SUPREME COURT OF NOVA SCOTIA
Citation: *Forgeron v. Garner*, 2024 NSSC 80

Date: 20240321
Docket: 509131
Registry: Halifax

Between:

Denise Forgeron and Derrick Forgeron

Applicants/Respondents

- and -

Christopher Taylor Garner and Mausi Reinbold

Respondents/Applicants

DECISION ON APPLICATION

Judge: The Honourable Justice Ann E. Smith

Heard: May 9, 10, 11, 12, and 15, 2023, in Halifax, Nova Scotia

Counsel: Samuel Ward and Levi Parsche, for the Applicants
Matthew Moir and Micaela Sheppard, for the Respondents

By the Court:

Introduction

[1] This case involves a multitude of claims going back and forth between the owners of abutting properties on the shore of Porters Lake, Nova Scotia. Each party claims that their enjoyment of their property has been negatively affected by the various disputes which have arisen between them. Many of these disputes arise over each of their right to enjoy a deeded right-of-way ("ROW") over each other's land. This ROW imperfectly follows the boundary line between the two properties.

[2] The Applicants are Denise and Derrick Forgeron. I will at times refer to them by their names, or collectively as "the Forgerons" or the "Applicants". The Respondents are Christopher Taylor Garner and Mausi Reinbold. The same holds true for how the Court will identify these litigants, except that I will at times refer to them collectively as "Garner/Reinbold".

[3] To say that the Forgerons and Garner/Reinbold cannot get along as neighbours is an understatement of great magnitude. As is abundantly clear from the pleadings, the large and voluminous affidavits filed, the number of witnesses cross-examined and the testimony heard by this Court, no perceived slight by either the Forgerons or Garner/Reinbold supposedly directed towards them has been forgiven, forgotten or not litigated, including ones that occurred many years ago.

[4] Until 2020, the relationship between the Forgerons and Garner/Reinbold appears to have been friendly. They had known each other for many years.

[5] The trigger for the animosity which started in the fall of 2020 appears to have been the cutting down of trees by Garner/Reinbold on their own property, Crown land and on the Forgeron Property.

[6] The claims before the Court include trespass and tree cutting on the part of Garner/Reinbold, trespass and tree planting on the part of the Forgerons, the building of a fence in the ROW by the Forgerons, the building of a retaining wall in the ROW by Garner/Reinbold, the repeated calling of various government bodies, including the RCMP on each other and the supposed stealing or defacing of each other's personal property. There are also claims by Garner/Reinbold that the Forgerons altered their access to Porters Lake in 2004. Even the Forgerons' dog, Milo, entered

the fray, with claims by the Forgerons that he was abused by Garner/Reinbold and claims by Garner/Reinbold that the Forgerons allowed Milo to trespass on their Property, not to mention by doing his "business" on it.

[7] Each party accuses the other of nefarious spying or watching of the others' comings and goings. There are disputed explanations about how a Greek salad, hockey pucks, a golf ball and empty beer cans ended up on the Garner/Reinbold Property and who slashed the tires of the car belonging to a visitor to the Forgeron Property. There are disputed facts about whether guests who attended parties on the Forgerons' Property trespassed on Garner/Reinbold Property and concerning the Forgerons' stealing or removal of green bins, garbage can and signpost from the mouth of the shared driveway between the two properties.

[8] There is also a claim by Garner/Reinbold for prescriptive rights over the top of the shared driveway after the Forgerons' purchase of surplus Crown land in 2022.

[9] The Court visited the properties at the request of counsel to "take a view" prior to the trial.

[10] In this decision, the Court has attempted to ground these disputes within a legal framework and adjudicate them. Likely the interpersonal relationships between these parties which have plagued their enjoyment of their properties for many years can not and will not be resolved by whatever decision this Court makes. One hopes it will turn out to be otherwise.

[11] The Court notes that thirty-seven affidavits in total (some in several volumes) were filed by the parties, including the affidavits of four experts. Most of the affiants were cross-examined at trial on their affidavits. The parties were also examined out of court on discovery.

[12] In terms of written submissions, the Court received the following:

<u>From counsel for the Forgerons:</u>

- a forty-one page pre-hearing brief with authorities;
- a thirty-seven page reply brief, with authorities; and
- an eleven page rebuttal brief.

<u>From counsel for Garner/Reinbold</u>:

- a seventy-three page pre-hearing brief with authorities;
- a fifty-one page reply brief, with authorities; and
- a twenty-one page rebuttal brief.

[13] The Court heard a motion to strike large portions of the affidavits of Garner/Reinbold at the start of trial. This motion took an entire day. Even with large portions of these affidavits being struck, there remained a huge volume of affidavit evidence for the Court to review and consider, together with the evidence heard at trial through cross-examination.

Background – Facts Not Contested

[14] Although many facts are in dispute in this proceeding, the parties do agree on certain of the background information leading up to the initiation of these claims in the fall of 2021. I will review the basic facts that are not in dispute in this part of the decision.

- Denise Forgeron is the registered owner of property located at 338 West Porters Lake Road in Porters Lake, Nova Scotia (the "Forgeron Property").
- Christopher Garner is the registered owner of property located at 340 West Porters Lake Road in Porters Lake, Nova Scotia (the "Garner Property" or the "Cottage").
- Denise Forgeron's father, Les Harlow, was the original owner of the Forgeron Property and lived on that property from 1963 to 1991.
- Bill Jackson was the original owner of the Garner Property.
- Les Harlow and Bill Jackson developed and subdivided the parcel of land that eventually became the Forgeron and Garner Properties.
- Denise and Derrick Forgeron reside at the Forgeron Property, along with their two adult children. The Forgeron Property is their family home and primary residence where they live year-round. Over the years, the Forgerons have built up the residence on the Forgeron Property from a cottage to a much larger family home.
- Bill Jackson and Les Harlow decided to make each property accessible by a single shared driveway, which curved to the right when coming off West Porters Lake Road. In his affidavit, Les Harlow states that making both

properties accessible by separate driveways would have required clearing out more trees between West Porters Lake Road and the properties, which would have negatively impacted the privacy of the properties.

