IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Baxandall v. Campbell,*
2024 BCSC 529

Date: 20240403
Docket: S239154
Registry: New Westminster

Between:

Bradley Percy Scott Baxandall and
Jennifer Anne Nelson

Plaintiffs

And:

Blaire Tiffy Edward Campbell and
Adrianne Alyse Campbell

Defendants

Before: The Honourable Mr. Justice Riley

Reasons for Judgment

Counsel for the Plaintiff:	M.P. Katzalay
Counsel for the Defendants:	N. Mulholland
Place and Date of Hearing:	New Westminster, B.C. December 11, 2023 January 24, 2024
Place and Date of Judgment:	New Westminster, B.C. April 3, 2024

2024 BCSC 529 (CanLII)

2024 BCSC 529 (CanLII)

Introduction

[1] These are reasons for judgment on a summary trial application in an action for trespass. The plaintiffs own a residential property on 192 Street in Surrey, immediately adjacent to a neighbouring property owned by the defendants. The plaintiffs claim that certain structures owned by the defendants, namely a deck and a number of fences, encroach on their property. By way of remedy, the plaintiffs seek a declaration that the defendants are trespassing, together with an order under s. 36(2)(c) of the *Property Law Act*, R.S.B.C. 1996, c. 377 requiring the defendants to remove the encroaching structures.

[2] The position of the defendants is twofold. First, they say the matter is not suitable for determination by way of a summary trial, arguing that the application should be adjourned pending cross-examination on some of the affidavits filed by the plaintiffs, and further that a summary trial will not allow the defendants to elicit all of the evidence necessary to assess the equities of the situation. This point plays into the second argument advanced by the defendants, namely that the court has a broad discretion to assess the equities of the situation, and if the court is prepared to rule on the merits, the appropriate remedy in this particular case is to grant an easement under s. 36(2)(a), or a vesting order under s. 36(2)(b) of the *Property Law Act*, thus allowing the defendants to leave the encroaching structures in place.

Facts

The Two Adjacent Properties

[3] The plaintiffs Mr. Baxandall and Ms. Nelson are the owners of a residential property on 192 Street in Surrey, which they acquired on 28 May 2020.

[4] The defendants Mr. and Ms. Campbell are the owners of an immediately adjacent residential property, also on 192 Street, which they acquired on 1 November 2018.

[5] The Baxandall property is situated on the northeast corner of 192 Street and 70 Avenue, with 192 Street running along the west side of the property, and 70

Avenue running along the north of the property. The property has a single-family residence facing west onto 192 Street, and a coach house at the back of the property, adjacent to a laneway on the east side the property.

[6] The Campbell property is immediately south of the Baxandall property. It also has a single-family residence facing west onto 192 Street, and a coach house on the east side of the property adjacent to the laneway.

[7] The common property line between the two properties runs east-west, along the south side of the Baxandall property and the north side of the Campbell property.

The Dispute Concerning Alleged Encroachments

[8] The claims advanced by the plaintiffs are focused on four structures said to encroach on their property, namely: (i) a ground-level deck in the back yard of the Campbell property, said to extend over the property line onto the Baxandall property; (ii) a high wooden fence in the back yard of the Campbell property, running perpendicular to the property line, across the line and right up to the south wall of the Baxandall residence; (iii) a high wooden fence in the front yard of the Campbell property, running perpendicular to the property line, across the line and right up to the south wall of the Baxandall residence; and (iv) a low wooden fence running along the front and north side of the Campbell property, allegedly over the property line along the south side of the Baxandall property.

[9] The first three of these structures – the deck, the high back fence, and the high front fence – were present when the plaintiffs acquired their property in 2020. The fourth structure – the low wooden fence – was erected some time after the plaintiffs took possession of their property.

Initial Dialogue Between the Parties

[10] On or about 7 June 2020, shortly after the plaintiffs took possession of their property, Mr. Baxandall and Mr. Campbell had a conversation about the property line and the placement of the structures. It appears to be common ground between the

2024 BCSC 529 (CanLII)

parties that the conversation took place, although there is a dispute about the particulars. I would summarize the competing accounts of what was said as follows:

a) After showing Mr. Campbell a survey certificate that he had received when he acquired his property, Mr. Baxandall expressed concern that the deck and the two fences were over the property line and encroaching on his property.

b) Mr. Baxandall claims that Mr. Campbell acknowledged the encroachment and implied that he would move the structures.

c) Mr. Campbell does not deny having a conversation during which he was shown a survey certificate, but denies making any concessions about the location of the property line, and further denies that he agreed to remove the structures.

d) Mr. Campbell claims that Mr. Baxandall was aggressive and belligerent during the conversation.

[11] Although the particulars of the initial conversation are in dispute, I find the conflicting details to be inconsequential for the purposes of the legal analysis undertaken below.

The Target Land Survey

[12] In July 2020, Mr. Baxandall arranged for a survey crew from Target Land Surveying to conduct a survey to determine the exact location of the property line. Using string, stakes, and spray paint, the survey crew marked out the property line, which indicated that all four structures – the wooden deck, high back fence, high front fence, and low front fence – were encroaching on the Baxandall property.

[13] Appended to Mr. Baxandall's first affidavit are photographs showing the string, stakes, and spray paint demarcating the line between the two properties, at

2024 BCSC 529 (CanLII)

least as it was ascertained by the survey crew in July 2020. These photographs show that:

a) The Campbell deck runs over the property line as depicted by the surveyor markings. To be more precise, the deck appears from the photographs to be at least several feet – or at least the width of seven wooden planks running the entire length of the deck – over the property line. The north edge of the deck runs parallel to the southern wall of the Baxandall residence. In my estimation, based on the photographs, the north edge of the deck appears to be a matter of inches away from the wall of the Baxandall residence.

b) The high back fence is near the back (east end) of the two properties. It runs perpendicular to the property line as reflected in the surveyor markings, over the line and right up to the south wall of the Baxandall coach house.

c) The high front fence is near the front (west end) of the two properties. It also runs perpendicular to the property line indicated by the surveyor markings, over the line and right up to the south the wall of the Baxandall residence. This fence has a swinging gate, on the Campbell side of the property line, allowing passage between the front and back yard of the Campbell property.

d) The low front fence runs parallel to the property line, close to the line itself. However, there is one photograph (photograph #20 in Mr. Baxandall's first affidavit) showing that the northwest corner of this fence is entirely over the line. The south edge of the fence is two inches over the line.

[14] Mr. Baxandall alleges that in conversing with Mr. Campbell on the date of the survey, Mr. Campbell once again admitted that the subject structures were encroaching on the Baxandall property and said he would move them, but then changed his position 30 minutes later, after the surveyors left. For his part,

2024 BCSC 529 (CanLII)

Mr. Campbell admits speaking to Mr. Baxandall on or around the date of the survey, but denies making any admissions or concessions, asserting once again that Mr. Baxandall was aggressive and intimidating. Once again, I do not find the points in dispute between the parties to be consequential to the outcome of the application.

2024 BCSC 529 (CanLII)

Removal of the Survey Markings

[15] The photographs appended to Mr. Baxandall's first affidavit also reflect that at some point the wooden stakes erected by the surveyors were pulled out of the ground and placed in a pile next to the Baxandall residence. Mr. Baxandall avers that he did not remove the stakes and speculates that Mr. Campbell or someone associated with the Campbells must have done so. I would not place any weight on Mr. Baxandall's speculation.

Position of the Defendants as to the Historical Use of the Properties

[16] In his first affidavit, Mr. Campbell says he "purchased [his] property with the deck and fence already constructed". Although Mr. Campbell's affidavit does not distinguish between the three fences – the high back fence, the high front fence, and the low front fence – when Mr. Campbell says in his affidavit that "the fence" was already constructed when he and his wife purchased their property, I take this to be a reference to the high back fence and the high front fence. Mr. Campbell does not specifically deny Mr. Baxandall's averment that the low front fence was erected after the plaintiffs purchased their property, as discussed under the next heading.

[17] In his second affidavit, Mr. Campbell asserts that "[e]ach homeowner on my block occupies the space to the south exterior wall of the property immediately to the north". There is no evidence to contradict this assertion and I have no request to question it.

[18] Mr. Campbell goes on to assert in his second affidavit that the plaintiffs have been encroaching on the city property to the north of their lot, by paving a portion of the city-owned property "to create a space for his tenant to part [his] vehicle". In support of this contention, the defendants have tendered an extract from the

examination for discovery of Ms. Nelson, during which she concedes that a portion of her driveway encroaches a number of “inches” onto the adjacent city property. Ms. Nelson explains that the driveway is constructed with “pavers”, which from the context I take to be some kind of removable stone or concrete blocks.

2024 BCSC 529 (CanLII)

Erection of the Low Front Fence

[19] At some point, the Campbells erected the fourth disputed structure, the low front fence, between the two properties. The plaintiffs say this fence also encroaches upon their property. The fence is depicted in photograph #20 attached to Mr. Baxandall’s first affidavit. A caption at the bottom of this photograph asserts that it was “built after we [the plaintiffs] purchased”. There is no other evidence in the record as to precisely when this fence was erected.

[20] The photographs attached to Mr. Baxandall’s affidavit show that the low front fence basically hems in the front yard of the Campbell property, running along the west (front yard) and north (side yard) of the property. On the north side of the Campbell property, where the property line with the adjacent Baxandall property is located, the low fence runs between the two properties right up to the east side of the high front fence. As noted above, photograph #20 also shows that the northwest corner of the fence is entirely over the property line, on the Baxandall side, by a distance of some two inches.

