IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Epp v. Gartside,*
2011 BCSC 1687

Date: 20111212
Docket: 19978
Registry: Cranbrook

Between:

Vern Russel Epp and Holly Charanne Epp

Petitioners

And

Anna Mae Gartside, Vera-Lynn Gartside and Oren Edmund Gartside

Respondents

Before: The Honourable Mr. Justice Melnick

Reasons for Judgment

Counsel for the Petitioners:	D. Collins
Counsel for the Respondents:	N. Robertson, Q.C.
Place and Date of Hearing:	Cranbrook, B.C. November 15, 2011
Place and Date of Judgment:	Cranbrook, B.C. December 12, 2011

[1] The petitioners (the "Epps'") seek a declaration that they hold an easement over a portion of the land of their neighbours, the respondents (the "Gartsides"), for part of the driveway to their residence. They also seek to enjoin the Gartsides from entering upon their land or the portion of their driveway on the Gartsides' land.

I. BACKGROUND

[2] The lands of both parties are located on Black Bay on Moyie Lake near Cranbrook. They are in a subdivision that was created over 70 years ago. That is when the family of the Gartsides acquired their land. The family built a vacation home on it which is now occupied year-round by the respondent, Anna Mae Gartside ("Ms. Gartside"). The Epps purchased their property in 1996 from Maria Isabel Halskov ("Ms. Halskov"). Ms. Halskov is the widow of Eric Halskov ("Mr. Halskov"). Mr. Halskov had acquired the Halskov property from others in the late 1950s or early 1960s.

[3] At that time, the mother of Ms. Gartside, Mrs. Knight, gave Mr. Halskov and his then wife permission to access their property by building a portion of their driveway over part of her property. The Halskov land, and another lot beyond it owned by a Mr. Graham, were already being accessed by an unregistered easement across the Gartside (the Knights') land. The evidence before me is that Mrs. Knight made it clear to Mr. Halskov and his then wife that she did not wish to grant them a formal easement that would run with the land, but rather was doing so only as a personal favour to the Halskovs. What Ms. Halskov knew of this from Mr. Halskov, if anything, is unknown. However, in approximately 1991, after the death of Mr. Halskov and Mrs. Knight, Ms. Halskov asked Ms. Gartside to grant her an easement for the driveway. Ms. Gartside refused, explaining then to Ms. Halskov that the easement had always been intended only for Halskovs' use and not a subsequent owner. Thus, Ms. Halskov clearly knew that she had no right of passage over the Gartside land to sell to another.

[4] Ms. Gartside and her family had been upset when, in 1987, the Government of British Columbia expropriated a large part of their land for a road right-of- way.

The government then claimed the right to do so as they had (at the apparent request of the Grahams and the Halskovs) plowed the road in the winter. So what was a favour to neighbours by the Knight family turned into the loss of lakefront property for modest compensation. It was against this background that Ms. Gartside insisted on the original easement arrangement permitted by her mother. Ms. Halskov did not pursue the matter further.

[5] In mid 2005, Ms. Halskov listed her property for sale with a realtor, Sharron Billey ("Ms. Billey").

[6] In early September 2005, Debbie Graham ("Ms. Graham") and a Ms. Large attended an open house held by Ms. Billey to show the property. Ms. Large and her husband own a cottage nearby. At that time, Ms. Graham, in the presence of Ms. Large, explained to Ms. Billey that there was no driveway access from the roadway to the Halskov property; that the driveway crossed the Gartside property. Ms. Billey indicated that she was aware of an encroachment onto the Gartside property by a few feet.

[7] Ms. Graham explained to Ms. Billey that the encroachment was much greater - that the bottom third of the Halskov driveway was located on the Gartsides' property. Ms. Graham pointed out to Ms. Billey what turned out (after a survey) to be a fairly accurate approximation of the property line.

[8] Thus, at the time the Epps agreed to purchase the Halskov property on May 4, 2006, it is abundantly clear that Ms. Halskov knew she did not have other than permission for her driveway to cross the Gartside land for her own use while she owned the property. And her realtor knew as well (or at the least was put on notice to investigate) that there was a serious issue with respect to access to the Halskov property.

[9] As it happened, Ms. Gartside met Ms. Billey in Cranbrook one day in September 2005. Ms. Gartside says she joked about getting enough money for an easement for the driveway to buy a speedboat. Ms. Gartside insists she was just

making a joke. But she may have left an impression with Ms. Billey that any problem with access for the driveway was not insurmountable. That said, Ms. Billey apparently made no effort to pursue clarification of whether the Gartsides would be willing to provide an easement to a purchaser of the Halskov property.

