The Boundary Point
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Case Commentaries on Property Title and Boundary Law

The Boundary Point is published by Four Point Learning as a free monthly e-newsletter, providing case comments of decisions involving some issue or aspect of property title and boundary law of interest to land surveyors and lawyers. The goal is to keep you aware of decisions recently released by the courts in Canada that may impact your work.

The root cause behind many boundary disputes can often be traced back to uncertainty in title and conveyancing documents. Old and ambiguous metes and bounds descriptions that are confusing on their face, or reveal some inconsistency and cause for confusion when applied to the ground remain with us. In such circumstances, lasting improvements built by land owners may trespass onto neighbouring properties. When an encroachment is discovered, simple removal may not always be a practical option. Across Canada, several provinces have enacted statutes which create potential remedies as an alternative to the removal of such encroachments. For example, in British Columbia, the *Property Law Act*[1] may be used to apply to the courts to seek an order removing the encroachment, declare an easement on the encroached land, or vest title in the encroached land with compensation to the affected title holder – all depending on the circumstances.[2] In a recent decision from the British Columbia Court of Appeal in *Fox v. British Columbia*[3] the dispute concerned a strip of land that once formed the bed of a railway and bisected the appellants' farm property.

The appellants had built a number of encroachments onto the strip on the understanding that it was part of their property. However, ownership remained with the Crown. The case dealt with the availability of remedies in the *Property Law Act* in general, and as against the Crown in particular. Ensuring that lay purchasers are able to interpret and fully understand plans and survey products would likely have, in this dispute, avoided the misunderstanding. While plans depicting the railway line were available at the time of purchase, title documents did not reference the railway and the appellant did not seek a full explanation of the available plans. While the appellants were unsuccessful in that the court found the *PLA* not binding on the Crown, it was noted that under the circumstances, other potential remedies may be available for dealing with this trespass claim.

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[1] *Property Law Act*, RSBC 1996, c. 377, https://canlii.ca/t/55xb6 (herein, "*PLA*").

[2] The last option is tantamount to a court ordered private expropriation.

[3] *Fox v. British Columbia (Ministry of Forests, Lands, Natural Resource Operations and Rural Development),* 2023 BCCA 170 (CanLII), https://canlii.ca/t/jwss4

Can an Encroachment onto Crown Land be Cured by a *Property Law Act* Application?

Key Words: *land swap, railway right-of-way, statutory remedies, statutory interpretation, survey plan*

The plaintiffs had purchased a farm property in 2003 through which a railway had once run in the early 20th century. A survey had been commissioned at the time of purchase and depicted the railway, but since the railway had long been abandoned and there was no reference to the right of way on title, the plaintiffs had assumed that the corridor was included in the main lot. The court described the surveying history of the strip as follows:

> […] The part of the strip that is relevant to this proceeding was surveyed in 1899 as District Lot 5391. Although the plaintiffs were unaware of this fact until recently, I believe it is now common ground that plans representing the survey of DL 5391 were filed in the Crown Land Registry and in the Land Title Office in Nelson in or about 1899. Title to DL 5391 was granted by the Crown in right of the Province to the railway company in 1901. (I will refer hereafter to District Lot 5391 as the "Railway Corridor" or the "Corridor").
>
> In 1927, a property identified as Lot 11338 was surveyed consisting of two pieces separated by the Railway Corridor. The two pieces comprised 36.7 acres and were shown on the survey, with the Corridor running between them at an angle (the north end being farther west than the south end). It appears the Crown granted title to DL 11338 in 1945 to one Mary Markin.[4]

At some point after 1945, the railway company discontinued operations and its assets (including the corridor) were transferred to the Canadian Pacific Railway. The CPR transferred the corridor to the province in 1995. The Plaintiffs purchased the property in a foreclosure sale in 2003. Below, Figure 1 depicts a portion of the survey plan prepared at the time the plaintiffs purchased the lot. The Canadian Pacific Railway line clearly bisects the lot, District Lot 11338 but given its state of disuse and the absence of reference to the line in the title documents, the plaintiffs assumed that it was included within DL 11338.