[21] The low front fence blocks the plaintiffs from accessing the south side of their property, right up to the high front fence. The gate in the high front fence is on the defendants’ side of the property. The net effect is that the plaintiffs cannot access the gate, and therefore cannot gain any access whatsoever to more or less the entire south side of their property, including the south wall of both their residence and their coach house.

The Litigation

[22] On 14 July 2021, having been unable to resolve their differences with the defendants over the precise location of the property line or the status of the

impugned structures, the plaintiffs filed a notice of civil claim alleging trespass, and seeking removal of the structures.

[23] On 17 August 2021, the defendants filed a response to civil claim denying any encroachment, and asserting in the alternative that any such encroachment is "*de minimis*". The defendants also filed a counterclaim alleging harassment, trespass, nuisance, and intentional infliction of emotional distress.

[24] The factual basis for the counterclaim is set out in the first and second affidavits of Mr. Campbell, who claims that since the boundary dispute arose shortly after the plaintiffs took possession of their property, Mr. Baxandall has: (i) communicated with Mr. Campbell and his wife in an "angry", "belligerent", "aggressive", and "intimidating" manner regarding the location of the property line and the status of the disputed structures; (ii) gone onto the Campbell property without permission; (iii) harassed visitors and recorded comings and goings from the Campbell property; (iv) placed surveillance cameras directed at the Campbell property; (v) peered into the windows of the Campbell residence from his rooftop; and (vi) permitted or instructed a roofer to park his truck on the Campbell property.

[25] Neither of the affidavits Mr. Baxandall filed in the summary trial application respond directly to Mr. Campbell's allegations, which are not the focus of the summary trial application. However, there are two features of Mr. Baxandall's affidavit evidence with at least some bearing on Mr. Campbell's harassment claims.

[26] First, attached to Mr. Baxandall's first affidavit is a photograph of a sign on the side of the Campbell residence, that says, "WARNING, NO TRESPASSING", along with a pictogram of a video camera along with the words "24 HOUR VIDEO SURVEILLANCE". The caption to the photograph says, "Neighbour has numerous cameras facing our property". This implies that at least some of the conduct that Mr. Campbell alleges to be intrusive has been reciprocal in nature.

[27] Second, Mr. Baxandall also states in his first affidavit that on a number of occasions, after he merely "looked over the fence near the alley on the south side of

2024 BCSC 529 (CanLII)

[his] property", the defendants called the police. Mr. Campbell admits that he contacted the police on multiple occasions, claiming he had a reason for doing so, but without providing any particulars of the incidents.

Adjournment of the Trial

[28] A 10-day trial on all of the claims was scheduled for 29 May 2023. As the trial date approached, the plaintiffs were self-represented and had not filed any expert reports. It appears that they intended to rely on the Target Land Survey to prove the alleged trespass, even though it was not in the form of an admissible expert report.

[29] On or about 26 April 2023, the plaintiffs retained their current counsel. Shortly thereafter, counsel served two expert reports — a land survey report and a real estate appraisal report — but these reports were served on the defendants well past the 84-day time limit provided for in Rule 11-6(3) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009.

[30] On 29 May 2023, the first day of the trial, counsel for the plaintiffs applied for an adjournment of the trial, or alternatively an abridgement of the time requirements for serving of expert reports. Justice Kirchner granted an adjournment, on a number of conditions, including a term that "[t]he security cameras owned and operated by all parties" were to be repositioned so as to capture only the area between the houses, without showing the opposing party's windows or front or back yards.

The Fulkerson Expert Reports

[31] The plaintiffs subsequently obtained two further expert reports from Mr. Fulkerson, a Certified Professional Land Surveyor who is the principal of Target Land Surveys. These reports are attached as exhibits to the affidavit of Mr. Fulkerson, filed by the plaintiffs in support of their summary trial application.

2024 BCSC 529 (CanLII)

[32] The first Fulkerson report, dated 19 July 2023, explains the process followed by the Target Land Surveying crew, under Mr. Fulkerson's direction, in conducting their survey of the subject properties on 28 July 2020. In particular:

a) Acting under Mr. Fulkerson's direction, the survey crew located a total of five iron posts in various locations corresponding with the subdivision plan. Some of these posts were bent, but the crew was able to conduct their measurements from their bases.

b) One of the iron posts was located in the northwest corner of the Campbell property (Lot 38). The others were found in other locations throughout the subdivision.

c) Using these five iron posts as the starting point for their survey, the survey crew marked out the property lines of the Baxandall property (Lot 37) and the Campbell property (Lot 38).

d) This process yielded a set of property measurements that fit within +/- 6 cm between all the posts. Excluding the worst fitting post improved the fit to +/- 4 cm.

e) The survey crew used their measurements to identify the property line between the Baxandall property (Lot 37) and the Campbell property (Lot 38), which the crew then marked with stakes and spray paint.

f) Using the data collected by the survey crew, Mr. Fulkerson then produced a document entitled "Sketch Plan of Encroachment Onto Lot 37". The sketch plan shows that:

    (i) the high front fence runs over the property line, extending 1.22 metres onto the Baxandall property, right up to the exterior wall of the Baxandall residence;

2024 BCSC 529 (CanLII)

(ii) the deck runs over the property line extending 1.04 metres onto the Baxandall property, within centimetres of the exterior wall of the Baxandall residence;

(iii) the high back fence runs over the property line, extending 0.59 metres onto the Baxandall property, right up to the exterior wall of the Baxandall coach house; and

(iv) the low front fence runs essentially along the property line between the front yard of the two properties; it is not clear from the sketch plan that this fence is over the line, but this is clarified in Mr. Fulkerson's first report, which states that this fence "cross[es]" the property line and "is situate on the Baxandall/Campbell Property".

g) Mr. Fulkerson also obtained the foundation location certificates for the two subject properties, Lot 37 and Lot 38, both prepared by a different Certified Professional Land Surveyor in 2010. The measurements on these certificates agree with the results of the Target Land Survey conducted under Mr. Fulkerson's direction on 28 July 2020. In particular, the foundation location certificate for Lot 37 indicates that the south wall of the foundation for the Baxandall residence is 1.21 metres from the property line, and the south wall of the foundation for the Baxandall coach house is 0.61 metres from the property line.

[33] The second Fulkerson report, dated 20 July 2023, was intended to document the steps taken by Mr. Mr. Fulkerson to personally confirm the data relied upon in the first report. Thus, on 13 July 2023, Mr. Fulkerson personally attended the survey site, in the company of the survey technician who conducted the initial survey, to look for additional legal evidence of the property lines, and confirm the original survey results. While at the site, Mr. Fulkerson was able to locate a total of five more iron posts (two straight posts and three bent posts) corresponding with the subdivision plan. After incorporating these additional posts into the property line measurements, Mr. Fulkerson was able to improve the fit to +/- 4 cm. The results did

2024 BCSC 529 (CanLII)

not alter Mr. Fulkerson's original opinion as to the boundary between the two properties and the degree of encroachment of the impugned structures as set out in the first Fulkerson report.

Real Estate Appraisal

[34] The plaintiffs also obtained an expert report dated 11 May 2023 from Mr. Hara, a realtor. Mr. Hara's report is attached as an exhibit to his affidavit, filed by the plaintiffs in support of the summary trial application.

[35] I would summarize the opinions offered by Mr. Hara in three propositions.

[36] First, in Mr. Hara's view, based on an assessment of comparable properties, as of the date of the report the market value of the Baxandall property if the encroaching structures (the deck and fences) were removed would be $1,425,000.

[37] Second, Mr. Hara opined that the continued presence of the encroaching structures on the Baxandall property would make it "significantly more difficult to obtain a fair market price". The factors contributing to that conclusion were: (i) the loss of useable square footage due to the presence of the encroaching structures; (ii) the inability to access the south side of the Baxandall house because access is blocked by the encroaching structures; (iii) the extremely close proximity of the neighboring property; and (iv) the "general aversion that most purchasers have" to encroachments that could interfere with the use and enjoyment of the property.

[38] Third, Mr. Hara's opinion was that if the property were to be marketed as is, without the removal of the encroaching structures, the expected sale price would be "approximately $200,000 less" than the aforementioned fair market value.

Contractor's Opinion

[39] The plaintiffs also tendered an affidavit from Mr. McLennan, a residential building contractor and ticketed carpenter, appending a copy of his expert report as to the costs of removing the encroaching structures. In the report, Mr. McLennan offers the opinion that it would cost a total of $715 to remove the encroaching

2024 BCSC 529 (CanLII)

structures (the deck and fences) from the Baxandall property. Attached to Mr. McLennan's report is a job estimate quoting the same total, $715, to remove the encroaching portions of the structures. The quoted price includes the costs of material disposal and taxes.

[40] Mr. McLennan's report also offers an opinion on the costs of replacing the vinyl siding on the south side of the Baxandall residence to repair damage allegedly caused by the neighbours and, or the encroaching structures. It is not necessary to address this aspect of Mr. McLennan's report, because it is relevant only to the damages claim which the plaintiffs have not proposed to pursue as part of the summary trial application.

2024 BCSC 529 (CanLII)

Additional Evidence as to the Manner of Use of the Disputed Area

[41] Attached to Mr. Baxandall's second affidavit is a photograph showing an overhead view of the space between the Baxandall property and the Campbell property. Mr. Baxandall explains that he took the photograph on 16 November 2023, and then drew a red line down the centre, representing "the approximate location of the true property line" based on his understanding of the Target Land Survey.

