COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *D'Amico v. Atkinson,*
2024 BCCA 330

Date: 20240906
Docket: CA49580

Between:

Giacomo D'Amico

Appellant
(Petitioner)

And

John Edward Atkinson

Respondent
(Respondent)

Before: The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Abrioux
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated December 12, 2023 (*D'Amico v. Atkinson*, 2023 BCSC 2186, Kelowna Docket S137426).

Oral Reasons for Judgment

Counsel for the Appellant:	E.C. Watson M.B.G. Durovic
Counsel for the Respondent:	Y.D. Gershony M.S. Moorhouse
Place and Date of Hearing:	Vancouver, British Columbia September 6, 2024
Place and Date of Judgment:	Vancouver, British Columbia September 6, 2024

Summary:

The appellant made an application under the Property Law Act for an order that a retaining wall, which encroached onto his property, be removed. The chambers judge dismissed the appellant's application and instead granted the respondent's application for an easement over the encroachment. The appellant argues that the judge erred in law by misapplying the doctrine of accretion, and made palpable and overriding errors of fact in exercising his discretion to grant an easement.

Held: Appeal dismissed. The judge made no legal errors in his analysis of the doctrine of accretion. The judge's decision to grant an easement was supported by the evidence, and there is no basis to interfere with his exercise of discretion.

HORSMAN J.A.:

Introduction

[1] The appellant, Mr. D'Amico, and the respondent, Mr. Atkinson, are owners of adjoining properties in Vernon, British Columbia that front Okanagan Lake (respectively, the "D'Amico Property" and the "Atkinson Property"). There is a concrete retaining wall between the properties that was constructed before either property was purchased by the parties (the "Retaining Wall"). The Retaining Wall facilitates access to the Atkinson Property from a dock and bridge that is located on the Lake.

[2] The appellant alleged that the Retaining Wall encroached on the D'Amico Property. He filed a petition under the *Property Law Act*, R.S.B.C. 1996, c. 377, seeking an order that the Retaining Wall be demolished. At the hearing of the petition, the respondent did not dispute that a portion of the Retaining Wall encroached on the D'Amico Property. However, the respondent opposed the order sought by the appellant and argued, instead, that the court should grant an easement over the encroaching portion.

[3] Section 36 of the *Property Law Act* provides the court with remedial discretion in the event that, on a survey of land, it is found that a building encroaches on adjoining land. In this case, in reasons indexed at 2023 BCSC 2186, the chambers judge exercised his discretion by granting the respondent an easement over the portion of the Retaining Wall that encroached on the D'Amico Property. He found

that prior to this dispute arising: the respondent had an honest belief that the Retaining Wall did not encroach on the D'Amico Property; the Retaining Wall was a permanent structure that would be costly to remove; and the encroachment had no more than a *de minimus* effect on the D'Amico Property. Accordingly, the judge concluded that the balance of equity and convenience between the parties favoured the respondent.

[4] On appeal, the appellant argues that the chambers judge erred in law in his application of the doctrine of accretion, and made palpable and overriding errors of fact in exercising his discretion to grant an easement.

Factual background

[5] The factual background is largely undisputed.

[6] The respondent and his wife purchased the Atkinson Property in July 2009. A previous owner of the Atkinson Property had constructed a dock attached to a natural island, which is connected to the property via a bridge. The bridge is, in turn, connected to the Retaining Wall. In 2010, the respondent successfully applied to the Crown for a "Specific Permission for Private Moorage" for the dock and bridge structure.

[7] The evidence was not clear as to when the Retaining Wall was built. It could have been as early as the 1970s.

[8] The appellant and his wife purchased the adjoining D'Amico Property in September 2021. The D'Amico Property was originally created by the deposit of a subdivision plan in 1951. The registered title continued to reference this plan at the time the appellant purchased the property. The plan depicted a "natural boundary" on the lake-facing boundary of the property. This natural boundary is approximately 21 feet landward compared to the Atkinson Property, which was created by the deposit of a subdivision plan in 1970.

[9] A natural boundary on lakefront property typically runs with the high-water mark of the lake. The upland owner owns the land up to the natural boundary, while the Crown owns the foreshore and the bed of the adjoining body of water. Over time, the high-water mark may shift due to a process known as accretion: the gradual and imperceptible addition of land to the upland property through natural deposition of soil, sand, or other substance. The upland property owner acquires ownership of the accreted land. Where accretion has occurred, the plan referenced on the registered title to the property may not accurately depict the extent of ownership. Under s. 94 of the *Land Title Act*, R.S.B.C. 1996, c. 250, a property owner may apply to the Surveyor General to certify an updated survey plan to reflect the inclusion of lawfully accreted land within title.

