THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Shill v. Hooker,*
2023 BCSC 1979

Date: 20231110
Docket: 231340
Registry: Victoria

Between:

FRED SHILL AND KELLY SHILL

Petitioners

And:

ERNEST HOOKER AND KAREN KNUTSON

Respondents

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

Counsel for the Petitioners:	J. Travers
Counsel for the Respondents:	D. A. Currie, Articled Student, and D. McKay
Place and Date of Hearing:	Victoria, B.C. September 7, 2023
Place and Date of Judgment:	Victoria, B.C. November 10, 2023

[1] The petitioners and respondents are neighbours. Their properties are divided by a wood fence constructed by the petitioners. The fence is primarily on the petitioners' property with minor encroachments at each end. Access to the fence for its maintenance and repair requires entry onto the respondents' property. The parties disagree on the terms for such access hence the petitioners seek an order for access to the respondents' property pursuant to s. 34 of the *Property Law Act*, R.S.B.C. 1996, c. 377 (the "*Act*").

Background

[2] In December 1985 the petitioners purchased the property located at 929 Inskip Road, Victoria, B.C., Canada, V9A 4J6, legally described as:

> Lot 19, Section 10, Esquimalt District
> Plan 326
>
> (the "Petitioners' Property").

[3] They installed a wood fence between the parties' properties in or about 1986. The fence runs close to the property line and, other than 0.02" at the rear of the fence and 0.44" at the front, it is located on the Petitioners' Property. The respondents dispute the survey which I note was done by a licensed surveyor. They provide no reason for refusing to accept it other than it was ordered by the petitioners. The respondents have provided no survey of their own nor any expert evidence that the survey is flawed.

[4] In September 2000 the respondents purchased the back unit of a two-unit strata located next to the Petitioners' Property. Their property has a civic address of 933 Inskip Road, Victoria, B.C., Canada, V9A 4J6, legally described as:

> Strata lot B, Section 10, Esquimalt District
>
> Strata Plan VIS4845
>
> Together with an interest in the common property in proportion to the unit entitlement of the strata lot as shown on Form 1
>
> (the "Respondents' Property").

[5] Strata lot A is owned by Alvin and Grace Mariano and has a civic address of 931 Inskip Street. They agree to granting access to the petitioners hence they are not party to this proceeding.

[6] Until approximately July 2015, the respondents allowed the petitioners access to their property to maintain the fence. In July 2015 the parties had a falling out although they dispute the cause.

[7] At issue are the terms of such access if granted pursuant to s. 34 of the *Act*.

Position of the Petitioners

[8] The petitioners seek orders that they or a third party engaged by them can, on an ongoing annual basis, access the Respondents' Property to repair and/or maintain the fence. The order they seek is to gain access to the Respondents' Property pursuant to s. 34 of the *Act* on the following terms:

1) The Petitioners may access the Respondents' Property for the purposes of repairing and/or maintaining the Fence:
   a) no more than once annually; and
   b) no longer than three consecutive calendar days.
2) The Petitioners will provide 48 hours written notice to the Respondents prior to accessing the Respondents' Property for the purposes of repairing and/or maintaining the Fence. The notice shall include:
   a) the type of work being undertaken;
   b) the persons or company engaged by the Petitioners undertaking the work; and
   c) the expected duration of the work.

   (the "Written Notice")
3) Service of the Written Notice will be effected either by:
   a) if the Respondents provide an email for service, by emailing notice to the email address provided, pursuant to Rule 4-2(6)(a) and (b) of the *Supreme Court Civil Rules* (the *"Rules");* or
   b) by leaving the document in the Respondents' mailbox pursuant to Rule 4-2(3) (a) and (b) of the *Rules.*
4) The Petitioners shall compensate the Respondents in the case of damage caused to the Respondents' Property by the Petitioners, or a third party engaged by the Petitioners, in the course of carrying out repairs and/or maintenance to the Fence.

