

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Flavel v. Comeau*,
2026 BCSC 1199

Date: 20260625
Docket: S131255
Registry: Kelowna

Between:

Nathan William Flavel and Randy Thomas Leslie

Plaintiffs

And

Daniel Henri Joseph Comeau and Ayu Putri Comeau

Defendants

Before: The Honourable Justice Hardwick

Reasons for Judgment

Counsel for the Plaintiffs:

A. Spraggs

Counsel for the Defendants:

T.M. McCaffrey

Place and Dates of Trial/Hearing:

Kelowna, B.C.
April 8-9, 2026

Place and Date of Judgment:

Kelowna, B.C.
June 25, 2026

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Introduction

[1] In the Robert Frost poem, the “Mending Wall”, Frost twice quotes the proverb that “good walls make good neighbours”. Unfortunately, the reverse can also be said. Sometimes, bad walls can make bad neighbours.

Overview

[2] Before the court are cross summary trial applications seeking final orders pursuant to R. 9-7 of the *Supreme Court Civil Rules* [SCCR] in a long-standing easement dispute between two sets of neighbours.

[3] The initial application filed by the plaintiffs, Nathan William Flavel and Randy Thomas Leslie, on January 6, 2026 (the “plaintiff’s Application”), seeks, *inter alia*, injunctive relief (both mandatory and permanent), damages and special costs. The specific relief sought has, however, winnowed somewhat between the filing of the plaintiffs’ Application and the hearing before me. I will address this later in my reasons for judgment.

[4] The cross-application filed by the defendants, Danuel Henri Joseph Comeau and Ayu Putri Comeau on January 20, 2026 (the “defendants’ Application”) primarily seeks relief pursuant to s. 35 of the *Property Law Act*, R.S.B.C. 1996, c. 377. Somewhat unusually, as I will return to, the defendants’ Application seeks such relief without proposing the payment of any compensation to the plaintiffs. The defendants also seek costs as against the plaintiffs, albeit ordinary tariff costs under the SCCR.

[5] Counsel for all parties agreed at the outset that the matter was suitable for summary determination under R. 9-7 of the SCCR. Although there were a few discrete issues that arose during the hearing that brought this into question in my mind, as discussed with counsel at the relevant time, I am ultimately satisfied that I can find the necessary facts to decide the issues in question and that a conventional trial with *viva voce* evidence is not required: see *Cepuran v. Carlton*, 2022 BCCA 76 at para. 149. Further, neither counsel resiled from their position as to suitability for summary determination pursuant to R. 9-7 during submissions.

[6] On this basis, the five-day trial which was scheduled in Kelowna for the assize week commencing Monday, June 15, 2026, was adjourned by consent whilst these reasons for judgment were under reserve. Of some import to my later analysis, the notice of trial was filed by the plaintiffs.

Factual Background

[7] The plaintiffs are the registered owners of the real property legally described as Lot 7, Section 31, Township 26, ODYD, Plan EPP51888 and municipally known as 1298 Modern Place, Kelowna, BC ("Lot 7"). Purchased originally as bare land, the plaintiffs built a residence on Lot 7 where they continue to reside.

[8] The defendants are the registered owners of the real property legally described as Lot 6, Section 31, Township 26, ODYD, Plan EPP51888 and municipally known as 1294 Modern Place, Kelowna, BC ("Lot 6"). Purchased originally as bare land, the defendants also built a residence on Lot 6 where they continue to reside.

[9] Lot 6 and Lot 7 are adjacent properties situated within a cul-de-sac (the "Cul-de-Sac").

[10] The defendants' residence on Lot 6 is situated on two levels with attached garages on both levels. For context, the photographs in evidence show that the lower-level garage is at approximately street level, and the upper garage is slightly lower in grade than the single garage attached to the plaintiffs' residence on Lot 7.

[11] At the time both the plaintiffs and defendants purchased their respective properties, there was an easement registered on title to the plaintiffs' property (Lot 7) in favour of the defendants' property (Lot 6) (the "Easement"). Under the Easement, Lot 7 is the "dominant tenement", and Lot 6 is the "servient tenement".

[12] The Easement was, in fact, originally registered with the Kamloops Land Title Office under number CA4813687 on November 17, 2015.

[13] The Easement covers, as best as can be articulated in writing, an angled portion of Lot 7 that connects it to the Cul-de-Sac. The purpose of the Easement was, it is not disputed, for ingress and egress to and from the Cul-de-Sac from Lot 6.

[14] The Easement specifically provides, in part, as follows:

1. The Grantor covenants, agrees, and grants unto the Grantee, and the Grantee's servants, agents tenants, invitees, and licensees, and the Grantee covenants, agrees, and grants unto the Grantor, and the Grantor's servants, agents, tenants, invitees, and licensees:

(a) the full, free., and uninterrupted dght. license, liberty, easement, privilege, and permission at all times to pass and repass with or without men, equipment, chattels, pets, vehicles, and motor vehicles through and over the driveway installed upon the Easement Area; and

(b) The right to enter upon and have full and uninterrupted access at all times over, through, the said Easement Area with or without workmen, vehicles and equipment, as applicable, for the purpose of cleaning, and otherwise applicable servicing the aforementioned driveway, and to permit orderly passage of men, vehicles, and equipment thereon to enable full and uninterrupted access to Lot 7.

2. That as applicable, the Grantor covenants with the Grantee and the Grantee covenants with the Grantor as follows:

(a) The Grantor shall construct a cement driveway on the Easement Area at the sole cost of the Grantor in accordance with any and all bylaws or other lawful requirements of the City of Kelowna which is at least 16 feet wide on the west side of the Easement Area. The remaining portion of the Easement Area may be landscaped provided the landscaping does not interfere with access to Lot 7.

(b) That no building, structure, fence, foundation, excavation, well, pile of material or obstruction shall be made, placed, erected, or maintained on any portion of the Easement Area.

(c) That no residence shall be made, placed, erected, or maintained within the Easement Area as hereinbefore described.

(d) That the Grantor and the Grantee shall not do or knowingly permit to be done any act or thing which will interfere with or obstruct access or egress through the Easement Area.

(e) That the Grantor and the Grantee shall mutually agree as to such works as shall from time to time be required for the repair, maintenance, and upkeep of the driveway located within the Easement Area. PROVIDED that should the parties fail to agree as to the necessity, nature, or extent of such works, or shall fail to agree on any matter associated wherewith or relating thereto, then in such case the matter will be decided pursuant to the provisions of the Arbitration Act of British Columbia and any successor or amending acts.

(f) Each will repair any damage to the Easement Area occasioned by its use of the Easement.

(g) That the Grantor shall not do or permit to be done any act or thing within the Grantor's control which will interfere with the exercise by the Grantee of the Grantee's rights hereunder.

...

5. It is understood and agreed that nothing herein contained shall be interpreted so as to restrict or prevent the Grantor from using the Easement Area in any manner which does not interfere with the exercise by the Grantee of the Grantee's rights under this Agreement.

...

7. The parties hereto covenant and agree that they will do and execute such further acts and deeds and such further assurances as may be reasonably necessary to implement the true meaning of this Agreement.

...

11. If any provision of this Agreement is at any time found to be unenforceable or invalid for any reason it will be severable from the remainder of this Agreement and, in its application at that time, this Agreement will be constructed as though such provision was not contained herein and the remainder will continue in full force and effect and be constructed as if this Agreement had been executed without the invalid or unenforceable provision.

...

