

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hellmen v. Hartwick*,
2025 BCSC 45

Date: 20250113
Docket: S62152
Registry: Kamloops

Between:

Raymond Lorne Hellmen and Shannon Lee Wallis

Petitioners

And

Stephen Leonard Hartwick and Jil Meredith Forbes

Respondents

Before: The Honourable Justice Hori

Reasons for Judgment

Counsel for the Petitioners:

D.K. Buchanan

Counsel for the Respondents:

J.G. Frame

Place and Date of Hearing:

Kamloops, B.C.
January 24 and
September 5–6, 2024

Place and Date of Judgment:

Kamloops, B.C.
January 13, 2025

Introduction

[1] There are two main issues in this petition action. The first issue relates to the enforcement of an easement granted in favour of property owned by the petitioners over property owned by the respondents (the “Easement”).

[2] The second issue relates to the encroachment of structures on the petitioners’ property onto the respondents’ property (the “Encroachments”).

[3] The petitioners are the owners of property located at 19 Nicola Street, West, in the City of Kamloops. The petitioners’ property has a legal description of Lot 1, District Lot 232, Kamloops Division Yale District, Plan 2730 (“Lot 1”). The petitioners reside in a house situated on Lot 1.

[4] The respondents are the owners of property located at 11 Nicola Street, West, in the City of Kamloops. This property is comprised of two lots, being:

- a) Lot 2, District Lot 232, Kamloops Division Yale District, Plan 2730 (“Lot 2”);
and
- b) Lot 3, District Lot 232, Kamloops Division Yale District, Plan 2730 (Lot “3”).

The respondents reside in a house located on Lot 3.

[5] Lot 2 is located between Lot 1 and Lot 3. Lot 2 is a long narrow strip of property that runs from the southern boundaries of Lot 1 and Lot 3 to the northern boundaries of those lots. Attached to these reasons as Appendix A is a current field survey of the subject properties.

[6] The Easement is for the benefit of Lot 1 and is registered against title to Lot 2. On January 17, 1995, in a previous action between the previous owners of the properties, the Court of Appeal declared that the Easement was a

...free and uninterrupted right of way, ingress and egress for persons, animals and vehicles, through, along and over that certain parcel of land described as: Parcel Identifier: 010-970-495 Lot 2 District Lot 232 Kamloops Division Yale District Plan 2730.

[7] The petitioners allege that the respondents have interfered with their rights under the Easement by obstructing their passage through Lot 2 with the parking of vehicles and the installation of a fence and gate on the north end of Lot 2. The petitioners seek an injunction restraining the respondents from obstructing the Easement and requiring them to remove the fence and gate.

[8] The house in which the petitioners reside encroaches into Lot 2. The encroachments related to the petitioners' house are:

- a) The "house stucco dripline encroaches into Lot 2 by 0.02 m along the easterly side" of Lot 1; and
- b) The eaves of the house encroach into Lot 2 by 0.2 m along the easterly side of Lot 1.

[9] In addition to the encroachments related to the petitioners' house, a concrete block wall and a retaining wall that extend from the south-east corner of the petitioners' house to the south boundary of Lot 2, encroaches into Lot 2 for its entire length.

[10] The petitioners admit that the structures on Lot 1 encroach into Lot 2. The petitioners seek a declaration, pursuant to s. 36(2) of the *Property Law Act*, R.S.B.C. 1996, c. 377, that they have an easement on Lot 2 to accommodate the encroachments (the "Encroachment Easement").

History of the Properties

[11] The three properties that are involved in this dispute were created by the subdivision of Lot 1, Plan 1724. These lots came into existence upon the deposit of Subdivision Plan 2730 on January 4, 1940.

[12] There is a conflict in the evidence as to the construction dates for the two houses on the properties. On the petitioners' version of the evidence, the construction date for the petitioners' house is 1925 and the date of construction for the respondents' house is 1940. The respondents' version is that the date of

construction for their house is 1925 and construction of the petitioners' house did not occur until 1940. It is not necessary to resolve this conflict in the evidence in order to reach a conclusion on the issues before me.

