

SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Fickes v Busche*, 2025 NSSM 75

Date: 20251127

Docket: SCBW-533225

Registry: Bridgewater

Between:

Jackson Webb Fickes

Claimant/Defendant in counterclaim

v

Margaret Leona Busche

Defendant/Counterclaimant

Adjudicator: Ryan Clements

Heard: November 19th and 26th, 2025, by videoconference

Counsel: Ruben Dexter, for the Claimant/Defendant in
counterclaim
Calvin DeWolfe, for the Defendant/Counterclaimant

By the Court:

Introduction

[1] This matter involves competing claims in private nuisance. For the reasons to follow, both claims are dismissed.

Facts

[2] Jackson Webb Fickes, the claimant, is the owner of the residential property located at 186 Silver Point Road, in Martins River. Margaret Leone Busche¹, the counterclaimant, is the owner of the neighbouring residential property located at 196 Silver Point Road. These properties share a boundary line.

[3] There are several large white pine trees that run along this boundary line. These trees are situated on Ms. Busche's property, about 3 feet away from the boundary line with Mr. Fickes' property. They are spread out along the boundary line although several are clustered towards the front of the property, near Silver Point Road². These trees were there when Mr. Fickes purchased the property³.

¹ Ms. Busche, who is now in her mid 90s and has serious health challenges, did not participate in this hearing. Her son, Gordon Busche, did.

² *Claimant's Book of Evidence*, Tab 1, photographs, pp. 1-22.

³ Mr. Fickes testified that he moved into 186 Silver Point Road in 2020 (although he purchased it 10 to 12 years ago).

[4] In the second half of 2021, Mr. Fickes constructed a French drain that runs immediately along his side of this boundary line. Mr. Fickes estimated that the French drain, which runs from near the front of his property to the top of the hill in the rear, is 100 to 150 feet in length. He testified that he constructed this French drain to prevent water from running onto the Defendant's property. He testified that Ms. Busche had complained to him about runoff from his property.

[5] Mr. Fickes did not hire professionals to build the French drain. Rather, he and his employee, Mitchell Hubley, built it. He testified that he had built 3 to 4 French drains in the past, but only for himself and on his own properties. Mr. Hubley, who did all the digging and rock placement for the French drain at Mr. Fickes' direction, testified that he had never built one before. The French drain was installed 3 feet below grade⁴.

[6] At the time that Mr. Fickes built the French drain, he was aware that they required a certain amount of maintenance. He considered building a trench instead but was concerned that, during heavy rain, a trench would cause a washout of Silver Point Road. In contrast, he believed that the French drain – with a rock bed and a holding tank – would slow the water down.

⁴ Mr. Busche testified that such French drains will freeze during the winter because there is a "4-foot frost line in Nova Scotia".

[7] Mr. Fickes testified that the large boulders situated along his side of the boundary line secure the French drain⁵. He does not believe that the construction of the French drain caused any change in elevation between the properties. He acknowledged, however, that his property was higher than Ms. Busche's property in the area adjacent to Ms. Busche's outbuildings⁶. Additionally, Ms. Busche's property begins to elevate - to slope upwards to form a hill⁷ - behind her outbuildings⁸. The same hill, but on Mr. Fickes' side, has been modified by Mr. Fickes and appears to slope towards his own property⁹.

[8] Mr. Fickes introduced several photographs that he had taken of his property. Many of the photographs - taken between the summer and late fall - depict a considerable amount of pine needle debris, including on the driveway, the garden, the lawn, the French drain bed and the French drain grate cover over the holding tank¹⁰. There appears to be little dispute that the pine needles are largely from the trees located on Ms. Busche's property. Mr. Fickes agreed that the trees are not

⁵ *Claimant's Book of Evidence*, Tab 2, p. 2

⁶ *Claimant's Book of Evidence*, Tab 2, p. 1

⁷ Mr. Gordon described this hill as "a very large hill."

⁸ *Claimant's Book of Evidence*, Tab 2, pp. 1, 4

⁹ *Claimant's Book of Evidence*, Tab 1, p. 7

¹⁰ *Claimant's Book of Evidence*, Tab 1, photographs, pp. 1-22

overhanging his property and that it is the wind which carries the needles onto his property¹¹.