- Bill Jackson and Les Harlow decided to make each other a right-of-way over one another's property on either side of the boundary line between the properties. Initially, each property owner had a 25-foot right of way over the other's property.
- Bill Jackson eventually sold the Garner Property to Donald and Anne Mackenzie, who sold it to Raymond and Nancy Harris, who then sold it in 1978 to Martin and Edith Reinbold, Mausi Reinbold's parents. Mausi Reinbold became the owner of the Garner Property in 2000, when her parents deeded the property to her.
- Mausi Reinbold did not regularly visit the Garner Property until the 2000s. In 2003 she married Christopher Taylor and thereafter they visited the property more regularly.
- In December 21, 2020 Mausi Reinbold transferred her joint ownership interest of that property to Christopher Garner.
- The Garner Property is a cottage and is not Garner/Reinbold's primary residence, which is elsewhere in Nova Scotia. Garner/Reinbold do not reside at the cottage year-round, but primarily during the spring, summer and fall months. Since approximately 2017, Garner/Reinbold have had third-party renters or "house-sitters" live in the Cottage during the months when they are not there.
- The Forgeron Property and the Garner Property share a common boundary line running roughly north-east to south-west along the northern side of 340 West Porters Lake Road and the southern side of 338 West Porters Lake Road.
- When the two properties were originally laid out as cottage lots in 1963, they were each subject to a right-of-way, fifty (50) feet wide, one-half on each property, running from where the properties ended near Porters Lake Road through their common boundary to the waterline of Porters Lake.
- In 1978, by mutual agreement of the then property owners, the right-of-way was narrowed from fifty (50) feet to fifteen (15) feet, still one-half on each property and still running from where the properties ended near Porters Lake Road through their common boundary to the waterline of Porters Lake.

- A shared gravel/dirt driveway was laid down within the original ROW, but by mutual agreement of the previous owners, follows the existing ROW imperfectly, in that it runs partially through the ROW on the Forgerons' side of the common boundary line.
- The West Porters Lake Road is a public highway within the meaning of the Nova Scotia *Public Highways Act*, RSNS 1989, c. 114.
- The location of the boundary between the two properties and the location of each 7.5-foot-wide ROW is generally agreed.
- The deed of the Garner Property from the Mackenzie family to the Harris family describes the ROW as follows:

> … a fifty foot (50') right-of-way in common with the owner of the lands lying immediately to the north of and abutting the land under description herein, which said lands are now or were formerly owned by one Harlow.

- The deed of the Garner Property from the Harris family to the Reinbold family contains identical wording describing the ROW.

Background – Main Contested Facts or Contested Circumstances Surrounding Uncontested Facts

[15] Until October 2020, the portion of the Forgeron Property closest to the West Porters Lake Road was treed.

- On October 14, 2020, the Forgerons say that Garner/Reinbold trespassed upon the Forgeron Property and directed a landscaping crew to cut down nine (9) trees on the Forgeron Property closest to West Porters Lake Road. The Forgerons also say that this crew cut trees within the ROW as well as trees on adjacent Crown land totalling some 83 trees overall.
- Garner/Reinbold say they had the consent of the Forgerons to cut these trees. They deny that any of the trees cut were on Crown land.
- The Forgerons plead that the trees cut occupied a large and mature stand of spruce, fir, birch, maple and poplar trees and that of the 83 trees cut, nine (9) trees were cut on the Forgeron Property. The Forgerons hired an arborist, Brian Phelan, who counted trees stumps, valued their loss, prepared an expert's report and was cross-examined at trial. Mr. Phelan says that nine (9) trees were cut from the Forgeron Property.

- Garner/Reinbold say that the stand was not full of mature trees, did not include maple or poplar trees and that only six (6) trees were cut on Forgeron Property. Garner/Reinbold rely upon the evidence of Nova Scotia Surveyor Glenn Myra who surveyed the location of the boundary between the Forgeron and Garner properties. His plan of survey notes the location of cut trees. Mr. Myra counted six (6) tree stumps on Forgeron Property.
- The Forgerons characterize the cutting of these trees in their pleadings and during their trial evidence as "clear-cutting" and as "destroying" the privacy that they enjoyed from highway traffic and noise on the West Porters Lake Road.
- Garner/Reinbold dispute that they engaged in an act of "clear-cutting" or destruction and say that of the trees they cut none had a substantial impact on highway noise or the loss of privacy for the Forgerons.
- Garner/Reinbold say that soon after the tree cutting, the Forgerons trespassed on their property and in an act of retaliation planted six (6) cedar trees on it when Garner/Reinbold were not there and refused to remove these cedar trees even after their legal counsel wrote to the Forgerons' legal counsel demanding that the cedar trees be dug up.
- Garner/Reinbold say that they eventually carefully dug up the cedar trees and placed them in containers on the Forgerons' property for re-planting.
- The Forgerons concede that they planted the cedar trees but say that most or some of these trees were within the ROW and that they planted them to try to regain some of the privacy which they say they lost after Garner/Reinbold's tree cut.
- In late September 2003 Hurricane Juan destroyed a boat slip or boat launch on Porters Lake (the Forgerons call it a boat slip; Garner/Reinbold call it a boat launch) at the end of the ROW which the Forgerons constructed in about 2000. The Forgerons had this area repaired in 2004 in the aftermath of the hurricane. Garner/Reinbold now claim, that the repairs resulted in their inability to wade into the water of Porters Lake or launch a boat into the water. They add that the Forgerons did not have permits to carry out this work.
- The Forgerons say these claims are well out of time, relying upon the Nova Scotia *Limitations of Actions Act*. Garner/Reinbold say that that is the wrong legislation governing limitation periods involving real property and that the

correct legislation is the *Real Property Limitations Act*, which means that their claim was started in time.

