

CANADA / JUDGMENT

Thompson v. Hay

2024 BCSC 583

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Supreme Court of British Columbia

DECIDED

10 April 2024

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2024 BCSC 583 Thompson v. Hay

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Thompson v. Hay,

2024 BCSC 583

Date: 20240410

Docket: S131160

Registry: Kelowna

Between:

Richard John Thompson

Plaintiff

And

Scott Leonard Hay

Defendant

And

Richard John Thompson

Defendant by Counterclaim

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for the Plaintiff and Defendant by Counterclaim:

L. Nykolaychuk

Counsel for the Defendant:

A. Cathcart

C. MacLeod

Place and Dates of Trial:

Kelowna, B.C.

August 15 to 17, 2023

Place and Date of Judgment:

Kelowna, B.C.

April 10, 2024

I. Introduction

- [1] As the saying goes, good fences make good neighbours. This case is about an allegedly bad fence, a fence that has had a negative effect on the relations between three neighbours.
- [2] The defendant, Scott Hay, built the subject fence in 2021, locating it within the bounds of a right-of-way easement granted to the plaintiff in 1998 for the purposes of enabling access to his property.
- [3] The plaintiff, Richard Thompson, says the fence was improperly located within the easement area and it interfered with his free and safe use of the easement. After the plaintiff received expert advice on the issue, he had a contractor remove the fence. The removal of the fence is the basis for the defendant's counterclaim against the plaintiff.
- [4] Both parties seek injunctions against one another as well as damages associated with the removal of the fence.
- [5] Surveys prepared during the course of the litigation reveal that the access road associated with the easement did not conform to the boundaries of the easement. The plaintiff seeks rectification of the easement plan so that it conforms to the actual configuration of the roadway. The defendant now agrees that the rectification order sought by the plaintiff is appropriate.
- [6] This matter proceeded by summary trial. Both parties agree that adjudication by way of summary trial is appropriate here. I agree with that assessment.

II. Facts

A. Background

- [7] The properties in question are large, rural acreages located in a mountainous area west of Radium Hot Springs. The access road in issue runs in a north-south direction and is approximately two kilometres long. From the north, it begins on the Hay property, passes through property owned by Allen and Teresa Mazar, and ends on the Thompson property. In the subject area, the road grade varies between five and 15 percent.
- [8] The Mazars purchased their property in 1991. Mr. Mazar deposed that there was no road access to his property at that time, only an old game trail and wagon track. He made arrangements with Mr. Hay's predecessors in title, the Hansens, to build a road that essentially followed that track, after which the as-built road was to be surveyed and an easement registered. That process was completed in 1994.
- [9] Mr. Thompson purchased his property in 1998. He accesses his property using the road built by Mr. Mazar. He entered into an easement agreement with the Hansens that largely duplicated the Mazar agreement and used the same easement plan. That easement was registered in 1998.
- [10] Mr. Hay purchased the Hansen property in July 2015 and, pursuant to the provisions of both the Mazar and Thompson easement agreements, became bound by those easement terms.
- [11] Both easement agreements require the grantees to bear the costs of maintenance and upkeep. I will return to this subject later, but for now it is sufficient to note Mr. Mazar's evidence that for the last 25 years or so he and Mr. Thompson have been responsible for maintaining the road, which includes snow ploughing in winter and grading and pothole filling in the summer and fall.
- [12] The easement area, as identified in the registered plan, is 20 metres wide for most of its length, although it is 24.66 metres wide at its southern end, where the terrain is flatter. The average width of the roadway within the northerly section of the road is approximately 5.8 metres.

B. The Easement Agreement

- [13] The subject easement agreement contains clauses as follows:
- a) granting Mr. Thompson "a free and uninterrupted right, liberty, easement and right-of-way", "to pass and re-pass by pedestrian or vehicular means, over and upon the right-of-way, and to repair, maintain and upgrade the right-of-way" through the lands in the easement area (Clause 1);

- b) confirming that Mr. Thompson, and his contractors, servants, agents, invitees, etc., "shall have the full and free right and liberty to have ingress and egress to pass and to repass on the Easement Area either on foot or by means of vehicles and to remove such trees, grade, gravel, otherwise improve the road surface, and to construct such ditches, and culverts and related improvements as shall be reasonably necessary to utilize and enjoy the benefit hereby granted" (Clause 2);
- c) confirming that any work done by Mr. Thompson or his contractors to repair and improve the road or construct ditches and culverts is to be done at his expense and in a good and workmanlike manner. This provision is subject to a sharing provision should Mr. Hay use the easement for access to his own property (Clauses 3 and 5);
- d) allowing Mr. Thompson to use aggregate materials on or near the easement area "for the purposes of maintaining and upkeeping the easement and right of way" (Clause 3); and
- e) confirming the Hansens' (now Mr. Hay's) covenant that "he shall not make, place, erect, or maintain on the Easement Area any building, structure, foundation or obstruction which would interfere with the rights hereby granted" (Clause 5).

C. The Fence

- [14] In May 2021, Mr. Hay constructed a fence around the eight acres of his property he described as being the "main yard space" around his house. He deposed that his primary object in constructing a fence was to limit the entry of cattle as well as ATVs and other motorized vehicles to his yard site.
- [15] Mr. Hay gave no notice of his intention to construct a fence and he did not seek permission to do so from either Mr. Thompson or Mr. Mazar. Once he became aware that the fence was being constructed, Mr. Thompson attempted to halt the construction and reach an agreement to move the fence off the roadway, but these efforts were unsuccessful.
- [16] Only one side of that fence is in issue here, the side along the road. The contentious section is 345 metres long and for that section the fence is located entirely within the easement area.
- [17] Mr. Thompson deposed that he had concerns about the location of the fence, which in some places had been constructed right at the edge of the road shoulder but in other places had been constructed within areas of the roadway itself. He was concerned that the fence restricted his (and Mr. Mazar's) ability to plough snow in winter and to grade and repair the roadway in spring. As to the latter, he said grading and pothole repairs are carried out by pulling excess gravel and other material from the sides of the roadway to the centre, something the fence prevented them from doing in 2021.

- [18] Mr. Thompson expressed those concerns to Mr. Hay, but the ensuing dialogue was unconstructive and unpleasant. Mr. Thompson retained counsel, who sent a letter to Mr. Hay demanding that the offending portion of the fence be removed. Mr. Mazar also retained counsel, who sent a similar letter to Mr. Hay.
- [19] Mr. Thompson commenced these proceedings on May 27, 2021. Although Mr. Mazar has not joined with these legal proceedings, counsel informed the Court that Mr. Mazar supports Mr. Thompson's application.
- [20] Mr. Thompson proceeded to dismantle the subject fence section following the receipt of a November 8, 2021 report from Ron Kellam, a professional engineer who had been retained by Mr. Thompson's counsel. I will review this report in more detail later, but for the moment I will say that Mr. Kellam found that the fence interfered with the safe operation of the driveway, impeded proper maintenance of the road, impeded snow removal and associated drainage, and could impede the use of fire and other emergency vehicles. He concluded:

With the onset of winter conditions, I recommend that the fence be removed immediately and relocated to the lower edge of the easement or at the toe of the slope where the road section has been filled.

[Underlining in original omitted.]

- [21] Mr. Thompson said the following about the removal of the fence:

On November 22, 2021, I hired contractors to remove the Fence. I instructed the contractors to use their best efforts to avoid causing any damage to Hay's Fence posts or gate. The contractors removed the Fence poles, stacked them, and placed the poles within the Easement Area at the side of the Roadway. The contractors filled the holes from the Fence posts with gravel to avoid creating a tripping hazard for animals.

- [22] Because the removal of the fence involved the cutting of its barbed wire, Mr. Thompson obtained two rolls of replacement barbed wire and had these placed near the stacked fence poles.
- [23] Mr. Hay says the removal of the fence took place essentially without notice to him, as Mr. Thompson's counsel only informed Mr. Hay's counsel of the intended fence removal on the very day it was carried out.

III. Survey Evidence

- [24] A survey of the easement, roadway and fence location was carried out by professional land surveyor Parker Minard in the summer of 2021, when the fence was in place.

- [25] In his report, Mr. Minard identifies the errors (and likely sources of those errors) in the 1993 survey that resulted in the easement plan. He also prepared a new plan that corrects the errors and ensures that the existing road is contained within the easement area. No issue was taken with his survey or his evidence.
- [26] Mr. Minard's survey depicts the easement boundaries, the edges of the road shoulder and the location of the fence. Describing such a visual exhibit is not an easy task, but I consider it fair to say that the fence line largely coincides with the exact edge of the roadway, but in four locations the fence line is significantly within the roadway.