14. This Agreement is and will be deemed to have been made in British Columbia, for all purposes will be governed exclusively by and construed and enforced in accordance with the laws prevailing in British Columbia and the rights of the parties will be determined in accordance with those laws.

[Emphasis added.]

[15] As set out above, the Easement specifically prohibited the defendants from building any type of structure in the "Easement Area".

[16] In this regard, I accept that the Easement failed to adequately account for the slope between Lot 7 and Lot 6. Given the topography, the Easement probably ought to have made provision for the construction of a retaining wall on the Easement Area. Ultimately, however, it did not and both the plaintiffs and the defendants purchased their respective properties with full knowledge of the terms of the Easement then registered on title.

[17] In or about mid-September 2018, which was around the same time that the defendants commenced building their residence on Lot 6, the defendants commenced preparations for building a retaining wall in the Easement Area.

[18] A stop work order was made by the City of Kelowna quite shortly thereafter, at the request of the plaintiffs.

[19] Throughout 2019 and 2020, the parties tried to reach an agreement regarding modifying the Easement so that a retaining wall could be built on the Easement Area. During this time, the construction of the residence on Lot 6 was completed and the defendants moved in. Although habitable, the ongoing dispute over the construction of a retaining wall on the Easement Area resulted in the defendants being unable to access their residence using the front door.

[20] On June 8, 2021, the plaintiffs commenced this action against the defendants. They did so on the basis, as indicated above, that the Easement does not permit the construction of any building, structure, fence, etcetera in the Easement Area.

[21] The defendants did not initially file a response to the proceeding. Rather, it appears that negotiations continued, albeit very slowly.

[22] On May 30, 2022, the parties entered into a settlement agreement regarding the dispute over the Easement (the "Settlement Agreement"). The Settlement Agreement permitted the defendants to construct a retaining wall (the "Retaining Wall") on the Easement Area on certain express conditions which would allow both the plaintiffs and the defendants to complete their respective driveways.

[23] The terms of the Settlement Agreement included the following:

- a) Work to be completed by an approved builder in accordance with an engineered drawing and survey which were appended to the agreement;
- b) The grading of the driveways on both properties, at the expense of the defendants and upon prior approval by the plaintiffs, such that water flowed appropriately towards drainage and/or away from Lot 7;
- c) Work on the Retaining Wall was to commence "as soon as possible", and would be completed "within 3 months"; and

d) The defendants would pay the plaintiffs \$1,000 per month, for three months, or a total payment of \$3,000.

[24] Further, as an integral part of the Settlement Agreement, the plaintiffs and the defendants modified the terms of the Easement through the registration of a Modified Easement on title to Lots 6 and 7 (the “Modified Easement”).

[25] The Modified Easement, registered under Document Number CB270784 at the Kamloops Land Title Office, provides as follows:

WHEREAS the Grantor Is the registered owner of certain lands and premises situate In the City of Kelowna, Province of British Columbia and legally described as:

PID #029-710-421, Lot 6, Section 31, Township 26, ODYD, Plan EPP51888

(hereinafter called “the Servient Lands”)

AND WHEREAS the Grantee Is the registered owner of certain lands and premises situate In the City of Kelowna, Province of British Columbia and legally described as:

PID #029-710-430, Lot 7, Section 31, Township 26, ODYD, Plan EPP51888 (hereinafter called “the Dominant Lands”)

AND WHEREAS there is registered against title to the Lands an Easement registered in the Land Title Office, Kamloops, British Columbia on the 17th day of November, 2015 under registration number CA4813687 (the “Easement”).

AND WHEREAS the parties agree to modify the terms of the Easement.

NOW THEREFORE In consideration of the premises and the covenants hereinafter contained and other valuable consideration the Grantor and the Grantee do hereby covenant and agree as follows:

1. Section 2(b) of the Easement Is hereby deleted in its entirety and replaced with the following:

(b) That no building, structure, fence, foundation, excavation, well, pile of material or obstruction shall be made, placed, erected, or maintained on any portion of the Easement Area except for a concrete retaining wall to be constructed at the expense of the Grantor.

The retaining wall shall be 20.32 centimeters thick and shall be located approximately 3.302 meters from the westerly boundary of the Easement Area and 2.438 meters from the easterly boundary of the Easement Area. The retaining wall shall commence 10,668 meters from the southerly boundary of the Easement Area and extend for 7.62 meters.

2. All other provisions of the Easement remain in full force and effect.

[26] Ultimately, work on the Retaining Wall did not commence by the contractor retained by the defendants until late May 2023. This was almost a full year after the Settlement Agreement was signed. The defendants attribute the delay to redesigning and reengineering the Retaining Wall in accordance with the Settlement Agreement and obtaining a new building permit. However, these requirements, I find, ought to have been reasonably foreseeable to the defendants when they entered into the Settlement Agreement.

[27] Once work finally commenced, three key events in the building of the Retaining Wall were the pouring of footings on June 23, 2023, the pouring of the Retaining Wall itself on July 6, 2023, and the removal of the forms for the Retaining Wall on July 8, 2023.

[28] On or about July 9, 2023, the day after the removal of the forms, the plaintiffs became aware that the Retaining Wall was being built in apparent breach of the Settlement Agreement and sent an email to the plaintiffs raising their concerns (in quite specific detail). This was forthwith followed up by correspondence from the plaintiffs' counsel.

[29] According to the evidence of the defendants, it was only after the receipt of the plaintiffs' July 9, 2023 email that the defendants consulted with their contractor and learned that the contractor had unilaterally added six feet more length to the Retaining Wall at the toe nearest the Cul-de-Sac (the "6-Foot Extension").

[30] On July 18, 2023 the plaintiffs' counsel sent a further letter demanding that all work stop on the Easement Area. In this correspondence, counsel also made clear that the defendants' access to Lot 7, either by themselves or their agents, was revoked failing which such entrance or work would constitute a trespass (the "Trespass Notice"). The significance of the Trespass Notice will become apparent in due course.

[31] Discussions between the parties through counsel ensued, but consensus *ad idem* was again not quickly reached.

[32] Importantly, in correspondence dated July 24, 2023 and again in correspondence dated August 2, 2023 sent by the defendants' [then] counsel, counsel acknowledged that an application to court would be required to continue work on the Retaining Wall because it was effectively conceded the Retaining Wall, as partially built, was not in compliance with the Settlement Agreement or the Modified Easement. No such application was filed.

[33] On or about September 11, 2023, the defendants' contractor resumed work on the Retaining Wall. This occurred approximately one day after the plaintiffs left the country on vacation. The defendants deny that they undertook the work with knowledge that the plaintiffs were out of the country. I agree with the plaintiffs that it seems unusually coincidental, but there is ultimately nothing in the record beyond speculation about the timing of the work. What is not speculation is that the defendants knew that the plaintiffs had demanded that work on the Retaining Wall cease unless the dispute as to its lack of compliance with the Settlement Agreement was resolved and delivered the Trespass Notice. Further, the defendants' [then] counsel had expressly acknowledged in writing that absent a negotiated resolution, a court application was required to complete the Retaining Wall.

[34] Upon their return from vacation, it was the plaintiffs who filed an application seeking interim injunctive relief to have the Retaining Wall removed and to strike the damages portion of the defendants' counterclaim (which had been filed just a few weeks earlier). I shall refer to this application, filed on October 10, 2023, as the "Injunction Application".

