SUPREME COURT OF NOVA SCOTIA
Citation: Behie v. Carrigan, 2011 NSSC 171

Date: 20110504
Docket: Ant 299328
Registry: Antigonish

Between:

Ronald Behie and Sharon Behie

Plaintiffs

v.

Earle Carrigan and Jessie Elizabeth Carrigan

Defendants

Judge:	The Honourable Justice Patrick J. Duncan
Heard:	October 18, 19 and 20, 2010, in Antigonish, Nova Scotia
Final Written Submissions:	January 14, 2011
Counsel:	M. Louise Campbell, Q.C. for the plaintiffs
	William F. Meehan, for the defendants

By the Court:

Introduction

[1] The plaintiffs and defendants are relatives, and long time next door neighbours. They reside on Highway 344, in the rural community of Sand Point, Guysborough County, Nova Scotia. This Action seeks to resolve their dispute over the location of the common boundary line of their adjoining properties.

Background

[2] A tax deed executed November 14, 1967 and registered on October 17, 1968 conveyed two lots of land from the Municipality of the District of Guysborough to Earle Carrigan.

[3] By Warranty Deed dated November 30, 1973, and registered February 26, 1974, the defendants conveyed to the plaintiffs a parcel of land situated on Highway 344 in Sand Point described as a portion of the first lot of land described in the tax deed. The metes and bounds description is:

> Beginning at the point where the Northern boundary line of lands of John Carrigan intersects the Western boundary line of the Main Highway leading from Sand Point to Mulgrave.
>
> Thence in a Southwesterly direction following the Northern boundary line of lands of John Carrigan a distance of 1340 feet more or less to the Eastern boundary line of lands expropriated by the Province of Nova Scotia, December 1, 1972;
>
> Thence in a Northwesterly direction following the said Eastern boundary line of lands expropriated as aforesaid a distance of 125 feet;
>
> Thence in a Northeasterly direction and parallel with the said Northern boundary line of lands of John Carrigan to the Western boundary line of the Highway aforesaid;
>
> Thence in a southeasterly direction following the said boundary of the said Highway to the place of beginning;
>
> And being a part of the first lot of land described in the deed from the Municipality of the District of Guysborough to Earle Carrigan bearing date the 14th day of November 18, 1967, and recorded that the Registry of Deeds at Guysborough in Book # 70, Page 158.

[4] The lot acquired by the Behies in 1973 had an old house and an outbuilding on it. They undertook an extensive renovation of the house and landscaping of the surrounding property. Over the next 34 years, they continued to add landscape features to the property, such as trees, flower gardens and lawn sods. The outbuilding was torn down and a modern garage was constructed in 2002-3.

[5] It is apparent that there has been a long history of animosity as between the parties that dates back at least to 1979. To that point the parties shared a well, but when the plaintiffs developed their own well Earle Carrigan took umbrage. The 2003 garage construction caused a water drainage problem that negatively impacted on the defendants' land. This was also a source of irritation. In 2006, the Behies applied for and obtained a so-called "Peace Bond" pursuant to the **Criminal Code,** which restricted Mr. Carrigan's contact with the Behies.

[6] In June of 2007, the defendants commissioned a survey of the land which was completed in November 2007. The resulting plan shows several feet of the Behie garage to be on the Carrigan side of the property line.

[7] Armed with the survey information, Earle Carrigan began to aggressively stake out and occupy the lands that the survey shows to be on his side of the line and which to that time, say the Behies, was occupied exclusively by them.

[8] In view of Mr. Carrigan's actions the Behies applied for an interim injunction in July of 2008 seeking to restrain the defendants from actions that

interrupted the plaintiffs' use of the disputed lands. That was resolved by an interim order of Justice D.L. MacLellan issued 30 September 2008 which required both parties to refrain from engaging in acts of occupation of the undeveloped portion of the disputed lands. It also had the effect of allowing the Behies the uninterrupted use of their garage, pending disposition of the claim.

[9] The Behies claim adverse possession of the disputed property and rely on the provisions of section 10 of **Limitation of Actions** Act, R.S.N.S. 1989, c. 258. The defendants, as title holders, rely on that title together with evidence of their occupation of the lands to reject such a conclusion.

[10] Evidence adduced in the hearing consisted of the testimony of the parties, family members and neighbours, as well as photographs and various documents from over the years, all intended to assist the court in resolving the factual dispute that underpins the competing claims.

Law of Adverse Possession

[11] The title holder of land is presumed to be in possession of that land. When adverse possession of the land by a non title holder is proved, then they acquire title that is inconsistent with that of the title holder.

[12] The plaintiffs' claim relies on the provisions of section 10 of the **Limitation of Actions Act R.S.N.S. 1989, c. 258**, as amended, which stipulates that:

> Action respecting land or rent
>
> 10 No person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress or to bring such action first accrued to some person through whom he claims, or if such right did not accrue to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing the same. R.S., c. 258, s. 10.

[13] Other relevant provisions of the **Act** include:

> 13 No person shall be deemed to have been in possession of any land, within the meaning of this Act, merely by reason of having made an entry thereon.
>
> ...

> 22 At the determination of the period limited by this Act to any person for making an entry, or distress, or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress, or action respectively might have been made or brought within such period, shall be extinguished.

[14] In **Law of Real Property**, *3rd ed.* (Anger and Honsberger) (Ontario: Canada Law Book, 2010), at page 29-21, the authors set out the well accepted test to establish the quality of the possession necessary to be proven by the non title holder to advance a successful claim to title based on adverse possession:

> The possession that is necessary to extinguish the title of the true owner must be "actual, constant, open, visible and notorious occupation" or "open, visible and continuous possession, known or which might have been known" to the owner, by some person or persons not necessarily in privity with one another, to the exclusion of the owner for the full statutory period, and not merely a possession which is "equivocal, occasional or for a special or temporary purpose".

[15] This test has been cited with approval in numerous decisions of this court and in the Nova Scotia Court of Appeal. *see*, *Morrison v. Muise* 2010 NSSC 163, and cases cited therein at para. 14.

[16] The determination of whether this test has been satisfied rests on a series of underlying principles which were canvassed by Edwards J. in *Morrison v. Muise*, *supra:*

15 In order to trigger the operation of the **Limitation of Actions Act,** R.S.N.S. 1989, c. 258, the person claiming adverse possession must establish all of the elements of possession, as well as the commencement date for said acts. MacIntosh, in *Nova Scotia Real Property Practice Manual*, writes at page 7-7:

> In order to succeed under the Statute, a party claiming a possessory interest must be able to establish a commencement date for his or her acts of physical possession, so that the limitation period may be computed. [emphasis added]

16 MacIntosh continues at page 7-9, citing *Teis v. Ancaster (Town)* (1997), 35 O.R. (3d) 216 (C.A.) at page 221 for the following:

> To succeed, the acts of possession must be open, notorious, peaceful, adverse, exclusive, actual and continuous. If any one of these elements is missing at any time during the statutory period, the claim for possessory title will fail.

