Court of King's Bench of Alberta

Citation: Nelson v Whitney, 2026 ABKB 24

Date: 20260109
Docket: 2401 16194
Registry: Calgary

Between:

DARRELL NELSON

Plaintiff

- and -

JAMES A. WHITNEY and TAMMIE L. WHITNEY

Defendants

Memorandum of Decision
of the
Honourable Justice D.V. Hartigan

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[1] The Defendants appeal the learned Applications Judge's decision wherein he declined to strike the Plaintiff's Statement of Claim pursuant to Rule 3.68 of the *Alberta Rules of Court*. The matter involves two neighbouring properties owned by the parties. The Plaintiff complains that trees planted by the Defendants, obstructing the view from his property, constitute an actionable nuisance.

STANDARD OF REVIEW

[2] The standard of review in appeals from an Applications Judge under Rule 6.14 is correctness and the hearing is conducted *de novo*: ***Bahcheli v. Yorkton Securities Inc***, 2012 ABCA 166.

STRIKING CLAIMS

[3] Rule 3.68 allows all or part of a claim to be struck where it discloses no reasonable claim. It further directs that no evidence may be submitted on such an application. Rather, a claim will only be struck if it is plain and obvious that the pleading discloses no reasonable cause of action. In making that assessment, the facts pleaded in the claim are assumed to be true. However, bare assertions of malice, fraud, deceit and other misconduct will not be accepted as being true without reasonable particulars of the allegations: ***Gay v Alberta (Workers' Compensation Board)***, 2023 ABCA 351. A bare allegation of bad faith, without any pleaded facts in support and without some particulars, is inadequate: ***Walton International Group Inc v Rockyview (Municipal District No 44)***, 2007 ABCA 21.

[4] In deciding the reasonable prospect of success of a novel claim, the court should consider factors including the clarity of the factual pleadings and case law discussing similar causes of action. As noted in ***O'Connor Associates Environmental Inc. v MEC OP LLC***, 2014 ABCA 140 at para. 16, "[T]he courts must be careful not to inhibit the development of the common law by applying too strict a test to novel claims. However, the courts must resist the temptation to send every case to trial, even if some legal analysis is needed to determine if a claim has any reasonable prospect of success."

THE STATEMENT OF CLAIM

[5] The allegations contained in the Statement of Claim are summarized in the Plaintiff's materials, which I reproduce here:

- "Nelson and Whitneys own neighbouring properties in a subdivision south of Calgary. Whitneys purchased their property on or about March 1, 2023. Nelson purchased his Property on or about May 1, 2024."
- "The properties, along with two other lots in the subdivision run up a slope [and] are renowned and valued because of their unobstructed views of the City of Calgary and Bow Valley. A restrictive covenant registered against both properties restricts the size of building envelops on each lot in order to preserve the views of each successive lot."
- "Nelson's lot is higher up the slope than Whitneys."
- "Shortly after moving onto the property, in May 2024, Whitneys sought Nelson's consent to make changes to the restrictive covenant in order to allow development on the Whitney Property outside and to the west of the hatched areas shown in the Restrictive Covenant as well as numerous other changes."
- "Nelson advised Whitneys that he did not consent to changes to the Restrictive Covenant."
- "Whitneys persisted with 4 further communications between May 23rd and 29th, but Nelson did not resile from his position."
- "On October 1, 2024, Nelson observed excavation and foundation report work commencing on the Whitney property. He was concerned that the Whitneys were proceeding with their plans to build in violation of the Restrictive Covenant."

- "On October 16, 2024, counsel for Nelson sent a registered letter to the Whitneys, citing the May discussions and the Restrictive Covenant ("October 16 correspondence"). The letter demanded that Whitneys cease and desist from any construction on the Whitney Property in violation of the Restrictive Covenant. The correspondence also stated that if Nelson was somehow mistaken as to the extent of the construction and, specifically, whether the construction violates the terms of the Restrictive Covenant, then Nelson sought evidence from the Whitneys demonstrating same."
- "Following receipt of the October 16 correspondence Whitney contacted counsel for Nelson. He agreed to have a licensed surveyor attend at the Whitney Property on November 5, 2024, to measure and confirm the extent of construction."
- "On October 28, 2024 the Whitneys caused 12 blue spruces to be planted on their side of the fence line. The blue spruce trees were approximately 25 feet high when they were planted. When mature they will grow to between 40-60 feet high. Between each blue spruce tree, the Whitneys caused to be planted an unknown species of deciduous tree."
- "The trees were planted so as to constitute a "spite fence" with the sole malicious intention of blocking Nelson's view." (Brief of the Respondent)

