IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Honey v. 540967 BC Ltd.,*
2024 BCSC 2365

Date: 20241227
Docket: S136914
Registry: Kelowna

Between:

Anita Honey, Larry Anderson, and Carol Andrews

Petitioners

And

540967 BC Ltd.

Respondent

Before: The Honourable Justice Hardwick

Reasons for Judgment

Counsel for the Petitioners:	A.P. Prior
Counsel for the Respondent:	M.S. Moorhouse
Place and Date of Hearing:	Kelowna, B.C. December 11, 2024
Place and Date of Judgment:	Kelowna, B.C. December 27, 2024

2024 BCSC 2365 (CanLII)

2024 BCSC 2365 (CanLII)

Introduction

[1] These are my reasons for judgment dealing with the issue of compensation for an easement following my order made June 12, 2024 (hereinafter the "Order").

[2] My prior oral reasons for judgment underlying the Order were subsequently transcribed at counsel's request and are indexed at 2024 BCSC 1446 (hereinafter the "Petition Reasons").

[3] No appeal was initiated by either party of the Order and my factual findings setting out the basis for the Order stand uncontested. I am thus not going to reproduce the factual background set out in the Petition Reasons.

[4] By way of brief context, the underlying dispute concerns two neighboring waterfront properties on Mabel Lake in or about Enderby, British Columbia. Each property has a cabin on it.

[5] The petitioners own Lot 59 and the corporate respondent owns Lot 58.

[6] The cabin on Lot 59 encroaches upon Lot 58.

[7] There are two encroachments at issue, as defined in the Petition Reasons as the:

a) Cabin Encroachment; and

b) Eave Overhanging Encroachment.

[8] Based on the Order arising from the Petition Reasons, a remedial easement (the "Easement") was granted pursuant to s. 36(2)(a) of the *Property Law Act*, RSBC 1996, c. 377 (the "*PLA*").

[9] However, the issue of compensation for the Easement pursuant to s. 36(2)(a) of the *PLA* was not adjudicated upon as I was not, as indicated at paragraphs 52 to 58 of the Petition Reasons, satisfied that the evidentiary record allowed me to make

the necessary findings at the time. I further considered it more effectively addressed by a further appearance before me as opposed to a reference to the registrar.

[10] Accordingly, the parties provided written submissions through Supreme Court Scheduling pursuant to the Order and a brief oral hearing occurred before me on December 11, 2024.

2024 BCSC 2365 (CanLII)

Issues to be determined

[11] The issues to be determined the Court are:

a) the amount to be awarded as compensation by the petitioners to the corporate respondent for the Easement; and

b) Costs of the compensation hearing.

Summary of positions

[12] By way of an overview of the parties' respective positions:

a) the petitioners submit that the appropriate compensation for the Easement is $5,500; and

b) The corporate respondent submits that the appropriate compensation for the Easement is in the range of $10,000 to $25,000.

Legal framework

[13] Section 36(2)(a) of the *PLA* permits an easement in exchange for compensation at a rate to be determined by the court. The law in respect of same is not controversial.

[14] As a starting point, the court has broad discretion to set the terms of compensation: see *Beaton v. Towle*, 2019 BCSC 287 at para. 38.

[15] I further accept that the following principles apply in exercising that discretion to determine the appropriate amount of compensation for an easement under s. 36(2)(a):

a) Compensation should not be based on an expropriation formula: see *Rowse v. Halloran*, 1997 CanLII 3132 (BCSC) at para. 23;

b) The increase in value to the lot obtaining the easement can be used: *Langley v. Yang*, 2012 BCSC 1520 at para. 29;

c) In the absence of objective evidence, compensation can be set in relation to the term of the easement and a commensurate level of compensation while the encroachment is in place: *Beaton* at para. 40; and

d) At the very least a nominal amount of compensation must be ordered.

2024 BCSC 2365 (CanLII)

Summary of the basis for the Parties' positions

[16] The petitioners' position on determining compensation is based upon a combination of the assessed values of Lot 58 and Lot 59, the size of the encroachments (total area of 6.95 sq. m. and 0.85 sq. m. respectively) and historical use.

[17] Based upon these factors, the petitioners submit that, depending upon the approach utilized, an award between $2,000 and $5,401 would be more than justified. The Petitioners submit using the high end of the range, rounded to $5,500.

[18] The corporate respondent's position on determining compensation is based primarily on an equitable analysis. Specifically, the corporate respondent submits the petitioners are receiving a significant benefit by virtue of having their formally illegal encroachments become effectively permanent (there is no term of the Easement but it will presumably last for the lifetime of the petitioners and their heirs so long as the cabin on Lot 59 remains in its present form) and as such the value of maintaining the current footprint of petitioners' cabin (rather than modifying it) should be considered.

[19] On this basis, the corporate respondent submits that the appropriate amount of compensation is $25,000. In the alternative, even if a nominal amount of compensation is awarded, the corporate respondent submits it should be at least

$10,000. In the further alternative, the corporate respondent submits that there is some objective evidence to support an award of at least $12,500 (plus GST).

Caselaw and Analysis

[20] Given the discretionary nature of the task of determining compensation, it is inherently fact specific. However, I was referred to a few case authorities which are instructive.

[21] In *Beaton v. Towle*, 2019 BCSC 287, the Court ordered compensation at a rate of $1,000 per year for a 25-year easement. The Court found that, in the absence of objective evidence, it needed to consider the value of the easement to the respective parties. The Court considered that the area of the encroachment (which included a driveway, landscaping, fence and concrete patio) was of significant personal value to both parties when setting the commensurate level of compensation: See paras. 38-41.