17 Anger and Honsberger, **The Law of Real Property**, *supra*, states at page 29-24.1:

> Time of dispossession or discontinuance begins to run when all facts which must be established as part of the adverse possessor's claim have occurred, and when those facts reasonably should have been known to the true owner.

18 A successful claimant's possessory title will be confined to the specific portion of land he or she openly, notoriously, continuously and exclusively possessed. Possession of part of the land is not possession of the whole. [*Ezbeidy, supra* at para. 17; and *Tobias, supra,* at para. 81].

19 The duration of possession required in Nova Scotia is a continuous 20 years ....

20 **Presumptions Favour True Owner**: The burden of proof in an adverse possession claim rests squarely on the shoulders of the alleged adverse possessor. In *Tobias et al v. Nolan,* [1985] N.S.J. No. 539, Macintosh J. succinctly states this point at paragraph 74:

> As he who alleges must prove, those who seek to establish title by adverse possession must provide the necessary facts in support of such a claim. It must also be kept in mind that there is a presumption that possession of land is in the party having paper title. Reference is made in this regard to *Bentley v. Peppard* (1903), 33 S.C.R. 446:
>
> > Possession must be somewhere -- in somebody -- and he who has the title is presumed to have the possession unless the actual dominion and occupancy is elsewhere.

21 A title holder, or "true owner", is not required to assert a claim to lands. Even if the lands remain vacant, the presumption is that the true owner is in possession. This presumption is not rebutted by the fact that the true owner is not in actual occupation of the land in dispute. MacQuarrie J. of the Nova Scotia Supreme Court summarized this point in *Ezbeidy v. Phalen*, [1957] N.S.J. No. 12 at paragraph 14:

> As to (3) where there is a contest between a person who claims by virtue of his title, as the defendant does here, and a person who claims by long adverse possession only, such as the plaintiff must rely on here, there is first of all a presumption that the true owner is in possession, that the seisen follows the title. This presumption is not rebutted or in any way affected by the fact that he is not occupying what is in dispute. In order to oust that presumption it is necessary to prove an actual adverse occupation first which is exclusive, continuous, open and notorious, and after that has been proved, the position is that the owner is disseised and the other person is in possession. If that person who is in adverse possession continues openly, notoriously, continuously and exclusively to exercise the actual incidence of ownership of the property, that possession in time ripens into title ...

22 Charles MacIntosh in his **Nova Scotia Real Property Practice Manual** at page 7-7 writes:

> Practically speaking, there is no difference between dispossession and discontinuance of possession. The limitation period commences to run only if there is both absence of possession by the person who has the right and actual possession by another, and the onus is on the trespasser to establish that the true owner has been out and someone else in for the duration of the statutory period. Consequently, the fact that an owner may cease to physically occupy the land, leaving it vacant, does not start the limitation period running. There is a presumption that the true owner is in possession and that presumption is not rebutted by the fact that he or she is not occupying the land, or exercising its rights incidental to ownership. [emphasis added]

23 ...

24 **Sufficiency of Evidence Needed to Dispossess:** In *Ezbeidy, supra,* MacQuarrie J. comments at paragraph 17, "The legal owner is not to be deprived of his property lightly". Hallet J. in *Lynch v. Nova Scotia (Attorney General),* [1985] N.S.J. No. 456 comments on the extremely high evidentiary burden an alleged adverse possessor faces:

> [7] The legal concept which allows a person to acquire possessory title good against the holder of the legal title is based on the premise that a legal owner cannot stand aside and allow a trespasser or co-tenant to make improvements to the property and pay the taxes over many years and then come in and claim it, even though he could see the other was in possession. As a safeguard to the legal owner, the courts have insisted that the possession be of the quality described before the legal owner's title is extinguished; otherwise there could be great injustices if by doing sporadic, unobservable acts on the land a person could acquire possessory title. Hence the care which should be taken by a court before a finding is made that the title of the legal owner to woodland in particular, is extinguished as the acts relied upon are very often sporadic in nature and unobserved by the true owner yet can qualify as being acts that are consistent with the limited use a person who owns land of that nature would make of such land.

> [8] As claims for possessory title extinguish the title of the legal owner pursuant to a limitations Act, the court should only act on very cogent evidence that proves that the person's possession has been visible, exclusive and continuous possession for the required statutory period. Legal owners should not be dispossessed where land is such that the legal owner would not make a great deal of use of the land, such as woodland, particularly if the claim is made not by a trespasser but by one co-tenant or more against others. Section 12 of the **Limitation of Actions Act** provides that no person shall be deemed to have been in possession of any land within the meaning of the Act merely by reason of having made an entry thereon. Where the acts of possession relied upon with respect to woodland are the occasional unobserved cutting of logs and firewood from the property, such acts do not improve the property even though they evidence the intention of one co-tenant to possess it exclusively. It cannot be too strongly emphasized that evidence of possession to extinguish title must be of a quality that has been required by the courts for hundreds of years. Each case turns on its own facts.

25 In *Lynch, supra*, Hallet J. points out that the nature of the lands must be taken into consideration when determining the sufficiency of possession. In particular, when dealing with woodlands, His Lordship cautioned against the acceptance of "sporadic" and "unobserved" acts as evidence of possession and furthermore that the Court should only act on "very cogent evidence". In *Spicer v. Bowater Mersey Paper Co., supra*, the Court of Appeal comments on the sufficiency of evidence at paragraph 20:

> From this review of the authorities it is clear that the claimants of possessory title have the burden of proving with very persuasive evidence that they had possession of the land in question for a full 20 years and that their possession was open, notorious, exclusive and continuous. They must also prove that their possession was inconsistent with the true owner's possession and that their occupation ousted the owner from its normal use of the land. As well, possession by a trespasser of part is not possession of the whole. Every time the owner, or its employees or agents, stepped on the land, they were in actual possession. When the owner is in possession, the squatter is not in possession. [emphasis added]

26 **Nature of Possession Required**: Anger and Honsberger, **The Law of Real Property**, *supra*, describes factors which should be taken into consideration when determining the sufficiency of possession at page 29-19:

> Whether there has been sufficient possession of the kind contemplated by the statute is largely a question of fact in each case in which due regard is to be had to the exact nature and situation of the land in dispute. Possession must be considered in every case with reference to the peculiar circumstances, for the facts constituting possession in one case may be wholly inadequate to prove it in another. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to their own interests, are factors to be taken into account in determining the sufficiency of possession.

27 In *Ezbeidy, supra*, the court described the nature of possession in the following oft-quoted passage:

> [18] Possession may be roughly defined as the actual exercise of rights incidental to ownership as such, that is, the person who claims to be in possession must exercise these rights with the intention of possessing. Where a man acts toward land as an owner would act, he possesses it. The visible signs of possession must vary with the different circumstances and physical conditions of the property possessed.