IV. Further Evidence

- [27] In the following summary I have focused on the evidence most relevant to the issues in this case and I have not mentioned everything that was contained in the affidavits.

A. Plaintiff's Case

Richard Thompson

- [28] Mr. Thompson said his concerns with the fence were that it was constructed within the easement area, it was located on the roadway he and the Mazars use to access their properties, its location created safety and liability concerns, and it affected his ability to maintain the roadway. He emphasizes that, unlike the case with Mr. Hay's property, the access road in question is his sole means of accessing his property and the only means by which essential services (propane delivery, ambulance and fire vehicles) can access his property.
- [29] In May 2021, during the time the fence was in place, the Radium Hot Springs Fire Department conducted a drill exercise at his property to test their ability to respond to a fire there. The exercise was attended by 15 to 20 firefighters, along with two fire trucks and an ambulance. The two fire chiefs who were present both expressed concerns about accessing the property in winter given the presence of the fence, as their trucks needed as wide as possible a road to account for icy conditions. These comments prompted Mr. Thompson to retain Mr. Kellam for his professional opinion on that issue.
- [30] Road access for emergency medical assistance is a concern for Mr. Thompson, as he is 77 years old, has health issues and recently suffered a stroke.
- [31] Mr. Thompson said that he and Mr. Mazar have been responsible for maintaining the road for approximately the last 25 years. Snow ploughing is done both by Mr. Mazar, who uses his personal truck fitted with a snow blade, and by a contractor hired by Mr. Thompson. He said Mr. Mazar ploughs the roadway after every snowfall of four or more inches and this results in six to 10 ploughings a year. In addition, Mr. Thompson has his contractor plough and sand the roadway when it becomes particularly icy, something that takes place five or six times during the winter. Icy conditions occur in areas where snow melts back onto the roadway

and the water then freezes. This is a particular problem in the section where Mr. Hay constructed the fence, as the road is constrained by a steep hill on the west side of the roadway and a ravine on the east side.

- [32] Mr. Thompson deposed that the fence would have blocked their ability to plough the snow because the hill on the west side leaves no space for snow placement, and the fence would have prevented them from ploughing the snow over the bank on the east side and into the ravine area. He said:

With repeated snowfalls, snow would inevitably pile up on either or both rises of the Roadway because there is nowhere for it to be ploughed. This would reduce the Roadway's usable road width.

- [33] Mr. Thompson said that during the time the fence was in place, it restricted them from accessing the east side shoulder of the road in order to pull excess gravel and road material from the side into the centre. This material is used to both level the roadway and to repair potholes. In a later affidavit, Mr. Thompson added that material is also brought from the sides to the middle of the roadway in order to build a crown, which allows water and snow melt to run into the ditches rather than accumulate in the centre.
- [34] Mr. Thompson said that he takes no issue with Mr. Hay's desire to prevent cattle and trespassers from entering the area near his home. He noted, however, that the cattle involved are those that Mr. Hay himself has allowed on his property under a grazing lease and, further, that Mr. Hay typically leaves his gate open during those times he is on his property, thus allowing cattle free access.
- [35] Mr. Thompson said he dealt with cattle and trespassers on his own property by fencing areas along the access points used by trespassers, and by posting signs. Since doing so, he has had few, if any, issues with trespassers and no issues with cattle.
- [36] Mr. Thompson has obtained a quote from his contractor, Daviduke Holdings Ltd., for the rebuilding of the fence parallel to its original location but several metres off the roadway and down the bank. This proposed fence location would not interfere with snow ploughing or road maintenance. The quoted cost was \$3,024.
- [37] Mr. Thompson's affidavit also appended: (1) photographs and drone footage of the subject road and fence; (2) photographs of the preserved fencing materials following the removal of the fence; (3) photographs showing Mr. Hay's gate open and cattle inside his property on three different dates; and (4) photographs of road grading work done by Mr. Mazar and Mr. Thompson in September 2022.

Allen Mazar

[38] In his affidavit, Mr. Mazar attested to the various facts, summarized earlier, concerning the origins of the road and the easement granted by Mr. Hay's predecessor in title, the Hansens. He gave similar evidence to that of Mr. Thompson on the matter of snow ploughing and road maintenance, stating that he ploughs the road approximately eight to 12 times per year, using his personal truck outfitted with a snow blade. Mr. Thompson's contractor ploughs and sands the roadway about five or six times a year when the road is icy. Mr. Mazar added:

In addition to winter maintenance, once a year in either the summer or fall, Thompson and I typically spend around a day repairing potholes and grading the Roadway. We were unable to grade the Roadway this year because the Fence restricted us from accessing the shoulder of East/Ditch Side of the Roadway.

[39] Mr. Mazar said he anticipated the fence would create "significant challenges maintaining the road, particularly during the winter months". He said the fence would block his ability to plough snow over the slope into the ditch or ravine, and there is nowhere else to put the snow. Accumulation of snow on the roadway in the subject area will lead to a narrowing of the road, tighter corners, and a steeper grade. He felt this would make the roadway dangerous in the wintertime.

[40] Access to his property is particularly important to Mr. Mazar and his wife because he has some severe health issues and his wife is a quadriplegic. They rely on regular visits by homecare workers who attend twice a day, seven days a week, to assist with their medical needs.

Franz Feldmann

[41] Mr. Feldmann is a rancher who has a grazing lease with Mr. Hay. Before that, he had a grazing lease with the Hansens. His summertime herd is approximately 680 cows and calves, of which 20 to 50 are placed on Mr. Hay's property for a six-week grazing period each year.

[42] Mr. Feldmann said Mr. Hay has never mentioned wanting to cancel the grazing lease and has never expressed any concerns about cattle grazing on his property. As to safety concerns, Mr. Feldmann said:

Although cows with calves can be protective of their young, in my 59 years of ranching, I am not aware of anyone ever being injured by one of my cows.

Tanner Daviduke

[43] Mr. Daviduke is the owner of Daviduke Holdings Ltd., a contracting company that provides snow removal, landscaping, irrigation and excavation services in the Radium and Fairmont Hot Springs area. He has been in that business for 22 years.

[44] As at the date of his affidavit, Mr. Daviduke had provided snow removal services for Mr. Thompson for four winters, during which he ploughed the roadway around six to 12 times each year. He ploughs the road using a five-ton truck fitted with a 10-foot blade on the front and a salt sander on the back.

[45] Mr. Daviduke noted that the road is an unpaved rural road or driveway, and in its steeper areas it has a steep upward slope on one side and an embankment or drop-off on the other. The roadway is, on average, about one and a half car widths wide. He said that due to the roadway's curves and steep grades he generally drives at speeds of five to 10 km/h, and no faster than 20 km/h, as faster speeds would be unsafe on that road.

[46] Mr. Daviduke described his ploughing practice on the subject road:

While ploughing snow in the curved, sloped areas of the roadway, my normal procedure is to plow the snow off the side of the road and either into the ditch or down the embankment. I do this by doing the first pass down the centre of the roadway with my plowing blade, and doing a second and sometimes third pass to push the snow either into the ditch where a ditch is available, or right off the edge of the roadway and down the embankment where there is an embankment. I follow up with one pass to salt and sand the road.

To push the snow right up to and over the edge of the embankment, I often end up driving on or along the shoulder of the roadway. I have never experienced the shoulder of the roadway to be soft or unstable. I push as much snow as possible into the ditch or over the side of the embankment because if the snow is not pushed off the roadway, with repeated snowfalls, the snow will creep into the driving surface of the road.

[47] Mr. Daviduke said he was the contractor who removed the fence at Mr. Thompson's request. He said that had the fence not been removed, it would have interfered with his snow removal work because the fence would have prevented him from blading the snow over the edge of the road and down the embankment. He said that, instead, the snow would build up next to the fence and would have to be removed by using a skid steer to scoop and then deposit the snow over the fence. This would add significantly more time and cost for snow removal.

[48] Mr. Daviduke said he has also provided grading services to Mr. Thompson for the subject road. He said that although he did not attempt to grade the roadway during the time the fence was in place, the fence would have interfered with his ability to grade it properly as he would not have been able to get a full crown from side to side on the roadway.