5) The Respondents must provide proof of damage in the form of photographic or video evidence in the case of an allegation of damage to the Respondents' Property.
6) Where the Petitioners, or a third party engaged by the Petitioners, have been alleged to cause damage to the Respondents' Property in the course of carrying out repairs or maintenance to the Fence, and the parties are unable to come to an agreement regarding a remedy for the damage, the Respondents may apply to the British Columbia Supreme Court (the "BCSC") for determination of a remedy for the damage.
7) The Order shall remain in effect as long as the Petitioners reside at the Petitioners' Property and the Respondents reside at the Respondents' Property.

[9] The also seek a declaration that they are the sole owners of the fence, pursuant to R. 20-4 of the *Supreme Court Civil Rules.*

Position of the Respondents

[10] The respondents submit the petitioners have not engaged in meaningful discussion and negotiation to agree upon dates for the work and who will perform it. More significantly they submit the petitioners have sought an ongoing order which is in practical terms an easement and as such is not authorized by s. 34 of the *Act*. They also oppose the declaration sought giving the petitioners ownership of the fence.

Law and Analysis

Interpretation of s. 34 of the *Act*

[11] In 2018 the provincial government amended s. 34 of the *Act*. When introducing the proposed amendment, the Honourable David Eby stated:

> It's intended as such, that people should be able to access their land, and they should be able get through if they have something that they're working on - their building, structure or improvement. It's meant to be a broad definition... Apparently, this came to the attention of the ministry because someone owned a commercial building on a property that was enclosed by land owned by others. They couldn't reasonably get permission from the owners to access that commercial building because the definition said: "the owner of a dwelling house on one parcel of land." That's why it's been expanded to now say: "The owner of a building, structure, improvement or work." It was the advice of legal counsel that that was really the intent of the provision. It makes sense,

> certainly, to have a provision to allow someone to access their land when necessary.

See "Bill 24 - Miscellaneous Statutes Amendment Act (no. 2), 2018", 1st reading, *Official Report of Debates (Hansard)*, British Columbia, Legislative Assembly, 41-3, No. 127 (26 April 2018) at 4294 (Hon. David Eby).

[12] Section 34 of the *Act* as amended states:

> 34 (1) The owner of a parcel of land on which there is a building, structure, improvement or work may apply to the Supreme Court for an order permitting the owner to enter adjoining land to carry out repair or work if
>
> (a) the building, structure, improvement or work is so close to the boundary of the adjoining land that repair or work on the part of the building, structure, improvement or work that adjoins the boundary cannot be carried out without entering the adjoining land, and
>
> (b) the consent of the owner of the adjoining land to the entry is refused or cannot reasonably be obtained.
>
> (2) An order under subsection (1) must state the following:
>
> (a) the period of time and purpose for the permission;
>
> (b) that the owner who obtains the order must compensate the adjoining owner for damage caused, in the course of carrying out repair or work under the order, by the owner who obtains the order, or by anyone employed or engaged by or on behalf of the owner who obtains the order, in an amount to be determined by the court if the owners cannot agree;
>
> (c) other terms the court considers reasonable.

[13] Counsel agree there is no authority directly on point.

[14] The petitioners submit that s. 34 of the *Act* is to be considered remedial and is to be given a fair and liberal interpretation. The petitioners rely on *Oyelese v. Sorensen,* 2013 BCSC 940, where Justice Fitzpatrick, in addressing an encroachment issue under s. 36(2) of the *Act*, noted that:

> [20] The *Act* is, in accordance with s. 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, to be construed as "remedial" and is to be given a "fair, large and liberal construction and interpretation as best ensures the attainment of its objects".
>
> …
>
> [27] The interpretation proposed by the Oyeleses is not consistent with a fair, large and liberal construction and interpretation that ensures that the objects

> of the *Act* are attained—namely, to resolve neighborhood disputes about encroachments based on equitable principles. …

[15] They note as well the comment in obiter of Justice Macintosh in *Chua v. Jassal*, 2019 BCSC 1686, varied 2020 BCCA 283, regarding the resolution of such neighborhood disputes:

> [21] While this one paragraph of these reasons is not a legal adjudication, I strongly recommend that the Defendants leave the wooden fence where it is and permit the Plaintiffs access to it to perform any final repairs or touch-ups, and to maintain it in future. None of the property owners who testified in this case appeared to me to be unreasonable people, and as I noted earlier, were it not for the Plaintiffs' mistaken belief that they had a right to a new retaining wall made of poured concrete on the Defendants' property, none of this unfortunate impasse likely would have occurred. I strongly hope the parties will resume the relationship of good neighbours they enjoyed in the past.
>
> [Emphasis added.]

[16] The petitioners' submission is that s. 34 as amended permits access to property enclosed by land owned by others and that the intent, based on a fair and liberal construction and interpretation, is to permit ongoing limited access to the adjoining land for a specified purpose where the landowner will not reasonably permit such access.

[17] The petitioners also note that they are required to keep the fence in good condition and repair by the Township of Esquimalt, Bylaw No. 2826, *Maintenance of Property and Nuisance Regulation Bylaw* (2014) ("*Maintenance Bylaw"*) and doing so requires access to both sides of the fence. The *Maintenance Bylaw* provides:

> 2 "Unsightly Property" includes Land that displays any one or more of the following characteristics to such an extent that as a whole it looks unkempt, unmaintained, dilapidated or in disrepair:
>
> (c) any building, structure, fence, external surface, or parts thereof, that contains holes, breaks, rot, or that is crumbling or cracking, or is covered with rust or peeling paint, or any other evidence of physical decay, neglect, excessive use, or lack of maintenance;
>
> …
>
> 8(2) No Owner or Occupier shall cause or permit Refuse or noxious, offensive or unwholesome objects, materials or items from collecting or accumulating oil or around the Land of that Owner or Occupier. No Owner or

> Occupier shall cause or permit the Land of the Owner or Occupier to become or remain an untidy or Unsightly Property.
>
> …
>
> 12(3) Every Owner or Occupier shall maintain any fence on the Land of that Owner or Occupier in good condition and repair, and shall repair such fence if it falls into a state of disrepair.

[18] The petitioners argue their request for yearly access to the Respondents' Property on an ongoing basis reflects the remedial nature of the *Act* and ensures they are able to fulfill their obligations under the *Maintenance Bylaw*, without the cost and inconvenience of having to obtain a court order every time the fence requires repair and/or maintenance.

[19] The respondents object to the orders sought on two grounds. First, the respondents submit the petitioners have not established that the respondents have refused entry, or that such cannot reasonably be obtained. Second, the respondents assert that s. 34 does not contemplate the type of ongoing order sought by the petitioners.

[20] Regarding the first objection, the respondents submit the conditions for s. 34(1)(b) have not been satisfied. They submit the petitioners have not meaningfully engaged in the process of negotiating who is to come onto their land, when, for how long and for what purpose. Further the respondents assert that the petitioners have to engage with the respondents' preference that a third party do the work.

[21] From the limited affidavit evidence, it is clear the parties do not get along. Correspondence provided establishes counsel for the petitioners sought permission to paint the fence and, if required, have a third party do the work. Counsel indicated the work would take about three hours. The respondents were non-responsive. In his affidavit, the respondent Ernest Hooker denies certain allegations against him and notably challenges the survey of the fence prepared for the petitioners. Mr. Hooker deposed that they "dispute" the survey but he provided no evidence in

support. The respondents had refused access to the surveyor to prepare the survey of the fence.

[22] I am satisfied the consent of the respondents cannot be reasonably obtained hence the conditions required by s. 34 have been met.

[23] Turning to the respondents' second objection concerning the type of order that can be made under s. 34, the respondents object not to the access itself but rather to the ongoing nature of the order sought. They submit s. 34 is not capable of supporting such an order. Instead, they submit that s. 34 contemplates an order allowing for a single instance of access for repairs or maintenance—not what is in effect equivalent to an easement allowing continuous access for as long as the parties own their respective properties.