[13] I have made the following findings of fact based on the historical Land Title documents related to the properties:

- a) Before the subdivision that created the properties involved in this application, the owner of Lot 1, Plan 1724 was Duncan Anderson Burden;
- b) By a deed of land (the "Deed"), made on December 22, 1939, Duncan Anderson Burden transferred ownership of Lot 1 to Matilda Grace Phillips and created the Easement over Lot 2;
- c) In order to complete the transfer of Lot 1 to Matilda Grace Phillips and the registration of the Easement, the "Land Registry Office", as it was then known, received the Deed on January 3, 1940, and Subdivision Plan 2730 on January 4, 1940;

[14] Lot 1 eventually came to be owned by Vasco Gasparin and Elisa Gasparin. They purchased Lot 1 in about 1960. Mr. Gasparin passed away in 2005. Ms. Gasparin passed away in 2017, but she sold Lot 1 in 2014.

[15] During the period when the Gasparins owned Lot 1, Leslie Louise Arduini owned Lot 2 and Lot 3. These owners were before the court in 1993 with disputes over the Easement. The Gasparins sought to clarify the terms of the Easement and to restrain Ms. Arduini from obstructing their use of the Easement. Ms. Arduini, in a cross-application, sought to have the Easement cancelled.

[16] The dispute between the Gasparins and Ms. Arduini made its way to the Court of Appeal. The only aspects of the Court of Appeal decision that have relevance to the issues before me in this application are:

- a) The Court did not cancel the Easement; and

- b) The Court construed the Easement as providing for a free and uninterrupted right of way, ingress and egress for persons, animals and vehicles, through, along and over Lot 2.

[17] The petitioners purchased Lot 1 on July 31, 2017. At that time, the owner of Lot 2 and Lot 3 was Leslie Louise Arduini.

[18] The respondents purchased Lot 2 and Lot 3 on June 29, 2020.

The Easement

[19] Under the terms of the Easement, the petitioners are entitled to a free and uninterrupted right of way, ingress and egress for persons, animals and vehicles, through, along and over Lot 2. There are two issues that arise in this case from the Easement.

[20] The first issue is what use can the petitioners make of the Easement area. The second issue is whether the respondents have unreasonably interfered with the petitioners' authorized use of the Easement area.

[21] For reasons that will become clear later in this judgment, I must point out that the petition seeks an order to enforce the Easement in its current form. The petition does not seek an order amending or rectifying the terms of the Easement. Therefore, I will interpret the Easement in its current form and I will not engage in any variation or amendment of the Easement.

Authorized Use of the Easement

[22] Based on how the properties involved in this application came into existence, I find that the intention of Mr. Burden, when he granted the Easement, was to create a corridor through which the occupiers of Lot 1 could access their property from the east side. Mr. Burden granted the Easement at the same time that he transferred Lot 1 to Ms. Phillips. The language of the Easement conveys a right of way for ingress and egress to and from Lot 1 and nothing more. In these circumstances, the Easement authorizes passage over Lot 2 for entry to or exit from Lot 1.

[23] In *Bosler v. Burton*, 1993 CarswellBC 2477, Justice Cooper was interpreting an “easement for right of way for persons and vehicles” registered against the defendants’ land. In finding that the plaintiffs’ easement for a right of way over the defendants’ property conferred a right of passage and no more, Cooper J. quoted the following passage from *Wells v. Mitchell & Brown* (1939) 3 D.L.R. 126 (Ont. C.A.):

The term “right-of-way” in its strict sense means a right to pass from one point to another across another person’s land in a course defined either in the grant or by implication according to the use to which it is to be put, and is strictly a right of passage only.

[24] In *Strange v. Edy*, 2024 BCSC 870, Justice Chan was dealing with an indenture in which the grantors agreed to grant an “easement of right of way” over the servient tenement. The indenture further described the easement as:

For the purposes connected with the use and enjoyment of the said [dominant tenement] ... and in common with the Grantors and all others who now have or may hereafter acquire a similar right, the full free right and liberty at all times of ingress, egress and regress upon, through and over [the servient tenement] ...

[25] Justice Chan held that the words of the grant of easement were clear and not ambiguous when read as a whole. She found that the easement was a right of way and that its use by the plaintiff was limited to travel through the servient tenement to and from the dominant tenement. At para. 28, Chan J. held:

