

CANADA / JUDGMENT

Abel v. Harlton

2024 BCSC 1072

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Supreme Court of British Columbia

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2024 BCSC 1072 Abel v. Harlton

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Abel v. Harlton,

2024 BCSC 1072

Date: 20240620

Docket: S222488

Registry: Victoria

Between:

Laurie Lynn Abel

Plaintiff

And

Lenore Brooke Harlton

Defendant

And

Laurie Lynn Abel

Defendant by Counterclaim

Before: The Honourable Justice MacDonald

Reasons for Judgment

Counsel for the Plaintiff and Defendant by Counterclaim:

K.J. Hauer

Counsel for the Defendant:

L.J. Alexander

Place and Dates of Trial/Hearing:

Victoria, B.C.

January 8-11 & 18-19, 2024

Place and Date of Judgment:

Victoria, B.C.

June 20, 2024

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Overview

- [1] This is an unfortunate dispute over the correct boundary between the properties of two next-door neighbours. It relates to adjoining lots in a residential neighbourhood in Victoria, BC. The plaintiff, Laurie Abel, owns one lot and the defendant, Lenore Harlton, owns the other lot. Ms. Abel has built a fence that Ms. Harlton says encroaches on her land. The encroachment is said to be in the range of four to five inches.
- [2] The dispute emanates from a mistake in the original description of Lot 1952, which has now been divided between the parties. In simple terms, from Lot 1952, which was originally described as having a 60-foot frontage, Ms. Abel is said to have a 20-foot frontage and Ms. Harlton is said to have a 40-foot frontage. The problem is that Lot 1959 was not actually 60 feet wide; it was several inches shorter than that. The ultimate question before me concerns who should bear that shortfall.
- [3] The dispute is not one that can be resolved with reference to an original survey as none is extant; rather, two conflicting surveys have been tendered. Ms. Abel seeks declaratory relief as to which survey is correct and where the boundary between the two parcels should be located. Ms. Harlton has a counterclaim seeking a declaration in her favour, an injunction to force Ms. Abel to remove the fence at her own cost, and damages for trespass. Ms. Harlton says the trespass was intentional, high-handed, and that it was done at Ms. Abel's peril.

- [4] For the reasons that follow, I find that it is Ms. Harlton who must bear the shortfall. The question, as I see it, is ultimately one of priority, and whether I rely on the first registration of a partial lot in absolute fee or registration of indefeasible title, I find the outcome is the same. Ms. Abel is granted an easement to the limited extent that her fence protrudes onto Ms. Harlton's lot, with compensation to Ms. Harlton. A discussion of certain evidentiary issues precedes my ultimate analysis.

Preliminary Issue regarding Expert Evidence

- [5] Mr. Glen Quarmby, a surveyor, prepared an expert report for Ms. Abel for the purposes of this litigation. During the trial, there was a voir dire regarding the admissibility of the expert report of Mr. Quarmby dated August 21, 2023 (the "Quarmby Report"). The defendant argued that the plaintiff had not complied with the Supreme Civil Court Rules, B.C. Reg. 168/2009 [Rules] in terms of timeliness. The defendant also raised concerns about deficiencies in the Quarmby Report itself.
- [6] This trial was originally set to take place on November 14, 2023, but, due to institutional delays, it commenced instead on January 8, 2024. The Quarmby Report was served on August 21, 2023 with a view to the original trial date of November 14, 2023, and counsel for the defendant acknowledged that it was properly served in accordance with R. 11-6(3) of the Rules.
- [7] On September 27, 2023, however, the plaintiff served a Corrigendum, on the defendant. The Corrigendum served only to correct a mathematical error in the Quarmby Report. Further, a schedule of documents dated November 3, 2023 (the "Schedule") was served on the defendant on November 7, 2023.
- [8] The defendant objected to the admission of the Corrigendum and the Schedule, and raised concerns with the Quarmby Report itself. The basis of the defendant's objections, in brief, were: timeliness, missing signatures and certificates, the annotation of an original document, lack of an indication of which documents were relied upon by Mr. Quarmby when forming his opinions, unsupported measurements, missing documents, and certain other more minor deficiencies.
- [9] The plaintiff acknowledged that there were some deficiencies in the disputed evidence, but argued that any such deficiencies were merely technical and should not defeat her opportunity to tender that evidence. I note that the defendant did not argue that the admission of the Corrigendum and the Schedule would engender any prejudice. Further, any concerns with timeliness would have been offset by the delay in the commencement of the trial.
- [10] The day following the voir dire, I dismissed the objections raised by the defendant for the reasons set out below.

Legal Principles

- [11] The Rules serve as a complete code for the admissibility of expert evidence at trial: *Redmond v. Krider*, 2014 BCSC 2585 at paras. 23-25 and 31. Expert evidence is presumptively inadmissible and may only be admitted when its admissibility is established: *Ganges Kangro Properties Ltd. v. Shepard*, 2015 BCCA 522 at para. 42. In *Ford v. Lin*, 2022 BCCA 179, the Court of Appeal set out the primary purposes of the Rules, with respect to expert evidence, as follows:
- [75] Like its predecessors, the present rules with respect to expert evidence have two primary purposes. First, they are intended to ensure each party has full disclosure of the expert evidence the opposing party intends to tender, thereby avoiding trial by ambush or surprise. Second, they enable expert evidence to be tendered in writing, thereby reducing the length of a trial and the cost to the parties. In addition, they obviate or reduce the need for experts to spend time in courthouses either waiting to give or giving evidence

[Citations omitted.]

- [12] Rule 11-7(6) provides that, at trial, the court may allow an expert to provide evidence, on terms and conditions, if any, even though one or more requirements of the applicable Part of the Rules has not been complied with. Such evidence may be admitted if new facts are uncovered, if the non-compliance is unlikely to cause prejudice to the objecting party, or if it is in the interests of justice to allow the evidence despite the non-compliance. The test in R. 11-7(6) is disjunctive.
- [13] Referring to R. 11-7(6), Justice Griffin (as she then was) noted in *Paur v. Providence Health Care*, 2015 BCSC 1008, that these "correcting provisions illustrate the goals of the formalities of the Rules" but "also make it clear that technicalities should not defeat the interests of justice": at para. 78.
- [14] The Rules provide that, in order to raise an objection to the admission of expert evidence, a party must, "on the earlier of the date of the trial management conference and the date that is 21 days before the scheduled trial date, serve on every party of record a notice of any objection to the admissibility of the expert's evidence that the party receiving the report or supplementary report intends to raise at trial": R. 11-6(10).

Analysis

Timeliness

- [15] In respect of the Quarmby Report, the defendant did not raise an objection until October 17, 2023, which was after the Trial Management Conference held on September 19, 2023. Pursuant to the Rules, such an objection must not be permitted at trial to the extent that notice was not given: R. 11-6(11). I have not been made aware of any reason that reasonable notice of such an objection could not have been made within the statutory timeframe.

- [16] With respect to the Corrigendum and the Schedule, the concerns with the timing and deficiencies in these documents were not brought to the plaintiff's attention until the hearing of the voir dire, which was mid-trial. There was no pre-emptive notice to the plaintiff.
- [17] I am of the view that any non-compliance with statutory timelines--to the extent any such non-compliance existed--was unlikely to cause prejudice to the defendant: R. 11-7(6)(b). In practice, any timeliness issues were addressed by the fact that the trial did not commence until January 8, 2024. In the intervening time between the original trial date and the actual start of trial, the defendant, in my view, had sufficient time to tender evidence in response to the Corrigendum and the Schedule, and to prepare for cross-examination. This is not a circumstance in which it could be said that the plaintiff was ambushed or surprised.