[4] Ibid. at paras 1-2

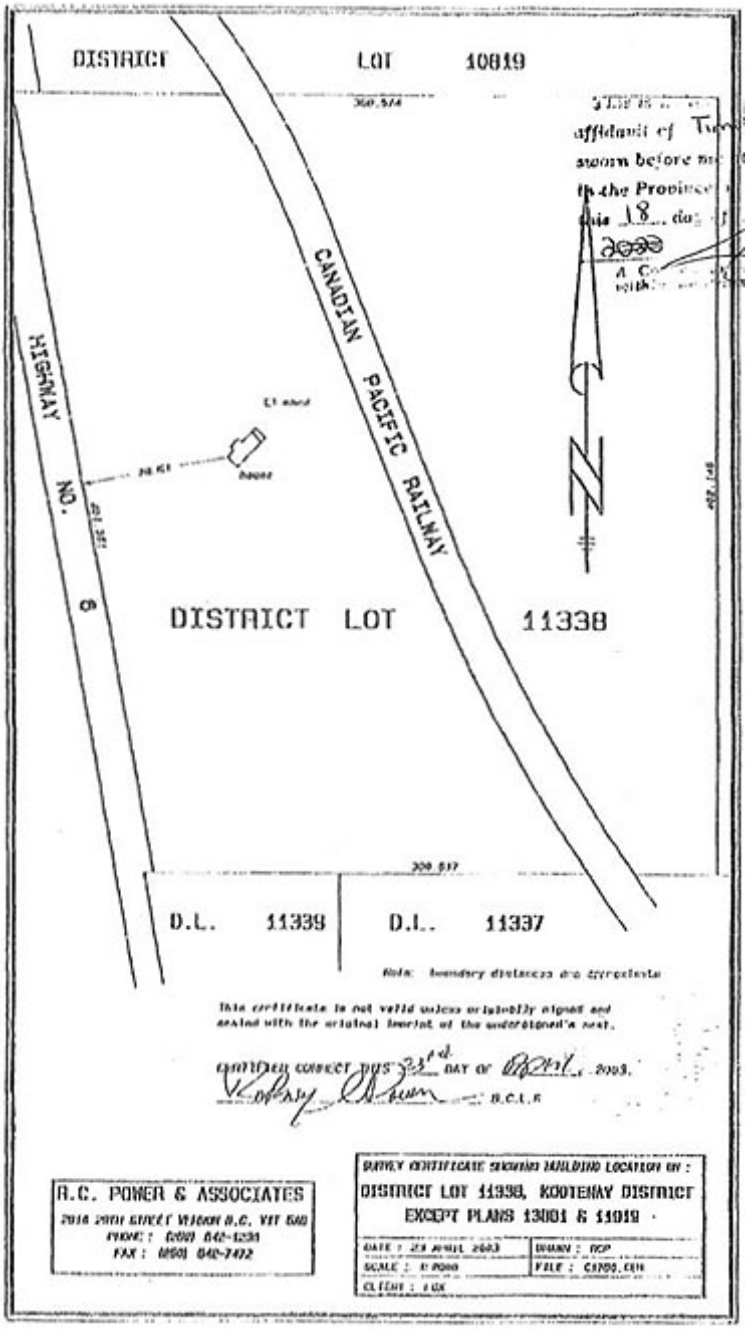

Figure 1: Appearing as Schedule A to the reported reasons, a plan of survey completed for the plaintiffs at the time of purchase depicting the railway line running through Lot 11338.

The plaintiffs built a barn and several other structures for their agricultural operation, some of which encroached onto the railway strip. They received a number of trespass notices from the Province beginning in 2013 as the Province began efforts to open the strip for public use as a recreational trail. Such activity conflicted with the plaintiffs' farming operations and in particular the wellbeing of their livestock. Eventually, a claim was brought under section 36 of

the *Property Law Act* for an order vesting title of the encroached lands to the plaintiffs in exchange for an alternative route through the plaintiffs' land or payment of compensation; or a declaration that the plaintiffs have a permanent easement over the encroached lands; or an order that the Crown pay compensation for loss and damage to the lands.