[28] The Easement granted to the plaintiffs is described in Schedule A of the indenture. Schedule A states that for the purposes connected with the “use and enjoyment” of the plaintiffs’ lots, and in common with the rights of the defendants and all others who are easement holders, the plaintiffs have the “full free right and liberty at all times of ingress, egress and regress upon, through and over” the Easement lands. In my view, the Easement is a right of travel through the Easement lands. While the opening words are for the plaintiffs’ “use and enjoyment”, this is limited to travel through the Easement to access the foreshore and back to their upland lots. There is no broad right of use and enjoyment of the Easement lands for the plaintiffs, such as a right to occupy it, use it to enjoy viewpoints, or to develop the area. The ordinary meaning of the words in the grant of Easement do not permit the interpretation urged by the plaintiffs. The plaintiffs’ interpretation ignores the words “ingress, egress and regress” and seeks to only give effect to the opening words of the grant. The right of the plaintiffs is for “ingress, egress and regress” through the Easement lands, which are words for entering,

leaving and returning. Further, in my view, the phrase “for the purposes connected with the use and enjoyment” is referencing the use and enjoyment of the plaintiffs’ lots, not the Easement lands. That is, the Easement is granted so the plaintiffs’ use and enjoyment of their own lots can be enhanced.

[26] Accordingly, the terms of the Easement allow the petitioners to move through, along and over Lot 2 while travelling to and from Lot 1. The Easement is a right of way that permits the passage from one point to another across Lot 2.

[27] The Easement does not authorize the parking of vehicles on Lot 2, the delivery of materials to Lot 1, the storage of materials or equipment on Lot 2 or the undertaking of gardening activities from Lot 2.

[28] At the present time, the eastern boundary of Lot 1 to the south of the petitioners’ house has limited access due to a concrete block wall, a retaining wall and vegetation planted along the boundary by the petitioners. The only access to Lot 1 along its eastern boundary is a gate located south of the south-east corner of the house.

[29] The concrete block wall and the retaining wall were not present when Mr. Burden created the Easement. Therefore, at that time it was feasible to access Lot 1 at any point along the eastern boundary. Mr. Gasparin constructed the concrete block wall and the retaining wall in the 1960s. The construction of these structures limited access to Lot 1 from the east. In its current state, access to Lot 1 cannot be achieved through Lot 2 at any point south of the south-east corner of the petitioners’ house except through the gate.

[30] Accordingly, in my view, the use of the Easement area to the south of the north-east corner of the petitioners’ house is, under the present circumstances, limited to foot traffic to and from the gate along the eastern boundary of Lot 1. However, the use of this Easement area may expand should the petitioners remove the concrete block wall, the retaining wall and the vegetation, or parts thereof, and create a means to gain more fulsome access to Lot 1 from Lot 2.

[31] The Easement area to the north of the petitioners' house is available for access to Lot 1, both by foot and by vehicles. The Easement area to the north of the petitioners' house adjoins the petitioners' driveway leading to their garage. There is no impediment to the petitioners using this Easement area for ingress to and egress from Lot 1.

[32] The petitioners present a great deal of evidence with respect to the previous use of Lot 2 by the occupiers of Lot 1. The evidence of previous use cannot inform my interpretation of the Easement. How the current or previous owners of the subject properties treated the Easement cannot impact on my decision unless the evidence establishes an agreement about the use of Lot 2 between the current owners.

Obstruction of the Easement

[33] The Easement grants the petitioners the free and uninterrupted right of way, ingress and egress for persons, animals and vehicles, through, along and over Lot 2. However, the respondents retain all residual property rights to Lot 2 and they are entitled to use and enjoy the property so long as they do not impair the petitioners' right of passage in a substantial way: *Banville v. White*, 2002 BCCA 239, at para. 51.

[34] The test to establish an actionable interference with an easement is stated in *LY Capital Inc. v. 668599 B.C. Ltd.*, 2023 BCSC 233:

[21] In order to be actionable, interference with an easement must be "substantial": *Smith v. Balen*, 2018 BCSC 918 at para. 85. The test of whether there has been actionable interference with a right of way is whether it could be practically and substantially used as conveniently after as before the interference: *Grenier v. Elliott*, 2007 BCSC 598 at para. 35. Where the obstruction is permanent, "little difficulty can arise as to the right of action": *Grenier* at para. 36, citing Goddard, *The Law of Easements*, 8th ed. at 501.

[35] The petitioners claim that the respondents substantially interfere with their use of the Easement by parking vehicles on Lot 2. As a result of my conclusion that the use of the Easement area to the south of the north-east corner of the petitioners' house is limited, at the present time, to foot traffic to and from the gate on the eastern boundary of Lot 1, I find that parking vehicles on Lot 2 in this area of the

Easement does not substantially interfere with the petitioners' use of the Easement. Since the petitioners cannot currently access Lot 1 south of the north-east corner of their house other than by foot because of the concrete block wall and the retaining wall, parked vehicles in this area of Lot 2 will not substantially interfere with access to Lot 1.