[10] In May 2021, as he was considering purchasing the D'Amico Property, the appellant obtained a survey of the property (the "May 2021 Survey"). The May 2021 Survey suggested that the high-water mark of the Lake had gradually retreated over the years through a process of accretion. As a result, it appeared that at some point in time a portion of the Retaining Wall had ceased to be located on Crown land and instead had become subsumed within the D'Amico Property.

[11] The appellant did not provide the May 2021 Survey to the respondent.

[12] The respondent deposed that in June 2022, he noticed that survey stakes had been placed on the Retaining Wall. The respondent retained a surveyor to survey the area and determine if the Retaining Wall encroached on the D'Amico Property. In July 2022, the surveyor prepared a drawing using the boundaries in the existing plan for the D'Amico Property. The drawing suggested, on its face, that the entirety of the Retaining Wall was on the Atkinson Property or on Crown land.

[13] In August 2022, the appellant's legal counsel wrote to the respondent, stating that "the back wall to your dock is constructed on our client's property." In light of the information the respondent had received from his surveyor, he did not agree with

this assertion. The respondent accordingly instructed his counsel to respond with a letter confirming the respondent's position that there was no encroachment.

[14] In October 2022, after the exchange of correspondence, the appellant retained a surveyor to conduct a second survey of the D'Amico Property. On receipt of the second survey, the appellant then applied to the Surveyor General under s. 94 of the *Land Title Act* for the certification of a new plan to reflect the addition of lawfully accreted land to the property. This application was granted. In April 2023, the Surveyor General approved a new reference plan reflecting a new natural boundary that extended the lakefront boundary of the D'Amico Property by 21 feet. Under the new reference plan, it was apparent that a portion of the Retaining Wall—approximately 4.5 square metres, mostly linear—encroached on the D'Amico Property.

[15] In June 2023, the appellant filed a petition seeking an order, pursuant to s. 36 of the *Property Law Act*, that the Retaining Wall be removed from the D'Amico Property. The petition was heard in November 2023.

The chambers judgment

[16] At the petition hearing, the respondent did not dispute that the Retaining Wall encroached on the appellant's property. The issue for the judge was what remedy was appropriate to address the encroachment.

[17] The chambers judge began his analysis by reviewing the relevant case law and legislation. No issue is taken on appeal with the judge's statement of the applicable legal principles. In light of the arguments advanced on appeal, it should be noted that the judge's summary of the law included the following description of the doctrine of accretion:

> [33] The common law respecting accreted property and applications to the Surveyor General to certify updated reference plans was nicely summarized by the Court of Appeal in *0640453 B.C. Ltd. v. Tristar Communities Ltd*. 2018 BCCA 460 at paras. 34–54. In short, accreted lands vest in the riparian owner by operation of law. When property is conveyed, title to any lawfully accreted land is conveyed with it. The legislative scheme for applying to the

> Surveyor General to certify an updated reference plan does not change the common law principles related to accretion of land.

[18] The petition hearing focussed on the question of what remedy should be ordered for the encroachment under s. 36(2) of the *Property Law Act*. Section 36(2) provides:

> 36 (2) If, on the survey of land, it is found that a building on it encroaches on adjoining land, or a fence has been improperly located so as to enclose adjoining land, the Supreme Court may on application
>
> (a) declare that the owner of the land has for the period the court determines and on making the compensation to the owner of the adjoining land that the court determines, an easement on the land encroached on or enclosed,
>
> (b) vest title to the land encroached on or enclosed in the owner of the land encroaching or enclosing, on making the compensation that the court determines, or
>
> (c) order the owner to remove the encroachment or the fence so that it no longer encroaches on or encloses any part of the adjoining land.