Deficiencies in Mr. Quarmby's Evidence

- [18] The most troubling deficiency in the Quarmby Report, as the plaintiff acknowledged, was the fact that Mr. Quarmby did not include a description of the documents and research upon which he relied in forming his conclusions. This is the deficiency that the plaintiff's introduction of the Schedule sought to redress. In my view, the timing of the introduction of the Schedule in relation to the start of the trial made prejudice to the defendant unlikely. In any event, the foundation for the expert's opinion could be covered in cross-examination.
- [19] The Quarmby Report also included a mathematical error, which the plaintiff sought to redress by introduction of the Corrigendum. The defendant argues that, in substance, the Corrigendum is a supplementary report, in respect of which the process for admission set out in RR. 11-6(7) and 11-2(2) must have been abided. The plaintiff has not taken the position that the conjunctive requirements for a supplementary report set out in R. 11-6(7) have been satisfied.
- [20] The Corrigendum was narrow in scope and did not include a material change in the expert's opinion; it merely served to correct a mathematical error. Despite non-compliance with the Rules in respect of supplementary reports, in my view, admittance of the Corrigendum is preferable to allowing the court to rely on incorrect information. Moreover, waiting for Mr. Quarmby to testify in order to address the error would, in reality, provide the defendant with less rather than more notice. In any event, I find it unlikely that any non-compliance in respect of the Corrigendum prejudiced the defendant.
- [21] Other deficiencies in Mr. Quarmby's evidence were minor and, again, unlikely to invite any prejudice on the defendants. An annotation on an original document, for example--one of the alleged deficiencies--could be explored in cross-examination. More generally, I found I could benefit from expert evidence from the plaintiff because there is a great deal of conflict in the evidence before me with respect to the surveys.

Conclusion

- [22] Ultimately, I did not accede to the defendant's evidentiary objections to the extent that it was open to them to make those objections. Relying on R. 11-7(6)(b), I find that none of the aforementioned deficiencies were likely to invite prejudice on the defendants, whether due to the timeline or otherwise. Neither ambush nor surprise are instant concerns, cross-examination remained available to the defendants, and, to the extent deficiencies exist, they go to the weight.
- [23] All of the Quarmby Report, the Corrigendum, and the Schedule were admitted in accordance with my discretion under R. 11-7(6).

Additional Objection to the Expert Evidence

- [24] Following my aforementioned ruling on admissibility and cross-examination on his qualifications, the defendant raised an additional objection to the admission of Mr. Quarmby's evidence, this time relating to his qualifications. The defendant alleged that Mr. Quarmby had not provided his Curriculum Vitae and that, in result, he was not a properly qualified expert. The issue of the admissibility of Mr. Quarmby's evidence was again put before me, despite my previous ruling that it be admitted.
- [25] I was troubled by the objection, which came absent notice to the defendants and after time had already been expended on resolution of the issue of Mr. Quarmby's evidence. The plaintiff suggested that the absence of a Curriculum Vitae in the Quarmby Report only became apparent through the course of Mr. Quarmby's cross-examination. I am unable to accept this assertion in respect of a report that had been served on the plaintiff--which the plaintiff elsewhere acknowledged--several months prior. In my view, this is the end of the inquiry, as "reasonable notice of an objection could have been given under subrule (10)," but was not: RR. 11-6(10)-(11). Beyond the issue of notice, however, it demonstrates a poor appreciation of the court's time to re-raise a matter that, in general terms, had already been considered in a previous ruling.
- [26] With all of this said, it is true that no Curriculum Vitae was provided by Mr. Quarmby. He did, however, include the following in his Report:

I am a licensed British Columbia land surveyor with 32 years of experience in land surveying.

I was commissioned as a British Columbia land surveyor in 1991 and have been practicing ever since. My expertise, and preferred area of practice, is in Land Title Act and Strata Property Act.

- [27] In the threshold stage of the test from R. v. Mohan, [1994] 2 S.C.R. 9, 1994 CanLII 80 (SCC), it is required that the party seeking the introduction of expert evidence demonstrate--inter alia--that the proposed expert is properly qualified. To be properly qualified, and expert must be willing and able to fulfil the expert's duty to the court to provide opinion evidence: R. v. Abbey, 2017 ONCA 640 at para. 48. The expert must understand that it is their duty to the court to give impartial, independent and unbiased opinion evidence. Moreover, the

Rules provide that "[t]he assertion of qualifications of an expert is evidence of them": R. 11-6(2).

- [28] While he did so with some brevity, Mr. Quarmby expressly acknowledged the duties of an expert as set out in RR. 11-2(1)-(2) and made assertions as to his qualifications, which I have set out above. It is on these bases that I found Mr. Quarmby to meet the applicable requirements related to qualification.
- [29] The plaintiff's qualification objection was raised late and without notice, and, in accordance with the Rules, is not an allowable objection. Even if it were allowable, despite not being in the proper form I find Mr. Quarmby satisfied the applicable qualification requirements.
- [30] Ultimately, the parties agreed that the evidence of Mr. Quarmby would be admitted and submissions on its weight were relegated to closing submissions.

Background

Historical Interests and Conveyances

- [31] The root of the dispute can be traced to the mid-19th century when the Hudson's Bay Company (the "HBC") leased Vancouver Island. When Vancouver Island reverted to the British Crown in 1859 the lots created by the HBC became Crown land. In 1889, the City of Victoria received a Crown grant for the land in question. On October 10, 1910, the City conveyed Lot 1959 to two men, Mr. Watson and Mr. McGregor (together, "WM").
- [32] Lot 1959 is a residential lot in the James Bay area of Victoria, BC, which consists primarily of single-family dwellings. When Lot 1959 was conveyed to WM in 1910, it was described as 60 feet wide and 120 feet deep. No survey was conducted at the time. As this dispute has put into focus, due to a shortfall, Lot 1959 is less than that width by several inches.
- [33] On December 16, 1910, WM registered the land and successfully applied for two Certificates of Title, one for the westerly 40 feet (the "W40") and another for the easterly 20 feet (the "E20") of Lot 1959. What is described as "20 feet" of frontage, the E20, is owned by Ms. Abel and what is described as "40 feet" of frontage, the W40, is owned by Ms. Harlton. I note that my using the E20 and W40 descriptors should not itself be taken as my endorsement the width of either or both of those proposed frontages.
- [34] On March 24, 1911, WM signed a private conditional sales agreement for sale of the W40 with a person named Agnes Loretta Spring. The agreement for sale was registered on October 20, 1911 in the Register of Charges, and was subject to a mortgage constituted as a vendor take-back mortgage (the "VTB Mortgage"). The private conditional sales agreement for sale provided that there would be no conveyance of the applicable deed in fee simple until all principal and interest payments had been made by Ms. Spring.

- [35] On April 29, 1911, WM assigned the VTB Mortgage on the W40, an equitable charge against the land, to Louise Nelson. A certificate of charge was registered on November 20, 1911. According to Ms. Harlton this transfer entirely dispossessed WM of the W40, but this is contested by Ms. Abel.
- [36] On December 15, 1911, WM conveyed the E20 to Rosalie Pallanatier. The conveyance of the E20 was registered on January 4, 1912 and it was recorded in the Absolute Fee Book.
- [37] On October 29, 1913, Ms. Spring had paid off the vendor financing and title was registered in her name for the W40 and recorded in the Absolute Fee Book.

The Circumstances of Ms. Abel and Ms. Harlton

- [38] Although there have been other owners since 1911, the applicable portions of Lot 1959 are currently owned by the plaintiff and the defendant. Ms. Harlton's owns the W40 at 215 Superior Street. She previously owned the property jointly with her husband, now deceased. She now lives in the lower part of the home; her daughter and family live in the upper part of the home.
- [39] Ms. Abel owns the E20 at 219 Superior Street. She also owns an adjoining 20-foot lot, Lot 1958, so in total she owns a 40-foot lot. Ms. Abel purchased this property in 2019 to be a home for herself and her elderly mother.
- [40] Insofar as Lot 1959 is less than 60 feet wide, one or both of the parties' portions of Lot 1959 are less than their allotted feet. This shortfall was not apparent until Ms. Abel decided to undertake improvements to her land in order to make the home more accommodating for her elderly mother.
- [41] At first, Ms. Abel planned a major renovation for which variances were needed from the City of Victoria. Ms. Abel advised her neighbours of the variances being sought and attempted to obtain their approval. Ms. Abel later decided it would be better to build a new home. Ms. Abel was advised that in order to carry out any major works, such as a demolition, it would be necessary for her to consolidate her two 20-foot parcels. This consolidation required a survey.
- [42] Up to this point, Ms. Abel had been speaking and negotiating with her neighbours in respect of her proposed improvements. Unfortunately, cordial relations broke down and future correspondence seems to have largely or entirely occurred via email.
- [43] Ms. Abel hired Sam Arsenault of McElhanney Associates Land Surveying Ltd. to complete the required survey (the "Arsenault Survey") so that she could consolidate her two parcels into one lot and apply to demolish the original home. Ms. Abel testified that she also wanted a survey to ensure compliance with all municipal codes and setbacks before she began construction of her new home. Moreover, Ms. Abel testified that a survey would enable her to get ahead of and hopefully resolve any possible boundary disputes with Ms. Harlton.