- Garner/Reinbold say that in April 2022, several months after this litigation began, the Forgerons constructed a six (6) foot tall wooden fence in the middle of the shared ROW (the "Fence" or the "Forgeron Fence"), running from the shoreline of Porters Lake and ending at the end of the paved section of the shared driveway near the West Porters Lake Road.
- Among other claims related to the Forgeron Fence, Garner/Reinbold say that it totally obstructs their usage of the shared ROW, which they say was their primary access to the waterfront and prevents them from using it as a boat launch. They want the Forgeron Fence removed.
- The Forgerons do not dispute that they had the Fence constructed, although they do dispute its exact location. They admit that a part of the fence is within the ROW. However, they say that the Fence does not substantially interfere with Garner/Reinbold's use of the ROW. They also say that the Fence's location is the same as that of an older "stick" fence in the ROW that Garner/Reinbold's predecessors in title erected many years before.
- The Forgerons say that starting in the summer of 2021 Garner/Reinbold built a retaining wall which squarely falls within the shared ROW and prevents large trucks from accessing the Forgeron Property.
- Garner/Reinbold say that the retaining wall does not fall squarely within the ROW, but only encroaches into it by approximately six (6) inches. They say that they were careful to have the retaining wall built on the site of a previous rock wall. Further, Garner/Reinbold say that there is no evidence that the retaining wall encroaches on the travelled, paved portion of the ROW.
- Garner/Reinbold say that in December 2022, the Forgerons notified them that they had purchased Crown land around the mouth of the shared driveway near West Porters Lake Road. The Forgerons say they told Garner/Reinbold to remove certain of their personal property from the mouth of the driveway, including a signpost with Garner/Reinbold's civic address on it, a green bin and a garbage can. Garner/Reinbold accuse the Forgerons of cutting down the signpost with a saw and stealing and disposing of their green bin.
- Garner/Reinbold seek a declaration that they enjoy a prescriptive easement over the mouth of shared driveway. The Forgerons deny that Garner/Reinbold are entitled to that remedy.

The Issues

[16] The Court has distilled the main issues arising from the competing claims as follows:

1. The tree cutting by Garner/Reinbold.
2. The cedar tree planting by the Forgerons.
3. The construction of the retaining wall by Garner/Reinbold.
4. The construction of the Fence by the Forgerons.
5. The 2004 repairs to the boat launch/slip by the Forgerons.
6. Miscellaneous claims of nuisance and other torts going both ways.
7. Garner/Reinbold's claim for a prescriptive easement at the top of the shared ROW near West Porters Lake Road.
8. Remedies sought by each party.

A Brief Review of the Law Concerning Rights-of-Way

[17] A brief review of certain key aspects of the law of rights-of-way is instructive since this case deals with a shared right-of-way which straddles the boundary between these two neighbouring properties.

[18] Although during the hearing of this case, the parties, counsel and this Court variously used the phrase, "shared right-of-way" and "right-of-way" to describe the ROW at issue, as Mr. Moir, counsel for Garner/Reinbold, correctly points out in his written and oral submissions, it is legally more precise to describe this as two separate 7.5 rights-of-way which mirror and abut each other. It is helpful to describe the access in this way when analyzing the legal issues because the rights and obligations differ depending on whether a party is the dominant tenement owner or the servient tenement owner in respect of a particular piece of land.

[19] A right-of-way is generally defined as a right to pass over the land of another. (Charles W. MacIntosh, *Nova Scotia Real Property Practice Manual*, 2022 ed. Looseleaf, (Toronto: LexisNexis Canada, 1988), 13.3B Classification of Easements, at p. 1) ("*MacIntosh*").

[20] The dominant tenement holder of a right-of-way has the right to enter onto the lands of the servient tenement holder, typically for ingress and egress, but also to maintain such right of ingress and egress by, for example, clearing the way or making necessary repairs (*MacIntosh*, 13.3B Classification of Easements, at p. 1).

[21] The dominant tenement holder does not enjoy any superior rights over the property than does the servient tenement holder; a right-of-way does not convey ownership of the land in question (*MacIntosh*, at p. 1).

[22] The precise scope of the dominant tenement holder's rights is determined by the specific facts surrounding the particular right-of-way, including the language used in its creation.

[23] What this means in this case, is that while the Forgerons are the owners in title of the Forgeron Property, their predecessors in title elected to grant their neighbour a portion of these property rights over the now 7.5-foot-wide strip of land roughly following the boundary from the West Porters Lake Road to the lakeshore, creating a legally deeded property interest for Garner/Reinbold in the Forgerons' own land.

[24] The Forgerons are therefore the servient owners of this 7.5-foot-wide strip of land and Garner/Reinbold are the dominant owners. Garner/Reinbold therefore enjoy an ownership interest in this strip of land.

[25] The same can be said in reverse. Garner/Reinbold are the owners in title of the Garner Property but their predecessors in title elected to grant their neighbour a portion of these property rights over a now 7.5-foot-wide strip of land following the boundary from the West Porters Lake Road to the lakeshore, creating a legally deeded property interest for the Forgerons in Garner/Reinbold's own land.

