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Homeowner in deep end thanks to old survey

When a judge ordered Kenneth Sorensen to move his in-ground swimming pool, I can only imagine it spoiled his whole day.

The story began sometime before Sorensen bought 288 Raven Dr., in Kelowna, B.C., in 2007, and his neighbours, Olutoyese and Denise Oyelese, bought number 282 next door in 2009.

A prior owner of the Sorensen property constructed an in-ground swimming pool on the lot behind their house. A patio and landscaping surrounded the pool, and a cedar hedge was planted along the line of an old chain link fence. A new fence was constructed beside the original one.

When Sorensen purchased his house, the sellers gave him a copy of a 1998 survey showing what was described as the "current status of the property." Someone, possibly the prior owner, had incorrectly sketched the pool in on the survey by hand to show its approximate location within the lot lines.

Shortly after the Oyeleses moved in, they began to put in their own pool, and discovered that the fence which both neighbours thought marked the boundary line encroached significantly into their lot. The long pie-shaped encroachment is narrow near the street line and widens out near the back of the lot. The total area of the encroachment is 1,636 square feet, or 152 square metres.

Part of the Sorensen pool sits on the disputed piece of land, along with a fence, patio, retaining wall and hedges.

Eventually, the neighbours wound up in British Columbia Supreme Court where the Oleyeses demanded that Sorensen move the pool off their property.

In response, Sorensen cited a section of the B.C. Property Law Act which states that where a building or fence encroaches onto adjoining land, the court may order the land in dispute sold to the encroaching owner at fair market value, or it may allow an easement permitting the encroachment to remain. It also has the option to order the removal of the offending fence and any construction.

Ontario has a similar provision in section 37 of its Conveyancing and Law of Property Act.

At the hearing before Justice Shelley Fitzpatrick in May, the evidence showed that the cost of filling in the old pool and constructing a new one would be more than $58,000 including taxes, and a similar amount to remove and relocate the chain link fence, retaining wall and cedar hedges.

The appraised value of the disputed sliver of land, if the court ordered it sold to Sorensen, was slightly more than $7,000.

The Oyeleses told the judge that they just wanted the pool moved, and offered to absorb the cost of removing the other items.

In her written reasons, Justice Fitzpatrick found that the "balance of convenience" favoured the Oyeleses, and ordered the pool moved within 75 days.

The judge reasoned that landowners should not be forced to transfer part of their land in order to relieve a neighbour of a problem arising from the conduct of a prior owner of his house.

Although I agree with the result, I do not agree with the judge's conclusion that neither party was at fault.

The simple fact is that both properties were purchased without a current land survey, which is always the most important document in any real estate transaction. Had either party obtained an up-to-date land survey prior to closing, the litigation would have been avoided and the matters resolved before closing.

The purpose of a survey is to show where the building and improvements are in relation to the lot lines, and more importantly, where they are not.

There is no mention of title insurance in the court ruling, but the fact is that while title insurance is never a substitute for a land survey, it might - repeat, might - pay for some of the costs involved in forced removal of a structure – but not the aggravation.

Closing a purchase transaction without a current land survey is like diving into a pool without knowing where the deep end is.

[See Oyelese v. Sorensen, 2013 BCSC 940 (CanLII), http://canlii.ca/t/fxq74]

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