



*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.

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It is rare that the results of a survey makes the news. However, when a survey reveals encroachment of a garage and driveway, litigation between neighbours can result. Such was the subject of an article posted on the [CBC site](#). The opening paragraph of the article described the dispute: “A judge has ruled a man in a small Manitoba community must give up a portion of his property, after a once-accepted survey line led to a ‘regrettable’ legal fight between two next-door neighbours.” Such was the result in *Barnabe v. Robert*,<sup>1</sup> a Manitoba decision that once again resolved a claim to land innocently built upon which led to an encroachment.

In granting the claim to an order awarding title or an interest in land encroached upon, the court not only exercised its statutory authority to make such an order, but also explained the relevant principles when exercising such power.

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## Discovery from a Survey of an Encroachment Leads to Court Order Awarding Title

**Key Words:** *encroachment, discretion, official and historical survey, River Lot surveys*

Readers may be surprised that courts continue to play a role when an encroaching structure built by a neighbour is “discovered.” The remedy, tantamount to “private expropriation,” is discretionary and despite the court’s jurisdiction to make an order, success can never be guaranteed. Regardless of the practical consequences and costs of a court-ordered removal, the risk remains. If only a survey had been obtained first...

Such was the case in *Barnabe v. Robert*,<sup>2</sup> a decision of the Manitoba Court of King’s Bench.

A helpful summary of the circumstances leading to the dispute is given by the court:

Charlene Barnabe and Dustin Robert are homeowners on adjacent properties on Rue Caron, in the Village of Saint Jean Baptiste (St. Jean), Manitoba. Unknown to either, the original,

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<sup>1</sup> *Barnabe v. Robert*, 2025 MBKB 10 (CanLII), <https://canlii.ca/t/k90dh>

<sup>2</sup> *Ibid*



Note the proximity to the sectional township system to the west and the Red River to the east.

The retracement and survey of property lines can be a challenge at best of times, but in this context, the mention of no one getting a survey when purchasing or before building structures<sup>6</sup> leads to the very problem addressed in *Barnabe v. Robert*.

The court described the legislation which gave it jurisdiction to hear this application under *The Law of Property Act*<sup>7</sup> and the sections which distinguished between “improvements” and encroachments”:

Sections 27 and 28 of the *Act* specify:

**Relief of persons making improvements under mistake of title**

27 Where a person makes lasting improvements on land under the belief that the land is his own, he is or his assigns are entitled to a lien upon the land to the extent of the amount by which the value of the land is enhanced by the improvements, or is or are entitled, or may be required, to retain the land if the Court of King's Bench is of opinion or requires that that should be done, according as may, under all the circumstances of the case, be most just, making compensation for the land if retained, as the court may direct.

**Encroachments on adjoining land**

28 Where, upon the survey of a parcel of land being made, it is found that a building thereon encroaches upon adjoining land, the Court of King's Bench may, in its discretion,

- a) declare that the owner of the building has an easement upon the land so encroached upon during the life of the building upon making such compensation therefor as the court may determine; or
- b) vest title to the land so encroached upon in the owner of the building upon payment of the value thereof as determined by the court; or
- c) order the owner of the building to remove the encroachment.

The parties disagree as to whether s. 27 is available to provide relief to Ms. Barnabe, as the “improvement” (s. 27) or “encroachment” (s. 28) is a portion of Ms. Barnabe’s driveway and part of a garage attached to her residence. I find the driveway and garage is more properly considered an encroachment. It is partly on Mr. Robert’s land and partly on Ms. Barnabe’s. Neither is an improvement to Mr. Robert’s property in any way. To him as owner of his property, it is a detriment that does not enhance the value of his property.

As such, I will focus only on s. 28, which is fulsome enough to deal with this dispute. Counsel agree. I acknowledge the parties also addressed the possibility of a prescriptive easement, but it is unnecessary to consider it.<sup>8</sup>

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<sup>6</sup> *Ibid.*, *Barnabe v. Robert*, at para. 1

<sup>7</sup> *The Law of Property Act*, CCSM c L90

<sup>8</sup> *Ibid.*, at paras. 6-8

The court then described leading cases from Manitoba and British Columbia which established the principles for how the discretion was to be exercised:

The leading case in Manitoba respecting s. 28 is the Manitoba Court of Appeal's 2024 decision of **634 Broadway Ave Ltd. v. Par-Ket/Vending Inc.**, 2024 MBCA 24. The court undertook an extensive review of jurisprudence. It endorsed the Manitoba precedent of **Howarth v. Ferguson**, 2014 MBQB 103, aff'd in part 2015 MBCA 21, and the older British Columbia decision of **Vineberg v. Rerick**, 1995 CanLII 3363 (BC SC), which set out relevant considerations or factors in these types of situations, as clarified by the British Columbia Court of Appeal in **Taylor v. Hoskin**, 2006 BCCA 39 (at paras. 50 - 53).

The Court of Appeal in **634 Broadway** (at para. 40) is clear that s. 28 applications require the judge to review the so-called **Vineberg** factors to guide their assessment of the facts and equities of each individual case. The applicable principles include:

- where an encroachment is found to exist, s. 28 confers a broad discretion to impose an equitable resolution to boundary disputes, based on facts and equities of the individual case;
- the **Vineberg** factors are a non-exclusive list used in a balance of convenience analysis. No one factor is a threshold factor. These factors are not a "test" to be rigorously applied but rather are factors to weigh and consider, in the circumstances of each case, to follow principles of equity, promotion of fairness and prevention of injustice;
- the **Vineberg** factors are those set out at para. 20 and 21 of that decision:

[20] ... I have noted three predominant considerations used in the balance of convenience analysis:

1. The comprehension of the property lines: Were the parties cognizant of the correct boundary line before the encroachment became an issue? There are three degrees of knowledge: honest belief, negligence or fraud. The party seeking the easement should have an honest belief to be awarded this remedy.
2. The nature of the encroachment: Was the encroachment a lasting improvement? What is the effort and cost involved in moving the improvement? Was 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 these considerations will be weighed in favour of the petitioner.
3. The size of the encroachment: How does the encroachment effect 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.