[10] Ms. Gartside followed up this conversation with a telephone call to Ms. Billey on October 3, 2005. Ms. Gartside suggested to Ms. Billey that Ms. Halskov have a survey done.

[11] Ms. Gartside's son, Oren Gartside, spoke with Ms. Halskov in the spring of 2006. He stressed to her that the portion of the Gartside property over which the Halskov driveway passed was not for sale as an easement to a purchaser of her property. Oren Gartside met with Ms. Halskov and pointed out to her what proved later upon survey to be a fairly accurate approximation of their mutual property line.

[12] As noted above, the Epps entered into an agreement to purchase the Halskov property in late May 2006. They took possession on July 4, 2006. Ms. Halskov spoke with Ms. Gartside in early June 2006, telling her that she had sold her property and would be leaving near the end of the month. She did not identify the purchasers. However, a few days after Ms. Halskov told Ms. Gartside that she had sold the property, Oren Gartside was contacted by Ms. Billey who suggested to him that the septic tank from the Gartside residence was encroaching onto the Halskov property. The Gartsides commissioned a survey and determined this not to be so.

[13] At one point, after the Epps had purchased the Halskov property, Jerry Boutin ("Mr. Boutin"), a realtor in the same firm as Ms. Billey, approached Ms. Gartside. He insisted that the Gartsides grant an easement to the Epps. She refused. Mr. Boutin subsequently spoke to Oren Gartside. He suggested to Oren Gartside that the Gartside septic field was too close to the Epps' well. He suggested that the Epps would overlook this issue if they were granted an easement for the driveway without compensation. Again, the threat articulated by Mr. Boutin turned out to have no basis in fact. But the manner with how they had been dealt upset the Gartsides and steeled them in their resolve not to sell an easement to the Epps or anyone else.

[14] In evidence is a photograph of the Halskov residence as it was in the 1950s. A fence extends an uncertain distance down one side of the driveway on the side nearest the lake. A photograph as the driveway appears currently shows the fence to be no longer in place but the other side of the driveway to be partially lined with fieldstones as an apparently decorative addition or perhaps to prevent erosion of the bank that slopes down toward the driveway on that side. The driveway is paved with asphalt that is cracked and apparently worn.

[15] The Epps have priced out the cost of a driveway if it was to be located solely on their own property. The cost would be about $150,000. Retaining walls would be required and approval obtained from the government for encroachment onto the easement the government took from the Gartsides for a public road allowance (but not onto the portion presently used as a roadway).

[16] An appraiser for the Epps valued the area of the easement at $7,500 by the method of comparing the percentage of the area of the driveway encroachment and the entire surface of the Gartside property. However, the Epps seek only to have a declaration of entitlement to an easement made on this application. If successful, they wish the opportunity to negotiate a price with the Gartsides.

[17] The Gartsides, at one point subsequent to the purchase of the property by the Epps, offered the Epps a licence to use the easement for 20 years at $2,000 a year. The Epps are not interested in a licence as they feel, no doubt correctly, that not having a permanent access will affect the eventual marketability of their property.

[18] The Epps were aware of the encroachment of the driveway onto the Gartside property before they bought the Halskov property. But they were of the impression, apparently, that the encroachment was just a few feet and would not cause any difficulty. Certainly none of the Gartsides did or said anything to give them that impression. The Epps did not have a survey undertaken prior to completing the purchase.

[19] It is the position of the Epps that as the easement over the Gartside property for their driveway has existed for close to 60 years, and as the Gartsides have no firm current plans to develop or use their property in a way which would be in conflict with the creation of a permanent easement, the balance of convenience favours the Court declaring that they are entitled to one, upon payment of appropriate compensation to be determined later.

II. DISCUSSION

[20] The Epps rely on s. 36 of the *Property Law Act*, R.S.B.C. 1996, c. 377 ("the *Act*"):

> 36 (1) For the purposes of this section, "owner" includes a person with an interest in, or right to possession of land.
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> (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
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> (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,
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> (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
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> (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.

