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Neighbourhood Feud!
Survey Says: Oops, Your Fence is Over the Property Line!

People plan and the gods laugh.

It is a beautiful fence. You went all out. You deliberately poured concrete posts so that the fence would be sturdy and last long term. The fence was topped with an artfully designed trellis and you planted a beautiful wisteria in the far corner to grow along the top. You can see the picture of your fence on the cover of the next edition of Homes and Gardens.

And then the clouds block the sunshine. Your neighbour strolls over to let you know that, unfortunately, even though you constructed your work of art exactly where the old fence was located, the old fence was two feet over the property line onto your neighbour's property. Your work of art is now a trespass and your neighbour has kindly requested that you relocate the fence to the property line. You recall you poured those fence posts really deep with extra concrete…

This scenario plays out with fences, retaining walls, driveways, garages, common party walls, staircases, concrete pathways, garden walks, underground pools, sheds, ancillary buildings, decks, etc.

We often receive the call from one of the two property owners asking what can be done with respect to the encroachment.

Hopefully, the neighbours can agree on terms that accommodate the encroachment, the removal or relocation of the encroachment, or some in-between compromise.

An agreement between the property owners may address such issues as:

- Easement rights to allow the encroachment for a certain period of time (the life of the fence, driveway, garage, etc.) or possibly indefinitely;
- Compensation, if any, to be paid for the encroachment, which may be paid in one lump sum or on an annual basis so long as the encroachment continues;
- Joint use of the encroached-on area, if applicable (for driveways, staircases, pathways, etc.);

- Maintenance and repair obligations;
- Insurance obligations;
- Safety and security requirements; and
- Other collateral issues, concessions or benefits related to the encroachment.

If drafted as an easement and registered at the Land Title Office, the terms of the easement will be binding on the future owners of both properties. The current owners are at risk if they do not register the easement at the Land Title Office, as a future owner of one of the properties may take the position that they are not bound to honour the terms of the unregistered agreement or unwritten understanding between the previous property owners.

Regrettably, property owners are sometimes unable to agree on acceptable terms with respect to the encroachment and things escalate further.

Section 36 of the *Property Law Act*

This issue is so common the provincial government passed legislation (section 36 of the *Property Law Act*) to address the subject of encroachments onto adjoining lands. Section 36 of the Property Law Act is set out below.

Encroachment on Adjoining Land

36 (1) For the purposes of this section, **"owner"** includes a person with an interest in, or right to possession of land.

(2) If, on the survey of land, it is found that a building on it encroaches on adjoining land, or a fence has been improperly located so as to enclose adjoining land, the Supreme Court may on application

(a) declare that the owner of the land has for the period the court determines and on making the compensation to the owner of the adjoining land that the court determines, an easement on the land encroached on or enclosed,

(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.

Scope of Section 36

Section 36 provides a statutory right for either property owner to apply to the British Columbia Supreme Court to:

1. Grant an easement over the part of the property being encroached upon and order the encroaching neighbor to pay compensation for the easement (s 36(a));

2. Grant title to the property to the encroaching neighbor and order them to pay compensation (s 36(b)); or

3. Order the encroaching neighbor to remove the encroaching or enclosing building or fence (s 36(c)).

Principles the Court Will Apply

The following are key principles, but not the only principles, the court will consider with respect to an application made pursuant to section 36 of the Property Law Act:

1. 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? What is its effect on the properties? The more fixed the improvement, and the more costly and cumbersome it would be to move it, the more considerations will be weighed in favour of the petitioner.

3. The Size of the Encroachment: How does the encroachment affect the properties in terms of their present and future value and use? These questions serve to balance the potential losses and gains of the creation of an easement.

Vineberg v. Rerick, [1995] BCJ No. 859 (BCCA).

Application of Section 36 to Various Fact Patterns

The following are fact patterns where a property owner has made a successful application to court with respect to section 36 of the *Property Law Act*:

1. An encroaching fence, located between two properties that resulted in a driveway being constructed which was also encroaching, was a “fence” despite part of the fence having fallen down;

2. A fence, hedge and trees demarking two neighbouring lots was a fence even though it had gaps and was no longer standing. The fence did not have to fully surround the area in question, only enclose it for the purposes of the Act;

3. A retaining wall encroaching on the neighbouring property along almost the full length of the lot line was a fence;

4. An aggregation of large stones around a patio was a fence; and
5. A concrete two-foot wide sidewalk was an extension of a home and thus came within the definition of a "building".

In general, the legislation is remedial and, as such, is given a fair, large and liberal construction and interpretation.

The court also has discretion to vest in the encroaching party land that exceeds the actual encroachment.

Broad Interpretation to the Meaning of "Fence"

Section 36 of the Property Law Act expressly refers to "buildings" and "fences". The term fence is not defined in the Act. The courts have liberally interpreted that a fence can be a, "structure of any kind, provided it serves the purpose of either enclosing property or separating contiguous estates" (Barrow v. Landry, [1998] BCJ No. 1601 (BCSC).

A Moment of Reflection before Releasing the Litigation Dogs of War

Before rushing to court, we highly recommend parties attempt to negotiate a compromise to any encroachment that they discover.

In our experience, emotions can quickly escalate and run hot in disputes between neighbours. After positions are publicly taken on the subject, sometimes in anger and/or without time to reflect, they can become entrenched. No one wants to lose face. These factors can make it very hard to negotiate an agreement acceptable to both parties. We recommend both parties do their best to avoid this outcome.

