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.



We might assume that the difference between an easement and a licence is relatively easy to tell – especially when a right of access for maintenance can be sought from court under a statute. In *Shill v Hooker*,[1] this question became central in a dispute between neighbours. One neighbour owned the fence; the other neighbour's property title was not subject to any easement that would permit access by the neighbouring owner to maintain their fence. The decision is instructive in both property law and how not to get along with one's neighbours.

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# Distinguishing Between Easement and Licence in Obtaining a *Property Law Act* Remedy

**Key Words***: easement; fence; licence;* Property Law Act (BC)

It might be understandable that neighbours don't always get along. But it seems unthinkable that this sad reality is especially true when it comes to mere fences. As Justice Quinn wrote in *Suprun v. Bryla*,[2] "A good fence may make a good neighbour, but does it make a good lawsuit?"

The Shills built a wood fence in or about 1986, after they had bought their property. The fence ran close to the property line and, other than a minor encroachment at either end, it was located entirely on their property. A survey obtained by the Shills showed the encroachments to be "0.02" at the rear of the fence and 0.44" at the front."[3] What seems remarkable is

[1] *Shill v. Hooker*, 2023 BCSC 1979 (CanLII), https://canlii.ca/t/k145k

[2] *Suprun v. Bryla*, 2007 CanLII 56089 (ON SC), https://canlii.ca/t/1v8sl, citing, "Good fences make good neighbors [*sic*]." *Mending Wall* [1914], by Robert Frost (1874-1963).

[3] *Supra*, footnote 1, at para 3. This is a direct quote, but it is suspected that the dimensions are in fact in feet, not in inches, as appears in the reported decision at *Shill v Hooker*, 2023 BCSC 1979 (CanLII), at para 3, https://canlii.ca/t/k145k#par3.

Hookers' dispute of the survey, prepared by a BCLS, but with no other survey being produced by them.

The Respondent Hookers have owned their property since 2010, but the court noted that the parties had a "falling out" in 2015, without giving any details as to whether or not this was over the fence. In any event, after permitting the Shills to maintain the fence on their side of the property line for their first 5 years of ownership, the Hookers have denied the Shills access since 2015.

The Shills brought a petition to court under Section 34 of the *Property Law Act*. Section 34 states:

> 34 (1) The owner of a parcel of land on which there is a building, structure, improvement or work may apply to the Supreme Court for an order permitting the owner to enter adjoining land to carry out repair or work if
>
> a) the building, structure, improvement or work is so close to the boundary of the adjoining land that repair or work on the part of the building, structure, improvement or work that adjoins the boundary cannot be carried out without entering the adjoining land, and
>
> b) the consent of the owner of the adjoining land to the entry is refused or cannot reasonably be obtained.
>
> (2) An order under subsection (1) must state the following:
>
> a) the period of time and purpose for the permission;
>
> b) that the owner who obtains the order must compensate the adjoining owner for damage caused, in the course of carrying out repair or work under the order, by the owner who obtains the order, or by anyone employed or engaged by or on behalf of the owner who obtains the order, in an amount to be determined by the court if the owners cannot agree;
>
> c) other terms the court considers reasonable.[4]

The *Property Law Act* was amended in 2018 and interestingly, the court noted that there appeared to be no previous reported cases in which Section 34 had been applied since that year. The purpose of the amendment was explained by the Minister's statement as reported in *Hansard* when the amendment was introduced:

> In 2018 the provincial government amended s. 34 of the *Act*. When introducing the proposed amendment, the Honourable David Eby stated:

[4] *Property Law Act*, R.S.B.C. 1996, c. 377, s.34

> It's intended as such, that people should be able to access their land, and they should be able get through if they have something that they're working on - their building, structure or improvement. It's meant to be a broad definition... Apparently, this came to the attention of the ministry because someone owned a commercial building on a property that was enclosed by land owned by others. They couldn't reasonably get permission from the owners to access that commercial building because the definition said: ''the owner of a dwelling house on one parcel of land." That's why it's been expanded to now say: "The owner of a building, structure, improvement or work." It was the advice of legal counsel that that was really the intent of the provision. It makes sense, certainly, to have a provision to allow someone to access their land when necessary.[5]

Apparently, before 2018, Section 34 did not include wording that was broad enough to permit access to their property under the circumstances faced by the Shills. The relief sought by the Shills was an order that they, or a third party engaged by them can, on an ongoing annual basis, access the Respondents' Property to repair and/or maintain the fence. Terms were proposed in language that specified how the access would occur and re-occur, including a requirement that they pay damages to the Hookers if this became necessary.