[26] Neither party disputes that the ROW in this case is express, the width of the ROW (7.5 feet) nor, generally, the location of the ROW. The parties do dispute the use which may be made of the ROW.

[27] The express grant before this Court does not state what use may be made of the shared right-of-way for either party, so in that sense its language is ambiguous.

[28] The leading test for interpreting express grants of rights-of-way is the decision of the Nova Scotia Court of Appeal in *Knock v. Fouillard*, 2007 NSCA 27 ("*Knock*").

[29] In *Knock*, the Court of Appeal found that where the words in the grant are ambiguous, the Court may look to extrinsic evidence of the surrounding circumstances at the time of the Deed's execution to resolve the ambiguity. Fichaud J.A., writing for the Court of Appeal, stated:

> 60. Absent a direction from the words in the deed, the court may draw assistance to resolve ambiguity from the surrounding circumstances at the time of the deed's execution. *Anger and Honsberger*, 17:20.30(a) summarizes the approach to determine the extent of a right-of-way by express grant:
>
> > …The nature and extent of a right-of-way created by an express grant depends on the proper construction of the language of instrument creating it. The following rules apply in interpreting the instrument: (1) The grant must be construed in the light of the property and the surrounding circumstances, in order to ascertain and give effect of the intention of the parties. (2) If the language of a grant is clear and free from doubt, such language is not the subject of interpretation, and no resort to intrinsic facts and circumstances may be made to modify the clear terms of the grant. (3) The past behaviour of the parties in connection with the use of the right-of-way may be regarded as a practical construction of the use of the way. (4) In case of doubt, construction should be in favour of the grantee.
>
> See also: *Laurie v. Bowen* (1952), [1953] 1 S.C.R. 49 (S.C.C.) at p. 56; *Gale on Easements*, 1-123, 9-15.

[30] The grantee of a right-of-way (the servient tenement) does not necessarily have the right to demand that the entire width of the right-of-way be kept free of any obstructions. This point was addressed in *Landry v. Kidlark*, 2014 NSSC 154, where Justice Hood wrote:

> 76 The plaintiffs claim that various actions of Kidlark and McKale have narrowed the right-of-way. This claim is based on the notion that the entire width of the right-of-way must be kept free of obstruction. That is not so.
>
> 77 In *Foster v. McCoy* (1998), 203 N.B.R. (2d) 252 (NBQB), the court in para. 28 quoted from an older English decision:
>
> > 27 In the case of *Keefe v. Amor* (1964), [1965] 1 Q.B. 334 (Eng.Q.B.), Lord Russell said:
> >
> > Where a right of way exists in respect of a strip of land it is not necessarily open to the grantee to complain of obstacles on every part of the strip: <u>he can only complain of such obstacles as impede the user of the strip of such exercise of the right granted as from time to time is reasonably required by the dominant tenant</u>…I would remark that it is sometimes thought that the grant of a right of way in every part of a defined area involves the

> proposition that the grantee can object to anything on any part of the area which would obstruct passage over that part. This is a wrong understanding of the law. Assuming a right of way of a particular quality over an area of land, it will extend to every part of that area, as a matter, at least, of theory. But a right of way is not a right absolutely to restrict user of the area by the owner thereof. The grantee of the right would only object to such activities of the owner of the land, including retention of obstruction, as substantially interfered with the use of the land in such exercise of the defined right as for the time being is reasonably required.
>
> [Emphasis added]

[31] Coughlan J. in *Pink v. Lohnes-Davis*, 2014 NSSC 304 further explained the rights of the servient tenement, with reference to *Anger & Honsberger* (*supra*):

> The servient tenement, on the other hand, cannot unduly restrict the use of the right-of-way. An act which substantially interferes with the exercise of a right-of-way is a nuisance. There is an actionable disturbance of a right-of-way if the way cannot be practically and substantially exercised as conveniently as before the interference. To be actionable, the interference must be substantial. Thus the erection of a gate is not necessarily an interference with a private right-of-way if the owner of the dominant land has reasonable access to the way. In determining the degree of interference, the nature of the obstruction is relevant. Thus, where the obstruction is permanent this may be seen as creating the requisite degree of obstruction although the actual interference with the right-of-way is not great:
>
> > [W]here the thing that is complained off is the erection of a substantial and permanent structure upon the land over which the grantor has already given a right of way, it appears…to be almost impossible to say that there is not a real and substantial interference with the right conveyed.
>
> If the owner of the servient tenement obstructs the right-of-way, the owner of the dominant tenement may remove as much of the obstruction as is necessary in order to exercise the right-of-way, or may deviate and go around the obstruction if it cannot be easily removed. The right to deviate must be exercised in a reasonable manner.
>
> [Emphasis added]

A Brief Review of the Elements of the Tort of Trespass

[32] Given the abundance of the claims of trespass going back and forth between the parties, it is useful to review, generally, the essential elements of a trespass to land.

[33] The tort of trespass protects a person's possession of land against wrongful interference. That interference must be direct. It is actionable without proof of

damage and must be committed either intentionally or negligently (see Bryson J.A. in *Halifax County Condominium Corporation No. 277 v. Halifax Regional Water Commission*, 2024 NSCA 1 at 17, citing *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143 at 42.