[24] The respondents submit the petitioners rely on too broad a reading of s. 34, noting the policy and purpose of the Torrens system. In *Roop v. Hofmeyr,* 2016 BCCA 310, the Court of Appeal described the Torrens system:

> [57] There are strong policy reasons for preserving the Torrens system of land registration from unregistered interests. The abrogation of the doctrine of implied grant by the *Land Title Act* with respect to subsequent good faith purchasers is rooted in the general principles upon which the Torrens system is premised. In *Principles of Property Law*, 6th ed. (Toronto: Carswell, 2014) at 481, Professor Ziff described the foundation of the Torrens system as follows:
>
> > Under Torrens the register is supposed to be everything. That means that one should (in theory anyway) be able to examine an abstract of title for a specific parcel of land and see listed there all of the interests in land that pertain to that parcel. The register is said to be a mirror of all rights in relation to that land.

[25] By way of analogy the respondents refer as well to *Banville v. White,* 2002 BCCA 239 a decision regarding s. 35 of the *Act*. Section 35(1) of the *Act* provides:

> (1) A person interested in land may apply to the Supreme Court for an order to modify or cancel any of the following charges or interests against the land, whether registered before or after this section comes into force:
>
> (a) an easement;

[26] In *Banville*, the Court of Appeal held that s. 35 is not to be used to expand the scope of an interest in land:

> [23] There are two cases which appear to be against the trial judge's interpretation. In *Firman v. Michaleski*, [1995] B.C.J. No. 2696 (December 15, 1995) Victoria Registry, 3742/94 B.C.S.C., Drake J said at p. 7:
>
> > The statute invests the Court with a discretion to modify an easement only on very limited grounds; of which the reflection of current use is not one: "current use" being a changeable thing in the course of time. Nor does the discretion, in my opinion, extend to changing the terms of a grant at the request of a party who wishes to regain full proprietary rights over all or part of the land impressed with the easement.
>
> [24] In *Sidhu v. Chandra*, [1997] B.C.J. No. 88 (B.C.S.C.), Mr. Justice Boyle said:
>
> > [26] I agree with the Respondent's argument s. 31 applies to the servient party bearing the burden of a charge against the land and does not provide a remedy to the dominant party who enjoys the benefit.
> >
> > [27] I agree with the Respondent's statement that s. 31 "is not intended to provide a chargeholder with the means to expand the scope of his/her interest in the land." If expansion were contemplated by s. 31, it would give a power similar to expropriation of a right in the land.
> >
> > [28] S. 31(4)(b) requires notice to "the persons who appear entitled to the benefit of the charge or interest to be modified or cancelled." From that requirement it appears the holder of the servient tenement, not the charge holder, must be the applicant. The “land” referred to in the section is the title holder’s land, not the charge holder’s.
>
> [25] I respectfully agree with these conclusions. I am therefore of the view that the learned trial judge erred in purporting to "modify" the easement across the Banvilles' property in the Whites' favour, in order to include the turnaround by applying s. 35 of the *Property Law Act*.

[27] In addition, the respondents rely on *Grieve v. Huntley,* 2006 BCSC 1112 in support of their submission that one cannot expand interests in land. The respondents submit that s. 34 cannot have been intended to have the effect of creating an interest in land for as long as the owners involved own their respective interests, hence it is doubtful that a large and liberal reading should permit such. In *Grieve,* the Court stated:

> [21] The section, as evidenced by its wording, only operates to modify or cancel an existing easement. It does not create easements. This is supported by the case law referencing the subsection, all of which do not purport to create an easement but instead modify or cancel existing easements, see: *Fisher v. Bosse*, 2005 BCSC 236; *Prinsen v. Wickland* (2003) 32 B.C.L.R. (4th) 141, 2003 BCSC 1795.

[28] The matter turns on the plain meaning of the wording of Section 34. Section 34 permits access to carry out repair or work. That implies such is necessary at that time, not some speculative work at some speculative future date. Section 34(2) states that the order sought must set out the period of time and purpose for the permission sought, that the owner seeking the order must compensate for damage and such other terms as the court considers reasonable.