[35] Concrete work on Retaining Wall resumed on Friday, October 20, 2023, which happened to be the Friday preceding the Monday on which the Injunction Application was set to be heard. On this date, the contractor (and/or subcontractors) were observed to be "loitering" on both Lot 6 and Lot 7 with an unleashed dog and playing loud music which was disconcerting to the plaintiffs' tenant. There are pictures in evidence showing these unidentified individuals in the driveway of Lot 7.

[36] I heard the Injunction Application on October 24, 2023. In oral reasons for judgment delivered on November 2, 2023, which reasons have been transcribed but not published, I dismissed the claim for interim injunctive relief and made certain orders respecting the defendants' counterclaim, mostly significantly to allow the defendants the opportunity to seek relief pursuant to s. 35 of the *Property Law Act*. As I stated at paras. 26-28:

[26] On this basis, I am ordering that the counterclaim—as presently drafted—is struck pursuant to R. 9 5(1)(a) of the *Rules* with liberty to the defendants to file an amended counterclaim within 30 days pleading relief under s. 35 of the *Property Law Act*.

[27] The plaintiffs shall have 45 days to file a response to the counterclaim. I have given the plaintiffs additional time having regard to the intervening Christmas holidays.

[28] With respect to the injunctive relief claim as set out in the application, having regard to my order allowing the amendment to the counterclaim, my conclusion regarding the mandatory injunction should be apparent. I am not going to order a mandatory injunction that the retaining will be removed until such time as the issues can be properly addressed on their merits.

[37] On the same day of the release of my oral reasons for judgment, the plaintiffs' counsel sent correspondence to the defendants [then] counsel purporting to accept the repudiation of the Settlement Agreement and elect to treat it at an end.

[38] It was only at this point that the defendants tendered the \$3,000 which was to be paid in accordance with the Settlement Agreement. The plaintiffs' counsel refused the cheque and returned it to defendants' [then] counsel.

[39] On November 27, 2023, the defendants filed their amended counterclaim.

[40] On July 18, 2024, the action came back on before me again over continued wrangling over the pleadings, namely the defendants' amended counterclaim. In oral reasons for judgment delivered August 7, 2024, indexed at 2024 BCSC 1527, I provided the defendants a further opportunity to remedy the deficiencies in their pleadings to properly plead s. 35 of the *Property Law Act*. Specifically, starting at para. 32, I stated as follows:

[32] For the reasons I have articulated, I remain satisfied that the defendants have a viable claim for relief under s. 35 of the *PLA*. That is what the counterclaim should articulate in accordance with the requirement under R. 3 of the *Rules*, that parties plead material facts and not evidence or argument.

[33] Moreover, having regard to the facts of this case, I have already permitted the defendants to fix one manifest defect in the pleadings to defend as against the plaintiffs' claims; namely, the s. 35 *PLA* remedy. The order was not intended to and did not provide the opportunity for pleadings of other claims which were not discussed in the course of the underlying hearing wherein the Court did not have the benefit of a draft revised pleading to review, as is helpfully often the case.

[34] In the circumstances, I remain of the view that the defendants should be permitted to file a counterclaim that appropriately pleads for relief under s. 35 of the *PLA*. The defendants are also entitled to make any claim for costs that may be appropriate in the circumstances. The defendants were not, however, given leave to bring a new or completely revised clause of action for damages or some other novel or creative cause of action under the terms of my November 2, 2023 order.

[35] Subject to my orders below, I have concluded that the appropriate solution is to give the defendants yet one more opportunity to file a counterclaim that conforms with my November 2, 2023 order and under the *Rules* generally.

[41] The defendants filed a further amended counterclaim on September 20, 2024, in accordance with my August 7, 2025 order.

[42] But for a change in counsel by the defendants, the action then stood dormant for all intents and purposes until the plaintiffs filed the notice of trial on October 10, 2025. This was followed by the filing of the plaintiff's Application on January 6, 2026 (which was sufficiently outside the 42-day time limit required by R. 9-7(3)).

[43] Several other relevant facts which necessitate mentioning before moving on to a summary of the parties' positions and the analysis of the legal issues are that:

- a) according to the defendants, the total cost of the Retaining Wall (including design costs, engineering fees, machinery, labour and material) was \$78,594.71. This evidence is not challenged;
- b) the defendants have offered previously and continue to be willing to remove the 6-Foot Extension; and

- c) the defendants cannot remedy the thickness of the Retaining Wall or the location of the Retaining Wall without removing and replacing the Retaining Wall. This would involve a significant amount of excavation and considerable further expense. It would also, I accept based on the evidence before me, likely destabilize the slope on Lot 6 and might also potentially destabilize the Lot 7 driveway.

Issues to be Determined

[44] Excluding costs, I find that the issues to be decided in the cross-applications are as follows:

- a) Are the defendants entitled to relief pursuant to s. 35 of the *Property Law Act*?
 - i. If so, should that order be conditional upon a payment of compensation by the defendants to the plaintiffs? If so, what is the appropriate amount of compensation?
 - ii. Should those conditions not be met, are the plaintiffs entitled to a mandatory injunction for the removal of the Retaining Wall?
- b) Have the defendants trespassed on the plaintiffs' property? If so, what damages flow from that trespass? Alternatively, have the defendants committed the tort of private nuisance? If so, what damages flow?
- c) Are the plaintiffs' entitled to any other injunctive or declaratory relief?

The Parties' Positions

[45] The parties' current positions are articulated in their written submissions, which were filed in accordance with Practice Direction No. 69.

[46] The plaintiffs seek the following relief:

- 1. Pursuant to Rule 9-7 of the Supreme Court Civil Rules, BC Reg 168/2009, the plaintiffs seek:
 - a. Judgment in favour of the Plaintiffs;

- b. General damages for Trespass and Nuisance against the Defendants;
- c. Interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79 and amendments thereto;
- d. Declarations that:
 - i. The Plaintiffs are entitled to easement CB270784;
 - ii. The Defendants violated easement CB270784;
 - iii. The Defendants repudiated the settlement agreement entered into with the Plaintiffs on or about May 20, 2022;
 - iv. The Plaintiffs were entitled to accept that repudiation and treat the Agreement as at an end on November 2, 2023, and duly did so.
- e. An order under s. 35 of the *Property Law Act*, R.S.B.C. 1996, c. 377 (the “**PLA**”) that easement [CB270784] be amended to allow for the Retaining Wall and its maintenance, conditional upon:
 - i. The six-foot extension of the retaining wall which extends onto easement CB270784 being removed within 60 days, in accordance with the order e.ii. above; and
 - ii. The defendants paying compensation to the plaintiffs in the amount of \$85,000, or such other amount as this honourable court deems just, within 60 days.
- f. Should conditions e.i. and e.ii. not be met:
 - i. An order under s. 35 of the *PLA* that easement [CB270784] be cancelled and CA4813687 shall be reinstated; and
 - ii. An order for a mandatory injunction requiring the Defendants to return the easement area to its original state and grade within 92 days of this order.
- g. Mandatory injunctions:
 - i. Requiring the Defendants to return the Plaintiffs’ property to their pre-altered states within 42 days of this order by, in particular and without limitation:
 - 1. Removing the cinder block wall constructed on the Plaintiffs’ property; and
 - 2. Re-paving the Plaintiffs’ property where the Defendants’ had chipped away at it around the cinder block wall.
 - ii. Requiring the defendants to remove the six-foot extension of the retaining wall which extends onto easement CB270784 within 60 days of this order.