- [44] Ms. Abel obtained the Arsenault Survey in December 2019, and it was filed with the Land Title Office ("LTO") on December 10, 2019 under Plan EPP96737. With that survey in hand, Ms. Abel obtained a new lot description and a new certificate of title.
- [45] Ms. Abel testified that she provided a copy of the Arsenault Survey to Ms. Harlton by email in December of 2020, approximately one year after the survey was completed. In that email, Ms. Abel did not attach the Arsenault Survey and instead attached a topographical plan. At trial, Ms. Abel testified that this was an innocent mistake and that the Arsenault Survey was registered and easily available from the LTO. Ms. Harlton argues she was unaware of the Arsenault Survey boundaries until August 2021, when concrete between the two properties was initially cut.
- [46] I am unable to fault Ms. Abel for this mix-up for several reasons. First, on December 16, 2020, Ms. Abel provided Ms. Harlton with a link to the LTO Registry. Moreover, as Ms. Abel pointed out, Ms. Harlton is a former lawyer who practised in the area of estates and real estate, and I infer from that that she would have had at least some knowledge of land title matters. Ms. Harlton admitted in cross-examination that she could find land title documents through an internet search. As counsel for Ms. Harlton acknowledged in a letter dated November 9, 2021, as a retired lawyer Ms. Harlton is "somewhat familiar with the basic aspects of our land title system and surveys."
- [47] Second, on December 18, 2020, Ms. Abel sent an email to Ms. Harlton and the neighbour adjacent to the other side of her property stating:
- The surveyors came today to do an accuracy check on my southern pegs. To assist us all in understanding where our property line is they have marked the boundary line with some spray paint on the hardscaping and put in some wood pegs on the softscaping. They were very attentive to put the pegs in where [there would] be no damage to Aura's plants.
- [48] Ms. Harlton admitted in cross-examination that she did not take time to look at the pegs or spray paint referred to in this email. Around this time, Ms. Harlton was spending much of her time on Pender Island. She testified to having visited Victoria for a medical appointment, but, on that occasion, did not visit 215 Superior Street or observe the property line. When Ms. Harlton returned home on December 20, 2020, she arrived and departed in the dark. Ms. Harlton never indicated that she might have asked her daughter, who lived full-time in the home at 215 Superior Street, to look at the painted line and pegs on her behalf.
- [49] Third, in a subsequent email on December 24, 2020, Ms. Abel provided Ms. Harlton with the number and legal description of her new plan--based on the Arsenault Survey--filed in the LTO.
- [50] I find that by late December 2020, Ms. Harlton was aware or should have been aware of the proposed boundary due to the emails and, more importantly, the paint and pegs noted in Ms. Abel's email of December 18, 2020.

- [51] Communications seemed to breakdown in January 2021. Ms. Harlton asked questions of Ms. Abel, but Ms. Abel seems to have been of the view that she had already provided all of the information she had any duty--formal or otherwise--to provide. On July 14, 2021, Ms. Harlton retained Brent Taylor, her surveyor, following discussions they had had in June of that year. Mr. Taylor ultimately produced a survey, which I refer to as the "Taylor Survey".
- [52] Ms. Abel became aware that Ms. Harlton intended to dispute the boundary between E20 and W40 on August 13, 2021. On this date, construction workers retained by Ms. Abel arrived at her property to begin certain work. At the time, Ms. Harlton was at her second home on Pender Island, however, her daughter was home at 215 Superior Street. On seeing the arrival of the construction workers, Ms. Harlton's daughter called Ms. Harlton to ask what to do. Ms. Harlton advised her daughter to block access to the property by parking on a concrete portion between the houses that spanned the disputed boundary. Ms. Harlton's daughter did so.
- [53] In the meantime, Ms. Harlton called Ms. Abel's general contractor who explained that the construction workers needed to cut into the walkway between the houses. Ultimately, Ms. Harlton agreed that they could do so as long as Ms. Abel would not place any fence on or near the disputed property line until November 2021. This delay was intended to provide Ms. Harlton with adequate time to obtain survey evidence of her own in support of her view of the boundary between the two properties.
- [54] Jeremy Hiebert of Flintstone Construction, the organization involved in building the fence, testified at trial and recounted the events of August 13, 2021. He testified that the construction workers had painted an orange line on the concrete between the relevant properties based on the Arsenault Survey. The plan being followed by Mr. Hiebert in August 2021 was to cut a clean line along the painted line. Care was to be undertaken not to fracture other parts of the walkway. The workers would then erect a temporary fence for security.
- [55] Mr. Hiebert's testimony aligned with that of Ms. Harlton in respect of their call on August 13, 2021. Speaking by phone, Mr. Hiebert advised Ms. Harlton of the plan of the construction workers, and advised that if they cut the line in an incorrect location, they would correct this error. Ms. Harlton agreed to the cut but did not want a fence erected. Mr. Hiebert, presumably on the instruction of Ms. Abel, agreed.
- [56] On this same day, Ms. Harlton wrote to Ms. Abel including the following text: "Please accept this as formal notice that there is a dispute as to the boundary line between the properties at 215 and 219 Superior Street."
- [57] Following the events of August 13, 2021, Ms. Abel testified to having taken steps to communicate and mark the boundary between her property and Ms. Harlton's in a visually identifiable manner. Ms. Abel also testified that she sought conflicting survey evidence from Ms. Harlton before initiating the construction of a fence.

- [58] Ms. Abel testified that in late October 2021 she wrote to Ms. Harlton and advised of her plan to place a fence on her own property, based on the survey by Mr. Arsenault, in mid-November of that year. This timing aligns with the testimony relating to the August 13, 2021 events. Ms. Abel noted that her planned timing and the plan itself was subject to hearing about a genuine issue of concern about the Arsenault Survey from another qualified surveyor.
- [59] In mid-November of 2021, after being advised that Ms. Harlton had retained her own surveyor, Mr. Taylor, Ms. Abel agreed to wait another month before erecting her fence. She anticipated she would hear from Ms. Harlton's surveyor about what was potentially wrong with the Arsenault Survey within the specified timeline.
- [60] Just before Christmas 2021, having not received conflicting survey results from Ms. Harlton or her surveyor, Ms. Abel proceeded to have a fence constructed between the two properties in abidance with the Arsenault Survey. I note that a communication from Ms. Harlton's counsel on December 14, 2021 suggested that the survey work was ongoing, but not complete, and that further work on the fence should be delayed. Nonetheless, the fence was placed on the boundary identified by Mr. Arsenault, as well as being erected close--but more slightly towards Ms. Harlton's property--to marks in the pavement showing where a previous fence had been erected.
- [61] With the erection of the fence, the shortfall of several inches in the width of Lot 1959 became apparent and the nature of this dispute crystallized.
- [62] The evidence shows that the fence erected by Ms. Abel is close to Ms. Harlton's house. Photos in evidence demonstrate the way in which the four or five-inch shortfall, depending on whose measurements you use, has impacted Ms. Harlton who enters her home from the side on which the fence was erected. Because the fence has been placed between the two houses, Ms. Harlton has lost width from the walkway she uses to enter and leave her house. The width is now only about 27 inches wide. Ms. Harlton contends that she cannot properly carry her groceries on a path of this width and she instead has to hold them in front of her. She adds that it is difficult to get anything large into or out of her entrance way and she struggles to move her garbage bins.
- [63] Ms. Abel disputes the extent of Ms. Harlton's difficulties with the narrowed walkway. As one example, Ms. Abel testified that she observed Ms. Harlton move a large dingy through this pathway without it being damaged. Moreover, Ms. Abel contests, Ms. Harlton has room on the other side of her house that could be utilised.
- [64] At trial, Ms. Harlton responded to Ms. Abel. She testified that the 'dingy' referred to by Ms. Abel was, in fact, a narrow wooden row boat. Ms. Harlton acknowledged that she was able to move the boat down the walkway. Ms. Harlton testified that she has a retaining wall on the other side of her property, as well as a tree, and that they would both need to be removed to put a walkway on that side of the house.

