

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1133607 B.C. Ltd. v. Singh*,
2024 BCSC 1598

Date: 20240829
Docket: S243489
Registry: Vancouver

Between:

1133607 B.C. Ltd.

Petitioner

And

Manjul Singh and Bhupendra Kumar Singh

Respondents

Before: The Honourable Justice A. Ross

Reasons for Judgment

Counsel for the Petitioner:

S. Driver

Counsel for the Respondents:

A. Beesley

Place and Date of Trial/Hearing:

Vancouver, B.C.
July 25, 2024

Place and Date of Judgment:

Vancouver, B.C.
August 29, 2024

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[1] The petitioner brings this proceeding under the *Property Law Act*, R.S.B.C. 1996, c. 377 [PLA], seeking the grant of an easement and other related relief in respect of a neighboring property which is owned by the respondents.

[2] The petitioner purchased, and then significantly renovated, a derelict building on Victoria Drive in Vancouver. Upon completion of the redeveloped building, a survey determined that a portion of the petitioner's building overhangs the respondents' property.

[3] Both parties agree that an easement should be granted. The dispute is over the terms of that easement, primarily the price to be paid by the petitioner. For context, the petitioner submits that the payment should be \$7,500. The respondents' position is that it should be \$50,000.

Issue

[4] The sole issue for me to decide is: What is the appropriate compensation to be paid for the encroachment and easement?

Background Facts

[5] Since 1996 the respondents, Bhupendra Kumar Singh and Manjul Singh (the "Singhs"), have been the registered owners of the property located at 4005 Victoria Drive, Vancouver, legally described as:

PID: 008-335-443

LOT 9 BLOCK 16 DISTRICT LOT 352 PLAN 1344

(the "Singh Property")

[6] Since June 2020, the petitioner, 1133607 BC Ltd., has been the registered owner of 4015 Victoria Dr., Vancouver, BC, legally described as:

PID: 014-832-461

LOT 10 BLOCK 16 DISTRICT LOT 352 PLAN 1344

(the "Subject Property")

[7] The Singh Property and the Subject Property are neighbouring lots situate on the west side of Victoria Dr. The Singh Property is immediately north of the Subject Property.

[8] Both the Singh Property and the Subject Property are zoned as R1-1 (“residential inclusive zoning”). This zoning typically requires a minimum side yard width of 1.2 metres (*i.e.*, the house must be 1.2 metres from the side boundary).

[9] When the petitioner purchased the Subject Property, there was an existing house on it. That structure, constructed in or about 1910, was derelict. The existing structure did not meet current city of Vancouver building bylaws in respect of setbacks. The structure was built close to Victoria Drive and it abutted the Singh Property. There was no “side yard”.

[10] I accept the Singhs’ submission that part of the reason for the petitioner keeping the existing derelict structure was to take advantage of the existing, noncomplying footprint of the building.

[11] Prior to purchasing the Subject Property, the petitioner obtained a survey (the “First Survey”). The First Survey showed that the foundation and walls of the building were close to, but within the property lines of, the Subject Property. I accept the evidence of the petitioner that they were not aware of any encroachment.

[12] The petitioner obtained a development permit and building permits and began renovating the structure.

[13] It is not disputed that the Singhs were pleased with the development of the Subject Property. The old building was an eyesore and was used for illicit purposes. It is common ground that the Singhs allowed the petitioner and its tradespeople to come onto their land to repair the side of the building, including the installation of new siding and gutters.

[14] Further, during the construction the petitioner’s employees took a number of steps to accommodate requests from the Singhs. Those accommodations included:

- a) relocating the rear exit to the south side of the subject building;
- b) removing a planned garage in order to permit more light into the garden on the Singh Property; and
- c) removing windows along the north side of the Subject Property.

[15] Most importantly, for this petition, the respondents noted that the new roofing system created a situation where the rain would cascade off the petitioner's roof and onto the Singh Property. To alleviate that problem, the petitioner agreed to install a gutter at the roof level on that side of the building.

[16] The renovations are now complete, and the petitioner is in the process of filing their strata plans. The Subject Property will be sold as a duplex.

[17] Upon completion of the renovation, in February 2024, the petitioner obtained a subsequent survey of the property (the "Second Survey"). The purpose of the Second Survey was to prepare the strata plan in order to create the individually titled duplex units. This Second Survey identified encroachment issues for the first time. This Second Survey showed that a portion of the roof, including the new gutter, and a portion of the cladding on the north side of the building encroached on the survey lines on the northeast portion of the Singh Property.

[18] As a result of the Second Survey, it was determined that the petitioner's building slightly leans in the direction of the Singh Property. In addition, a portion of the roofing system, including the new gutter, encroach at the roof level.

