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(Winnipeg Centre)
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

CHARLENE BARNABE,	)	Evan F.P. Podaima
	)	for the applicant
applicant,	)	
- and -	)	
	)	
	)	
DUSTIN ANDRE ANTHONY ROBERT	)	Jessie J.D. Rock
	)	for the respondent
respondent,	)	
	)	
	)	Judgment Delivered:
	)	January 17, 2025

MARTIN J.

INTRODUCTION

[1] 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, historical property lines were drawn according to a "river-lot" surveying system, while decades later, another official survey aligned the property lines to the road at the front of the property. As a result, Ms. Barnabe's home,

specifically part of its attached garage and approaching driveway, encroached on Mr. Robert's property. This is not an unusual occurrence on Rue Caron. Other properties are similarly affected by the conflicting surveys, with various structures not corresponding to the official property lines. I understand some properties may have up to 50% of a residential structure within a different property line. Further, new purchasers of these properties often did not obtain a formal survey as part of pre-purchase due diligence and hence the problem persists.

[2] While Ms. Barnabe and Mr. Robert had a friendly, neighbourly relationship, the encroachment and boundary issue was accepted, as it is for many other homeowners on Rue Caron. However, in 2021, their rapport soured, and the issue became contentious. One or the other sought assistance from the local municipality, lawyers, the RCMP and now the court.

[3] Ms. Barnabe made an application under s. 27 and s. 28 of ***The Law of Property Act*** C.C.S.M. c. L90 (the ***Act***) for a declaration of an easement upon Mr. Robert's property, or alternatively, that the title to the encroached land be vested to her. In either case, compensation would be due to Mr. Robert. If granted, they do not agree on the amount of compensation. Further, Mr. Robert's primary position is the encroachment should be removed so that he can enjoy his property in full.

[4] Otherwise, in general, the conflict between the official and historical survey is too cumbersome for a one-size-fits-all fix by government, given the highly individual nature of specific encroachments, property lines and knowledge or perceptions of owners.

[5] Much of the evidence led by both parties on affidavit and cross-examination is not critical to the determination of the legal issue. It is really more of an explanation and tit-for-tat measures each took as their friendship deteriorated. As such, I will set out the law and then, to the extent necessary, in my analysis refer to salient facts.

THE LAW

[6] 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.

[7] 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.

[8] 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.

[9] 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. Farguson***, 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).

[10] 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 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 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.

[11] 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.

APPLICATION OF THE PRINCIPLES

[12] Based on the facts that I have found, and for the reasons that follow, 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.

[13] My analysis includes:

a) The Parties' Knowledge and Comprehension:

When did the parties acquire their properties? Was the encroachment in place? What was their understanding of the property lines and encroachment?

- Ms. Barnabe was bequeathed her property in 2020, from her common-law partner's estate (Mr. Reid) after his death in 2018. She had lived there with him since 2015. According to a property report, Mr. Reid acquired the property in 2010;
- Mr. Robert acquired his property in December 2015;
- the encroachment was built in 1980, originally as a car port and patio. It was enclosed sometime later, apparently before Mr. Reid acquired the property;
- Ms. Barnabe (and Mr. Reid) and Mr. Robert believed that the driveway and garage were on her property until he had a formal survey done in August 2016, as he was contemplating erecting a fence. He says they were all stunned with the survey;
- upon learning of the true or official property lines according to the survey, the parties continued to co-exist harmoniously with the historical property line. Mr. Robert put off building the fence;
- Mr. Robert deposed he would deal with a new owner about the conflicting property lines when Ms. Barnabe's property changed hands;
- I also note Ms. Barnabe's property is encroached by a residence to the south. She and that neighbor have agreed to adjust or right-size her property to reflect the historical property line when she sells. On the other side, after Mr. Robert purchased his property, his northernly

neighbor erected a fence on the official property line. Mr. Robert had a swing set on that property, but no fixed or permanent structures;

- Neither Ms. Barnabe nor Mr. Robert have any present intention to sell.

How did the acrimony over the property come about?

- In 2021, Ms. Barnabe re-partnered. That man resided with her. He and Mr. Robert got along until they did not. Thereafter, Mr. Robert started complaining about the property lines and trespass. Ms. Barnabe and the man split-up in 2022. He is no longer a factor. Ms. Barnabe did not condone the petty, corrosive actions her partner took that aggravated Mr. Robert. To be clear, Mr. Robert also undertook petty reprisals;
- In August 2022, Mr. Robert and Ms. Barnabe exchanged lawyers' demand letters; he wanting the encroachment removed and she to assert a prescriptive easement. Further, in 2023, Mr. Robert's counsel sent another demand letter to remove the encroachment(s);
- In July 2022, Ms. Barnabe offered to purchase the encroached upon land from Mr. Robert. He did not respond;
- In November 2022 and July 2023, Mr. Robert built a front fence near the official property line, but without bisecting the driveway. When it reached the garage, it essentially abutted it and, with a small exception at the rear corner, the back fence is one foot from the

official property line. As it is, Ms. Barnabe would have to trespass on his property to do normal maintenance on her garage.

b) The Encroachment:

What is the nature and impact of the encroachment? Is it fixed or temporary? What is the cost to remove the encroachment or to replace it? What is the effect on value to the encroached property?