Evidence from the Examination for Discovery of Mr. Hay

[49] The plaintiff led the following evidence from the examination for discovery of Mr. Hay:

- a) he knew some of the fence was built within the easement area;
- b) he wanted the fence to be a permanent structure;

- c) he did not really consider any other locations for the fence;
 - d) his fence contractor said he could build the fence on a slope but Mr. Hay decided to build it in the easement area; and
 - e) he did not speak to either Mr. Thompson or the Mazars before commencing the fence construction and he gave them no notice it would be taking place.
- [50] The plaintiff also referred to a text message from Mr. Hay to Mr. Thompson in which he said it would be "impossible" to move the fence four feet to the east.

Ron Kellam - Registered Professional Engineer

- [51] Mr. Kellam is an expert in the field of road design for country residential and county roads, among other forms of roadways. He prepared a report dated November 8, 2021 and he also swore an affidavit dated October 21, 2022, responding to certain issues raised by the defence experts.
- [52] In his report, Mr. Kellam noted that measurements appear to show that the road crown surface was originally constructed to an average width of 6.7 metres, or 22 feet. This dimension is adequate to support two-way traffic at lower speeds, as would be expected for a driveway. It is not wide enough to be considered a rural road. It also does not meet the "rural road" standards prescribed by the Transportation Association of Canada (TAC) for curved sections (three of its curves are too tight) and because of its steep gradient in places.
- [53] As to the fence, Mr. Kellam said:
- The fence has been constructed in an unusual location regarding this driveway.
- Rather than being constructed on the limit of the easement, where one would normally expect it to be constructed, it was constructed in what appears to be the easiest way to construct it, given the terrain.
- [54] Referencing photographs he took at the site, which show places where the fence was constructed on the actual driving area, Mr. Kellam noted a "shy zone" had been created as a result of the fence structure. He explained:
- For clarification, a shy zone is that area that a driver intuitively uses to shy away from a vertical barrier to avoid conflict with it. With the fence being constructed on the shoulder of the road and within the road crown driveway width, the barrier (fence) effectively reduces the useable drivable surface width for the driveway.
- [55] The road width at one particular location had been reduced to 3.0 metres, far less than the originally intended 6.7 metres, and suitable only for a single vehicle.
- [56] He concluded:

The presence of the fence being constructed on the road surface, combined with the shy zone has effectively reduced this driveway from a road surface that would support 2 way traffic to one lane in portions of the lower reach of the driveway.

[57] Mr. Kellam also concluded the presence of the fence would impede road grading and snow removal. The inability to grade in fenced areas "will potentially create channelization of road drainage on the road surface rather than letting water sheet flow over the edge, increasing the chances of a road washout". In winter, windrows of snow will be left under and by the fence and will act as a barrier to road surface drainage when melt occurs. This will channel water on the road surface and cause erosion, potentially damaging the road by rutting, and resulting in increased maintenance expense.

[58] Mr. Kellam also expressed concerns about access for fire and emergency vehicles, but this section of his report was based on hearsay from the local fire chief, and was objected to by the defendant. While I appreciate that experts can rely on hearsay in formulating their own opinions, as the plaintiff submitted, in this case Mr. Kellam does little more than relate the views of the fire chief and does not really advance any opinion on that subject himself. Accordingly, I conclude the defendant's objection was a valid one.

[59] Mr. Kellam concluded his first report as follows:

With the onset of winter conditions, I recommend that the fence be removed immediately and relocated to the lower edge of the easement or at the toe of the slope where the road section has been filled.

[Emphasis omitted.]

[60] Mr. Kellam also provided an affidavit dated October 21, 2022 in response to comments made by the defendant's experts. He said:

- a) While the subject road did not meet the TAC standards for a "rural road" and therefore should be considered a "driveway", nonetheless those standards provide basic design principles for road construction and design aimed at public safety;
- b) In his experience, where there is an access right-of-way easement, a structure such as a fence is never constructed within the driving surface (both the road crown and shoulders) because the easement instrument typically prohibits the construction of a structure within the easement area;
- c) In response to Richard Lupul's questioning of his qualifications to offer opinions on the subject road, he said that as a professional engineer responsible for the design and construction of roads, he would not at any time specify that a fence be installed within the driving surface of this driveway, which would restrict its width and the driveway surface. Normally, a fence would be located at the limits of the easement area or off the shoulder of the driveway;

- d) He had observed evidence of a "shy zone" when he inspected the subject road, noting that wheel tracks "appeared to be around 2-3 feet (0.6-0.9 m) away from the fence;
- e) While a fence can provide benefits, such as delineating the edge of the roadway and identifying dangers like soft shoulders or embankments, a fence located on the road crown also creates a hazard and a shy zone. Both the benefits and the risks must be considered. Here, the risk created by the fence due to its location on the surface of the driveway "far outweighed the benefit conferred by identifying the edge of the embankment";
- f) In further answer to Mr. Lupul's assertion that he (Mr. Kellam) does not have the qualifications to comment on roadway maintenance, he said that as a professional engineer he is charged with considering public safety and long-term sustainability in his road designs. This includes maintenance considerations such as weather impacts and snow removal, snow buildup, and the effects of ploughed snow accumulation and storage on vehicular operations. He also referred to his practical experience in operating bulldozers and semi-trailers, his qualifications to drive heavy trucks and other vehicles, and his work as a field supervisor for infrastructure and land development projects, which gave him "a very good understanding of the operational capabilities of heavy construction equipment"; and
- g) While he accepted that highway road crews routinely plough snow through guardrails, lane delineators and cable barriers, this did not apply to the driveway in question because highway snowploughing is done with specialized equipment at high speeds. The physical constraints of the subject driveway would not permit the throwing of snow over the fence but merely to push it close to the fence so as not to damage the fence.

John Morrall - Registered Professional Engineer

- [61] Dr. Morrall is a professional engineer working in the field of highway and traffic engineering. He is also a professor emeritus of civil engineering with the University of Calgary. He has particular experience in conducting road safety audits, having done over 300 road safety audits over the past 15 years.
- [62] Dr. Morrall said the subject road is a lower classification road than a public road or forest service road in terms of geometrics such as horizontal curves, vertical curves, grades and cross-sections. He said "the combination of sharp horizontal curves with a radius less than 30 m and steep grades combined with the narrow cross section result in a safe operating speed in the 20 - 30 km/h range".
- [63] He noted that the Ministry of Transportation and Infrastructure's design guide for low volume roads prescribes a three metre minimum setback for poles or fences, meaning they must be at least three metres from the travelled way. Although the subject road is not a Ministry road, "the basic principles of road maintenance in summer and winter, as well as road safety and operations, still apply".

- [64] He said the location of the subject fence is "puzzling" and it should have been located along the easement boundaries.
- [65] Dr. Morrall noted the steep terrain of the subject road, which leaves little room on the upslope side for storing ploughed snow, and ample room on the other side to push snow. He said the logical ploughing method would be to blade the snow away from the upslope, creating a windrow, and then on the next pass ploughing the windrow and remaining snow toward and over the steep side slope.
- [66] He said the fence would have three impacts on snow ploughing:
- a) the operator would shy away from the fence posts by about one metre, with the result being that about one metre of the road would not be ploughed;
 - b) the reduced width of the road in winter would have consequences for the safe passing of vehicles travelling in opposite directions, as lane width would be reduced to three metres or less; and
 - c) over time, snow would accumulate along the fence line, creating a windrow which would build up over the winter each time the road was ploughed. As there is no ditch, the melting snow "would drain toward the road, creating ponds of water and eventually causing pot-holes and other roadway distresses".
- [67] Dr. Morrall also said the fence, given that it is located along the shoulder of the road and on the road itself, would prevent a grader operator from "crowning the road and 'pulling' the shoulders", which is necessary to maintain a minimum crossfall of four percent. The consequences would be inadequate drainage, washboards, potholes, ruts and gravel accumulation along the shoulders.

B. Defendant's Case

Scott Hay

- [68] Much of Mr. Hay's evidence has already been summarized. As noted earlier, he deposed that he had the fence built in order to limit the entry of cattle and motorized vehicles to his yard area.
- [69] Mr. Hay said the cattle that graze on his property have caused damage such as crushing the chicken feeders, eating garden plans and knocking over stacks of wood. Some of the cattle rubbed against the supporting posts of an outer deck, causing it to collapse. They also leave their droppings, which Mr. Hay believes can cause E. coli infections if there is contact.
- [70] He adds that he has long-term plans for his property that involve creating cattle pastures and hayfields, and so he anticipates that further fencing will be needed for those purposes.

[71] Mr. Hay says he and his wife have two young children, with a third on the way, and although the children have never been injured in any encounters with cattle, they are concerned about the risk to the children's safety.

[72] Trespassing by riders of motorized vehicles was also a problem. He has documented 50 instances of this type of trespassing and he says this is likely an underestimate. This too is a safety concern in terms of their children.

