



*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 affect your work.

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Land fronting on water continues to generate disputes that often result in litigation. This month we turn back to British Columbia where sometimes stark but beautiful topography can result in extreme building challenges – and encroachments. We consider an appellate decision from what started as a petition for the removal of an encroaching retaining wall at the waterfront.<sup>1</sup>

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## Encroachments and Retaining Walls at the Waterfront

**Key Words:** *encroachment, easement, equitable remedies, natural boundaries*

The court at first instance gave a brief summary of the case:

At issue is a concrete block retaining wall (“Block Retaining Wall”) separating two properties that was built before either property was purchased by their current owners. The petitioner says the Block Retaining Wall encroaches on his property and seeks an order pursuant to s. 36(2)(c) of the *PLA* that it be demolished.

In response, the respondent seeks an order under s. 36(2)(a) of the *PLA* granting an easement over the petitioner’s property for so long as the Block Retaining Wall continues to exist. The respondent says that the encroachment at issue has only arisen because of the recent alteration of the petitioner’s property line extending its lakefront “natural boundary” and enlarging it. The petitioner has now registered a new survey plan at the Land Title Office (“LTO”) resulting in a portion of the Block Retaining Wall encroaching onto his property.

### Summary of Decision

For the reasons that follow, the petition is dismissed with costs.

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<sup>1</sup> *D’Amico v. Atkinson*, 2023 BCSC 2186 (CanLII), <https://canlii.ca/t/k1p7s>; appeal dismissed at *D’Amico v. Atkinson*, 2024 BCCA 330 (CanLII), <https://canlii.ca/t/k6v86>

Further, there shall be a declaration that, on payment of \$2,000 to the petitioner and for such period as the Block Retaining Wall continues to exist, the respondent shall have an easement over the petitioner's property to the extent of the encroachment.<sup>2</sup>

In order to gain a sense of the location and title records in LTSA, please refer to Figure 1<sup>3</sup> below:



### *Waterfront Boundaries and Understanding the Effect of Accretion*

One of the most important features of the case is that the dispute was not simply about a retaining wall. Rather, the litigation arose because the legal boundary itself evolved over time through accretion and later became reflected in an updated survey plan accepted by the Surveyor General.

The petitioner's lakefront property on Okanagan Lake had increased in size through natural processes. The chambers judge accepted that the petitioner lawfully obtained an updated survey plan showing an extended natural boundary lakeward. Prior to registration of that updated plan, the retaining wall was either entirely on the respondent's property or on Crown land. Only after the updated plan was accepted did the retaining wall technically become an encroachment.

This aspect of the decision is particularly significant for surveyors and real property practitioners. It demonstrates that encroachment disputes may emerge not because parties deliberately build across boundaries, but because the legal expression, or location, of the boundary changes over time. Waterfront properties are uniquely vulnerable to such

<sup>2</sup> *Ibid.*, at paras 2 to 5

<sup>3</sup> Image from LTSA at <https://parcelmapbc.ltsa.ca/pmsspub/> All rights reserved. Further annotated with text boxes and arrow.

developments because natural boundaries are ambulatory. Erosion, accretion, sediment movement, and shoreline stabilization efforts may all affect how parcel boundaries are later interpreted and depicted.

This case therefore illustrates a recurring tension in waterfront law – the distinction between physical occupation on the ground and legal boundary recognized in a title registration system. For years, the retaining wall existed without controversy. Yet, once the revised plan was approved, an encroachment suddenly materialized *in legal terms*.

Importantly, the court resisted an overly formalistic application of indefeasible title principles. Although the petitioner possessed valid title to the accreted lands, that did not automatically entitle him to the drastic remedy of demolition. Instead, the court turned to the equitable jurisdiction found in s. 36 of the *Property Law Act*.

#### *The Role of Section 36 of the Property Law Act*

Section 36 of the *Property Law Act* remains one of the most flexible remedial provisions in British Columbia property law. Historically, encroachments often resulted in mandatory removal orders. Equity intervened because rigid enforcement could produce disproportionate hardship.

As various authorities have recognised, the legislation allows the court to grant easements, vest title, or order compensation where a structure encroaches onto adjoining land.

The statute provides the court with three principal remedial options:

1. vesting title to the encroached land;
2. granting an easement; or
3. ordering removal of the encroachment.

The selection of the appropriate remedy depends largely upon the balance of convenience and equitable considerations.