[19] The judge observed that the purpose of this provision is to allow the resolution of disputes over encroachments on equitable grounds. The judge cited case law standing for the proposition that the court is to "take a broad, equitable approach and weigh the equities between the parties to determine the balance of convenience": at para. 34. The judge summarized the factors that may be relevant to the balance of convenience under s. 36(2) of the *Property Law Act*, as set out in *Vineberg v. Rerick*, 1995 CanLII 3363, [1995] B.C.J. No. 2506 (S.C.) at para. 20, and cited by this Court in *Taylor v. Hoskin*, 2006 BCCA 39 at para. 50. In brief, the factors are:

a) whether the parties were cognizant of the correct property line before the encroachment became an issue, and whether the party seeking an easement had an honest belief that the structure was within their property line;

b) whether the encroachment is a lasting improvement, and the cost and effort required in removing it; and

c) the size of the encroachment and its impact on the affected property in terms of its present and future values.

(the "*Vineberg* Factors")

[20] The judge acknowledged that the facts and equities of each case determine the court's exercise of discretion, and the *Vineberg* Factors are not intended to be rigorous tests. He reviewed the unique context within which the issue of encroachment arose in the present case, stating:

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

[21] The judge found that the encroachment was "extremely minor" as compared to the remainder of the D'Amico Property. He was not persuaded that the encroaching portion of the Retaining Wall will have "any more than a '*de minimus*' effect" on the D'Amico Property, now or in the future. The judge concluded that:

> [42] … [the appellant's] complaints that the Block Retaining Wall is an ongoing inconvenience causing a loss of enjoyment of his property are disingenuous, trifling, and nonsensical.

[22] As to the parties' state of knowledge, the judge found that as a result of the May 2021 Survey, the appellant would have known of the encroachment before he purchased the D'Amico Property, and that this militated against an order that the encroachment be demolished. By contrast, the judge found that the respondent did not have knowledge of the encroachment until after the petition commenced:

> [45] On the other hand, I am persuaded that that respondent had no idea that the Block Retaining Wall encroached on the D'Amico Property until this petition was well underway, surveys were completed, he became acquainted with the common law doctrine of accretion, and the Surveyor General had already approved the Adjustment Application. Prior to the Adjustment

> Application being approved, the D'Amico Property's boundaries as registered in the LTO showed no encroachment, and the independent survey that the respondent commissioned also showed no encroachment. The respondent was entitled to rely on this information to inform his actions.

[23] In these circumstances, the judge concluded that at all material times leading to the filing of the petition, the respondent had an honest belief that no portion of the Retaining Wall encroached on the D'Amico Property.

[24] The judge found that the Retaining Wall was a permanent fixture, and the cost of removing it, while not overly prohibitive, was nevertheless significant. The judge observed that removing the encroaching portion of the Retaining Wall would not address the appellant's stated concerns regarding his use of property because the portion of the Retaining Wall on Crown land would remain in place. There would simply have to be a cut-out, or "jog", of the Retaining Wall to remove the encroaching portion. Furthermore, the judge found that if the respondent was required to demolish the encroaching portion of the Retaining Wall, it would likely lead to a complicated and expensive process of government assessments and approvals to address environmental issues on the foreshore.

[25] Finally, the judge turned to the question of the compensation to be paid to the appellant under s. 36(2)(a) of the *Property Law Act* in relation to the easement. He noted there was no evidence that the encroachment reduced the value of the D'Amico Property, and he repeated his finding that the encroachment had little functional or economic impact on the property. Nevertheless, the judge was satisfied that the encroachment must have some value at law. He considered that an award of $2,000 was adequate to compensate the appellant for the remaining life of the Retaining Wall.

Issues on appeal

[26] The appellant alleges the judge erred in three respects in his analysis:

a) He erred in law by misapplying the doctrine of accretion;

b) He made palpable and overriding errors of fact in determining the parties' state of knowledge about the encroachment's existence; and

c) He made errors of mixed fact and law in misapplying the *Vineberg* Factors.

Standard of review

[27] The judge's decision involved an exercise of discretion under s. 36(2) of the *Property Law Act*. The standard of review for a discretionary decision is deferential. To justify appellate intervention, it must be shown that the judge "acted on a wrong principle of law, failed to have given any, or sufficient, consideration to relevant factors, or his decision must have resulted in a miscarriage of justice": *Yinghe Investment (Canada) Ltd. v. CCM Investment Group Ltd.*, 2024 BCCA 285 at para. 24.

Analysis

Issue 1: Did the judge err in law in misapplying the doctrine of accretion?

