CANADA / JUDGMENT

Pinette v. Ellis

2025 BCSC 2446

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Supreme Court of British Columbia

DECIDED
24 October 2025

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2025 BCSC 2446 Pinette v. Ellis

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pinette v. Ellis,

2025 BCSC 2446

Date: 20251024

Docket: S259644

Registry: Victoria

Between:

Celia Pinette and Lyle Eggen

Petitioners

And:

Matthew Ellis and Tara Ellis

Respondents

Before: The Honourable Justice Morley

Oral Reasons for Judgment

(Petition Under Section 36 of the Property Law Act)

Counsel for the Petitioners:

D. Blanchard

Counsel for the Respondents:

N. Lenaghan

Place and Date of Hearing:

Victoria, B.C.

October 22, 2025

Place and Date of Judgment:

Victoria, B.C.

October 24, 2025

Overview

[1] The petitioners Celia Pinette and Lyle Eggen own property located at 5087 Catalina Terrace in Saanich. The respondents, Matthew Ellis and Tara Ellis own the parcel next door at 5083 Catalina Terrace.

[2] They are before me because it turns out that an east-facing deck attached to the Pinette/Eggen home encroaches about 50 square feet onto the Ellises' land. The deck was built to enclose a carport in 1976. At the time, Saanich approved it to go up to one foot from the property line despite the ordinary setback rules. As built, it actually went over.

[3] Ironically, the encroachment came to light because Ms. Pinette and Mr. Eggen demanded the Ellises stop work on a parking area until they had obtained survey evidence to determine the boundaries of the two properties. When they did so, the survey showed not only that the respondents owned the area they proposed to use for parking, but also revealed the encroachment that is the subject of the petition before me.

[4] If neighbours cannot work out their own solution to an encroachment like this, the owner of the land with encroachment can make an application pursuant to s. 36 of the Property Law Act, R.S.B.C. 1996, c. 377. In this case, there is what both parties call a "great deal of animosity and ill will" between the neighbours and so resolution of the situation falls to me.

[5] Section 36 gives the Court three options if, as here, a survey shows that a building on one parcel of property encroaches on adjoining land:

a) Section 36(2)(a) permits the Court to "declare that the owner of the land has for the period the court determines and on making the compensation to the owner of the adjoining land that the court determines, an easement on the land encroached on or enclosed",

b) Section 36(2)(b) allows it to "vest title to the land encroached on or enclosed in the owner of the land encroaching or enclosing, on making the compensation that the court determines," while

c) Section 36(2)(c) gives the authority to "order the owner to remove the encroachment or the fence so that it no longer encroaches on or encloses any part of the adjoining land".

[6] Neither party thinks a vesting order under s. 36(2)(b) makes sense. So the real issues before me are:

a) Should I require Ms. Pinette and Mr. Eggen to remove the encroachment by cutting back the size of their deck by three feet?

b) If not, how much should I make them pay for an easement under s. 36(2)(a)?

The Legal Test

[7] Before going through the facts of the situation here, I will briefly set out the legal test.

[8] As a strict matter of common-law property rights, an encroachment is, by definition, a trespass. The default therefore is that if the owner of the encroached-upon parcel will not agree to a licence or easement, the encroachment has to be removed.

[9] However, s. 36(2)(a) codifies the equitable principle that if the encroachment was accidental and expensive to remedy, requiring it to be dismantled would, in some cases, be harsh and the encroached-upon parcel owner should instead be compensated with money.

[10] The onus is on the owner of the encroaching parcel to show that giving them an easement is equitable and in accordance with the "balance of convenience": Gainer v. Widsten, 2006 BCCA 580 at para. 8.

[11] The following considerations are set out in Vineberg v. Rerick, 1995 CanLII 3363 as relevant (at para. 20):

a) What did the party seeking the easement know about the correct boundary line before the encroachment became an issue? The easement remedy usually requires that the encroaching party had an "honest belief" that the building was on their land. If there was fraud, or even negligence, an easement remedy is not usually available, although there is some support for the possibility that it might be available, but on compensation terms that deprive the encroaching party of any material benefit.

b) What is the nature of the encroachment? This involves some sub-questions: Was the encroachment a lasting improvement that is difficult to dismantle? What is the effort and cost involved in moving the improvement? What is its effect on the properties in question? The more fixed the improvement, and the more costly and cumbersome it would be to move it, the more likely the court will order an easement or vesting of title and the less likely there will be an order to remove. The graver its effect on the encroached upon property, the more likely there will be an order to remove.

c) The size of the encroachment. How does the encroachment affect the properties, in terms of both their present and future value and use? These questions serve to balance the potential losses and gains of the creation of an easement.