The chambers judge in *D'Amico v. Atkinson* emphasised several key factors:

- the encroachment was extremely minor;
- the retaining wall pre-dated both current owners;
- the respondent honestly believed the wall was properly located;
- removal would be costly and environmentally disruptive; and
- the petitioner's claimed prejudice was minimal.

The encroachment itself measured approximately 4.5 square metres – “mainly linear” – along a property consisting of more than an acre.

The court concluded that demolition would be disproportionate to any practical harm suffered by the petitioner. That conclusion reflects a broader trend in encroachment jurisprudence – courts increasingly focus on functional prejudice rather than abstract invasions of title.

### *The Importance of Honest Belief*

A recurring theme in encroachment cases is whether the encroaching party acted in good faith. The jurisprudence has long distinguished between intentional trespassers and parties who honestly but mistakenly believed they were building within their boundaries.

The chambers judge found that the respondent had an honest belief that the retaining wall did not encroach on the petitioner's property. Indeed, for many years the registered plans appeared to support that assumption.

That finding substantially influenced the equitable analysis. Courts are generally reluctant to reward deliberate encroachers. However, where an encroachment results from uncertain boundaries, historical occupation, or evolving surveys, equitable relief becomes more readily available and important.

The appellate court<sup>4</sup> later confirmed that the chambers judge made no palpable and overriding error in assessing the respondent's state of knowledge. The Court of Appeal stressed the deferential standard applicable to discretionary balancing under s. 36.

This aspect of the case is particularly important for litigators. Encroachment disputes are often driven by emotional reactions to perceived invasions of ownership rights. Yet the courts consistently approach these disputes pragmatically. Accordingly, a technically successful title claim may nevertheless fail to justify demolition where the equities strongly favour preserving the *status quo*.

### *Retaining Walls as "Fences"*

Another subtle but important feature of the decision concerns the characterization of the retaining wall itself. Section 36 applies not only to "buildings" but also where "a fence has been improperly located so as to enclose adjoining land." Earlier authorities interpreted "fence" broadly, including retaining walls and other structures separating contiguous properties.

The chambers judge accepted that the retaining wall qualified as an encroachment under the legislation. This broad interpretation is sensible from both practical and policy perspectives.

Waterfront retaining walls frequently function simultaneously as:

- erosion control structures;
- shoreline stabilization systems;
- lateral support mechanisms;
- boundary demarcations; and
- integrated landscape features.

To restrict the legislation only to traditional upright fences would undermine the remedial flexibility intended by the statute.

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<sup>4</sup> *D'Amico v. Atkinson*, 2024 BCCA 330 (CanLII), <https://canlii.ca/t/k6v86>

Surveyors and property lawyers should note that modern shoreline improvements often blur distinctions between structural, environmental, and boundary-related infrastructure. Docks, tie-back walls, revetments, riprap installations, and retaining systems may all become relevant in the analysis of future encroachment disputes.

### *The Court's Rejection of Technical Opportunism*

Perhaps the most striking language in the decision was the chambers judge's description of the petitioner's complaints as "disingenuous, trifling, and nonsensical."

Such language is unusual in property litigation, where courts ordinarily adopt restrained phrasing. The comments reveal the judge's concern that the petitioner sought to leverage a highly technical encroachment into an excessive remedy.

The petitioner argued that the retaining wall interfered with recreation, storage, access to the waterfront, and future construction plans. Yet the photographic evidence appears to have undermined those claims. The court concluded the wall had only a *de minimis* effect on the property.

This aspect of the case underscores an important practical reality – encroachment litigation often turns heavily on visual evidence. Unlike many commercial disputes, property cases are profoundly spatial. Surveys, aerial photographs, historical plans, shoreline images, and site inspections can become compelling evidence.

Indeed, one reason this case is particularly valuable pedagogically is that the extensive photographic record allows readers to understand why the court regarded demolition as unreasonable. Textual descriptions alone would not convey the proportionality concerns nearly as effectively.

### *Environmental and Waterfront Considerations*

The waterfront context also materially affected the court's reasoning. The chambers judge observed that removing the retaining wall could trigger environmental assessments and governmental approvals. Waterfront works frequently engage overlapping regulatory regimes involving fisheries protection, riparian setbacks, Crown foreshore rights, and environmental permitting.