Orders Requested by the Plaintiff

- 1) Declaratory relief regarding the correct boundary as set out in paragraphs 1-4 of the Notice of Civil Claim:
 - a. A declaration that in the event Lot 1959 is less than sixty feet wide, title of the owner of the easterly 20 feet of Lot 1959 is superior to and prevails over the title to the westerly forty feet of Lot 1959;
 - b. A declaration that the boundaries of 215 Superior and 219 Superior are as shown in the [Arsenault Survey];
 - c. A declaration that the [Taylor Survey] is in error; and
 - d. A declaration that the boundaries of 215 Superior is more correctly described as "THAT PART OF LOT 1959 EXCEPT THE EASTERLY 20 FEET".
- 2) Leave to address costs if the parties cannot agree.

Orders Requested by the Defendant

- 1) A declaration that the land contained within the title to 215 Superior Street is as shown on the [plan associated with the Taylor Survey, registered as] EPP 1119676.
- 2) A declaration that the title to 219 Superior only contains so much of the original Lot 1959 that was not conveyed to Spring and Nelson in March and April 1911.
- 3) A mandatory injunction requiring the plaintiff to remove the new fence.
- 4) A declaration that the defendant is to re-establish the sidewalk on 215 Superior to its previous width at the cost of the defendant, recoverable as special damages.
- 5) General damages for trespass, and special punitive and exemplary damages in that respect.
- 6) Special damages primarily to include Ms. Harlton's survey costs to obtain a correct reference plan.
- 7) Costs, including leave to apply in respect of the scale of costs, once the court has pronounced judgment.

Issues

[65] The issues before me are:

1. Who is entitled to their stated frontage and who bears the shortfall?
2. Given the two conflicting surveys, how does the court determine which boundary is correct?
3. If the defendant is successful, should I issue an injunction that the plaintiff must remove her fence at her own cost?

4. If the defendant is successful, should I award damages to her for trespass and, if so, what types?

[66] The essence of this dispute, as I see it, concerns who must bear the shortfall. All other orders flow naturally from that decision.

Parties' Positions

Plaintiff

- [67] Ms. Abel seeks declaratory relief determining the boundary between the two properties. She seeks this declaration in relation to the Taylor Survey, which she describes as a "frankly gargantuan survey and accompanying survey letter (a one in 5,000 occurrence)" that was prepared and registered by Ms. Harlton for the dominant purpose of this litigation.
- [68] Ms. Abel testified that in April or May of 2022 she learned that Ms. Harlton had registered a plan based on the Taylor Survey at the LTO, establishing a new legal description and title in respect of Lot 1959. Alongside the new plan there was an accompanying 14-page survey letter critiquing the Arsenault Survey (the "Taylor Letter"). The Taylor Letter contained a detailed legal chain of title analysis to show why Ms. Harlton should get her stated frontage rather than Ms. Abel. In consequence, Ms. Abel understood that her fence might be taken down.
- [69] According to Ms. Abel, based on the Arsenault Survey, the shortfall is about three and a half to four inches wide. Ms. Abel contends the shortfall is on Ms. Harlton's side of the property line.
- [70] Ms. Abel argues that priority to the shortfall is governed by the order of registration at the LTO, not the sequence in which deeds were signed or executed. Ms. Abel emphasizes that her predecessor was the first registered owner in absolute fee for the E20. Although the W40 had earlier been subject to a contractual arrangement between WM and Ms. Spring, this created an equitable charge against the title enforceable in personam against the party to the instrument. The charge, it would follow, did not establish ownership in rem. At that time, WM continued to legally own all of Lot 1959. When Ms. Spring registered title in absolute fee, title was transferred to her from WM, not Nelson, who held the equitable rights under the agreement with WM, registered as a charge. Subsequently, Ms. Harlton's predecessor registered as the absolute fee owner of the W40 after Ms. Abel's predecessor registered her title in absolute fee.
- [71] In any event, according to Ms. Abel, rather than look at the absolute fees that were registered by the purchasers from WM, one should look at which title first became indefeasible because it is more than prima facie evidence of ownership. Indefeasible title was first granted in respect of the E20.
- [72] Ms. Abel relies on s. 74 of Land Registry Act, S.B.C. 1906, c. 23, s. 50 [1906 LRA], which states:

No instrument purporting to transfer charge, deal with or affect land shall pass any estate or interest, either at law or in equity, in such land until the same shall be registered in compliance with the provisions of this Act, but such instrument shall confer on the person benefited thereby, and on those claiming through or under him, whether by descent, purchase, or otherwise, the right to apply to have the same registered

- [73] Based on her property being the first of Lot 1959 registered in indefeasible title, Ms. Abel seeks a declaration that she is entitled to the full foot frontage notwithstanding the shortfall. Even though the plaintiff submits that the Arsenault Survey is fundamentally correct, to the extent that the court may find that the fence encroaches on Ms. Harlton's land by a matter of centimeters or millimeters, Ms. Abel requests this Court to grant an easement with compensation, rather than force her to move a fence by a very small margin.
- [74] If this Court finds that the issue is not based on the priority of registered title, that the Arsenault Survey is not correct and Ms. Harlton is entitled to her full stated frontage, Ms. Abel acknowledges that the fence will have to be removed.

Defendant

- [75] Ms. Harlton argues that Lot 1959 is slightly more than five inches short of 60 feet in width. Based on the Taylor Survey, Ms. Harlton argues that the new fence encroaches on her pathway from the municipal sidewalk through her backyard. The missing inches alleged by Ms. Harlton are important to her as a matter of access to her abode. The fence, she suggests, severely limits access on that side of the property and on the other side of the property a tree and a retaining wall would need to be removed in order to facilitate access.
- [76] According to Ms. Harlton, even assuming the Arsenault Survey is correct, some of the fence posts that Ms. Abel has constructed encroach between .2 centimetres and 1.5 centimetres onto Ms. Harlton's property.
- [77] Ms. Harlton contends that WM entered into an agreement of sale with Ms. Spring on March 24, 1911. On April 29, 1911, she argues, WM divested themselves of their interest in the W40 by selling that interest to Nelson. The agreement with Nelson was registered, Ms. Harlton contends, on November 20, 1911 in the Absolute Fee Book Registry as well as in the "charge" book. Ms. Harlton argues that the LTO did not separate the properties between east and west until November 20, 1911.
- [78] Ms. Harlton relies on the legal principle, *nemo dat quod non habet*, meaning a person cannot validly give to another that which they do not own. Ms. Harlton argues that in November 1911, her predecessor received the first title in absolute fee because the Spring/Nelson agreement with WM predated the conveyance to Ms. Pallanatie on December 15, 1911, which was not registered until January 4, 1912.

- [79] Ms. Harlton suggests that by this point, WM no longer had 20 feet to give in the E20 because they had previously sold the W40 at the full width of 40 feet. As a result, Ms. Harlton argues, the nemo dat rule would apply to the E20, making it 20 feet minus a number of inches.
- [80] To this extent, Ms. Abel's predecessors were mistaken in their description of the E20. They should instead have only conveyed the remaining part of Lot 1959, i.e., "all land except for the westerly 40 feet which had already been conveyed."
- [81] Ms. Harlton also seeks a declaration that the Taylor Survey is correct. She previously had a claim in adverse possession for the shortfall, but she announced at trial that she is not pursuing this claim.
- [82] Lastly, Ms. Harlton seeks an injunction to have the fence moved and damages for trespass by the fence, including punitive damages. To this end, Ms. Harlton argued that the trespass was intentional. Ms. Abel went ahead and built the fence when she knew Ms. Harlton was waiting for her own survey results.