[22] In *Lalli v. Eng et al*, 2000 BCSC 686 at para. 27, it was stated that “the Court must not be seen as somehow condoning the taking of someone else’s property, no matter how innocently done, without some redress or compensation”. The Court then proceeded to issue a nominal award of $1,000 in compensation for a very modest encroachment.

[23] I further accept that the two quite recent cases involving an assessment of a nominal amount of compensation provided to the Court can be summarized as follows:

a) *D’Amico v. Atkinson*, 2023 BCSC 2186; aff’d 2024 BCCA 330. Therein the court granted $2,000 for a 4.5 square meter retaining wall encroachment at the foreshore of the parties’ properties; and

b) *Abel v. Harlton*, 2024 BCSC 1072. Therein the court granted $5,000 for a .2 to 1.5-centimeter fence encroachment.

2024 BCSC 2365 (CanLII)

[24] Coming back to basic principles, while the exact amount of compensation will vary depending on the specifics of each case, I accept the court aims to achieve a fair and equitable outcome for both parties involved in an encroachment dispute under s. 36(2)(a) of the *PLA.*

[25] In this case, I accept the petitioners are receiving a real benefit by virtue of the Easement. Specifically, the value to the petitioners for maintaining the current footprint of the cabin on Lot 59 is significant. This is made clear from the Petition Reasons. Simply stated, the petitioners are two families who share the cabin on Lot 59. In order to use the cabin at the same time, there needs to be two bedrooms. Modifying the cabin to remove the Cabin Encroachment would have resulted in the loss of one bedroom.

[26] On the other hand, while the corporate respondent is inconvenienced somewhat by the fact access between the cabins on Lot 58 and Lot 59 is limited by virtue of the extreme closeness of the cabins and there are some concerns regarding snow accumulation, the reality is that no identifiable issues have genuinely arisen and required remedy over the years these cabins have been in active use.

[27] I do also consider it relevant, within the scope of my discretion under s. 36(2)(a) of the *PLA*, that this is not a situation where the petitioners made an intentional decision to knowingly proceed as they saw fit in their personal interests and simply seek permission later. That type of conduct is never encouraged by the court. To the contrary, the corporate respondent purchased Lot 59 with some actual recognition of a possible concern. As I stated at paragraphs 26 to 30 of the Petition Reasons:

> [26] The respondent corporation purchased Lot 58 in the spring of 2021. Given their long-time ownership of property in close proximity to Lots 58 and 59 and presence in the community generally, I find it quite obvious that the Bostocks were very likely aware of the encroachment by the Cabin onto Lot 58. It is quite simply obvious from the photographs included in the evidence in the petition record before this Court. . . .
>
> [27] Despite what I conclude was a known or at least strongly suspected encroachment, the Bostocks, through the corporate respondent, did not obtain a survey of Lot 58 as a subject condition prior to completing their

2024 BCSC 2365 (CanLII)

> purchase of said property. There is also no evidence of a property disclosure statement being provided by the former owner of Lot 58 as a condition of sale . . .
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> . . .
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> [30] Thus, I accept that the Bostocks wanted to purchase Lot 58 and made, through the corporate respondent, an offer to purchase without a survey and without a property disclosure statement at their own peril. Both would have been quite simple due diligence.

2024 BCSC 2365 (CanLII)

[28] I repeat, as I did in the Petition Reasons, this does not mean the corporate respondent was incorrect in bringing this matter before the court on the basis there were encroachments as subsequently confirmed by a professional survey. I expressly recognized this when making my costs order on the basis set out at paragraph 60 and 61 of the Petition Reasons. However, when balancing equities, it is material that the petitioners did not come to court with unclean hands.

Conclusion re Compensation

[29] Ultimately, I conclude the appropriate compensation, when considering the size and effective permanency of the Easement and the relevant balancing of equities in the circumstances, is the sum of $18,000.

[30] Based upon my above conclusion, I have not considered it necessary to analyze the objective evidence submitted in support of an award of compensation for the Easement as part of the corporate respondent’s further alternative position.

Costs

[31] Costs were previously dealt with in the Petition Reasons save and except for costs of this compensation hearing.

[32] The corporate respondent has been substantially successful in obtaining compensation for the Easement within the range that they proposed. Accordingly, they are presumptively entitled to their costs of the compensation hearing as costs at scale B pursuant to the *Supreme Court Civil Rules*.

2024 BCSC 2365 (CanLII)

[33] However, by agreement of counsel, the issue of costs of the compensation hearing can alternatively be dealt with via written submissions.

[34] If the parties elect to proceed with written submissions regarding costs, the schedule for delivery shall be as follows:

a) The petitioners shall have 14 days from the date of release of these reasons for judgment to provide written submissions, not exceeding five pages (excluding any appendixes), through Supreme Court Scheduling;

b) The corporate respondent shall have 30 days from the date of release of these reasons for judgment to provide written submissions, not exceeding five pages (excluding any appendixes), through Supreme Court Scheduling;

c) There shall be no reply submissions;

d) The parties are at liberty to agree upon a modified schedule for delivery of the written submissions by agreement but Supreme Court Scheduling must be informed of the revised schedule by no later than 28 days following the release of these reasons for judgment; and

e) In the event that the parties resolve the issue of costs by agreement, Supreme Court Scheduling shall be promptly informed of same.

<u>Leave for directions</u>

[35] Lastly, the Easement has yet to actually be drafted pending resolution of the compensation issue. In the event that the parties cannot agree on the language of the Easement, either party has liberty to bring the matter back before the court for directions.

"Hardwick J."