28 In *Scheinfeldt v. Nova Scotia*, [2001] N.S.J. No. 146, Gruchy, J., held that the nature of the land should be taken into consideration when assessing the sufficiency of the acts of possession. His Lordship also explained that the acts of possession on "wild lands" are assessed differently than other lands (such as cultivated property):

> [24] There is no doubt that the quality of possession required to obtain possessory title of wild lands (as is the lot in question) is different from that required for cultivated or settled lands or property.

29 The degree of possession is also critical. An adverse possessor must exercise exclusive possession as against the true owner as well as other trespassers. In Anger and Honsberger **Real Property** (3rd ed., 2009) the authors explain at page 29-12:

> To establish the quality of possession required by the statute, an adverse possessor must show that they have actual possession and the intention of excluding the owner from possession and that they have effectively excluded the true owner from possession.

30 The authors continue at page 29-22:

> It is not necessary, however, for a person in exclusive possession to be certain of his right to do so. If a person, uncertain and unconcerned about his legal rights, remains in exclusive possession, possessory title can result.

31 In *Spicer v. Bowater Mersey Paper Co., supra,* the Court of Appeal held that the trial judge erred on the element of exclusivity. Roscoe J.A, speaking for the court, stated:

> [20] From this review of the authorities it is clear that the claimants of possessory title have the burden of proving with very persuasive evidence that they had possession of the land in question for a full 20 years and that their possession was open, notorious, exclusive and continuous. They must also prove that their possession was inconsistent with the true owner's possession and that their occupation ousted the owner from its normal use of the land. As well, possession by a trespasser of part is not possession of the whole. Every time the owner, or its employees or agents, stepped on the land, they were in actual possession. When the owner is in possession, the squatter is not in possession.
>
> [21] In this case, the prerequisite that the respondents clearly failed to prove, in my opinion, was that of exclusivity. Possibly, because at trial the appellant argued primarily that the possession was not open and notorious, or continuous, the trial judge overlooked the requirement that

> the possession of the trespasser must dispossess the true owner and it is insufficient if the trespasser's possession is merely a possession shared with others during the relevant period of time. [emphasis added]

32 The Court of Appeal in *Spicer, supra* held that the use of the land by the unsuccessful respondent did not interfere with the normal use and occupation of Bowater. The court also held that there was clear evidence that the appellants did not abandon the land as they routinely surveyed the forest every five years. The court also noted that the appellant paid the property taxes on the land in question for all of the years the respondent claimed adverse possession.

33 Exclusive possession typically requires inconsistent use of the property which is adverse to the true owner's intended use. Acts which do not interfere with and are not inconsistent with the owner's enjoyment of the land for the purposes for which he intended to use it are not evidence of dispossession, as provided by MacIntosh at page 7-8:

> Adverse possession is established when the claimant's use of the land is inconsistent with the owner's enjoyment of the soil for the purposes of which he or she intended to use it.

Credibility

[17] Other than perhaps the surveyor, Cory Sullivan, every witness in this proceeding demonstrated themselves to bring self interest and/or bias with them to the stand as they gave their evidence. It is clear that sides have been drawn within families, and within the community, and that it has influenced the testimony.

[18] There were two incidents that the defendants pointed to, in particular, which they suggest should be pivotal in my assessment of the credibility of the plaintiffs and their witnesses.

[19] The first of these was a meeting held a few days before the trial where the witnesses for the plaintiff gathered at the plaintiffs' house to meet with counsel for the plaintiffs. This provided opportunity for the witnesses to collaborate and to fabricate all, or some of their intended testimony.

[20] The second came as a result of a plaintiffs' witness discussing elements of his evidence with witnesses who had not yet been called to the stand. This was in direct contravention of an order I issued at the opening of the trial that excluded witnesses; and admonitions given to each witness at the conclusion of their testimony to not discuss their evidence with witnesses yet to be called.

[21] Counsel for the plaintiffs seeks to minimize the impact of these events and has referred me to the words of the British Columbia Court of Appeal in *Faryna v Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), where the court commented:

9 If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, *see Raymond v. Bosanquet Tp.* (1919) 59 S.C.R. 452 , at 460. **A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial judge and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth.** I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

10 The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. **The test must reasonably subject his story to an examination of its' consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.** Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say "I believe him because I judge him to be telling the truth," is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

11 The trial judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial judge with a divine insight into the hearts and minds of the witnesses. And a court of appeal must be satisfied that the trial judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

(Emphasis added)

[22] I am mindful of this useful guide to assessing credibility, but the defendants are correct in their two points of concern. The testimony of some of the witnesses for the plaintiff bears careful scrutiny arising from the two incidents. There has been a considerable passage of time over which these events occurred and so I am also alert to issues of reliability generated by failed memories. I reiterate that the testimony of most of the witnesses, including that of the defendants, has earned careful scrutiny. As I will discuss, the photographic evidence of the site, showing its' state over the span of the last 36 years is helpful in sorting through these concerns to arrive at a conclusion.

The evidence

[23] Sharon Behie lives with her husband, Ronald Behie, and next door to her brother Earle Carrigan and his wife, Jessie. The house now occupied by the Behies was in the Carrigan family for a number of years. It was the birthplace of the grandfather of Earle Carrigan and Sharon Behie.

[24] After purchasing the property from the Carrigans, the Behies raised the house and put a foundation under it. Tab 7 of Exhibit 1 contains nine photographs taken while the house was raised on blocks. (Copies of these photos were also tendered and marked as Exhibit 4). The photos, taken in 1974, depict the property and portions of the defendants' current property from several angles. They are very helpful to an understanding of the problem and the resolution of it. This evidence provides a visual representation of the area as the Behies acquired it. As the Carrigans lived in the house before selling it to the Behies, these photos also provide evidence of the topography of the property as the Carrigans occupied it in the time prior to the Behies' purchase.

[25] The property does not sit squarely with the four compass points and different witnesses used different compass points to show relative positions. For consistency, I will use the compass directions used by some of the witnesses to explain the relative locations of the properties to each other, and of various buildings, ditches, trails, gardens, trees and posts. These directions vary from the metes and bounds set out in the deed.

[26] The homes of the parties face Highway 344 which borders on the north side of their properties. The Carrigans' property is on the west side of the Behies. Undeveloped property owned by a Kenneth Carrigan is on the east side of the Behies.

[27] A Plan of Survey, Exhibit 2, certified on November 25, 2007 by Cory Sullivan, shows the Carrigan lot as having a road frontage of 49.979 m (164'), a back line of 50.621 m (166') and a common line with the Behie lot of 440.533 m (1445.3'). Their western side line is 444.915 m (1459.7'). It is not quite a rectangle. The corners of the lot do not form 90˚ angles.

[28] The Behie lot was stated by deed to measure 125' across the backline and 1344' along the eastern boundary. The length of common property line with the Carrigans, and the road frontage, is not specified in the deed. The Survey certificate does not specify the measurement of the road frontage but the eastern boundary is shown as 441.707 m (1449'). The lot is not a rectangle and the corners are not 90˚ angles. Mr. Sullivan's testimony does not address the 105' discrepancy as between his calculations and those contained in the deed with respect to the length of the north-south running boundaries of the Behie lot.