[73] Mr. Hay deposed that:

Due to the peaks, valleys, and cliff edges that exist on My Property, the only suitable and practicable location was along the edge of the Easement area as this area is relatively flat.

The location of the Fence did not inhibit access to the Private Driveway as it was built in the grassy edges on the side of the Private Driveway.

[74] In his affidavit, Mr. Hay included hearsay information he received from his fencing contractor, whom he did not identify. I am satisfied these statements are inadmissible as they were being led for the truth of their contents.

[75] Mr. Hay said the easement road "has never been a true two-way road", although it does accommodate two-way traffic for smaller vehicles. There are several sections of the road that could not accommodate two-way traffic for large vehicles such as big rigs or logging trucks.

[76] Mr. Hay said he has observed that the road is ploughed differently on that section located on his property than on those of the two neighbouring properties. On his property, the road is ploughed in two strips, "angling the snow plough to widen the drivable area", whereas on the other properties the road is generally ploughed in just one strip, "leaving no space for any vehicles to pass one another".

Richard Lupul

[77] Mr. Lupul says he is a "certified and nationally recognized Canadian Registered Safety Professional and a contract safety trainer and consultant for the Alberta Municipal Health and Safety Association". He said his specialty is equipment operator training, including loaders, graders, and plough and sander trucks. He prepared a report dated May 26, 2022, responding to the report of Mr. Kellam.

[78] Mr. Lupul said that the fence "is very beneficial to all road users in that it brings attention to the embankment", in similar fashion as lane delineators or guardrails. He said:

This fence is a way of addressing the hazard of the soft edge and embankment by providing a reference for drivers to see, and in fact, I believe it enhances the safety of all using the road access.

- [79] He noted that the type of machinery likely used to build the fence would have been impractical for use on the slope beside the road, and "therefore the fence was built on the flat non treed grass area just above the [slope]".
- [80] Mr. Lupul said the fence was built outside that area of the road where vehicles actually drive. He disagreed with Mr. Kellam that this shoulder area would be an area where vehicles drive, and so "having the fence in the grassed area on the edge poses no impact to vehicles" driving along the road. He said he saw no evidence of vehicles having "shied" away from any of the fenceposts.
- [81] Mr. Lupul disagreed that the fence would impact road maintenance, and he questioned Mr. Kellam's qualifications to express such an opinion.
- [82] He said the fence would not impair the ability of a plough operator to push the snow because road crews routinely plough snow through guardrails, lane delineators and cable barriers.
- [83] He disagreed that the fence would mean runoff from melting snow would be trapped between the snow at the roadside and the crown of the road. He said that, based on his own observations, the road does not have a crown and so the water will simply drain to the low side, whatever side of the road that might be. Even if the crown were to be reset, a snowbank on the edge would not be a drainage impediment because the snow will melt and stay away from the driving surface because of the crown.
- [84] Mr. Lupul said that, in any event, pushing snow over the bank is "not practical and would be very unsafe". Without some form of marker to the edge of the embankment the plough operator "would have no idea where the edge is".
- [85] Mr. Lupul disagreed that the fence would impair grading operations because material from the shoulder could not be moved to the travelled portion of the roadway. He said the material "would not end up against the fence as vehicles would not be that close to it". In any event, some of the material, most notably that in grassy shoulder areas, would not be suitable as it will be comprised of "contaminants" (rocks, grass and dirt) that would break down and cause potholes.
- [86] Mr. Lupul said Mr. Kellam does not have the qualifications to comment on life safety issues. He said the road access "is more than wide enough" for a single ambulance. If there was a fire requiring a multi-unit response, all or most of the responding apparatus would be arriving more or less at the same time. If there was a need to establish a water shuttle, a system would be established to ensure there would be no chance of two vehicles meeting in narrow areas. He added that a fence at the side of the road would assist emergency vehicles in identifying the edge of the roadway.

[87] Mr. Lupul also provided a report in response to Mr. Daviduke's affidavit. The plaintiff objected to the admissibility of this rebuttal report on the basis that it was not attested to by Mr. Lupul, but instead was merely attached to the affidavit of a legal assistant. The objection is well taken. However, I note Mr. Lupul's rebuttal report is essentially a repetition of the same points made in his earlier report and so nothing is lost to the respondent by reason of this ruling.

Adam Brash

[88] Mr. Brash is both a registered professional engineer and British Columbia land surveyor. His engineering qualifications are in geomatics engineering. He inspected the scene and his firm also performed a detailed field survey of the subject road, which he described as an "access driveway".

[89] Mr. Brash noted that the driveway would not be properly referred to as a "rural road" or "road" as it is not a dedicated road. Accordingly, "any reference to the TAC Manual issued by the Ministry of Transportation and Infrastructure in BC is, in my opinion, not accurate".

[90] Mr. Brash said that in his opinion, "the fence is not constructed in an unusual location as described by Mr. Kellam". In the many easement surveys he has done he has never seen a consistent location for the fence along the easement driveway. He said "terrain and accessibility generally dictate the fence location".

[91] Mr. Brash said his survey revealed that there were no fence posts located directly in the travelled surface of the driveway. However, he recommended that:

Fence posts located on inside corners be moved or straightened so the perception of the fence being in the travelled surface is avoided.

[92] Mr. Brash concluded the driveway "is reasonable and meets all the requirements I have observed for other access driveways in the Kootenay Region". He also noted the driveway "has good slopes, an excellent solid foundation, good drainage and provides adequate pull out[s] for passing when required for all types of vehicles".

[93] Mr. Brash agreed with the errors identified by Mr. Minard and with his boundary solution. While he recommended that the problem be solved by way of registering with the Land Title Office a reference plan rather than an explanatory plan, this debate was rendered moot by the defendant's ultimate agreement to the form of order sought by the plaintiff on this issue.

V. Positions of the Parties

A. Plaintiff

[94] The plaintiff submits the fence that the defendant constructed on the easement constituted an actionable interference with his easement rights.

- [95] The plaintiff says the test for actionable interference requires that the interference be such that the easement rights cannot be practically and substantially exercised as conveniently as before.
- [96] While noting that the defendant's reasons for constructing the fence do not stand up well to scrutiny, the plaintiff says the defendant's intentions in building the fence are largely irrelevant to the question whether the fence constituted an actionable interference with his rights under the easement.
- [97] The plaintiff emphasizes that the easement unambiguously prohibits the defendant from placing "any building, structure, foundation or obstruction" in the easement area. The easement terms clearly prohibit the construction of a permanent fence in the easement area.
- [98] The terms of the easement also grant the plaintiff an express right to both full access for ingress and egress, and to repair, maintain and upgrade the easement area fully and without obstruction. These broad rights encompass the entire easement area, not just the area of the roadway.
- [99] The plaintiff says the construction of the fence created an actionable interference with his easement rights because:
- a) the fence reduced the useable width of both the roadway and the effective width of the easement;
 - b) the fence would have prevented the plaintiff's method of removing snow by ploughing it off the roadway and over the bank;
 - c) the inability to plough snow over the bank would mean ploughing would create windrows of snow. This, in turn, would cause water to channel on the road surface and lead to icy conditions in thaw/freeze cycles, potholes and other damage;
 - d) the fence would interfere with grading by preventing a grader operator from "pulling" gravel or other road material from the shoulders to the road surface in order to create a crown; and
 - e) any advantage gained by having a fence on the road that delineated the edge of the road surface would be outweighed by the risks created by the presence of a fence in that location.
- [100] The law permits an aggrieved party to abate a nuisance, provided the method used is the least detrimental of the available abatement options. Here, the plaintiff says he acted reasonably by giving notice of the nuisance and requesting removal of the fence, attempting to resolve the issue amicably, acting only after receiving an expert's report from a professional engineer that indicated urgent abatement was needed to remove a hazard, and removing the fence in a manner that preserved all but five fence posts and providing replacement barbed wire.

- [101] The plaintiff notes that he took the least intrusive means possible to remove the fence, and his contractor always remained within the easement area in order to carry out that work. He seeks judgment against the defendant for the \$1,500 cost of the fence removal.
- [102] The plaintiff seeks a permanent injunction, arguing that it is warranted here given the nature of the dispute, the need for a clear statement of the plaintiff's rights both now and in the future, and the defendant's stated intention of building more fencing along the roadway or easement area. A permanent injunction would also ensure that the plaintiff can continue to maintain the road in the same manner as he has since 1998.
- [103] The final issue has to do with rectifying the easement to correct errors. Although the defendant now agrees with the rectification method advanced by the plaintiff, there remains an issue about who should bear the associated cost. The plaintiff says the cost should be shared equally.