PRIVATE NUISANCE

[6] The tort of private nuisance occurs when a person is responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or an interest in land, where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable: ***St. Pierre v Ontario (Minister of Transportation and Communications),*** 1987 CanLII 60 (SCC), [1987] 1 SCR 906 ["***St. Pierre***"]. Such interference "can take two quite different forms. The interference may be in the nature of "physical injury to land" or it may take the form of substantial interference with the plaintiff's use or enjoyment of his or her land:" ***Smith v Inco Limited***, 2011 ONCA 628.

POSTIONS OF THE PARTIES

[7] The Defendants argue the Statement of Claim discloses no reasonable claim, as it is long-settled law in Canada that a claim for private nuisance cannot be founded on the loss of a view or prospect. The Plaintiff's contend that there is a reasonable prospect of success, as a court could conclude the interference with their property is both substantial and unreasonable.

ANALYSIS

[8] To establish private nuisance, a party must satisfy a two-part test. That test is summarized in the Supreme Court of Canada decision in ***Antrim Truck Centre Ltd. v. Ontario (Minister of Transportation)***, 2013 SCC 13 ["***Antrim***"], as follows:

> [19] The elements of a claim in private nuisance have often been expressed in in terms of a two-part test of this nature: to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both *substantial* and *unreasonable.* A

> substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances.

[9] Therefore, for a claim to succeed it must first satisfy the threshold requirement of "substantial interference". This threshold requirement "provides a means of screening out weak claims before having to confront the more complex analysis of reasonableness": ***Antrim*** at para. 21.

[10] The Plaintiff argues the view from his property is its most desirable feature. By planting the trees, the Plaintiff and his family "have suffered substantial interference with their enjoyment of the property. The panoramic views of the mountains, city and Bow River Valley have been substantially or completely obstructed by the trees." (Statement of Claim, para. 17). It is this either complete or significant loss of view which the Plaintiff contends satisfies the first or threshold stage of the ***Antrim*** test.

[11] The Defendants argue that the very nature of this alleged interference necessarily means there is no reasonable cause of action. They argue that it is long-settled law that the loss of a view cannot found a claim in nuisance. In support of this position, they cite the Supreme Court in ***St. Pierre***:

> [13] From the very earliest times, the courts have consistently held that there can be no recovery for the loss of prospect, (*William Aldred's Case* (1610), 9 Co. Rep. 57 b, 77 E.R. 816; *Foli v. Devonshire Club* (1887), 3 T.L.R. 706; *Walker v. Pioneer Construction Co. (1967) Ltd.* (1975), 1975 CanLII 481 (ON SC), 8 O.R. (2d) 35 (H.C.); *Muirhead v. Timbers Brothers Sand & Gravel Ltd.* (1977), 3 C.C.L.T. 1 (Ont. H.C.); see also Linden, *Canadian Tort Law* (3rd ed. 1982), at pp. 539-40; Buckley, *The Law of Nuisance* (1981), at p. 34; Fleming, *The Law of Torts* (6th ed. 1983), at p. 385).

[12] There have been several non-binding Canadian authorities where courts have deviated from the strict rule against recovery for loss of views. In ***Chan v. Familton***, [1994] BCJ No. 2804, BCPC ["***Chan***"] the British Columbia Provincial Court found that a number of offensive boards on a neighbour's fence constituted a nuisance. However, while the court referred to ***St. Pierre*** regarding the test for nuisance, it did not address the part of that case dealing with loss of prospect.

[13] In ***White v. Leblanc***, 2004 NBQB 360, the New Brunswick Court of Appeal found a nuisance where a neighbour parked a tractor trailer on his property, blocking the Plaintiff's view. However, there appears to have been some urgency in deciding the matter, such that the court opened its decision by saying, "I will preface my decision and my remarks by saying that I wish I had a bit more time to review the matters before me, the law, the submissions that have been made and the affidavit evidence. I think the matter has to be addressed immediately." (at para 1). As with the ***Chan*** case above, I don't find this a persuasive authority.