[29] The following are the salient features of the 1974 photos:

1. The photos provide a clear view of the disputed land;

2. The Behie front yard was undeveloped and covered with scrub grass;

3. An outbuilding, referred to by the witnesses as “Frankie” was to the west of the Behie house and in approximately the location of the current garage (though not as large as the garage);

4. Further west of “Frankie” was a line of low bushes and trees running north south in the approximate area where the Behies claim the line to be. This area has sometimes been referred to in evidence as the “scruffy area”, or the “Behie line”;

5. Freshly excavated dirt is spread around the house. To the west of the Behie house the pile of dirt is pushed toward the Carrigan line and to the north of “Frankie”;

5. The Carrigans' lot was an open field with no buildings visible in the photos.

[30] According to Mrs. Behie, they moved into the house in the fall of 1974. In 1976, they brought in a bulldozer to shape the lands around the house. Mr. Behie testified that he landscaped the lot, putting down sods approximately "five years" after he bought the property. That would have been in 1978. I am satisfied from the cumulative effect of the testimony that the sodding occurred sometime in the 1976-1978 period.

[31] The first photograph of Tab 8 in Exhibit 1 is a picture of Mr. Behie with his granddaughter putting Christmas lights on a pine tree located near the highway, and within the disputed area of land. It was taken in the time frame of 1992-95. ("1994 photo"). There are, again, some important features to be noted in the photograph:

1. The "lawn area" of the Behie property, including the disputed land, has no vegetation showing above the snow.

2. The line of low bushes and high grass along the western boundary of the Behie property and observed in the 1974 photos is very visible as bushes and poles are seen sticking out of the snow along that same north-south line;

3. There is not a lot of snow on the ground. In the area around the tree the grass is showing through. On the west side of the Behie house there is an obvious flat area which then slopes gradually and evenly down to that line of tall grass, the "scruffy area".

[32] The photo is consistent with the plaintiffs' evidence that the disputed land was landscaped as if part of their lot, and that the visible "line" on the ground continued over the years to follow that north south line of brush and poles. That undeveloped strip of low bush is seen in photos taken in approximately 1974, 1994 and again in later photos taken during the period post 2000.

[33] Subsequent photographs at Tab 8 show that wagons, and outbuildings belonging to the Carrigans were placed/ built up to the area of that same north - south line that is shown in Tab 7 and in the first photo of Tab 8. They as well as trees ("the tall trees") that were planted by Mrs. Carrigan, are clearly to the west of

the disputed lands. To the east of that strip is carefully shaped and mowed in a typical lawn that is contiguous with the undisputed lawn area of the Behies.

[34] Mr. Behie says that he mowed the entire lawn, including the disputed area, from at least 1978 until 2007 when Mr. Sullivan and then Mr. Carrigan placed stakes on the purported common line as established by survey. He says that the Carrigans did not enter onto that strip to mow the lawn despite their evidence to the contrary. He is supported in this testimony by a number of witnesses, including Mrs. Behie.

[35] Exhibit 1, Tab 1 includes a series of photographs taken after the Sullivan survey. The bottom photo on page 13 of the Tab, shows the disputed strip mowed so close to the ground that it is brown and burned out. It is in stark contrast to the remaining and contiguous lawn of the Behies. Mr. Carrigan mowed this strip to create this effect. Once again the taller grass that follows that same north - south line first identified in the 1974 photos is present. As I will discuss later, the fact that Mr. Carrigan did not mow it at the same time provides some insight to the Carrigans true understanding and intentions.

[36] **Everette Halfpenny** is a neighbour of the parties and grew up in the community with Mrs. Behie and the Carrigans. He has worked on the Behie property at various times since they acquired it in the early 1970s.

[37] Mr. Halfpenny is employed away from the area during the work day, and at least on one occasion was away for a period of several months. Nevertheless, it is apparent that he is very familiar with the property from both before and after it was acquired by the Behies. He confirmed the chronology of the landscaping work as testified to by the Behies. He assisted in spreading top soil and putting down lawn sod. He says that the Carrigans did not protest this action. He acknowledges that he can only speak to his own observations. Those observations are that over the span of the last 37 years, it was the Behies who first developed and then maintained the lawn area, including the disputed lands. He says that he never observed the Carrigans on those lands.

[38] Mr. Halfpenny testified that he first learned of the boundary dispute when the stakes went in the ground after the Sullivan survey.

[39] **Dale Kindervater** is married to a niece of the Behies and has visited at their residence approximately a half dozen times per year for some 26 or 27 years.

[40] He testified that he stays for weekends and has from time to time assisted Mr. Behie with building renovations and construction. In particular, he confirmed that he helped with various aspects of the renovation of the house.

[41] Mr. Kindervater testified that he has never seen the Carrigans on the disputed lands and that the close cropped, browned out grass shown on the disputed lands in the bottom photograph on page 13 of Tab 1 in Exhibit 1 was inconsistent with the way in which Mr. Behie had maintained the property in previous years. He confirmed that from his observation the disputed land had always been treated as part of the Behie lot and that it was maintained by Mr. Behie solely.

[42] He confirmed that the only people he saw traveling on the disputed lands were the Behies. He never observed Earle Carrigan operating an all terrain vehicle there, as he alleges to have done.

[43] In 2002-2003 he shingled the roof of the new garage as well as installed windows and siding. This took place over a series of visits. During the construction of the garage, he observed Mr. Carrigan on his own land, but not on the Behie property or on the disputed land. Mr. Carrigan did not protest the construction of the garage.

[44] Mr. Kindervater identified gravel shown in Exhibit 1 at Tab 8 at page 2, located on the disputed land near the highway, as having been placed there as part of the drainage at the time the garage was built.

[45] He too first learned of the boundary dispute when the Sullivan survey stakes appeared.

[46] **Herbert Talbot** was the second witness of the second day of trial. His conduct has brought his credibility into serious question.

[47] Evidence was adduced to show that he was present with a number of plaintiffs' witnesses for the Sunday meeting with legal counsel. I will deal with that issue first. The evidence about the Sunday meeting does not satisfy me that

there was any attempt to collude for the purpose of bringing false or misleading evidence into the trial. I have little detail upon which I could say that anything improper was done.

[48] It is apparent that there has been an ongoing community discussion about this matter and that counsel's meeting with the witnesses was nothing more than typical witness preparation - describing the role of a witness and the types of questions that may be asked. For many of those involved it was the only pretrial meeting they had with counsel. There was no evidence to suggest to me that it should trigger any greater scrutiny of the credibility and reliability of the witnesses than the circumstances already call for.

[49] However, there are other problems with Mr. Talbot's evidence. He drove home with Mr. Halfpenny after the latter gave his testimony on the first day of trial. Again there is no real evidence of improper collaboration, but opportunity was present and the defendants' suspicions raised.