[12] I note that these three factors, although sometimes referred to as a "test", are not statutory criteria and should not be regarded as necessary and sufficient conditions for relief: Taylor v. Hoskin, 2006 BCCA 39 at para. 5. Rather, they are properly understood as considerations that guide the exercise of equitable discretion. Every case is fact specific.

[13] The first factor - "honest mistake" -- goes to the level of fault on the part of the applying party. We do not normally allow private parties to compulsorily acquire other people's property. Therefore, we would not countenance acquiring part of someone else's party if the person doing so was encroaching deliberately or with reckless disregard to the property rights of others. If there has been negligent, but not intentional, intrusion, then this is also a reason, albeit a less compelling one, to deny relief. If both the encroaching and encroached upon property owners are effectively equally innocent parties, then what will matter is the balance of convenience.

[14] The first factor can also be seen as an application of the general principle that equitable relief depends on "clean hands". Properly understood, this is not an inquiry into irrelevant deficiencies in the moral character of applicants. Rather, it is the principle that the courts of equity will not themselves participate in something shady.

[15] The second and third factors both go to the relative losses and gains for each side from each remedy. As between essentially equally innocent parties, the dominant consideration is reducing the total loss, especially if the compensation payment can make the party whose land is encroached upon whole.

[16] When it comes to the amount of compensation, there is also substantial discretion. The purpose of the compensation amount is to equitably resolve disputes over encroachments: Svenson v. Hokhold, [1993] B.C.J. No. 859 (B.C.C.A.) at para. 12, as cited in Strata Plan VR 10 v. EE Management Corp., 2016 BCSC 1597 at para. 31. Clearly, the encroached-upon owner must be compensated for all their direct and indirect costs and damages. In addition, the easement (or transfer of title) must be given an appropriate value, which, to my mind, would generally be what would be reached by a willing buyer and willing seller not under some compulsion to sell (or buy).

[17] In some cases, where there have been "unclean hands", a compensation payment may be set so as to disgorge any benefit or profit for the encroacher: Langley v. Yang, 2012 BCSC 1520. However, in the case of unintentional encroachment, it will normally be a windfall to provide more than the value of the easement (in the sense of what a hypothetical willing buyer and a willing seller would agree upon) plus the losses to the encroached-upon property owner that this value does not reflect.

Was the Encroachment an "Honest Mistake"?

[18] The petitioners argue that their encroachment onto the Ellises' property was an honest mistake.

[19] With the exception of a Hydro meter, the current footprint of the carport/deck was the result of construction that occurred in 1976. When the petitioners purchased their property in October 2019, the vendors checked "no" to "Are you aware of any encroachments, unregistered easements or unregistered rights-of-way?" on the Property Disclosure Statement. Their neighbour at the time they moved in did not indicate any issue of encroachment, although it does appear she was extremely elderly and no longer managing the property. It is common ground that, as Ms. Ellis deposes in her first affidavit, "Our property was overgrown and none of the property boundaries and survey markers and iron posts were visible, or apparent" prior to April 2024.

[20] By contrast, the respondents argue very strongly that the petitioners cannot claim an "honest belief" that they were not encroaching. They say the petitioners ought to have obtained a survey prior to doing various work on their property and, if they had done so, they would have known about the encroachment. They therefore assert that the petitioners do not come to the court with clean hands and equitable relief should be denied.

[21] Mr. Ellis appends to his affidavit a Google Maps photo from 2014 showing a garage door next to the carport. More recent pictures show this area enclosed with a residential door. The respondents state that this work would have occurred at the same time as the electrical upgrade that led to the installation of a Hydro meter on one of the posts holding up the deck. The respondents assert that this work would have required a permit and that it breaches requirements of the Electrical Code and B.C. Hydro.