B. Defendant

- [104] The defendant emphasized that he constructed the fence for safety and security purposes and the plaintiff removed the fence essentially without notice. He says the plaintiff has foisted on him both an incorrect easement and this litigation. Further, he has been subjected to the plaintiff's exercise of a "self-help remedy" in removing the fence, which has obliged him to bring a counterclaim in order to obtain his own remedy. He says the plaintiff has "weaponized litigation" against him.
- [105] The defendant says his counterclaim is not just about the fence, it is about having certainty with respect to his rights as a property owner. He has "many potential projects" in mind and so he says the plaintiff must be deterred from interfering with his use of his own property.
- [106] While the defendant agrees that the easement plan has to be rectified, he does not agree that he should have to pay for any of the associated cost.
- [107] The defendant says the crux of this case is whether the fence constituted a "substantial interference" with the plaintiff's easement rights. Based on the opinion of Mr. Lupul, in particular, not only did the fence not substantially interfere with the plaintiff's use, it enhanced it because it made snow removal operations safer.
- [108] The defendant notes the subject road has never been a full two-lane road. It varies in width throughout its length and in some sections it is wide enough for two vehicles to pass. No part of the fence was situated on the actual travelled part of the roadway.
- [109] The defendant questions the ability of the plaintiff's experts to offer opinions on rural driveways because their experience appears to be in either urban development, major highway or infrastructure projects. The statements of the plaintiff's contractor, Mr. Daviduke, to the extent they are opinion evidence, are not admissible as Mr. Daviduke does not have expert qualifications.

- [110] The defendant says Mr. Lupul is the "preeminent expert in this case", and the Court ought to accept his opinions. Although he has no university degrees, he has practical experience and various certifications as a safety professional.
- [111] The defendant notes there are limits to the remedy of self-help or abatement, the most important of which is that the right to abate rests only with parties who would be successful in a cause of action. Also, an abatement that involves entry onto another's land requires notice except in limited circumstances, and no notice was given here.
- [112] The defendant advances claims in trespass and nuisance for the plaintiff's removal of his fence. Relying on *Gibson v. Sun*, 2018 BCSC 1277 at para. 111, a case also involving the removal of a fence, the defendant says the plaintiff's actions in removing the subject fence constitute both trespass and nuisance. He claims the cost of replacing the fence, which he suggests will be in the range of \$5,000 to \$8,000 based on the cost of the original fence (\$12,000), the fact that one-third of it was removed by the plaintiff, and adding an inflationary component. He also seeks reimbursement for the cost of a temporary electric fence and the cost of replacing four fruit trees damaged by cattle, the receipts for which total about \$1,390.
- [113] The defendant seeks general damages for nuisance and trespass, with the amount being significantly more than the \$13,000 awarded in *Gibson*, plus a nominal award for aggravated damages for the distress caused, and an amount for punitive damages that will be sufficient to denounce and deter the plaintiff for having removed the fence without notice. As to the quantum of punitive damages, the defendant cited decisions in which awards ranged from \$30,000 to \$100,000 in cases involving significant tree-cutting or trespasses involving anchor rods installed by neighbouring property developers.
- [114] Finally, the defendant seeks a permanent injunction restraining the plaintiff from interfering with his rights as landowner. Relying on the factors set out in *Qureshi v. Gooch*, 2005 BCSC 1584, the defendant says an injunction is called for here to confirm his right to both rebuild the fence and build such other fences as he sees fit.

C. Plaintiff's Reply

- [115] There are two components to the plaintiff's reply, as he made reply submissions both as part of his summary trial application and in response to the submissions in chief of the defendant on the defendant's summary judgment application.
- [116] On the issue of notice of the intended abatement, the plaintiff says he gave notice of his objections on May 10, 2021, when he first noticed the fence being constructed. He reminded the defendant of the latter's obligations under the easement, and in later discussions that day he expressed his concerns about the fence location and asked that it be located four feet to the east. The defendant rejected both the plaintiff's concerns and his request, and instead stated words to the effect that if the plaintiff did not mind his own business, he (the defendant) "would close the whole road off".

- [117] Notice was also given to the defendant by way of a demand letter sent on May 11, 2021, which was ignored. On this point, I digress to note the defendant says he did not respond because the email attaching the demand letter was diverted to his junk mail folder.
- [118] In late October 2021, the defendant proposed that the parties meet to discuss the fence. The plaintiff agreed to meet but also suggested the parties discuss the matter by telephone. The defendant did not respond at all to that communication and did not follow up on his proposal that the parties have a meeting.
- [119] The plaintiff said he acted with despatch in removing the fence on receipt of Mr. Kellam's report of November 8, 2021 because Mr. Kellam said the fence should be removed "immediately" given the imminent onset of winter and in light of Mr. Kellam's concerns about winter maintenance and ensuring access for emergency vehicles.
- [120] In response to the defendant's submissions suggesting the diminution in useable area is minimal, the plaintiff points to the survey, which shows the fence "right smack in the middle" of the roadway.
- [121] The plaintiff says that he has the right to use the entirety of the easement area and just because the current road is where it was when the defendant purchased his property in 1999 does not mean that the plaintiff is restricted to using only that width of road. In other words, he could widen the road if he wanted to, given that the easement entitles him to "remove such trees, grade, gravel, otherwise improve the road surface, and to construct ditches". He is also entitled to use "aggregate materials otherwise situate near or upon" the easement area.
- [122] The plaintiff says these easement terms demonstrate that the plaintiff's rights are not restricted to mere access, but entitle him to enhance and maintain the road. The fence is a substantial diminution of that right.
- [123] As to Mr. Lupul's opinion that the road could still be maintained despite the presence of the fence, the plaintiff notes that the issue is not whether Mr. Lupul could grade the road, but whether the plaintiff could practically exercise his easement rights as conveniently as before. The uncontradicted evidence of Mr. Daviduke, Mr. Thompson and Mr. Mazar is that the road has been maintained in a certain manner for 25 years and the fence would have interfered with activity. Similarly, the plaintiff does not have to establish that the fence created an actual safety hazard by narrowing, or that access by emergency vehicles might have been hampered by it. He only has to show that he cannot practically use the road as conveniently as before.
- [124] As noted earlier, the plaintiff also made submissions in response to the defendant's claims in trespass and nuisance. Some of these submissions were duplicative of earlier submissions and I so will summarize just the additional points made.

- [125] The plaintiff notes that a claim in trespass requires a direct interference with land in the absence of a legal right to do so. The defendant's right of possession over the easement area was and is subject to the terms of the easement agreement. Here, the plaintiff had express leave and licence to enter, travel, repair and improve the road within the easement and they entered the easement area to remove an obstacle - the fence - from the easement area.
- [126] In any event, given the nature of the events in question, any damages in trespass ought to be nominal only.
- [127] As to the defendant's claim in nuisance, the plaintiff says that nuisance is distinct from trespass. Unlike trespass, which requires direct entry onto another's land, nuisance is the infringement of the claimant's property interest without direct entry. The interference must originate from somewhere outside the affected land. The defendant's claim of nuisance must fail because the alleged nuisance (the removal of the fence) did not originate outside the defendant's property.
- [128] Actionable nuisance requires that the interference with the claimant's use and enjoyment of their land be both substantial and unreasonable. While denying that there was any interference in this case, the plaintiff says the defendant has failed to show substantial and unreasonable interference here. The plaintiff was allowed by the terms of the easement agreement to be in the area, and to repair and maintain the area, and the fence was removed by keeping the fencing materials intact and replacing those materials that could not be kept intact. The plaintiff's actions were a reasonable response to legitimate concerns.
- [129] On damages, the plaintiff says that, at most, the defendant would be entitled to the cost of rebuilding the fence using the preserved fencing materials, which Mr. Daviduke estimated at \$3,024. The plaintiff also argues that no case has been made out by the defendant for awards of either aggravated or punitive damages.
- [130] Finally, the plaintiff submits that, given there was no trespass or nuisance in this case, there is no basis on which a permanent injunction could be granted.

D. Defendant's Reply

- [131] In reply submissions on his counterclaim, the defendant said the easement agreement did not contain terms which permitted the removal of a fence in the area.
- [132] As to the requirement in nuisance cases that the nuisance originate from outside the lands in question, the defendant notes that the crew that removed the fence came from an outside location.
- [133] On the matter of damages, the defendant notes the Daviduke quote is based on a re-use of materials but it is not reasonable to re-use fence posts that have been removed and possibly damaged.