[50] After Mr. Talbot concluded his testimony, he entered into the room where the yet to be called plaintiff witnesses were waiting their turn. I heard testimony

on what was said from each of Mr. Talbot, Mildred Carrigan and Kim Carrigan. I am satisfied that Mr. Talbot, contrary to my instructions, briefly discussed his testimony with them. I also find that he was not forthright in admitting what was said.

[51] As to what was said, and its' impact on my assessment of the witnesses, I conclude that it is minimal. I find that as Mr. Talbot entered into the room, Mr. Henry O'Halloran left to take the stand. My notes record such a short passage of time that he could not have participated in the conversation. This observation is borne out by the witnesses.

[52] When he entered into the witness room, Mr. Talbot was asked by someone as to how it went and he replied "good". He indicated that he was on the stand for approximately 15 minutes, which is accurate. Mr. Talbot said that he was asked where he lived, and the distance to his work, and the length of time it takes to travel back and forth to work from his home. This is consistent among the witnesses and I accept it to be correct.

[53] Christopher Carrigan, son of the defendants, overheard some of the conversation from an adjoining room. What he heard caused him to summon the sheriffs and report the improper conversation. He was correct to do so. He heard a very brief segment which included the comments about the distances traveled to and from work by Mr. Talbot. He also says that Mr. Talbot gave information as to when he became aware of the dispute and in particular that he had heard of the dispute "through the grapevine". He also suggested there was a discussion about the Sunday meeting. Some of what Mr. Carrigan believes he heard is consistent with Mr. Talbot's testimony. Other aspects are dissimilar and some parts relating to the Sunday meeting are not confirmed by the two witnesses who heard Mr. Talbot.

[54] Mr. Talbot's testimony was brief. I am not prepared to condone his failure to comply with specific directions of the court not to discuss his evidence with other witnesses. In my view, there are sufficient concerns about his credibility and reliability that I put no weight on his evidence.

[55] Mr. Talbot's comments made to the two witnesses would provide them with little information that went to the substantive aspects of their testimony, and I conclude should not impact on my assessment of their credibility and reliability.

[56] **Henry O'Halloran** was 79 years of age at the time of trial and retired from his position as a marine technician with the Coast Guard. He has lived in Sand Point throughout his life and in particular has lived almost across from the subject property for the past 45 years. He knows the parties well and is close in age to the defendant, Earle Carrigan. They went to school together. Overall this gentleman impressed me as forthright.

[57] He recalled that he assisted in removing sod from the property to the east of the Behie lot and, together with others, placed the sod on the Behie lot, including in the disputed area. He felt that had taken place approximately 35 years ago. i.e., 1975. Over the ensuing years, the Behies mowed and otherwise maintained the disputed area as part of their lawn.

[58] He confirmed that the pine tree pictured at Tab 8 of Exhibit 1 was located in the disputed area and that the plaintiffs put Christmas lights on it.

[59] When asked about the “brown scrub” area that formed the north-south demarcation of the Behie-Carrigan boundary he indicated that it had never been mowed or otherwise tended over the years. The Behies maintained the land in the disputed area up to that “brown scrub”.

[60] When asked whether he observed Mr. Carrigan operate a lawn mower or ATV on the disputed areas he testified that he had not.

[61] In cross-examination he confirmed that he could not recall whether a bulldozer was used on the Behie side of the line, but he did recall Mr. Carrigan putting a ditch in with a dozer which, in his opinion was operated on the Carrigan side of the scruffy area.

[62] When asked what he took from the Sunday meeting with counsel he said that “I was supposed to tell what I saw”.

[63] **Mildred Carrigan** is a sister to Sharon Behie and Earle Carrigan. She lives a couple of houses away on the opposite side of the highway from the subject

property. She has a view of their homes. She too confirms that the land was sodded when the Behies first moved in. She testified that the Behies used to put Christmas decorations on the pine tree in the disputed area, as depicted in Exhibit 1 Tab 8.

[64] Although aware of "issues" that existed over the years as between the plaintiffs and defendants, Ms. Carrigan was unaware of any boundary problems as between the parties until recently. She had always understood the boundary line to be the area "where the grown-up stuff is", referring to the bushy area previously identified from the photographs beginning in 1974.

[65] **Kim O'Halloran** is a daughter of the plaintiffs. She lived at home until 1984 and spoke of her time as a child on the property. She testified that when she was in grade 7 comments were made by the Carrigan children that suggested animosity over the well water problems between their parents. She returned to Sand Point in 1988 and has lived there ever since.

[66] Ms. O'Halloran, too, confirms the history of the development and use of the Behie lot including the disputed area. She says that her husband also assisted in

mowing the area as well as a “young man” that her father had hired on a couple of occasions. Other than that she knew her parents to have mowed the area and that the Carrigans had not.

[67] The area controlled by her family extended to the area where the grass met the “brown weeded area”. She denied suggestions that her uncle Earl Carrigan had operated an ATV or a lawnmower on the disputed area.

[68] The “Christmas tree” photograph is of her father and her daughter who she estimated to be about age 4 in the photograph placing the time of the photograph at approximately 1995. She confirmed that it was a tradition for a number of years for her family to place lights on that tree.

[69] She was shown a series of photographs and in them identified the “tall trees” that had been planted by her aunt, Jessie Carrigan. She also identified another series of trees planted in the disputed area by her parents.

[70] Ms. O'Halloran approached Earle Carrigan after the Sullivan survey stakes went in and asked Mr. Carrigan what his plans were. He told her that he "might sell" the land where the garage is located, to the Behies for the sum of $10,000.

[71] This concluded the evidence adduced on behalf of the plaintiffs.

[72] The defendants called five witnesses: themselves, their two sons and the surveyor, Cory Sullivan.

Cory Sullivan

[73] Mr. Sullivan was retained by the defendants to provide a survey tendered as Exhibit 2. His staff did the field work; he never went to the site. There has been no contrary expert opinion evidence offered and this action has proceeded on the basis that possession by the plaintiffs is adverse.

[74] The survey sets out the boundaries of the Carrigan lot and the place of beginning is at the northeast corner of their lot. The survey only collaterally gives

information about the Behie lines. As a result, it does not follow the mapping directions for the lines of the Behie lot as set out in the deed to them.

[75] **Christopher James Carrigan** is 39 years of age and grew up in Sand Point. He graduated from high school in 1989 and left the area to study, and work on two different occasions. He has, for a number of years resided about 10 miles north of the subject property.

[76] The key aspects of his testimony included the following:

1. That as a young teenager, he and others crossed the disputed lands as a shortcut to his house, and while coasting, skiing and snowmobiling;

2. That he cut wood behind his parents' mobile home and brought it out on a path that traveled over a portion of the disputed area before turning back onto his parents' lot;

3. That he recalled the Behie family mowing the disputed area but that he did not recall the children playing in the area;

4. That he observed his father plow the disputed area to create a walkway for his dogs, but only after the Sullivan survey;

5. That he and his parents all mowed the disputed area prior to 2007;

6. That as a child, his father cautioned him against going to the east of the area where the Sullivan survey line was, because that was where the Behie line was. He testified that his father "always knew where the line was";

7. That his father built a dam in 2002-2003 to divert water created by the garage construction. The posts can be seen in Exhibit 1, tab 9 at page 1;

8. That he recalled the pine tree being decorated for Christmas , but did not know by whom. While he thought his mother planted the tree he was not present and had no personal knowledge of who put it there. He believes the power company took the tree down in approximately 2004. He could not identify his cousin, Emma, as the little girl in the photo found at Tab 8 of Exhibit 1.