[34] Those elements are as follows:

> Any direct and physical intrusion onto land that is in the possession of the plaintiff;
>
> The defendant's act need not be intentional, but it must be voluntary;
>
> Trespass is actionable without proof of damage; and
>
> While some form of physical entry onto, or contact with, the plaintiff's land is essential to constitute a trespass, the act may involve placing or propelling an object an object, or discharging some substance onto, the plaintiff's land.
>
> [See *McInnis v. Stone*, 2016 NSSC 69 at para 115].

Issue 1: The Tree Cutting by Garner/Reinbold

[35] The Forgerons say Garner/Reinbold came onto their property and cut down nine of their trees in October 2020. They say that in fact Garner/Reinbold cut down a total of 83 trees at that time and that these activities constituted trespass, with nine of the 83 trees being on their land and the remainder cut from Crown land or from the Forgeron side of the ROW. The Forgerons seek special damages for the loss of nine trees as well as general damages for loss of privacy which they say resulted from this "tree cut" or "clear cutting".

<u>The Trees Cut from Forgeron Property</u>

[36] Denise Forgeron's affidavit evidence is that until "October 2020, the portion of the Forgeron Property closest to West Porters Lake Road contained a large and mature stand of trees, which included spruce, fit (sic) birch, maple, and poplar trees". She did not revise that evidence, even after the arborist retained by her and Derrick Forgeron to find and assess the trees lost by the Forgerons did not report that any fir, maple or poplar trees had been cut.

[37] In September 2020, before the trees were cut down, Denise Forgeron and Mausi Reinbold sent emails to each other about Ms. Reinbold's plan to remove certain trees from the Garner/Reinbold Property that she said were close to power lines. Apparently, Ms. Reinbold had communicated with Nova Scotia Power about this issue but Nova Scotia Power was not willing to remove the trees that Ms.

Reinbold wanted removed, so Ms. Reinbold told Ms. Forgeron that she and Mr. Garner would get their "tree guy" to "cut the trees from the houses up to the main road that are in the power line.

[38] The background to this decision to cut trees was, according to Garner/Reinbold, that the Forgerons had told them thirteen years or so before, that they were responsible for maintaining the trees which rubbed against the power lines. The Forgerons say they did not make these statements.

[39] Garner/Reinbold hired a crew to cut trees around the power line.

[40] Denise Forgeron says that on October 13, 2020, she came home to her property to find that a "huge number of trees had been removed from the Forgeron Property, the Right-of-Way, and the Crown Land". She says that the same day she went to talk to Mausi Reinbold and Christopher Garner and they admitted that the trees had been cut down at their instruction.

[41] Denise Forgeron says that a few days after the tree removal, Derrick Forgeron, Mausi Reinbold and Christopher Garner met and discussed the tree removal. She says that Derrick Forgeron said that trees had been removed from their property without their permission, as well as from Crown Land. Denise Forgeron says that Mausi Reinbold replied that that had been a mistake and in response to Denise Forgeron's frustration responded, "You'll have to sue us". Mausi Reinbold denies that she made that statement.

[42] Denise Forgeron states that "since the removal of the trees, the Forgeron Property is more visible from West Porters Lake Road, more open and much less private".

[43] It is a fact that Garner/Reinbold cut down trees in the ROW, on the Forgeron's side of the property boundary. What is contested is the number of trees, the size of those trees, and whether or not Garner/Reinbold had the consent of the Forgerons to cut the trees, or an ancillary right to cut down the trees, arising from their ROW.

<u>Alleged Consent Given by Forgerons to Garner/Reinbold to Cut the Trees</u>

[44] Garner/Reinbold say that the Forgerons told them that they were responsible for maintaining the trees under the power lines on two occasions and thereby had the Forgerons' consent to cut down the trees. Garner/Reinbold say that they were so told approximately thirteen years before they cut down the trees. The Forgerons

deny ever telling Garner/Reinbold that they were responsible for the maintenance of the trees under the power lines.

[45] The issue of consent can easily be disposed of. Garner/Reinbold's argument for implied consent is based on two conversations the Forgerons say never happened and which even Garner/Reinbold say took place thirteen years prior to the tree cut.

[46] Further, Ms. Reinbold admitted on cross-examination that she had no right to cut down the Forgerons' trees and that she told Jeffrey Touesnard of Atlantic Wharf Builders (whose evidence will be referred to later in this decision) that she and Christopher Garner were "at fault" for cutting down the Forgerons' trees. While Mausi Reinbold's evidence does not change the legal reality of whether or not she had the right to cut down the trees in question, nonetheless her evidence in this regard is inconsistent with Garner/Reinbold's position that they had the Forgerons' consent to cut the trees.

[47] In addition, Mausi Reinbold admitted on cross-examination that she did not know whether all of the trees that were removed in October 2020 actually rubbed against the power lines. Accordingly, even if the Forgerons did tell Garner/Reinbold that they were responsible for maintaining the trees under the power lines, which the Forgerons deny, there is insufficient evidence to show that the trees on the Forgeron Property which were cut down actually rubbed against the power lines.

[48] The argument that Garner/Reinbold had the consent or implied consent of the Forgerons to cut trees in the ROW fails.

<u>The Alleged Ancillary Right to Cut Trees in the ROW</u>

[49] With respect to the argument that Garner/Reinbold had an ancillary right to cut down trees in the ROW, such an ancillary right had to have been reasonably necessary in order for them to use the ROW. The evidence does not bear this out since Mausi Reinbold admitted on cross-examination that the tree cut did not affect their ability to use the ROW. There is no evidence that the tree cut was reasonably necessary for Garner/Reinbold's use and enjoyment of the ROW.

[50] The argument that Garner/Reinbold had an ancillary right to cut down the trees in the ROW fails.

