

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Boguski v. Stearman*,
2025 BCSC 39

Date: 20250110
Docket: S228358
Registry: New Westminster

Between:

Rachel Boguski and Colin Boguski

Plaintiffs

And

**Arlene Stearman a.k.a. Cheryl Arlene Laudrum
and Robert Milburn**

Defendants

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for the Plaintiffs:

C. Steinberg

Counsel for the Defendants:

R. Wu
T. Roemer, Articled Student

Place and Dates of Hearing:

New Westminster, B.C.
September 21-22 and
November 28, 2023

Place and Date of Judgment:

New Westminster, B.C.
January 10, 2025

I. Introduction

[1] This case concerns a property dispute involving the owners of neighbouring residential properties located in the Squamish area.

[2] The plaintiffs' lot, Lot 350, is about 0.17 acres in size. The defendants' property, Lot 311, is much larger, about 1.35 acres in size. The two properties abut one another in their respective back yards. The properties are not on the same street; instead, each property is accessed by way of separate cul-de-sacs.

[3] The plaintiffs acquired their property (Lot 350) in July 2019. At the time of purchase there was a firewood shed at the back of Lot 350 (the "Shed"), a structure that had been built by the spouse of a prior owner in or around the late 1990s. The wall of the Shed is located right at the property line, but it is common ground that a portion of the Shed's roofline encroaches on the back part of the defendants' property, Lot 311. The encroachment is no more than about six inches.

[4] In 2005 or 2006, a later owner of Lot 350 built a circular platform, using Allan blocks or similar materials, to provide a base for a hot tub that he placed on top. This platform has come to be described as the Fire Pit. That former owner deposes that he *thought* he built the Fire Pit entirely on Lot 350, but in fact it was built entirely on Lot 311. He removed the hot tub when he sold Lot 350 in 2015, but the Fire Pit remained.

[5] The defendants were absentee owners for much of the time leading up to the dispute. Their lot, Lot 311, was acquired by the defendant Arlene Stearman and her former husband in 2000, and Ms. Stearman resided there only about half the time from 2000 to 2005. From 2005 to January 2017 the defendants rented the property to tenants and left the management of the property to a property manager. They say they were entirely unaware that these structures had been built on their property. In this regard, they note that their lot, at 1.35 acres in size, is very large, largely consists of woodland, and is heavily treed.

[6] The plaintiffs say that when they bought Lot 350 in 2019 they thought both the Fire Pit and the Shed roofline were on the property they had just purchased. They allege that the defendants were aware of both the Fire Pit and the use of the hot tub atop the Fire Pit, yet the defendants had never voiced any objections to the prior owners. They submit these circumstances warrant an order vesting part of Lot 311 to them, or the granting of an easement. They also argue that proprietary estoppel precludes the defendants from denying the relief sought as it would be “dishonest or unconscionable” for the defendants to succeed in enforcing their property rights.

[7] The defendants submit the plaintiffs are the authors of their own misfortune. They note that the plaintiffs: (1) entered into a contract for the purchase of Lot 350 sight unseen; (2) they never made inquiries of their own realtor concerning the lot boundary; and (3) they did not obtain a survey of the property. Further, to the date of completion of that purchase, the plaintiffs had never met with, nor spoken to, either of the defendants or any previous owner of Lot 350. They say the plaintiffs’ property claim should be dismissed.

[8] This dispute between neighbours devolved into some alleged unneighbourly behaviour starting in approximately March 2020. This led to cross-claims in trespass and nuisance. The defendants did not pursue these claims at this summary trial, but the plaintiffs continued their claims in nuisance and in fact expanded them through a successful application to amend brought at the outset of the summary trial hearing.

II. Plaintiffs’ Evidence

A. The Plaintiffs

[9] The affidavits of the plaintiffs are essentially the same and so I summarize them together, while adding any further evidence specific to a particular plaintiff.

[10] The plaintiffs each depose that they purchased Lot 350 in July 2019 from one Delesalle, who they understood did not live there but rather rented the property to a tenant, Karl Campbell. The plaintiffs regarded the property as their “dream home”, as it had a back yard in a natural setting, and offered a significant amount of privacy.

[11] The plaintiffs each say they first became aware of the property through an online listing. The listing included photographs, including one showing the back yard with what appeared to the plaintiffs to be a fire pit. The photograph was taken in a way that suggested the Fire Pit was part of Lot 350. From this, they came to believe the Fire Pit was located on Lot 350.

[12] The plaintiffs had been interested in that property prior to 2019, as Lot 350 had been listed for sale in 2015. They had viewed that listing in 2018. The 2015 listing included a photo of a hot tub placed atop the Fire Pit and a reference to a removed hot tub. The plaintiffs were unable to purchase Lot 350 in 2018 “but were left wanting to”.

[13] The listing agent for both the 2015 and 2019 listings was Andrew Laurie. The plaintiffs depose that Mr. Laurie must also have believed the Fire Pit was part of the property. They arrive at this conclusion based on the listing photos and reference to a removed hot tub, and from their post-purchase viewing of the property, which I will describe shortly.

[14] In March 2019, the plaintiffs had their agent prepare a purchase offer for Lot 350 but, coincidentally, the property was listed for sale before that offer was presented. The listing went up on April 30, 2019, with an asking price of \$975,000. As Mr. Boguski deposed:

That same day, without delay or even viewing Lot 350 in person, on April 30, 2019 my wife and I instructed (our realtor) to offer Mr. Laurie’s client the asking price for Lot 350, or \$975,000. We wanted to move quickly and offer exactly the number the seller was seeking, to maximize our chances of being able to purchase Lot 350.

[15] As noted, they instructed their agent to present an offer at the asking price, which was done, and after some further discussion they finalized a contract of purchase and sale on May 3, 2019.

[16] After entering into the contract, the plaintiffs arranged a viewing of the property with the seller’s agent, Mr. Laurie. This took place on May 5, 2019. They trod what they described as a well-worn path from the house to the Shed and then

past the Shed to the Fire Pit. The plaintiffs stood on and around the Fire Pit and audibly extolled its virtues, all within earshot – they believe – of Mr. Laurie.

[17] Both plaintiffs depose as follows:

I am positive that this conversation held by our family occurred within earshot of Mr. Laurie. He was very near to our whole family, being a matter of several feet away from any one of us, and I am certain he was aware of what we were saying.

Mr. Laurie did not then or ever indicate that the Fire Pit was not located on Lot 350.

[18] The purchase and sale closed on July 30, 2019, and the plaintiffs moved into what they describe as their “dream home” on August 21, 2019. In the eight months that followed, they enjoyed frequent use of the Fire Pit. Their use of the Fire Pit included making fires and, the plaintiffs say, their use of the Fire Pit, and the smoke from the Fire Pit, would have been visible to the occupants of Lot 311.

[19] While the plaintiffs admit they never encountered Ms. Stearman while they were sitting around the Fire Pit, they depose that Ms. Stearman never made “any comment, complaint or protest” of any sort about the plaintiffs’ use of the Fire Pit.

[20] Around May 22, 2020, Ms. Boguski saw Ms. Stearman bringing people onto what Ms. Boguski thought was their property. The people appeared to be surveyors, as they were flagging the area with fluorescent tape. Shortly after, Mr. Boguski spoke with the defendants and learned the defendants considered the Fire Pit to be located on their property (Lot 311), and they had obtained a survey confirming that fact. Mr. Boguski asked for a copy of the survey, which the defendants did not provide at that point.

[21] Shortly after that, the defendants had a small plastic snow fence installed, which blocked the plaintiffs from accessing the Fire Pit.

[22] By a letter dated June 10, 2020, the defendants forwarded a copy of the survey to the plaintiffs’ then counsel. The defendants also said:

We would like the fire pit to be removed forthwith. If your clients do not remove the fire pit within a week of your receiving this letter, we will take the necessary steps to ensure its removal.

With regard to the shed, we are content for the building to remain as it is; however, we request that your clients deliver a letter indemnifying us from any public liability that might arise from the portion of the shed which is located on our property.