[77] **Richard Carrigan**, son of the defendants, is 50 years of age, a truck driver and lives in Alberta. He lived in Sand Point until 1989, although was on the road during the period 1980-1989. Mr. Carrigan has lived in Ontario and Alberta since that time, except for a short period in 2002 or 2003. He visits his parents regularly.

[78] He recalled that as a child in the 1970's, he and other children played on and traveled across the disputed lands. Indeed, as was evident from Christopher Carrigan's evidence, it was common for the area children to cross the lands of various owners as they went about their play. No one in the community objected to the children's entry onto their lands in this way.

[79] He recalled his mother planting the "tall trees".

[80] **Jessie Carrigan,** defendant, was the last witness in the trial and had the benefit of being present to hear all of the evidence.

[81] She testified, as all of the witnesses agree, that she planted the so-called "tall trees" that are seen in Exhibit 1, tab 1, page 12, in the top right-hand photo. The

trees are located on undisputed Carrigan land to the west of the ditch and the poles that roughly follow the line claimed by the Behies.

[82] She also acknowledges that the small trees shown on the disputed area in the same photograph were planted by Mrs. Behie. She estimates that occurred around 2005. She believes that they were planted at about the same time the flower bed was planted, which is located at the north end of the Behie and disputed lands, near the Highway, and where the pine Christmas tree had once been. Mrs. Carrigan acknowledges that she did not protest the planting of the "small trees".

[83] She testified that she planted the pine Christmas tree between 35 and 40 years ago. i.e., between 1970 and 1975. She was not asked whether this was before or after they sold the house to the Behies. She agrees that the Behies decorated it as a Christmas tree for a few years. Her husband estimated that Mrs. Carrigan planted this tree "38 to 40 years ago" which if correct would suggest that the tree was planted on the property during the time it was owned by the Carrigans and before it was sold to the Behies.

[84] Mrs. Carrigan says that she had mowed over the disputed lands prior to 2007, as far east as the “little trees” and south to a point near the end of where the new garage is but not behind it as it was swampy in that area. One instance of mowing was, according to her testimony, in 1980. She also says that she cleaned up and burned off trees in the scruffy area on one occasion. It is not clear when or where that took place.

[85] There is confusion as to the area that Mrs. Carrigan was referencing. She testified that the “scruffy area” shown in the bottom left photo on page 12 of Tab 1, Exhibit 1 was there as a result of the interim order of Justice MacLellan. This is clearly wrong as later photos show that area to be to the east and covered with grass in this photo. The scruffy area she identified is the one that appears to have always been present.

[86] The Behies also mowed the disputed areas at times, she testified.

[87] The witness confirmed that her son, Christopher, cut long lengths of wood for stove wood “20 years ago maybe”, which if accurate would place it around 1990, somewhat later than her son seemed to suggest. Her husband, Earle, was

also suggested to have cut and hauled stove wood, although she says “he probably forgot about it” since he did not testify to this. She marked the path followed as from behind their home, then across onto the disputed area in an unknown location close to the Behies garage. The path then followed north toward the highway along the disputed land and back onto their front yard near where the Christmas tree once was. She says that the reason for following this path, instead of bringing the wood straight to the back of their home, was to avoid damage to her grounds.

[88] According to Mrs. Carrigan, there was an occasion late in the 1970s or the early 1980s where Mr. Carrigan allegedly told Mr. Behie to stay off the land. In 1994 or 1995, she testified, her husband told Ronald Behie to “stop”. It is unclear from her testimony what he was to “stop” doing at that point. The inference is that it related to the disputed lands on both occasions.

[89] I find Mrs. Carrigan’s evidence very vague and lacking in detail. Even if I am to assume that these conversations took place, the evidence is so lacking in detail as to be of no assistance in assessing what was said, the context in which it was said, the activity being complained about or the physical location referenced in the conversations.

[90] Earle Carrigan says that there was an occasion when he told Mr. Behie to stay off his land, but he too provided no detail to understand his meaning, or what Mr. Behie would have understood by this.

[91] It may be that the Carrigans are speaking of a conversation that the Behies testified to. If so, then it does not assist the Carrigans' argument since both testified that in the mid 1980's Earle Carrigan had placed posts in the scruffy area and told them not to come on his side of those posts. This did not refer to the lands to the east of the scruffy area.

[92] In cross examination, Mrs. Carrigan acknowledged that the Behies did not ask for permission to plant trees, garden or to build their garage.

Agreed facts

[93] The parties agree that the photograph showing the disputed area ,in Exhibit 5, was taken after the Sullivan survey was complete.

[94] Exhibit 6, being a photograph of a level mound of dirt where the dam was constructed, was taken in approximately 2002 or 2003.

[95] The Carrigan garage shown in Exhibit 6 was constructed in approximately 1993 and the Carrigan shed was constructed around 1995 or 1996.

[96] Information set out in affidavits contained in the joint exhibit book is not evidence in the trial, except to the extent that such evidence was confirmed in the *viva voce* evidence of the affiant(s).

Earle Carrigan

[97] Mr. Carrigan outlined the history of the property from the time of his initial acquisition in 1968. He says that it was his intention to convey a 125' wide lot to the Behies and retain a 150' wide lot for himself.

[98] He testified that until 1970 he used a horse to mow hay on both lots. Between 1970 and 1973 he says that he mowed the Behie lot with a gas mower. Then in 1974 he moved to his current property. He says that he used a gas mower

to mow the area between the two houses including the "scruffy area" - up to the time that the fill was put in "about 9 years ago". He agreed that he continuously mowed the area from 1973 on. He acknowledges that Mr. Behie also mowed the area.

[99] Mr. Carrigan testified that there was a "beautiful lawn" in front of the Behie house when he sold it in 1973 and that no sodding was necessary. He could not recall when the sodding took place, but knew that he was away at the time. Counsel cross examined him against his Discovery evidence in which he testified that he never noticed the sods. In trial he says that he did not notice them until the grass started to grow and that they ended approximately 5' to his side of where the Sullivan line is. He did not attempt to reconcile his answers.

[100] He agrees that over the years, he never placed any of his belongings nor buildings on the disputed land. The photos accurately depict the furthest east that he has ever placed his property or his buildings on his lot.

[101] Mr. Carrigan confirmed that Mrs. Behie planted the flower garden at the north end of the disputed area as well as the “little trees” in the disputed area, and did so without asking permission.