VI. Discussion

A. Suitability for Summary Trial

- [134] As noted earlier, both parties agree this matter is suitable for disposition by summary trial, and although I agree with that assessment, there is one comment I must make on that issue.
- [135] During the hearing I expressed concern that the criticisms expressed by both counsel concerning the opposing experts might require that the experts appear in person to be cross-examined. I left that issue with counsel to ponder, and subsequently both counsel said they did not want experts to be cross-examined as their respective clients want the matter resolved. They agreed that all experts' issues raised, including the question of qualifications of an expert to provide the opinions proffered, are to go to weight only.

B. Findings of Fact

- [136] First, as the survey shows, the fence was constructed well within the bounds of the easement area except in the one area where the parties agree the easement plan needs to be corrected.
- [137] Second, I am satisfied that significant portions of the fence were located well within the bounds of the roadway, by which I mean within the bounds delineated by the edge of the road shoulder. The survey, which was not challenged, makes this very clear.
- [138] More particularly, the survey shows four significant incursions by the fence into the roadway, ranging from 2.14 m to 3.2 m (7 feet to 10.5 feet) inside the edge of the road shoulder, and some of these larger incursions carry on for some distance, approximately 50 m or 165 feet in one instance, though the magnitude of that incursion diminishes over its length.
- [139] There is one stretch shown on the survey where, by my reckoning, for about 75 m (246 feet), the fence incursion averages around .6 m (2 feet) inside the roadway.
- [140] There is at least some incursion by the fence into the roadway for the majority of its entire length.
- [141] Both parties referred to photographs that supported their arguments, which is understandable enough, though I thought the defendant's photographs tended to be unreasonably selective in his favour, showing the roadway at its widest and the fence at its least intrusive location. In this regard, I found the drone video footage to be the most helpful visual aid as it depicts the road, roadway and fence for the entire length of the subject area.

- [142] I accept the legitimacy of the defendant's concerns regarding off-road vehicle trespassers and wandering cattle, and the property damage and potential safety concerns associated with those matters, which were his reasons for building the fence, but I also agree with the plaintiff that these have little to do with the legal issues in this case. Importantly, none of those reasons required that the fence be built in a location that might infringe on the plaintiff's easement rights.
- [143] On that subject, I do not accept the defendant's evidence that this was the only suitable location for the fence. I reject that assertion because: (1) he provides no basis in terms of experience or expertise to make that statement; (2) he says his contractor also told him it could not be located elsewhere, but that statement is hearsay and the contractor is unnamed and thus unattributed; (3) in the defendant's examination for discovery, he said he did not really consider any other location but, notably, he also said his contractor told him he could build the fence on a slope; and (4) there is a quote of about \$3,000 from Mr. Daviduke (who does fence construction work) for the building of a similar fence down the slope, thus indicating there was no significant impediment to building a fence there.

C. Legal Principles

- [144] The parties largely agree on the principles relating to alleged breaches of easement rights, with both citing *TimberWest Forest Corp. v. 0768816 B.C. Ltd.*, 2020 BCSC 1184 [Timberwest]. In *TimberWest*, the landowner installed a locking gate on a road over which *TimberWest* held a statutory right of way. The statutory right of way contained terms similar to those in the present case.
- [145] In *TimberWest*, the Court determined that the appropriate approach is to first determine the nature and extent of the rights granted by the easement agreement, and to then determine whether those rights have been substantially interfered with by the actions of the landowner.
- [146] As to the first step - the nature and extent of the rights granted - the proper approach is set out in *Tessaro v. Langlois*, 2019 BCCA 95:
- [18] Easements are to be interpreted as contractual documents. Contractual interpretation involves questions of mixed fact and law because the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 3 at para. 50; *Robb v. Walker*, 2015 BCCA 117 at paras. 30–31.
- [19] This court summarized these legal principles in *Grant v. Lowres*, 2018 BCCA 311:
- [20] Contractual interpretation generally involves discerning "the intent of the parties and the scope of their understanding" by "read[ing] the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Sattva* at para. 47.

- [21] This court adapted those insights to the particular context of easements in *Robb v. Walker* [2015 BCCA 117]:
- [31] When interpreting an easement, the court must have regard to the plain and ordinary meaning of the words in the grant to determine what the intention of the parties was at the time the agreement was entered into. Surrounding circumstances, that is, objective evidence of the background facts at the time of the execution of the contract, are to be considered in interpreting the terms of a contract: *Sattva* at para. 58.
- [32] The wording of the instrument creating the right of way should govern interpretation unless (1) there is an ambiguity in the wording, or (2) the surrounding circumstances demonstrate that both parties could not have intended a particular use of the easement that is authorized by the wording of the document: *Granfield v. Cowichan Valley (Regional District)* (1996), 16 B.C.L.R. (3d) 382 (C.A.).
- [147] The second step - substantial interference - was described in *Smith v. Balen*, 2018 BCSC 918, as follows:
- [85] The test as to whether there has been an actionable disturbance on an easement is whether the way could be practically and substantially exercised as conveniently after as before the interference; to be actionable, the interference must be substantial: *Grenier v. Elliott*, 2007 BCSC 598 at para. 35; see also *Fallowfield v. Bourgault* (2003), 68 O.R. (3d) 417 at paras. 11 and 33 (Ont. C.A.).
- [148] Both parties cited various cases illustrating the application of these principles. Among other cases, the plaintiff cited *TimberWest; Langlois v. Tessaro*, 2018 BCSC 1463 (appeal allowed only to the extent of varying the injunction terms, 2019 BCCA 95); *Lotzkar v. The Owners, Strata Plan BCS2715*, 2012 BCSC 1500; and *Dodsworth v. Madill*, 2019 BCSC 898. The principal cases relied upon by the defendant were *Lewko v. Budd*, 2019 ONSC 3594 and *Gardiner v. Robinson*, 2006 BCSC 1014.

D. Expert Evidence

- [149] By way of a general comment, I accept that all the experts have qualifications and expertise to opine on at least some of the issues in this case. I do not agree with the defendant's argument that the plaintiff's experts are not in a position to offer opinions on rural driveways because their experience has focused on either urban development or major highway or infrastructure projects. I am satisfied they each have extensive experience and qualifications in road design of various types and that they are reasonably well-placed to offer opinions on the subject road.
- [150] Mr. Lupul said he saw no evidence that the fence had created a "shy zone", yet a "shy zone" is, by definition, a place of non-activity because drivers will tend to shy away from an obstruction. Photographs taken when the fence was in place show there to be a travelled roadway at least 3 feet away from the closest fenceposts, which is consistent with a "shy

zone". I accept that the travelled part of the roadway could have been established in those locations irrespective of the fenceposts, or that a shy zone could be created through the avoidance of a perceived slope edge, but the photographs and drone footage show these fenceposts to be very obviously intrusive. In my view, it is telling that Mr. Brash, a defence expert, recommended that "fence posts located on inside corners be moved or straightened so the perception of the fence being in the travelled surface is avoided." In other words, he expresses concern about the location of those fence posts and their effect on drivers' perception.

[151] I conclude that the most encroaching of the fenceposts did in fact create a "shy zone", meaning an effective reduction in the useable roadway width. In this regard, I find that the opinions of the plaintiff's experts carry more weight here insofar as they each have qualifications and experience in road design, including designs that address the effect of obstructions on driver behaviour, and Mr. Lupul, the defendant's expert who opined on the subject, does not. In coming to this conclusion I also rely on the photographs and drone footage depicting the road and fence at a time when the fence was in place. The crowding effect of the fence seems very apparent in those images.

[152] I do not accept Mr. Lupul's opinion that the fence should have no effect on snow ploughing because snow can be pushed through the fence in the same way that road crews routinely plough snow through guardrails and cable barriers. First, I see no equivalency between a highway guardrail and this barbed wire fence, which seems a much flimsier structure. I do not accept that volumes of snow could be repeatedly pushed through such a fence without damaging it. Second, I see no comparison between highway snow ploughing, which is done at speed through the use of specialized snow removal equipment, and the low-speed ploughing done by Mr. Mazar and Mr. Daviduke, using basic equipment.

[153] The plaintiff was critical of Mr. Brash's conclusion that the driveway "is reasonable and meets all the requirements I have observed for other access driveways in the Kootenay Region", noting that Mr. Brash offered no explanation or context for his conclusion. I agree with that criticism. The absence of analysis and the manner in which that opinion is expressed suggest it is little more than an anecdotal comment. I also note that Mr. Brash's expertise is in the field of geomatics engineering, not civil engineering or road design, and so it is not clear to me that he has the expertise to opine on the "reasonableness" of both the subject road and location of the fence. For these reasons, I am unable to give this particular conclusion any weight.