[23] The plaintiffs filed a notice of civil claim on June 23, 2020 along with a certificate of pending litigation. They also posted a sign, located on their lot, putting “would-be contractors and others on notice that the area around the Fire Pit is subject to litigation, and that any augmentation done in the area is with notice”. Mr. Boguski said this notice was to prevent any trees or plants in the area from being removed or destroyed.

[24] In the spring of 2021 the defendants erected a larger, wooden fence along the boundary. Mr. Boguski has measured the distance from his house to the fence at 30 feet. The fence has fenceposts measuring nine feet in height. Mr. Boguski says this height of fence exceeds that allowed by local bylaws, which prescribe a maximum fence height of 1.83 metres, or six feet.

Alleged Acts of Nuisance

[25] Both Mr. Boguski and Ms. Boguski say that since this dispute “came to a head” there have been incidents that have caused his family safety concerns and interfered with their privacy and enjoyment of their home. These are as follows:

- a) June 16, 2020: Ms. Boguski heard a loud scream, “apparently from behind my house”. Later, she heard the sounds of digging at the back of her house.
- b) June 17, 2020: Around 10:00 am, Ms. Boguski heard the sound of digging. She looked out and saw Ms. Stearman at the Fire Pit. Ms. Stearman removed the fire ring from the Fire Pit and threw it in their yard. She called the police, who said they would speak to Ms. Stearman.

- c) July 4, 2021: Ms. Stearman played classical music at an extremely loud volume. Both plaintiffs said that while this was disturbing to their family, they ignored it and it stopped after some time. Mr. Boguski said that at the time, he did not believe this disturbance was created with the intention of disturbing his family.
- d) July 4-5, 2021: From about 9:45 pm to 1:00 am, Ms. Stearman stood near the boundary line and yelled profanities that were easily heard at the Boguski house. Mr. Boguski went out to investigate, but he did not speak to Ms. Stearman, and she did not say anything directly to him. Mr. Boguski believes that Ms. Stearman must have seen him, yet continued to yell profanities. Mr. Boguski eventually called the police, but Ms. Stearman stopped the yelling before police arrived.
- e) July 24, 2021: Just after midnight, Ms. Stearman came to the Fire Pit area and proceeded to sing loudly. The next morning, Mr. Boguski noticed that some of the Allan blocks in the Fire Pit had been dislodged and scattered.
- f) March 20, 2022: By this date, the Boguskis had installed a security light near the Fire Pit, which they put on the “always on” setting, rather than the “motion activated” setting. Shortly after midnight, Mr. Boguski heard a noise and when he looked out the window, he saw a body lying in the Fire Pit area. The body lay there without moving for 15 minutes. He called the police, who arrived around 1:00 am. The officer called out, and a female voice responded. Mr. Boguski believes the voice was Ms. Stearman’s. He then heard a dialogue between the officer and the person, with the latter saying words to the effect that there was a dispute over the boundary between the two properties.

The next morning, they noticed that their security light setting had been altered from “always on” to “motion activated”. Ms. Boguski considered this to be “highly invasive”.

- g) June 2, 2022: A plastic flamingo was placed in the Fire Pit area, facing the Boguski residence. The Boguskis came to believe that the flamingo contained a camera that was recording their family in their home and while this is still a concern, they now believe the flamingo was placed there merely to make them feel uncomfortable.
- h) September 22, 2022: Around 11:00 pm, the plaintiffs saw Ms. Stearman walking near the boundary line, and saw her stop and stare at the Boguskis' house. She coughed in an exaggerated manner and continued to stare at the house, which made them feel very uncomfortable. They called the police.
- i) February 15, 2023: At 8:55 pm, Ms. Stearman came to the boundary and removed a tarp she had previously strung on her side of the fence. The tarp had provided a visual barrier between the two properties. There were then a series of flashes similar to camera flashes, followed by flashes from three red lights in the same area. The flashing of the red lights recurred through to 9:31 pm. Ms. Stearman appeared to be looking at their house. Ms. Boguski felt spied upon, and believed Ms. Stearman was filming or photographing them in their home.
- j) May 2, 2023: The red lights flashed for about 45 minutes during the evening. Mr. Boguski was concerned that his family was being spied on and that these lights were some sort of surveillance device.
- k) July 15, 2023: Mr. Boguski noticed "a number of unusual objects" near the Fire Pit. I note the accompanying photograph, said to show these unusual objects, shows just two objects. One looks like a garden ornament with a solar or photo cell on it; the other appears to be of similar size but is difficult to describe, and it too appears to have a solar or photo cell on it. Mr. Boguski said these objects contributed to the sense of unease and concern in their family, and caused them to wonder if they were being watched or recorded.

B. Thea Boguski

[26] Thea Boguski is the plaintiffs' daughter. She was 14 years old when she swore her affidavit in September 2023.

[27] Thea Boguski deposed about two events. On June 16, 2020, she heard a scream outside their house, "coming from outside". She looked out the window but did not see anyone.

[28] The second event took place on January 21, 2023. By that point, her parents had installed a security light in their back yard, which lights when someone moves near it when it is dark. Thea saw the light go on and saw Ms. Stearman under the light, looking at her. She then saw Ms. Stearman "turn and aim her bum at me and shake it, as well as stick her tongue out at me". Thea thought that was "creepy", so she took a picture of Ms. Stearman. The accompanying photo shows a woman on the other side of a fence, looking back toward the photographer.

C. Roman Lehocky

[29] Mr. Lehocky is a former owner of Lot 350. He purchased Lot 350 from his mother in 2003.

[30] His parents purchased the property in 1984 and built a house on the property in 1987. Title to the property passed to his mother alone on the death of his father in 1992. Roman Lehocky said that up to 2003 he frequently visited Lot 350 to visit his parents, or later, just his mother, and following his purchase of Lot 350, he resided there full time until he sold it to Michael Delesalle in 2015.

[31] Mr. Lehocky said the Shed was built in or around the late 1990s. From discussions with his mother and her then partner, Martin Kouprrie, he learned that Mr. Kouprrie had built the Shed to store firewood. The Shed was in frequent use from that time forward.

[32] Mr. Lehocky said he always believed the Shed to be located entirely within Lot 350 and no one told him otherwise.

[33] In 2005 or 2006, Mr. Lehocky built a stone platform, known in these proceedings as the Fire Pit, intended as a base for a hot tub. This structure was eight feet in diameter and constructed of concrete-like stones several layers high. He situated this structure in a spot that he believed was wholly within Lot 350. He installed a wood-fired hot tub on top of the stone platform.

[34] When he sold Lot 350, he removed the hot tub from the stone platform and took it with him. He did not remove or deconstruct the stone platform.

[35] Mr. Lehocky said he was aware that the neighbouring property, Lot 311, was owned by a couple. He believes the neighbours were aware of the hot tub because it was present for about 10 years, was used regularly, created steam while in use, and was visible from the back yard of Lot 311. He never received any complaint from those neighbours about the platform or the hot tub.

D. Karl Campbell

[36] Mr. Campbell is a former tenant who resided in the house at Lot 350 from about December 2018 to July 2019. He had no direct dealings with the owner of Lot 350 and dealt only with a rental agent.

[37] The Shed was in place on Lot 350 while he resided there. The agent told him he was free to use the shed. He used the shed frequently. He deposed that he had believed the Shed was located entirely on Lot 350, and no one told him anything to the contrary. He never spoke to any neighbours about it.

[38] The Fire Pit was also there while Mr. Campbell resided on Lot 350. From the ash and charred wood present in the area, Mr. Campbell concluded it had been used as a fire pit.

[39] Based on the proximity of the Fire Pit to the house and the signs of wear in the yard, Mr. Campbell believed the Fire Pit was located on Lot 350.

[40] Mr. Campbell said he never used the Fire Pit and never saw anyone else use it either. He never had any discussions with any neighbours concerning the Fire Pit and was not aware of any complaints made about it.

E. Maria Angelica Vazquez

[41] Ms. Vazquez acted as buyer's agent for the plaintiffs in their purchase of Lot 350. She confirmed the evidence, summarized earlier, concerning the preparation of an offer to purchase Lot 350, then coincidentally Lot 350 being listed for sale, and the dealings leading to the plaintiffs' signing of a purchase contract for Lot 350.