[21] That section has been judicially considered in a number of cases. In *Svenson v. Hokhold*, [1993] B.C.J. No. 859 (B.C.C.A.) and in *Vineberg v. Rerick*, [1995] B.C.J. No. 2506 [*Vineberg*], our courts found that it was sufficient if the property in question had, at some time in the past, been partially enclosed by a fence or a construction equivalent to a fence. In *Vineberg*, Mr. Justice Leggatt indicated at para. 17 that one should not impose too strict a criteria on a section that is intended to provide equitable relief. Similarly, the definition of what is a building has been interpreted with seemingly great elasticity. For example, in *Dattolo v. Merlo,* [1998] B.C.J. No. 1499 [*Dattolo*], Mr. Justice Shabbits found a concrete sidewalk to be an

extension of a home and thus coming within the definition of a building. Of course, he also found in those particular circumstances that if the sidewalk had been removed, access to a rental unit connected by it to the home would have been impractical. The sidewalk in question was two feet wide and encroached the neighbour's property by a couple of inches due to mutual mistake by the neighbours as to the location of the property line when the sidewalk was installed. Mr. Justice Shabbits ordered an easement to be granted as the balance of convenience favoured that applicant.

[22] Once an applicant establishes that either of the requisites apply (a building encroaching on the neighbour's property or it having been at least in part delineated by something that can be said to be the effective equivalent of a fence) then the Court applies a balance of convenience test. This was described in *Vineberg* at paras. 19 and 20:

> 19 Moving on to the heart of this matter, the test for determining how to use s. 32 is the balance of convenience: *McNutt and McNutt v. Tedder and Tedder* (1982), 34 B.C.L.R. 145 (B.C.S.C.).
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> 20 Counsel has provided several cases which illustrate how the balance of convenience has been judicially interpreted in similar situations. From these and other cases considering s. 32, I have noted three predominant considerations used in the balance of convenience analysis:
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> 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 (sic) 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.

[23] In this case, there is no evidence to suggest that the driveway, although paved, was an essential part of the “building” (the home on the property) as the Court found the sidewalk was in *Dattolo*. The paving clearly took place at some point subsequent to the construction of the home. It is not at all evident that it is, in any way, a part of the home or any other building on the property. The fact that it is a paved driveway does not, by that alone, make it a building within the intent of s. 36 of the *Act*.

[24] Whether the easement area was in some way delineated by some form of construction that could be characterized as a fence is not easy to determine. I have carefully studied the photographs and the survey drawings that have been submitted in evidence. I conclude as a fact that the wooden fence depicted in the circa 1950s photograph did not extend onto the Gartside property.

[25] There are some areas of the uphill side of the driveway (to the right as one looks uphill toward the Epp residence) which has fieldstone covering the bank where the natural slope of the Gartside property has been cut away to provide a level surface for the driveway. But the irregular placement of this fieldstone on part of this bank is in marked contrast with the rock wall or rock construction that one can see on the Epp property proper bordering what appears to be a parking area on the upper part of the driveway. I conclude as a fact that the fieldstone does not constitute a construction that, even by the most elastic of interpretations, can be classified as a fence.

[26] Thus, s. 36 of the *Act* is not engaged. Had I found it to be engaged, however, I would not have concluded that the balance of convenience favoured the Epps in any event.

[27] The Epps were aware that the driveway encroached onto the Gartside property to some extent before they purchased it. They made no effort to ascertain the extent of the encroachment. A simple property search would have shown that no easement was registered. They had to know that before they closed the transaction. They chose to proceed nonetheless, without even having a survey undertaken. They

may have relied on representations of their real estate agent(s) or Ms. Halskov, but they were negligent in looking after their own interests by not undertaking basic and easily performed enquiries. If they were misled in some way by others, that is not the fault of the Gartsides, nor is it the Gartsides' problem. The Epps did not have an honest belief in the sense required by the balance of convenience analysis.

[28] The nature of the improvement is a driveway that has existed for about 60 years. It is paved. It will be expensive to replace it wholly on the Epps' land. Apart from the cost of doing so, it may be physically difficult and enquiries of the government for an encroachment onto the road right-of-way have not yet been undertaken. No one knows what the response from the government may be. Balanced against this is the vague plans the Gartsides have for perhaps developing their property someday in a manner such that the driveway may prove to be in the way either of the construction or the view from what is constructed. This factor favours the Epps.

[29] As to the size of the encroachment: It is not large in proportion to the entire land area of the Gartside property. But it is located in a very sensitive area - facing the view over Black Bay. Thus it has the real potential to be "in the faces" of the Gartsides and potentially affect their enjoyment of their property in a substantial way if they build toward that part of their property.

[30] Subjectively, the land area has a real value to the Gartsides substantially in excess of any simple comparison of the area occupied by the easement in to the whole of the Gartside land. That said, the balance of convenience with respect to this factor, given proper compensation being factored in, favours the Epps.

[31] While two of three of the factors for the balance of convenience favour the Epps, nonetheless, the threshold factor, honest belief on the part of the Epps, is not present here and thus I would not have found them entitled to receive an equitable remedy under s. 36 of the *Act*, even if I had found that s. 36 was engaged.