[19] According to the Second Survey (which the respondents accept), the petitioner's building encroaches on the airspace of the Singh Property for total surface area of 3.3 square metres. That area is comprised of a strip which is 16.26 metres long and .2 metres wide over the Singh Property. In places, the overhang is due to the new roofing system of which the new gutter accounts for .1 metre (approximately half) of the encroachment.

[20] In addition, parts of the siding of the building also encroach on the Singh Property. When redeveloped, the original siding was removed and replaced with fire-rated and rain-screen siding. The petitioner says that the contractors were attentive to ensure that no thickness was added to the building. Despite the petitioner's efforts, the Second Survey indicates that portions of the exterior wall of the building encroach on the Singh Property

[21] All of the encroachment is in the airspace. There is no encroachment at ground level.

[22] I pause to note that the petitioner is willing to remove the gutter. However, that will not eliminate the encroachment. As noted, the gutter constitutes approximately 50 percent of the total width of the encroachment.

[23] Returning to the issue of city zoning, any future development on the Singh Property will be required to adhere to zoning bylaws. Current setbacks would require the new owner to maintain a 1.2 metre separation from the Subject Property. I accept the petitioner's submission that, because of this requirement, the petitioner's incursion into the Singh's airspace does not have any foreseeable impact on the development potential of the Singh Property.

[24] Based upon the facts set out above, the petitioner seeks an easement for the encroachment. In addition to an easement relating to the encroachment, the petitioner seeks an easement of 40 centimetres to allow the future owners of the Subject Property to have access at the ground level to conduct any necessary maintenance.

Legal Basis

[25] The authority for the grant of an easement is provided by s. 36(a) the *PLA* which provides:

Encroachment on adjoining land

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,

[26] While there are other provisions and solutions provided within the *PLA*, both parties agree that the only sensible path to relief is to proceed under s. 36(a).

[27] The purpose of s. 36 is to provide a basis for resolving disputes over encroachments on equitable grounds: *Taylor v. Hoskin*, 2006 BCCA 39 at para. 52.

[28] In *Gainer v. Widsten*, 2006 BCCA 580, Justice Lowry wrote at para. 8:

[80] ... this Court stated the first condition for granting relief under the Act in favour of one who encroaches on the property of another is that it be equitable and in accordance with the balance of convenience to do so. Most recently, in *Taylor v. Hoskin*, 265 D.L.R. (4th) 132, 2006 BCCA 39 ¶ 51, this Court made it clear that it is the facts and the equities of each individual case that are important to determining how the court is to exercise its discretion.

[29] As to the valuation of an easement, this Court has long accepted a set of principles first enunciated in *Vineberg v. Rerick*, 1995 CanLII 3363 (B.C.S.C.) at para. 20:

1. The comprehension of the property lines: Were the parties cognizant of the correct boundary line before the encroachment became an issue? There are 3 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? What is the 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 affect 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.

[30] I address parties' position on these three elements below. However, as stated above, I accept three important points:

- a) The First Survey did not indicate an encroachment. Hence, the first element is satisfied. The petitioner had no knowledge of the encroachment.
- b) All of the encroachment is in the air.
- c) The encroachment will not prevent any future development of the Singh Property.

Positions of the Parties

[31] The petitioner submits that the incursion into the Singh Property is minimal:

- a) It only affects the airspace;
- b) It does not impact future construction;
- c) At certain places, approximately half of the encroachment is caused by the gutter that was installed at the Singhs' request.

[32] The petitioner further notes that it would be very expensive to remedy the encroachment.

[33] To provide some context to its offer, the petitioner made a calculation based upon the assessed value of the land comprising the Singh Property. The encroachment constitutes 3.3 square meters over the Singh Property. The petitioner noted the assessed value of the Singh's and calculated the cost per square metre if it were to buy (which it cannot) 3.3 square meters at that assessed value. The estimated cost of 3.3 square metres would be \$15,000.

[34] On that basis, the petitioner submits that \$7,500 is appropriate compensation.

[35] In response, the Singhs point to the following:

- a) Due to the new structure, rain water falls heavily from the roof onto their property. The heavy fall of water splashes at ground level, damaging their plants and dirtying their house.
- b) Because of the encroachment, they have less sunlight in their front yard.
- c) They planned a cedar hedge down the south side of the house. With the grant of an easement, they will not be able to plant that hedge.

[36] The respondents submit that the encroachment has had these significant effects on the respondents. As a result, they seek an award of \$50,000.

Analysis

[37] Both sides referred me to a number of cases. The recurring theme in those cases is that each case must be judged on its own merits. That is not to say, however, that guidance cannot be drawn from prior decisions.