[42] Ms. Vazquez was present when the plaintiffs and their children first viewed Lot 350 on May 5, 2019, after the plaintiffs had purchased the property. Mr. Laurie, the seller's agent, was also present for that viewing.

[43] Ms. Vazquez gave similar evidence to that of the plaintiffs concerning the Fire Pit as an apparent feature of the property, the photo of the Fire Pit in the sales listing, and of the discussions to that effect that were held when Mr. Laurie was within earshot and "no more than a few feet away". She said Mr. Laurie seemed to also believe the Fire Pit was on Lot 350. He never said anything to the contrary.

[44] Ms. Vazquez also noted the path leading from the house to the Shed and onward to the Fire Pit, and deposed that as a result of these matters, "it never occurred to me to make inquiries into whether or not the shed or firepit were on or entirely on Lot 350, and I did not".

III. Defendant's Evidence

A. Arlene Stearman

[45] Ms. Stearman purchased Lot 311 in March 2000 with her former husband. In January 2006, Ms. Stearman became the sole registered owner of Lot 311 following her divorce. In February 2006, Robert Milburn, Ms. Stearman's common law spouse, was added to the title as a joint tenant.

[46] In her affidavit, Ms. Stearman described her property, Lot 311. The house has a back deck, with a lawn below and, beyond that, there is a back yard comprised of natural woodland which includes small cliffs on a forested slope towards a creek. The Fire Pit is located on a ledge in the woodland. She deposes that there is no direct sightline from their house to the Fire Pit.

[47] Ms. Stearman is a geologist, and her former spouse was a geologist as well. Their jobs required them to work in distant locations and so they did not reside at Lot 311 full time. In their absence, their residence was maintained by a family who house-sat for them. They never brought to Ms. Stearman's attention any neighbour or boundary disputes regarding Lot 311.

[48] Ms. Stearman began her relationship with Mr. Milburn in 2005. Between 2005 and 2017, she and Mr. Milburn lived in Edmonton and Yellowknife. In those years, they engaged a property manager to rent their property to tenants. She was not made aware of any neighbour or boundary disputes during those years, and no neighbour asked to use any portion of their property.

[49] In 2016, the defendants decided to move back to Lot 311 on a permanent basis. Mr. Milburn had retired, but by this point he also had mobility issues due to injuries suffered in a fall, possibly caused by now-diagnosed Parkinson's Disease. Mr. Milburn moved to Lot 311 in January 2017. Ms. Stearman joined him at the end of February 2017, but she continued to travel regularly to their home in Yellowknife until they sold it in September 2017.

[50] Ms. Stearman deposes that she continues to work as a geoscientist and her work involves travel to work sites approximately forty percent of each year.

[51] Ms. Stearman said that when she moved back to Lot 311 in 2017 she did not generally go into the woodland portion of their back yard "because the underbrush obscures hazards and it is not safe or easy for me to walk through". Instead, she stayed on the back deck and lawn area and used the public footpath beside their

property to walk their dogs. She said she had no reason to venture as far back as the Fire Pit and never did so until the dispute with the plaintiffs began.

[52] Because the defendants' property (Lot 311) and the plaintiffs' property (Lot 350) are accessed by separate cul-de-sacs, Ms. Stearman did not, and does not, see any residents of Lot 350 coming and going. Her interactions with prior residents of Lot 350 have been limited. She did not know the names of any of the prior owners until title searches were done as part of these proceedings.

[53] More specifically, Ms. Stearman deposed that she had no discussions with any former owners or occupants of Lot 350 concerning the property boundary, none of those persons ever asked to use any part of Lot 311, and she did not give permission to any of them to use any portion of Lot 311.

[54] Ms. Stearman believes the Shed was built after she and her former husband acquired Lot 311, though she did not recall an exact date. She thought the Fire Pit would not have been built in 2005 because she gave Mr. Milburn a tour of the property when he visited in 2005 and she had no recollection of seeing the Fire Pit during that tour.

[55] Ms. Stearman did not meet either of the plaintiffs until after they had purchased Lot 350, and early interactions consisted of "neighbourly small chat".

[56] In March 2020, she saw, from her kitchen window, Mr. Boguski clearing shrubs on her own property. She immediately went to the back yard and told Mr. Boguski that he was clearing trees and shrubs located on her land. Mr. Boguski stopped his activities without objection and she returned to her house.

[57] The clearing activity made the sight line between the public path, located on the west side of Lot 311, and the Fire Pit less obstructed, but the Fire Pit continued and continues to be out of view from Ms. Stearman's house. Ms. Stearman appended a photograph taken from her back deck in the direction of the Fire Pit, and it appears to support her statement.

[58] On April 12, 2020, Ms. Stearman saw a pile of compost on her property and a new trail leading to that compost pile from Lot 350. Later that day, she walked across her back yard and found Mr. Boguski at the Fire Pit, having a fire. This was the first time she had seen Mr. Boguski at the Fire Pit. She told him that she would be obtaining a survey to determine the boundary line. Mr. Boguski did not object, and Ms. Stearman returned to her house.

[59] On May 26, 2020, Ms. Stearman relocated the compost from her property to the plaintiffs' property. She did so at night, when she "felt safe to do so". She said she had been very upset by the dumping of compost on her property.

[60] Mr. Boguski came to their house on May 28, 2020, speaking first to Ms. Stearman and then to Mr. Milburn. He told Ms. Stearman, "I can make life very difficult for you".

[61] Around this time, Ms. Stearman, with the help of a neighbour, placed a snow fence along the property line. The neighbour had his five year old son with him. Mr. Boguski came out and started filming them, and the neighbour asked him to stop filming his child. Mr. Boguski refused and continued filming.

[62] A survey was carried out by Bunbury & Associates Land Surveying Limited in May 2020. The survey determined that the Fire Pit was located entirely within Lot 311 and that part of the Shed roofline encroached on Lot 311.

[63] Counsel for the plaintiffs wrote to the defendants on June 1, 2020, requesting a copy of the survey. The defendants responded by sending a copy of the survey, together with the letter dated June 10, 2020, quoted earlier in these reasons.

[64] Although the defendants indicated in that letter that they were content to leave the Shed as is, they are no longer willing to do so.

[65] The plaintiffs responded to the defendants' June 10, 2020 letter through different counsel, who said that the plaintiffs remained of the view that the two structures were on the plaintiffs' property, Lot 350. Plaintiffs' counsel, who had not

yet received the survey, gave various reasons why the plaintiffs should have possession of these lands even if a survey revealed the Fire Pit and Shed roofline to be located on the defendants' property. Plaintiffs' counsel also put the defendants on notice that they were not to interfere with either of those structures and that they were to remove the fence that had been constructed, presumably referring to the plastic snow fence.

[66] Through document discovery, Ms. Stearman became aware that the plaintiffs engaged their own surveyors, whose survey dated August 20, 2020 confirmed the property boundary as found by the defendants' surveyors, Bunbury & Associates.

[67] Around June 25, 2020, the plaintiffs erected a sign on their side of the snow fence, facing Lot 311, with the following notice:

NOTICE

The real estate located just on the other side of the fence faced by this sign is subject of:

BC Supreme Court Action: #New S-S-228358

Ownership is claimed by owners of this property, who do not authorize attendance on or augmentation of those lands. If you do so, you are doing so with notice. Direct inquiries to: csteinberg@doublediamondlaw.com

[68] Ms. Stearman said that sign remained in place until mid-February 2023, when it was removed. Ms. Stearman said the defendants did not remove that sign and she does not know who did remove it.

[69] In her affidavit, Ms. Stearman responded to the plaintiffs' allegations of nuisance, and some other allegations, as follows:

- a) The wooden fence: this is located at the property boundary and is bylaw-compliant. She understands the height restriction applies to the fence rails, not the posts. If that turns out to be incorrect, she will trim the posts.