Comments on Evidence

- [83] This dispute raises issues touching on the common law, applicable land and title legislation, and matters related to land surveying. In terms of which party is entitled to their stated frontage--and who must bear the shortfall--portions of the evidence of the parties are ultimately secondary to the legal issues. In respect of the legal issues, the key differences between the parties is their analysis of the sequence of events as to when and how the properties were transferred, and when they were registered at the LTO.
- [84] The parties have a very different view of the effect of the sequence of registration and the effect of the legislation in dispute. A review of historical land title records is thus required. These documents must be read in light of the relevant legislation, as it existed at the time of each transfer, and the applicable authorities.
- [85] The evidence of the communications between the parties was largely focused on Ms. Harlton's counterclaim for damages in trespass. Ms. Harlton is of the view that Ms. Abel was not forthcoming and acted in a highhanded way by not waiting for her survey before erecting the fence. Ms. Harlton also led evidence regarding the hardship she says she has suffered.

Legal Principles

Types of Land Title

- [86] The Torrens system governs land title in British Columbia. It provides for the registration of reliable title for bona fide purchasers of value of interests in land. It achieves this goal by "presuming indefeasibility of title and assigning priority of interests in the land according to the dates of registration, subject to limited exceptions": *Chichak v. Chichak*, 2021 BCCA 286 at para. 13 [emphasis added].
- [87] Prior to the Torrens system, there were prima facie absolute certificates of title under which conclusive evidence of title was not conferred. Instead, an owner was one with an absolute fee with a rebuttable presumption of title. A purchaser of land was deemed to be the prima facie owner of the land for an estate in freehold, subject to registered charges appearing on the certificate or title, and to the rights of the Crown: 1906 LRA, s. 24. A charge is an estate or interest in land less than fee simple. Charges can give rise to equitable interests against title.
- [88] There is a longstanding rule that equity prefers to act in personam and not in rem. Consequently, any charge against title was enforceable against the party to the instrument rather than against the land: *Hanbury and Martin*, *Modern Equity*, 21st ed. (London: Sweet and Maxwell, 2018) at 28.
- [89] In 1905 the legislature moved toward the Torrens system of land registration: Land Registry (Amendment Act), S.B.C. 1905, c. 31. Moving forward, British Columbia had two types of registrable title. One could apply for a certificate of absolute fee title, i.e. if one registered a charge against the property interest the owner would obtain less than a fee simple title. Alternatively, one could apply for a certificate of indefeasible title: 1906 LRA, s. 15. Indefeasible title, as set out in the s. 3(d) of the 1906 LRA (which is the same as in the current Land Title Act, R.S.B.C. 1996, c. 250, s. 169(1)(b) [LTA]), was an estate in fee simple held under a good safe-holding and marketable title. It was superior to prima facie--absolute fee--title.
- [90] Section 23 of the current LTA explains indefeasible title is: "conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land " subject to certain exceptions.
- [91] Once title is registered as indefeasible, the state interposes to guarantee that the title is what is shown on the registration. A lack of protection of land subject to charges is contrary to the rule that applies to indefeasible title where a purchaser will, by virtue of registration of a transfer, hold title in fee simple. Under the Torrens system, any defects in a fee simple interest are cured on registration. Indefeasible title is conclusive evidence at law and in equity that the registered holder of the fee simple interest is the holder of the interest. Indefeasible title is "against all the world": *C.P.R. v. Turta*, [1954] S.C.R. 427 at 443, 1954 CanLII 58 (SCC).

Registration of Title

[92] Section 74 of the 1906 LRA clearly set out that no instrument would take effect or pass to any estate until it was registered:

No instrument executed after and taking effect after the thirtieth day of June, 1905, and no instrument executed before the first day of July, 1905, purporting to transfer, charge, deal with or affect land, or any estate or interest therein (except a leasehold interest in possession for a term not exceeding three years), shall pass any estate or interest, either at law or in equity, in such land until the same shall be registered in compliance with the provisions of this Act, but such instrument shall confer on the person benefited thereby, and on those claiming through or under him, whether by descent, purchase, or otherwise, the right to apply to have the same registered.

[Emphasis added.]

[93] This is very similar to the current LTA, which provides:

20. (1) Except as against the person making it, an instrument purporting to transfer, charge, deal with or affect land or an estate or interest in land does not operate to pass an estate or interest, either at law or in equity, in the land unless the instrument is registered in compliance with this Act.
- (2) An instrument referred to in subsection (1) confers on every person benefited by it and on every person claiming through or under the person benefited, whether by descent, purchase or otherwise, the right
 - (a) to apply to have the instrument registered, and
 - (b) in proceedings incidental or auxiliary to registration, to use the names of all parties to the instrument, whether or not a party has since died or become legally incapacitated.
- (3) Subsection (1) does not apply to a lease or agreement for lease for a term not exceeding 3 years if there is actual occupation under the lease or agreement.
21. Instruments executed before and taking effect before July 1, 1905, purporting to transfer, charge, deal with or affect land or an estate or interest in it, unless registered before that date, are not receivable by a court or the registrar as evidence or proof of the title of a person to the land, as against the title of another person to that land, registered on or after July 1, 1905, except in an action before the court questioning the registered title to the land on the ground of fraud in which the registered owner has participated or colluded.

[Emphasis added.]

[94] Section 21 does not apply to the instant circumstances, but it does demonstrate that title must be registered.

Misdescription of Boundaries

[95] Despite the strength of indefeasible title, it is subject to limited exceptions. One of those exceptions is the incorrect description of boundaries, which is set out in the LTA as follows:

Effect of indefeasible title

23 (1) In this section, "court" includes a person or statutory body having, by law or consent of parties, authority to hear, receive and examine evidence.

- (2) An indefeasible title, as long as it remains in force and uncanceled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following:
- (b) a federal or Provincial tax, rate or assessment at the date of the application for registration imposed or made a lien or that may after that date be imposed or made a lien on the land;
 - (h) the right of a person to show that all or a portion of the land is, by wrong description of boundaries or parcels, improperly included in the title .

[96] The general rule was set out by Justice Gomery in *Burko v. Martindale*, 2023 BCSC 2:

[19] In British Columbia, a certificate of title affords to the registered owner of a piece of land conclusive proof of ownership, subject to statutory exceptions; Land Title Act, R.S.B.C. 1996, c. 250 [LTA], s. 23(2); *Phillips v. Keefe*, 2012 BCCA 123 at para. 57 [Phillips CA], varying 2010 BCSC 2005 [Phillips SC]. The documents registered in the land title office describe the property in question, but are not conclusive as to its location on the ground; *Phillips CA* at paras. 58-63. Location on the ground must be determined by survey evidence and that is the issue in this case.

[97] If a boundary is wrongly described, the fee simple owner will not be entitled to the land as described in the title. As stated in *Phillips v. Keefe*, 2012 BCCA 123 [Phillips CA]:

[57] Relying on s. 23(2), the defendants assert that Plan 712 is conclusive evidence as to the location of the property lines. With respect, that is not what the section says. The provision is concerned with the legal effects of land title. It establishes that a registered owner of a piece of land has conclusive proof of ownership against all others, subject to the lettered exceptions. Section 23(2)(h) allows for the possibility of showing that lands have been improperly included in the title by misdescription of boundaries or parcels.

[Emphasis in original.]

Surveying

[98] The surveying profession relies on a hierarchy of evidence, established by the common law as follows:

- i) natural boundaries;
- ii) original monuments;
- iii) fences or indicia of possession that can reasonably be related back to the time of the original survey monuments; and
- iv) measurements (as shown on the plan or as stated in the metes and bounds description).