[32] The Epps also seek relief on the ground of promissory estoppel. The modern approach to that doctrine was discussed in *Trethewey-Edge Dyking District v. Coniagas Ranches Ltd.*, 2003 BCCA 197, by Madam Justice Newbury at paras. 63 to 65 as follows:

> [63] I agree with the disposition of this appeal proposed by my colleague, Madam Justice Levine, but I do so for different reasons.
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> [64] At the outset, I note that the five elements or "probanda" famously cited by Fry J. in *Willmott v. Barber* (1880) 15 Ch. D. 96, including in particular the making of a "mistake" by a party as to his or her legal rights, have now been overtaken by a broader and less literal approach to proprietary estoppel. *Halsbury's* (4th ed., vol. 16) explains this approach as follows:
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> > The more recent cases raise the question whether it is essential to find all the five tests literally applicable and satisfied in any particular case. The real test is said to be whether upon the facts of the particular case the situation has become such that it would be dishonest or unconscionable for the plaintiff, or the person having the right sought to be enforced, to continue to seek to enforce it. The belief on which the person seeking protection from equity relies need not relate to an existing right nor to a particular property. It may be easier to establish acquiescence where the right in question is equitable only. Where, on the hypothesis that liability has been established, the question is whether equitable relief should be withheld in the case of a continuing legal wrong, the true test is that the facts must be such that the owner of the legal right has done something beyond mere delay to encourage the wrongdoer to believe that he does not intend to rely on his strict rights, and the wrongdoer must have acted to his prejudice in that belief. The modern approach is a broad one and the tendency is to reject any classification of equitable estoppel into exclusive and defined categories. (para. 1072; emphasis added.)
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> [65] This broader approach is consistent with the judgments of Lord Denning in *Crabb v. Arun District Council* [1976] 1 Ch. 179 (C.A.), *Moorgate Mercantile Co. Ltd. v. Twitchings* (1976) Q.B. 225 (C.A.), (rev'd on other grounds at [1976] 2 All E.R. 641 (H.L.), and *Amalgamated Investment & Property Co. (in liquidation) v. Texas Commerce International Bank Ltd.* [1981] 3 All E.R. 577 (C.A.); and of Oliver J. in *Taylors Fashions Ltd. v. Liverpool Trustees Co. Ltd.* [1982] 1 Q.B. 133 (Ch. Div.), a case described by one writer as a "watershed in the development of proprietary estoppel." (See *Gillett v. Holt* [2000] 3 W.L.R. 815 (C.A.), at 829, quoting Gray, *Elements of Land Law* (2nd ed., 1993) at 324.) In *Taylors Fashions*, the Court held that it was not essential that the representor (in this case, the defendants) should have been guilty of fraudulent or unconscionable conduct in permitting the plaintiff to assume he could act as he did; rather, it was enough that in all the circumstances, it would be unconscionable for the representor to go back on

> the assumption which he had allowed the plaintiff to make. After reviewing the other decisions mentioned above, Oliver J. noted in a memorable phrase:
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> > So here, once again, is the Court of Appeal asserting the broad test of whether in the circumstances the conduct complained of is unconscionable without the necessity of forcing those encumbrances into a Procrustean bed constructed from some unalterable criteria. (at 154).

[33] In *Erickson v. Jones*, 2008 BCCA 379, Mr. Justice Chiasson referred with approval to the above passages after having set out, at para. 53, the five “probanda” referred to by Newbury J.:

> [53] A starting point is *Willmott v. Barber* (1880), 15 Ch. D. 96 (C.A.), wherein Fry J. formulated his oft-quoted statement of the five "probanda" that need be demonstrated by a person seeking to raise a proprietary estoppel: (1) that the plaintiff (the person seeking to raise the estoppel) must have made a mistake as to his legal rights; (2) that he have expended some money or done some other act to his detriment on the faith of his mistaken belief; (3) that the defendant (the person sought to be estopped) must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff; (4) that the defendant know of the plaintiff’s mistaken belief of his rights; and (5) that the defendant have encouraged the plaintiff in his expenditure of money or other acts, either directly or by abstaining from asserting his legal right.

