

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *D'Amico v. Atkinson*,
2023 BCSC 2186

Date: 20231212
Docket: S137426
Registry: Kelowna

Between:

Giacomo D'Amico

Petitioner

And

John Edward Atkinson

Respondent

Before: The Honourable Justice G.P. Weatherill

Reasons for Judgment

Counsel for the Petitioner:

K. Sandulescu

Counsel for the Respondent:

Y. Gershony
M.S. Moorhouse

Place and Date of Trial/Hearing:

Kelowna, B.C.
November 17, 2023

Place and Date of Judgment:

Kelowna, B.C.
December 12, 2023

Introduction

[1] This is a residential boundary dispute under s. 36 of the *Property Law Act*, R.S.B.C. 1996, c. 377 [*PLA*], involving adjoining lakefront properties on Okanagan Lake near Vernon, BC.

[2] At issue is a concrete block retaining wall (“Block Retaining Wall”) separating two properties that was built before either property was purchased by their current owners. The petitioner says the Block Retaining Wall encroaches on his property and seeks an order pursuant to s. 36(2)(c) of the *PLA* that it be demolished.

[3] In response, the respondent seeks an order under s. 36(2)(a) of the *PLA* granting an easement over the petitioner’s property for so long as the Block Retaining Wall continues to exist. The respondent says that the encroachment at issue has only arisen because of the recent alteration of the petitioner’s property line extending its lakefront “natural boundary” and enlarging it. The petitioner has now registered a new survey plan at the Land Title Office (“LTO”) resulting in a portion of the Block Retaining Wall encroaching onto his property.

Summary of Decision

[4] For the reasons that follow, the petition is dismissed with costs.

[5] Further, there shall be a declaration that, on payment of \$2,000 to the petitioner and for such period as the Block Retaining Wall continues to exist, the respondent shall have an easement over the petitioner’s property to the extent of the encroachment.

Background

[6] The petitioner and his wife purchased the lakefront property civically described as 9119 Smith Road, Vernon, BC, on September 24, 2021, with the intention of replacing the existing somewhat dilapidated home with a new one. Other than using the property part-time during summer months, the petitioner and his family reside elsewhere. The petitioner’s property is legally described as:

PID: 011-158-964, Parcel A (DD 150858F and Plan B6964) of Lot 1, Section 14, Township 13, Osoyoos Division Yale District, Plan 2109 (the "D'Amico Property").

[7] Twelve years earlier in July 2009, the respondent and his wife had purchased the lakefront property immediately to the north of the D'Amico Property and civically described as 9109 Smith Road, Vernon, BC. He and his family have been residing there full-time ever since. The respondent's property is legally described as:

PID: 007-728-573, Lot 3, Section 14, Township 13, Osoyoos Division Yale District, Plan 20850 (the "Atkinson Property").

[8] Previous owners of the Atkinson Property constructed a dock attached to a natural island, which is connected to the property via a bridge, which in turn is connected to a concrete retaining wall spanning the lakeside part of the property ("Dock/Bridge Structure"). Although it is unknown when the Block Retaining Wall was constructed, it is evident that it forms an integral part of the Dock/Bridge Structure. Because the Dock/Bridge Structure was in the foreshore area, the previous owners of the Atkinson Property required, and obtained, approval from the Crown in the form of Licence No. 3409564 allowing its construction. On May 15, 2010, the Province issued a "Specific Permission for Private Moorage" which replaced the original dock licence and permits the Dock/Bridge Structure to remain on the foreshore in front of the Atkinson Property.

[9] The lake-facing boundary of a lakefront property is referred to as the property's "natural boundary" which typically runs in line with the high-water mark of the lake. The natural boundary is delineated on a property's survey plan which is registered in the LTO.

[10] The D'Amico Property was originally created by subdivision plan B6964 in September 1951, and reflects a "natural boundary" which is approximately 21 feet landward compared to the Atkinson Property which was originally created by subdivision plan 20850 in November 1970.

[11] In May 2021, prior to purchasing the D'Amico Property, the petitioner commissioned a survey and site plan ("May 2021 Survey") of it that disclosed two encroachments:

- a) an 18' portion of a wooden fence on the Smith Road side; and
- b) a portion of the Block Retaining Wall comprising a length of 4.9 meters from the natural boundary and a width of between 0.78 and 1.15 meters (for a total of approximately 4.5 square meters) (the "Encroachment").