[42] Mr. Baxandall proceeded to mark the photograph with a total of 38 small yellow circles, drawn around piles of dog feces. Mr. Baxandall deposes that some of the dog feces is in or immediately adjacent to the window well for his basement suite. The window well is depicted in the photograph. One pile of feces can be seen at the bottom of the window well, and a further six or seven piles of feces are just in front of the window well, evidently on the Baxandall side of the property.

[43] Mr. Baxandall deposes that his basement tenant is "prevented from having the window open due to the foul smell of dog feces outside the window". The smell of the dog feces also discourages Mr. Baxandall from opening his own kitchen window, which is "[d]irectly above" the basement tenant's window.

[44] From my observations of the photograph, 25 of the 38 piles of feces are on the Baxandall side of the property line. Even if one were to err on the side of caution

by shifting the line two to four centimetres closer to the Baxandall property, many of the piles would still be on the Baxandall side. Furthermore, since the low front gate, high front gate, and high back gate block the plaintiffs from gaining access to the entire south side of their residence, the plaintiffs would be unable to clean up this dog feces even if they were prepared to take on this task themselves rather than relying upon the defendants to do so.

[45] Mr. Campbell's response is set out in his second affidavit, sworn on 5 December 2023. In it, Mr. Campbell does not directly deny that the dog feces depicted in Mr. Baxandall's photograph came from his dog or his tenant's dog. Rather, his response is to "attest that I pick up my dog's feces regularly and ensure that it is not left on the ground for an extended period". Mr. Campbell has also "emphasized to [his] tenant that they must pick up their dog's feces regularly and not let it lay there for any time".

[46] Mr. Campbell also alleges in his affidavit that despite the order made by Justice Kirchner on 29 May 2023, requiring the parties to reposition their security cameras so as to avoid capturing the opposing party's windows or yards, the plaintiffs have "yet to adjust the cameras pointed at [the defendants'] property".

Analysis

(1) Suitability for Summary Trial

[47] Summary trials are governed by Rule 9-7. Two sub-rules are of particular interest in addressing suitability of a case for summary trial, namely Rule 9-7(11) and Rule 9-7(15).

[48] Rule 9-7(11) provides that on or before the hearing of a summary trial application, the court may adjourn or dismiss it on the grounds that the issues raised are not suitable for summary disposition, or that the application will not assist in the efficient resolution of the proceedings. Thus, Rule 9-7(11) allows for a preliminary determination of suitability, either in advance of or at the outset of the summary trial application. In deciding whether to exercise the authority to "pre-

2024 BCSC 529 (CanLII)

emptively" dismiss a summary trial application, the court must consider, firstly, whether the matter is suitable to be determined in a summary trial, and secondly, whether a summary trial would assist in the efficient resolution of the proceedings: *Eisler v. GWR Resources Inc.*, 2018 BCSC 162 at para. 58.

[49] Rule 9-7(15)(a) sets out the circumstances in which the court may grant judgment on a summary trial application, either on a specific issue or generally. Judgment may be granted by way of summary trial unless the court is (i) unable to find the facts necessary to decide the issues, or (ii) of the opinion that it would be unjust to decide the issues summarily. In considering whether it would be unjust to decide a matter in a summary trial, the court should have regard to a variety of factors, including: the amount involved, the complexity of the case, its urgency, any prejudice associated with a delay in the proceedings, the cost of proceeding to a full trial by comparison to the amount involved, and the history and status of the proceedings: *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 at para. 49(C.A.) [*Inspiration Mgmt.*]. Other relevant factors include the costs of the litigation, whether credibility is a critical factor in resolving the issues, whether a summary trial will create unnecessary complexity in the resolution of the case, and whether it would result in "litigating in slices": *Gichuru v. Pallai*, 2013 BCCA 60, at para. 31.

[50] This latter phrase, "litigating in slices" is a reference to the concept of severability. Rule 9-7(15)(a) states that the court may grant judgment by way of summary trial on "an issue or generally". As explained by Justice Griffin, as she then was, in *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485, at para. 79 [*Greater Vancouver*], "[a] chambers judge has discretion whether to decide only some issues, with other issues remaining for trial, and should consider if that may assist in settlement and should not feel constrained in doing so". In exercising this discretion, the court must assess whether the administration of justice would be enhanced by a ruling disposing of some but not all the issues in a particular case: *Greater Vancouver* at para. 84, citing *Jam's International Ventures Ltd. v. Westbank Holdings Ltd.*, 2001 BCCA 121 at para. 4.

2024 BCSC 529 (CanLII)

[51] The issue of severability raises two somewhat inter-related aspects of the interests of justice. The first aspect is the overall utility to the court system associated with making a determination on specific issues, working from the premise that it would be unwise to do so where it will not simplify the proceedings or reduce the overall court time required for the litigation. The second aspect is the efficiency of a summary trial "from the standpoint of the litigation itself", bearing in mind that "piecemeal decision-making" is "rarely an efficient manner in which to resolve a dispute", and "raises the possibility of multiple appeals" so as to "impede rather than hasten the orderly determination of the action": *Coast Foundation v. Currie*, 2003 BCSC 1781 at paras. 17–18.

[52] The case law highlights the potential inefficiency or injustice associated with "litigating in slices": *Greater Vancouver* at para. 85, citing *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd.*, 2002 BCCA 138, at para. 7. As Justice Groberman, as he then was, stated in *Coast Foundation* at para. 13, the court may be "justifiably reluctant to decide cases in a piecemeal fashion". However, litigation in slices may be more feasible "if the slice can be made cleanly": *Greater Vancouver* at para. 96. For this reason, the court must consider whether, on the one hand, the issue or issues to be determined by summary trial are sufficiently discrete that they can be separated from the balance of the case, or whether, on the other hand, the issues are "inextricably interwoven" so as to make summary trial on only some issues impossible or impractical: *Greater Vancouver* at para. 97.

[53] In applying these principles to the case at bar, by way of overview, I will first address the question of whether the summary trial application should be adjourned under Rule 9-7(11)(a). I will then turn to the question of whether I am able on the record before me to make the findings of fact necessary to determine the issues as contemplated in Rule 9-7(15)(a)(i). Finally, I will consider whether it would be unjust within the meaning of Rule 9-7(15)(a)(ii) to decide the issues by way of a summary trial. I appreciate that these points are interrelated and are often analyzed together: *Inspiration Mgmt.* at para. 43, citing *Placer Development Ltd. v. Skyline Explorations Ltd.* (1985), 67 B.C.L.R. 366 (C.A.) at 385. In this particular case I find it convenient

2024 BCSC 529 (CanLII)

to discuss these points in the order that I have just described, keeping in mind the key questions are whether it is not possible to make the necessary findings, and whether it would be otherwise unjust to determine the issues by summary trial.

(a) Whether to Adjourn for Cross-Examination

[54] The defendants seek to adjourn the hearing of the summary trial generally, pending cross-examination of Mr. Baxandall, Mr. Hara, Mr. Fulkerson, and Mr. McLennan. The defendants argue that an adjournment is necessary in the interests of justice, citing the factors set out in *Navarro v. Doig River First Nation*, 2015 BCSC 2173 at para. 20, which include: the objective of attaining a just and speedy resolution of the case on its merits, the timeliness of the request, the grounds for the request, and the reasonableness of those grounds, the potential prejudice to each of the parties, the right to a fair trial, and the procedural history.

[55] The principal reason for the adjournment request would appear to be the proposal for cross-examination, which the defendants' counsel says will elicit important evidence. Counsel submits that allowing the defendants to place this evidence before the court is necessary to ensure a full and fair hearing, such that an adjournment is required in the interests of justice.

[56] Cross-examination on affidavits in the context of summary trial is provided for in Rule 9-7(12)(b). There is no right to cross-examination at a summary trial. Leave is required. The burden is on the party seeking leave to show that cross-examination would "benefit [that party's] case": *Magdalena v. Vancouver Coastal Health Authority*, 2016 BCCA 16 at para. 32. Another way of framing the question would be to ask whether there is a reasonable likelihood that cross-examination will elicit evidence of assistance in determining the issue or issues to be litigated in the summary trial: *Lower v. Investment Industry Regulatory Organization of Canada*, 2019 BCSC 175 at para. 80.

[57] In this particular case, the defendants have not shown a basis for the proposed cross-examination. For the reasons that follow, I find that cross-examination could not reasonably be expected to elicit evidence that will assist in the

2024 BCSC 529 (CanLII)

determination of the trespass claim, or the question of appropriate remedies for encroachment under s. 36(2) of the *Property Law Act*.

[58] I accept that there are factual disputes between Mr. Baxandall and Mr. Campbell, but none of the points in dispute have any bearing on either the trespass issue or the statutory remedies for encroachment. The points of fact in issue between Mr. Baxandall and Mr. Campbell all have to do with either (i) details of their conversations that need not be resolved in order to determine the trespass and encroachment claims, or (ii) conduct that is the subject of the counterclaim. None of this evidence will assist the court in determining the location of the property line, whether the impugned structures encroach upon the Baxandall property, or whether the court ought to grant an encroachment remedy under the *Property Law Act*. Cross-examination of Mr. Baxandall could not reasonably be expected to advance the defendants' case on any of these issues.

[59] With respect to Mr. Hara (the real estate appraiser), Mr. McLennan (the contracting expert), and Mr. Fulkerson (the surveyor), the defendants have not tendered any expert reports or other material on which to contradict or challenge the expert opinions. The case law suggests that in the absence of evidence that could be used to test an expert's opinions, leave to cross-examine the expert may be refused on that basis alone: *Magdalena* at paras. 29, 32; *Mikhail v. Northern Health Authority (Prince George Regional Hospital)*, 2010 BCSC 1817 at paras. 70, 81; *Tripp v. Ur*, 2013 BCSC 785 at para. 14.