[154] I would add that I am well satisfied that Mr. Brash has expertise in surveying and geomatics, which I understand has to do with spatial information and analysis.

[155] I will address other points made by the experts in the next section.

E. Analysis

- [156] I begin by determining the nature and extent of the rights granted to the plaintiff under the terms of the easement.
- [157] I addressed those terms fully earlier in these reasons but, to summarize, they grant the plaintiff:
- a) "a free and uninterrupted right, liberty, easement and right-of-way";
 - b) the right to "repair, maintain and upgrade the right-of-way";
 - c) the right to "remove such trees, grade, gravel, otherwise improve the road surface, and to construct such ditches, and culverts and related improvements as shall be reasonably necessary to utilize and enjoy the benefit hereby granted"; and
 - d) to use aggregate materials on or near the easement area for the purposes of "maintaining and upkeeping the easement and right of way".
- [158] The easement terms also confirm the defendant will not "make, place, erect, or maintain on the Easement Area any building, structure, foundation or obstruction which would interfere with the rights hereby granted".
- [159] I am satisfied that the fence constructed by the defendant was a "structure" within the meaning of that prohibition. A fence may be a "structure". Here, the subject fence was something built from component parts and installed both into and onto the land, and obviously intended to be permanent; hence it is a "structure": *R. v. Fajtl*, 53 C.R. (3d) 396, 1986 CanLII 1247 (B.C.C.A.), leave to appeal to SCC ref'd, 20287 (24 March 1987); and *R. v. Thibault*, 51 N.S.R. (2d) 91, 1982 CanLII 3780 (C.A.).
- [160] The next question is whether the fence interfered with the plaintiff's easement rights. As noted earlier, the test as to whether there has been an actionable interference on an easement is whether the right of way could be practically and substantially exercised as conveniently after as before the interference. It is on this point that the case turns.
- [161] I am satisfied that the fence was located in a manner such that the plaintiff could not practically and substantially exercise his easement rights as conveniently as he could before the fence was built. In particular, I am satisfied that:
- a) the intrusion of the fence into the roadway reduced its effective and usable width. As noted earlier, the survey shows this intrusion to be substantial;
 - b) the most intrusive of the fenceposts created a "shy zone", which further reduced the usable width of the roadway;

- c) the presence of the fence would interfere with the plaintiff's snow ploughing insofar as snow could no longer be ploughed over the bank. Without the ability to eliminate the presence of at least some of the snow in that way, it is likely snow would accumulate at the side of the road in a manner that would further diminish the usable width of the roadway in winter;
- d) snow accumulating on the side of the road would increase the likelihood that water would channel on the road surface rather than drain to the side. This would increase the likelihood of ice on the road in freeze/thaw conditions and increase the likelihood of potholes and other damage; and
- e) the fence would substantially interfere with road grading by preventing a grader from "pulling" material from the road shoulder into the road itself.

[162] In coming to those conclusions, I have relied on the survey, the photographs and drone footage, and the opinions of Mr. Kellam and Dr. Morrall. I found their opinions to be sensible and well-reasoned.

[163] Mr. Lupul's opinions were problematic in some respects. He saw no negative effects from the fence in terms of grading operations because the fence was not located on the actual travelled portion of the road. He appeared to see no need to have access to the shoulder because he felt road material would not work its way close to the fence such that it would need to be graded back to the road. He also said he did not see that the road had a crown and so the road would not have properly drained anyway. Finally, he said that, in any event, some of the material on the shoulder was not suitable for use in repairing or restoring the road surface.

[164] These opinions are largely refuted by the evidence of the plaintiff and Mr. Daviduke, the contractor who has done grading on the subject road. Mr. Daviduke said the presence of the fence would have interfered with his ability to grade the roadway because he would not be able to form a full crown from side to side. Mr. Daviduke is in the best position to say whether the fence would actually interfere with the type of grading he does. I would add that I do not view this as a matter of opinion evidence as on this point Mr. Daviduke was giving factual evidence about his method of carrying out grading on this road.

[165] The plaintiff said the same thing: using an improvised grader blade affixed to a backhoe, he and Mr. Mazar pull material from the sides of the road to the centre in order to level the road and carry out repairs.

[166] I am satisfied that in the course of maintaining the road, the plaintiff and his contractor, and Mr. Mazar, do in fact pull material from the side of the road into the centre and the presence of the fence substantially interfered with their ability to do so.

[167] Mr. Lupul also says that ploughing snow over the bank is unsafe and the fence actually benefits road users because it denotes the beginning of the slope. In effect, he is saying that Mr. Daviduke and the plaintiff should not plough snow in the manner they have for the last

25 years, but instead they should do it a different way. In my view, this supports the conclusion that with the fence in place, the plaintiff would not have been able to exercise his easement rights as conveniently as he had done for the last 25 years. I would add that I do not consider the plaintiff's ploughing and grading methods to be in any way unreasonable.

- [168] I digress for a moment to address certain photographs said by the defendant to demonstrate that snow was not being ploughed over the bank. First, the photographs in question depict areas where the road is very wide, with one area appearing to have a pullout next to it, and there is room to move snow well off the roadway without having to push it over the bank. Second, it is not clear from the photographs that snow has not been pushed over the bank.
- [169] The plaintiff and Mr. Mazar raised concerns about the fence negatively affecting access by emergency vehicles due to a narrowing of the usable area of the road. While I acknowledge that the plaintiff and Mr. Mazar have a valid basis for their subjective concerns, given the health issues within their households, due to the limited and conflicting evidence on the subject I am unable to conclude the fence would have impaired emergency vehicle access.
- [170] Both parties cited cases to illustrate "substantial interference", or the lack of it, but cases of this type are very fact-specific. I will refer to just a few of them.
- [171] I agree that Dodsworth and Langlois, cases cited by the plaintiff, are broadly similar. In both cases, encroachments narrowed the usable area of the easements and restricted the rights-holders from exercising their full entitlement.
- [172] The cases cited by the defendant were less helpful. Lewko, an Ontario case, involved the installation of a gate on an easement that provided pedestrian beach access. The impact on the rights-holders was minimal, as the Court noted:
- [27] Really, very little has changed; they now need to remember to bring a key, and they need to spend what must be thirty seconds or less each time to unlock, open, close and then re-lock the gate.
- [173] The other principal case relied upon by the defendant was Gardiner, which also involved the installation of a gate. The grantors, who operated a ranch, granted an easement to neighbours to permit them to access their property more conveniently. At the time the easement was granted, there were three gates on that access road, which were necessary in order to control cattle movement. Environmental regulations required them to install a fourth gate near a river. The Court said:

- [27] It is clear that the respondents have a right to fence their property. Indeed, under the Trespass Act, R.S.B.C. 1996 c. 462, they have a duty to do so. Similarly, the fence along the river is required by the Agricultural Waste Control Regulation, B.C. Reg 131/92. As to gates, there were three gates in place when the easement was granted. The Robinsons have added only one further gate, and that was as a result of the necessity of fencing the area along the river.
- [28] The petitioners say that the necessity for that gate, that is Gate Number 2, could be avoided by putting a fence along both sides of the easement route, but such an arrangement would interfere with the ability of the Robinsons' cattle to enter the corral area, where they obtain water. In my view, the relatively minor inconvenience to the petitioners of having one additional unlocked gate is justified by the legitimate needs of the Robinsons in carrying out their ranching operations.
- [174] I do not see that Gardiner assists the defendant. The plaintiff does not contest the defendant's right to fence his property. The Court in Gardiner said the landowners were entitled to carry out their ranching operations "so long as they do not substantially and unreasonably interfere with the petitioners' use of the easement route" (at para. 36). Those same principles apply here.
- [175] Accordingly, as already noted, I find that the fence constructed by the defendant constituted an actionable interference with the plaintiff's easement rights.

F. Self-Help/Abatement

- [176] The question of the plaintiff's right to abatement raises the issue of notice. The plaintiff says notice was given, effectively at least, and the defendant says that no effective notice was given.
- [177] I begin with some general principles from Allen M. Linden et al, Canadian Tort Law, 12th ed. (Toronto: LexisNexis, 2022) at 608-609 [Linden on Torts]:

Abatement, a "self-help" remedy, is available to an individual suffering nuisance where speed is required to end the offending conduct. It is permitted in situations of emergency only and has been discouraged by the courts for obvious reasons. Clearly, where one has been denied an injunction one cannot subsequently resort to abatement in spite of the court's ruling.

