

Interim injunction ordered to prevent neighbour from blocking private access road

Litigation | Litigation & Dispute Resolution | Real Estate | Right-of-way Access

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Many rural properties in Ontario are accessed through private roads that traverse lands owned by one or more neighbours. The use of a private road may involve a registered easement or right-of-way (ROW). In other cases, the private road may be subject to unregistered prescriptive rights acquired over time. Ontario's [Road Access Act](#) generally prevents a landowner from blocking a private road that is being used as the only means of access to someone else's property. However, there are specific criteria that must be established in order to qualify as an "access road" under the statute.

In *Kunto v. Hollmer*, 2022 ONSC 3406 (CanLII), the court addressed the interim rights of the user of a private road in the face of a land owner's attempt to close it.

The plaintiff resided at a waterfront property in Skead, Ontario. The property had been owned by the plaintiff's family since 1968 and it was the plaintiff's principal residence.

In 2002, the defendants acquired the neighbouring waterfront property, which they also used as their principal residence.

The properties were partially accessed by a municipal road and a registered right-of-way (ROW) that commenced at the municipal road and traversed the two properties. The ROW connected the plaintiff's property to the municipal road.

Most of the ROW had been developed into a gravel roadway. However, one section of the ROW between the plaintiff's residence and the defendants' residence was an undeveloped treed area which was not currently accessible to vehicular traffic. The parties disagreed as to the reasons why that area remained undeveloped.

Historically, the undeveloped portion of the ROW was not an issue for the plaintiff in accessing her residence since there was a large gravel driveway on the defendants' property between the plaintiff's residence and the defendants' residence. Before 2020, the plaintiff, with the acquiescence of the defendants, accessed her property through this gravel driveway. The entrance to the plaintiff's driveway was connected to the gravel driveway rather than the ROW.

In December 2020, the defendants advised the plaintiff that she was no longer permitted to use the gravel driveway to access her property. This notice was the culmination of several years of deteriorating relations between the neighbours. The "final straw" was the plaintiff's refusal to continue her late husband's custom of clearing snow from the gravel driveway during the winter.

The defendants then placed three telephone poles across a portion of the gravel driveway, thereby restricting access to the plaintiff's driveway. The plaintiff contacted the police, which resulted in one of the defendants being criminally charged. Those charges were subsequently withdrawn by the Crown.

In December 2021, the defendants provided further notice to the plaintiff that she was not permitted to use the gravel driveway. Once again, they placed telephone poles across the gravel road, thereby restricting access to the plaintiff's driveway. The plaintiff contacted the police once again but they declined to become involved.

As a result, the plaintiff had to park her vehicle at another neighbour's property and walk to her residence. Service vehicles, including a heating oil truck, a water truck, and garbage removal were unable to access the plaintiff's residence.

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The plaintiff commenced an action in the Ontario Superior Court of Justice seeking an interlocutory injunction to restrain the defendants from blocking access to her driveway through the roadway which traverses the defendants' property. In response, the defendants argued that the *Road Access Act* was not applicable to the roadway and the court therefore lacked jurisdiction to grant the relief sought.

Section 2(1)(a) of the *Road Access Act* provides:

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 [.]

An "access road" is defined in section 1 of the *Road Access Act* 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. A "common road" is "an access road on which public money has been expended for its repair or maintenance". The driveway at issue was not a common road.

An access road may be closed upon application to court, upon 90 days' notice to the parties affected. A party resisting such an order has the onus to demonstrate that there is no alternate access to their property: *Brown v Savage*, 2017 ONSC 4357 (CanLII), at para 50. Courts have imposed a heavy burden on a party seeking to demonstrate that the closure of the access road will prevent any road access to the property and physical inconveniences are not generally sufficient in such circumstances unless such physical impediments are insurmountable: *Atkins v. Carter*, 2004 CanLII 8193 (ON SC), at para 26.

In the case at hand, the issue that would eventually need to be determined was whether the driveway was an "access road" under the statute. In the meantime, the plaintiff sought an interim injunction that would allow her to continue to use the driveway.

In order to obtain such relief, the plaintiff had to establish the traditional criteria for the granting of an injunction by establishing (a) a serious question to be tried; (b) irreparable harm if the injunction is not granted; and (c) that the balance of convenience favoured granting the injunction sought: *RJR MacDonald Inc. v. Canada (Attorney-General)*, 1994 CanLII 117 (SCC).

The motion judge found that there was a serious issue to be tried concerning whether or not the *Road Access Act* was applicable, referring to prior decisions regarding the statute by the Court of Appeal in *2008795 Ontario Inc. v. Kilpatrick*, 2007 ONCA 586 and the Superior Court of Justice in *Atkins v. Carter*, 2004 CanLII 8193 (ON SC).

In that regard, the court noted that the current dispute would turn on whether or not the plaintiff had a means of "alternate access" to her property or whether such access depended upon a precondition such as municipal approval. For the purposes of the injunction motion, the court was satisfied that the plaintiff had raised a serious issue to be tried.

As for irreparable harm, the court was satisfied that the test was met by the accessibility issues caused by the defendants' closure of the gravel driveway. The plaintiff was 75 years old and was currently unable to access the primary driveway to her home. Service vehicles were unable to access her residence to provide drinking water and heating fuel and emergency service vehicles were unable to access her residence without using a path through a neighbouring property.

The issue of balance of convenience did not tilt either way since the plaintiff did have access (albeit inconvenient) through the neighbour's property. However, the court was satisfied that there were specific uses of the driveway that required interim relief.

As a result, the court made interim orders requiring the defendants to immediately remove any obstructions across the disputed roadway in dispute and enjoining them from taking any steps to block or obstruct access to the plaintiff's property over the roadway until 15 January 2023, unless otherwise extended by order of this court.

In turn, the court ordered that the plaintiff was allowed access to the roadway for the specific purposes of (a) accessing the garage on her property; (b) permitting service vehicles to attend at her residence upon providing not less than 24 hours' notice to the defendants; (c) permitting emergency vehicles to attend at her residence (without notice); and (d) to permit the construction of a roadway to the plaintiff's residence on the right of way, with notice to be provided of such construction activities to the defendants. Costs of the motion were reserved to the trial judge.



While the defendants were temporarily prohibited from blocking the driveway to the plaintiff's property, a trial regarding whether they can permanently do so would likely require that she prove that she has no alternate means of constructing another way to legally access her property. A PDF version is available to download [here](#).

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