[34] He added at para. 57:

> [57] An earlier example of this Court taking a broad approach to estoppel is *Zelmer v. Victor Projects Ltd.* (1997), 34 B.C.L.R. (3d) 125, 9 R.P.R. (3d) 313. Hinds J.A. had this to say in paras. 36 and 37:
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> > [36] A few months after the decision in *Western Fish Products*, Lord Denning affirmed his decision in *Crabb*, in his judgment in *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd*., [1981] 3 All E.R. 577 (Eng. C.A.). At 584 he spoke thus:
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> > > The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence; estoppel cannot give rise to a cause of action; estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction

> proceed on the basis of an underlying assumption (either of fact or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.
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> [37] The foregoing statement is a helpful exposition of the historical formulation of equitable estoppel with its different forms and limitations, its flexibility, the reluctance to classify it into different categories and the underlying principle of what equity entails - that justice be done.

[35] In this case, the Epps argue that the Gartsides are estopped from denying them an easement for the driveway because the Epps, to their detriment, purchased the Halskov property which does not have legal access. They suggest that they, or more importantly, the Halskovs before them, were encouraged by the Gartsides to rely on the access across the Gartsides' land. The Gartsides were silent, argue the Epps, not having communicated to them before they purchased the Halskov property any reluctance to agree to their continued access across the Gartside land. There is no bar to equitable relief, say the Epps.

[36] This argument does not accord with the facts. The evidence is uncontroverted, and I find as fact, that the Gartsides always permitted the Halskovs an easement over their property for the benefit of the Halskovs only. They made it crystal clear to Ms. Halskov, and to her husband while he was alive, that this was not an easement they were prepared to have registered on title.

[37] When the Gartsides learned that Ms. Halskov intended to sell they did not remain silent. They did whatever was reasonably available to them to do. Members of the Gartside family spoke with both Ms. Halskov and Ms. Billey, her realtor, to make it abundantly clear to them that access over their land was not something that could be passed on to a purchaser. They had no way of ascertaining the identity of the Epps to speak to them directly until after the Epps completed the transaction and took possession. They owed no duty of disclosure to the Epps before they even knew who they were. They advised them as soon as they did know.

[38] In any event, the duty of disclosure of the state of affairs respecting the easement lay not with the Gartsides but with the vendor, Ms. Halskov, who I find (for the purposes of this application) knew very well that she did not have an easement to sell and that, further, the Gartsides would not grant an easement to whomever she sold her property. Ms. Billey knew that as well. They chose to ignore the problem hoping, perhaps, that it would go away in that the Gartsides would relent or that they might find some problem that the Gartsides faced (the location of their septic field) to force them to be cooperative. In any event, the Epps knew before they completed the transaction that at least part of the driveway was on the Gartsides' land and that there was no registered easement for it. Any "mistake" they may have made cannot be laid at the feet of the Gartsides. By not having a survey done or by not making the reasonable enquiries any purchaser would be expected to make in the face of even the degree of a potential problem the Epps say they were aware of, they were the authors of their own difficulties with the Gartsides.

[39] Undoubtedly, the Epps have expended a considerable amount of money to purchase the Halskov property. But this was not because of any mistaken belief that they had any right to an easement over the Gartside property.

[40] The Gartsides' position was consistent over almost 60 years - they would not grant a registered easement over their land and would only permit its use by the Halskovs. Once they became aware of the Epps having purchased the Halskov property, they made that clear to the Epps as well. When the Epps communicated to them their understanding that the driveway just encroached a couple of feet onto the Gartside land, the Gartsides straightened them out immediately. They encouraged nothing on the part of the Epps, either their expectations with respect to access or their expenditure of the purchase price to acquire the Halskov property. They likewise never encouraged any expectations on the part of the Halskovs.

[41] It was argued on behalf of the Epps that they would never have purchased the Halskov property if they had known that there was no road access. The fact of the matter is that, with the expenditure of money and the acquisition of the

appropriate government approval, they probably can have road access - just not across the Gartsides' land. In the circumstances here, the Epps must look to others for satisfaction. Equity does not demand that the Gartsides solve their problem by granting an easement to them for a driveway. The Gartsides are in no way estopped from continuing to rely on the position the family has consistently taken over all these years, both to the Halskovs and now to the Epps.

III. CONCLUSION

[42] For the reasons set out above, the petition is dismissed with costs. Counsel may speak to costs at a time to be arranged.

IV. OBITER POSTSCRIPT

[43] Had I found that Epps were entitled to an easement and had been asked to value it, I would have fixed a value in the range of $70,000 plus whatever taxable costs Gartsides had expended in defending this application. The value of near-lakeshore property such as this, the location of the easement in such a prominent place on the lake-side of the property, and its sentimental value to the family, all would have dictated a significant amount of monetary compensation.

[44] An amount such as this would also have been in keeping with the award of $35,000 for nearby property made in the case of *Epp v. Franson,* 2008 BCSC 1133.

"Melnick J."