[21] Before I begin to use these considerations to determine the balance of convenience in this matter, I emphasize that I am looking for exactly what the title of the test denotes -- an equitable balance between the interests of both parties.

I caution that at point 1 above, the reference to the party seeking the easement (or title) having an honest belief, has taken on a broader understanding. More specifically, an honest belief that the resulting encroachment was intended to be developed on the correct property, is neither a threshold issue or a necessary factor - it is not a precondition to granting an easement (s. 28(a)) or vesting title (s. 28(b)). Honest belief, negligence or fraud of the encroaching party are simply factors to be considered in the overall mix.

The Manitoba Court of Appeal explained and summarized:

[39] More broadly, in my view, the law in Manitoba and other provinces, including British Columbia, supports a broad, equitable approach to the application of s 28 of the *Act*. The *Vineberg* factors are applicable as guidance in assessing the equities, which involves a consideration of the degree of knowledge and comprehension of the property lines, the nature of the encroachment, the size of the encroachment and its impact on the neighbouring property owner's land. Where there is evidence of an honest belief in the comprehension of the property lines, that factor may generally favour granting the relief sought. On the other hand, where there is evidence the property owner exercised fraud, knew full-well where the property line was located and built across the property line onto neighbouring property, such evidence would weigh in favour of not granting relief under s 28. In cases where there is evidence of negligence, the court must weigh the facts and equities in the individual case to determine whether it should exercise its discretion. As pointed out in the British Columbia authorities, this is not an application of a one-size-fits-all “test” (*Taylor* at para 51). The factors are not independent hurdles that must be met.<sup>9</sup>

These criteria are important. For lawyers, they point to the kind of evidence needed to support an application. For land surveyors, these factors point to the importance of communicating to the public the need for an up to date survey before constructing improvements on land based only on an “assumed” property line location.

In *Barnabe*, the court applied the principles and ordered that, “the equitable resolution of Ms. Barnabe’s and Mr. Robert’s boundary and encroachment dispute is that an easement be granted or title vest to Ms. Barnabe sufficient to allow reasonable, common-sense use of the driveway and garage encroaching upon Mr. Robert’s property. Accordingly, Mr. Robert is entitled to compensation.”<sup>10</sup>

Fundamental to this determination was the rationale explained by the court as follows:

In sum, Ms. Barnabe, Mr. Reid, and Mr. Robert all were under the mistaken impression as to the correct or official property lines demarking their adjoining properties. They were all honestly mistaken until this was known to them in August 2016. There is no negligence or

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<sup>9</sup> *Ibid.*, at paras. 9-11 Note that *634 Broadway Ave Ltd. v. Par-Ket/Vending Inc.* was the subject of an earlier issue of TBP at [https://4pointlearning.ca/4PL/TheBoundaryPoint\\_vol12\(4\).pdf](https://4pointlearning.ca/4PL/TheBoundaryPoint_vol12(4).pdf)

<sup>10</sup> *Ibid.*, at para. 12

fraud on behalf of Mr. Reid or Ms. Barnabe in any way respecting the construction of the driveway or garage, which was done decades before they acquired the property. When Mr. Robert bought his property, he assumed that the driveway and garage were properly on the neighbouring property. In other words, he did not believe that was his property. In effect, granting Ms. Barnabe's application would leave Mr. Robert in the exact position he thought he was in when he purchased his property, *vis a vis* that property line. Granting the order I do, leaves him in a better position.

Further, the size of the area encroached by the driveway and garage is not material to either party except as to the cost to remove or rectify the encroachment if so ordered. Neither is the impact upon Mr. Robert by the loss of this area. Overall, it is not reasonable or just that Ms. Barnabe be required to expend about \$26,000 to do so, or \$79,600 to remove, repair and replace the driveway and garage. This is disproportionate to the value of both properties but particularly, the slightly diminished value of Mr. Robert's property if vesting or an easement were granted. By paying whatever purchase price he paid, he had already implicitly accounted for the encroachment because he did not believe that was his land. In saying this, I recognize he lost some land he thought was his to his other neighbour. I also take into account evidence of the title insurance appraisal as to the actual loss from an easement or title being granted to that area.<sup>11</sup>

Note the mention of title insurance by the court and the fact that some compensation might be available. It is unclear what role the insurer played, or if either of the parties were compensated at all. The article on the [CBC news site](#) makes no mention at all of title insurance, despite such coverage now being ubiquitous for home buyers across Canada.

*Editor:* Izaak de Rijcke

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

The subject matter considered in *634 Broadway Ave Ltd. v Par-Ket/Vending Inc.* is discussed in section 6: *Honest but Mistaken Belief Regarding the Boundary and Ownership*, and in Chapter 4: *Adverse Possession and Boundaries*.

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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

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<sup>11</sup> *Ibid.*, at paras. 14-15

hours.<sup>12</sup> These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year's quota.

## AOLS' 133rd Annual General Meeting

This year's theme: *Navigating a Demanding Landscape: Futureproofing the Profession*, underscores the profession's commitment to adapting to a rapidly changing industry. This in-person [event](#) is set to take place from March 5 to 7, 2025, at the Westin Ottawa.

## SaGES Conference

British Columbia Institute of Technology (BCIT) is hosting the 29th biennial [conference](#) of the Surveying and Geomatics Educators Society (SaGES) set to take place from June 15-19, 2025 in Vancouver.



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<sup>12</sup> 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.