- h. Permanent injunctions:
 - i. Restraining the Defendants from interfering with and obstructing the Easement;
 - ii. Restraining the Defendants from interfering with the Plaintiffs' property;
 - iii. Restraining the Defendants from trespassing on the Plaintiffs' property.
- 2. An order against the defendants for the plaintiffs' special costs, or in the alternative, increased costs, or in the further alternative, costs.
- 3. Such further and other relief as this Honourable Court deems just and equitable in the circumstances.

[47] The defendants seek the following relief:

- 1. Dismissal of the plaintiffs' action;
- 2. An order granting the defendants pursuant to section 37 of the Property Law Act the right to modify the Easement and Modified easement to account for the retaining wall on the Easement Area:
 - a. being 10" thick;
 - b. being located where it is currently located; and
 - c. party and party costs at Scale B payable by the plaintiffs.

Section 35 of the Property Law Act

[48] Section 35 of the *Property Law Act*, which gives the court the jurisdiction to modify or cancel charges, provides as follows:

- 35** (1) A person interested in land may apply to the Supreme Court for an order to modify or cancel any of the following charges or interests against the land, whether registered before or after this section comes into force:
- (a) an easement;
 - (b) a land use contract;
 - (c) a statutory right of way;
 - (d) a statutory building or statutory letting scheme;
 - (e) a restrictive or other covenant burdening the land or the owner;
 - (f) a right to take the produce of or part of the soil;
 - (g) an instrument by which minerals or timber or minerals and timber, being part of the land, are granted, transferred, reserved or excepted.

- (2) The court may make an order under subsection (1) on being satisfied that the application is not premature in the circumstances, and that
 - (a) because of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete,
 - (b) the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled,
 - (c) the persons who are or have been entitled to the benefit of the registered charge or interest have expressly or impliedly agreed to it being modified or cancelled,
 - (d) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest, or
 - (e) the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.
- (3) The court may make the order subject to payment by the applicant of compensation to a person suffering damage in consequence of it but compensation is not payable solely for an advantage accruing by the order to the owner of the land burdened by the registered instrument.
- (4) The court must, as it believes advisable and before making an order under subsection (2), direct
 - (a) inquiries to a municipality or other public authority, and
 - (b) notices, by way of advertisement or otherwise, to the persons who appear entitled to the benefit of the charge or interest to be modified or cancelled.
- (5) An order binds all persons, whether or not parties to the proceedings or served with notice.
- (6) The registrar, on application and the production of an order made or a certified copy of it must amend the registrar's records accordingly.

Easement Caselaw

[49] The law on the interpretation of easements is generally well settled in this province. In this case, the plaintiffs rely strongly on the decision of Justice McEwan in *Langley v. Yang*, 2012 BCSC 1520 whereas the defendants rely strongly on my decision in *Horning v. Schroeder-Collen*, 2025 BCSC 1233. Both are equally persuasive authorities, although *Horning* does review certain appellate authorities which are binding upon me.

[50] Factually this case is clearly much more on all fours with *Langley* than with *Horning*.

[51] In *Langley*, the respondents undertook the construction of a patio adjacent to their house, extending the finished surface to the edge of the “boulder line” which lay between their property and the petitioners’ property. Unfortunately, the “boulder line” was not representative of the legal boundary between the properties and a portion of the patio encroached on the petitioners’ property. This resulted in cross-petitions like the cross-applications before me—the petitioners sought an order requiring the removal of the encroachment and the respondents sought remedial relief under the *Property Law Act*.

[52] Justice McEwan found that the respondents, in building their patio to the boulder line without first confirming that their property extended to the boulder line, had created a *fait accompli* in service of their own interests. Starting as follows at para. 11, he stated:

[11] It is abundantly clear that the actual location of the boundary was not precisely known. It was not where the Yangs had first thought it to be. None of the discussion at the time the Langleys protested the use of the path, or suggested where the boundary *probably* was, is really pertinent. That is because no reasonable person in the Yangs’ position would have embarked upon an expensive landscaping project without establishing the boundary by means of a proper survey. The material gives rise to a strong inference that the Yangs simply considered it in their best interests to finish the landscaping to the natural boundary, creating a *fait accompli*.

[Emphasis in original.]

[53] Justice McEwan further found that the respondents’ *fait accompli* combined with the court’s disposition towards maintaining the status quo made for a compelling case for the court to allow the encroachment to remain, despite the injustice of allowing the defendants to effectively take a portion of the petitioners’ property by being effectively negligently ignorant of their own property line:

[25] Melnick J.’s observation [in *Epp v. Gartside*, 2011 BCSC 1687] that an “honest belief” is a threshold issue would be binding on me and would dictate a result in favour of the Langleys, were it the *ratio* of the case. The distinction between *Epp* and the present case is that in *Epp* the applicants failed the first threshold of establishing that the encroachment was a building or a “fence.” The rest is useful, but obiter, as Melnick J. noted.

[26] I think that generally the lack of an honest belief should be treated as crucial consideration. What Leggatt J. said in *Vineberg*, however, was that the party seeking the easement “should” have an honest belief. I think that

somewhat cautious word is wise, because there may be cases where other considerations are not entirely overwhelmed by the applicant's choice of an unjustifiable tactic.

[27] I think this is such a case. The land in question is really not accessible or usable by the Langleys. It is not, except psychologically, a manifest intrusion on their living space. It is well behind and away from their domicile. It is beyond a boulder line they have not found it necessary to disturb during their occupation of the property. It seems obvious that what has occurred is that relations between the parties have reached such a low that reasonable accommodation is not possible. The parties have, for example, descended to putting up signs along the border instructing each other of their positions.

[28] What the Yongs did was inexcusable, but in the particular circumstances of this case I am persuaded that a proper amount of compensation together with costs will serve the purposes of an adequate rebuke of such behaviour, and also the ends of justice and common sense.

[Italic emphasis in original; underlined emphasis added.]

[54] As to the proper amount of compensation, Justice McEwan ordered the respondents to pay the sum of \$22,000 based, in part, on an appraisal respecting the increase in value of the respondents' property attributable to the improvement whilst making some allowance for the loss of value to the petitioners' property: see para. 29. Justice McEwan also ordered special costs against the respondents but in doing so did not engage in any substantive analysis of what conduct during the litigation merited such an award: see para. 30.

[55] In *Horning*, the plaintiffs owned property at the end of a short lane way. To obtain access to their residence, an access easement was granted over five other properties for the benefit of the plaintiffs, including the property owned by the defendants (which was immediately adjacent to the plaintiffs' property). One of the issues in dispute involved a relatively small retaining wall that had been built decades before the defendants purchased their property. A survey obtained by the plaintiffs revealed that the retaining wall encroached into the easement area by between 0.93m and 1.17m. This had the practical impact of narrowing the right of way down to approximately 21 feet from the prescribed 25 feet over the defendants' portion of the easement area (some approximately 16 percent).

[56] Ultimately, I concluded that the defendants' retaining wall did not constitute a significant interference and the plaintiffs had thus not established a case for a mandatory injunction in respect of the retaining wall: see para. 52. That conclusion was founded entirely on the facts of that case: namely the "total lack of evidence" upon which to conclude that the retaining wall had interfered in any way with convenient access to the plaintiffs' property as stipulated by the easement: see para. 50. Rather, the plaintiffs' entire case rested on the survey which confirmed there remained at least 21 feet upon which vehicles could pass and repass: see para. 51.

