

COURT OF APPEAL FOR ONTARIO

CATZMAN, FELDMAN and SHARPE JJ.A.

B E T W E E N :

THE TDL GROUP LTD. and CHRI-
GYN LTD.

Plaintiffs (Respondents)

- and -

REGIONAL MUNICIPALITY OF
NIAGARA

Defendant (Appellant)

)
)
) Roger T. Beaman and Darcy Merkur for
) the Appellant
)
)

) Paul Bates and Kirk Stevens for the
) Respondents
)
)

) Heard: July 17, 2001

On appeal from the Judgment of Justice Nancy Backhouse dated January 30, 2001.

SHARPE J.A.:

[1] This appeal concerns the nature of a property owner's right of access to a public road and the corresponding power of a municipality to limit such access to maintain orderly and safe traffic conditions.

FACTS

[2] The respondents operate a Tim Hortons franchise on the south side of Fourth Avenue in St. Catharines. There is significant commercial development in the area, including a "Power Center" that will consist of a number of large retail operations on the property adjacent to that of the respondents. The appellant Municipality decided that it

was necessary for operational and safety reasons to widen Fourth Avenue from a two-lane rural cross-section to a four, and in some locations five-lane urban cross-section. The plan includes a continuous centre median running along the widened segment of the road. The median would prevent motorists heading west along Fourth Avenue from making a left turn directly into the respondents' Tim Hortons shop. Instead, westbound patrons would have to take a circuitous route, partially on private lands, to access the shop. The centre median would also prevent patrons leaving the respondents' premises from turning left onto Fourth Avenue.

[3] The respondents challenged the right of the appellant to enact a bylaw imposing the continuous centre median. The respondents rely on the *Municipal Act*, R.S.O. 1990, c. M.45, s. 298, which provides as follows:

- s. 298(1) A by-law shall not be passed for stopping up, altering or diverting any highway or part of a highway if the effect of the by-law will be to deprive any person of the means of ingress and egress to and from the person's land or place of residence over such highway or part of it unless such person consents to the passing of the by-law or unless in addition to making compensation to such person, as provided by this Act, another convenient road or way of access to the land or place of residence is provided.
- (2) The by-law does not take effect until the sufficiency of such road or way of access has been agreed upon or until, if not agreed upon, its sufficiency has been determined by arbitration as hereinafter mentioned.
- (3) If such person disputes the sufficiency of the road or way of access provided, the sufficiency of it shall be determined by arbitration under this Act and, if the amount of compensation is also not agreed upon, both matters shall be determined by one and the same arbitration.
- (4) If the arbitrator determines that the road or way of access provided is insufficient, he or she may in the award determine what road or way of access should be provided and, in that case, unless such last-mentioned road or way of access is provided, the by-law is void and the corporation shall pay the costs of the arbitration and award.

[4] The respondents say that a continuous centre median preventing westbound motorists from turning directly into their shop would significantly affect their business. They insist that there be a cut in the median to allow unimpeded access for west-bound traffic. They moved, *inter alia*, for a declaration that the by-law in question deprives them of access to part of Fourth Avenue and that they are entitled to arbitration pursuant to s. 298 for determination of another convenient means of access to that part of the roadway and of the compensation to which they are entitled. In a separate proceeding, the respondents gave notice of their claim for compensation for injurious affection pursuant to the *Expropriations Act*, R.S.O. 1990, c. E.26.

[5] In concluding that the respondents were entitled to the declaratory relief they sought, the motions court judge found as follows:

The restriction of left turn movements created by the continuous median adjacent to the Tim Hortons effectively divests it of all westbound traffic flow and removes any means of access over the eastbound part of the highway. The use of the words “the means of ingress and egress to and from the person’s land” and “over such highway or part of it” (emphasis added) in s. 298 of the *Municipal Act* qualifies the concept of “deprivation” and does not, in my view, require that a landowner be totally or wholly deprived of all access to and from the land. The purpose of s. 298 seems to be to provide a balance between the preservation of common law rights of access and the public interest in road improvements. I find that where there has been a substantial impairment of access beyond the de minimis range such as exists here, the element of “deprivation” in s. 298 has been satisfied.

ANALYSIS

[6] In my respectful view, the motions court judge erred in her interpretation of s. 298(1). While the decided cases are not on all fours with the facts of the present case, there is a consistent line of authority that s. 298(1) only applies where the effect of the by-law is to deprive the landowner of his or her only means of access to the highway. The statutory remedy does not apply where some means of access remains and the by-law merely limits the landowner's access. Interruption of a preferred or alternate means of access may well give rise to a remedy for compensation for injurious affection. However, the property owner who is left with some means of access cannot insist upon the more substantial remedy offered by s. 298(1), requiring the municipality not only to pay compensation but also to provide an alternate means of access.

