

# TALES FROM THE TRENCHES™

BY BARRY C. MCGUIRE

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## “HOT TUB TRIALS AND TRIBULATIONS.”

This episode of *Tales from the Trenches* is shocking! A client had retained my legal services to help with purchasing her dream home in Edmonton, Alberta. The seller provided a brand-new real property report (RPR) to my client, who in turn sent the RPR to me for review. There were a few red flags, but not even decades of experience as a real estate lawyer could prepare me for what happened...

### Documents Needed for a Real Estate Purchase Contract

Here's the background. According to the current version of the Alberta Real Estate Association (AREA) contract, it is the seller's obligation to provide the buyer with a current RPR and evidence of municipal compliance or nonconformance. The AREA contract also has a seller warranty that there are no encroachments for which there is not already a registered agreement or an agreement in writing allowing the encroachment.

The seller didn't have a current real property report so he obtained one from his surveyor. Then, before sending the RPR to the City of Edmonton for the compliance application, he sent it to my client. I took a look at the RPR and identified at least three issues.

### Three Problems in the Real Property Report

1. **Private Encroachment:** There was an encroachment of the seller's concrete, side-yard, retaining wall of 2 inches (5 cm) onto the neighbour's property. This is what is known as a private encroachment.
2. **Public Encroachment:** There was also an encroachment of the seller's fence onto the alley of about 2 feet (60 cm). This property belongs to the City, so it's a public encroachment.
3. **Missing Permits:** There was a hot tub in the backyard with no municipal permit for it.

The seller told his realtor that he realized there were two encroachments. The retaining wall really fit with and complemented a concrete patio on the neighbour's property. He had a cooperative neighbour, and it would just make no sense at all to get out the concrete saw and start sawing off the 2 inches. He sent photos, and I took a look. Yes, it appeared that the retaining wall and neighbour's patio complemented each other, and it would be silly to make any adjustments. So, I wasn't too worried about the private, encroaching, retaining wall.

Now, the fence that encroached into the alley was a different matter. It was only 2 feet of fence. The worst-case scenario is that the City could come along and say they were going to do some

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work in the alley. If my client didn't remove the offending 2 feet, the City would do it for her. Not a real big deal, but still, this is the seller's problem, so why accept it?

There is a process at the City of Edmonton to apply for an encroachment agreement. The City charges an application fee and then an encroachment fee plus GST, which I believe is in the range of about \$500 plus GST in total. My advice here was that we should require the seller to make the encroachment application for the back-alley fence with the City and get that encroachment agreement registered on the title so it wouldn't bother my client in the future.

For the hot tub, I told my client that the City requires permits. Hot tubs, like swimming pools, are attractive to children and perhaps other adults or children that do not live in the property. The City is pretty careful in their permitting of hot tubs, because anything with water in it has drowning potential and is therefore a safety issue.

My careful client had retained a top-notch home inspector who commented that the hot tub was a good brand and well installed. He didn't see any issues from the inspection side. Further, the home inspector said that the house was really in great shape and had been taken care of well. Based on this inspection, my client felt reasonably confident that a permit from the City wouldn't be a problem.

## Three Complications of Real Property Reports Versus Compliance

1. **An RPR Doesn't Tell the Whole Story:** As much as I have a good idea of City compliance requirements, I couldn't guarantee that the two encroachments and a potential non-permitted hot tub were the only issues.
2. **A Compliance Report Is Different from an RPR:** When you get an RPR without a compliance, the best approach is to actually send the RPR to the City and then review the results of the compliance application. Once you have the actual compliance certificate in hand, only then can you deal with all identified issues.
3. **Compliance Problems Don't Go Away:** And, as I tell all my clients, if you don't solve your RPR and compliance problems when you buy, then you may have to solve them at greater expense, time, and trouble when you sell.

My client said to me, "what should I do?" I told her that the best bet was to tell the seller he would have to apply for the compliance, get it to us for review, and then we could move forward. So, we told the seller through his realtor, and that's what the seller did.

He made his application for compliance and when the City replied, guess what? That's right, they noted the fence encroachment and the non-permitted hot tub. As usual they made no comment on the private encroachment of the retaining wall, because they view that as an issue

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between neighbours and not something they regulate. Again, my buyer client was just not worried about this 2-inch retaining wall encroachment that complemented the neighbour's concrete work and patio.

My client agreed with me that our best bet was to have the seller make applications for an encroachment agreement for the fence and permit applications for the hot tub. The seller hemmed and hawed. He didn't have the time. He was leaving town, so it was too much trouble. He countered, how about if my client took a \$1,000 price reduction?

Again, my client said to me, "what should I do?" I explained that reducing the purchase price of the home by \$1,000 would cover the costs of the encroachment agreement or moving the fence if that was required in the future, as well as the costs of the hot tub permits with a little money to spare. **But, the big, hidden issue is that we don't know what the City's requirements are for the hot tub development and building permits.** Until you actually make those permit applications and give the City all the detail they require (they require a lot of detail), then you just don't know what it will take to get those permits or how much it will cost.

My client again spoke to her home inspector, who confirmed the hot tub was a good brand, well installed, and that there were no issues from the inspection side of things. She checked with the City to confirm that having a hot tub was allowed, and so the development permit would not be an issue. It was really just a matter of the building permit, so my client thought "what could go wrong?"

## Consequences of Accepting a Price Reduction Instead of a Real Property Report with Full Compliance

In the end, my client decided to accept the RPR and dubious compliance provided by the seller, along with a \$1,000 reduction in the price of the home. The purchase closed on that basis. After closing, however, my client said to me that she wanted to do the encroachment application and the hot tub permit applications. She felt that those were outstanding issues that she should get settled now while the transaction was still fresh in her mind, and she had the money to do it from the price reduction. Then she could carry on knowing that when she sold the property, unless she had made other changes during her ownership, she would have the RPR and compliance issue all sorted.

The encroachment agreement went smoothly for the fence in the alley. The City provided the usual encroachment agreement, which my client signed, and we registered it against the title.

The hot tub permit applications were more difficult. As expected, the development permit was granted, no issues. But the building permit? That was a different story. My client retained an electrician to help her make the applications.

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One of the City's requirements was that the electrician had to confirm for the City how much load all of the home's electrical requirements would draw. Once the electrician had provided his load review, the City said that the existing 100-amp electrical panel was not sufficient.

The electrician went back to the City and said, "listen, the only way the existing 100-amp panel won't be sufficient is if every appliance in the home plus the electric mower and block heater are all being used at the same time. That's never going to happen, not even close."

The City stuck to their position. As the saying goes, you can't fight City Hall. The solution was a new 150-amp panel, which required a heavier, upgraded powerline into the home provided through EPCOR.

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## LESSONS LEARNED

1. **You Don't Know What You Can't Know:** You can't know a municipality's development and building permit requirements, and the cost of meeting those requirements, until those applications are made.
2. **RPR and Compliance Problems Can't Be Ignored:** If you don't know, understand, and solve your RPR and compliance problems when you buy, you will likely have to solve them at greater expense when you sell.
3. **Don't Accept Other People's Problems:** Why take on a seller's responsibilities? Whenever you buy, insist on a new RPR and clean compliance certificate.