[29] A plain reading of the section is it refers to a single occasion for access. That is, repairs or work are necessary and a specific time for that purpose is ordered. It makes no mention of a recurring or ongoing right of access. Section 35 of the *Act* addresses such, referencing easements, restrictive covenants, statutory rights of way and the like.

[30] Section 8 of the *Interpretation Act,* R.S.B.C. 1996, c. 238 requires that the purpose or object of the legislation in issue is kept in mind and the interpretation is remedial in the sense of a liberal interpretation to give effect to that purpose. Here the purpose is to permit access to another's property to effect necessary repairs and maintenance.

[31] The petitioners dispute the respondents' analogy to their request amounting to an easement noting the proposed right of access is a contractual one binding only on the present owners of the two properties not an *in rem* charge on respondents' land.

[32] The petitioners submit they should not have to come to court every year just to look at the fence to determine whether it requires any repairs or maintenance. They depose they have tried for eight years to gain access to the fence, two of those years with the assistance of a lawyer, all to no avail.

[33] The reliance of the petitioners on s. 8 of the *Interpretation Act* to support a long term right of access goes beyond that purpose. While what is sought is an order relating to *in personum* rights and not an *in rem* remedy, nonetheless it goes beyond the wording of s. 34.

[34] I therefore make the following orders:

a) The Petitioners be granted access to the Respondents' property, pursuant to s. 34 of the *Property Law Act*, R.S.B.C. 1996, c. 377, located at 933 Inskip Road, Victoria, B.C., Canada, V9A 4J6 and legally described as:

> Strata lot B, section 10, Esquimalt District Strata Plan VIS4845 Together with an interest in the common property in proportion to the unit entitlement of the strata lot as shown on Form 1
>
> (the "Respondents' Property")

b) Access for maintenance and repair and any future maintenance and repair is granted on the following terms:

i. The Petitioners will provide 48 hours written notice to the Respondents prior to accessing the Respondents' Property for the purposes of repairing and/or maintaining the Fence. The notice shall include details of:

(1) the type of work anticipated or being undertaken;

(2) the persons or company engaged by the Petitioners undertaking the work; and

(3) the expected duration of the work.

(the "Written Notice")

ii. Service of the Written Notice will be made either by:

(1) if the Respondents provide an email for service, by emailing notice to the email address provided, pursuant to Rule 4-2(6)(a) and (b) of the *Supreme Court Civil Rules* (the "*Rules*"*);* or

(2) by leaving the document in the Respondents' mailbox pursuant to Rule 4-2(3) (a) and (b) of the *Rules.*

iii. The Petitioners shall compensate the Respondents in the case of damage caused to the Respondents' Property by the Petitioners, or a third party engaged by the Petitioners, in the course of carrying out repairs and/or maintenance to the Fence.

iv. The Respondents must provide proof of damage in the form of photographic or video evidence in the case of an allegation of damage to the Respondents' Property.

v. Where the Petitioners, or a third party engaged by the Petitioners, have been alleged to cause damage to the Respondents' Property in the course of carrying out repairs or maintenance to the Fence, and the parties are unable to come to an agreement regarding a remedy for the damage, the Respondents may apply to the British Columbia Supreme Court (the "BCSC") for determination of a remedy for the damage.

[35] I turn to the petitioners' request for declaratory relief regarding the ownership of the fence.

Request for Declaratory Relief

[36] The petitioners seek a declaration that they are the sole owners of the fence pursuant to R. 20-4. The fence runs along the property line on the petitioners' property other than 0.02" at the rear of the fence and 0.44" at the front of the property.

[37] They seek the declaratory relief to "settle any dispute over ownership of the fence, as a preventative measure".

[38] Rule 20-4 provides:

> A proceeding is not open to objection on the ground that only a declaratory order is sought, and the court may make binding declarations of right whether or not consequential relief is or could be claimed.