[60] The central point in Mr. Hara's expert report is his opinion that the market value of the Baxandall property is reduced by $200,000 due to the presence of the encroachments. This opinion is not relevant to legal liability for trespass, because trespass is actionable *per se*. I accept that this opinion will have some relevance in considering the statutory remedies for encroachment, but even on this issue cross-examination intended to show that the opinion is overstated and that the reduction in value might only be 50% or even 25% of Mr. Hara's estimate would, in my view, have a negligible bearing on the calculus under s. 36(2) of the *Property Law Act*. In

2024 BCSC 529 (CanLII)

any event, the defendants have not shown any basis on which to challenge Mr. Hara's opinion, which rests on his extensive experience as a real estate agent, and is supported by cogent reasoning. It is speculative at best to suggest that there would be any benefit achieved through cross-examination of Mr. Hara.

[61] Mr. McLennan's opinion that the physical damage to the Baxandall residence would cost over $30,000 to repair is relevant only to the question of damages for trespass, which is not an issue that the plaintiffs seek to pursue in the summary trial. The one feature of Mr. McLennan's expert opinion that is relevant to the issue of statutory remedy for encroachment is his estimate that it would cost $715 to remove the impugned structures from the Baxandall property. However, the defendants have not put forward any basis for questioning Mr. McLennan's opinion on this point. There is not even a competing quotation for the cost of the work. Further, without delving too far into the merits at this point, I would say that Mr. McLennan's opinion, as a contracting expert with professional qualifications as a carpenter, is hardly earth shattering. What is in issue here is the costs of removing several wooden fences and a total of 75 square feet of wooden decking. I would not expect the removal costs to be exorbitant or prohibitive, and Mr. McLennan's opinion simply confirms what would otherwise be a common-sense inference or assumption. Adjourning the summary trial application to allow for cross-examination of Mr. McLennan on this point would not be consistent with the objective of securing a just, speedy, and inexpensive determination of the merits.

[62] Finally, with regard to Mr. Fulkerson, I consider the subject matter of his expert reports to be fairly technical. He has articulated in considerable detail the steps taken to determine the precise location of the impugned property line and the status of the impugned structures. The defendants have not put forward any competing or contradictory opinion, any potential flaws in the data collection process, or any potential analytical errors in the reports so as to provide a concrete basis for cross-examination of Mr. Fulkerson. Although cross-examination can be a valuable tool in the search for the truth, it is not an absolute right in a summary trial.

2024 BCSC 529 (CanLII)

[63] I therefore decline to grant the defendants' request for an adjournment to facilitate cross-examination. An adjournment is not necessary to serve the interests of justice. The question is not whether a summary trial would allow the parties to address the issues as exhaustively as they would at trial, but rather whether a summary trial will allow the court to adjudicate the particular claims with confidence that the necessary facts can be found and the legal issues determined, in a manner that is just, fair, and proportionate: *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 50, 57; *Greater Vancouver* at paras. 74–77.

(b) Ability to Make Findings of Fact Necessary to Determine the Issues

[64] I turn next to the court's ability to make the findings of fact necessary to determine the issues as contemplated in Rule 9-7(15)(a)(i). In my view, the relevant facts can be determined on the basis of the affidavit evidence, the attached photographs and documents, and the expert reports. Key among these are the two expert reports of Mr. Fulkerson, which delineate the property line between the two properties, and also speak directly to the question of encroachment.

[65] I accept that there are points of fact in issue, in terms of conflicting affidavit evidence from Mr. Baxandall on the one hand and Mr. Campbell on the other. However, it is not necessary to resolve these conflicts in the evidence in order to decide the issues on which judgment is sought by way of summary trial.

[66] Much of the conflicting evidence has to do with certain details of the conversations between Mr. Baxandall and Mr. Campbell. The points in issue include: (a) whether Mr. Campbell ever admitted or conceded that his structures encroached on the Baxandall property, (b) whether Mr. Campbell ever agreed to remove the alleged encroachments, (c) whether Mr. Baxandall harassed or threatened Mr. Campbell in the course of their interactions, and (d) whether Mr. Baxandall went onto or intruded upon the Campbell property. None of these points have anything to do with the question of whether there is a trespass on the Baxandall property due to the presence of the impugned structures, whether those structures constitute

2024 BCSC 529 (CanLII)

encroachments, or whether any such encroachment should be remedied under s. 36(2) of the *Property Law Act*.

[67] Most if not all of the other factual disputes relate to the counterclaim. None of the allegations in the counterclaim need to be resolved in order to decide the trespass and encroachment claims. Even though the conduct complained of in the counterclaim may have been triggered by the dispute over the property line, to the extent that the conduct complained of in the counterclaim is actionable, it would be actionable independent of the precise location of the property line, or the status of the alleged encroachments.

[68] I turn next to the question of severability, that is, whether it would be appropriate for the court to decide the two issues raised in the summary trial application even though this will not dispose of the entirety of the litigation.

[69] For the reasons that follow, I find that the trespass claim and the remedial orders sought under s. 36(2) of the *Property Law Act* are discrete issues, readily separated from the balance of matters in issue in the litigation. The remaining issues, namely damages for trespass and the allegations in the counterclaim, are easily segregated or hived off and left for determination at trial, if necessary.

[70] In my view, the trespass claim is quite straightforward. The basic facts underlying this claim are not really contested, and the outcome does not turn on a qualitative assessment of witness credibility or reliability. To decide this claim, the court need only determine where the property line is, whether the impugned structures encroach on the plaintiffs' property, and whether the elements of trespass have been satisfied. No proof or quantification of damages is required in order for the plaintiffs to make out their trespass claim.

[71] With regard to the remedial order sought by the plaintiffs, namely removal of the alleged encroachments pursuant to s. 36(2) of the *Property Law Act*, this is also a discrete issue. Counsel for the defendants says that because the remedies under s. 36(2) are discretionary, the court will be obliged to undertake a qualitative

2024 BCSC 529 (CanLII)

assessment of the equities involved, based on the totality of the circumstances. While I accept that the remedy requires a weighing of the equities, I do not agree that this is inextricably interwoven with the remaining issues in the litigation, namely the claim for damages or the allegations in the counterclaim.

[72] Trespass is actionable *per se*, hence not dependant upon proof of damages. Should the plaintiffs wish to pursue their claim for monetary damages for trespass, a trial judge would likely be required to embark on a detailed assessment of the use of the Baxandall property over time, and the extent to which that use and enjoyment has been affected by the alleged trespass. The court would also have to hear evidence about the nature and extent of alleged physical damage to the Baxandall property, and the costs required to restore it. Further, the court would need to delve into the degree of fault or level of blameworthiness of the defendants. None of this evidence needs to be considered in determining the claim for trespass itself, which as I have indicated above is relatively straightforward.

[73] The allegations in the counterclaim are also readily distinguishable from the trespass claim and the plea for a remedial order under the *Property Law Act*. Many of the things complained of in the counterclaim, including alleged threats, invasion of privacy, and interference with use and enjoyment of the Campbell property, arise independently from the trespass claim. For example, Mr. Campbell's complaints that the plaintiffs invaded his privacy by peering into or directing surveillance cameras into his windows exist quite independently of where the property line is drawn or whether the impugned structures encroach on the Baxandall property. Although the acrimony between the parties arose because of the dispute over the property line, if there is anything actionable about Mr. Baxandall's conduct, it is not dependant on proof or disproof of the plaintiffs' trespass or encroachment claims.

[74] In my view, the counterclaim allegations are very much on the periphery of what is relevant to the analysis of the remedial order sought under the *Property Law Act*. I do not consider that the conduct alleged in the counterclaims would have a material impact on the remedy analysis under s. 36(2) of the *Property Law Act*, and I

2024 BCSC 529 (CanLII)

see no risk of inconsistent findings. As explained above, while the conduct complained of in the counterclaim might have been triggered by the property line dispute, the counterclaim appears to be actionable regardless of the precise location of the property line or the status of the alleged encroachments. In these circumstances, a continuing dispute about the allegations in the counterclaim should not stand in the way of a conclusive determination of the issues raised in the summary trial application.

[75] Furthermore, on my assessment of the case as a whole, the determination of the issues raised in the summary trial application is likely to advance the litigation. Looking at the action as a whole, the most contentious points are whether the impugned structures encroach on the Baxandall property so as to support a finding of trespass, and whether an encroachment remedy should be granted under s. 36(2) of the *Property Law Act*. A conclusive determination of those points, one way or the other, is likely to clear the way for a resolution of the balance of the issues. Even if it does not, it will narrow the issues to the point where they can be focused on the conduct of the parties in relation to each other, rather than on the status of the property line or the impugned structures.

(c) Whether it is Unjust to Decide the Issues by Summary Trial

[76] Finally, I turn to the question of whether it would be unjust within the meaning of Rule 9-7(15)(a)(ii) to decide the issues raised in the plaintiffs' application by way of a summary trial. In my view, the nature of the claims, the amounts of money in issue, the cost of proceeding to a full trial, and the length of the anticipated trial on all the issues, are all factors weighing in favour of determining the issues raised in the plaintiffs' application in a summary trial.