[38] In *D'Amico v. Atkinson*, 2023 BCSC 2186, Justice G.P. Weatherill assessed the compensation to be paid in relation to lakefront property near Vernon. The encroachment consisted of a portion of a retaining wall. Justice G.P. Weatherill assessed the compensation at \$2,000, noting (at para. 46):

... Further, it is only the approximate 4.26 meters of the Block Retaining Wall landside of the present natural boundary that is encroaching. The wall continues some distance into the lake that is Crown land. Requiring the removal of the Encroachment would not assist the petitioner's stated concerns regarding use of his property because even if the portion of the Block Retaining Wall that encroaches on the D'Amico Property were removed, the portion that continues onto Crown land would remain. There would simply be a "jog" in the replacement retaining wall. I conclude that while possible, it would not be a simple task to cut out the Encroachment and put a "jog" in the wall.

[39] Although G.P. Weatherill J. refers to "4.26 meters" in para. 46, it is clear (from para. 11) that he is referring to an area measurement (4.26 square metres).

[40] The encroachment in *D'Amico* was at ground level, thus, in my opinion, had a greater effect on the neighbouring land. However, the lot size was larger.

[41] *Langley v. Yang*, 2012 BCSC 1520, involved neighboring one-acre properties in Anmore. Due to the topography, the Langleys could not access a back portion of their property. The Yangs built a patio area at the top of the Langley property.

Justice McEwan wrote:

[28] What the Yangs did was inexcusable, but in the particular circumstances of this case I am persuaded that a proper amount of compensation together with costs will serve the purposes of an adequate rebuke of such behaviour, and also the ends of justice and common sense.

[29] Accordingly, I order the Yangs to pay the Langleys the sum of \$22,000 based on the appraisal of Leigh Walker respecting the increase in value of the Yang property attributable to the improvement, and making some allowance for the loss of value to the Langley property.

[30] I also order the Yangs to pay special costs to the Langleys as well as their disbursements, including the \$728 spent for a survey.

[42] In *Langley*, the respondents had acted deliberately, and the patio increased the value of their property.

[43] Considering the submissions of counsel, the cases submitted, and the factors set out in *Vineberg*, I conclude:

- a) The impact of the encroachment is relatively small.
- b) The encroachment is entirely in the air.
- c) The Singhs' concerns, while valid, are not necessarily caused by the encroachment:
 - i. The problems with rain egress and loss of sunlight would exist if the renovated building did not encroach. Those problems would exist, but they would be 10 to 20 centimetres to the south.
 - ii. The encroachment makes the problems marginally worse.
- d) The petitioner obtains a benefit from the easement, in that it does not have to rebuild the structure. However, it is clear that the petitioner did not intend to encroach. Put another way, the value of the petitioner's

redevelopment of the Subject Property would be the same if the building did not encroach. The encroachment does not improve or enhance the value of the Subject Property.

- e) Similarly, the encroachment does not diminish the value of the Singh Property.

[44] I also consider the evidence regarding the cost to purchase a square metre of the Singh Property to be persuasive. The petitioner seeks an easement (primarily in the air) on a portion of the Singh Property when the purchase price of the encroached area would be, in theory, \$22,000.

[45] Considering all of these relevant factors, in my opinion, the \$50,000 compensation proposed by the Singhs is not reasonable. Instead, I find that the \$7,500 compensation proposed by the petitioner is fair and reasonable. In my opinion, compensation of \$7,500 is in accord with prior cases, the degree of encroachment, and the effect on each property.

Grant of Easement

[46] For the reasons set out above, I grant the following relief:

- a) The building constructed upon the land situated at 4015 Victoria Drive, Vancouver, BC, legally described as PID: 014-832-461, Lot 10 Block 16 District Lot 352 Plan 1344, encroaches into the airspace above the adjoining land situate at 4005 Victoria Drive, legally described as PID: 008-335-443 Lot 9 Block 16 District Lot 352 Plan 1344.
- b) Upon the payment of \$7,500 by the petitioner to the respondents, the petitioner shall be granted an easement over the encroaching area described above. I note that the petition indicates that there is an Explanatory Plan of Easement attached to the petition. There is no such document attached to the pleading in my materials. However, a similar

document is included in Exhibit “E” to the first affidavit of Mr. Cameron McLeod. I will leave it to counsel to append the appropriate document.

- c) In addition to an easement relating to the encroachment, I grant an easement of 40 centimetres to allow the future owners of the Subject Property to have access to the Singh Property at the ground level to conduct any necessary maintenance.
- d) The term of the easement shall be the duration of the current structure on the Subject Property. The easement will be extinguished if the current structure on the Subject Property is demolished, or if it is damaged or renovated to the extent that repairs or renovations amount to 50 percent or more of the replacement cost.
- e) The owners the Subject Property shall maintain the easement area in a safe condition, and indemnify the owner of the Singh Property against any losses or damages arising from their control of the easement area, and carry appropriate liability insurance with respect to it.

[47] The petitioner seeks the costs of this petition. While the petitioner has been successful, in my opinion, each party should bear their own costs. However, if there were offers of which I am not aware, the parties are at liberty to bring those offers to my attention within 90 days of the release of these reasons.

“A. Ross J.”