[9] Mr. Fickes introduced several photographs that he had taken of Ms. Busche's property. Some of these photographs depict the accessory buildings on the Busche property. Others depict downspouts from the gutters on the rear outbuilding, including one downspout that is close to the adjoining deck¹². In yet more photos, the deck is covered with pine needle debris, seemingly among mud, pebbles, branches and pinecones¹³. As noted by Mr. Gordon Busche, "there are lots of pine needles" on his mother's property, pretty much "everywhere".

[10] Mr. Fickes believes that this needle debris impedes the functioning of the French drain by clogging the French drain bed and the French drain grate cover. One photograph, taken during heavy rain, shows water breaching the French drain and onto his driveway¹⁴. In the winter, the water freezes and creates a hazard, particularly when it runs down his driveway onto Silver Point Road. Mr. Fickes

¹¹ Mr. Fickes further testified that, at one point, Ms. Busche had someone limbed some of the white pine trees, but this did not alleviate the situation. Mr. Busche also testified about cutting down some of these trees "as part of the court case" and "to appease the neighbour" with "his problems" with the pine needles in his French drain and on the driveway. See also: *Book of Exhibits*, Tab 2.

¹² *Claimant's Book of Evidence*, Tab 2, p. 5-10.

¹³ *Claimant's Book of Evidence*, Tab 2, pp. 11-12

¹⁴ *Claimant's Book of Evidence*, Tab 1, photographs, pp. 10 & 14

also testified that the needles impede the growth in his garden and on his lawns, which he attributes to the “acetic acid” from the needles¹⁵.

[11] Mr. Hubley testified that the French drain gets “plugged up” wherein the water “won’t go through it” and it runs down the driveway and onto the roadway¹⁶. In his recollection, this has happened five or six times since 2023. To fix the situation during the winter months, he has had to dig out the ice and snow from the French drain grate cover; he noted that there are needles mixed in with the snow and ice. He, as well, believes that the needles are ultimately to blame: “the pine needles wouldn’t allow the water to go down through the drain”¹⁷.

[12] Mr. Fickes further testified that he spends money having the pine needles vacuumed out of the French drain¹⁸. He hires Mr. Hubley to do this work. In the fall, Mr. Hubley does this as much as twice a month.

[13] Mr. Busche testified that his mother has owned 196 Silver Point Road since 1967. He would spend weekends at the property, but he stopped doing this in the early 2000s, when he built his own cottage. Over the years, he would visit “off and

¹⁵ Mr. Fickes acknowledged in cross-examination that he is not an expert in horticulture.

¹⁶ During the winter months, it freezes to the point that Mr. Hubley cannot drive his vehicle up the driveway.

¹⁷ Counsel for the Defendant objected to this evidence because Mr. Hubley is a non-expert as to ‘the source of the clog’.

¹⁸ *Claimant’s Book of Evidence*, Tab 3, p. 2, Invoice, dated April 30, 2024. Mr. Fickes testified that this was for yard work over a 12-month period between 2022-2023 at the 186 Silver Point property.

on” and help his mother maintain the property. He built the accessory buildings, which he referred to as “the garage” and the “implement shed”, in the late 1980s or early 1990s. When asked about his other involvement with the property, he testified that he had “looked after” the “court cases” over the last “4 to 5 years, or whatever it’s been”.

[14] Mr. Busche testified that the court case was “ongoing for many years”. When pressed, Mr. Busche acknowledged that he may have been mistaken as to whether there was, in fact, “a court case” (as opposed to an “argument”) but that he assisted his mother in 2022 with taking photographs to provide to her lawyer, Pat Burke (who had been writing “legal letters”). Ms. Busche confirmed that one of his mother’s concerns at that time was with runoff onto her property. According to Mr. Busche this was a significant concern involving, among other work, the removal of “truckloads of topsoil”.

[15] Mr. Busche testified that the problems began when Mr. Fickes built the road on his property, which involved raising up the land “to make it flatter” (and making the adjacent elevation higher)¹⁹. According to Mr. Busche, the French drain was subsequently built by Mr. Fickes to stop the migration of water and silt from

¹⁹ Mr. Busche testified that the road was built around 2020 to 2023.

coming onto his mother's property (because of the elevation change). Prior to the French drain, "large amounts of gravel" would flood over onto the deck and up against the accessory buildings. With rain, it caused flooding inside of the garage. He testified that "we went to court and it was decided that Mr. Fickes had to remove the dirt". Although this dispute was "settled" and Mr. Fickes partially cleaned it up, the silt and gravel continue to "bury the deck".