[14] The Plaintiff cites a number of American authorities where "spite fences" (fences or signs built on one owner's property for the purpose of offending or blocking the view of another's property) have been found to be nuisances. However, these cases are distinguishable as since at least the 1970's the American law on private nuisance has diverged from the traditional British model from which the bar to claims regarding prospect arose.

[15] Nor am I of the view that the recent cases presented by the Plaintiff from the United Kingdom assist in my decision: ***Fearn v Board of Trustees of the Tate Gallery*** [2023] UKSC 4 (UK) involves a loss of privacy rather than the loss of a view, consequent upon a viewing gallery's proximity to an apartment complex. Similarly, in ***Nicholas & Ors v Thomas & Anor***, [2025] EWHC 752 (Ch) (UK), the Trial Court found that a crane-like piece of machinery was a nuisance insofar as it affected the sight lines of the neighbour's falcons. I find this case more analogous to ***Manitoba v Campbell***, (1983) 24 Man R (2d) 70 (Q.B.) where the court concluded a 70-foot tower erected to obstruct the operation of a neighbouring airport constituted a nuisance.

[16] On the other hand, the majority of Canadian decisions clearly accept the proposition that a loss of prospect or the loss of a view is not compensable as a private nuisance: ***Sabo v AltaLink Management Ltd***, 2024 ABCA 179 (a decision binding on this Court); ***Webster v Low***, (2009) Carswell Ont 6986 (O.S.C.J.); ***Strachan v Sterling***, 2004 BCPC 203; ***Acciaroli v R***, [1988] FC 389.

[17] In ***Becze v Edmonton (City)***, [1993] 13 Alta LR (3d) 61 (Q.B.), at para. 36, Justice Nash said the following, "In conclusion, in Canada, the law seems settled that there is no action in nuisance for loss of view.".

[18] Most recently, the Nova Scotia Supreme Court in ***Havelka v. Greenfield Construction Ltd.***, 2025 NSSC 10 stated, "The [Plaintiffs] also claimed as a nuisance that the new wharf was moved to a significantly different location from the previous wharf, and that that new wharf now interferes with their view of the ocean horizon from their home. A loss of the enjoyment of a view is not a nuisance compensable at law – ***St. Pierre v. Ontario (Minister of Transportation and Communications)*** 1987 CanLII 60 (SCC), [1987] 1 SCR 906 at paras. 11-13."

[19] The Plaintiff further argues the intentional aspect of planting the trees for the sole or primary purpose of blocking his view as alleged distinguishes this matter. However, the intentionality or malicious intent allegedly underlying the placement of the trees is only relevant to the second stage of the ***Antrim*** test (reasonableness) and not whether the trees and their effect upon the Plaintiff's view constitute a substantial interference with his property.

[20] I therefore conclude the overwhelming authority in Canada stands for the proposition that a loss of view cannot be the basis of a claim in private nuisance. Recognizing my responsibility not to inhibit the development of the common law, I do not find that this case represents a novel factual or legal framework such that it is a novel claim. I therefore find that the Statement of Claim discloses no reasonable cause of action.

[21] Another issue which arose in this matter is whether the reference to malice in relation to the Defendants' planting of the trees is nothing more than a bald or bare assertion, unsupported by the facts stated in the claim. However, given my above ruling that the Plaintiff has not met the requisite threshold on the first part of the ***Antrim*** test, and that malice goes to the second part of the test (reasonableness), I need not determine that question.

CONCLUSION

[22] The appeal is allowed. The Statement of Claim is struck pursuant to Rule 3.68.

COSTS

[23] If the parties cannot agree to costs, they may contact the Court Coordinator to arrange a remote hearing before me, or they may agree to make written submissions, within 30 days of receipt of this decision.

Heard on the 3rd day of December 2025.
Dated at Calgary, Alberta this 9th day of January 2026.

D.V. Hartigan
J.C.K.B.A.

Appearances:

Peter W.K. Ridout and Lillian Howard
for the Plaintiff

Catriona Otto-Johnston and Samantha Stokes
for the Defendants