[99] In Phillips CA, the Court of Appeal affirmed that this hierarchy is to be relied on:

[66] The surveyors' hierarchy has been relied on by surveyors for years, and is accepted by this and other courts as a precedential ranking of the best evidence with which to locate physically a disputed boundary: see for example Hawkes v. Silver Campsites Ltd., [1994] B.C.J. No. 1094 (C.A.).

[67] There is no authority to suggest that the use of the evidential hierarchy conflicts in any way with the Land Title Act.

[100] The hierarchy of evidence is grounded in the best evidence rule and policy concerns regarding the risks of disturbing settled possession based on mathematical measurements: Phillips SC at para. 67.

[101] The third part of the test is conducted to determine "whether a reasonable factual nexus has been established between evidence of possession and the presence of original monuments": Phillips v. Keefe, 2010 BCSC 2005 at para. 72, rev'd in part 2012 BCCA 123 [Phillips SC].

[102] Surveyors interpret old evidence in locating the position of original boundaries: Burko at para. 23. They are "not the authority of final decision; that remains the function of the courts": David Lambden and Izaak de Rijcke, Survey Law in Canada: A Collection of Essays on the Laws Governing the Surveying of Land in Canada (Carswell, 1989) at 120. Ultimately, the conclusion as to whether a survey or plan correctly establishes a boundary is for the court.

Nemo Dat Quod Non Habet

[103] In Gill v. Bucholtz, 2009 BCCA 137, the Court of Appeal held that the LTA preserves the common law nemo dat rule with respect to charges even where the property holder has relied on a registration: at para. 26. The rule applies only to less than fee simple interests. In such cases, titleholders can only convey what they validly hold. As stated by the Court of Appeal in Chichak, "this court has held [in Gill] that the principle of nemo dat quod non habet, which is codified in s. 86(3) for registered judgments, continues to operate for interests in land less than an estate in fee simple": at para. 19

Analysis

Registration and Nemo Dat

- [104] Ms. Harlton asserts that the description of Ms. Abel's lot is mistaken as a matter, in essence, of the operation of the nemo dat rule. To address this contention, I must examine the absolute fees that were registered by the purchasers from WM in 1911, as well the order in which title became indefeasible (i.e., more than prima facie evidence of ownership). Ms. Harlton emphasized the former approach, and Ms. Abel emphasized the latter.
- [105] At the outset, I note that on December 16, 1910, two certificates were issued and registered to WM: one for the W40 and another for the E20. The defendant says that this did not create two titles and the plaintiff says two titles were created at a later date, in November 1911. Even if these certificates are considered separate titles, both were registered on the same day rendering it not possible to determine chronological priority as between them. For the purposes of this matter, I proceed on the basis that the division of Lot 1959 occurred at a later date.
- [106] The agreement between WM and Ms. Spring included a conditional sales agreement/right to purchase the W40. Ms. Spring's interest was registered as a charge. As the holder of a right to purchase, together with the equity of redemption, Ms. Spring held equitable rights that she could enforce personally against WM: Hanbury and Martin at 28. Title, however, remained with WM, the owners in absolute fee, until Ms. Spring's charge was removed.[1] WM retained their interest should Ms. Spring default.
- [107] On April 29, 1911, WM entered into a contract granting their equitable rights to the W40 to Nelson, but they remained on title. This was structured as a "conveyance of equity" and registered as a charge under the 1906 LRA, in Form D. A charge is a type of private contract that equity will enforce.
- [108] As a result of assigning their equitable rights to Nelson, Ms. Harlton argues that when WM conveyed the title for the E20 to Ms. Pallanatier nemo dat applied. She contends that WM were no longer in possession of the W40--Nelson was--and therefore they did not have 20 feet to convey. Instead, they had 20 feet minus the shortfall. To this extent, WM could not give to Ms. Pallanatier what they did not have, i.e, a full 20-foot lot. In my view this analysis is incorrect.
- [109] Equitable rights, registered as charges, do not operate in rem; equity acts in personam. Therefore, charges against property registered in absolute fee attract in personam remedies. The equitable interests assigned to Ms. Spring did not transfer title. WM retained their title in the event that the equity holder defaulted in their payments.
- [110] The first actual transfer of title in respect of Lot 1959 occurred when WM conveyed the E20 to Ms. Pallanatier in absolute fee. The title that was transferred was free of any equitable interests, including any charges. The conveyance to Ms. Pallantier occurred on December

11, 1911, and the transfer of title was registered on January 4, 1912. It was not until October 29, 1913 that WM transferred the W40 to Ms. Spring. Consequently, I am satisfied that Ms. Abel demonstrated that the full E20 was the first registered in absolute fee by virtue of the transfer to Ms. Pallantier.

- [111] Applying this reasoning, the nemo dat rule--and the application of the shortfall--would apply to the W40 and not the E20. When Ms. Harlton's predecessor acquired the W40--subsequent to the transfer of title of the E20 to Ms. Pallantier--there was a shortfall that applied to that parcel because there was less than 40 feet to convey to Ms. Spring. I am satisfied that nemo dat applied in these circumstances because the W40 was subject to charges and nemo dat continues to operate for interests in land less than an estate in fee simple: Chichak at para. 19.
- [112] In the result, I am satisfied that the certificate of title of what was being conveyed to Spring should have stated the remaining part of Lot 1959, i.e., something in the way of "Lot 1959 except for the easterly 20-feet" which had already been conveyed. To the extent that the lot was not described in this way, Ms. Harlton's historical title was wrongly described.

Indefeasible Title

- [113] If the preceding analysis were not dispositive of the question of who should bear the shortfall, based on the principle of priority of registered title, the property that was first granted indefeasible title and registered as such would obtain its full frontage.
- [114] Indefeasible title is a creation of the modified Torrens system in British Columbia. It is designed to "create a mile-wide exception to the principle of nemo dat quod non habet": Bruce Ziff, *Principles of Property Law*, 7th ed. (Toronto: Thompson Reuters Canada, 2018) at 532. This is because British Columbia's title registration system provides for immediate indefeasible title, which cures any defects in a fee simple interest. The legislature has made a policy choice to prevent the nemo dat rule from applying to indefeasible title, and instead, the state warrants the ownership of the property.
- [115] Indefeasible title may be subject to a charge: LTA, s. 23(2)(g). The LTA grants indefeasibility to fee simple interests, but preserves the nemo dat rule with respect to charges: Gill at para. 26.
- [116] Ms. Harlton argues that the issue of indefeasibility is a red herring. She suggests that the key issue is not the dates of entitlement thereto--when the ownership of the land vested--but the location of the property boundary. She takes the position that it is the wrong description of the boundaries which has created the dispute in this case.[2]

[117] As I read the applicable legislation, indefeasible title is conclusive evidence in courts that the person named is seized of an estate in fee simple. It is assumed the title on the registry is valid: Ziff at 533. Section 23(2) of the LTA provides a number of limited exceptions. For the instant purposes, s. 23(2)(h) of the LTA, relating to mistaken boundaries is applicable, but only to the extent of the mistake in the boundary. As that section sets out:

[T]he person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following:

(h) the right of a person to show that all or a portion of the land is, by wrong description of boundaries or parcels, improperly included in the title

[118] When this legislation is read in conjunction with the authorities, indefeasibility of title is assumed and priority of interests in the land is assigned according to the dates of registration: Chichak at para. 15. Based on the authorities, it becomes clear that it is Ms. Harlton who must bear the shortfall because indefeasible title was first registered to Ms. Abel's predecessor on August 1, 1919. Subsequently, on August 20, 1920, Ms. Harlton's predecessor registered an indefeasible title.

[119] This approach is consistent with s. 25(2)(e) of the LTA:

Protection of registered owner against actions for recovery of land

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(2) An action of ejectment or other action for the recovery of land for which an indefeasible title has been registered must not be commenced or maintained against the registered owner named in the indefeasible title, except in the case of

.

(e) 2 or more indefeasible titles having been registered under this Act in respect of the same land, the registered owner claiming under the instrument that was registered first

[120] The boundaries of Lot 1959 were initially misdescribed. In such circumstances the registration of title become paramount.