The highway, building and railroad strip all appear in the image below in Figure 2.

Figure 2: Visual image of site from Googlemaps®

The court described the history and rationale behind the cited provision of the *Property Law Act* as follows:

> Section 36 of the *PLA* provides:
>
> > 36 (1) For the purposes of this section, "owner" includes a person with an interest in, or right to possession of land.
> >
> > (2) If, on the survey of land, it is found that a building on it encroaches on adjoining land, or a fence has been improperly located so as to enclose adjoining land, the Supreme Court may on application
> >
> > (a) declare that the owner of the land has for the period the court determines and on making the compensation to the owner of the adjoining land that the court determines, an easement on the land encroached on or enclosed,
> >
> > (b) vest title to the land encroached on or enclosed in the owner of the land encroaching or enclosing, on making the compensation that the court determines, or

> (c) order the owner to remove the encroachment or the fence so that it no longer encroaches on or encloses any part of the adjoining land.
>
> The genesis of s. 36 and the correct approach to be taken in applying it were considered at some length by this court in *Taylor v. Hoskin* 2006 BCCA 39. As noted by Madam Justice Levine for the Court, the provision first appeared as s. 12 of the *Laws Declaratory Act*, R.S.B.C. 1960, c. 213 as a consequential amendment when a new *Limitation Act* was enacted. One of its effects was to jettison the principle of adverse possession, which was inconsistent with the Torrens system of land registration. In its *Report on Limitations: Part II — General*, the Law Reform Commission had expressed the view that adverse possession could still be useful in "boundary" disputes, and recommended legislation similar to what was then s. 28 of the *Law of Property Act* of Manitoba, R.S.M. 1970, c. L90 (see *Taylor* at para. 41). In due course, a slightly expanded version of that provision was adopted in 1975 in British Columbia. When the *Laws Declaratory Act* was repealed in 1978, the provision became s. 32 of the *Conveyancing and Law of Property Act*, S.B.C. 1978, c. 16, and ultimately became s. 36 of the present PLA.
>
> One of the issues before the Court in *Taylor* was whether s. 36 was intended to be interpreted narrowly or more liberally. The Court found that a "broader equitable approach" was "amply supported by a consideration of the history and purpose of s. 36." The phrase "equitable approach" was, I infer, not intended to suggest that a remedy like s. 36 had been available in Equity, but that the remedy was a discretionary one to which equitable principles such as fairness apply. As noted by Chief Justice Williams in *Hrynyk v. Kaprowy* 1960 CanLII 544 (MB KB), [1960] 30 W.W.R. 433 (Man. Q.B.) at 443:
>
> > I should point out that any relief given by the court under sec. 29 [the equivalent of s. 36 of the *PLA*] is entirely discretionary.... In exercising its discretion the court, as has been seen, proceeds upon equitable principles. [At 443.]
>
> In *Taylor* itself, the Court affirmed a trial judge's order for a "land swap" under s. 36, following an earlier land swap case, *Tai Wo Enterprises Ltd. v. 338822 B.C. Ltd.* [1996] B.C.J. No. 70 (S.C.).[5]

The Province took the position that s. 36 was limited in its application to disputes between private owners and did not apply to the Crown. Its application would take away provincial decision-making control over its interests in land and shift that role to the courts. The trial judge agreed with the Province's position. The Court of Appeal referred to this portion of the trial decision:

> In the judge's analysis, Crown land was excluded from the operation of s. 36, and it was "understandable" why this was so, given the context of the obligations placed on the Province by the [*Land Act*] when disposing of an interest in Crown Land." He continued:

[5] *Ibid.*, at paras 20-22

> The Province has discretionary decision-making authority over the land it holds on behalf of the people of British Columbia and it must consider the public interest in the exercise of its discretion. The [*Land Act*] imposes limitations and conditions on the Province's discretion to dispose of Crown land. Those limitations and conditions include the following [sections 8(1); 8(3); 9; 10.1(1); 11; 32(2); 33; 33.1; 35 were identified]
>
> This conclusion was, the judge noted, supported by the recent decision of *Wan v. British Columbia* 2022 BCSC 106, where the Court had ruled that Crown *foreshore* was excluded from the operation of s. 36 of the PLA. In particular, MacNaughton J. had stated in that instance:
>
> > There is a clear legislative intent not to permit the *PLA*'s vesting and entry orders to provide applicants a back door to circumvent the formal Crown grant process. The *Land Act*:
> >
> > 1. prohibits the acquisition of Crown land through unauthorized occupation, or colour of right, both of which are at the foundation of *PLA* vesting orders; and
> >
> > 2. sets up an exclusive statutory regime governing how individuals can gain an interest in the foreshore, to the exclusion of the *PLA*. [At para. 120; emphasis added.]
>
> The summary trial judge interpreted *Wan* as applying to *all* Crown land, not only foreshore. In the result, he ruled that the plaintiffs could not pursue a claim against the Province under s. 36 of the *PLA*.[6]

The appeal court also agreed:

> In my view, then, no error in law or principle has been shown in the summary trial judge's conclusion that s. 36 of the PLA does not apply so as to give the Court the ability to order a disposition of Crown land in order to resolve an encroachment dispute. Any such remedy would clearly "affect" the Crown's use of land — in this case, the Railway Corridor; indeed, as already noted, that effect would be the sole objective of any land swap or grant of easement. It would also have the effect of circumventing the myriad provisions of the *Land Act* designed to ensure that the public interest governs any disposition of Crown land. As we have seen, the authorities suggest that courts should be cautious in making orders that would circumvent or attenuate the provisions designed to protect the public interest where Crown land or an interest therein is being disposed of.[7]

Though the conclusion that s. 36 did not apply to Crown land in itself would be sufficient to dispose of the matter, the application of s. 36 was further discussed by the trial judge as noted by the Court of Appeal:

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[6] *Ibid.,* at paras 28-29
[7] *Ibid.,* at para 46

In *Vineberg v. Rerick* 1995 CanLII 3363 (B.C.S.C.), a three-part test had been suggested for consideration by a court in weighing the balance of convenience under s. 36, namely:

> a) Did the party seeking relief have an honest belief as to the location of the property line?
>
> b) Is the encroachment a lasting improvement? and
>
> c) How does the encroachment affect the properties in terms of present and future value and use? [Reasons at para. 60.]

On the other hand, this court in *Taylor* had emphasized that the three "*Vineberg* considerations" are not exhaustive and that the granting of a remedy under what is now s. 36 of the *PLA* is discretionary. In the words of the Court in *Taylor*:

> In applying the controlling principles of equity, the promotion of fairness and the prevention of injustice, in cases, such as this one, which present unusual factual circumstances, the court can only apply "tests" formulated in prior decisions to the extent that the tests may be relevant to the factual issues before it in determining whether to grant or refuse relief. [Quoted at para. 51 of *Taylor* from *Manita Investments Ltd. v. T.T.D. Management Services Ltd. (Realty World Capital)* (1997), 15 R.P.R. (3d) 88, *aff'd* 2001 BCCA 334, at paras. 42–43.]

As far as the *Vineberg* considerations were concerned, the summary trial judge noted the plaintiffs' claim that they had honestly believed that DL 11338 had included the Railway Corridor "even though their survey of DL 11338 showed the Railway Corridor running through the property." (At para. 65.) Although they "may have" relied upon legal advice and documents from the Land Title Office to conclude that the Railway Corridor shown on their survey was "merely a landmark from a previous time", they had not sought an explanation from their surveyor about the presence of the Corridor on his survey. After receiving the first Trespass Notice, they had proceeded to construct the horse barn because, the plaintiffs said, they had received no response from the Province to their letter disputing the trespass claim. The summary trial judge found that there had been an "element of recklessness and wilful blindness" on the plaintiffs' part. Although they may have had an honest belief that they owned the Railway Corridor, they had formed that belief "by failing to make inquiries that they ought to have made."

In connection with the second *Vineberg* consideration — whether the encroachment is a lasting improvement — there was little doubt that the fence, horse barn and pig barn were "lasting improvements" that could not be moved without "significant cost".