[102] When shown the photograph marked as Exhibit 5, he identified an area at the north end of the disputed land that had the snow plowed off of it. He acknowledged that he did that and that he had been doing that for “4 or 5 years”. Mr. Carrigan testified that he “took his little dog on his 4 wheeler” to that area and had been clearing it as an area to “walk” the dog. To do this he plowed over the flower garden that he says was there for about 5 or 6 years before the Sullivan survey was put in.

[103] Mr. Carrigan keeps his own driveway plowed but does not plow his own lawn. He has a substantial piece of land around his house. No reason was offered as to why he would need to drive this very short distance, plow a piece of lawn and let his dog out to “walk” on it. His evidence of having done this before 2007 is not consistent with any other witness and is not credible.

[104] He states that he never went on to the Behie property since he sold it to them and that he was not aware that his son drove a snowmobile across their land.

[105] He denied putting the stakes in the ground that are seen in the photograph in Exhibit 1, Tab 8, page 1, top photo, and cannot say how they got there.

[106] The “disputed area” that he claims occupation and title to was described by Earle Carrigan as beginning at the orange stakes shown in photos in Exhibit 1, Tab 1, page 12, among others, and running to the “scruffy area”. He estimated the width varied with the widest portion being closest to the highway and then narrowing as one travels south toward the Behie garage. He estimated that the distance at the second orange stake from the bottom of the photo at the north end of the area as approximately 20' wide; the distance from the orange stakes, near the little trees, to the scruffy area, was estimated to be 15'.

[107] Various witnesses spoke about Earle Carrigan constructing a dam in an area that extended north-south approximately where the scruffy area has been. Photos of his work are shown in Exhibit 1, Tab 9. This work was performed in approximately 2002 to divert water away from his property which he says was

necessary to correct a problem stemming from earlier work performed by Mr. Behie. He acknowledges that when he built the dam he came in to do the work from his side of the area. He also trenched behind his garage, but states that he did not enter on to the disputed area to do so.

[108] As to wood cutting and hauling, he contradicts his wife by saying that he had cut pulp and firewood at one time but removed it via his father's property, not over the disputed lands, and that in any event, this predated the sale of the lot to the Behies. He never cut wood behind the Behies and never brought wood out with a four wheeler.

Analysis

[109] Subject to my reservations about Mr. Talbot's evidence, I prefer the evidence of the plaintiffs' witnesses to that of Earle, Jessie and Christopher Carrigan. Richard Carrigan's evidence is not controversial.

[110] In general, the evidence of the plaintiffs and their witnesses was consistent within itself, as one to the other, and as compared with the photographic evidence.

While there was a certain sameness about their observations, that is to be expected since the facts they offered were limited and uncomplicated. Participating in the placement of sods, observations of who mowed a lawn, whether someone complained in their presence about activities on the disputed lands, are very simple assertions.

[111] At times, some of the evidence did present too absolutely, but not so as to cause me to doubt the veracity of the testimony.

[112] The defendants and their son Christopher, unfortunately, did not present as credible or reliable witnesses. One could not miss the bitterness and disdain that Jessie and Earle Carrigan hold toward the plaintiffs. It permeates the testimony of the defendants and leaves me skeptical about much of their evidence where it touches on the material questions of fact. The only reason offered for these feelings is that they had to develop their own well many years ago when the plaintiffs had a new one dug for themselves. Experience tells us that it can take very little to create a life long wedge within a family- that has happened here. The anger is directed by the Carrrigans at the Behies. There is no evidence that the Behies have acted out in similar ways to the Carrigans.

[113] My concerns are evidenced by the spiteful conduct of Mr. Carrigan in deliberately mowing the disputed sodded area so as to cause damage to it after the Sullivan survey. Similarly, plowing a car length or two of snow off of what had been the Behie lawn, so that he could take his dog over to "walk", is indicia of the lengths Mr. Carrigan would go to embarrass and harass the plaintiffs. He is full of malice toward them.

[114] I reject Earle Carrigan's evidence that he left a "beautiful lawn" around the Behie house in 1973; that he did not know that the sods were put down until much later, that he mowed the scruffy area and the disputed lands from 1973 to 2002, that he told the Behies to stay off of the disputed lands, or that he plowed the dog walk area for years before the Sullivan survey. These assertions are contradicted by the testimony and photographic evidence which I do accept.

[115] He says that he mowed the area in 1973 and 1974 - the 1974 photos make it clear that there was no mowing of the area where excavated dirt and "Frankie" were located, or anywhere else along that sideline.

[116] I accept the evidence of the Behies that in the 1980's Earle Carrigan placed the posts on the scruffy area that can be seen in the photo of the pine tree in Exhibit 1, at Tab 8. I also accept that he did so because he believed that to be the location of the property line, and that he told the Behies not to cross that line to his side of it. I accept that he replaced those posts on at least two occasions after that, and essentially in the same area.

[117] Similarly I can see no reason why Christopher and Jessie Carrigan would mow the disputed sodded area while leaving unmowed the so called “scruffy area” that appears in the1974, 1994 and later photos. I reject the suggestion that they mowed either area. It makes no sense to bypass the scruffy area to mow a piece of sodded lawn that is clearly contiguous to the remainder of the Behie lawn. It could not enhance the Carrigan front yard to do so, and they certainly were not going to do it to maintain the appearance of the Behies’ front yard.

[118] When Christopher Carrrigan testified that as a child his father specifically directed him to not travel to the east of the line now marked as the Sullivan survey line, it was obviously not true. First, Mr. Carrigan Sr. has never reflected a good understanding of where the line actually was, and second the suggestion that he

could demark the exact point of what ultimately would be identified as the Sullivan line is not credible. It is an example of a son trying too hard to assist his father's cause.

[119] Evidence that wood was cut and hauled across the disputed area is also suspect. Earle Carrigan makes it clear that it was not done by him, and that when he did cut firewood or pulp he did not haul it across the disputed lands. The circuitous route described by Christopher and his mother by which the wood was hauled seemed unnecessary and improbable, notwithstanding the explanations offered of avoiding damage to the Carrigan yard. There is also evidence of a path over a bridge that was used to haul wood to the back of the Carrigan house, apparently without bringing it over the disputed land. If the story of hauling wood is true, then it unfortunately lost any weight that I could attach to it because of the prevalence of exaggeration and misrepresentation by the defendants and Christopher.

[120] I have concluded that the parties intended in 1973, when still on good terms, to divide Mr. Carrigan's lot into two pieces with equal road frontages, as testified to by the Behies. It was thought that the total road frontage was 250' and so a deed

was prepared to the Behies for half of that, being 125'. Neither party took steps to confirm the lot sizes before the deed was executed.

[121] The survey shows that there was a total of approximately 290', so each lot should have had 145' of road frontage. Therefore, the line should have been 19' to the west of the Sullivan line. Estimates of the distance between the Sullivan line and the “scruffy area”, what I will refer to as the “Behie line”, are consistent with this distance. Earle Carrigan, for example, estimated the distance of the disputed area at 20' nearest the highway.