[16] Mr. Busche noticed the problem – of silt and gravel coming on the property and the deck – reemerge as early as the spring of 2022. He referred to photographs – which he took in the spring of 2022 – that depict the accessory buildings, the deck and the land between his property and Mr. Fickes' property²⁰. These photographs were taken "after the court case" and "after the deck was cleaned". Mr. Busche stated that these photographs depict further build-up of silt and gravel from Mr. Fickes' property onto the property and deck. Mr. Busche testified that his mother did not complain about this "because she was tired of it".

[17] Mr. Busche also referred to photographs that he took on April 27, 2025. In one of the photographs – that depicts the deck largely covered with what looks like mud, pebbles, pine needles and other tree debris – he testified that this depicts "the

²⁰ *Defendant's Book of Exhibits*, Tab 1, pp. 10-14

deck that is still buried under gravel...”²¹. Mr. Busche stated that the images from the spring of 2022²² and April 27, 2025²³ show that the “gravel is continually migrating”. Mr. Busche testified that, because of the ongoing build up of silt and gravel, the deck is rotting²⁴. He first noticed the rot “after the cleaning took place”, in 2022.

[18] Mr. Busche testified that he had “not done a lot” to address this build up. He agreed that he stopped sweeping or shovelling anything off the deck in 2022, “during that court case”. In his words, it was “not my problem”.

[19] Mr. Busche believes that the silt and gravel is coming from the Fickes property and not from the hill behind the accessory buildings because the hill is covered with grass and hay and “pebbles do not come from hay fields”²⁵. One photograph indicates that the land immediately behind the accessory buildings – but before the hill slopes upward - is not covered in grass²⁶. Further, Mr. Busche could not identify any pebbles in the photography of Mr. Fickes property but noted

²¹ *Defendant’s Book of Exhibits*, Tab 1, p. 3. See also p. 1. The deck is covered with a copious amount of pine needles. See also *Claimant’s Book of Evidence*, Tab 2, pp. 11-12

²² *Defendant’s Book of Exhibits*, Tab 1, p. 10

²³ *Defendant’s Book of Exhibits*, Tab 1, p. 3

²⁴ Mr. Busche believes that the airflow in the deck is impeded by silt runoff into the deck cavities.

²⁵ Mr. Busche testified that there is no drainage trench or French drain (or anything at the bottom of the hill to mitigate or prevent runoff) on his property to control runoff from the hill because, in his view, it “naturally flows to the bottom of the hill” and “just dissipates” in the grass. Mr. Busche testified that the property has never been assessed by an expert to determine the source of the runoff or gravel.

²⁶ *Claimant’s Book of Evidence*, Tab 2, p. 4.

that Mr. Fickes' road used to be a gravel road but had been paved over "1 to 2 years ago".

[20] Based on his experience as a contractor, Mr. Busche testified that it would cost approximately \$5672.00 to remove the old deck and install a new one²⁷.

Although built in the late 1980s or early 1990s the deck had been replaced about 15 years ago with pressure treated lumber and had done well until the runoff from the Fickes property.

ANALYSIS

The Law of Private Nuisance

[21] The parties agree that the law of private nuisance is well-settled and offered several leading and helpful decisions on the topic, including: *Antrim Truck Centre Ltd. v Ontario (Transportation)*, 2013 SCC 13 at paras [18-24](#); *Canada (Attorney General) v MacQueen*, 2013 NSCA 143 paras [135-142](#); *Stadnyk v The Corporation of the City of Thunder Bay*, 2023 ONSC 3920 at paras [34-52](#) per Perell J., affirmed by [2025 ONCA 137](#). I do not propose to repeat what is set out in these decisions. Rather, I will apply this law to the facts.

²⁷ *Defendant's Book of Exhibits*, Tab 3

Mr. Fickes' Claim

[22] Mr. Fickes' claim is that "[t]he falling pine needles and other detritus from the trees have caused the clogging of the French drain and have damaged the Claimant's garden, as well as portions of his law near the common boundary line"²⁸. In my view, this claim cannot succeed.

[23] First, I am not satisfied on a balance of probabilities that the tree debris, particularly the pine needles, causes the clogging of the French drain: *Stone v Tkachyk*, 2020 ABQB 24 at paras [49](#)-52 *per* Grosse J (as she then was); *Baumann v Capello*, 2024 ONSC 357 at para [15](#)²⁹. Based on the lay opinion evidence that I heard in this proceeding, as well as the fact that this large French drain was designed and constructed by non-professionals, there is a real possibility, if not a likelihood, that there is a material flaw with its design or construction. In other words, while it is possible that the pine needles are to blame, it is equally possible, if not more likely, that the design or construction of the French drain is the culprit. See: *Flatters v Brown*, 1999 CanLII 14988 (ONSC) at para [11](#); *Pavlovich v Danilovic*, 2020 BCCA 239 at paras [56](#)-58.