[77] This issue at the heart of this litigation – the delineation of the property line between the Baxandall property and the Campbell property – is relatively straightforward. Although Mr. Fulkerson's expert reports are quite technical, the exercise of determining the property line is not a complicated matter. The manner in which the defendants propose to litigate the case seems to me, with respect, to be

2024 BCSC 529 (CanLII)

greatly out of proportion to the relative simplicity of the exercise. To hold a 10-day trial on these issues would be out of proportion to the amounts of money involved, the relative importance of the issues, and the lack of complexity of the proceedings.

[78] The defendants argue that determining whether to grant an encroachment remedy under s. 36(2) of the *Property Law Act* requires an assessment of the equities of the case, such that it would be unjust to decide that issue in a summary trial. I do not agree. The history of each party's property ownership, the history of the impugned structures, the manner in which those structures are used by the defendants, the manner in which the same structures affect the use and enjoyment of the plaintiffs' property, and the cost and potential inconvenience associated with the removal of those structures are all readily ascertainable from the whole of the evidence in the summary trial record. A trial is not necessary to assess the equities of the case.

[79] Relief under s. 36(2) of the *Property Law Act* is often dealt with by petition, and petition proceedings are presumptively summary in nature. Courts have had no difficulty assessing the equities at play in such cases, on the basis of affidavit evidence, and without the need for a full trial. See *Singer v. Willows*, 2022 BCSC 241; *Glahn v. Stipec*, 2022 BCSC 2351; *Gainer v. Widsten*, 2006 BCCA 580; *Midway Industrial Park Ltd. v. 659935 B.C. Ltd.*, 2019 BCSC 2153. I appreciate that the question of suitability for trial must be answered on a case-by-case basis. Indeed, there are certainly cases where a petition for relief under s. 36(2) has been converted into a full trial. See *i.e.*, *Wan v. British Columbia*, 2021 BCSC 808.[1] My point is that, depending on the facts of the case, it is certainly possible for a court to grant relief under s. 36(2) of the *Property Law Act* on a chambers record.

[80] The only factual issues that are not amenable for determination by way of summary trial have to do with the acrimonious interactions between Mr. Baxandall and Mr. Campbell, and the allegedly actionable misconduct of Mr. Baxandall in the

[1] *Wan* was decided before *Cepuran v. Carlton*, 2022 BCCA 376, in which the test for referring a case commenced by way of petition to the trial list was revisited to allow for a more flexible approach.

2024 BCSC 529 (CanLII)

counterclaim. These matters have little or no relevance to the issues to be determined on the summary trial, including the consideration of any remedial order under the *Property Law Act*. For example, the allegation that Mr. Baxandall harassed Mr. Campbell in the course of their dispute over the property line adds literally nothing to the analysis of the claims raised by the plaintiffs. Conduct of this sort is not to be condoned or encouraged, but I do not see how it could materially alter the determination of an otherwise *bona fide* trespass claim arising from structural encroachments, at least on the factual matrix of this case. To be clear, I make no findings on these allegations. My point is that if Mr. Baxandall engaged in any civilly actionable misconduct, this can be addressed in a trial on the counterclaim, should the defendants choose to pursue it. None of this should stand in the way of a just, timely, and cost-effective determination of the issues before the court in this summary trial application.

2024 BCSC 529 (CanLII)

(2) Trespass

(a) The Law of Trespass

[81] Trespass to land occurs where a person enters onto the land of another without authority. It is actionable without proof of damage: *Phillips v. Keefe*, 2010 BCSC 2005 at para. 75 [*Phillips BCSC*]; *Gambling v. Dykes*, 2021 BCSC 938 at para. 50.

[82] The essential elements of the tort of trespass to land are: (a) that the defendant made a direct interference with or intrusion onto the plaintiff's land, (b) that the interference was intentional or negligent, and (c) that the interference was physical: *Gambling* at para. 50, citing *AM Gold Inc. v. Kaizen Discovery Inc.*, 2021 BCSC 515 at para. 337.

[83] The element of intention was discussed at length in *Peter Ballantyne Cree Nation v. Canada (Attorney General)*, 2016 SKCA 124, leave to appeal to SCC ref'd [2017] S.C.C.A. No. 95, as follows:

> [132] In practice, the requirement that the interference must be intentional or negligent, is limited to intentional interference as negligent interference is

> normally pleaded in the tort of negligence. It is generally viewed that "intentional" does not mean that the defendant intended to do a wrongful act against the plaintiff, but that the defendant completed a voluntary and affirmative act. Trespass will occur, regardless of consciousness of wrongdoing, if the defendant intends to conduct itself in a certain manner and exercises its volition to do so (*Calgary (City) v. Costello*, 1997 ABCA 281 at para. 33, 152 D.L.R. (4th) 453 [*Costello*]). In *R. v. East Crest Oil Co. Ltd.*, 1945 CanLII 24 (SCC), [1945] S.C.R. 191 at 195, Rand J. stated that "[t]respass does not depend upon intention. If I walk upon my neighbour's land, I am a trespasser even though I believe it to be my own". Furthermore, if person A is carried against his will by person B onto the plaintiff's land, A is not liable for trespass as his act was not voluntary (see *Smith v. Stone* (1647), 82 ER 533). The requirement that the interference must be physical simply means that the defendant themselves must have physically interfered with the property or caused some physical object to be placed on the property. Objects such as fumes, smoke, noise, or odour do not fall within trespass.

2024 BCSC 529 (CanLII)

[84] Where these elements are made out, the defendant can escape liability by showing that he or she had authority, which generally requires proof that the plaintiff consented to the defendant's interference with the land. Consent may be given expressly or by implication: *Phillips BCSC* at para. 75; *Gambling* at para. 51, citing *AM Gold Inc.* at para. 339.

[85] Acquiescence by the plaintiff can support a finding of implied consent, provided that the plaintiff is found to have acquiesced with full knowledge of his or her legal rights: *Gambling* at para. 51, citing *AM Gold Inc.* at para. 340.

[86] Another legal principle of relevance to the case at bar is the concept of "continuing trespass". The gist of this concept is that, "[i]f a structure or other object is placed on another's land", both the "initial intrusion" and the "failure to remove it" constitute actionable wrongs. Thus, there is a "continuing trespass" for so long as the structure or object remains. Even a "subsequent transferee of the land may sue", and even a subsequent "purchaser of the offending chattel or structure" may be liable, "until the condition is abated": *Peter Ballantyne Cree Nation* at para. 136, citing John G. Fleming, *The Law of Torts*, 5th ed. (Sydney: Law Book Company, 1977) at 53. The doctrine of continuing trespass is well-known to the courts. The articulation of this concept in *Peter Ballantyne Cree Nation* has been endorsed and applied more recently in this Court: *Howes v. FortisBC Inc.*, 2021 BCSC 2271 at

paras. 56, 68; *Ward v. Cariboo Regional District*, 2021 BCSC 1495 at paras. 66–72, 76.

(b) Legal Principles Governing Boundary Disputes

[87] The means by which disputed property lines are proven by the evidence of a land surveyor was discussed at length in *Phillips BCSC*. The dispute in that case concerned the status of a fence erected by the plaintiff. The defendant, who owned the adjacent property, was of the view that the fence was in fact 12 feet over the property line, on his side, so he removed it. The plaintiff then commenced an action in trespass for the defendant's removal of the fence. The key issue at trial was the location of the property line between the two properties.

[88] In that context, Justice Dickson summarized the law governing "boundary disputes" as follows:

> [66] The boundary lines of land conveyed in a grant, should a dispute arise, is a matter for legal determination: *Kirkpatrick v. Parkinson Estate*, 2002 CarswellBC 2865. The common law rule governing resolution of boundary disputes mirrors the survey profession's hierarchy of evidence. In *Nicholson v. Halliday* (2005), 74. O.R. (3d) 81, the Ontario Court of Appeal confirmed the applicable legal principles. The evidentiary hierarchy, to be applied sequentially, is: i) natural boundaries; ii) original monuments; iii) fences or possession that can reasonably be related back to the time of the original survey monuments; and iv) measurements (as shown on the plan or as stated in the metes and bounds description).
>
> [67] These common law principles are grounded in the best evidence rule, as well as policy concerns about the risks of disturbing settled possession based on mathematical measurements. Courts have long recognized the risks of error associated with survey evidence and the inherent reliability of evidence of long-standing possession: *Fraser v. Cameron* (1854) 2 N.S.R. 189; *Fitzpatrick v. McSorley* (1920) 48 N.B.R. 162. In particular, courts have repeatedly commented upon the human tendency to build fences along boundary lines of adjoining properties and acknowledge them as delineating the common boundary: *Fitzpatrick*; *O'Hanley v. Wheatley* (2005) 29 R.P.R. (4th) 79. In *Fitzpatrick*, for example, Barry J. stated:
>
> > When a person purchases a lot of land and proceeds to fence it, it is a fair presumption, I think, that he intends at any rate to place his fences upon the lines.
> >
> > …
>
> [69] The task of a surveyor is to re-establish original boundaries, taking into account the best available evidence. The task is not to define limits as

2024 BCSC 529 (CanLII)

mathematically described in a deed or elsewhere. This point was made by Gow J. in *McKellar v. Canlan Investment Corp.*, [1988] B.C.J. No. 2150, when he referenced *Kingston* and a passage from *Home Bank of Canada*. *v. Might Directories Ltd.* (1914), 31 O.L.R. 240, in which the court described a resurvey made after original monuments have disappeared as being "... for the purpose of determining where they were, and not where they ought to have been ..."

