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Goudreau v. Chandos (Township)

Goudreau et al. v. Corporation of the Township of Chandos

[1993] O.J. No. 2070

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Action No. 9081/93

Ontario Court (General Division),

Weekes J.

August 3, 1993

Counsel:

G.H.T. Farquharson, Q.C., for applicants.

Robert E. Pakenham, for respondent.

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1 **WEEKES J.**: -- Mr. and Mrs. Goudreau have property on the Crow River in the Township of Chandos. An unopened road allowance leads to their property from a municipal road. They wish to improve the road allowance and on this application have asked me to determine the following question: Has a member of the public, who is required to use an unopened road allowance for access to his property, the right to cut trees and remove or grade other natural obstructions as may be reasonably necessary to permit the safe passage of a motor vehicle, without the express permission of the municipality?

2 The agreed statement of facts indicates that the applicants are the owners of part of Lot 32, Concession 10 in the Township of Chandos. Their sole access to a public highway is over an uno-

pened road allowance between Concessions 10 and 11, a distance of 1.6 km. At present the road allowance can be traversed, in part, in safety by motor vehicles without the necessity of removing trees or making surface improvements. However, in order to permit the safe passage of a motor vehicle over the whole length of the unopened road allowance it is necessary to cut and remove trees in places, to reduce the grade in certain spots and to fill low areas in other places. The Goudreaus sought the consent of the municipality to carry out the work and were refused permission unless they first agreed to construct the whole of the road to the standards of the Ontario Ministry of Transportation. This led them to bring this application.

3 The Goudreaus' position is that pursuant to s. 261 of the Municipal Act, R.S.O. 1990, c. M.45, the unopened road allowance is a common and public highway as it is a road allowance made by the Crown surveyors when the township was surveyed. While it has never been opened by the township members of the public have made use of it and it is now used by the Goudreaus as the only means of vehicle access to their land which is situated on the Crow River. The argument is that ownership of highways is held by municipalities in trust for the public and, in particular, those using the road allowance for access to their property. It is argued that the failure of the municipality to open the road allowance makes it necessary for the public to do what is necessary to make the road allowance passable and that, as there is no express statutory authority for this, there is an implied right to do so.

4 The township has no quarrel with the Goudreaus regarding the proposition that road allowances are held in trust for the public. This has long been recognized as the law but was more recently expressed by Hope J. in Big Point Club v. Lozon, [1943] O.R. 491 at pp. 495-96, [1943] 4 D.L.R. 136 (H.C.J.), in these terms:

> Ownership of highways is held by municipalities in trust for all such of the King's subjects as have occasion to make use of them for purposes of communication or for other lawful purpose, or in order to gain access to or egress from adjacent lands.

5 In Big Point Club Hope J. had relied on J.F. Brown Co. v. Toronto (City) (1916), 36 O.L.R. 189, 29 D.L.R. 618 (C.A.), to support the passage quoted above. The Goudreaus rely on certain passages in the same decision (J.F. Brown) as support for the proposition that the public is at liberty to open road allowances without consent. In particular they rely on the passage at p. 227 where Masten J.A. stated:

> A consideration of the sections of the Municipal Act relating to highways (429 - 486) confirms the view that the municipal corporation are trustees for all the King's subjects of the highway so vested in them, and that it remains the right of all such subjects to pass over the highway without obstruction, and that this right is paramount, and cannot be infringed, even by the municipal authority itself, except under express statutory powers.

And again at p. 228 where he stated:

> . . .I think that the Ontario statute vesting the freehold of highways in the municipal corporation does not confer on such municipal corporation any jurisdiction

> or power to interfere with the paramount right of the public to uninterrupted and unimpeded passage over such highways.

6 It is important to bear in mind the context of the case. It had to do with the right of a property-owner to be compensated for injurious affection of its lands resulting from the construction of public lavatories on a city street. I do not think for a moment that Masten J.A. intended his remarks to be used as support for the proposition that the public is at liberty to open municipal road allowances without municipal approval.

7 The township takes the well-founded position that the public can only use the road allowance as it finds it. The authority for this proposition is the decision of Patterson J.A. in Hislop v. McGillivray (Township) (1888), 15 O.A.R. 687 (C.A.), affirmed (1889), 17 S.C.R. 479, where, at p. 691, he stated:

> The system of survey in laying out any town, township or place is and always has been, as a rule, to lay out concessions and lots of uniform size and rectangular shape, the allowances for roads being made at regular intervals between concessions and lots without any regard to the adaptation of the ground for the purposes of a highway. The inevitable result is that many such allowances can never become travelled roads, either by reason of absolute unfitness or by reason of the outlay required to make roads of them. . .
>
> Still they remain statutory highways, and the rights of the public to such uses as they are capable of remain, unless they are stopped up under section 550, or in possession of a private person and enclosed with a lawful fence under the circumstances mentioned in section 552.

(Emphasis added)

8 The issue in Hislop was whether a township could be compelled to open an unopened road allowance. It was held that it could not be so compelled. I interpret the words of Patterson J.A. to the effect that road allowances can be put to such uses as they are capable of to mean in the condition they are found at the time of the initial survey. I do not think that Patterson J.A. meant to imply that the public had a right to improve unopened road allowances and then put them to such uses as they were capable of in their improved condition. Had that been his intention it would have been simple to state it.

9 The Goudreaus argue that if the public is not entitled to do its own clearing and improving of an unopened road allowance this would run afoul of the statement of Masten J.A. in Ontario Hydro-Electric Power Commission v. Grey (County) (1924), 55 O.L.R. 339 (C.A.) at p. 344, that:

> It has long been recognised in the Courts of Ontario and England that the right of the public to free passage along the King's highway is paramount, and cannot be interfered with even by the Crown itself, but only by Parliament or the Legislature.

In my view it is a long and impossible leap from the issue in that case, which was whether the Hydro-Electric Power Commission had the right to place its poles and wires on a highway without the

consent of the municipal corporation, to employ the language of Masten J.A. to support the proposition that is advanced here. It would require me to ignore the passage in Hislop to which I have already referred. It also ignores s. 312(6) of the Municipal Act which provides:

> 312(6) Except with the authority of the council or a committee or officer thereof appointed as aforesaid, no person shall remove or cut down or injure any tree growing upon a highway.

10 In Uxbridge (Township) v. Walker, [1955] O.W.N. 192 (Co. Ct.), Pritchard Co. Ct. J. held that "tree" as defined in s. 483(1) of the Municipal Act, R.S.O. 1950, c. 243 (now s. 312), included any tree that may have been standing on a road allowance as well as any trees or shrubs planted or left growing for the purpose of shade or ornament. I share his opinion. The Goudreaus are therefore not at liberty to remove, cut down or injure any tree on the road allowance unless they are in compliance with the statute.

11 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.

12 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, 10 C.E.L.R. 40, 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.

13 I was referred to a number of cases that dealt with the issue of good faith on the part of the municipality. The argument that the municipality is not acting in good faith when it requires the road to be built to the standards of the Ministry of Transportation is one that would require very different considerations from the matters raised by this application and is not the issue before me.

14 I therefore hold that a member of the public, who is required to use an unopened road allowance for access to his property, does not have the right to cut trees and remove or grade other natural obstructions as may be reasonably necessary to permit the safe passage of a motor vehicle, without the express permission of the municipality. Written submissions may be made regarding costs within 45 days.

Order accordingly.