- b) The fire ring: In their letter of June 10, 2020, the defendants demanded that the plaintiffs remove the Fire Pit forthwith. The plaintiffs did not remove it, so in the early hours of June 17, Ms. Stearman went to the area and removed the fire ring, placing it on the neighbouring property without stepping foot on it. She also removed some river rocks by rolling them away.
- c) The scream: Ms. Stearman denied that she screamed in her back yard on June 16, 2020.
- d) Playing loud music: Ms. Stearman said she was playing music on her laptop while she did some gardening. She also loves to sing while gardening.
- e) Alleged profanities: That same evening (July 4, 2021), Ms. Stearman went to the fence line to pick up some of her solar lights that had stopped working. While doing so, she tripped and fell. She acknowledged she might have sworn. When she looked up, she saw Ms. Boguski on her patio. She apologized to her. On her way back to her house, Ms. Stearman paused because she wanted to ensure Ms. Boguski was okay. She could no longer see Ms. Boguski and assumed she was still there, so she “said a few kind and supportive words”.

In a later affidavit, Ms. Stearman recalled that she had been singing in her back yard earlier that evening, both while gardening and as she walked to the solar lights. At the time, she believed the Boguskis were not home. In a further affidavit, Ms. Stearman said she now recalled the songs she was singing were “You Never Walk Alone”, which she described as her “courage song”, meaning a song to give her courage; the “Rodeo Song”, a tune that has profane lyrics that include the line, “Well, it’s 40 below and I don’t give a fuck” and other uses of similar language; and “Satan is Real”, which she had heard on CBC earlier that day.

As to the singing of the “Rodeo Song”, Ms. Stearman said:

I sang this song because I was taking a stand for myself, privately, and as a way of venting due to my frustration with the situation with the Boguskis. While I was singing, I believed that the Boguskis were not home.

- f) Singing/Moving Allan blocks: Ms. Stearman believes this refers to July 23, 2021, not July 24. Other neighbours were hosting an outdoor party. Ms. Stearman went over to the party and chatted for a bit, but did not sing.

She started back to her house using the public pathway, but started thinking about the loose Allan blocks at the Fire Pit. She went to the Fire Pit and, using her bare feet, tested the blocks to see if they would move. Some of them fell down. These Allan blocks were not secured in any way; they were just stacked and easy to remove.

- g) Boguskis’ security light/Lying down: In the evening of March 20, 2022, Ms. Boguski became concerned about a different neighbour’s use of a wood-fired sauna, as the chimney for that sauna is located below the branches of some of her trees. She concedes she had had “some drinks”. She returned via the area of the disputed boundary, which triggered “numerous spotlights”. She deposed that she has PTSD from prior trauma and the light caused her to drop and freeze in place. She then proceeded with methods she learned through self-regulation therapy, and simply lay there while working through her emotions. Eventually, a police officer attended and helped her home.
- h) The flamingo: Ms. Stearman said she put up a flamingo garden ornament with a “Private Property” sign at the property line near the public walkway. There have been a few times where she has knocked over the flamingo without picking it up and unknown others have put it back up. Eventually the legs of the flamingo fell off and so she brought it back inside.

- i) Coughing and staring: Ms. Stearman said she had a bad cough in September 2022, during which she was away at a remote work site for a time. Her cough was so bad that she worked from her room in the camp rather than at the site office. On the night in question, she went to the back yard but something triggered her cough and she could not stop. She acknowledges she may have walked along the fence line and might have looked at the Boguskis' house, but she did not do so intentionally. She tries to avoid looking there as much as possible as she is very distraught over this dispute.

- j) Thea's allegations: Ms. Stearman said she did not have a specific recollection of being in her back yard on January 21, 2023, but she said she was regularly in the area to walk her dogs, to check on the fence and to check the small green garden fence she placed under the bottom fence rail that was installed to keep out the Boguskis' dog.

Ms. Stearman said she had no recollection of wiggling her bum or sticking her tongue out, and would never do that to the plaintiffs' children.

She acknowledges the photo that shows her looking toward the camera at the Boguski house, but says she was surprised to see that photo and did not recall what might have caused her to look in that direction. She noted the Boguskis' security lights are "blinding to look towards".

- k) Tarp removal: Ms. Stearman notes this was the first time she called the police. She had put up a tarp to obscure her view of the plaintiffs' offensive sign, but it had become torn and so she went to remove it. She noted that Mr. Boguski was filming her, which she found offensive and disturbing, and which triggered her PTSD. She fell from the fence while she was trying to untie one end of the tarp. She took a break to recover, then returned to finish removing the tarp. She considered taking a photo of Mr. Boguski filming her, but "did not have the guts to do so", so she took some random photos towards her own house as a "shot across the bow"

to Mr. Boguski about his filming. A police officer attended, who said he would go and speak to Mr. Boguski.

- l) Alleged flashing lights: Ms. Stearman said that at the alleged time (May 2, 2023) she was recovering from multiple shoulder fractures suffered two weeks prior. On May 2, 2023, she was “still firmly in a sling and was unable to walk on uneven ground due to balance issues”.
- m) Unknown objects: Ms. Stearman said these are solar-powered lights. One is designed to resemble an owl. Ms. Stearman confirmed there is no surveillance equipment in these ornaments and queried why anyone would think that they were surveillance devices.

B. Robert Milburn

[70] Mr. Milburn began a relationship with Ms. Stearman in 2005, and he visited Lot 311 several times that year. On one of those visits he walked the perimeter of the back yard, but did not recall seeing the Fire Pit. He believes he would have noticed such a structure had it been present at the time.

[71] Although he became registered as a joint tenant on Lot 311 in 2006, he did not reside there until January 2017. In the years between 2005 and 2017 he lived in Edmonton and, later, Yellowknife, and the property was managed and rented through a property manager. He never met any neighbours, including any residents of Lot 350, he was not made aware of any boundary disputes, and no neighbour ever asked to use any portion of Lot 311.

[72] Mr. Milburn has met Mr. Boguski, but this only took place after the plaintiffs had purchased Lot 350. He has never met or spoken with Ms. Boguski.

[73] Mr. Milburn’s only discussion with Mr. Boguski took place on May 28, 2020, when Mr. Boguski said “but we need the Fire Pit. It was all part of the deal” and “I have been grandfathered with respect to our new property”. To Mr. Milburn, Mr. Boguski seemed to believe he was given the Fire Pit and a “sliver of land”

through his purchase of Lot 350. When Mr. Milburn refused, Mr. Boguski became agitated and flushed, with his fists clenched.

[74] Mr. Milburn, who is in his mid-70s, said his mobility is impaired and this limits him from going to the woodland area where the Fire Pit is located. As noted earlier, Ms. Stearman said Mr. Milburn's mobility issues stem from a traumatic brain injury suffered in a fall, with the fall possibly attributable to Parkinson's Disease.

[75] Mr. Milburn learned of the existence of the Fire Pit only after this dispute arose. He believes that the use of the Fire Pit in this dense woodland area "constitutes an unacceptable fire hazard to the entire neighbourhood".

[76] In an examination for discovery held on May 29, 2023, Mr. Milburn testified that he ordered a property survey after he had seen a circular platform on Lot 311. When asked when he had that survey done, he said "June of 2006. I'm guessing." He was asked to produce that survey. In a letter dated July 4, 2023, counsel for the defendants said Mr. Milburn had been mistaken about the survey date as there was no survey from June 2006 and the only survey done was the Bunbury & Associates survey done in May 2020.

C. Admissions

[77] The defendants served the plaintiffs with a notice to admit dated May 16, 2023. The plaintiffs did not respond, so the following matters are deemed admitted. I will refer only to the most relevant admissions, which I have edited slightly for readability:

- a) The plaintiffs do not require access to the "Disputed Lands" (as defined in the plaintiffs' notice of civil claim) to access their property or to access public lands.
- b) As at the completion date of the plaintiffs' purchase of Lot 350, the plaintiffs had never met or spoken to:
 - i. either of the defendants;

- ii. any previous owner of Lot 350, including Roman Lehocky;
 - iii. any tenant of Lot 350, including Karl Campbell.
- c) As at the completion date of the plaintiffs' purchase of Lot 350, they had no knowledge regarding how the defendants used their lot, Lot 311.
- d) As at the completion date of the plaintiffs' purchase of Lot 350, they had never had any direct communications with the seller of Lot 350, Mr. Delesalle.
- e) The plaintiffs knew that the seller of Lot 350, Mr. Delesalle, had never occupied Lot 350.
- f) The plaintiffs did not rely on any representations by either of the defendants as part of their decision to purchase Lot 350.
- g) As at the completion date of the plaintiffs' purchase of Lot 350, the plaintiffs did not obtain a survey to determine the boundary lines, square footage and/or lot size of Lot 350.
- h) As at the completion date of the plaintiffs' purchase of Lot 350, the plaintiffs did not make any inquiries of their own realtor regarding the boundary lines, square footage or lot size of Lot 350.
- i) The plaintiffs are able to make a fire, and they have made fires, in their backyard located entirely within Lot 350.
- j) The plaintiffs' document 21 depicts logs forming a square/rectangle shape which is located entirely on Lot 311. Mr. Boguski used logs located on Lot 311 to make that shape and entered on Lot 311 to carry out that work.