The May 2021 Survey was not provided to the respondent.

[12] After the petitioner purchased the D'Amico Property, he raised the issue of the wooden fence encroachment with the respondent, who eventually had it re-located on July 19, 2023, so it no longer encroaches onto the petitioner's property. Although raised in the petition, the wooden fence is no longer an issue in this case.

[13] The remaining issue, the Encroachment, existed long before either party purchased their respective properties. The Encroachment only became a problem after the petitioner purchased the D'Amico Property.

[14] The petitioner commissioned a second survey on October 27, 2022. Following receipt of that survey, the petitioner applied to the Surveyor General, pursuant to s. 94 of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*], to adjust the registered natural boundary of the D'Amico Property to reflect the accretion of land that occurred over many years prior ("Adjustment Application"). The respondent became aware of the Adjustment Application and, through counsel, informed the petitioner of his objection. His counsel wrote to the petitioner's counsel that:

. . . any change to the natural boundary must not result in [the petitioner's] property line changing to encroach on ...the retaining wall" and that "the rest of the retaining wall and dock structure ...must remain [the respondent's] property, regardless of any change to [the petitioner's] natural boundary line.

[15] The Adjustment Application was approved on February 1, 2023, and on April 11, 2023, the Surveyor General approved a new reference plan reflecting a new

natural boundary which had the effect of bringing the D'Amico Property's natural boundary 21 feet lakeward and in line with the Atkinson Property line. This change enlarged the D'Amico Property's registered footprint into what was formerly Crown land (at least as far as the LTO property surveys depicted), resulting in the Encroachment becoming apparent.

[16] This petition was filed on June 5, 2023, and served on the respondent on June 7, 2023.

[17] The petitioner wanted the petition heard as soon as possible and asked for responding materials to be provided right away. Several extensions were granted. The response to petition was filed on August 4, 2023, opposing the relief sought in the petition and seeking the granting of an easement in the respondent's favor. No affidavit material was filed by the respondent until September 29, 2023.

[18] Despite the response identifying the issues to be resolved between the parties, on August 30, 2023, petitioner's counsel filed a notice of hearing for the week of October 10, 2023, noting that the petition was "unopposed".

The Petitioner's Position

[19] The petitioner asserts that, although the original survey plan that created the D'Amico Property showed its property line some 21 feet inland from the survey plan that created the Atkinson Property, by operation of the common law, his lakefront property line had accreted west resulting in the Encroachment existing well before the Adjustment Application. He says that the natural boundary moved lakeward over the years since the original survey was filed and as it did, land accreted to the D'Amico Property as a matter of law. He says the Encroachment is preventing him from using, enjoying and developing his property and he wants it removed. He applies under s. 36(2)(c) of the *PLA* for an order that the Encroachment be removed forthwith.

[20] As a preliminary matter, the petitioner seeks sanctions against the respondent for his "*delay in filing any Affidavit evidence to delay these proceedings, in breach of*

the rules of court'. He points to Rules 16-1(4) and (7) of the *Supreme Court Civil Rules* [*Rules*] which state that a respondent must file all affidavits that he or she intends to rely on with the response, and that no late-filed affidavits are permitted unless all parties consent or the court grants leave. Since the respondent did not provide any affidavits with the response, did not obtain the petitioner's consent, did not obtain leave of the court, nor provide an adequate explanation for the delay in providing the affidavits, the petitioner argues that I should exclude all affidavits filed by the respondent and decide the case in the petitioner's favour: *Tietz v. Cryptobloc Technologies Corp.*, 2021 BCSC 190 at para. 32.

[21] Respecting the Encroachment, the petitioner contends that because of the common law doctrine of accretion and by operation of law, the Block Retaining Wall, or at least part of it, encroached on the D'Amico Property as the foreshore accreted to it over the years: *Wolfe v. British Columbia Electric Railway Co. Ltd.*, 3 D.L.R. 319, 1949 CanLII 265 (B.C.S.C.); *0640453 B.C. Ltd. v. Tristar Communities Ltd.*, 2018 BCCA 460 at para. 38. He says a portion of the Block Retaining Wall encroaches on his property and he wants it removed within 14 days at the respondent's expense. He also seeks an order for costs of the legal survey he commissioned.