[121] By granting a certificate of indefeasible title for the W40 without describing it as "Lot 1959 except for the easterly 20-feet", the LTO was perpetuating an error. It assumed that the purchaser was receiving from the vendor indefeasible title against all the world when they were not. The LTO is to correct such errors. Provision for a correction of this sort is set out in the LTA:

Power of registrar if measurements on plans conflict

105 (1)The registrar may

refuse to accept a plan tendered for deposit, the measurements of which do not correspond with the measurements shown on a plan already on deposit covering all or part of the same land or having a common boundary with the plan being tendered,

[122] At s. 68 of the 1906 LRA, where any land was subdivided and where that subdivision could not be easily or plainly identified, it was required that a plan or map of the identified lands be deposited with the Land Registry Office. In relation to this requirement, it was

[]

Provided always, that the Registrar may, in his discretion, refuse to accept any map or plan the measurements of which do not correspond with any map or plan, or maps or plans, covering the same land in whole or in part already deposited in his office; and provided further, that he may, upon the filing of sufficient evidence, correct the measurements upon any deposited map or plan.

[123] As a general matter, as is clearly set out in the contemporary legislation, the Registrar should not accept for filing a plan that conflicts with another plan previously filed. To this extent, in practice, the first to register indefeasible title has priority.

[124] I agree with the plaintiff that discussion from *Evans Application (Re)*, 1955 CanLII 614 (BC SC), while not binding, is on point. Although it was not for the Registrar to decide the dispute that arose in *Evans*, the court found their comments sufficiently helpful to set them out in some detail:

It is pointed out that it is not correct for there to be two Certificates of Indefeasible Title in existence, one covering the West 40 feet and the other covering the East 26 feet of an individual parcel, even if, by the plan on deposit the width of the lot is shown as 66 feet, because, should, in point of actual fact, the lot be less than exactly 66 feet wide, then an overlap in registration of title would result. Conversely, if the width of the lot should prove to exceed exactly 66 feet, then there would exist a strip of land, the title to which is not included in either of the aforementioned certificates.

[125] Later in *Evans* the Registrar produced a report regarding the title to the property in question pursuant to s. 153 of the Land Registry Act, R.S.B.C. 1948, ch. 171. Parts of that report were set out in *Evans* and stated as follows:

- (b) 1. Plan No. 168 which was deposited on November 28th, 1885, gives no dimensions but the lots shown thereon have a reputed and scaled width of sixty-six feet, more or less.
2. According to the Registrar of Absolute Fees, one Ernest Edwards Barker was, on March 16th, 1886, the registered owner of the whole of Lot 14 and on that date executed a conveyance in fee simple to James Henry Favor, of the easterly part (26 feet wide by the length of the lot) of Lot 14. Application for registration of the absolute fee was made on April 9th; 1886 (A.F.B. 10-292, No. 1093-a).

By various mesne transactions, the said easterly twenty-six feet of Lot 14 became vested in William Sloan, whose title was registered in Indefeasible Fees Book 1-74, No. 1852-0 on December 18th, 1905. This registration was the first indefeasible registration for the east twenty-six feet of the lot. The present registered owner of such parcel is Bruce Snider.

3. On April 6th, 1886, the aforesaid Ernest Edwards Barker conveyed in fee simple to George Byrnes 'The westerly part (40 feet wide by the length of the lot) of Lot 14.' Application for registration in the absolute fees was made on April 8th, 1886 (A.F.B. 10-298, No. 1084-A).

By various mesne transactions the said westerly forty feet of Lot 14 became vested in Ernest Edward Evans, George Coleman and Percy William Evans, whose title was registered in Indefeasible fees book 1-161, No. 3109-E on March 15th, 1906. This registration was the first indefeasible registration for the west forty feet of the lot.

4. The said Ernest Edward Evans and Marie Josephine Evans are remote successors in title to the said Ernest Edward Evans, George Coleman and Percy William Evans. "By reason that the indefeasible certificate of title first issued to the west forty feet of the said Lot 14 is subsequent in date to the issuance of the first indefeasible certificate of title to the east twenty-six feet of Lot 14, it is my view, in the event that the said Lot 14 proves to be less than sixty-six feet wide, that the title of the owner of the east twenty-six feet of Lot 14 will be superior to and prevail over the title to west forty feet of Lot 14. In consequence, I am not justified in continuing the description 'the west 40 feet of Lot 14,' but am bound to require, by reason of, inter alia, section 141 (1), Land Registry Act, the description on application 310811-L to be changed as regards Lot 14 to read: 'Lot 14, except, the east 26 feet, Block 2, Old Granville Townsite, Plan 168.' In the alternative, the present certificate of title to the east twenty-six feet of Lot 14 could, with the consent of the owner named therein Bruce Snider, be amended to read: 'Lot 14, except the west 40 feet thereof, Block 2, Old Granville Townsite, Plan 168.'

[126] The court in Evans did not decide whose boundaries were correct; the only matter before the court was whether the Registrar should have been compelled to register the application of the petitioner and the court was of the view that he was not so required. The Registrar's reasoning, however, is instructive. Applying that reasoning, along with my interpretation of s. 105 of the LTA, I find that Ms. Harlton must bear the shortfall given her predecessor registered indefeasible title after Ms. Abel's predecessor.

Survey Evidence

[127] A central question in this case is the interaction between the certificates of title at the LTO and the survey evidence proffered by both parties.

- [128] A purchaser can rely on a certificate of indefeasible title as a guarantee of title, but not of the exact extent of that purchase. In Phillips CA, Chief Justice Finch (as he then was), speaking for the court, described the interaction between the certificate of title and survey evidence delineating the boundaries on the ground as follows:
- [63] There is no inconsistency, as the defendants suggest, between the statutory provisions of the Land Title Act, which govern the indefeasibility of title, and the surveyors' hierarchy of evidence, which is used to locate boundaries on the ground. The Act speaks to legal title. The survey evidence speaks to the physical location of what is described in that title.
- [129] The complicating factor in the instant circumstances is the absence of an original survey in respect of Lot 1959 or the same when the lot was first subdivided. It was not open to the surveyors retained by each party to consider an original survey; they only had the original boundary descriptions which were mistaken, at least in part.
- [130] The law is clear that it is the task of a surveyor is to re-establish original boundaries considering the best evidence available. The hierarchy of evidence, however, presupposes that there is an original survey to refer back to when assessing the evidence. As Justice Gomery pointed out in Burko, for example:
- [25] As is apparent from the surveyor's hierarchy generally and in particular its third level ("fences or indicia of possession that can reasonably be related back to the time of the original survey monuments"), the hierarchy presupposes a cadastral boundary originally fixed by a natural boundary or original monuments.
- [131] In Phillips SC, Justice Dickson (as she then was), made a similar observation:
- [69] The task of a surveyor is to re-establish original boundaries, taking into account the best available evidence. The task is not to define limits as mathematically described in a deed or elsewhere.
- [132] Absent physical manifestations of the boundaries of a property, Angel & Honsberger have the following to say in Law of Real Property (3rd ed., looseleaf) at §18:11:

Finally, where there are no references to natural boundaries and the boundary has not yet been established on the ground, reliance must be placed on the description in the document of title. Again the focus is on the intention of the parties. If courses and distances conflict, either might be seen as determinative, depending on the intent of the conveyance. Generally both courses and distances would outweigh an inconsistent statement of area or acreage. However, if a deed contained a description which could equally well be interpreted in two different ways, one of which would match the quantity of land described and one of which would not, the first interpretation would be preferred.

Thus, where elements of the boundary description conflict, the focus is on intent. Where the document conveying title is clear in its intent, the court does not need to look any farther. However, where the document is ambiguous, extrinsic evidence of the knowledge of the parties

at the time the conveyance was executed may be considered. If there is insufficient extrinsic evidence, then the court may look to rebuttable presumptions. For instance, a hedge or ditch, even if not referred to in the document of title, might raise a presumption about a boundary line if the location of the boundary could not be determined from the title deeds themselves.