Abatement is not confined to cases where the offending condition (encroaching tree branches or roots, for example) can be removed from the land of the party aggrieved, but also justifies entry upon the land of another for this purpose. The person carrying out the abatement must take reasonable care not to inflict unnecessary damage while doing so, and the least detrimental of possible alternative methods of abating must be adopted.

It has been suggested that an abatement cannot be justified unless a mandatory injunction would have issued on the basis that "otherwise one might obtain an end by self-redress which would have been denied to him if he had taken recourse to the judicial process". Thus, the privilege will not lie where the damage caused by abating is wholly disproportionate to the harm threatened.

Notice to the offender is not necessarily required prior to invoking the remedy, although it is certainly advisable. Notice of abatement will not be necessary where there is no need to enter onto someone else's land, where there is an emergency, and (probably) where the land belongs to the original creator of the nuisance.

Only persons who would be successful in a cause of action are entitled to abate.

[Footnotes omitted.]

[178] The present matter is not a case where there was no notice of any kind. The plaintiff made his objections known to the defendant very shortly after fence construction started. He asked the defendant to relocate the fence off the roadway. Attempts to discuss the matter with the defendant were unsuccessful. Counsel for the plaintiff sent a demand letter, and then an action was commenced.

[179] On November 22, 2021, counsel for the plaintiff notified defence counsel that the plaintiff would be removing the fence. This was, however, the same day that the removal work began.

[180] The authorities on the need for notice do not provide the clearest of guidance. It is clear that notice is not necessary where there is an emergency. The authorities also say notice is not needed in some other cases, as where the owner of the land was the original wrongdoer by placing the nuisance there (*Linden on Torts*, at 609; Gregory S. Pun et al, *The Law of Nuisance in Canada*, 2nd ed. (Toronto: LexisNexis, 2015), §6.19) [*Pun on Nuisance*], and where entry onto another's land is not required in order to abate the nuisance: *Phoenix v. Quagliotti*, 11 W.L.R. 659, 1909 CarswellBC 36 (S.C.).

[181] I accept that the plaintiff had good reason to move urgently given the imminent onset of winter that would have prevented the removal of the fence without damaging the fencing materials and possibly damaging the road. Also, there would shortly be a need to plough snow to maintain access to the Mazar and Thompson properties, with the fence complicating that process. I accept as well that the plaintiff had received expert advice that the fence should be removed immediately. Still, whether the situation was an emergency is a difficult one.

[182] The same type of issue arose in *Suttles v. Cantin*, 8 W.W.R. 1293, 1915 CanLII 733 (B.C.C.A.), a case cited in both the texts referenced earlier. The case involved two adjacent mining claims that were being worked by the respective parties. The upstream miner was washing mine tailings from his claim down to the downstream miner's claim. The downstream miner went to the upper claim and opened a gate, such that water no longer reached the tailings, but this caused other damage to the upstream claim. The downstream miner gave

no notice that he intended to abate the nuisance, despite the fact that the other miner was evidently fairly readily available in the area.

- [183] It is difficult to discern a general statement of principle from Suttles because of the varying judgments of the five judges. Two judges held there was no pressing urgency entitling the downstream miner to abate without notice, two judges held that the situation was one of emergency or sufficient emergency, and the fifth judge noted it would have been preferable for notice to have been given, but deferred to the trial judge who, it appears, concluded the situation was sufficiently urgent.
- [184] Here, the decision is a similarly close one. However, given the entirety of the circumstances, including the plaintiff's (and the Mazars') significant health issues that gave rise to valid heightened concerns about access, together with the fact that a civil engineer recommended the plaintiff remove the fence immediately, I conclude the situation was one of such urgency that the limited notice given was sufficient.
- [185] If I am wrong on that point, I conclude that the plaintiff was entitled to remove the fence without notice, or with the minimal notice given, because he was abating an actionable interference with his easement rights without committing a trespass on another's land. In short, the plaintiff had a right to be there.
- [186] As final points on the abatement issue, I am satisfied that there was no less detrimental way of abating the nuisance, for example, by moving just a few fenceposts, as the incursion of the fence into the roadway was present for most of its length. I am also satisfied that the fence removal was carried out in a manner that preserved the fencing materials as much as possible.
- [187] Had I held otherwise on the abatement issue and found that the plaintiff was not entitled to remove the fence as he did, then I would have awarded the defendant nominal damages only, given the various circumstances that I have already reviewed at length.

G. Remedies

- [188] The plaintiff seeks several remedies: (1) a declaration that he is entitled to an easement on the terms and conditions set out in the easement instrument; (2) a permanent injunction restraining the defendant from interfering with the easement area, including by constructing a fence in the easement area; (3) judgment against the defendant for \$1,500, being the cost incurred by the plaintiff to remove the fence; and (4) an order rectifying the easement by filing a new, corrected explanatory plan.
- [189] The defendant, in his application response, consented to the declaration and, ultimately, he agreed with the rectification order, though not with the cost of the rectification. The remaining issues are therefore the injunction, the fence removal cost and the rectification costs.

- [190] I am satisfied that a permanent injunction should issue in this case. On this point, I note that the defendant sought a similar injunction against the plaintiff should it emerge that he was in the right, and he based his argument on the same general principles. The authorities cited on this point included *Langlois*; *Pun on Nuisance*, §6.31; and *Qureshi*.
- [191] In the reference noted above, the authors of *Pun on Nuisance* note the essential nature of nuisance is a continuing interference with property rights, and so these are the kinds of circumstances in which an injunction is most likely to be granted where requested, unless the interference is trivial in nature or an injunction cannot be justified on the balance of convenience.
- [192] Here, the plaintiff emphasizes the defendant's evidence that he had longer-term plans to engage in cattle ranching, an activity that will involve the construction of more fencing, including fencing along the subject road. I agree that these statements of intent weigh heavily in favour of granting the injunction sought. No balance of convenience factors were raised by the defendant in opposition to an injunction, and so an injunction is warranted here.
- [193] I am, however, concerned that the injunction terms sought by the plaintiff are unnecessarily wide. As written, they would prohibit the defendant from constructing a fence anywhere in the easement area, which is a wider prohibition than that contained in the actual easement instrument given that it refers to structures or obstructions "which would interfere with the rights hereby granted". It seems to me that the easement prohibition might still allow a fence to be built within the easement area, but down the slope, as this would be unlikely to interfere with the roadway.
- [194] For these reasons, I leave it to the parties to settle on the wording of the injunction order, with leave to address the matter if they cannot agree.
- [195] The plaintiff will have judgment for the cost of the fence removal (\$1,500). This follows, as a matter of course, from my earlier conclusions.
- [196] Although there was eventual agreement to the rectification order sought by the plaintiff, the parties do not agree who should bear the associated cost.
- [197] This is not a situation where only one party benefits from the easement since both parties derive a benefit from it here. Although the subject road is not the primary means by which the defendant accesses his property, he does use it as a secondary access and he also rides an ATV along the road every week except during winter. He therefore enjoys both the benefit of the easement and the fact that the plaintiff and Mr. Mazar maintain the road pursuant to the easement agreement.

[198] For these reasons, I conclude that the rectification costs should be shared 75-25, with the plaintiff bearing the greater share. Should the parties be unable to agree on the amount, there will be a reference to the registrar to determine the issue, with the result to be certified.

H. The Counterclaim

[199] It follows from my earlier conclusions that the counterclaim is dismissed.

VII. Conclusion

[200] Judgment is granted in favour of the plaintiff, with orders as follows:

- a) a declaration that the plaintiff is entitled to an easement over the subject property on the terms and conditions set out in the easement instrument;
- b) an order, in terms to be settled by the parties, restraining the defendant, his agents, servants, etc., from interfering with the plaintiff's easement rights, including by constructing a fence or other obstruction in an area that the parties will define, with leave to address the matter if the parties cannot agree;
- c) an order that the defendant pay to the plaintiff the sum of \$1,500 for the fence removal cost;
- d) an order, in the terms sought by the plaintiff, rectifying the easement by filing a corrected explanatory plan, with liberty to apply for any further orders necessary to effect the rectification; and
- e) an order that the costs associated with rectifying the easement shall be shared 75-25, with the plaintiff bearing the greater share. Should the parties be unable to agree on the amount, there will be a reference to the registrar to determine the issue, with the result to be certified.

[201] Subject to any submissions the parties may wish to make, the plaintiff will have costs of both his claim and the counterclaim.

"Blok J."

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Prepared on 26 October 2026 · Esheria