[22] The petitioner asserts that given the circumstances of this case, such a demolition order is the only just and equitable remedy. He argues that the respondent should not be granted an easement because he does not come to court with clean hands. He cites: i) delay in removal of the wooden fence encroachment; ii) delay in providing responding materials to the petition; iii) refusal to initially agree to the existence of the Encroachment; iv) refusal to remove the Encroachment; v) improper removal of survey stakes; vi) wrongly adding layers of bricks and rocks to the top of the Block Retaining Wall in an effort to bolster his position; and vii) erection of, at first, a temporary plastic green and, later, a plastic black fence (both easily removeable) on top of the Block Retaining Wall, as reasons.

[23] The petitioner further asserts that because the respondent has not come to court with clean hands, he is not entitled to equitable relief under s. 36 of the *PLA: Henderson v. Porter*, 2001 BCSC 1601, at paras. 10–11,16.

[24] He says that, through his counsel, he notified the respondent of the Encroachment on several occasions and that the respondent failed to take reasonable or any steps to remedy the situation. He says the balance of equities favours the immediate removal of the Encroachment.

[25] The petitioner also asserts that the Block Retaining Wall has prevented his family and him from proper use and enjoyment of the D'Amico Property. He contends that the area of the Encroachment is his family's favorite spot for relaxing and enjoying their waterfront. He cites several examples including: i) it is on an important part of his property useful for a number of purposes such as storing kayaks and other lake gear; ii) interfering with his ability to place boats and other water crafts into the lake; iii) the area around it is flat, well maintained and shaded by trees whereas other areas of the property are rockier and harder to walk on; and iv) interfering with ongoing and future building and design plans for his property, including a planned boat lift.

[26] The petitioner has obtained a quote of \$19,500 to remove the Encroachment.

[27] The cost of the survey and related survey plan documents was \$11,955.23, which the petitioner seeks to have repaid.

The Respondent's Position

[28] The respondent accepts the petitioner's argument that the land in question was lawfully accreted land and properly belongs to the D'Amico Property. He argues, however, that in the circumstances of this case, the equities favour granting him an easement over the D'Amico Property to the extent of the small portion of the Block Retaining Wall that now encroaches on the petitioner's property.

[29] The respondent says that, until the Adjustment Application was granted, and the Surveyor General confirmed that land lakeside of the D'Amico Property line accreted to it and the property line was adjusted accordingly, there was no encroachment because the offending portion of the Block Retaining Wall was owned by the Crown.

[30] The respondent maintains that given the uniqueness of this case, the balance of convenience favours that he be given an easement over the D'Amico Property to the extent of the Encroachment, pursuant to s. 36(2)(a) of the *PLA*, upon payment of the nominal amount of \$1,000 to the petitioner.

The Relevant Case Law and Legislation

[31] Section 1 of the *Land Act*, R.S.B.C. 1996, c. 245, defines the natural boundary as follows:

“natural boundary” means the visible high water mark of any lake, river, stream or other body of water where the presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark on the soil of the bed of the body of water a character distinct from that of its banks, in vegetation, as well as in the nature of the soil itself;

[32] Section 94(1) of the *Land Title Act*, R.S.B.C. 1996, c. 250, allows for applications to the Surveyor General to adjust a present natural boundary:

94(1) Despite the *Land Act*, if a plan to be tendered for deposit in the land title office

(a) includes land that adjoins Crown land and that has lawfully accreted to the land being subdivided, or

(b) shows a water boundary that differs from the water boundary shown on the plan already on deposit on which the present title is based,

the Surveyor General may, if in the Surveyor General's opinion it is in the public interest to do so, endorse on the plan a certificate

(c) that the land in question is lawfully accreted land, or

(d) that the water boundary is the natural boundary as defined in the *Land Act*.

(2) The Surveyor General must not certify a plan under subsection (1) unless the Surveyor General is satisfied that

(a) the land in question has lawfully accreted to the registered land of the subdivider, or

(b) the water boundary shown on the plan is in fact the correct water boundary, and the water boundary as shown on the plan already on deposit on which the present title is based was incorrectly shown on that plan due to lack of detail or sufficient detail, or other good reason.