[70] Fences that can be dated back several decades are one form of helpful evidence that may relate to original boundary demarcation: *Thelland v. Golden Haulage Ltd.*, [1989] O.J. No. 2303. Although not conclusive, there is a strong presumption that long-standing fences accurately mark boundary lines despite the absence of an unbroken evidentiary chain. In *James v. Stevenson*, [1893] A.C. 162, the Privy Council considered a slightly wavy fence that had stood for "upwards of 40 years" but could not be dated back to the original Crown grant. Sir Edmund Fry, speaking on behalf of the court, stated:

> In such circumstances there arises, in the judgment of their Lordships, a very cogent presumption in favour of the existing fence being on the line intended and expressed by the deed of conveyance by the predecessors in title of the defendant to the predecessors in title of the plaintiffs - a presumption not to be displaced, if at all, unless by the most conclusive evidence of error in the actual position of the fence.

[71] Other helpful evidence may include landmarks and recollection of knowledgeable residents of long settled possession: *Marks Service Centre Ltd. v. Henderson*, [1996] B.C. J. No. 1222. In *Re Janes* (1977), 17 N.B.R. (2d) 600, for example, a dispute arose in the 1970s over the boundary between adjacent lands granted by the Crown in 1786 and 1832. Although there was no evidence directly linked to original monuments to help establish the boundary, the court relied on the testimony of an elderly witness, born in 1898, who testified that the alleged boundary line “was there when she got there and there never was any dispute over it.": see also *Saly Estate v. Flabiano* (2006), 149 A.C.W.S. (3d) 156.

[72] Each case will, of course, turn on its own unique facts, the possible permutations of which are virtually endless. When the third order of evidence in the hierarchy is invoked, however, the key question for determination is whether a reasonable factual nexus has been established between evidence of possession and the presence of original monuments. If it has, the inquiry need proceed no further. If it has not, resort to the fourth order in the hierarchy - measurements - is required.

[73] If a party chooses to dispute an established boundary line, that party bears the onus of proving on the balance of probabilities that the proposed new boundary is correct: *Palmer v. Thornbeck*, [1877] O.J. No. 170; *Thelland*. In *Aqua Pura Salmon Ltd. v. Hooper*, 2004 NBQB 224, McNally J. cited Palmer with approval and stated:

> It has long been established that in actions brought to determine the true boundary line between properties, the burden of proof lies upon the plaintiff who seeks to change the possession.

2024 BCSC 529 (CanLII)

> [74] In my view it matters not whether the party seeking to challenge settled possession is the plaintiff or the defendant in an action. Consistent with the presumption described in *James*, the persuasive burden rests upon the party seeking to justify the change. In this case, the evidence demonstrates that from at least 1949 until Mr. Barnard's 1989 and 1990 surveys the Fence marked the generally accepted boundary between the two properties and thus settled possession. That being so, the party with the persuasive burden in this case is the defendant.

[89] Applying those principles to the facts of the case, Dickson J. reasoned that the fence torn down by the defendant was reflective of the "generally accepted boundary" between the two properties: *Phillips BCSC* at para. 74. The burden was therefore on the defendant to establish that his proposed new boundary was correct. The defendant's land surveyor was found to have been inattentive to the evidence of historic occupation, causing him to rely on new measurements to erroneously conclude that the fence was 12 feet over the boundary between the two properties: *Phillips BCSC* at para. 84. The court granted the plaintiff's request for a declaration that the boundary was marked by the fence that the defendant had removed, along with damages for trespass. The damages included some $16,000 for repair of the fence and remedial landscaping, along with a punitive award of $5,000: *Phillips BCSC* at paras. 85–86.

[90] The Court of Appeal subsequently affirmed Dickson J.'s approach to the determination of the property line, and the "surveyors' hierarchy of evidence". In doing so, the Court considered and rejected the defendant's contention that Dickson J.'s analysis was inconsistent with the Torrens system and various provisions in the *Land Title Act*, R.S.B.C. 1996, c. 250. The Court reasoned that while a certificate of indefeasible title is conclusive proof of ownership of the land described in the certificate, "the legal effect of being named as the owner of land in the B.C. Land Title Registry" did not speak to the actual boundaries of the land "on the ground". Thus, the relevant provisions of the *Land Title Act* speak to the "indefeasibility of title", whereas survey evidence speaks to "the physical location of what is described in that title": *Phillips v. Keefe*, 2012 BCCA 123 at paras. 59–64 [*Phillips BCCA*].

2024 BCSC 529 (CanLII)

[91] The Court went on to affirm Dickson J.'s treatment of the hierarchy of surveyor evidence, her discussion of the onus of proof, and her application of those principles to the facts of the case: *Phillips BCCA* at paras. 54–97. However, the Court ultimately allowed the appeal in part, setting aside the punitive damages order made against the defendant: *Phillips BCCA* at paras. 108–113.

(c) Analysis of the Survey Evidence in this Case

[92] In the particular circumstances of the case before me, I have some difficulty applying the proposition from *Phillips BCSC* at para. 73 that the party who seeks to challenge an "existing boundary line" bears the onus of proving that the proposed "new boundary line" is correct. I say that because in this particular case there is no clear evidence of an "existing boundary". On the whole of the evidence before me, there appears to have been no settled historical boundary between the Baxandall property and the Campbell property. And, as explained in greater detail, there were no "natural boundaries", "original monuments", or "fences or possession" that could be related back to original survey monuments. Apart from a single metal post on Lot 37 (the Campbell property), there were no other boundary markers "on the ground" between the Baxandall property and the Campbell property.

[93] Despite my difficulty in applying the existing boundary principle, I will proceed on the assumption that the onus is on the plaintiffs to establish that the proposed "new boundary line" is correct. I say that in part because in their response to civil claim, the defendants pleaded, in division 3, paragraph 8, that at the time they purchased their property, "there was only one visible property marker" between the two properties, "which appeared to be in line with the existing deck and fencing". Of course, the response to civil claim is not evidence, and I was not referred to any evidence in the record that would support this claim. To be clear, there was one "visible property marker", namely a single bent metal post in the northwest corner of the Campbell property, but there is no evidence in the record that this post is "in line with the existing deck and fencing". Still, on the basis of the pleadings, there is at least some room for the notion that the plaintiffs seek to establish a new boundary line while the defendants purport to rely on an alleged existing boundary.

2024 BCSC 529 (CanLII)

[94] I will add this to my discussion of onus. It has sometimes been said that the onus of proof really only matters in close calls. In my view this is not such a case. For the reasons explained below, I find that the evidence overwhelmingly supports the position of the plaintiffs as to the boundary line between the two properties.

[95] I move on to a consideration of the "hierarchy" of surveyor evidence discussed in *Phillips BCSC*. I have no difficulty moving past the first and second orders of evidence. This is no evidence of any "natural boundaries". There is evidence of a single metal post on Lot 37 (the Campbell property), which might qualify as an "original monument". I have two points to make about this post. The first is that it is a single post, not a series of posts between the two properties. Taken on its own, it would not establish the line or boundary between the two properties. The second point is that Mr. Fulkerson acknowledged this post and took it into account in his survey of the subject properties. I will return to this point in my discussion of the fourth order of evidence, measurements based on the survey plans, as set out in paragraph 101 below.

[96] I turn to the third order of evidence, that is, fences or other evidence of possession that can be reasonably related back to the time of the original survey monuments.

[97] There are no fences that are referable to the original survey monuments.

[98] Both the high back fence and the high front fence run perpendicular to the property line, so they cannot be taken as evidence of where the line is to be drawn. Further, even though these fences run right up against the south wall of the Baxandall residence, I do not consider this to be indicative of the property line, because I cannot accept that either the south wall of the Baxandall residence or the south wall of the Baxandall coach house represent the boundary line between the two properties. I find it impossible to conceive that residential structures in a modern subdivision would be built right up to the property line, or would effectively serve as the property line with the adjacent property.

2024 BCSC 529 (CanLII)

[99] I do not accept that the low front fence is proof of the boundary line for two reasons. First, it does not run the length of the property, but rather only squares the front yard of the Campbell property, hence it is not truly indicative of the boundary line between the two properties. Second, I accept Mr. Baxandall's uncontradicted evidence that the low front fence was erected after the current dispute arose.

[100] The only other feature that one might point to as evidence of possession relating back to the original survey monuments would be the Campbell deck. However, I do not accept that this is evidence of possession related back to the original survey or monuments because once again the deck does not run the entire length of the property, and thus affords little insight into the state of the property line. Perhaps more importantly, there is no evidence about when the deck was built. The evidence only goes so far as to indicate that the deck was present when the Campbells acquired their property on 1 November 2018. There is no affirmative evidence that, when the deck was built, the builder constructed it in line with the original survey monuments.

[101] That brings me to the fourth order of survey evidence, namely measurements based on the survey plan. Mr. Fulkerson was at considerable pains to relate his measurements to survey monuments located throughout the subdivision. Ultimately, he was able to confirm a total of ten iron posts, which are original monuments, corresponding with the subdivision plan. I note that one of these survey posts was located on the northwest corner of the Campbell property. Using these posts, Mr. Fulkerson was able to measure out the property line between the Baxandall property and the Campbell property. His measurements fit within +/- 4 cm of the iron posts corresponding with the subdivision plan. Further, Mr. Fulkerson's measurements corresponded more or less exactly with the foundation location certificate for Lot 37 (the Baxandall property) prepared by another certified land surveyor in 2010.