On the third consideration — how the encroachments affect the properties — the judge was left with no doubt that the Province's use of the Railway Corridor as a public trail would disrupt the plaintiffs' livestock operation and perhaps pose a danger to users of the trail and to livestock nearby. […]

> In the end, the *Vineberg* considerations did not provide the judge with a "clear indication" of where the equities lay between the parties. On the one hand, the permanent nature of the encroachments on the Railway Corridor and the significant costs of removing them tended to favour the plaintiffs, while on the other hand, the plaintiffs' failure to investigate the status of the land "fully and completely" before they purchased it tended to favour the Province. The judge continued:
>
> > With respect to the effect on the present and future value and use of the property, both the plaintiffs and the Province have legitimate and serious interests that will be compromised.
> >
> > While the balance of convenience on the *Vineberg* Considerations does not favour one party over the other, the deciding consideration in this case is the need to consider and protect the public interest through the requirements of the [*Land Act*].
> >
> > As suggested in *Liu*, I must be extremely cautious about making orders that eliminate the consideration of the public interest by elected representatives.
> >
> > Therefore, I conclude that the equities in this case favour the Province. Accordingly, even if s. 36 of the *PLA* applied to the Province, I would find that the plaintiffs are not entitled to the remedy they seek. [At paras. 82–85; emphasis added.][8]

On the question of equities and the application of s. 36, the appeal court also agreed.

> It will be recalled that the summary trial judge considered that even if s. 36 did apply to the Province, there were "legitimate and serious interests" on both sides relating to the status and use of the Corridor. (See para. 82.) In the Court's analysis, the deciding factor was the need to "consider and protect the public interest through the requirements of the [*Land Act*]." Applying the standard of review applicable to discretionary decisions formulated in *Friends of the Old Man River Society v. Canada (Minister of Transport)* 1992 CanLII 110 (SCC), [1992] 1 S.C.R. 3, I see no reviewable error in this part of the judge's analysis. I agree with him that caution is required in making orders that at least on their face "eliminate the consideration of the public interest by elected representatives". At the least, a much more precise understanding of the remedy sought under s. 36 would be required, necessitating a full survey of the 'bypass' area and, one assumes, evidence as to the economic value of what each side would be 'trading'. Such evidence was clearly not before the summary trial judge.[9]

While the appellants were unsuccessful, there was a certain amount of sympathy towards them. The reported decision noted that an application for a grant of the land under the *Land Act* was still available to them and the court went so far as to encourage the following:

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[8] *Ibid*., paras 30-35
[9] *Ibid.,* at para 47

> If the plaintiffs consider making such an application, I would urge the relevant Provincial authorities to consider the equities that were considered by the trial judge as lying on the plaintiffs' side, as well as the fact that they appear to have relied on the survey attached to these reasons as Schedule A when they were thinking of acquiring DL 11338. There was no reference to DL 5391 on that plan or on the title at the time. The reason for this has been explained, but that is little consolation to the plaintiffs at this point. Further, the comments of the Agricultural Land Commission concerning the negative effects of recreational trails on agricultural land should be of interest to the Province […].
>
> I express the hope that the plaintiffs and the Province may find some solution in the *Land Act* to the unfortunate situation in which the plaintiffs find themselves. Since no stay or injunctive relief was sought by the plaintiffs, I also express the hope that until a reasonable time has passed in which the plaintiffs could be expected to file an appropriate application should they decide to do so, the Province will not proceed with further enforcement of its trespass notices and other enforcement measures.

In addition to clarifying that section 36 of the *Property Law Act* is limited in its application to private owners and does not extend to the Crown, the decision also illustrates the importance of a thorough title investigation at the time of purchase. The court noted that the survey at the time should have raised red flags or caused the purchasers to seek clarity on the status of the CPR strip, in spite the absence of a reference on the title documents. To a land surveyor, the reading of plans may be second nature; for the layperson client, it may not be that easy.

Editors: Izaak de Rijcke & Megan Mills

Cross-references to *Principles of Boundary Law in Canada*

The remedies available to an owner who mistakenly builds a structure or lasting improvement on land believed to be their own (as well as implications for title and boundary), are discussed at pages 125 and following.

FYI

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