[28] The first alleged error rests on the contention that the judge held the Retaining Wall did not encroach on the D'Amico Property until the updated plan was deposited in 2023, to reflect the inclusion of the accreted land within title. In fact, the appellant argues, the common law provides that accreted land vests in the upland owner even if it is not shown in the reference plan deposited in the Land Title Office. While s. 94 of the *Land Title Act* provides a process by which registered title can be updated to include accreted land, ownership of the land passes by operation of the common law. Thus, the appellant says, the judge erred in finding that the encroachment only came into existence in 2023.

[29] In my view, this argument rests on a misreading of the judge's reasons. The judge did not find that the encroachment only existed as of 2023. On the contrary, he expressly recognized that "accreted lands vest in the riparian owner by operation of law", and that the process under s. 94 of the *Land Title Act* "does not change the

common law principles related to the accretion of land": at para. 33. Further, he acknowledged that the encroachment in this case existed before either party had purchased their properties: at paras. 13–15.

[30] The appellant's arguments focus on para. 41 of the judge's reasons. However, that paragraph has to be read within the context of the judgment as a whole. In para. 41, the judge did not find that the encroachment only existed as of 2023. Rather, he found that the encroachment issue had only arisen when the appellant successfully applied to the Surveyor General to update his title. The judge observed that prior to the s. 94 application "no part of the Block Retaining Wall encroached on the D'Amico Property (at least as far as the LTO was concerned)" (at para. 41, emphasis added). This finding was relevant to the respondent's state of knowledge, which is one of the *Vineberg* Factors.

[31] The contentious question in this case was not the point in time at which the encroachment came into existence. That was a question that could not be answered with precision on the evidence. Regardless, there was no issue that the encroachment existed, as found by the judge, "long before either party purchased their respective properties": at para. 13. The real issue in dispute was when the respondent became aware of the appellant's ownership of the accreted land. The timing of the registration of the updated plan for the D'Amico Property in 2023 was directly relevant to that question. The judge found that the respondent did not have knowledge of the encroachment until after the updated plan was registered, despite the fact that the encroachment had existed for many years.

[32] I see no legal error in the judge's analysis as it relates to the doctrine of accretion. Accordingly, I would not accede to this ground of appeal.

Issue 2: Did the judge make a palpable and overriding error in finding that the respondent had an honest belief in the property line?

[33] The appellant argues that the respondent's belief that the Retaining Wall was entirely on his property or Crown-owned land was "at best a negligent belief, based upon a willful blindness of the actual natural boundaries of Okanagan Lake and

location of the Retaining Wall." The appellant points to evidence that he says ought to have led the judge to conclude that the respondent was put on notice that the natural boundary depicted on the registered plan for the D'Amico Property was inaccurate. This evidence includes the difference between the natural boundary shown on the registered plans for the D'Amico Property and the Atkinson Property, and the respondent's failure to make inquiries of his surveyor on receiving the July 2022 sketch that made the inconsistency in the boundary lines apparent. The appellant also points to the August 2022 letter from his counsel to the respondent, which asserted that the Retaining Wall encroached on the D'Amico Property. The respondent says the appellant must be taken to have been aware of the encroachment at least as of that date.

[34] In my view, the appellant's arguments on this issue amount to an invitation to this Court to reweigh evidence and substitute our factual finding for that of the judge. The judge considered all of the evidence, and made a factual finding about the respondent's state of knowledge that is supported by the evidence. The fact that the record might also have supported alternative inferences does not amount to a palpable and overriding error of fact.

[35] The appellant also argues that the judge erred in finding that the appellant's knowledge of the encroachment prior to his purchase of the D'Amico Property was a factor militating against the demolition of the encroachment. However, the case law cited by both parties recognizes that a petitioner's knowledge of the encroachment is a relevant, although not determinative, factor under s. 36(2) of the *Property Law Act*: *Robertson v. Naramata Resorts Ltd.*, 2005 BCSC 467 at paras. 14–19; *Singer v. Willows*, 2022 BCSC 241 at para. 25. The weight to be placed on this factor is a matter for the judge.

[36] Accordingly, I am not persuaded that the judge made a palpable and overriding error in finding that the respondent had an honest belief that the Retaining Wall did not encroach on the D'Amico Property. I would not accede to this ground of appeal.

Issue 3: Did the judge make errors of mixed fact and law in applying the *Vineberg* Factors?

[37] The appellant's final ground of appeal similarly invites the Court to revisit the judge's factual findings in the absence of any demonstrated palpable and overriding error.