[102] On the basis of all of this evidence, I have no difficulty accepting the expert opinions proffered in Mr. Fulkerson's two reports. Among these is Mr. Fulkerson's

2024 BCSC 529 (CanLII)

determination of the property line, as depicted in Schedule A to his first report, the accuracy of which is confirmed in his second report. Based on the dimensions listed in Schedule A, the property line runs 1.22 metres from the south wall of the Baxandall residence, and 1.21 metres from the north wall of the Campbell residence.

[103] I find that Mr. Fulkerson's conclusion is consistent with the admonition in *Phillips BCSC* at para. 69, that the objective is to identify where the property line was at the time of the placing of the original monuments (being iron posts, all but one of which are no longer present), not where the surveyor (or the court) thinks the line ought to have been. I say this because Mr. Fulkerson based his measurements on a best fit with the remaining original monuments (iron posts) found throughout the subdivision. In other words, I find that Mr. Fulkerson's focus was to "re-establish" the original boundaries, which is the correct approach according to *Phillips BCSC*.

(d) Analysis of the Trespass Claim

[104] The claim advanced by the plaintiffs is one of trespass by encroachment. In other words, the plaintiffs allege the structures owned or controlled by the defendants – the deck and the three fences – encroach on the Baxandall property. In my view, Mr. Fulkerson's opinion evidence concerning the demarcation of the property line, and the location of the impugned structures in relation to that property line, taken together, lead inexorably to the conclusion that the impugned structures do indeed encroach on the Baxandall property.

[105] There is overwhelming, uncontradicted evidence that the high back fence, the deck, and the high front fence run over the property line. In particular, it is clear from Mr. Fulkerson's reports and the sketch plan attached to the first report that: (i) the high front fence extends 1.22 metres onto the Baxandall property, right up to the exterior wall of the Baxandall residence; (ii) the deck runs over the property line extending 1.04 metres onto the Baxandall property, within centimetres of the exterior wall of the Baxandall residence; and (iii) the high back fence runs over the property line, extending 0.59 metres onto the Baxandall property, right up to the exterior wall of the Baxandall coach house.

2024 BCSC 529 (CanLII)

[106] With respect to the low front fence, which runs along the property line between the Baxandall property and the Campbell property, it is not apparent from the sketch plan attached to Mr. Fulkerson's reports that it is over the line. However, I accept the conclusion in Mr. Fulkerson's first report that this fence "cross[es]" the property line and "is situate on" the Baxandall property. This conclusion is consistent with photograph #20 appended to Mr. Baxandall's first affidavit, showing that the northwest corner of the low front fence is fully on the Baxandall property, with the south edge of the fence itself being a full two inches over the line. This equates to 5.08 cm, a figure that is greater than the +/- 4 cm margin of error confirmed in Mr. Fulkerson's second report.

[107] I further find that the defendants' intrusion onto the plaintiffs' land via the encroachments satisfies the three basic elements of the tort of trespass.

[108] As to the first element, I have no difficulty concluding that the encroachments constitute a direct interference with the plaintiffs' land.

[109] With respect to the second element, I find that the intrusion was intentional for the following reasons:

(a) I find that throughout his dealings with Mr. Baxandall, Mr. Campbell acted as agent for his wife Ms. Campbell. I further infer, on the basis of the statements in Mr. Campbell's affidavit, that Ms. Campbell was aware of the property line dispute and the legal status of the encroachments. Among other things, Mr. Campbell states in his first affidavit that when Mr. Baxandall initially spoke with Ms. Campbell about these matters. Thereafter, Mr. Campbell dealt with Mr. Baxandall.

(b) Both defendants clearly knew of the presence of the impugned structures, that is, the deck and the three fences. This is not a case where the defendants were ignorant of the very existence of the offending structures.

(c) Mr. Campbell admits that shortly after Mr. Baxandall took possession of the Baxandall property, he "did show me a copy of his survey certificate of the

2024 BCSC 529 (CanLII)

foundation and set back for his property". I find that this is in fact the foundation location certificate attached as Appendix C to Mr. Fulkerson's first report. This certificate shows that the south wall of the Baxandall residence is set back 1.21 metres from the property line with the Campbell property. I acknowledge here that Mr. Campbell specifically denies making any concession or admission as to the location of the property line or the status of the impugned structures. I will return to that point later.

(d) Mr. Campbell admits that land surveyors later attended and marked and staked the property line. Again, Mr. Campbell denies making any concessions or admissions as to the accuracy of those markings and stakes, a point which I will address shortly.

(e) On the basis of all of the foregoing, I conclude that Mr. Campbell's conduct in allowing the encroachments to remain after it was brought to his attention that they were over the property line, and in refusing to remove the encroachments, constituted intentional trespass of a continuing nature as described in *Peter Ballantyne Cree Nation* at para. 136.

(f) Mr. Campbell maintains that throughout his dealings with Mr. Baxandall, he never admitted or accepted the correctness of Mr. Baxandall's position regarding the property line or the status of the encroachments. I do not need to decide whether or not this is true. Even if it is true that Mr. Campbell never made such an admission, this is no basis for avoiding a finding that the conduct in issue was intentional based on the law as described in the following subparagraph.

(g) The case law makes it clear the legal element of intention is satisfied where the conduct of the defendant is voluntary or intentional in nature. There is no requirement for the defendant to have "intended to do a wrongful act against the plaintiff": *Peter Ballantyne Cree Nation* at para. 132. Thus, even "a mistaken belief by the defendant that the land was his" will not defeat a claim for trespass: *Peter Ballantyne Cree Nation* at para. 129, citing Fleming's *The Law of Torts*, 10th ed. Pyrmont, NSW: Law Book Co., 2011) at 49.

2024 BCSC 529 (CanLII)

[110] Turning to the third element of the tort of trespass, the encroaching structures involve a physical interference with or intrusion upon the Baxandall property.

[111] Finally, there is overwhelming evidence that the plaintiffs neither consented to nor acquiesced in the continuing trespass. Mr. Baxandall voiced objection to the encroachments shortly after he and his wife acquired the Baxandall property. My conclusion is that defendants are liable for the tort of trespass to land.

(3) Statutory Remedies for Encroachment under the *Property Law Act*

[112] The plaintiffs seek relief against the encroachments upon their property, by way of an order under s. 36(2)(c) of the *Property Law Act* that the defendants remove the encroaching structures. The defendants contend that if any relief is granted under s. 36(2), it should be either an easement under s. 36(2)(a), or a vesting order under s. 36(2)(b). In response to this position, the plaintiffs say, among other things, that the defendants did not seek an order under s. 36(2)(a) or (b) in their pleadings, and did not bring a cross-application for summary trial on that issue.

[113] Section 36 of the *Property Law Act* reads as follows:

> 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 that it no longer encroaches on or encloses any part of the adjoining land.

[114] The purpose of s. 36(2) is to “equitably resolve boundary disputes”: *Taylor v. Hoskin*, 2006 BCCA 39 at para. 51. The court is given a “broad discretion to do

2024 BCSC 529 (CanLII)

justice in the case of an encroachment". The task is to "weigh the equities between the parties to determine the balance of convenience": *Singer* at para. 21.

[115] In *Vineberg v. Rerick*, 1995 CanLII 3363, [1995] B.C.J. No. 2506 (QL) (B.C.S.C.) at para. 20, Justice Legatt noted "three predominant considerations" informing the balance of convenience analysis under what is now s. 36(2):

> 1. The comprehension of the property lines: Were the parties cognizant of the correct boundary line before the encroachment became an issue? There are three degrees of knowledge: honest belief, negligence or fraud. The party seeking the easement should have an honest belief to be awarded this remedy.
>
> 2. The nature of the encroachment: Was the encroachment a lasting improvement? What is the effort and cost involved in moving the improvement? Was is its effect on the properties in question? The more fixed the improvement, and the more costly and cumbersome it would be to move it, the more these considerations will be weighed in favour of the petitioner.
>
> 3. The size of the encroachment: How does the encroachment effect the properties, in terms of both their present and future value and use? These questions serve to balance the potential losses and gains of the creation of an easement.

[116] These three points have come to be known as the "*Vineberg* test", or the "*Vineberg* principles", although subsequent jurisprudence has emphasized that these are not to be used as a any kind of formula or "one-size fits all test": *Taylor* at paras. 50–51; *Singer* at paras. 23–24.

[117] In *Taylor*, the Court considered the legislative history of s. 36 of the *Property Law Act*, by contrast and comparison to provisions enacted in other provinces. Justice Levine, writing for the Court, explained that the principles articulated in *Vineberg* had "evolved from" a body of cases interpreting and applying these various provincial enactments, the contours of which do not in all respects align with the encroachment remedy scheme laid out in s. 36. While this was not cause to jettison the *Vineberg* principles, Levine J.A. explained that they "should be employed in the context of the words and intent of s. 36". In the result, there is no "one-size fits all 'test'". Rather the court's discretion must always be exercised upon a consideration of "the facts and the equities" of the particular case before it: *Taylor* at para. 51.

2024 BCSC 529 (CanLII)

[118] I would start the analysis in the case at bar by noting the obvious point that the deck and three fences in issue here constitute encroachments within the meaning of s. 36. I observe that the three fences not only extend onto and encroach upon the Baxandall property, but they also have the effect of enclosing a portion of it so as to make it inaccessible to its owners.

[119] As a preliminary matter, it is necessary to address the scope of relief that is open for consideration. On the one hand, the plaintiffs seek an order requiring the defendants to remove the encroaching structures under s. 36(2)(c). On the other hand, the defendants argue for an easement under s. 36(2)(a), or vesting of title to the encroached upon areas under s. 36(2)(b), allowing for the preservation of those structures. However, the plaintiffs contend that the relief sought by the defendants has not been properly pleaded, such that the court should not even consider it.