<u>The Number, Size and Species of Trees Cut</u>

[51] In terms of the number of trees which Garner/Reinbold cut down, the Court must consider the evidence of the Forgerons, Garner/Reinbold as well as the expert evidence of Brian Phelan, Arborist and Glenn Myra, Nova Scotia land surveyor.

[52] Brian Phelan was retained by the Forgerons to locate and assess the value of trees cut down on their property by Garner/Reinbold. Mr. Phelan filed a *Rule* 55 expert's report, which included a table identifying the stumps of trees he found cut in an area which included the Forgeron Property, the Garner/Reinbold Property and Crown land.

[53] Garner/Reinbold rely upon the expert evidence of Nova Scotia land surveyor, Glenn Myra, who prepared a Plan of Survey of the Properties which located tree stumps on it.

Brian Phelan – Rule 55 Expert – Arborist

[54] Brian Phelan is a member of the International Society of Arboriculture ("ISA") and an ISA-certified arborist. Mr. Phelan's expertise to give opinion evidence in his capacity as an arborist was not disputed.

[55] Mr. Phelan testified, and his report reviewed, that in June 2021 Derrick Forgeron contacted his company, Scotia Horticulture Solutions, asking about a method to determine the value of a number of trees that he said were cut down on his property and in the ROW.

[56] Mr. Phelan made three separate trips to the properties: the first on June 17, 2021, the second on August 6, 2021, and the third on November 2, 2022.

[57] On June 17, Brian Phelan met with the Forgerons. At that time, he walked the Forgeron Property with Derrick Forgeron to view the extent of the tree cutting which he understood had taken place over the Thanksgiving weekend of 2020.

[58] Brian Phelan states in his report that he understood that the tree cutting included a number of trees located within the ROW plus a number of trees located on Crown land. Mr. Phelan sent Derrick Forgeron a quote to provide an "Arborist Report" that he advised would include an evaluation of the trees that were removed. As a result, Mr. Forgeron hired Scotia Horticultural Solutions to proceed with the Arborist Report and evaluation.

[59] After being retained by the Forgerons Mr. Phelan returned to the area on August 6, 2021, to do site assessment and data collection work. At that time Derrick

Forgeron gave him "survey information" in the form of what Brian Phelan called a "plot plan" which refers to a "plan certified by Robert B. Ashley, N.S.L.S. dated February 24, 1995". Mr. Phelan did not have the Plan of Survey which was prepared, stamped and signed by Robert Ashley when he carried out his site assessment and data collection work but only the "plot plan". Derrick Forgeron also gave Mr. Phelan a number of photographs that he told him had been taken before and after the tree cutting.

[60] Brian Phelan said that Derrick Forgeron also told him that Nova Scotia Land Surveyor Allen Owen was doing a "follow-up survey". In fact, Derrick Forgeron provided Brian Phelan with a copy of a Plan of Survey prepared by Allen Owen of Thompson Conn Limited dated January 12, 2022 (the "Owen Plan") when Mr. Phelan returned to the Forgeron Property on November 2, 2022, prior to Mr. Phelan finalizing his November 4, 2022 report.

[61] Brian Phelan says that on his August 6, 2021 visit he found a survey marker close to Porters Lake and another in the vicinity of the Forgeron house and the Garner/Reinbold cottage but no markers in the area where the trees had been cut. He said that while he did not have a complete Plan of Survey, the Robert Ashley "plot plan" he had in hand showed the two properties, the boundary, the driveway and the ROW. Based on that information, Mr. Phelan said that he was able to deem what was the boundary between the Properties.

[62] On August 6, 2021 Mr. Phelan spray-painted tree stumps red which he found at or near the Forgeron Property. According to Derrick Forgeron's evidence, Mr. Phelan also spray-painted stumps with yellow paint which he found on Crown land.

[63] When he issued his final report dated November 10, 2022, Mr. Phelan had not reviewed the Plan of Survey prepared by Glenn Myra, Nova Scotia Land surveyor dated January 31, 2022 (the "Myra Plan"). However, Mr. Phelan's evidence was that after reviewing the Myra Plan his opinion as to the number of trees cut on the Forgeron Property did not change.

[64] A table in Mr. Phelan's report identifies the stumps of seven (7) spruce trees, including a thirteen-inch tree which he said could be called "mature" cut from the ROW. The table identifies eight- and nine-inch birch trees which he said could also be called "mature".

[65] Brian Phelan states in his report that a total of 83 trees plus several dead "snags" had been cut and chipped.

[66] Brian Phelan's opinion was that there were nine (9) trees lost from the Forgeron Property. Of these, seven were spruce. Of the spruce trees, four had diameters of two inches or less; two had diameters of four inches and six inches and there was a spruce cut with a diameter of thirteen inches. Mr. Phelan also identified a yellow birch with an eight-inch diameter and a white birch with a nine-inch diameter. Brian Phelan estimated the value of each of the nine trees lost. He valued the cost of replacing the trees using the "Replacement Cost Method" (for trees four inches or less in diameter) and the Trunk Formula Method (for trees with a diameter of more than four inches). The total he came to was $17,100 (rounded to the nearest hundred and excluding tax).

[67] The Forgerons gave evidence that their property is less private because of the tree cut. Denise Forgeron's evidence on cross-examination was that their property is more visible from the road. The Forgerons say that their property is also noisier as a result of the tree cut. Denise Forgeron says that she, her husband and their daughter can all hear increased highway noise from their bedrooms in the house.

[68] The Forgerons claim special damages in the amount of $17,100 for the loss of nine (9) trees on their property and $5000 in general damages for loss of use and enjoyment of their Property, including loss of privacy.