[39] The difficulty with the declaration sought is according to the survey the fence at each end is not on the property of the petitioners.

[40] In *Greater Vancouver Regional District v. British Columbia (Attorney General)*, 2011 BCCA 345 at paras. 50–51, the Court of Appeal addressed when a declaratory order is not available:

> [50] In arguing that the forms of declaration I have described in para. 48 are possible outcomes, the District relies strongly on R. 5(22) of the *Supreme Court Rules* (now Supreme Court Rule 20-4), which is the modern version of a rule first introduced in England in 1875 to overcome a common law rule to the contrary. Rule 5(22) provided:
>
> > No proceeding shall be open to objection on the ground that only a declaratory order is sought, and the court may make binding declarations of right whether or not consequential relief is or could be claimed.
>
> (See Zamir*, The Declaratory Judgment* (1962) at 10-1; *Kourtessis v. M.N.R*. [1993] 2 S.C.R. 53; *Guaranty Trust Co. of New York v. Hannay & Co*. [1915] 2 K.B. 536 (C.A.) at 557-62*; Kaska Dena v. British Columbia (Attorney General)* 2008 BCCA 455, 85 B.C.L.R. (4th) 69, at para. 12. See also the *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, s. 11(2).)
>
> [51] There is no doubt that the balance of judicial opinion is in favour of the liberal exercise of the declaratory power (*Zamir, supra*, at 12, citing *Dyson v. Attorney General* [1911] 1 K.B. 410; see also Zamir and Woolf, *The Declaratory Judgment* (2002) at s. 3.012). At the same time, it is also clear in Canada that a declaratory order is not available to provide an opinion that will not settle a "real" dispute between the parties. As Dickson C.J.C. stated for the majority in *Operation Dismantle Inc. v. Canada* [1985] 1 S.C.R. 441:
>
> > ... the preventative function of the declaratory judgment must be based on more than mere hypothetical consequences; there must be a cognizable threat to a legal interest before the courts will entertain the use of its process as a preventive measure. As this Court stated in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, a declaration could issue to affect future rights, but not where the dispute in issue was merely speculative. ... [At 457.]
>
> Dickson J. also stated in *Canada v. Solosky* [1980] 1 S.C.R. 821, in an oft-quoted passage:
>
> > Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal

> relationship, in respect of which a 'real issue concerning the relative interests of each has been raised and falls to be determined. [At 830.]
>
> [Emphasis in original].

[41] The declaration sought does not resolve the “real issue” between the parties. In addition, given the apparent encroachment of the fence the issue of its ownership is specifically addressed under s. 36(2) of the *Act*:

> 36 (1) For the purposes of this section, "**owner**" includes a person with an interest in, or right to possession of land.
>
> (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 it no longer encroaches on or encloses any part of the adjoining land.

[42] A declaration would only address the fence to the extent it is on the property of the petitioners. The encroaching portions remain. I decline therefore to make the declaration sought under R. 20-4. If the parties cannot agree on the fence location and the granting of an easement, then an application pursuant to s. 36 may be appropriate.

Costs

[43] Petitioners seek their costs. They submit failure of the respondents to respond to letters from them and their counsel necessitated this application. It appears those communications did not require an ongoing right of access, and such was only sought when the application was filed.

[44] The respondents in their response opposed the orders sought firstly on the basis the petitioners had not satisfied the conditions of s. 34(1)(b) by not

meaningfully engaging in discussion and negotiation in the process of agreeing upon dates for the work to be undertaken, who will perform it and secondly on the basis the petitioners have misunderstood what kinds of order s. 34 is capable of sustaining, specifically that s. 34 allows for orders allowing a single instance of access for repairs not an “ongoing easement”.

[45] The petitioners have established the need to bring the application. They have been successful in securing access pursuant to s. 34. The respondents have failed to establish they reasonably did not reach agreement for access. In such circumstances the petitioners are entitled to their costs at scale B.

“The Honourable Mr. Justice Punnett”