- the encroachment is described by surveyors as part of the driveway, garage, wing wall and cantilever floor. The garage floor is concrete. These are fixed or permanent structures;
- the official property line bisects much of the driveway and a corner of the garage, in a lopsided triangle. Eyeballing the surveys in evidence, the area encroached by the driveway and garage is not a substantial portion of Mr. Robert's property. That said, this comment ignores any temporary structures that may be in place near the back property line and any occupation of the rear yard that the historical property line allowed for;
- only one estimate is in evidence showing costs to remove, repair and rebuild the driveway and garage. It demonstrates $25,700 to remove the driveway and garage, including necessarily incidental repair to the land and house, and $53,900 to rebuild the driveway and garage in another location, for a total of $79,600. Mr. Robert takes issue with these values, suggesting the removal and repair should be quantified

at $20,000, and that no consideration be given for any rebuilding. Having noted this, again, only one estimate is in evidence. I have no cogent reason to disregard it;

- in evidence as well was a letter from Mr. Robert's title insurance. Their appraiser assessed the situation in 2024 and determined the value of his property at $151,000, or $149,000 taking into account the loss of the portion of land the encroachment is upon. They peg the actual loss of the encroached land at $2,000;
- also in evidence is municipal property assessments showing the assessed value of Mr. Robert's property at $13,000 for land and $62,100 for buildings, or $75,100 all in. I cannot square the title insurance values against the municipal assessed values. For Ms. Barnabe's property, the assessed values are $10,000 for land and $81,600 for buildings, or $91,600 all in. No formal appraisal evidence was submitted for either, likely owing to cost relative to the issues, and I have no evidence of the purchase price of either property;
- I also note Mr. Robert says he will have difficulty building a proposed large garage if he does not have the encroached land. This is hard to reconcile with photos showing his property, house and double detached garage, and the surveys.

[14] 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 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.

[15] 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.

THE ORDER

[16] Ms. Barnabe's application is granted. Counsel should determine whether it is feasible, from a technical and land title standpoint, that the area encroached by the garage and driveway only be vested to her. If so, that is my order. If it is not technically feasible, then I order an easement.

[17] The property line would be the front and back fence line that Mr. Robert installed up to the garage, at which point the fence must allow three feet distance or clearance from the garage structure to allow Ms. Barnabe reasonable access to the garage exterior walls, window, roof, overhang and gutters. This would effectively carve-out the driveway and garage encroachment from Mr. Robert's property, and otherwise conform to the official property line past the driveway in the front, and the garage corner in the rear. Any other items belonging to Ms. Barnabe that may be on Mr. Robert's property must be removed. If there are any concerns in respect of any of this, counsel should make an appointment, and I will clarify as necessary to ensure the order can be put in effect with certainty and finality.

COMPENSATION

[18] As to compensation, the parties are far apart. On a vesting, the title insurer values the lost value at $2,000. Ms. Barnabe suggests one payment of between $2,000 to $3,000, plus she would assume survey/land title fees. She equates this as roughly 20%+ of the total square footage of Mr. Robert's property, which the

municipality has assessed at $13,000. Mr. Robert seeks an easement charge of $3,000 per year ($24,000 from 2015 to present and $3,000 per year going forward).

[19] The net result of my order is that neither party gets exactly what they wish. Mr. Robert wanted the easement removed and the official property lines to be respected. Ms. Barnabe wanted vesting of the encroached property, including part of the rear yard according to the historical property line. Instead, the order attempts an equitable remedy of a carve-out of an area as minimal as practical to allow Ms. Barnabe continued use of the encroachment yet minimize the impact to Mr. Robert.

[20] Under these circumstances, the value of vesting the property versus an easement of the property makes no practical difference. Hence the values should be equivalent. The title insurance valuation is the only independent evidence in this respect, yet Ms. Barnabe has offered slightly more. I therefore set a one-time payment of $3,000 for either vesting or an easement. Given the facts I have found, there is no logical reason for a past-use payment to Mr. Robert. Ms. Barnabe will also be responsible for any survey or land title fees to give effect to this order. Further she will be responsible for the cost, to a maximum of $750, of installing and modifying the fence surrounding the garage to allow a three-foot clearance for maintenance. If this requires moving the few patio blocks and BBQ at the rear corner of the garage, that should be done. It may be most expedient if she simply reimburses Mr. Robert up to this amount for him to do the fence as he did the other fence.

CONCLUSION

[21] It is most regrettable the parties felt compelled to resort to litigation and the court to determine this issue for them. Nonetheless, that is what they each felt was necessary, even after encouragement from me to seek a reasonable settlement of their own making.

[22] Given that I do not consider neither party as being particularly responsible for the escalation of this matter to court, and the novel nature of the issue in St. Jean, I decline to award costs to either party. Further, I understand Mr. Robert's title insurance will cover some legal costs.

[23] In the end, Ms. Barnabe's application is granted consistent with paragraphs 16 to 20 of this judgment.

[24] I reiterate, if there are any issues or questions that flow from this judgment counsel should contact me.

_____ J.