²⁸ *Statement of Claim*, dated May 10, 2024, paragraph 6.

²⁹ Counsel in this case invited the Court to apply the "but for" test for causation in relation to their respective private nuisance claims, which I have done. As noted by Justice Perell, private nuisance is "not actionable without damage having occurred to the land or to the landowner's enjoyment and use of his or her land": *Stadnyk v. The Corporation of the City of Thunder Bay*, 2023 ONSC 3920 at para [40](#).

[24] Second, even if it was satisfied that the tree debris causes the clogging of the French drain (a non-trivial interference), I would not conclude that this interference is unreasonable in all the circumstances.

[25] In choosing to install a large French drain, Mr. Fickes knew that he was selecting an option which required significant maintenance. In other words, irrespective of the pine needles, he knew he would have to maintain the French drain by periodic cleaning.

[26] Mr. Fickes also knew that he was installing it right along the boundary line, which is lined with pre-existing mature white pine trees, presumably serving as a wind break (and in any event, a “natural use”). I have no hesitation in inferring that Mr. Fickes was fully aware of the considerable debris that these trees produced at that time that he installed the French drain: *Gallant v Dugard*, 2016 ONSC 7319 at para [25](#).

[27] In short, even if the pine needles result in more frequent cleaning than would have otherwise been required (had there be no trees), I cannot conclude that this interference is unreasonable in all the circumstances.

[28] I have also considered “the normal sensitivities of the reasonable person to interferences to their property”: *Stadnyk (ONSC)*, at para [48](#). While only one factor

in this evaluation, I note that these neighbours have been engaged in a protracted dispute, one seemingly set in motion by road work some years ago. I find that the “sensitivities” are rather elevated.

[29] Lastly, even if I was satisfied that the tree debris caused damage to the lawn and garden, I dismiss this aspect of the claim on the basis that any such damage is trivial, an interference that “must be accepted as part of the normal give and take of life”: *Stadnyk (ONSC)* at para [41](#). As noted in *Wallace v Joughin*, 2014 BCPC 73 at para [240](#):

...one who chooses to live in a semi-rural environment where there are a significant number of trees must expect to have the both the benefits and advantages of those trees and some of the minor inconveniences that naturally accompany them. Those minor inconveniences will include blowing fallen maple leaves in the fall, blossoming Japanese cherry trees in the spring and the year round rain of needles from the coniferous trees, many of which may end up in the house gutters. It will even include disruption of a personal goal to achieve a perfect lawn because of its natural incompatibility with the surrounding trees.

See also: *Sykes v Labuick*, 2014 SKPC 145 at para [18](#); *Gallant*, at paras [18](#)-23.

[30] Although I screen out this aspect of the claim on the substantial interference threshold, it would also clearly fail on “the more complex analysis of reasonableness”: *Antrim*, at para [21](#).

Ms. Busche’s claim

[31] Ms. Busche's claim is that "[t]he run off of silt from Mr. Fickes' property constitutes nuisance which has damaged the deck situate on Ms. Busche's property, and which more broadly has presented a substantial and continuing interference with the use and enjoyment of her property"³⁰. In defence to the counterclaim, Mr. Fickes argues, among other things, that this claim is statute barred³¹.

[32] I agree. Ms. Busche has failed to establish on a balance of probabilities that her claim in nuisance was brought within the limitation period established by clause 8(1)(a) of the *Limitation of Actions Act*³².

[33] Section 8(1)(a) states that a claim may not be brought "two years from the day on which the claim is discovered"³³. Section 8(2) states that:

A claim is discovered on the day on which the claimant first knew or ought reasonably to have known

- (a) that the injury, loss or damage had occurred;
- (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
- (c) that the act or omission was that of the defendant; and
- (d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.

³⁰ *Statement of Counterclaim*, dated June 25, 2024.

³¹ *Statement of Defence to Counterclaim*, dated July 9, 2024.

³² *Limitation of Actions Act*, SNS 2014, c 35, section 9(1).