[38] In summary, the appellant argues that:

a) the Retaining Wall is not a permanent fixture because: it is subject to the permission of the Crown, which can be revoked at any time; it could be destroyed by flooding; it requires ongoing upkeep; it is falling into disrepair; and it could easily be dismantled and removed at reasonable cost;

b) the Retaining Wall impedes the appellant's reasonable use of land because: he has plans to install a boat lift for a pontoon boat in the area of the Retaining Wall; and the north front of the D'Amico Property is more pleasantly landscaped than the south side;

c) the encroachment also significantly impedes the present and future value of the D'Amico Property, because the appellant is in the midst of a redevelopment that anticipates the use of the area of the encroachment; and

d) the encroaching portion of the Retaining Wall provides no practical benefit to the respondent because he can access the dock via the non-encroaching portion of the Retaining Wall.

[39] I am not persuaded that any of these arguments undermine the judge's factual findings, which have support in the evidence. The evidence included photographs that demonstrated the structural importance of the Retaining Wall to the dock and bridge structure. The Retaining Wall had existed for decades, dating back to before the respondent's acquisition of the Atkinson Property in 2009. The fact that a structure may be vulnerable to extreme environmental events, such as flooding,

does not make it inherently impermanent, nor does the fact that the structure may require a licence from the Crown. The appellant's arguments that the encroaching portion of the Retaining Wall interfered with his use of the D'Amico Property, and affected its value, were considered and rejected by the judge.

[40] The judge's conclusion that the appellant's complaints were disingenuous and nonsensical related to his specific alleged uses of the property. The judge was not suggesting that the appellant's desire to have full use of his property was disingenuous and nonsensical. The judge clearly understood that, in general, a landowner is entitled to the full use of their property

[41] The appellant also argues that the judge engaged in impermissible speculation in concluding that there would likely be significant costs in completing environmental assessments if demolition of the encroachment was ordered. The appellant says that the evidence does not establish what environmental assessments might be required, and what their costs would be.

[42] However, there was evidence before the judge of potential environmental liabilities flowing from a demolition order. There were protocols published by the Provincial Crown in evidence that set out the criteria for works affecting the foreshore of Okanagan Lake. The estimates of demolition and reconstruction work tendered by each party included contingency for environmental fees. It is difficult from the evidence to precisely estimate the magnitude of these potential liabilities. The appellant provided a quote indicating that the demolition work would cost $19,005, including environmental fees. The respondent's evidence was that the anticipated cost of the work was $109,000, subject to the caution that environmental fees could exceed this amount. Regardless, the question of environmental liabilities appears to have played a limited role in the judge's analysis.

[43] The judge viewed the equities of the case and the balance of convenience globally. The judge found that that the encroachment—which, again, was 4.5 square meters, mainly linear—was extremely minor by comparison to the size of the D'Amico Property as a whole. He did not accept the appellant's assertion that the

encroachment impaired his use of the property. He found that, in any event, demolition of the encroaching portion of the Retaining Wall would not address the appellant's stated concerns with his use of the property because cutting away the encroachment would still leave the rest of the wall in place. The judge found that the cost of demolishing the encroaching portion of the Retaining Wall would be significant, and would likely include costs associated with environmental assessments. He observed, correctly, that there was no evidence that the encroachment reduced the value of the D'Amico Property. Bearing in mind the deferential standard of review that applies on this appeal, I see no basis for interfering with the judge's exercise of discretion in this case, which was based on his fact-specific assessment of the balance of convenience and the equities that arose in the circumstances.

[44] Finally, the appellant also argues that the judge engaged in impermissible speculation in assessing compensation for what amounts to a permanent easement in the sum of $2,000. The appellant does not say what he thinks the correct compensation should be. It appears to me that the judge did the best that he could with the evidence that was before him. As I have noted, there was no evidence that the value of the D'Amico Property would be impacted by the grant of an easement over the encroaching portion of the Retaining Wall. The judge found as a fact that the encroachment had "very little functional or economic impact" on the D'Amico Property. In light of those findings, and the evidence, it cannot be said that the judge erred in ordering compensation in the nominal amount of $2,000.

[45] For these reasons, I conclude that the appellant's third ground of appeal is also without merit.

Disposition

[46] I would dismiss the appeal.

[47] **FENLON J.A.**: I agree.

[48] **ABRIOUX J.A.**: I agree.

[49] **FENLON J.A.**: The appeal is dismissed.

“The Honourable Madam Justice Horsman”