Arguments made by the Shills built on earlier case law that had resulted from petitions made under s. 36(2) of the *Property Law Act* and that these should guide the court by analogy.[6] The court explained,

> The petitioners submit that s. 34 of the *Act* is to be considered remedial and is to be given a fair and liberal interpretation. The petitioners rely on *Oyelese v. Sorensen,* 2013 BCSC 940, where Justice Fitzpatrick, in addressing an encroachment issue under s. 36(2) of the *Act*, noted that:
>
> > [20] The *Act* is, in accordance with s. 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, to be construed as "remedial" and is to be given a "fair, large and liberal construction and interpretation as best ensures the attainment of its objects".
> > …
> > [27] The interpretation proposed by the Oyeleses is not consistent with a fair, large and liberal construction and interpretation that ensures that the objects of the *Act* are attained—namely, to resolve neighborhood disputes about encroachments based on equitable principles. …
>
> They note as well the comment in obiter of Justice Macintosh in *Chua v. Jassal*, 2019 BCSC 1686, varied 2020 BCCA 283, regarding the resolution of such neighborhood disputes:

[5] See "Bill 24 - Miscellaneous Statutes Amendment Act (no. 2), 2018", 1st reading, Official Report of Debates (Hansard), British Columbia, Legislative Assembly, 41-3, No. 127 (26 April 2018) at 4294 (Hon. David Eby).

[6] The most recent reported decision dealing with Section 36(2) was *D'Amico v Atkinson*, 2023 BCSC 2186 (CanLII), https://canlii.ca/t/k1p7s

> [21] While this one paragraph of these reasons is not a legal adjudication, I strongly recommend that the Defendants leave the wooden fence where it is and permit the Plaintiffs access to it to perform any final repairs or touch-ups, and to maintain it in future. None of the property owners who testified in this case appeared to me to be unreasonable people, and as I noted earlier, were it not for the Plaintiffs' mistaken belief that they had a right to a new retaining wall made of poured concrete on the Defendants' property, none of this unfortunate impasse likely would have occurred. I strongly hope the parties will resume the relationship of good neighbours they enjoyed in the past. [Emphasis added.]

> The petitioners' submission is that s. 34 as amended permits access to property enclosed by land owned by others and that the intent, based on a fair and liberal construction and interpretation, is to permit ongoing limited access to the adjoining land for a specified purpose where the landowner will not reasonably permit such access.[7]

The Hookers had insightful arguments as well. For example, reference was made to their title being subjected to a potential easement which would undermine the purpose of title registration in a province like British Columbia which had a *Torrens*-like *Land Title Act*.[8] As the court explained,

> Turning to the respondents' second objection concerning the type of order that can be made under s. 34, the respondents object not to the access itself but rather to the ongoing nature of the order sought. They submit s. 34 is not capable of supporting such an order. Instead, they submit that s. 34 contemplates an order allowing for a single instance of access for repairs or maintenance—not what is in effect equivalent to an easement allowing continuous access for as long as the parties own their respective properties.
>
> The respondents submit the petitioners rely on too broad a reading of s. 34, noting the policy and purpose of the Torrens system. In *Roop v. Hofmeyr,* 2016 BCCA 310, the Court of Appeal described the Torrens system:
>
> > [57] There are strong policy reasons for preserving the Torrens system of land registration from unregistered interests. The abrogation of the doctrine of implied grant by the *Land Title Act* with respect to subsequent good faith purchasers is rooted in the general principles upon which the Torrens system is premised. In *Principles of Property Law*, 6th ed. (Toronto: Carswell, 2014) at 481, Professor Ziff described the foundation of the Torrens system as follows:
> >
> > > Under Torrens the register is supposed to be everything. That means that one should (in theory anyway) be able to examine an abstract of title for a specific parcel of land and see listed there all of the interests in land that

[7] *Shill v. Hooker, supra*, footnote 1, at paras 14 to 16

[8] *Land Title Act*, RSBC 1996, c. 250, available at: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96250_00

> pertain to that parcel. The register is said to be a mirror of all rights in relation to that land.[9]

This submission was interesting and suggested (but stopped short) of an adverse possession-like argument. Considering the approach to a *Shill v Hooker* problem in other provinces, Ontario does not have a companion provision to British Columbia's Section 34 of the *Property Law Act*.[10] If a land owner in Ontario is land-locked with no access to their parcel, common law remedies might be pursued. Alberta's *Law of Property Act*[11] includes a remedy under Section 69 for lasting improvements or building encroachments made on the wrong land. This remedy persists despite the amendment to Alberta's *Law of Property Act* in 2022 which disallowed claims to title based in adverse possession.[12]

So what did the court in *Shill v Hooker* do? The answer is found when the court explained that,