³³ *Limitation of Actions Act*, SNS 2014, c 35, section 8(1)(a)

[34] The provisions are cumulative, meaning that a claimant can discharge this burden by establishing that any one of the four factors has not been satisfied: *GHC Swift Current Realty Inc. v BACZ Engineering (2004) Ltd.*, 2022 SKCA 38 at para [29](#).

[35] As noted by Justice Moldaver, “a claim is discovered when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant’s part can be drawn”: *Grant Thornton LLP v New Brunswick*, 2021 SCC 31 at para [42](#). The degree of knowledge is “more than mere suspicion” but “does not rise so high as to require certainty of liability”: *Grant Thornton* at para [46](#). Furthermore, “it is well established that a plaintiff does not need to know the exact extent or type of harm it has suffered, or the precise cause of its injury, in order for a limitation period to run”: *Ibid*, at para [46](#).

[36] While “additional information supporting the claim may be useful in assessing whether or not to proceed, [it] is not necessary in order to “discover” the claim”: *Sampson v Empire (Binbrook Estates)*, 2016 ONSC 5730 at para [38](#). Furthermore, “the discovery of additional facts at a later date does not postpone the discovery of the claim”: *Location Access Credit Inc v Eisonor*, 2021 NSSM 4 at para [10](#) quoting *Smith v Parkland Investments Limited*, 2019 NSSC 74 at para [64](#); *McNeil v. van Gulik*; *McNeil v Panchapakesan*, 2019 ONSC 5816 at para [72](#).

[37] In my assessment of the evidence, particularly the testimony of Gordon Busche, I am not satisfied on a balance of probabilities that Ms. Busche's counterclaim was brought within the applicable 2-year limitation period.

[38] Ms. Busche brought her counterclaim on June 25, 2024. However, Mr. Busche testified that he became aware of the current issues with the (re)build-up of silt and gravel by at least April 2022, when he took the photographs. Indeed, it was at this point that Mr. Busche noticed that the deck was beginning to rot. Mr. Busche testified that his mother did not complain about this at the time "because she was tired of it".

[39] In my view, Ms. Busche and her son, who by this point was "looking after" the dispute with Mr. Fickes, knew that the damage had occurred, knew that it was caused by runoff from Mr. Fickes' property and knew or ought to have known that it was sufficiently serious to warrant a proceeding.

[40] It matters not that the deck *continued* to rot which, in this case, was almost a forgone conclusion given Mr. Busche testimony that he did nothing to mitigate this outcome after 2022. In my view, the limitation period cannot be postponed in this manner, beholden to the extent of deck rot. When Mr. Busche noticed the rot, he knew about the "damage" for the purpose of section 8(2) of the *Limitation of*

Actions Act. This is not trivial damage, particularly in the context of a claim which asserts that the “ongoing run-off of silt from Mr. Fickes’ property” has “more broadly...presented a substantial and continuing interference with the use and enjoyment of her property”. As noted, Ms. Busche and her son were aware of this “ongoing” issue since at least April of 2022.

[41] I also find that when Ms. Busche and her son became aware of the reemergence of the runoff issue, and the damage to the deck, they knew this damage was sufficiently serious to warrant a proceeding but, instead, chose to take no action (“because she was tired of it”). Their past involvement with this issue supports an inference that they knew *or ought to have known* that the damage was sufficiently serious to warrant a proceeding. After all, they had previously engaged with a lawyer to help resolve this matter, and they understood the potential for related and additional damages, including the flooding of the garage and the removal of “truckloads” of dirt.

[42] Although this claim was discovered as early as the spring of 2022, I suspect that it was only brought on June 24, 2024, because of Mr. Fickes’ claim, which had been brought a month early.

[43] Even if Ms. Busche's claim is not statute barred, I would have denied the nuisance claim. Much like the Fickes' claim, I am not satisfied on a balance of probabilities that the runoff from Mr. Fickes' property caused the damage to the deck. It is just as likely that the deck was damaged from runoff from the Busche property or from the copious amount of pine needles and other tree debris that were left to accumulate on the deck over the last two to three years³⁴.

[44] Furthermore, even if Ms. Busche's claim was not statute barred and her nuisance claim was allowed, I would not have awarded the full damages sought given that no effort was made to mitigate the damage to the deck.

Conclusion

[45] Both the claim and counterclaim are dismissed.

Ryan Clements, Small Claims Court Adjudicator

³⁴ *Defendant's Book of Documents*, Tab 1, p. 1; *Claimant's Book of Evidence*, Tab 2, pp. 11-12