[69] Mausi Reinbold's evidence at trial was that she could not argue with the Forgerons' evidence that they experience more noise from the Porters Lake Highway as a result of the tree cut, but she maintained that she and her husband do not experience more noise. She maintained that each Property was no more visible from the Porters Lake Road than it had been before the tree cut.

Glenn Myra – Rule 55 Expert – Nova Scotia Land Surveyor

[70] Glenn Myra is a Nova Scotia Land Surveyor. He was asked by Garner/Reinbold to provide an expert's report and a Plan of Survey of their property. Mr. Myra conducted a survey of the Garner/Reinbold Property on January 31, 2022, and produced an updated Plan of Survey on November 25, 2022.

[71] In his expert's report Mr. Myra states his findings as to the boundary of the Garner Property and the Forgeron Property.

[72] Mr. Myra updated his January 31, 2022 plan because after that survey was complete, the Forgerons constructed a Fence within, or substantially within, the ROW. Mr. Myra locates the Fence on his November 25, 2022 plan.

[73] In his report, Mr. Myra states that on November 18, 2022 he located tree stumps painted yellow and red.

[74] He also located three (3) holes, "suitable for transplanting" on November 18. These holes were on Garner/Reinbold Property. They were not in the ROW. This Court finds that these holes resulted from Mausi Reinbold's uprooting of the cedar trees planted by the Forgerons in the fall of 2000, which will be discussed later in this decision.

[75] Mr. Myra measured the circumferences of the tree stumps on November 25, 2022. The tree stumps and holes, as well as an old utility pole, are shown on his November 25, 2022 Plan. Mr. Myra's evidence was that there were six small stumps painted red on the Forgeron Property, that is, the Forgerons' side of the ROW.

Tree Stumps – Brian Phelan's Count or Glenn Myra's Count?

[76] Mr. Phelan's report identifies nine (9) trees cut from the ROW. Mr. Myra's report and Plan situates six (6) trees cut from the ROW.

[77] The Forgerons say that Mr. Myra missed the tree numbered "eight" in Mr. Phelan's report. Tree eight in the Phalen report is identified as a white birch stump with a diameter of nine inches.

[78] The Court notes that Mr. Myra measured the trees in feet. Nine inches is roughly equivalent to 2.4 feet. None of the measurements of the stumps on the Myra survey come close enough to reliably match the nine-inch white birch tree identified by Brian Phelan anywhere near the ROW. There is a tree which comes close to that in diameter but it is on the Garner Property well outside the ROW.

[79] Derrick Forgeron's explanation, at least in part, for the discrepancy between Mr. Phelan's tree stump count and that of Mr. Myra is found in his Affidavit:

> I reviewed the Myra Affidavit and took note of the tree stumps as identified by Mr. Myra in his survey….in late summer of 2021 following Brian Phelan's attendance at the Forgeron property for the purpose of collecting data …and before Mr. Myra's attendance at the property for the purpose of gathering data for the survey, the Respondents had numerous stumps from the trees they cut down grinded down and removed from the area. This means that those stumps would not have been present when Mr. Myra attended the property to prepare his survey.

[80] The insinuation here is that Garner/Reinbold did something clandestine. The Court also notes that while Derrick Forgeron refers to the "trees they cut down", he does not identify which trees in this paragraph of his affidavit.

[81] This Court finds that Garner/Reinbold did grind down tree stumps, but those stumps were on their property, located around their circle-driveway, and not in the ROW where the trees were cut down.

[82] The Forgerons also argue that Mr. Myra's evidence on cross-examination suggested that in October 2022 he only counted tree stumps which were painted red. They suggest that this means that he did not count tree stumps which had been painted red, but were no longer red, because the red paint had washed away.

[83] The Forgerons note that it was a year and several months between the time Mr. Phelan visited the properties and when Mr. Myra visited the properties. In that regard, Denise Forgeron's affidavit evidence is that since the paint used to paint the stumps was water-based, it was possible that rain could have washed away some of the paint during that year.

[84] This Court notes that Glenn Myra is an experienced land surveyor. Brian Phelan is an experienced arborist. However, land has contour and it is not disputed that the area around where the trees were cut in the ROW had contour. Mr. Phelan's expertise lies with his experience and training as an arborist; he is not trained as a land surveyor to locate boundaries nor to locate objects on a plan of survey. This Court takes note that it would be unusual for a land surveyor to specifically mark on a Plan of Survey painted tree stumps, but not to identify or even reference other, unpainted, tree stumps.

<u>Conclusion on Trees Cut by Garner/Reinbold and Damages for the loss of those Trees</u>

[85] The Forgerons bear the burden of proving what trees they say were cut on their property. To that end they retained arborist Brian Phelan to go there to value the cut trees.

[86] At the point that Mr. Phelan visited the area, Mr. Myra had not placed survey markers in the ground. Mr. Phelan did re-visit the area once the survey markers were placed and his evidence was that his opinion as to where the tree stumps were located had not changed.

[87] In terms of the argument that rain had washed off the red paint from trees stumps during the time period when Brian Phelan counted stumps and when Glen Myra noted red tree stumps, the fact remains that Glen Myra found painted stumps nearly a year and a half after the tree stumps were painted red. Further, there were many photographs in evidence showing red tree stumps. These were not all taken within a few days of when the stumps were painted.

[88] The Court finds that the Forgerons have proven that Garner/Reinbold cut six (6) spruce trees in the ROW, the largest of which had a six-inch diameter. They have not proven that Garner/Reinbold cut an eight-inch yellow birch, a nine-inch white birch or a thirteen-inch spruce.