[78] In addition to these formal admissions, there were admissions of the plaintiffs on discovery:

- a) Mr. Boguski admitted on discovery that he conducted no due diligence regarding the boundary lines of Lot 350 prior to purchasing it.
- b) Ms. Boguski agreed that Lot 350 was private from Lot 311. When asked “so somebody at lot 311 cannot see lot 350, then?”, Ms. Boguski said “barely”. She then agreed that there is a very limited sight line between Lot 311 and Lot 350.

IV. Positions of the Parties

A. Plaintiffs

[79] The plaintiffs submit that the Shed roofline and Fire Pit are long-term encroachments that go back years and over several changes of ownership of Lot 350. One of those prior owners (Mr. Lehocky) and one prior tenant (Mr. Campbell) believed the Shed and Fire Pit to be on Lot 350. Mr. Lehocky believed the neighbours knew about the hot tub he installed on the Fire Pit.

[80] The plaintiffs say Mr. Milburn knew about the Fire Pit as far back as 2006 because he testified on discovery that he ordered a survey that year on learning the Fire Pit was there.

[81] The plaintiffs emphasize, in particular, their own belief that the property they purchased includes the land on which the Fire Pit was situated. They say their belief was reasonable as others held the same belief, namely Mr. Lehocky, Mr. Campbell, their realtor (Ms. Vazquez), and, evidently, the seller’s realtor (Mr. Laurie) as well.

[82] Based on these facts, they say they are entitled to relief under s. 36(2) of the *Property Law Act*, R.S.B.C. 1996, c. 377 [PLA], which allows the Court to make an order vesting title where a building encroaches on adjoining land or a fence has been improperly located.

[83] The plaintiffs say there is no doubt the Shed is a building and that its roofline encroaches on Lot 311, and they say the Fire Pit and Shed together meet the definition of “fence”, citing *Bland v. Bland*, 2017 BCSC 1712; *Lahey v. Hartford Fire*

Insurance Co., [1968] 1 O.R. 727 (H.C.J.), varied on other grounds, [1969] O.J. No. 1417 (C.A.); and *Langley v. Yang*, 2012 BCSC 1520.

[84] The plaintiffs also cited *Vineberg v. Rerick*, [1995] B.C.J. No. 2506 (S.C.), for its elaboration on the assessment of equities and balance of convenience between parties in these types of cases. Here, the plaintiffs emphasize their honest belief that they owned the property in the area of the Fire Pit, the fixed nature of the Fire Pit, and the manner in which that encroachment affects the respective properties. On the latter point, the plaintiffs say that the Shed and Fire Pit form a “line of obstacle” that meets the definition of “fence”. This line, together with the actual boundary, could form two sides of a 600 square foot triangle of land that could be conveniently vested in the plaintiffs in return for a fair sum. This “triangle” would minimally affect Lot 311 if it were to be vested in the plaintiffs, given its much greater size, but it would maximally benefit Lot 350 in terms of its use and benefits.

[85] The plaintiffs argue that the defendants are at fault here, as they did nothing to inform any owner or resident of Lot 350 about the encroachments despite knowing about them.

[86] The plaintiffs also say that the facts in this case establish proprietary estoppel, which serves to prevent the defendants from denying the relief sought by the plaintiffs, citing *Epp v. Gartside*, 2011 BCSC 1687 and *Erickson v. Jones*, 2008 BCCA 379. Here, the plaintiffs again rely on the fact that the defendants failed to inform them of the encroachments and failed to object when they had to have known the Fire Pit was being used by the defendants. As the plaintiffs put it:

Whereas the Plaintiffs and all their predecessors had an “*honest belief*” that the Shed and Fire Pit were wholly on Lot 350, the Defendants knew otherwise, and sat on their laurels allowing all residents and owners of Lot 350 to operate under a misapprehension.

[Italics in original.]

[87] In the alternative, the plaintiffs seek an easement over the same “triangle”, though they submit this is not the most appropriate remedy given the need for finality in this case.

[88] The plaintiffs also submit the defendants are liable in nuisance, as they engaged in ongoing behaviour that unreasonably interfered with their quiet enjoyment of their property. They summarize that behaviour as follows:

The acts of nuisance have included screaming and swearing loudly at the Plaintiffs' house in a threatening manner at late hours of the night and early hours of the morning, resulting in numerous attendances by police. Another instance resulting in police attendance included [Ms.] Stearman lying on the ground for hours late at night, immediately behind the Plaintiffs' house, on the edge of Lot 311. These acts have also included attempting to watch or record the Plaintiffs and their family in their home, and to intentionally cause the Plaintiffs and their family to believe they were being recorded in their home. [Ms.] Stearman also made inappropriate gestures at Thea while she was in her house.

[89] The plaintiffs cited the following cases on nuisance: *Wasserman v. Hall*, 2009 BCSC 1318; *Pellegrin v. Wheeldon*, 2020 BCPC 143; and *Mete v. Masouleh*, 2023 BCCRT 515. In submissions, the plaintiffs acknowledged that the amount of damages to be awarded here “will be low”, and suggested that the sum of \$2,500 would be appropriate.

B. Defendants

[90] The defendants say they are innocent property owners who seek to uphold their property rights and retain the lands that are rightfully theirs.

[91] The defendants submit the plaintiffs are the authors of their own misfortune, insofar as the purchasers bought Lot 350 sight unseen, and to the time of the purchase:

- a) had never met or spoken with either defendant or any prior owner of Lot 350;
- b) never relied on any representation from either defendant prior to their purchase of Lot 350;
- c) did not obtain a survey of Lot 350 to determine its boundaries, size and dimensions; and

d) made no inquiries of their own realtor regarding boundaries, size or dimensions.

[92] The defendants say the evidence shows the Fire Pit to have been built at a time when they resided out of province and were renting the property to tenants. No prior owner of Lot 350 asked the defendants for permission to construct the Fire Pit or the Shed's overhanging roofline, and no such permission was ever given.

[93] In 2017, the defendants returned from out of province to live in their home on Lot 311. At that point, Lot 350 was owned by Mr. Delesalle. Mr. Delesalle never lived at Lot 350, and there is no evidence he ever used the Fire Pit. Lot 350 was rented to Mr. Campbell from about December 2018 to July 2019. Although Mr. Campbell observed a stone platform that he surmised had been used for a fire pit in the past, he never used it as a fire pit or otherwise.

[94] The plaintiffs became registered owners of Lot 350 on July 30, 2019. The property listing for Lot 350 made no reference to a fire pit or shed. The contract of purchase and sale for Lot 350 referenced a "storage shed" under "Included Items", but there was no reference to a fire pit. The contract of purchase and sale also contained the following provision:

The Buyers acknowledge reading and understanding the information that is contained in this Contract. The Buyers have been advised that if further information or exact measurements, square footage and / or lot size is a concern; the Property should be independently measured and the Buyers should also make their own investigations as to the age of buildings / structures. The Buyers are advised to verify the above information and arrange for any independent measurements and / or investigations at the earliest possible opportunity and in any event prior to proceedings with this Contract.

[95] The defendants note that s. 36(2) of the *PLA* requires that the encroachments be a "building" or a "fence". The section allows the court to declare a statutory easement, or vest title to building or fence encroachments where it would be equitable to do so: *Wan v. British Columbia*, 2022 BCSC 106 at para. 62, which quotes *Bland* at para. 50. The considerations for assessing the equities and balance

of convenience under s. 36 are set out in *Vanziffle v. Coulter*, 2003 BCCA 350 at para. 3.