[Footnotes omitted.]

[133] On the instant facts, there is a discrepancy between the legal descriptions on title and the measurement of the property lines, but we are left wanting for any 'original boundaries' by which who must bear the shortfall might be ascertained. For example, the hierarchy refers to natural boundaries and original monuments, neither of which are present here. It also refers to "fences or indicia of possession that can reasonably be related back to the time of the original survey monuments", but there are no such indicia that relate back to the time of the original survey to which I have been made aware. More recently, at the time Ms. Harlton and her husband purchased the home, there was a fence constructed between the properties. That fence was on or near the boundary between the E20 and W40 according to the Taylor Survey and was said to encroach onto the E20 by about four inches according to the Arsenault Survey.

[134] While monuments have been placed, re-established, and considered, I do not see how new surveys can ultimately--and legally--determine where the shortfall lies since there are no original boundaries to "re-establish" and they are not to "define limits as mathematically described in a deed or elsewhere": Phillips SC at para. 69. Neither party took me to an authority addressing a situation like this where there is no original survey. In such a case it is difficult to achieve a just solution, absent clear intent.

[135] Mr. Arsenault, who conducted the Arsenault Survey, testified at trial. His survey was filed in December 2019 after being delayed due to a routine practical review for new surveyors. He filed his plan with reliance on s. 100(1)(b) of the LTA, which concerns the re-establishment of boundaries. This section of the LTA permits the registrar to accept a reference plan without an accompanying description if a new parcel is created by the consolidation of adjoining surveyed parcels. Here, however, there were no surveyed parcels, they were described parcels.

[136] Mr. Arsenault testified regarding how he determined which lot should bear the shortfall in width, given that Lot 1959 is less than 60 feet. He initially determined that the shortfall should be split between the two properties, however, as a result of the practice review, he was advised he could not do so. In my view this was a reasonable conclusion - albeit not based on the necessary legal principles - because, absent an original survey, Mr. Arsenault could not determine where the shortfall should be located. A split of the shortfall might have been an acceptable compromise. If not, it would have been a good starting point from which the parties could have negotiated had they been so inclined. The fact that this matter is before me runs against such an inclination.

[137] I have considered this survey by Mr. Arsenault, as well as that prepared by Mr. Taylor. In the Taylor Survey and the Taylor Letter, Mr. Taylor sets out a view different from that of Mr. Arsenault, relying, in part, on a thorough review and re-establishment of monuments in the relevant area. Mr. Taylor disagreed with the results of Mr. Arsenault and, in his view, the fence built by Ms. Abel extends into the lot of Ms. Harlton. Ultimately, for the reasons outlined above, this matter hinges on a set of legal questions that the conflicting surveys could not answer in a dispositive manner.

Section 36 Property Law Act

[138] According to Ms. Abel, if I accept the Arsenault survey as correct then she should be granted an easement for the extent--2 mm to 1.5 cm--to which her fence encroaches on the property of Ms. Harlton, for the life of the fence, with compensation, pursuant to s. 36 of the Property Law Act, R.S.B.C. 1996, c. 377 [PLA].

[139] Section 36 of the PLA is governed by a set of factors from *Vineberg v. Rerick*, [1995] B.C.J. No. 2506, 1995 CanLII 3363 (BC SC) at para. 20, as adopted by the Court of Appeal in *Taylor v. Hoskin*, 2006 BCCA 39 at para. 50:

- a) Were the parties cognizant of the correct boundary line before the encroachment became an issue? The three degrees of knowledge are: honest belief; negligence; and fraud. The party seeking the easement should have an honest belief to be awarded this remedy.
- b) Is the encroachment a lasting improvement? What effort and at what cost is involved in removing the encroachment? What will be the effect on the two properties in question? The more fixed the encroachment and the more costly and cumbersome it would be to remove it, the more weight is towards an easement; and
- c) What is the size of the encroachment and how does it affect the subject properties in terms of their present and future values?

[140] These factors are not to be applied rigidly, and an order will only be made in respect of s. 36 where it is equitable and in accordance with the balance of convenience to do so. I have determined that, legally, the shortfall should be borne by Ms. Harlton. It is Ms. Abel's lot that was rightly described and the encroachment is minimal. With this in mind, I am inclined to grant Ms. Abel the easement she requests.

[141] I am satisfied that Ms. Abel held an honest belief that the fence was being constructed within the boundaries of her property on the basis of the Arsenault Survey. I note here, as I did above, that the Arsenault Survey was readily available to Ms. Harlton at the relevant time. In addition, Ms. Abel waited several months before going through with building the fence to allow Ms. Harlton to present conflicting survey evidence. I have not been taken to evidence satisfying me that in the period when Ms. Abel awaited conflicting survey evidence from Ms. Harlton some sort of doubt should have arisen as to her honest belief. The protest by Ms. Harlton's counsel on December 14, 2021 did not go beyond reiteration of

the property description of the W40 in terms of substantiating a conflict.

- [142] In respect of the second Vineberg factor, while the authorities sometimes diverge in respect of the 'lasting' character of a fence (see *Fox v. British Columbia (Ministry of Forests, Lands, Natural Resource Operations and Rural Development)*, 2023 BCCA 170 at para. 33 and Vineberg at para. 24), I am satisfied that the instant fence constitutes a sufficiently lasting improvement. It would no doubt be costly and cumbersome to move the fence; it is submitted that the range for such movement would be approximately \$4,000 to \$7,000.
- [143] I am cognizant that Ms. Harlton presented evidence that it would cost about \$8,000 to \$10,000 to construct a walkway on the west side of her property. It would require constructing steps to negotiate the two and a half foot retaining wall. It would also require removing or pruning a mature tree that is in the front yard on the other side of the fence. To the extent that it was Ms. Harlton's property that was misdescribed, however, the easement covers only a matter of centimetres. Even if the fence were moved by this margin, it does not seem that the problems experienced by Ms. Harlton would be alleviated.
- [144] Finally, as already indicated, the size of the encroachment is small. Any impact on the future value of Ms. Harlton's property may be diminished on account of its mistaken title description, not by virtue of this small easement. While the present value of the property to Ms. Harlton may be slightly diminished--insofar as her pathway is slightly narrower than it may otherwise have been--I am nonetheless of the view that the balance of convenience should favour Ms. Abel and that it is equitable that the easement be granted.
- [145] I grant an easement for the .2 to 1.5 centimetres that Ms. Abel's fence encroaches on the property of Ms. Harlton, with compensation. The easement shall be for the life of the fence. There shall be a one-time payment, following the entry of this judgment, of \$5,000 in damages to compensate Ms. Harlton for the encroachment. In my view this is consistent with the magnitude, which is minimal, of the encroachment along with the surrounding factors.

Conclusion

- [146] The task before me in this matter distilled, ultimately, to a legal question of priority. Having considered the applicable legal principles, whether I rely on the first registration of a partial lot in absolute fee or the first registration of indefeasible title, I find the outcome is the same. It is Ms. Harlton who must bear the several inch shortfall between the properties. An easement is granted in respect of Ms. Abel's fence, with compensation, as set out above.
- [147] Consequently, I grant the declaratory relief sought by the plaintiff and deny the relief sought by the defendant.

[148] If the parties cannot agree on the matter of costs, they have leave to address that matter within 60 days following the release of these Reasons. Arrangements may be made with scheduling to address costs orally or in writing.

"D. MacDonald J."

[1] As explained in *Kruger v. Wild Goose Vintners Inc.*, 2021 BCSC 1406:

[69] The essence of a right to redeem is a debtor's right, upon payment of a debt, to recover the property it gave to the creditor as security for payment of the debt. The right exists as a consequence of the fact that the property was only ever given to the creditor as security. The court will facilitate redemption by ordering of the conveyance of an interest in land or discharge of security registered against title to the land, *Law and Equity Act R.S.B.C. 1996 c. 253*, s. 17 [LEA]. .

[2] I note that Ms. Harlton first raised the application of the *nemo dat* rule.

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