successful, the court could not have made an order binding on anyone but the Dyers, as defendants. While a court order may reflect the agreement of the parties it remains an order of the court and as such, absent statutory authority, may not bind non-parties.

Since none of the parties to the original action retained any interest in the lands, the Court held that there was no reason for the order to remain on title and ordered that it be removed.

Old Letter is an Enforceable Contract

The case of *Forrester Estate v. Muzeen Estate*, [2008] O.J. No 3651

(Ont. C. A.), involves a dispute between the estates of two family members. In 1956 the Ms purchased a lot on the Lake of the Woods upon which they constructed two cottages. In 1964 F, the Ms' son-in-law, wrote a letter to the Ms offering to purchase a part of the lot, which contained one of the cottages, for \$2500. The Ms returned the letter after signing at the bottom with the notation "agreed to with thanks". The Fs paid the \$2500 to the Ms. The letter read, in part, "this is not a final determination by any means and hope that you will feel free to discuss any larger amount if this does not have your entire agreement and blessing, and subject to that sometime in the future, we can look into the whole matter of a survey and transfer but, in the meantime, this should provide us with some established base to work upon". A survey was never made, nor was the parcel ever transferred. At trial, with a survey, it was ultimately determined that the description in the letter included some adjacent lands not owned by the Ms. The Fs enjoyed their cottage for 39 years, contributed to taxes, made improvements and generally treated their cottage property as their own with the acquiescence of the Ms. In 2002 the F Estate sought specific performance of the 1964 bargain.

At trial, the court held that the letter was not an enforceable contract but merely an agreement to engage in further discussions. Although it was not entirely clear why, the trial judge felt that the letter was uncertain, possibly because of F's invitation to discuss "any larger amount". The trial judge also thought that the faulty description was uncertain. Finally, the trial judge held that the action was barred by the *Limitations Act* in 1970, 6 years after the acceptance by the Ms. The F Estate appealed.

As to the limitation period issue, the C.A. pointed out that the limitation period commences when the cause of action arises. In the case of breach of contract, the time period begins at the time the contract is breached. There was no breach until 2002 when the F Estate requested the transfer of the cottage and the M Estate refused. The Court found that there was agreement as to the price evidenced by the fact that the Ms accepted the funds and that the price was never discussed again. Insofar as the description included additional lands not owned by the Ms, the C.A. applied “the principle that purchasers may obtain specific performance even where the vendor is not able to convey the property as agreed. In particular, purchasers may choose to take whatever the vendor has, even if it is less than the property described in the agreement”.

Accordingly the Court found that the 1964 letter was a valid and enforceable contract and issued a vesting order.

Sole Shareholder Has an Insurable Interest

In *Kosmopoulos v. Constitution Insurance*, [1987] CanLII (S.C.C.) K operated a leather goods business. He was the sole shareholder and director of his company although he operated the business as if it were a sole proprietorship. Virtually all documentation was in his name including the insurance policy even though the insurance company knew that the business was actually being carried out by the corporation. A fire destroyed the assets of the corporation and the insurance company refused to pay damages on the basis that K, the insured, had no insurable interest in the corporation’s assets.

The Court referred to cases which held that one of three shareholders does not have an insurable interest in a corporation’s assets, and another case which held that a parent company had an insurable interest in the assets of its subsidiary. Here, the Court held that a sole shareholder does have an insurable interest in the assets of a corporation. The Court also stated that it had a duty “to lean in favour of an insurable interest, if possible...after underwriters have received the premium, the objection that there is no insurable interest is often, as nearly as possible, a technical objection, and one which has no merit, certainly not as between the assured and the insurer”.

Tarion Says Flippers Must Register As Vendors

“Vendor” is defined in the *Ontario New Home Warranties Plan Act* (the “Act”) as including “any person who sells on his, her or its own behalf a home not previously occupied to an owner”. “Owner” is the “person who first acquires a home from its Vendor for occupancy and the person’s successors in title”. Thus, a person who purchases a new home and sells it without first living in it becomes a “vendor” for the purposes of the Act. Banks and other mortgagees/chargees selling homes from builders who have defaulted on their loans also become “vendors” for the purposes of the Act and must register with Tarion.

In the summer 2008 issue, we reported on one of Bob Aaron’s *Toronto Star* articles. A couple purchased a new house in Wasaga Beach. On closing they received a warranty certificate from Tarion. Although the couple intended to move into the new home, circumstances changed and they resold to a third party without ever

having occupied the home. Six months later, when it came to Tarion’s attention, a Tarion representative advised the couple that they should have registered as vendors with Tarion when they resold the house. The Act calls for a fine up to \$25,000.00 or imprisonment for up to a year, or both, if a new home is sold by an unregistered vendor.

Tarion states that in the circumstances set out above flippers MUST register with Tarion.

We had reported our understanding that the purpose of the double registration is to ensure that the ultimate purchaser from the flipper would receive the full benefit of the Tarion warranties. We now understand that the ultimate purchaser receives only the remainder of the warranties. For example, if the ultimate purchaser buys the new home six months after the flipper purchased the new home, the first six months of the warranties would be lost to the ultimate purchaser. Tarion has explained to us that “the purpose of registering the reseller (or ‘flipper’) is to comply with the Act and improve disclosure to the ultimate purchaser. As part of his/her registration, the reseller is required to give the purchaser details about the status of the warranty coverage on the home. This way, the purchaser will know whether any of the warranty coverage has already commenced on the home”. ■

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