

Cottage Country Access Lessons

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With the 2017 summer cottage season winding down, a recent case involving sparing neighbours reminds us of the importance of ensuring you have some form of legalized road access to your rural retreat.

Brown v Savage, 2017 ONSC 4357, involved two waterfront properties on Buckham's Bay on the Ottawa River. Mr. & Mrs. Brown purchased their property in 1995.

In 2013, their neighbour sold his cottage to Ms. Savage.

Car access to the Browns' property from the local municipal road was via an unpaved but maintained laneway traversing through the back of Ms. Savage's newly-acquired land. Apparently, this state of affairs had existed for years before the purchase of either of the properties by the Browns and Ms. Savage, with the Browns and their former property owners contributing to the maintenance of the laneway and even offering at one point to have it paved (which the former owner of the Savage property declined).

However, the Browns' use of the laneway had never been made subject to a formal legal agreement.

Ms. Savage appears to have had no intention of endearing herself to her new neighbours. Rather, she had her lawyer give the Browns 60 days' notice of her intention to close their only non-water access point. Closing the laneway (most of which was not required for access to Ms. Savage's cottage) would presumably add additional space to the Savage lot for privacy and/or potential development.

The Browns were understandably concerned about this intention to prevent their only existing source of road access, so they launched court proceedings in an effort to establish a claim to the laneway through the legal doctrines of adverse possession or prescriptive easement. Ms. Savage in turn sought a "closing order" under the *Road Access Act*.

The Honourable Mr. Justice Mew rejected the Browns' claims. Acquiring title through "adverse possession" required the Browns to establish, among other criteria, that they or the former owners had the intention of excluding the true owner of the laneway from possession, and had effectively done so throughout a ten year period before the land was registered in the Land Titles system. The Court found that the Browns had not established such adverse possession since there was no evidence that their use of the laneway over Ms. Savage's property was "exclusive" to themselves or the former owners of their property. Rather, the former owner of Ms. Savage's property had also used and maintained the laneway.

The Browns' claim for prescriptive easement also failed. In some cases (exceedingly rare in Ontario due to the Land Titles system), a prescriptive easement may be obtained through application of a statute or the doctrine of lost modern grant, which holds that where there has been an equivalent to adverse possession for more than 20 years, it ought to be presumed to have originated lawfully in a grant at the time when the enjoyment began. In other words, the "deed" granting the easement is treated as if it had been made but then lost.

Based on the evidence that the Browns did not enjoy unfettered use of the laneway – including an incident where they had been required to move a boat they had parked on the laneway – the Browns' use was found to be neither uninterrupted nor unchallenged by the former owner of Ms. Savage's property. Use of the laneway was by permission rather than as of right. Unfortunately for the Browns, their claim for a declaration of prescriptive easement therefore failed.

Interestingly, Ms. Savage (but not the Browns) submitted evidence from a civil engineer as to the ability of the Browns to make alternate arrangements for access to their property from the adjacent municipal road, which would involve physical changes and the likely construction of a parking pad. The Court also considered any safety concerns with respect to sightlines and whether the owners would be forced to back out onto the municipal road. The estimated cost of the options proposed ranged from \$23,500 to \$35,000. There was no evidence that there would be any regulatory bars to the Browns' ability to build a new access road.

In the result, Justice Mew held that Ms. Savage was entitled as a property owner to exclude the Browns from accessing the laneway and that a statutory “closing order” was unnecessary.

However, His Honour suspended the order for one year, to the extent that Savage could not close or block the laneway to prevent its use to access the Browns’ property, so that the Browns could have a reasonable period of time to build a new road access.

This case provides a cautionary tale both for new and existing cottage property owners who should likely ensure that any “informal” access arrangements are legalized with their neighbours.

In the alternative, obtaining title insurance may also be helpful. While it is not clear from the decision whether the real estate agents or lawyers for either the Browns or Ms. Savage raised the issue of access to the Brown property via laneway at the time of either purchase, if the Browns had acquired a title insurance policy at the time they purchased their property in 1995, they may have had some coverage available for lack of access.

Instead, the Browns incurred legal costs in the case that will presumably dwarf the estimated costs required to build a new access road.

And of course, it is highly unlikely that the Browns or Ms. Savage will enjoy spending any leisure time in close proximity to their summer neighbour.

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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