[96] Here, there was never a fence that was improperly located so as to enclose the Fire Pit and Shed roofline. Although the plaintiffs reference a small black metal snow fence, this fence is irrelevant here as that fence ran north-south along the public walkway and did not run in the direction of the Fire Pit.

[97] To succeed under s. 36 of the *PLA*, the plaintiffs must show that they own the Fire Pit and the Shed, and that these structures are either a “building” or a “fence”. The plaintiffs do not own the Fire Pit, and it is neither a “building” nor a “fence”.

[98] While the Shed is a “building”, the defendants submit that the Court should not exercise its discretion under s. 36 to permit the roofline of the Shed to continue encroaching on Lot 311. They submit the balance of convenience favours the removal of the encroachment because the location of the Shed likely contravenes the setback requirements applicable to this area, and because of the animosity between the parties: *Urbanczyk v. 1128 Enterprises Ltd.*, 2019 BCSC 117 at paras. 66–67.

[99] Although the defendants submit there is no “fence” here on any reasonable interpretation, they add that, in any event, the balance of convenience favours the defendants. While the plaintiffs may have enjoyed their time at the Fire Pit, the reality is that the Fire Pit simply does not belong to them. In addition, the defendants have been working on a large-scale landscaping project on their lot since they returned to the property in 2017, which includes an area for dog agility training and trail work. Their plan is to extend the trail so that it will loop through the current area occupied by the Fire Pit, and to have a sandpit in the Fire Pit area for their dogs.

[100] The defendants say that, in short, they have plans to continue developing their property, as they ought to be entitled to do. By contrast, the plaintiffs have no identifiable need for a Fire Pit and will suffer no real prejudice. The defendants note this case does not involve a driveway or access road, where there is clear prejudice

to the party who is at risk of losing access to their property. Here, there is no prejudice to the plaintiffs.

[101] As to proprietary estoppel, the defendants cite *Cowper-Smith v. Morgan*, 2017 SCC 61, noting that there must be a representation or assurance, on the basis of which the claimant expects that he will enjoy some right or benefit over property. No representation, assurance or promise was made here. In fact, the plaintiffs had never met, nor spoken to, the defendants prior to the plaintiffs' purchase of Lot 350.

[102] As to the plaintiffs' claims in nuisance, the defendants say that the allegations are either not made out at all, or if made out, do not meet the test of being both a substantial and unreasonable interference with an owner's use or enjoyment of land: *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, 2013 SCC 13 at para. 19.

V. Discussion

[103] Before beginning my analysis, I note that both sides agree that this matter is suitable for disposition by summary trial. In fact, both sides went farther than that and indicated they wished to have this case dealt with this way.

[104] I begin by making some factual findings, beginning with the Fire Pit. The several photographs in evidence demonstrate that the Fire Pit is not a very obvious structure. It consists of a circular area formed, it appears, using small Allan blocks or similar landscaping items and filling in behind to make a level area. This is the "stone platform" referred to by Mr. Lehocky. The photographs indicate there is a downslope from south to north (that is, as one moves away from the plaintiff's house), with what appears to be three levels of Allan blocks on the downslope side, and perhaps no Allan blocks on the upslope side, or at least none that are visible in the photographs. In the earlier-taken photographs there is a fire ring in the middle of the circle, surrounded by what some witnesses have described as river rocks. The Fire Pit as a whole has a very low profile, and there is brush surrounding it. I consider it safe to assume that there was much more brush around it prior to the brush and tree clearing activities of Mr. Boguski in March 2020.

[105] I am satisfied that the Fire Pit is largely obscured from view from the defendants' house and, as one photograph shows, it is entirely obscured from view from the deck of the defendants' house. I conclude the Fire Pit would have been even less visible from the defendants' house prior to March 2020.

[106] I am also satisfied that the defendants were unaware the plaintiffs were utilizing a fire pit on their property until March 2020. The plaintiffs argue that the defendants must have seen Mr. Lehocky's hot tub atop the Fire Pit as it was there for nine or 10 years, but the defendants did not live at Lot 311 during those years, and the hot tub had been gone for two years or so by the time they moved back into the house in 2017.

[107] The plaintiffs also say the defendants must have noticed smoke coming from fires they had while using the Fire Pit, but the Fire Pit is located close to the property boundary and so I cannot conclude from the fact there was smoke at times that the defendants must have known it was coming from their own side of the boundary.

[108] The plaintiffs also rely on the discovery evidence of Mr. Milburn that he saw the Fire Pit in 2006 and this prompted him to order a property survey, but this evidence was promptly corrected afterward, with the explanation that Mr. Milburn had made a misstatement. The defendants argue that the discovery evidence of Mr. Milburn trumps his correction because the former was under oath or affirmation and the latter was not, but follow-up discovery answers also bear a formal obligation to be truthful. I conclude it would be most unfair to decide a case on the basis of a witness's misstatement, particularly where a witness is elderly and at least somewhat infirm. The plaintiffs could have pressed the matter by asking at the summary trial that Mr. Milburn be cross-examined on the point, but they did not.

[109] As for the Shed, while its essential structure is located on Lot 350, its roof overhangs Lot 311 by six inches or less. There is no evidence that the defendants were aware of that overhang.

[110] The remainder of the facts necessary to determine the property issues are largely undisputed.

A. Section 36, Property Law Act

[111] Section 36 of the *PLA* 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.

[112] The purpose of this section was described as follows in *Bland*:

[50] The purpose of s. 36 of the *PLA* is "to provide a basis, on equitable grounds, for resolving disputes over encroachments": *Westshore* at para. 88 citing *Taylor v. Hoskin*, 2006 BCCA 39 at para. 52. In broad terms, its purpose is to allow the court to declare a statutory easement, or vest title to building or fence encroachments in circumstances where it would be equitable to do so. This is achieved through an assessment of the balance of convenience: *Westshore*, para. 88.

[113] This passage was cited with approval in *Wan* at para. 62.

[114] In *Vanziffle*, the Court of Appeal summarized the matters to be considered when assessing the equities, or balance of convenience, between the parties in s. 36 cases:

[3] As the summary trial judge observed, the law governing applications under s. 36 is reasonably clear and well set out in the authorities, including *Gay v. Wierzbicki* [1967] 2 O.R. 211 (Ont. C.A.), *Barrow v. Landry* [1998] B.C.J. No. 1601 (B.C.S.C.) and *Vineberg v. Rerick* [1995] B.C.J. 2506 (B.C.S.C.). In the latter case, Leggatt J. noted three "predominant considerations" used by courts in assessing the "balance of convenience" analysis mandated by s. 36, namely:

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 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.

[115] I agree with the defendants that in order for s. 36 to apply, the plaintiffs must demonstrate that a “building” of theirs encroaches on the defendants’ land, or that a fence has been improperly located so as to enclose adjoining land.

[116] The situation with the Shed is straightforward enough as it is indisputably a building belonging to the plaintiffs. The Fire Pit is another matter.

[117] The plaintiffs’ primary argument is that the Shed and Fire Pit together comprise a “fence”. They rely on case authorities which have favoured a liberal interpretation of “fence”: *Bland*, *Lahey*, and *Langley*.

[118] In *Bland* at paras. 51–59, the court endorsed various authorities supporting a liberal interpretation of “fence”, and found that an access road that had formerly been fenced on both sides, and which formerly had willow trees on both sides, met the definition of “fence” under s. 36.

[119] In *Lahey*, which involved an insurance claim concerning a stone wall, a wall that I note varied from five feet to twelve feet in height, the court (at 729) defined a “fence” as “a structure which encloses wholly or partially some piece of property so as to impede ingress and egress”.

[120] In *Langley*, the court said (at para. 19): “an aggregation of large stones meant to separate two properties that effectively annexes a part of one property to the other, is a “fence” within the meaning of s. 36”.

[121] I agree that “fence” should be interpreted liberally, and along the lines set out in those and other authorities. However, the plaintiffs’ argument goes beyond an interpretation that is merely liberal to one that verges on the absurd. The Shed and the Fire Pit neither delineate nor enclose anything together. They are entirely separate things that are separated by a fair distance. The photographs, maps and diagrams in evidence in this case do not show anything that suggests, in any way, that these two features operate together to enclose land.