[57] Rather unusually, the defendants in *Horning* did not bring on a counterclaim seeking relief pursuant to the *Property Law Act*. Notwithstanding, the law regarding alleged breaches of easement rights remains applicable. As articulated starting at para. 31:

[31] When considering alleged breaches of easement rights, the appropriate approach is a two- stage one. Firstly, to determine the nature and extent of the rights granted by the easement agreement. Secondly, to determine whether those rights have been substantially interfered with: *TimberWest Forest Corp. v. 0768816 B.C. Ltd.*, 2020 BCSC 1184 at para. 22.

[32] In terms of applying the *Timberwest* test, I adopt the following summary of the law from Blok J.'s decision in *Thompson v. Hay*, 2024 BCSC 583 starting at para. 146:

[146] As to the first step – the nature and extent of the rights granted – the proper approach is set out in *Tessaro v. Langlois*, 2019 BCCA 95:

[18] Easements are to be interpreted as contractual documents. Contractual interpretation involves questions of mixed fact and law because the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 3 at para. 50; *Robb v. Walker*, 2015 BCCA 117 at paras. 30–31.

[19] This court summarized these legal principles in *Grant v. Lowres*, 2018 BCCA 311:

[20] Contractual interpretation generally involves discerning "the intent of the parties and the scope of their understanding" by "read[ing] the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Sattva* at para. 47.

...

[21] This court adapted those insights to the particular context of easements in *Robb v. Walker* [2015 BCCA 117]:

[31] When interpreting an easement, the court must have regard to the plain and ordinary meaning of the words in the grant to determine what the intention of the parties was at the time the agreement was entered into. Surrounding circumstances, that is, objective evidence of the background facts at the time of the execution of the contract, are to be considered in interpreting the terms of a contract: *Sattva* at para. 58.

[32] The wording of the instrument creating the right of way should govern interpretation unless (1) there is an ambiguity in the wording, or (2) the surrounding circumstances demonstrate that both parties could not have intended a particular use of the easement that is authorized by the wording of the document: *Granfield v. Cowichan Valley (Regional District)* (1996), 16 B.C.L.R. (3d) 382 (C.A.).

[147] The second step – substantial interference – was described in *Smith v. Balen*, 2018 BCSC 918, as follows:

[85] The test as to whether there has been an actionable disturbance on an easement is whether the way could be practically and substantially exercised as conveniently after as before the interference; to be actionable, the interference must be substantial: *Grenier v. Elliott*, 2007 BCSC 598 at para. 35; see also *Fallowfield v. Bourgault* (2003), 68 O.R. (3d) 417 at paras. 11 and 33 (Ont. C.A.).

[33] Given that the easement is a right-of-way easement, both parties referred me to *Grenier v. Elliott*, 2007 BCSC 598, cited above, wherein Justice Kelleher stated as follows starting at para. 35:

[35] The test for whether there has been an actionable disturbance of a right-of-way was stated in *Miller v. Maclean* (1972), 7 N.S.R. (2d) 371 (S.C.T.D.) where the court at para. 49 referred to the following passage from Anger and Honsberger, *Canadian Law of Real Property* at 1012:

The test of whether there has been an actionable disturbance of the right-of-way is whether the way could be practically and substantially exercised as conveniently after as before the interference...To be actionable, the interference must be substantial...but if there is an obstruction either wholly or partially to the right-of-way caused by a building the interference is actionable whether it is of a substantial nature or not as it amounts to an abridgement of the easement which if submitted to for a sufficient time will forever deprive one of the right to use as a way the portion encroached upon...

[36] The court in *Miller*, at para. 48, applied this passage from Goddard, *The Law of Easements*, 8th ed. at 501:

Obstructions of ways may be either permanent or temporary in their character: that is, the obstacle or the means used for obstruction may be placed in the way or adopted with the intention, evident from its character, that it shall not be removed ... When obstructions are permanent in their character, little difficulty can arise as to the right of action...

Are the Defendants Entitled to Relief Pursuant to the *Property Law Act*?

[58] The Easement was registered on title when the defendants purchased Lot 6. The Easement very clearly stated that no structures (including a retaining wall) could be built in the Easement Area. This term was not practicable in the circumstances given the slope between the two properties. A retaining wall is needed for lateral support and not merely for aesthetic purposes. However, instead of proactively addressing the issue by negotiating an appropriate modification of the Easement, the defendants simply started building a wall in obvious breach of the terms of the Easement. This required the plaintiffs to exercise their legal rights to stop construction until a solution could be found.

[59] Ultimately, the parties did finally find a solution in the form of the Settlement Agreement and Modified Easement. The terms of the Settlement Agreement contemplated the building of a very specific retaining wall. Indeed, the exact plans for the Retaining Wall are appended to the Settlement Agreement. Further, the Modified Easement clearly states that there shall be no building or structure (and so forth) in the Easement Area except for a concrete retaining wall built with these very specific parameters:

The retaining wall shall be 20.32 centimeters thick and shall be located approximately 3.302 meters from the westerly boundary of the Easement Area and 2.438 meters from the easterly boundary of the Easement Area. The retaining wall shall commence 10,668 meters from the southerly boundary of the Easement Area and extend for 7.62 meters.

[60] The Retaining Wall was constructed in breach of the Modified Easement. In this case, I am satisfied that even with the removal of the 6-Foot Extension, the Retaining Wall constitutes a significant interference and is thus actionable.

[61] It simply does not accord for the defendants to advance a *de minimis* argument when the Modified Easement so clearly contemplates a very specific retaining wall and that is not what was built. Further, I find that the defendants either had prior knowledge of the fact that their contractor intended to construct the Retaining Wall differently than what was permitted under the Modified Easement or were wilfully ignorant by not expressly confirming that the Retaining Wall was in complete compliance with the Settlement Agreement and the Modified Easement.

[62] Further, it merits mentioning that if a change to the thickness of the Retaining Wall was structurally required as a result of regulatory changes during the delay between the plans being first commissioned and the Retaining Wall actually being built, delay that all lies at the feet of the defendants, it was incumbent upon the defendants to raise this issue with the plaintiffs and seek their agreement to a further modification to the Modified Easement. They did not do so and simply forged ahead creating the *fait accompli* that the Justice McEwan described in *Langley*.

[63] Notwithstanding the foregoing, I am still satisfied that it is appropriate to grant the relief sought pursuant to s. 35(2) of the *Property Law Act* to allow that the Modified Easement be further amended to allow for the Retaining Wall as presently built and its ongoing maintenance, provided that:

- a) the 6-Foot Extension be removed, at the defendants' cost, within 90 days;
and
- b) the defendants are appropriately compensated.

[64] In reaching this conclusion, I am mindful of the plaintiffs' submission that there arguably should be no relief granted under the *Property Law Act* where a party knowingly encroaches onto an adjacent property for their own benefit and then seeks forgiveness as it has the potential to erode property law rights and reward wrongdoers. However, as I have sought to articulate, the Retaining Wall is not decorative. It serves a necessary purpose such that granting injunctive relief that it

be torn down likely just sets the stage for another court action to build a substantially similar retaining wall.

Compensation Due to the Plaintiffs

[65] Having concluded that it is appropriate to grant the relief sought under s. 35 of the *Property Law Act*, I must address the issue of the appropriate compensation that should be awarded to the plaintiffs.

[66] The plaintiffs have tendered no expert evidence to support their claim for damages. In *Langley*, the case extensively relied upon by the plaintiffs, there was expert evidence before the court which was relied upon, at least in part, in determining the compensation award to the petitioners.