[36] Therefore, the petitioners have not established a case for an injunction on this basis.

[37] However, the respondents must not substantially interfere with the petitioners use of the Easement area to the north of the north-east corner of the petitioners' house. The respondents have erected a fence in this area of Lot 2. The fence runs along the north-west boundary of Lot 2 from the north-east corner of the petitioners' house to the north boundary of Lot 2. The respondents have also installed a gate across the entrance to Lot 2 at the north end.

[38] The fence and the gate installed by the respondents substantially interfere with the petitioners' use of the Easement from the north-east corner of their house to the north boundary. It limits the width of the petitioners' driveway from the road to their garage. The reduction in the width of the driveway is significant and it impedes the petitioners' access to their garage.

[39] Therefore, the respondents will not obstruct the Easement area to the north of the north-east corner of the petitioner's house.

[40] The respondents claim that the fence and gate they installed on Lot 2 are necessary for their safety. The respondents have had intruders enter onto their property and have had items stolen from their property.

[41] I recognize that the respondents are concerned about their safety and the safety of their property. However, there is a reasonable way to respect the petitioners' right of way and at the same time afford the respondents some measure of safety.

[42] Accordingly, I will make the following orders:

- a) The respondents will remove the fence they installed on the west side of Lot 2;
- b) The respondents will remove the gate they installed across Lot 2 at the north end;
- c) The respondents may install a gate across Lot 2 adjacent to the north-east corner of the petitioners' house;
- d) Any gate installed by the respondents must be motorized and capable of being controlled remotely; and
- e) The respondents will provide the petitioners with a remote control device and any access codes necessary to open and close the gate.

Potential Variation or Amendment to the Easement

[43] As I indicated earlier in this judgment, I have interpreted the Easement in its current form. This is relevant because the respondents made a submission that they are prepared to consent to an amendment of the Easement to allow for the maintenance of the retaining wall provided that the petitioners limit their vehicular use of Lot 2 to the “infrequent loading and unloading of awkward and heavy items.”

[44] The pleadings do not seek an amendment to the Easement, the terms of any potential amendment are not before me and I question whether I have the jurisdiction to amend an instrument registered in the Land Title Office. Therefore, I am not prepared to issue an order amending the terms of the Easement. However, I encourage the parties to agree on the terms of an amendment and file the appropriate amending documents with the Land Title Office.

The Encroachments

[45] Survey plans prepared by surveyors retained by the petitioners and the respondents document the encroachment of structures from Lot 1 into Lot 2. The

parties agree on what those Encroachments are and where they are located. The surveyor retained by the petitioners, Tim Erickson, has prepared an explanatory plan showing the location of the proposed Encroachment Easement.

[46] Other than a downspout located on the south-east corner of the petitioners' house, all of the Encroachments were the result of building activities conducted by owners prior to the petitioners. The petitioners acknowledge that they relocated the downspout to the south-east corner of the house, but the petitioners did not know of the other Encroachments until after they purchased Lot 1.

[47] Section 36(2)(a) of the *Property Law Act* provides:

(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,

[48] The respondents will consent to the Encroachment Easement on the condition that:

- a) The petitioners pay compensation for the proposed Encroachment Easement;
and
- b) The petitioners relocate the downspout.

[49] The petitioners agree to relocate the downspout so the only remaining issue is compensation.

[50] The petitioners' surveyor established the area of the proposed Encroachment Easement as 11.3 m² and the area of Lots 2 and 3 combined as 616.4 m².

Therefore, the area of the proposed Encroachment Easement is 1.8% of the total area of the respondents' property.

[51] The B.C. Assessment Authority has assessed the combined land value for Lot 2 and Lot 3 at approximately \$400,000. The value of 1.8% of the respondents' property is \$7,200. However, the value of the land on Lot 2 is not as valuable as the land on Lot 3 because the Easement is a charge on Lot 2 and it is not large enough to be a building lot. Therefore, it is appropriate to discount the value of \$7,200. In my view, \$4,000 is adequate compensation for the Encroachment Easement.