[122] For completeness, I would add that there was never a fence that was improperly located so as to enclose the Fire Pit and Shed roofline.

[123] Although in argument the plaintiffs referenced a small black metal snow fence that was present in the general area at some point, I agree with the defendants that this other fence is irrelevant here as the black snow fence ran essentially north-south along the public walkway and did not run in the direction of the Fire Pit, which is an essentially east-west direction.

[124] I also conclude that the Fire Pit, on its own, does not meet the definition of “fence”. Its original purpose was to provide a level base for a hot tub, not to provide separation between pieces of property or to “impede ingress and egress”. In any event, the photographs demonstrate clearly that, regardless of its original purpose, the Fire Pit does not operate to separate pieces of property or impede access to other parts of the property.

[125] The plaintiffs’ other argument concerning the Fire Pit, that it meets the definition of “building”, suffers from two impediments. The first is that the plaintiffs do not have a “building” that encroaches on adjoining land, as s. 36 requires. Leaving aside, for the moment, the question of whether the Fire Pit is a “building”, the Fire Pit is not theirs. They do not own, and have never owned, the Fire Pit.

Their erroneous belief that the Fire Pit was theirs does not detract from simple, stark fact that the “encroachment” on which they base their s. 36 claim has never belonged to them.

[126] Although that observation is sufficient to dispose of this aspect of the plaintiffs’ claim, I will go further in concluding the Fire Pit does not meet any reasonable definition of “building”.

[127] *Wan* involved a similar issue. There, a swimming pool encroached on Crown land. In considering whether the pool fell within the definition of “building”, Justice MacNaughton said:

[65] It is well settled that the terms “building” and “fence” are to be interpreted broadly to give effect to the equitable purposes of s. 36. In *Epp v. Gartside*, 2011 BCSC 1687, Justice Melnick wrote:

[21] That section has been judicially considered in a number of cases. In *Svenson v. Hokhold*, [1993] B.C.J. No. 859 (B.C.C.A.) and in *Vineberg v. Rerick*, [1995] B.C.J. No. 2506 [*Vineberg*], our courts found that it was sufficient if the property in question had, at some time in the past, been partially enclosed by a fence or a construction equivalent to a fence. In *Vineberg*, Mr. Justice Leggatt indicated at para. 17 that one should not impose too strict a criteria on a section that is intended to provide equitable relief. Similarly, the definition of what is a building has been interpreted with seemingly great elasticity. For example, in *Dattolo v. Merlo*, [1998] B.C.J. No. 1499 [*Dattolo*], Mr. Justice Shabbits found a concrete sidewalk to be an extension of a home and thus coming within the definition of a building. Of course, he also found in those particular circumstances that if the sidewalk had been removed, access to a rental unit connected by it to the home would have been impractical. The sidewalk in question was two feet wide and encroached the neighbour’s property by a couple of inches due to mutual mistake by the neighbours as to the location of the property line when the sidewalk was installed. Mr. Justice Shabbits ordered an easement to be granted as the balance of convenience favoured that applicant.

[66] In this case, the pool is not a structure with a roof and walls. Further, it is not an extension of the home on the Property. It is some distance from the home, and it is not integral to it. The home was built before the pool. I would describe the pool as an amenity or a feature, not a building. I also find that the rope “fence” around the top of the retaining wall, is not a fence as contemplated by s. 36 of the *PLA*.

[67] Even with great elasticity, a pool does not fit neatly into the definition of a building, and the parties did not direct me to any case where a pool was the subject of an application under s. 36 of the *PLA*.

[68] Ms. Wan did rely on *Grant v. MacDonald*, [1992] 68 B.C.L.R. (2d) 332, [1992] 5 W.W.R. 577 (C.A.), where adjoining neighbours disputed the enforceability of an easement, which had been reserved for the purpose of building a pool. The case was about the interpretation of the easement agreement and whether it had been terminated. It is not helpful in assessing whether the Encroachments fall within s. 36.

[69] I conclude that the Encroachments do not meet the definition of a building or a fence in s. 36.

[128] Similarly, the Fire Pit in this case is not a structure with a roof and walls, it is not an extension of the home on Lot 350, it is not integral to that home, and the evidence shows that the home on Lot 350 was built before the Fire Pit.

[129] *Taylor v. Hoskin*, 2003 BCSC 1843, aff'd 2006 BCCA 39, is another case involving an amenity or feature. That case involved encroachments by two buildings and a fence, but also by a satellite dish installed on a post. The court concluded (at para. 87) the satellite dish did not qualify as a “building” or “fence”.

[130] I conclude that, like the pool in *Wan* and the satellite dish in *Taylor*, the Fire Pit is an amenity or a feature, not a “building”.

[131] In light of my conclusions, I will deal only briefly with both the equities and balance of convenience insofar as the Fire Pit is concerned. I pause to note that it is clear the exercise of the discretion granted in s. 36 involves the application of equitable principles: see the Court of Appeal decision in *Taylor* at paras. 51–53.

[132] Without meaning to be unduly critical, I must observe that the plaintiffs’ purchase of Lot 350 sight unseen, without doing anything whatsoever to verify the size, dimensions or boundaries of the property, showed a remarkable lack of diligence. But rather than accept the situation, the plaintiffs are, through these proceedings, attempting to visit the consequences of their lack of diligence on the defendants, who had absolutely nothing to do with the plaintiffs’ purchase decision. This, I conclude, is an appropriate consideration when assessing the equities of the case, and it weighs heavily against the plaintiffs.

[133] The balance of convenience is also against the plaintiffs. They seek to acquire land, on payment of compensation, that is not theirs, but which they erroneously believed was theirs. I agree with the defendants that while the plaintiffs may have enjoyed some occasions where they used the Fire Pit, the reality is that the Fire Pit does not belong to them. There is no detriment here because they cannot lose what they never had.

[134] By contrast, the defendants stand to lose a 600 square foot portion of their property. This part of their property is part of landscaping and development work they are undertaking so that they may utilize their property more fully. The prejudice to the plaintiffs is clear.

[135] The situation with the Shed is somewhat different, but my conclusion is the same. I accept that the Shed roofline encroachment is minimal in degree, but I am satisfied the cost to remove the Shed or overhang is also minimal. The photograph of the Shed shows a ramshackle, jerry-rigged structure in poor shape, and by “jerry-rigged” I mean it is clearly of improvised and rudimentary construction. It would not take much to dismantle and remove it, or to remove the overhanging roofline.

[136] I agree with the defendants that the ongoing presence of the Shed roofline encroachment is likely to be the source of further conflict between the parties and so this is an additional factor favouring its removal. Overall, the balance of convenience favours the removal of the Shed encroachment.

[137] I note, however, that there is a pleadings issue that may affect the ability of the defendants to obtain an order for the removal of the Shed encroachment. I address this issue later.

B. Proprietary Estoppel

[138] In *Cowper-Smith*, the Supreme Court of Canada set out the elements necessary to establish proprietary estoppel:

[15] An equity arises when (1) a representation or assurance is made to the claimant, on the basis of which the claimant expects that he will enjoy some right or benefit over property; (2) the claimant relies on that expectation by

doing or refraining from doing something, and his reliance is reasonable in all the circumstances; and (3) the claimant suffers a detriment as a result of his reasonable reliance, such that it would be unfair or unjust for the party responsible for the representation or assurance to go back on her word ...

[References omitted.]

[139] The representation or assurance may be express or implied. However, it must be unambiguous and must appear to have been intended to be taken seriously. Taken in its context, it must have been a promise which one might reasonably expect to be relied upon by the person to whom it was made: *Cowper-Smith* at paras. 15 and 26.

[140] Here, there was no representation, assurance or promise by or on behalf of the defendants that the plaintiffs would enjoy the right or benefit of using the Fire Pit or Shed overhanging roofline or the land on which they were located.

[141] Certainly there could have been no representation or assurance by the defendants up to the time the plaintiffs purchased Lot 350 as the parties had neither met nor communicated with one another to that date. At least that is what one would think, because the plaintiffs argue otherwise.