> [t]he matter turns on the plain meaning of the wording of Section 34. Section 34 permits access to carry out repair or work. That implies such is necessary at that time, not some speculative work at some speculative future date. Section 34(2) states that the order sought must set out the period of time and purpose for the permission sought, that the owner seeking the order must compensate for damage and such other terms as the court considers reasonable.
>
> A plain reading of the section is it refers to a single occasion for access. That is, repairs or work are necessary and a specific time for that purpose is ordered. It makes no mention of a recurring or ongoing right of access. Section 35 of the *Act* addresses such, referencing easements, restrictive covenants, statutory rights of way and the like.
>
> Section 8 of the *Interpretation Act,* R.S.B.C. 1996, c. 238 requires that the purpose or object of the legislation in issue is kept in mind and the interpretation is remedial in the sense of a liberal interpretation to give effect to that purpose. Here the purpose is to permit access to another's property to effect <u>necessary</u> repairs and maintenance.
>
> The petitioners dispute the respondents' analogy to their request amounting to an easement noting the proposed right of access is a contractual one binding only on the present owners of the two properties not an *in rem* charge on respondents' land.
>
> The petitioners submit they should not have to come to court every year just to look at the fence to determine whether it requires any repairs or maintenance. They depose they have

[9] *Shill v. Hooker, supra*, footnote 1, at paras 23 and 24

[10] Although the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34 may apply

[11] *Law of Property Act*, RSA 2000, c. L-7 at s. 69

[12] *Ibid.*, at s. 69.1, by SA 2022, c. 23, s. 2

tried for eight years to gain access to the fence, two of those years with the assistance of a lawyer, all to no avail.[13]

If the right claimed by the Shills was a perpetual one, recurring every year, it would be tantamount to an easement. If the right claimed by the Shills had to be pursued afresh, every year, it would be more in the nature of a licence. This was not lost on the court when it concluded, on this part of the dispute,

> The reliance of the petitioners on s. 8 of the *Interpretation Act* to support a long term right of access goes beyond that purpose. While what is sought is an order relating to *in personum* rights and not an *in rem* remedy, nonetheless it goes beyond the wording of s. 34.
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> I therefore make the following orders:
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> a) The Petitioners be granted access to the Respondents' property, pursuant to s. 34 of the *Property Law Act*, R.S.B.C. 1996, c. 377, located at 933 Inskip Road, Victoria, B.C., Canada, V9A 4J6 and legally described as:
>
> Strata lot B, section 10, Esquimalt District Strata Plan VIS4845
>
> Together with an interest in the common property in proportion to the unit entitlement of the strata lot as shown on Form 1
>
> (the "Respondents' Property")
>
> b) Access for maintenance and repair and any future maintenance and repair is granted on the following terms:
>
> i. The Petitioners will provide 48 hours written notice to the Respondents prior to accessing the Respondents' Property for the purposes of repairing and/or maintaining the Fence. The notice shall include details of:
>
> (1) the type of work anticipated or being undertaken;
>
> (2) the persons or company engaged by the Petitioners undertaking the work; and
>
> (3) the expected duration of the work.
>
> (the "Written Notice")
>
> ii. Service of the Written Notice will be made either by:
>
> (1) if the Respondents provide an email for service, by emailing notice to the email address provided, pursuant to Rule 4-2(6)(a) and (b) of the *Supreme Court Civil Rules* (the "*Rules*"*);* or
>
> (2) by leaving the document in the Respondents' mailbox pursuant to Rule 4-2(3) (a) and (b) of the *Rules.*

[13] *Shill v. Hooker, supra*, footnote 1, at paras 28 to 32

iii. The Petitioners shall compensate the Respondents in the case of damage caused to the Respondents' Property by the Petitioners, or a third party engaged by the Petitioners, in the course of carrying out repairs and/or maintenance to the Fence.

iv. The Respondents must provide proof of damage in the form of photographic or video evidence in the case of an allegation of damage to the Respondents' Property.

v. Where the Petitioners, or a third party engaged by the Petitioners, have been alleged to cause damage to the Respondents' Property in the course of carrying out repairs or maintenance to the Fence, and the parties are unable to come to an agreement regarding a remedy for the damage, the Respondents may apply to the British Columbia Supreme Court (the "BCSC") for determination of a remedy for the damage.[14]

This might seem onerous for both parties. The Shills need to petition the court each year. The court ordered the Hookers to pay the Shills' costs. Neither side "won." A more neighbourly accommodation in the future might make sense – even if the parties could not ultimately "mend fences" on all fronts. Perhaps mediation or arbitration remain as options in the future.

*Editor*: Izaak de Rijcke

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

Easements of Necessity are discussed in *Chapter 5: Boundaries of Easements.*

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## FYI

There are many resources available on the Four Point Learning site. These include self-study courses, webinars and reading resources – all of which qualify for *formal activity* AOLS CPD hours.[15] These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year's quota.

[14] *Shill v. Hooker, supra*, footnote 1, at paras 33 and 34

[15] Please note that the designation of CPD hours is based on the estimated length of time for the completion of the event. The criteria used are those set out in GeoEd's Registered Provider Guide for Professional Surveyors in Canada. Other professions may qualify under different criteria. References to AOLS are to its Continuing Education Committee. Elsewhere in Canada, please confirm your eligibility for claiming CPD hours.

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