[67] The plaintiffs' position is that compensation of \$85,000 should be awarded on the basis that this is similar to the amount that the defendants spent to design and build the Retaining Wall (the unchallenged evidence of the defendants, as noted, is that the actual total cost was \$78,594.71).

[68] The plaintiffs cite no case authority which supports their position in this regard. Which, in my view, is because it is legally untenable. As I articulated during submissions, this would be tantamount to blindly accepting, for example, that a building swimming pool that cost \$100,000 automatically added \$100,000 in value to a property.

[69] Further, after the removal of the 6-Foot Extension, the possible diminution in value to Lot 7 appears, on its face, relatively modest. Specifically, once the Modified Easement is amended to appropriately reflect the encroachment, the additional width of the Retaining Wall could potentially even be considered a benefit given it improves the structural integrity of the Retaining Wall. The same cannot be said for the location of the Retaining Wall which required the installation of the bollards to avoid, as discussed below, concerns about ongoing trespass upon Lot 7 by the defendants and their invitees when using the upper driveway to Lot 6. The bollards serve their purpose, but they are not what I would describe as aesthetically pleasing.

[70] The defendants' position that they should be entitled to s. 35 relief without paying the plaintiffs' any compensation is thus equally untenable.

[71] The Retaining Wall clearly adds value to Lot 6. But for the completion of the Retaining Wall, the defendants were unable to access their residence using their front door. It does not take expert evidence to conclude that the lack of a useable front door would have a negative impact on the market value of the property.

[72] I am thus left in the quandary of whether to direct that the matter come back before me with further evidence as to compensation, or to somewhat arbitrarily assess compensation based upon the evidentiary record before me.

[73] Given that the plaintiffs are the parties that filed the notice of trial and then initially brought this matter before the court for summary determination pursuant to R. 9-7 by virtue of the plaintiffs' Application, I conclude that they had ample opportunity to obtain and tender expert evidence in accordance with the *SCCR* if they so desired. They intentionally elected not to do so.

[74] The defendants were also aware that a conventional trial in this action was set for the week of June 15, 2026. Although the plaintiffs' Application was filed prior to the deadline for the delivery of expert reports, the defendants did not see fit to commission an expert report after the further amended counterclaim was filed on September 20, 2024 even though this evidence is relevant only to their counterclaim. Specifically, if the plaintiffs were successful in obtaining the injunctive relief initially sought in the plaintiffs' Application (and in their amended notice of civil claim), there would no need for expert evidence because the Retaining Wall would be removed at the defendants' expense.

[75] In these circumstances, and upon reflection of the equities in play, I conclude that it is appropriate to assess compensation on the evidence before me and not give either party the opportunity to obtain expert evidence to buttress the case they chose to put before this Court.

[76] In this regard, I am going to rely significantly upon another previous decision of mine regarding an easement dispute, *Honey v. 540967 BC Ltd.*, 2024 BCSC 2365. In *Honey*, which involved s. 36 of the *Property Law Act*, I did refer the issue of compensation back before me after deciding the underlying petition on its merits. In assessing the appropriate compensation, I stated as follows starting at para. 4:

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

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

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

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

- a) Cabin Encroachment; and
- b) Eave Overhanging Encroachment.

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

[9] However, the issue of compensation for the Easement pursuant to s. 36(2)(a) of the PLA was not adjudicated upon as I was not, as indicated at paragraphs 52 to 58 of the Petition Reasons, satisfied that the evidentiary record allowed me to make the necessary findings at the time. I further considered it more effectively addressed by a further appearance before me as opposed to a reference to the registrar.

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

Issues to be determined

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

- a) the amount to be awarded as compensation by the petitioners to the corporate respondent for the Easement; and
- b) Costs of the compensation hearing.

Summary of positions

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

- a) the petitioners submit that the appropriate compensation for the Easement is \$5,500; and
- b) The corporate respondent submits that the appropriate compensation for the Easement is in the range of \$10,000 to \$25,000.

Legal framework

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

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

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

- a) Compensation should not be based on an expropriation formula: see *Rowse v. Halloran*, 1997 CanLII 3132 (BCSC) at para. 23;
- b) The increase in value to the lot obtaining the easement can be used: *Langley v. Yang*, 2012 BCSC 1520 at para. 29;
- c) In the absence of objective evidence, compensation can be set in relation to the term of the easement and a commensurate level of compensation while the encroachment is in place: *Beaton* at para. 40; and
- d) At the very least a nominal amount of compensation must be ordered.

Summary of the basis for the Parties' positions

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

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

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

[19] On this basis, the corporate respondent submits that the appropriate amount of compensation is \$25,000. In the alternative, even if a nominal amount of compensation is awarded, the corporate respondent submits it should be at least \$10,000. In the further alternative, the corporate respondent submits that there is some objective evidence to support an award of at least \$12,500 (plus GST).

Caselaw and Analysis

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

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

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

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

- a) *D’Amico v. Atkinson*, 2023 BCSC 2186; aff’d 2024 BCCA 330. Therein the court granted \$2,000 for a 4.5 square meter retaining wall encroachment at the foreshore of the parties’ properties; and
- b) *Abel v. Harlton*, 2024 BCSC 1072. Therein the court granted \$5,000 for a .2 to 1.5-centimeter fence encroachment.

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

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

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

[27] I do also consider it relevant, within the scope of my discretion under s. 36(2)(a) of the *PLA*, that this is not a situation where the petitioners made an intentional decision to knowingly proceed as they saw fit in their personal interests and simply seek permission later. That type of conduct is never encouraged by the court. To the contrary, the corporate respondent

purchased Lot 59 with some actual recognition of a possible concern. As I stated at paragraphs 26 to 30 of the Petition Reasons:

[26] The respondent corporation purchased Lot 58 in the spring of 2021. Given their long-time ownership of property in close proximity to Lots 58 and 59 and presence in the community generally, I find it quite obvious that the Bostocks were very likely aware of the encroachment by the Cabin onto Lot 58. It is quite simply obvious from the photographs included in the evidence in the petition record before this Court. . . .

[27] Despite what I conclude was a known or at least strongly suspected encroachment, the Bostocks, through the corporate respondent, did not obtain a survey of Lot 58 as a subject condition prior to completing their purchase of said property. There is also no evidence of a property disclosure statement being provided by the former owner of Lot 58 as a condition of sale . . .

. . .

[30] Thus, I accept that the Bostocks wanted to purchase Lot 58 and made, through the corporate respondent, an offer to purchase without a survey and without a property disclosure statement at their own peril. Both would have been quite simple due diligence.

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

Conclusion re Compensation

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

[77] In this case, the inconvenience caused by the Retaining Wall's encroachment into the Easement Area is, I find, less than was the case in *Honey*. However, the circumstances resulting in the encroachment are entirely different.

[78] The encroachment in *Honey* was the result of the building of the petitioners' cabin many years prior to the dispute and the corporate respondent purchased its neighbouring cabin without doing simple due diligence which would have confirmed what I referred to as a "strongly suspected" encroachment. I also specifically noted it was not a situation where a landowner made an intentional decision to knowingly

proceed as they saw fit in their personal interests and simply seek permission later. That, however, is exactly what happened here.

[79] Balanced against this is the fact that the only compensation that the plaintiffs sought for granting the Modified Easement was the benefit of the grading of their driveway at the defendants' cost and the modest sum of \$3,000. It is something of a quantum leap to go from \$3,000 to \$85,000 in the absence of expert evidence.