[142] The plaintiffs say, in effect, that the failure of the defendants to disabuse not just the plaintiffs, but also the *prior* owners, occupiers and realtors associated with Lot 350, of their misconception about the property boundaries amounts to an unambiguous representation or assurance. They say it was a “tacit assurance”.

[143] While I cannot foreclose the possibility that a representation sufficient to establish proprietary estoppel could be effected by silence, or that a representation *made to other parties* can be relied on by the plaintiffs, the plaintiffs’ point fails on other facts. Simply put, and as I have found, the defendants did not know the Fire Pit was there or that the Shed roofline encroached on their property. They could not disabuse the plaintiffs and other parties from a misconception of which they themselves were not aware. There is no “tacit assurance” here.

[144] Further, I cannot accept the plaintiffs' assertion that the defendants ought to have kept abreast of the various sales of neighbouring Lot 350 so as to ensure the successive owners, tenants and even realtors associated with Lot 350 were not under any misconceptions about the property boundaries. Again, this is nothing more than an attempt by the plaintiffs to blame the defendants for their own lack of diligence.

[145] While these conclusions are sufficient to dispose of the plaintiffs' claim of proprietary estoppel, I will go on to briefly address the other elements, reliance and detriment.

[146] First, reliance. The defendants made no express representations to the plaintiffs prior to the plaintiffs' acquisition of Lot 350, so there is no issue of reliance here. To the extent that the plaintiffs rely on representations by silence – an argument I have rejected – any reliance by the plaintiffs would have been unreasonable as they ought to have made inquiries about the boundary or carried out a property survey.

[147] Finally, detriment. The plaintiffs have not incurred any expense in relation to the Fire Pit or Shed overhang. As to the property purchase itself, there is no evidence that they paid anything other than fair market value for Lot 350. Although they do not have the amenity of the Fire Pit as they mistakenly thought they had, there is no detriment as it was never theirs. In brief, there is no evidence that the plaintiffs have suffered any detriment.

[148] For these reasons, the plaintiffs' claim that the lands in and around the Fire Pit and Shed be vested in them is dismissed.

C. Nuisance

[149] I begin by summarizing the elements of private nuisance, which are expressed in the form of a two-part test set out in *Antrim* (at para. 19):

[T]o support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both *substantial* and *unreasonable*. A substantial interference with property is one that is non-trivial. Where this

threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances.

[Emphasis in original.]

[150] *Antrim* also provides the following further principles:

- a) Not every interference, no matter how minor or transitory, is an actionable nuisance as some interferences must be accepted as part of the normal give and take of life: *Antrim* at para. 21.
- b) Nuisance may take a variety of forms and may include not only actual physical damage to land but also interference with the health, comfort or convenience of the owner or occupier: *Antrim* at para. 23.
- c) The reasonableness of the interference must be assessed in light of all of the relevant circumstances. The focus of that balancing exercise, however, is on whether the interference is such that it would be unreasonable in all of the circumstances to require the claimant to suffer it without compensation: *Antrim* at para. 25.
- d) Generally, the focus in nuisance is on whether the interference suffered by the claimant is unreasonable, not on whether the nature of the defendant's conduct is unreasonable. The nature of the defendant's conduct is not, however, an irrelevant consideration. Where the conduct is either malicious or careless, that will be a significant factor in the reasonableness analysis: *Antrim* at paras. 28–29.

[151] I think it fair to say that both Ms. Stearman and Mr. Boguski acted in an unneighbourly fashion in the course of this dispute. However, only Ms. Stearman's behaviour is in issue here because the defendants have not pursued their own claims in trespass and nuisance.

[152] I do not intend to address the various allegations in detail. Some of the allegations are trivial (the solar-powered garden ornaments; the flamingo; the one

instance of loud classical music) and others have not been shown to be attributable to the defendants (the scream; the blinking red lights). Even if the blinking red lights were caused by the defendants, the lights were relatively faint and the two episodes were transitory and trivial.

[153] I do conclude that Ms. Stearman's nocturnal wanderings in the area of the property boundary were non-trivial and interfered with the defendants' comfort in their own home. The plaintiffs allege seven incidents where Ms. Stearman was skulking about in the dark, the dates being June 16, 2020; July 4, 2021; July 24, 2021; March 20, 2022; September 22, 2022; January 21, 2023; and February 15, 2023. Ms. Stearman admits she was out at the boundary at night on six of those occasions (the seventh being proven by a photograph), but denies or explains the other aspects of alleged misbehaviour while she was in the area at those times.

[154] These incidents all occurred after dark, some of them in the middle of the night. On Ms. Stearman's own admission, one incident involved her loudly singing a song with notably profane lyrics. While Ms. Stearman explains that this was her way of venting her frustration with the boundary conflict, the law of nuisance focuses on the effect rather than the purpose of the nuisance, and I am satisfied that the effect would have been distressing, disrupting and substantial. Why she was at the boundary in the dark or in the middle of the night on these various occasions – rolling away some river rocks, moving Allan blocks, removing a tarp, singing at volume, coughing loudly, staring at the plaintiffs' home (as shown in a photograph), making camera flashes, and lying on the ground motionless – is of lesser importance than the *effect* these behaviours had on the plaintiffs. The fact that these events occurred late at night, including in the middle of the night, and on multiple occasions satisfies me that they were substantially disturbing and not at all trivial.

[155] Having come to that conclusion, I now move to the question whether the non-trivial interference in the plaintiffs' enjoyment of their property was unreasonable in the circumstances. Having regard to many of the circumstances already mentioned, I am satisfied that the interference was unreasonable.

[156] I am satisfied that an award of damages is warranted here. The plaintiffs themselves concede that only a modest award is called for. I conclude that an award of \$750 would satisfactorily compensate the plaintiffs for the proven events of nuisance.

D. Counterclaim

[157] The defendants filed a counterclaim, claiming damages for trespass and nuisance but, as noted earlier, they did not pursue those claims in the summary trial. Those claims are therefore dismissed.

[158] The defendants also sought an order for the removal of the Shed encroachment, but I note this relief was not raised in either their counterclaim or their notice of application for the summary trial. I acknowledge that this relief might have been sought as part of the property issue generally, as s. 36 of the *PLA* allows the court to vest title, grant an easement or order the encroachment removed (although the section also says this must be done by application), but the basis for seeking the removal of the Shed encroachment was not made clear at the hearing.

[159] I recognize the possibility that there was an understanding between counsel on the matter of this relief, given that no objection was made by the plaintiffs when the defendants made these submissions and the plaintiffs themselves made submissions on it. For this reason, I grant leave to the parties to address the terms of the order concerning the counterclaim or Shed encroachment, if need be. In the absence of any further submissions, the order will simply be that the counterclaim is dismissed and there will be no order made concerning the Shed encroachment.

VI. Conclusion

[160] In summary:

- a) The plaintiffs' property claims are dismissed. This includes the plaintiffs' claims for an injunction, a vesting order, an easement, damages for trespass, and any other claims for damages relating to their property claims;

- b) The certificate of pending litigation filed by the plaintiffs shall be removed from title to the defendants' property;
- c) The plaintiffs are awarded damages for nuisance against Arlene Stearman in the amount of \$750;
- d) The parties have leave to address the order to be made on the defendants' counterclaim or on the specific issue of the Shed encroachment. In the absence of any further submissions, the order shall be that the counterclaim is dismissed and with no order made concerning the Shed encroachment.

[161] As to costs, my tentative view is that the defendants should recover 85 percent of their costs of the action, and the plaintiffs should recover their costs on the defendants' abandoned counterclaim. In coming to this tentative conclusion, I have taken into account the defendants' success on the main issue and the plaintiffs' substantial success on their nuisance claims. Although the amount of the nuisance award was very modest and pales in importance in relation to the property claims, a fact that might call for only a minimal reduction from a full costs award, I recognize that there would have been a fair amount of time spent on the various aspects of the plaintiffs' nuisance claims, thus leading to the proportion I have provisionally set out.

[162] Should either party wish to make submissions for a different costs award, then they are to file submissions in writing, not to exceed five pages, no later than 21 days after the date of these reasons. In the absence of costs submissions, costs will go in accordance with my tentative views set out above.

“Blok J.”