[33] The common law respecting accreted property and applications to the Surveyor General to certify updated reference plans was nicely summarized by the Court of Appeal in *0640453 B.C. Ltd. v. Tristar Communities Ltd.* 2018 BCCA 460 at paras. 34–54. In short, accreted lands vest in the riparian owner by operation of law. When property is conveyed, title to any lawfully accreted land is conveyed with it. The legislative scheme for applying to the Surveyor General to certify an updated reference plan does not change the common law principles related to accretion of land.

[34] Section 36(2) of the *PLA* deals with encroachments. Its purpose is to provide a basis, on equitable grounds, for resolving disputes over encroachments. It empowers the court to order the removal of a building or fence, including a retaining wall, if it is found to be encroaching on adjoining land on a survey of the land: *Lightfoot v. Gill*, 2022 BCSC 543 at para. 30. The section also empowers the court to declare an easement on the land encroached or vest title to the land encroached. Section 36(2) reads as follows:

36(2) If, on the survey of land, it is found that a building on it encroaches on adjoining land, or a fence has been improperly located so as to enclose adjoining land, the Supreme Court may on application

(a) declare that the owner of the land has for the period the court determines and on making the compensation to the owner of the adjoining land that the court determines, an easement on the land encroached on or enclosed,

(b) vest title to the land encroached on or enclosed in the owner of the land encroaching or enclosing, on making the compensation that the court determines, or

(c) order the owner to remove the encroachment or the fence so that it no longer encroaches on or encloses any part of the adjoining land.

Discussion

[35] Let me first deal with the petitioner's preliminary argument that I should exclude all affidavits filed by the respondent because they were not filed with the response to the petition or in a timely fashion.

[36] In short, I find the petitioner's assertion without merit. It was clear from the outset that the respondent was strenuously opposed to the petition and would be seeking an easement to the extent of the Encroachment. The issue between the parties was serious, complex, and required time for the respondent to seek and obtain proper legal advice to put his position forward. In my view, the petitioner's counsel's approach requiring that the strict timelines set out in the *Rules* were to be followed, was unreasonable. To the extent leave is required to allow the respondent's affidavits to be considered, such leave is granted.

[37] I will now deal with the primary issue on this petition, namely, whether it is "just and equitable" to order the removal of the Encroachment pursuant to the "balance of convenience" test to be applied under s. 36 of the *PLA*, or whether it is "just and equitable" to grant an easement in favour of the Atkinson Property over the D'Amico Property. Each party argues that the balance of convenience test should be decided in their respective favours.

[38] Section 36 of the *PLA* provides an equitable basis for resolving disputes over encroachments. The facts and equities of each case govern the exercise of the court's discretion. There have been numerous cases where this section has been applied and many were referred to during submissions. Section 36 grants the court broad discretion to do justice in the case of an encroachment. The court is to take a broad, equitable approach and weigh the equities between the parties to determine the balance of convenience. Relief under the section is entirely discretionary: *Singer v. Willows*, 2022 BSCS 241 at para. 21.

[39] I will summarize the factors for consideration set out in *Vineberg v. Rerick*, [1995] B.C.J. No. 2506, 1995 CanLII 3363 (B.C.S.C.) at para. 20, as adopted by the Court of Appeal in *Taylor v. Hoskin*, 2006 BCCA 39 at para. 50:

- a) Were the parties cognizant of the correct boundary line before the encroachment became an issue? The three degrees of knowledge are: honest belief; negligence; and fraud. The party seeking the easement should have an honest belief to be awarded this remedy.
- b) Is the encroachment a lasting improvement? What effort and at what cost is involved in removing the encroachment? What will be the effect on the two properties in question? The more fixed the encroachment and the more costly and cumbersome it would be to remove it, the more weight is towards an easement; and
- c) What is the size of the encroachment and how does it affect the subject properties in terms of their present and future values?

[40] Although these factors have been adopted and applied in many cases, they are not intended to be tests to be rigorously applied in every case: *Taylor* at para. 51.

[41] I agree with the respondent that the facts of this case are somewhat unique. The Encroachment issue has arisen because earlier this year, the petitioner succeeded with the Adjustment Application that officially changed the lakefront natural boundary by enlarging the property lines as registered in the LTO. The net effect was that a small triangular portion of the Block Retaining Wall was swallowed up and created the Encroachment. Prior to the Adjustment Application, no part of the Block Retaining Wall encroached onto the D'Amico Property (at least as far as the LTO was concerned), and it was located entirely on the Atkinson Property and/or Crown land with permission from the Province.

