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Real Estate Conveyancing

Lamont

2026-1 March

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This release features updates to the case law and commentary, based on the reissued publication materials, in the following chapters: Chapter 3 (Listing Agreements and Commissions), Chapter 4 (Offer to Purchase), Chapter 6 (Practical Description of Common Terms), Chapter 7 (Outline of Some Real Estate Statutes), Chapter 16 (Closing the Transaction), Chapter 19 (Careful Conveyancing), Chapter 20 (Remedies When Vendor or Purchaser in Default), Chapter 22 (Liens, Charges and Potential Claims), Chapter 23 (Mortgages), Chapter 25 (Power of Sale Pursuant to Mortgage Provisions), Chapter 26 (Subdivision Requirements), Chapter 27 (Condominiums), Chapter 28 (Building Restrictions), and Chapter 29 (Legal Surveying).

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Highlights

Offer to Purchase—Description of Property—Easement—Intention of Grantor—Variation Not Granted—Reconfigured Layout Creating Difficulties For Dominant Tenement—No Evidence of Agreement to Register Modified Easement—Where the holders of the dominant tenement provided compelling evidence of the types of uses they made of the driveway as originally configured in line with the registered easement, and the difficulties they had faced with the proposed reconfigured layout, the servient tenement's evidence that there was a verbal agreement to register a modified easement in the Land Titles Office (LTO) in 1999 was insufficient to establish such an agreement on its face, and in the context of the other evidence. In this case, the registered easement provided access, by way of the servient tenement's property to two properties on either side of his property, including the recreational property of the dominant tenements. The servient tenement alleged that the dominant tenements agreed to a modification of the easement to remove a substantial portion of the easement, and to replace it with a more direct descent along the side of his property, in exchange for which he agreed to support their variance request with the strata. The holders of the dominant tenement submitted that no such agreement was reached, but that the servient tenement nevertheless unilaterally reconstructed the driveway to his liking in 1999, on what they then thought was a temporary basis. The servient tenement wished to sell his property and was told it would not sell unless the registered easement was modified. The servient tenement brought a petition, seeking an order modifying an easement on his recreational property. His petition was dismissed.

The fact that the altered driveway maintained a degree of driveway access was not sufficient to make the benefits of the original easement obsolete. In any event, the easement was clearly not obsolete in relation to its original purpose. The easement remained the only registered vehicular access to the dominant tenements' strata lot. Although the full use of servient tenement's lot was impeded by registration of the easement, the reasonable use of it as whole was not precluded as result of the easement In any event, proof that the easement impeded the developable area of the servient tenement was not sufficient to remove the benefits it provided to the dominant tenement. Modifying the easement to the proposed plan would injure the holders of the dominant tenement. Section 35(2) of *Property Law Act*, R.S.B.C. 1996, c. 377, was a complete code that described all grounds on which the court could make an order to cancel or modify a charge or interest against land. The holders of the dominant tenement provided compelling evidence of the types of uses they made of the driveway as originally configured in line with the registered easement, and the difficulties they had faced with the reconfigured layout. Objectively, the proposed easement decreased the overall area of the original easement, resulting in a steeper grade of descent. It appeared from the evidence that the new configuration also relied on the use and maintenance of retaining walls. There was no meeting of minds between parties in respect of specific changes to the lower portion of the driveway. The servient tenement's evidence that there was a verbal agreement to register the modified easement in the LTO in 1999 was insufficient to establish such an agreement on its face, and in the context of the other evidence: *Weatherill v. Sievewright* 2025 BCSC 480, 69 R.P.R. (6th) 296, 2025 CarswellBC 828, [2025] B.C.J. No. 464 (B.C. S.C.).

Offer to Purchase—Zoning—Encroachments on City's Road Allowance—Site Plan Agreement and Approval of Building Drawings Not

Constituting Approval of Encroachments—City Requiring Encroachment Agreement—Where the constructed building encroached on the city's road allowance, none of the city's actions in approving the site plan agreement and the building drawings formed a sufficient basis to conclude that the city expressly approved the encroachments. In this case, the owner's existing concrete retaining wall, wooden access ramp, concrete step at the bottom of the access ramp and single-car parking space encroached on the city's road allowance adjacent to the sidewalk. In 1998, the city approved the site plan agreement, and the building permit drawings. A schedule to the site plan agreement mapped the four exterior structures at the front of the property that encroached on the road allowance adjacent to the sidewalk. In 2001, the city issued an occupancy and compliance permit, certifying that the lands were used in accordance with the zoning by-law, and that the building was constructed in accordance with the zoning and building by-laws. The city's encroachment policy in 2006 provided that, where an encroachment existed without the city's approval, it was required to be removed or the owner was to seek permission to remain. The policy expressly excluded from its operation the encroachments the city approved before the policy came into force. In 2019, the city confirmed there were no outstanding work orders against the property. The building was currently used as part of a boutique inn.

In 2021, upon reviewing the owner's re-zoning application, the city noticed the encroachments, and advised that the owner had to enter an encroachment agreement, which the owner was unwilling to do. The owner brought an application for relief related to the encroachments onto the road allowance. The owner's application was dismissed. The application judge found the city did not approve the encroaching structures. The owner did not meet test for estoppel. There was no inducement. Neither party was aware of the encroachments until the rezoning application was brought. In any event, there was no indication the owner or its predecessors in title made it clear to the city that they intended to rely on their belief about right to the encroachments. Furthermore, the encroachments did not meet the requirements for legal non-confirming use status. There was no by-law allowing for encroachments when they were installed. Any existing legal use was not clear as the plans referenced a ramp but not a parking spot, and a sloped ground cover but no concrete planter. The owner appealed, and its appeal was dismissed.

The owner focused on a single issue of whether the application judge made a palpable and overriding error of fact when he found that the city did not approve the encroaching structures when the building and site plan drawings were approved in 1998. The city argued that the evidence better supported a finding that neither party was aware of the encroachments before the owner filed its application for re-zoning in 2021. In examining the application judge's reasons as a whole, the appellate court found he was right to determine that the onus for bringing the encroachments to city's attention fell on the original owner who constructed the building, and on his professional advisors, not on the city. In addition, the encroachments were not clearly identified as encroachments onto city property on the site plans and building permit plans The appellate court agreed with the application judge that none of the city's actions in approving the site plan agreement and the building permit drawings in 1998, in issuing the occupancy permit in 2001, and in providing confirmation that there were no outstanding work orders in 2019, formed a sufficient basis on which to conclude that the city expressly approved the encroachments. In the appellate court's view, the application judge made no errors in reaching this conclusion,

let alone palpable and overriding errors: *2708959 Ontario Inc. v. Stratford (City)*, 2024 CarswellOnt 21931, 2024 ONSC 366, 60 M.P.L.R. (6th) 183, [2024] O.J. No. 6300 (Ont. S.C.J.), affirmed *2708959 Ontario Inc. v. Stratford (City)* (2025), 2025 ONCA 512, 2025 CarswellOnt 11347, 60 M.P.L.R. (6th) 203, 70 R.P.R. (6th) 76, [2025] O.J. No. 3108 (Ont. C.A.).