[52] Based on the foregoing, I will make the following orders:

- a) The petitioners will relocate the downspout so that it does not encroach on Lot 2 and it discharges onto Lot 1;
- b) The petitioners will have the Encroachment Easement over the area described as "Easement Area" in the explanatory plan, EPP128169, prepared by Tim Erickson and dated March 20, 2023;
- c) The petitioners will pay the sum of \$4,000 to the respondents as compensation for the Encroachment Easement;
- d) The petitioners will prepare and register the documents necessary to register the Encroachment Easement on title to Lot 2 at their cost; and
- e) The respondents will execute the documents necessary to effect the registration of the Encroachment Easement.

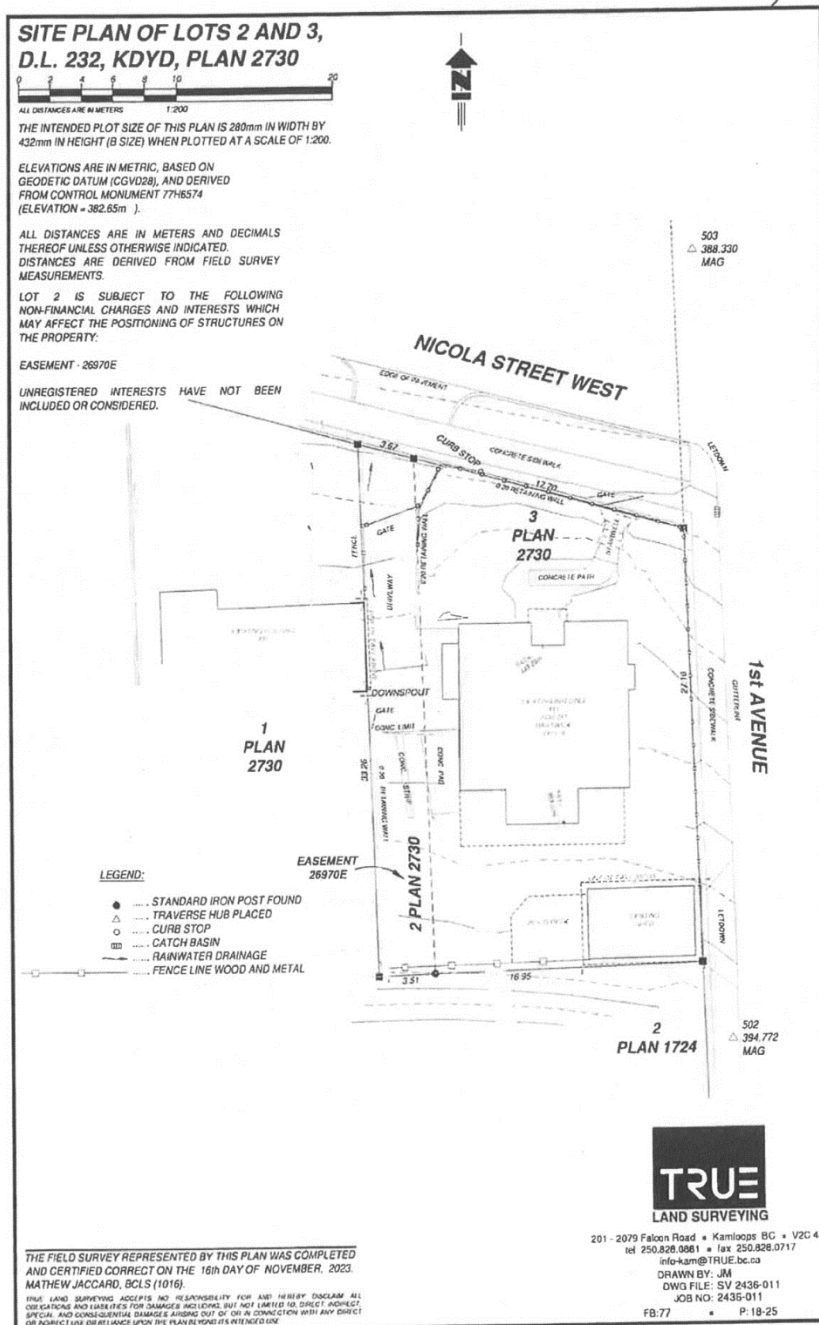
Costs

[53] Unless there are circumstances of which I am not aware, my view is that the parties should bear their own costs. However, if the parties do not agree, they have leave to make submissions on costs. If the parties wish to make costs submissions, they will schedule a hearing within 60 days.

"D.K. Hori J."

HORI J.

Appendix A



2025 BCSC 45 (CanLI)