[42] In my view, the facts and circumstances favour an easement be granted over the D'Amico Property in favour of the Atkinson Property. At 4.5 square meters, mainly linear, the Encroachment is extremely minor by comparison to the rest of the D'Amico Property. I am not persuaded that the Block Retaining Wall remaining will have any more than a *de minimus* effect on the D'Amico Property, present or future,

including the petitioner's stated plans for it, his enjoyment of it, or its value. The photographs in evidence support my findings, and I therefore conclude that the petitioner's complaints that the Block Retaining Wall is an ongoing inconvenience causing a loss of enjoyment of his property are disingenuous, trifling, and nonsensical.

[43] Further, it is noteworthy that the petitioner had the D'Amico Property surveyed before he purchased it and would have known of the Encroachment which militates against ordering it demolished.

[44] Finally, I am also not persuaded by the petitioner's submissions that the respondent is guilty of flagrant, deliberate and "inequitable conduct" and consider those allegations to be completely without merit.

[45] On the other hand, I am persuaded that that respondent had no idea that the Block Retaining Wall encroached on the D'Amico Property until this petition was well underway, surveys were completed, he became acquainted with the common law doctrine of accretion, and the Surveyor General had already approved the Adjustment Application. Prior to the Adjustment Application being approved, the D'Amico Property's boundaries as registered in the LTO showed no encroachment, and the independent survey that the respondent commissioned also showed no encroachment. The respondent was entitled to rely on this information to inform his actions.

[46] In any event, this petition is not about whether land accreted to the D'Amico Property, but rather is about where the equities lie on a s. 36(2) *PLA* application. I conclude that at all material times leading to the filing of the petition, the respondent had an honest belief that the D'Amico Property's registered survey plan set out the correct property boundary line and that the Block Retaining Wall did not encroach on it. Further, the Block Retaining Wall is a permanent fixture and although the cost of removing the portion that encroaches onto the D'Amico Property is not overly prohibitive, it is still significant. Further, it is only the approximate 4.26 meters of the Block Retaining Wall landside of the present natural boundary that is encroaching.

The wall continues some distance into the lake that is Crown land. Requiring the removal of the Encroachment would not assist the petitioner's stated concerns regarding use of his property because even if the portion of the Block Retaining Wall that encroaches on the D'Amico Property were removed, the portion that continues onto Crown land would remain. There would simply be a "jog" in the replacement retaining wall. I conclude that while possible, it would not be a simple task to cut out the Encroachment and put a "jog" in the wall.

[47] In addition, as the respondent rightly points out, unknown and significant environmental issues requiring complicated and expensive government assessments and approvals would likely arise if the Encroachment was ordered demolished.

[48] In terms of compensation to be paid to the petitioner under s. 36(2)(a) of the *PLA*, there is no evidence that the Encroachment reduces the value of the D'Amico Property. I have already concluded that it has very little functional or economic impact on it. I am satisfied, however, that the Encroachment must have some value at law. I conclude that reasonable, albeit nominal, compensation for the Encroachment remaining should be awarded in the amount of \$2,000. This sum is adequate to compensate the petitioner for an easement for the remaining life of the Block Retaining Wall: *Lalli v. Eng*, 2000 BCSC 686.

[49] In sum, I am persuaded that the balance of convenience and equities between the parties lies with the respondent who is entitled to the easement he seeks under s. 36(2)(a) of the *PLA*.

Decision

[50] The petitioner's application for the relief sought in the petition, including an order pursuant to s. 36(2)(c) of the *PLA* for an order that the Encroachment be removed, is dismissed.

[51] The petitioner's application for an order for reimbursement of survey expenses in the amount of \$11,955.23, is dismissed.

[52] The respondent's application for relief under s. 36(2)(a) of the *PLA* and that he be granted an easement over the portion of the Block Retaining Wall affected by the Encroachment, is allowed.

[53] The easement shall continue in force for so long as the Block Retaining Wall remains in place.

[54] The respondent shall pay the costs associated with obtaining a registered easement including survey costs, legal costs, and registration fees.

[55] As compensation for the easement, the respondent shall pay the petitioner the sum of \$2,000.

[56] Given that the respondent was the clear winner, he is entitled to his Scale B costs.

"G.P. Weatherill J."