[80] In all the circumstances, I assess the compensation payable by the defendants to the plaintiffs pursuant to s. 35(3) of the *Property Law Act* at \$40,000. This an all-inclusive award, such that the defendants are under no separate legal obligation to pay the \$3,000 pursuant to the Settlement Agreement (which as noted was attempted to be paid, albeit late, and refused on the basis that the agreement had been repudiated).

[81] This compensation must be paid within 90 days of these reasons for judgment. To avoid any opportunity for confusion, I calculate 90 days from the date of the release of these reasons for judgment as September 23, 2026.

Remedy if My Orders Are Not Complied With

[82] As set out above, the relief granted to the defendants pursuant to s. 35 of the *Property Law Act* to amend the Modified Easement to permit the existing Retaining Wall is conditional upon:

- a) the removal of the 6-Foot Extension within 90 days; and
- b) the payment of the sum of \$40,000 as compensation to the plaintiffs within 90 days (namely, September 23, 2026).

[83] To ensure compliance, the plaintiffs seek what effectively amounts to a “guillotine” order. Specifically, if the defendants do not comply with both terms within the time permitted, then the plaintiffs want this court to:

- a) order that the Modified Easement be cancelled and the Easement be reinstated; and
- b) grant a mandatory injunction to return the Easement Area to its original state within 92 days of the order (this is premised on the defendants being given 45 days to remove the 6-Foot Extension and pay the compensation as opposed to the 90 days which I have permitted).

[84] In my view, the plaintiffs' approach is inappropriately draconian.

[85] That said, the defendants' conduct in respect of the performance of their obligations under the Settlement Agreement give the plaintiffs' *bona fide* reason to be skeptical as to the defendants' timely compliance with my orders.

[86] Given the equities involved, I am satisfied that it is within my jurisdiction to put into place an order which will penalize the defendants monetarily if they do not comply with my orders, but in a way that is proportionate to the circumstances and ought not, hopefully, require yet another appearance by the parties in chambers.

[87] Specifically, I order that for each day after September 23, 2026 that the defendants have not removed the 6-Foot Extension and paid the \$40,000 in compensation to the plaintiffs, the defendants shall pay the plaintiffs the sum of \$200 in additional compensation. For example, if either of these obligations are not completed by the defendants by September 28, 2026 (which is five days after the deadline for compliance), the compensation owing to the plaintiffs shall be \$41,000. This amount shall continue to accumulate at a per diem rate of \$200 until such time as my orders under s. 35 of the *Property Law Act* have been complied with. This per diem compensation, if applicable, is in addition to any interest owing pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

Trespass and Nuisance

[88] Separate from the compensation sought under s. 35 of the *Property Law Act*, the plaintiffs also seek an award of damages on the basis that the defendants'

conduct constitutes the tort of trespass or, in the alternative, the tort of private nuisance.

[89] The tort of trespass is one of the oldest recognized torts. Trespass encompasses entering or remaining on someone else's land without permission, performing an unlawful activity on the land, or refusing to leave when asked by the property owner or authorized person: see *Lahti v. Chateauvert*, 2019 BCSC 1081 at para. 6. The tort is actionable per se, meaning a person can be sued for trespass even if no actual damage occurs.

[90] Said another way, to constitute trespass a defendant must in some direct way interfere with land possessed by a claimant. The requirement of directness differentiates trespass from private nuisance, which is committed when a defendant makes a use of his land that indirectly affects the land of a claimant.

[91] Specifically, in *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13, the Supreme Court of Canada addressed the legal principles governing private nuisance. At para. 18, Justice Cromwell said that a nuisance "consists of an interference with the claimant's use or enjoyment of land that is both substantial and unreasonable". A substantial interference with property is one that is nontrivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also reasonable in the circumstances: see para. 19.

[92] After the completion of the retaining wall in October 2023 until July 2025, it is alleged that the defendants, by virtue of the topography of the Easement Area and the location of the Retaining Wall, repeatedly trespassed onto Lot 7 when accessing the upper driveway of Lot 6 by motor vehicle (referred to in submissions as the "Choke Point Trespass").

[93] Importantly, there is no bright line demarcating the boundary of the Easement Area and the trespasses complained of by the plaintiffs are fleeting in nature (mere seconds based on the length of the driveway).

[94] The plaintiffs' solved the Choke Point Trespass by installing bollards at the edge of Lot 7 in July 2025. Bollards are, for reference, short, thick vertical posts designed for, amongst other things, controlling or restricting vehicle access.

[95] The bollards installed by the plaintiffs ensure that the defendants (and their invitees) do not trespass onto Lot 7 with vehicles. The installation of the bollards also illustrate that it is entirely possible to access the upper driveway of Lot 6 without trespassing (albeit perhaps less conveniently).

[96] Accordingly, to the extent that the plaintiffs have successfully proven on a balance of probabilities that there were occasions of trespass prior to the installation of the bollards in which the tort of trespass was committed, I am satisfied that the plaintiffs are only entitled to nominal damages notwithstanding that the tort is actionable per se. I assess those damages at \$500.

[97] The second very specific allegation of trespass relates to the conduct of the defendants' contractor (its' employees and/or subcontractors hired by the contractor) on October 20, 2023. This allegation resulted in a somewhat unanticipated deeper dive into the law as to whether the defendants can be liable for the alleged trespass committed by their agents.

[98] The cases I was referred to during oral submissions were:

- a) *Stewart v. Phillips*, 2018 BCSC 828;
- b) *Smith v. Balen*, 2018 BCSC 918 (an oft cited case regarding easements generally which I referred to in *Horning*); and
- c) *Moyer v. Mortenson*, 2010 BCSC 1528.

[99] In my view, this case, as many do, turns on its very specific facts. The defendants opted to have their contractor return on October 20, 2023, mere days before the plaintiffs' Injunction Application was set to be heard. At the time, the defendants were also on express written notice, and had been as of July 18, 2023,

that any entry upon the plaintiffs' property would constitute a trespass. The Trespass Notice could not have been more clear.

[100] In this factual matrix, the defendants cannot shield themselves from liability by claiming to have no control over the actions of the contractor (its employees and/or subcontractors). It was clearly incumbent upon the defendants to make it abundantly clear to the contractor where they were legally entitled to be (Lot 6) and where they were not legally entitled to be (Lot 7). The photographs in evidence show the individuals in question were trespassing onto Lot 7. This conduct, as already noted, is actionable per se.

[101] In assessing damages, I do not accept that the trespass itself or the behaviour of the contractor (its' employees or subcontractors) was intentionally intended to be intimidating despite the subjective belief of the plaintiffs' tenant. The pictures in evidence appear to primarily show the individuals involved socializing on a Friday afternoon. I accept the tenant's evidence that the music they were playing was loud, but this occurred well within the hours of the day when playing of music at a loud (but not obnoxious) level is permitted within the City of Kelowna's municipal boundaries. Further, the fact that the dog present was unleashed is not problematic as but for the trespass, there was nothing precluding the dog from being unleashed whilst on Lot 6. Moreover, and importantly, there is nothing even in the evidence of the plaintiffs' tenant that suggests that the dog was in any way aggressive. Merely being large and unleashed does not make the dog an aggravating factor in assessing damages.

[102] Balancing all the considerations, including the conduct of the defendants in effectively creating the trespass by commissioning the work, the timing of the trespass relative to the Injunction Application, the short duration of the trespass (less than half a day) and lack of finding of any intentionally intimidating conduct by the actual trespassers, I assess the damages owing by the defendants to the plaintiffs at \$4,500.