[7] In *Credit Foncier Franco-Canadien v. Swansea* [1940] 1 D.L.R. 446 (Ont. C.A.) the municipality enacted a by-law which had the effect of depriving the property owner of access to his garage which led to the street. The owner retained access from another point on his property to another street. This court held that the owner had no right to insist that the municipality provide alternative access pursuant to what was then s. 496(1) of the *Municipal Act*. Writing for the court, Robertson C.J.O. stated at p. 450:

It is only when the "effect of the by-law will be to deprive any person of the means of ingress and egress" that the subsection applies. It seems to me that it is plain when the statute speaks of *the* means of ingress and egress what is contemplated is a property having only one means of ingress and egress, and of that one means the land owner will be deprived by the by-law.

The statute plainly contemplates compensation being made under s. 347 of the *Municipal Act* to owners who are injuriously affected by closing a street, and so long as the owner is not wholly excluded from access to his land by a public highway there is no reason why the closing of any additional means of access he may have, cannot be the subject of compensation.

[8] This reasoning was followed in *The Trusts and Guarantee Co. Ltd. v. The Municipal Corporation of the Township of Toronto*, [1942] O.R. 68 where the property owner had two means of access to the same highway. The effect of the by-law was to close off one of those means of access. Chevrier J. followed the dictum just quoted from the *Credit Foncier* case. In an early Ontario case, *Re McArthur and the Corporation of the Township of Southwold* (1878), 3 O.A.R. 295, the court arrived at a similar interpretation of an earlier version of s. 298(1). At that time the statute required that the claimant be "excluded from ingress and egress to and from his lands or place of residence". The by-law at issue closed the road to which the owner had access but the owner retained access to another road. Patterson J.A. wrote at p. 305 that the owner had no claim under the statute "because there was already another mode of ingress and egress to and from the land in question..."

[9] The respondents rely on the common law principle stated in *Toronto Transit Commission v. Swansea*, [1935] S.C.R. 455 at p. 457, that a property owner is entitled to access to a highway "at any point at which his land actually touches [the] highway for any kind of traffic which is necessary for the reasonable enjoyment of his premises." I do not accept the proposition that the remedy conferred by s. 298(1) may be invoked in

every case where a by-law infringes a property owner's common law right of access to the highway. In my view, there is a clear distinction to be drawn between an interference with a common law right of access, which will lead to a remedy for compensation for injurious affection, and a denial of access, which will trigger the remedy conferred by s. 298(1). The statutory remedy under s. 298(1) consists not only of compensation but also of a right to an alternative means of access and can be invoked only where the owner is deprived of access, not where access is merely limited.

[10] Nor do I accept the contention that in s. 298 the words “or part of it” qualify the concept of “deprivation” with the result that something less than total deprivation of all access will trigger the remedy conferred by the section. The reference to deprivation of access “over such highway or part of it” refers back to the earlier language relating to the by-law providing for “stopping up, altering or diverting any highway or part of a highway”. In my view, the words “part of a highway” refer simply to the portion of the highway that is subject to the alteration or diversion. They do not imply a right to the statutory remedy where the owner's access is limited but not denied. If the words “part of a highway” were to be given the meaning contended for by the respondents, a property owner could insist upon access to every part of the highway that suits the property owner's convenience.

[11] In my view, accepting the respondents' contention would seriously and unduly impair the capacity of municipalities to make decisions necessary in the public interest for the efficient and safe operation of highways. To take the facts of the present case, it seems to me that if these respondents are entitled to insist upon a centre cut in the median to permit traffic to turn left into their premises, every other business establishment along the same road soliciting business from patrons travelling in both directions could make the same demand. If the respondents and all others similarly situated could insist upon a centre cut in the median to afford access to their premises, the municipality would, in effect, be powerless to create a centre median to control the flow of traffic.

[12] As I have already noted, the respondents are not without a remedy. They have filed for compensation for injurious affection. In my view, they are limited to that remedy and have no rights pursuant to s. 298(1).

[13] Accordingly, I would allow the appeal, set aside the order of the motions court judge and in its place make an order:

- i. declaring that s. 298(1) of the *Municipal Act* is not applicable in the circumstances of this case;
- ii. declaring that the defendant is entitled to complete the centre median in accordance with the terms of by-law

167-1999 along Fourth Avenue in the City of St. Catharines in and about the location of the plaintiffs' leased property;

- iii. declaring that the plaintiffs' only remedy arising from the completion of the centre median along Fourth Avenue is a claim for compensation for injurious affection under the *Expropriations Act*; and
- iv. dismissing this motion with costs payable to the defendant.

[14] The appellant is entitled to its costs of this appeal.

"Robert J. Sharpe J.A."

"I agree: M.A. Catzman J.A."

"I agree K. Feldman J.A."

Released: July 23, 2001