A few things to keep in mind:

1. **Control Your Destiny.** If you are negotiating with your neighbour, the terms of any agreement are ultimately subject to your approval. In contrast, if you proceed to court, you lose control over the ultimate decision. You may win your application for an encroachment easement but be shocked that the court awards your neighbour financial compensation which you think is outrageous. At the end of the day, you are rolling the dice if you go to court.
2. **Realities of Civil Litigation.** When emotions are high and you feel justice is on your side, it is easy, in the abstract, to decide to launch a court action. In our experience, most people do not have a combination of the financial resources; the steely nerves; or the available time and patience to see litigation through to its conclusion.

   If you want to proceed via the litigation route, you should anticipate a lawyer requesting a retainer in the $10,000 to $25,000 range and you are likely looking at many months, if not years, before a judgment is rendered. That judgment may be appealed, which would then add further costs and time before a final decision is received. Prepare yourself for an expensive and long ride if you proceed down the litigation path.

3. **Neighbourhood Peace.** You may be neighbours for a very long time. If you start litigation against your neighbour, it will very likely be the end of any good relations. If you are an owner or developer who is selling the property in 12 months or less, that is one thing. But if you will be seeing each other regularly when you take out the recycling, walk the dog, wash your car, and shovel snow, that is another thing. Do not underestimate the value of good relations with your neighbour.

4. **Karma.** Other issues may arise in the future. You may wish to redevelop your property or add an extension and want (or need) your neighbours to confirm to the municipality they support your proposed redevelopment/extension; maybe you want your neighbours to join you in opposing a development in your neighbourhood; maybe you would like to top or remove a tree on your neighbour's property; maybe you need to bring an excavator to your backyard and need access over your neighbour's property to do so. If you take a hard position on the encroachment issue and commence litigation against your neighbour, do not expect any cooperation from your neighbour when you need a favour in the future.

5. **Ownership Changes**. If you and your neighbour know there is an encroachment, have a decent relationship, and have an understanding as to how you will deal with the encroachment, we recommend you document that understanding in writing and register the agreement at the Land Title Office. If you do not do so, there is a risk every time one of the properties is transferred, that the new property owner does not take the same approach to the encroachment. You can avoid that outcome by registering an easement at the Land Title Office.

Well, if you have read this far, clearly this subject is of interest to you.

To wrap up, here is a summary of three select cases.

The Owners, Strata Plan VR 10 v. EE Management Corp., 2015 BCSC 473

Two strata corporations had a dispute when a survey revealed that a section of driveway used by one strata corporation was located on the common property of the other strata corporation. For decades, the driveway was in continuous use as no one was aware of the encroachment. The driveway was bordered by cedar trees believed to have been planted by the original developer to demarcate the property line.

The court found the trees were a "fence" within the meaning of the Property Law Act and ultimately ordered that the encroaching portion of the driveway be transferred to the trespassing strata (with compensation to the other strata). The reasons given by the court included the length of time the driveway had been in use, the permanent nature of the driveway, the cost to provide alternate access and the disproportionate effect on the two stratas if the driveway could no longer be used. For one strata it provided crucial access, including emergency response services access, for the other its loss was "negligible" because the other strata intended to move garbage bins out of its parking lot onto the driveway area to free up parking space, and approval for such a move was conditional upon the city.

The court determined the appropriate amount of compensation in a separate action (*The Owners, Strata Plan VR 10 v. EE Management Corp., 2016 BCSC 1597*). Being primarily a fact-driven analysis informed by equitable principles, the court has discretion in deciding on the compensation amount and the authorities only provide guidance. There is no preferred method of fixing compensation and the court may consider a number of factors. The court considered multiple factors, including appraisals of the land value from both sides ($24,000 and $133,000), the length of time the driveway had been in existence, and the parties' mistaken assumptions about their respective property lines. The court ordered $75,000 be paid in compensation.

Gueldner v. Nichele, 2013 BCSC 2354

A large barn and nearby shed with a chicken coop attached to the shed protruded onto the neighbouring property. The barn and shed had been there for years and were surrounded by a fence enclosing them with the barn owner's land. The barn and shed could not be moved and were used daily by their owner. The total area of the encroachment was over 7,100 sq ft. Despite this, the court ordered the removal of the barn, shed and fence within nine months because the trespassing owner had always known his buildings encroached on the neighbour's land and was therefore not entitled to relief under the Act, which only applies to situations where the party seeking the easement honestly believed that the land was his or was truly unaware of the legal ownership.

Oyelese v. Sorensen, 2013 BCSC 940

The Sorensens were ordered by the Court to remove their encroaching swimming pool from their neighbour's land. In 2001 or 2002, an in-ground pool had been installed which crossed over the property line unbeknownst to either homeowner. A chain link fence was installed and some landscaping was done around part of the pool. The size of the encroachment area was 0.0376 acres (or 1,636 sq ft).

In 2007, Mr. Sorensen purchased the home, unaware of the encroachment. At that time, Mr. Sorenson was provided a "survey certificate" with the hand-drawn location of the swimming pool. In 2009, Mr. Oyelese purchased the neighbouring property and discovered the encroachment, which then led to the lawsuit. The court directed the Sorensens to remove the part of the pool and deck from the encroaching area within 75 days.

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