[103] The final allegation of trespass relates to the construction of a cinder block wall along the northwest border between Lot 7 and Lot 6 (the “Upper Wall”).

[104] Unlike the Retaining Wall, I find that the Upper Wall was discussed in advance between the parties and that there was an oral agreement reached that the defendants would construct the Upper Wall at their cost and that in so doing any minor trespass that occurred during the construction of the Upper Wall was consented to by the plaintiffs. The initial trespass is thus not actionable: see *Lahti* at para. 7.

[105] Ultimately, shortly after the Upper Wall was constructed, it was determined that it slightly encroached upon Lot 7. Upon being notified of this, the defendants proceeded to relocate and rebuild the encroaching part of the Upper Wall such that it is now entirely within the boundaries of Lot 6. The defendants complain that this involved considerable effort and some additional expense, but they have no one to blame but themselves in this regard. In the circumstances, they ought to have been abundantly careful to ensure at first instance that the Upper Wall was solely within the boundaries of Lot 6. However, any minor trespass that occurred during the movement of the Upper Wall is also not actionable because the plaintiffs cannot on one hand demand that the encroachment be removed and then on the other hand complain that the defendants are trespassing when reasonably complying with that demand.

[106] Finally, I find that the plaintiffs have not proven, on a balance of probabilities, that the construction of the Upper Wall caused damage to the upper concrete pad on Lot 7.

[107] The total quantum of damages assessed for the defendants’ conduct which constitutes the tort of trespass is \$5,000.

[108] These damages are payable within 90 days of these reasons for judgment, and the award shall attract interest pursuant to the *Court Order Interest Act*.

[109] Given my conclusion as to the tort of trespass, it is unnecessary to consider the plaintiffs' claim for damages for private nuisance since the underlying facts relied upon are the same.

Other Relief Sought by the Plaintiffs

[110] Having regard to the orders I have made herein, which I conclude conclusively addresses the merits of the dispute between the parties, I am not satisfied that the plaintiffs are entitled to any of the other relief sought at this juncture; injunctive, declaratory or otherwise.

[111] Accordingly, except as specifically provided herein, all other relief sought by the plaintiffs is dismissed.

Special Costs

[112] The plaintiffs, as set out above, seek special costs.

[113] Special costs are distinct from party and party costs. In *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740, 1994 CanLII 2570 (BCCA), the Court of Appeal described the key factor in an order for special costs as "reprehensible conduct".

[114] In my last oral reasons for judgment in this case, I discussed the law regarding special costs in more detail, albeit focused on the plaintiffs' then submission that the defendants were advancing claims in their amended counterclaim that were meritless and bound to fail: see paras 42-45. I did not award the plaintiffs special costs.

[115] Currently, the plaintiffs' basis for the seeking special costs in this case is effectively two-fold. Specifically, the plaintiffs seek special costs on the basis that:

- a) the failure to comply with the terms of the Settlement Agreement is high-handed conduct deserving of rebuke and censure: see *Shewchuk v. IBM Canada Limited*, 2017 BCSC 2211 at paras. 66 and 67; and

- b) special costs in property disputes do not require findings of reprehensible conduct to avoid incentivizing the type of *fait accompli* conduct such as is present here and to not disincentive innocent parties from protecting their rights due to the cost of litigation.

[116] The latter submission is grounded primarily, it appears, upon the decision in *Langley*, as no other authority was specifically cited in support of this proposition. As I noted above, the award of special costs in *Langley* was made without any express discussion of the applicable law regarding special costs. Accordingly, while it is generally persuasive authority, I chose not to rely upon that aspect of the decision.

[117] With respect to the former submission, I expressly recognize that the plaintiffs have been the driving force in bringing this litigation before the courts even though it is not their conduct which has ever been legally offside. Indeed, despite my granting the defendants two opportunities to amend their counterclaim to plead relief pursuant to *Property Law Act*, it was not until the plaintiffs' Application was filed that the defendants' Application was eventually filed. This is important because the plaintiffs as the "dominant tenement" have no ability to seek relief under s. 35 of the *Property Law Act*: see *Banville v. White*, 2002 BCCA 239 at paras. 21-25 and *McLean v 1057149 Alberta Ltd.*, 2019 BCSC 801 at para. 55.

[118] That said, the defendants' conduct in constructing the Retaining Wall contrary to the Settlement Agreement and the Modified Easement was specifically factored into my quantification of the appropriate compensation payable to the plaintiffs. To rely on that same conduct as conduct worth of rebuke such as to warrant an award of special costs in favour of the plaintiffs would, I conclude, be in error.

[119] On this basis, the plaintiffs' claim for special costs is dismissed.

Party and Party Costs

[120] The above finding does not preclude an order for ordinary party and party costs under the SCCR tariff at Appendix B.

[121] The general principle is that costs are awarded to the successful party, but those costs are at the discretion of the presiding justice: see R. 14-1(9). This is the same at summary trial as it is at trial.

[122] In *Tisalona v. Easton*, 2017 BCCA 272, the Court of Appeal stated the law regarding costs as follows:

[71] Rule 14-1(9) ... grants unqualified discretion to depart from the *prima facie* rule that the successful litigant should be awarded its costs.

[72] This discretion must of course be exercised judicially, not arbitrarily or capriciously. An error in principle in an order departing from the usual rule will justify intervention by this court: *Brito (Guardian ad litem of) v. Woolley*, 2007 BCCA 1. Subject to such an error, the discretion is very broad.

[123] The plaintiffs have been substantially successful even though the amount of the compensation ordered was less than that sought. But for the late filing of the defendants' Application, there was a very strong claim for the injunctive relief sought. The plaintiffs are thus entitled to their costs of the Action.

[124] I further conclude that the plaintiffs are entitled to have those costs assessed, except where it might be contrary to a previous court order made in this proceeding at Scale C on the basis that the matter is of more than ordinary difficulty.

[125] In reaching this conclusion, I refer, in part, to my above comments regarding the plaintiffs' basis for seeking special costs regarding the plaintiffs being forced into the uncomfortable position of advancing this litigation even though ultimately it is the defendants who require relief under s. 35 of the *Property Law Act*. Further, I find that the defendants' *de minimis* argument to avoid paying compensation in the face of the express terms of the Settlement Agreement and the Modified Easement, and the defendants' attempt to avoid liability for the tort of trespass for the actions of its contractor on the eve of the Injunction Application, elongated the hearing of the cross-applications. It is appropriate in all the circumstances to make a cost order that appropriately reflects this. Costs at Scale C accomplish that objective.

[126] Given my conclusion that the plaintiffs are entitled to their costs and that those costs shall be assessed at Scale C, it is unnecessary to address in detail the

issue that was raised at the outset of submissions involving written argument prepared on behalf of the defendant including two “phantom cases”. According to the defendants’ counsel, he prepared the argument himself and did so using legal research through the “Quicklaw” legal database. Once he became aware of the “phantom cases”, he inquired of Quicklaw as to how this occurred but did not receive a substantive reply. Ultimately, I accept the defendants’ counsel’s submission that he did not inappropriately rely on artificial intelligence to prepare his submissions. Rather, I simply remind officers of this Court of the obligation to inform opposing counsel forthwith should the issue arise again. The defendants’ counsel did not do so here; instead waiting until shortly prior to the hearing and after having made inquiries of Quicklaw to advise plaintiffs’ counsel of the “phantom cases”.

“Hardwick J.”