[22] In my view, the original encroachment (i.e., the construction of the carport and deck) was an "honest mistake" from the perspective of the current petitioners.

[23] It is true that some work was done on the deck/carport in August 2022, after the petitioners purchased 5087 Catalina Terrace and before the respondents purchased 5083 Catalina Terrace. The respondents asked Saanich to investigate whether this was work that required a permit. Two bylaw enforcement officers were assigned the case and went to the property and interviewed one of the petitioners in June 2024. They concluded that the repairs were "minor" and did not require a permit.

[24] Before me, the respondents dispute Saanich's conclusions, pointing to what they say is photographic evidence of an additional post and a change of footprint.

[25] While I acknowledge that Saanich by-law officers are not infallible, I do not think it is appropriate for me to second guess them based on a record in a petition of this nature. I cannot infer from the pictures in the record that there was greater work than Saanich found. On a balance of probabilities, I find that the current footprint of the carport/deck is the same as it has been since 1976 and that there was no legal requirement for the petitioners to obtain a survey to do the work they did in August 2022.

[26] Admittedly, Ms. Pinette was fined for taking out a tree. But I do not think it is relevant on a proper understanding of the "clean hands" doctrine.

[27] I have some concerns about the electrical service, which led to the further encroachment represented by the Hydro meter.

[28] The respondents raised questions about whether the meter is appropriately accessible and facing the service. This has not been responded to by the petitioners. On the other hand, I am not prepared, on the basis of the evidence before me, to find as a fact that the installation of the Hydro meter was unlawful.

[29] But even if the respondents are right about this, it would not be the kind of thing that would deprive the petitioners of the ability to seek an equitable remedy. Rather, it is something I can address as a condition of granting an easement that includes the electrical box.

[30] On the evidence, the footprint for the encroaching structure was essentially put in place in the 1970s, and the petitioners had no reason to question it when they bought the house. It is perhaps understandable that the respondents resent the petitioners' demanding of them that they conduct a survey before doing work on their own property, when the petitioners turn out to be the ones encroaching. And the encroachment was increased, if by a very small amount, when the hydro meter was installed. I will consider the fact that the petitioners could have obtained a new survey earlier in considering the amount of compensation. But it would be overly punitive to ignore the balance of convenience and require the petitioners to remove the encroachment regardless of the balance of expense and inconvenience.

Does the Balance of Convenience Support Removal?

Harms to Pinette and Eggen of Removal

[31] According to the petitioners' appraisal evidence, the value of their home would be reduced by $15,000 if they reduced their deck by 2.97 feet and by $20,000 if they reduced it by 6.90 feet. I find that the $15,000 number is the relevant one because I do not see why my order would change the existing variance. The petitioners have submitted a letter from a realtor suggesting an even greater market value to the current size of the deck. While I accept the realtor's view as a possible amount a prospective purchaser might value this amenity at, I consider the appraisal to have given a more reasonable market value.

[32] Cutting back the deck to one foot from the property line would obviously require work. The petitioners have one estimate for $20,727 and another for $14,700, which does not include anything for permitting or engineering. I find that the construction cost would likely be around $20,000, not including the removal of the Hydro meter.

[33] The removal of the Hydro meter would require the petitioners to move their connection to electrical services. They have submitted an estimate from an electrical contractor of $16,938.65, which does not include the fees payable to B.C. Hydro for shutting off and restoring power and also, more significantly, does not include the work that would need to be done in the area where the power line is currently buried underneath the carport.

[34] I recognize that if the Hydro meter installation is contrary to the BC Electrical Code or B.C. Hydro requirements, it may have to be moved anyway. But if it is lawful, then this would mean the costs of removal would be very large.

[35] I accept as well that the current size of both the carport and the deck is an amenity for the petitioners and their family. If it was reduced, they would have less room to park, their children would have less room to run and there would be less room to conduct barbecues and other entertaining. On the evidence, there are alternative places for the petitioners to put a large deck, but I accept they are less desirable. There is no alternative place for a carport.

Harm to the Ellises of Non-Removal

[36] The petitioners argue that the area of the proposed easement is not an area that owners of the Ellises' property could effectively use for anything other than a privacy hedge.