[122] In 1974 the Behies undertook the raising of the house, and with the excavated dirt began to shape the land around the house to create a flat area that sloped toward the Behie line. In the next couple of years they brought in heavy equipment to further shape the property into that which is shown in the later photographs. With the assistance of neighbours and family they cut and placed grass sods across the front and on the side of their home, including the disputed area, creating a contiguous stretch of grass that was separated from the Carrigan lot by the “scruffy area”.

[123] Over the ensuing years they mowed and maintained the entire area, all without complaint from the Carrigans. The Behies did not seek permission to carry out the acts of occupation. These acts included planting trees in the disputed area, decorating a pine tree with Christmas ornaments, building a garage, creating a "French Drain", and planting a flower bed.

[124] When one speaks of the occupation of the disputed land being "open, visible and notorious", there can be no doubt that whatever happened with this land was well known and observed by all parties. I conclude as well that the Behie occupation of the disputed lands, which I will further define later, was actual and constant, having regard to the character of the land as a residential lawn.

[125] I am further satisfied that such occupation by the Behies commenced immediately upon occupation of the property in 1974 and continued until the Sullivan line was placed in November of 2007 at which point Mr. Carrigan undertook his aggressive staking out of the line and occupation of the disputed land by mowing and snow plowing the area.

[126] The issue in this case is whether the adverse possession of the Behies was exclusive.

[127] I reject the Carrigans evidence that they mowed or otherwise cared for the disputed property at anytime between 1973 and 2007. In saying this I am mindful of Mrs Carrigan's evidence of burning tree cuttings. I am not satisfied that occurred on or in relation to the disputed lands.

[128] Earle Carrigan's placement of posts over the years, and then the construction of the "dam" in 2002 or so, was confined to the scruffy area, and did not constitute an entry on to the sodded area.

[129] I accept that the children of the area, including the Carrigan children, at some points crossed the Behie lands as part of play and the typical roaming of the neighbourhood that children enjoy. I do not accept that this enures to the benefit of the titleholder as evidence showing the dispossession or discontinuance of possession by the Behies. Neither do I accept that it assists the titleholders' claim that they shared the possession of the disputed lands with the Behies.

[130] The intention of the Carrigans as to the location of the boundary is found in several ways. They placed their outbuildings and wagons to the west of the scruffy area. The posts placed in the ground by Earle Carrigan over the years consistently honored the scruffy area as the boundary of the properties. When constructing the dam he did not enter onto the disputed area. The “tall trees” planted by Mrs. Carrigan are to the west of the scruffy area.

[131] Accepting that Mrs. Carrigan planted the pine tree that is featured in Tab 8, top photo, page 1 of Exhibit 1, that was done according to her and her husband in the early to mid 1970's. It was treated by the Behies as their own when it came to decorating it for Christmas. When it was later taken out, it was the Behies who developed a garden on the site.

[132] All of the actions of occupation undertaken by the Behies on the disputed area were conducted in full view and with the complete knowledge of the Carrigans who raised no protest until 2007. This protest came 31 years after the sodding was done, 5 years after the garage was built and from 2 to 7 years after various plantings were made on the disputed area by Mrs. Behie.

[133] The evidence satisfies me that the Behies exhibited all of the necessary elements of adverse possession by them of the disputed land from 1974, continuously to 2007.

[134] I find the plaintiffs occupied the disputed lands to the exclusion of Earle and Jessie Carrigan from 1974 to 2007.

Conclusion

[135] The plaintiffs are successful in their action. The evidence meets the heavy burden that falls on a claimant of adverse possession who seeks to dispossess a titleholder from their land. The Behies established that they were in actual, continuous, open, visible and notorious possession of the disputed lands from 1974 to 2007 and that the defendants were fully aware of such possession.

[136] I also accept that such possession was exclusive. In so finding, I have rejected the evidence adduced by the defendants suggesting entries by them onto the disputed area in the period 1974 to 2007. I conclude that statements made by Earle Carrigan to the plaintiffs prohibiting them from crossing onto his land related

to a reference point where he placed stakes in the ground along the so-called scruffy area and which are seen in a number of photographs dating back to the photo taken of the pine Christmas tree in the period 1992-1995. It is that line which was recognized by both plaintiffs and defendants as the boundary line for the period 1974-2007.

[137] The remaining issue is to define the area of adverse possession.

[138] It is the area bounded on the east by the Sullivan survey line and on the north by the highway.

[139] On the west the boundary runs on a straight line that is to be drawn having regard to the following reference points in the photographic evidence:

- In Exhibit 1, at Tab 8, page 1, bottom photo there is a view looking south to north of Mr. Carrigan's wagon and outbuildings which are sitting just to his side of the edge of the tall grass forming part of the "scruffy area". The edge of the tall grass is the demarcation point.

- The line will run as closely as possible to the eastern edge of the scruffy area as shown in Exhibit 1, Tab 8, page 2, bottom photo; and in the bottom left photo in Exhibit 1, Tab 1, page12;

[140] I intend that the land under the Behie garage form part of the Behie lands, together with any further land to the west of it that the line drawn provides for. It is my conclusion that the scruffy area, so called, continues to form part of the lands of the Carrigans and that it will continue to form part of the land to which they hold title. I recognize the potential for difficulties in marking out the line on the basis of an area that has been allowed to overgrow. If the parties cannot agree on the exact location of the line based on my description herein, then I will receive further submissions from them.

[141] As to the southern boundary, I note that very little evidence addresses where this should be located. Submissions of plaintiffs' counsel were not specific in relation to this area. Defendants' position has consistently been that they should not be dispossessed of any land to which they hold title.

[142] The burden to establish the area of adverse and exclusive possession is on the plaintiffs. The photographic and *vive voce* evidence establishes that the Behies took over control of "Frankie" and the lands adjacent to it, in 1974. In time they were responsible for its' removal. They developed the land where the garage now sits and used an area around the garage sufficient to permit its' construction.

[143] I am satisfied that the garage falls within the area over which the Behies have established their claim. The question is how much of the area to the south of the garage is disputed land. As Earle Carrigan noted, the disputed land narrows as it goes from north to south from a distance of approximately 20' at the northern end, narrowing to approximately 15' near the little trees. I do not know where the line that I have stipulated on the eastern edge of the scruffy area will intersect at its south end with the surveyed line. It seems that it would be a relatively short distance to the south of the garage.

[144] Jessie Carrigan said that she did not mow the area behind where the Behie garage is now, because it was swampy. It is apparent that the Behies exercised control over sufficient space around Frankie to use the area, and behind the garage to bring in building supplies and otherwise use the property. Beyond that I have no

evidence that either of the parties used the land behind the garage or for what period of time.

[145] I fix a southern boundary that is an area 6' to the south of the Behie garage. I make no finding with respect to any other lands that may be subject to a claim of adverse possession that is further south than that point. The evidence simply does not provide enough detail to draw any further conclusions as it relates to that area.

Costs

[146] If the parties are unable to agree as to costs, they can elect to proceed by way of written submission or oral submissions at a time to be arranged.

[147] Order accordingly.

Duncan J.