[120] Having examined the pleadings, and after considering the arguments advanced by both parties in the course of the summary trial, I would not accede to the argument of the plaintiffs on this preliminary point, for two reasons.

[121] First, the court has a wide discretion under s. 36(2) to determine an appropriate remedy for encroachment. In exercising that discretion, the court must carefully weigh the equities of the situation and assess the balance of convenience between the parties. In my view, at least in the context of this particular case, this requires a consideration of all of the available options under s. 36(2).

[122] Second, even though s. 36(2)(a) and (b) are not expressly cited in any of the pleadings, I am satisfied that the availability of these alternative forms of relief was fairly raised by the defendants, under the very statutory provision invoked by the plaintiffs. I find that the plaintiffs are not taken by surprise by the alternative position advanced by the defendants, nor have the plaintiffs been prejudiced in their ability to respond. The plaintiffs have been able to place before the court all of the evidence that they could marshal with respect to the equities of the situation and the remedial options available to the court.

2024 BCSC 529 (CanLII)

[123] I will next deal with a specific point that was expressly pleaded by the defendants in the response to civil claim, namely their reliance on the doctrine of "*de minimis non curat lex*". The defendants contend that any encroachment on the Baxandall property is "trivial", but they presented no authority in support of the proposition that s. 36(2) is limited to "non-trivial" encroachments. In my view, the extent of the interference with or intrusion upon the plaintiffs' land is a factor that is best considered under the balance of convenience analysis. Indeed, the extent of intrusion falls squarely into the second group of factors listed in *Vineberg*, under the rubric of the nature of the encroachment. If the encroachments are found to be trivial, this would weigh heavily against an order requiring removal of the encroaching structures.

[124] This brings me to an assessment of the equities and the balance of convenience. I would summarize my findings on the equities of this particular situation as follows:

a) Three of the impugned structures, being the deck, the high back fence and the high front fence, were present when the defendants acquired their property in 2018.

b) I find on all of the evidence that the plaintiffs were aware of these three structures, and the likelihood that they encroached on their property, when they purchased it in 2020. However, there is no evidence that the plaintiffs used the presence of the encroachments as a bargaining chip to obtain a reduction in the price they paid to purchase their property.

c) Mr. Campbell asserts that all of the property owners on his block occupy the space between their property and the immediately adjacent property, right up to the south wall of their neighbor's residence. There is no evidence in the record to contradict this assertion, and I have no reason to question it.

d) The defendants also maintain that the plaintiffs have been occupying a part of the city property immediately to the north of the Baxandall property. The

2024 BCSC 529 (CanLII)

plaintiff Ms. Nelson conceded in discovery that her driveway runs over the property line, along city property by “a few inches”. Although I would not regard this point as completely irrelevant, in my view it does not carry a great deal of weight in assessing the balance of convenience. The defendants have no say, legally or morally, in the boundary between the Baxandall property and the adjacent city property to the north.

e) Almost immediately after taking possession of their property, the plaintiffs raised the issue of the location of the property line and the status of the encroaching structures with the defendants.

f) At some point after the plaintiffs took possession of their property, the low front fence was erected. It basically squares the front yard of the Campbell property, and then runs along the south perimeter. At least a portion of this fence is fully over the line and entirely on the Baxandall property. This fence runs in an east-west direction, with the west end running right up to the perpendicular high front fence.

g) The Target Land Survey, commissioned by Mr. Baxandall in July 2020, was accurate in its determination of the property line, to within +/- 4 centimetres. On the basis of this survey, it would have been readily apparent to both the plaintiffs and the defendants that the deck, the high back fence and the high front fence encroached upon the Baxandall property. Whether or not Mr. Campbell ever conceded this point – and I make no finding either way on this point – the defendants have never had any objectively discernible reason for questioning the accuracy of the Target Land Survey.

h) The defendants have never put forward any reason to call into question the location of the property line as determined in the Target Land Survey and subsequently confirmed by the expert opinion of Mr. Fulkerson. There is no basis in the record to support a finding that the Campbells had an honest belief that the impugned structures were located entirely on their property and thus did not constitute an intrusion onto the Baxandall property.

2024 BCSC 529 (CanLII)

i) The encroaching structures significantly intrude upon the Baxandall property. There are at least four factors that contribute to this finding. The first is the proximity of the Baxandall residence and coach house to the property line. The second is the fact that the fences effectively enclose the entire space between the property line and the Baxandall residence and coach house, preventing the plaintiffs from accessing the south wall of either building. Third, there is the manner in which the defendants have used the enclosed space including but not limited to allowing their dog and their tenant's dog to deposit feces in the laneway between the two properties, and the lack of diligence on the part of the defendants in cleaning up the mess. Mr. Baxandall deposes, and I accept, that the presence of the dog feces has made it intolerable for the plaintiffs or their tenant to open their kitchen windows, which face the laneway where the defendants have allowed dog feces to accumulate. Fourth, because the plaintiffs cannot gain access to the disputed area, they cannot conduct maintenance or repairs to the south wall of their residence.

j) Removal of the encroaching structures would not represent a significant impediment on the use and enjoyment of the Campbell property. There is no evidence that requiring the defendants to shorten their deck by approximately one metre would significantly affect its utility. It does appear that the fences have been set up in such a way as to allow the defendants and their tenants to use the laneway between the Baxandall property and the Campbell property as a dog run, although the defendants did not address this directly in their affidavit evidence. To the extent that the defendants have been using the encroached area in this manner, the convenience or benefit it affords them is outweighed by the prejudice to the plaintiffs in being unable to access the south side of their residence and being unable to open their kitchen window without exposure to unpleasant odours.

k) There is no evidence as to the value of the encroaching structures, or the costs of erecting them. However, I infer that the value is minimal, because these are all wooden structures of relatively simple design.

2024 BCSC 529 (CanLII)

l) The cost of removing the encroaching structures would be minimal. I accept the uncontradicted evidence that the total cost of cutting back the deck, removing the fences, and disposing of the materials would be a mere $715.

m) The presence of the encroachments has a potentially significant impact on the market value of the plaintiffs' property. Mr. Hara's uncontradicted evidence is that the market value of the Baxandall property would be reduced by $200,000 if the offending structures are not removed. Even if the actual reduction in market value were a mere 50% or even 25% of Mr. Hara's estimate, this would still be substantial. I accept that the plaintiffs must have been aware of these encroachments when they acquired the property a mere four years ago, but that does not really alter Mr. Hara's opinion that the presence of the encroachments and the added complications they present would negatively affect the price that prospective buyers would be prepared to pay for the property.

[125] In totality, the balance of convenience weighs in favour of the plaintiffs. The encroachments make it impossible for the plaintiffs to access the south side of their property. They cannot carry out any maintenance or repairs to the south wall of their residence or coach house. Furthermore, the use and enjoyment of their property has been impacted by the activities that the defendants have engaged in or permitted to occur in the enclosed area. By contrast, there is little evidence that the encroachments have any significant value to the defendants, or that they enhance the use and enjoyment of their property. For example, there is no evidence that cutting the deck back approximately one metre would make it any less useful or valuable to the defendants. Further, the costs of removing the encroachments is minimal, and pales in comparison to the effect that the encroachments may have on the market value of the plaintiffs' property.

[126] I inferred above that the plaintiffs were aware that the impugned structures were very likely encroaching on their property when they acquired it. This weighs in favour of the defendants, as does the undisputed assertion that all of the other

2024 BCSC 529 (CanLII)

property owners on the entire block have been occupying the space right up to the south wall of the adjacent property to the north. However, in my view these factors are not determinative, and they are not enough to overcome the continuing prejudice to the plaintiffs in allowing the encroachments to remain in place. It seems to be an entirely unworkable arrangement for the defendants to effectively have exclusive possession of, or even an easement allowing for exclusive use of the land right up to the wall of the adjacent owner's residence. This is especially so where the encroachments are of minimal value and can be removed without significant expense.

[127] All four structures, namely (i) the deck, (ii) the high back fence, (iii) the high front fence, and (iv) the low front fence, constitute encroachments within the meaning of s. 36 of the *Property Law Act*. Pursuant to s. 36(2)(c) of the *Property Law Act*, the defendants are required to remove the encroachments from the plaintiffs' property within 60 days.

Costs

[128] The plaintiffs were entirely successful in the summary trial application. In the normal course, they would be entitled to costs of the application, in any event of the cause, at Scale B. If either party takes issue with this costs disposition, then: (a) within 14 days of the judgment, the party seeking a different order as to costs is to file a written submission, no more than four pages in length, plus any supporting materials; (b) within 21 days of the judgment, the opposing party is to file any responding submissions, no more than five pages in length, plus supporting materials; and (c) within 28 days of the judgment, the initiating party may file a written reply submission, no more than two pages in length.

2024 BCSC 529 (CanLII)

Conclusion and Summary

[129] To conclude and summarize the outcome:

a) The plaintiffs are entitled to a declaration that (i) the defendants have committed the tort of trespass, and (ii) the presence of the encroaching structures on the plaintiffs' property constitutes a continuing trespass.

b) Pursuant to s. 36(2)(c) of the *Property Law Act*, the defendants are ordered to remove all four of the encroaching structures from the plaintiffs' property within 60 days.

c) Subject to the right of either party to argue for a different costs order via the process described in paragraph 128 of these reasons, the plaintiffs are entitled to costs of the summary trial application, at Scale B, in any event of the cause.

"Riley J."

2024 BCSC 529 (CanLII)