Thus, unlike a simple suburban fence dispute, demolition here risked destabilising the shoreline infrastructure and creating broader environmental consequences. This feature of the case highlights the interconnected nature of waterfront development. Retaining walls are rarely isolated structures. They interact with shoreline processes, adjacent improvements, docks, bridges, and erosion patterns. Removal of one segment may compromise the integrity of the larger system.

The decision therefore reflects judicial sensitivity to the realities of waterfront engineering. Courts increasingly recognise that rigid enforcement of surveyed boundaries may produce undesirable physical consequences where shoreline stabilization systems are involved.

#### *Lessons for Surveyors and Real Estate Practitioners*

Several practical lessons emerge from the decision.

First, waterfront boundaries should never be assumed static. Natural boundaries may migrate gradually through accretion or erosion, and property title updates can fundamentally alter legal relationships years after structures are constructed.

Second, historic occupation matters. Courts will examine the physical and legal context existing at the time the encroaching structure was built, not merely the present-day survey plan configuration.

Third, proportionality remains central. Even where encroachment is technically proven, removal is not automatic. Courts focus heavily upon practical prejudice, cost, environmental impact, and fairness.

Fourth, visual evidence is critical. The photographs and surveys in this case appear to have substantially influenced the court's assessment of credibility and proportionality.

Finally, litigants should approach encroachment disputes cautiously. The petitioner succeeded in establishing the legal encroachment, yet ultimately lost the petition, paid costs, and received only modest compensation.

#### *The Appellate Decision*

The subsequent appeal confirmed the broad discretionary authority available under s. 36. The Court of Appeal rejected arguments that the chambers judge misunderstood when the encroachment arose or improperly applied accretion principles. Instead, the appellate court held that the chambers judge appropriately weighed the factual and equitable considerations.

Most importantly, the appeal decision reinforces the deferential standard applicable in encroachment cases. Because s. 36 requires highly contextual balancing, appellate courts are generally reluctant to interfere – absent clear error. Parties challenging discretionary encroachment remedies face a difficult burden on appeal.

#### *Conclusion*

*D'Amico v. Atkinson* is ultimately not a case about a retaining wall alone. It is a case about the impermanence in position of waterfront boundaries, the interaction between natural processes and registered title, and the equitable flexibility required to resolve modern land disputes fairly. The decision demonstrates that strict legal ownership does not invariably dictate remedy. Courts applying s. 36 of the *Property Law Act* remain deeply concerned with proportionality, practicality, good faith, and the balance of convenience.

For surveyors, the case highlights the continuing importance of historic surveys, shoreline evolution, and visual evidence. For lawyers, it reinforces the centrality of equitable discretion in encroachment litigation. And for waterfront owners, it serves as a reminder that the shoreline is rarely static – legally or physically.

In the end, the retaining wall remained. But the case stands as a sophisticated illustration of how Canadian courts mediate the difficult intersection of seeking title certainty, shoreline change and slowly changing boundaries, neighbour relations, and equitable justice.

*Editor:* Izaak de Rijcke

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

A discussion of encroachments and remedies can be found at page 163.

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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.<sup>5</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.

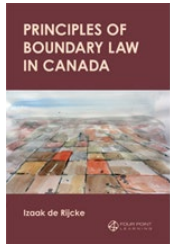
#### **Course: *Survey Law 1***

***Survey Law 1*** provides a foundation for professional surveyors to integrate legal principles, legislation and regulations within the overall framework of property boundary surveys. This course will be taught online Wednesday evenings by Izaak de Rijcke, starting September 9<sup>th</sup>. For more information, consult the [syllabus](#). Please go to Four Point Learning to [register](#).

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<sup>5</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.

## *Principles of Boundary Law in Canada*



This comprehensive treatment of the principles of boundary law lies at the intersection of law and land surveying. Although the textbook has its foundation in the law of real property in Canadian common law jurisdictions, it is intended as a resource which bridges two professions. For real estate lawyers, it connects legal principles to the science of surveying and demonstrates how surveyors' understanding of the parcel on the ground has helped shape efficient systems for property demarcation, conveyancing and land registration.

See [\*Principles of Boundary Law in Canada\*](#) for a list of chapter headings, preface and endorsements. You can mail payment to: **Four Point Learning** (address in the footer of the first page of this issue of *The Boundary Point*) with your shipping address **or** [purchase](#) online. (*NB: A PayPal account is not needed.*)

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