

Claim for Road Access Act and prescriptive easement to landlocked property dismissed

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In *Balogh v. R.C. Yantha Electric Ltd.*, 2021 ONCA 266 (CanLII), the Court of Appeal for Ontario affirmed that the appellants had no right to cross the respondents' land to get to their otherwise landlocked property.

In 2014, the appellants purchased a piece of land adjacent to the respondents' property. The appellants' land, on which a lumber mill may have been located in the 19th century, had water access, but the only way to access the land by vehicle was to use what was once a private road (referred to as "the red track"), across the respondents' property. The respondents objected to the appellants' attempt to use the red track, which was overgrown and long in disuse in 2014.

At trial the appellants asserted a right to use the red track over the respondents' property on two grounds: firstly because it was an access road under the Ontario *Road Access Act*; and secondly because the appellants' predecessors in title had acquired a prescriptive easement in accordance with the doctrine of lost modern grant.

The *Road Access Act* prevents landowners from closing off an access road on their property except with a court order or in other specified, and limited, circumstances. The *Road Access Act* was enacted to prevent "self-help" measures by landowners trying to stop others from using an access road to get to their properties (especially in rural areas and "cottage country"). The definition of "access road" in the *Road Access Act* refers to a road that is not located on land owned by a municipality, or that is not a public highway, and that "serves as a motor vehicle access route to one or more parcels of land."

At trial, the judge reasoned that the use of the word "serves" in the definition of "access road," in the present tense, means that an access road must be one that exists contemporarily, and that an access road can lose its status through disuse or overgrowth. The evidence at trial was that a fence had been erected across the red track in 2005 and that it was not used as an access road at that time or thereafter until the landlocked property was purchased by the appellants in 2014.

At the time of the purchase of the landlocked property, the appellants had to trim back overgrowth on the red track so that it was driveable for a truck. It was clearly not serving as a contemporaneous access road for cars or trucks.

Creatively, however, the appellants argued that the trial judge erred by failing to recognize that the red track could serve as an access road for all-terrain vehicles, which qualified as motor vehicles under the *Highway Traffic Act*, and that the red track had therefore not lost its status as an access road due to overgrowth. The appellants also focused on the wording in the definition of access road to argue that it applied to roads that were *intended* for use not just that were currently serving as one.

Unfortunately for the appellants, the Court of Appeal had previously determined that in order for a road to qualify as an "access road," it must exist contemporarily, specifically that it must serve as "a motor vehicle access road to one or more parcels of land" at the relevant point in time: 2008795 *Ontario Inc. v. Kilpatrick*, 2007 ONCA 586, 86 O.R. (3d) 561 at para 32, and *Blais v. Belanger*, 2007 ONCA 310, 282 D.L.R. (4th) 293. In *Blais*, at para. 32, the Court of Appeal noted that an access road could, through deterioration over time, cease to be a road and that the *Road Access Act* offers no assurance to those who use and depend on an access road that the road will continue to be available to them in the future.

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Based on the evidence, the trial judge found that the red track was no longer an access road in 2008 (when the fence was erected) or at the time the appellants purchased their property in 2014. The Court of Appeal found no errors in the trial judge's approach to the law or to her findings of fact and mixed fact and law.

As to the doctrine of lost modern grant, a claim for a prescriptive easement required the appellants to prove that the right had been acquired through 20 years' continuous use at any time before 14 June 1999, when the respondents' lands were transferred into the Land Titles system. Several witnesses testified at trial regarding the use of the red track over the years, and the trial judge found that the appellants had not established a prescriptive easement based on 20 years of continuous use of the red track as of 14 June 1999. The trial judge rejected the appellants' evidence regarding use of the red track, and based such findings in part on a determination of credibility, preferring the evidence of some witnesses over others.

On appeal, the appellants focused on the legal concept of agency, arguing that the former owners had asked them to check on the property over the years before they purchased the land, and that they had done so by crossing the red track as agents for the former owners.

However, the trial judge had rejected this argument, by analyzing the nature of the relationship between the former owners and the appellants. She found that the arrangement was that the former owners allowed the appellants to use the landlocked property, and in exchange, the appellants agreed to keep an eye on it from time to time. There were no specific dates or checks and no reporting back.

Significantly, the former owners never told the appellants to drive to the property or to use the red track to get there. The appellants' visits to the property were as much for their own enjoyment, including fishing, hunting, picnicking, and bonfires, as they were to help out the former owners. As the appellants were not acting as agents, their use of the red track did not count as part of the 20 years of possession by the former owners.

The Court of Appeal found no basis to interfere with the trial judge's conclusions.

The case demonstrates the importance of confirming legal access to a property, especially in rural and cottage areas, before agreeing to a purchase. What was once an access road may have been lost through time, and establishing a prescriptive easement is an onerous task that is dependent upon highly specific historical evidence regarding the frequency or the consistency of the use of the easement over the years. In the case at hand, the appellants may well have some other means to access the property via the water in the summer and in the winter when the water is frozen, but unless they negotiate with their neighbours to reopen the overgrown red track, it appears unlikely that they will ever have permanent land access for motor vehicles. A PDF version is available to download [here](#).

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