[37] The respondents say they would like to beautify the area at the top of the hill and would like to put in a fence. They say that because the lots have limited exposure to the street, putting a fence right up to the property line would enhance curb appeal. There is no specific evidence from a realtor or appraiser about how significant this would be, by comparison with a fence or hedge up to the side of the carport/deck.

[38] The Ellises say the deck is a problem for their privacy. I accept the evidence of the petitioners that the privacy issues are not a result of the encroachment, but the lack of a setback and the height difference and mutual location of the residences.

[39] I would say that the principal loss to the Ellises of non-removal would be the loss of their property right and their ability to use the encroached-upon area would be limited in any event.

What is the Appropriate Amount of Compensation?

[40] The determination of compensation under s. 36(2) is fact-driven and based on equitable principles. It is definitely not an exact science and various approaches have been employed.

[41] I agree with the respondents that they should be compensated for the survey work they did. This comes to $4,429.

[42] They should also be compensated for the loss of property rights inherent in an easement. In my view, the best conceptual way to think about this is what two otherwise arms-length but willing to cooperate neighbours would have agreed upon in a voluntary transaction. In a voluntary sale, there is typically a gap between the lowest price the seller would actually accept and the highest price a buyer would actually pay, which is sometimes referred to as the zone of potential agreement. A hypothetical voluntary sale would occur in this zone of potential agreement and, in the absence of any reason to think otherwise, can be presumed to occur at the midpoint of that zone.

[43] In this case, the best evidence of that is the appraiser saying the value of the petitioners' home would be enhanced by $15,000, with the realtor saying that the value to the owner of the 5087 Catalina Place could be much higher.

[44] In light of this evidence, it seems to me that $15,000 is the best number I have for what a willing buyer and willing seller would agree to for the easement. The realtor's evidence supports that an owner of 5087 Catalina Place would still get something out of the transaction, and I do not rely on it for more than that.

[45] I reject the respondents' approach of adding in all the avoided costs of removal. This would not really be "compensation" for them, since it would not reflect any loss they have suffered or value they have foregone, but would in effect just be punitive.

[46] I do not have enough evidence to determine whether the Hydro meter was lawfully installed. If it was, there is no or de minimis impact on the Ellises' property, so no reason to increase the compensation. If not, then this should be addressed. I think the appropriate compensation for this is to require the petitioners to pay for an electrician's opinion that they must share with the respondents who can either challenge it, if they think it is worth their while, or pursue corrective action if it indicates that the Hydro meter must be moved.

Judgment

[47] I therefore make the following orders and declarations:

a) A declaration pursuant to s. 36 of the Property Law Act that, on payment by one or both of the petitioners Celia Pinette and Lyle Eggen to one of Matthew Ellis or Tara Ellis of $19,429, the land described as Lot 5, Plan VIP200657, Section 31, Lake Land District and with the PID of 003-555-135 (the "Servient Land") may be subject to an easement in favour of the land described as Lot 6, Plan VIP200657, Section 31, Lake Land District and with the PID of 003-604-268 (the "Dominant Land") permitting the encroachment onto the Servient Land of a deck and carport attached to the main residence of the Dominant Land.

b) The petitioners are granted leave to apply to court to seek a declaration of an easement permitting the encroachment onto the Servient Land of a hydro meter attached to a post supporting the deck, no later than January 31, 2026, upon satisfying the court of the following:

i. That the payment to Matthew Ellis and Tara Ellis referred to in paragraph (a) has been made; and,

ii. That the installation of the hydro meter is, in the judgment of a qualified electrician, consistent with the Electrical Code and the requirements of the British Columbia Hydro and Power Authority.

c. If the petitioners make the payment referred to in paragraph (a) no later than January 31, 2026, either or both of them may register the easement in perpetuity.

d) If the petitioners or any successors in title to the Dominant Land dismantle or cut back the deck and carport so that it no longer encroaches onto the Servient Land, then the respondents or any successors in title to the Servient Land may apply for an order cancelling the easement.

e) Both parties have leave to apply for directions with respect to the dimensions and wording of an easement.

f) An associate judge may provide directions pursuant to this order.

[48] Each party will bear their own costs.

"J. G. Morley, J."

The Honourable Justice Morley

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Prepared on 27 October 2026 · Esheria