Damages Arising from the loss of the Trees

Special Damages

[89] In *Romkey v. Osborne*, 2019 NSSC 56, Arnold J. held that where "a party suffers a trespass, the aim of an award of damages is to place that party back in the same position as before the trespass" and that this aim can be achieved "through an award based on the cost of reinstatement or replacement". (para 155)

[90] The applicants in *Romkey* relied on an arborist's report to establish the value of trees that were removed from their property by the respondents. The arborist in that case used a method called "the wholesale prices and installation costs for trees of comparable size and species" to value trees with diameters in the range of one to 4.5 inches and used the "Trunk Formula Method" to value tress with diameters of greater than five inches. Justice Arnold found that the arborist's "appraised value [was] a reliable estimate of the cost to the [Applicants] to replace the trees and return their property to its pre-trespass state'. Justice Arnold also held that in order to fairly compensate the applicants, it was reasonable to make an award based on the replacement value of the trees (paras 75, 154 and 157).

[91] As did Justice Arnold in *Romkey*, *supra*, Brian Phelan used a similar, if not identical method, to value the trees removed from the Forgeron Property.

[92] The Forgerons say that if the Court finds that six (6) trees were cut from their property, that the Court should assess their special damages by reducing their total claim by one-third which they say was the approach utilized by Justice Arnold in *Romkey*. In *Romkey*, however, it appears that Justice Arnold was unable to determine precisely how many trees the respondent had cut down, or the size or

species of those trees, which introduced an element of uncertainty into the Court's assessment of special damages.

[93] Here, the Forgerons' own expert used a valuation method which the Forgerons rely upon in quantifying their special damages. The Court relies upon that method and the specific trees that Brian Phelan assessed to set damages.

[94] The Court finds that Brian Phelan's value for the six (6) trees which I have found Garner/Reinbold cut down is reasonable and a proper basis to award the Forgerons special damages in the amount of $2,850.

General Damages

[95] The Forgerons also claim general damages for what they say is the negative effect that Garner/Reinbolds' "clear-cut" has had on their privacy and their overall enjoyment of their property. Counsel for the Forgerons say that such damages have been awarded in cases involving trespass to land and the removal of trees from a person's property.

[96] Denise Forgeron states in her affidavit that "since the removal of the trees the Forgeron property is more visible from the West Porters Lake Road, more open and much less private". It is clear to the Court that here Ms. Forgeron is talking about removal of all 83 or so of the trees, including the Crown land trees. Derek Forgeron makes similar statements in his affidavit.

[97] In one of his affidavits Derek Forgeron includes a photograph depicting the view through some trees facing the highway on West Porters Lake Road. He states that this area was previously filled in with trees which "gave us cover from the cars passing on the highway. There has been significantly more noise coming from the highway since the Respondents cut down the trees is this area".

[98] Neither Denise or Derrick Forgeron provides further evidence to substantiate their statements that their home is more visible from the West Porters Lake Road, more open and much less private. In cross-examination for the first time, Denise Forgeron's evidence was that she hears more noise when the windows are open in their bedroom. She was cross-examined on this point. If she had any other evidence to support her claims of loss of privacy, the Court assumes that she would have given it.

[99] The Court finds that the evidence supports some loss of privacy arising from the loss of six (6) trees from the ROW and awards the Forgerons the sum of $2,000.00 for loss of privacy arising from the loss of those trees.

Issue 2: Cedar Tree Planting by the Forgerons

[100] It is not in dispute that in November 2020, shortly after Garner/Reinbold cut trees on the Forgeron Property in October, the Forgerons entered the Garner/Reinbold Property, dug several deep holes and planted at least six cedar trees there without the consent of Garner/Reinbold. Three of these were planted within Garner/Reinbold's circular driveway. Garner/Reinbold were not at the Cottage when these cedar trees were planted, having left for the season.

[101] The other three cedar trees were planted on Garner/Reinbold's side of the ROW, closer to the driveway leading to the West Porters Lake Road. Decorative tall grasses were planted around the base of certain of the cedar trees. I find that the Forgerons planted these grasses.

[102] Garner/Reinbold first discovered these cedar trees in late November 2020. Earlier that month they received an email from one of their tenants at the Cottage advising that she saw Denise Forgeron planting trees. Although there had been some discussion between Denise Forgeron and Mausi Reinbold about Denise Forgeron planting something in the area around the "tree-cut", there certainly had been no discussion of the Forgerons planting trees within the ROW closer to the houses or on the Garner Property.

[103] After Garner/Reinbold discovered the cedar trees, Mausi Reinbold sent an email to Denise Forgeron on December 1, 2020 about the need for her to immediately remove the trees from Garner Property, but she received no answer. Ms. Reinbold then printed the email and passed it to Denise Forgeron in an envelope. Denise Forgeron later left a note on the windshield of Garner/Reinbold's car, which contained Denise Forgeron's handwritten response, written on Mausi Reinbold's printed copy of her December 1 email. Denise's note reads as follows:

> Mausi: This isn't worthy of the paper it's written on.
>
> Review what I told you, you trespassed 100% and took approximately 10 trees OFF our property not yours. I am NOT removing any of those trees.
>
> Once you Replace all of the trees you removed off our property then we will look at this. In the meantime you have no hand here at all.

Denise

[104] Through legal counsel, Garner/Reinbold gave the Forgerons more than a year to remove the cedar trees, yet the Forgerons did not do so. In fact, the Court finds that the Forgerons continued to trespass on Garner/Reinbold land in order to "decorate" the cedar trees with vines and decorative grasses.

[105] Mausi Reinbold finally uprooted the trees. I find that Mausi Reinbold carefully protected the roots of the trees, put them into containers and placed them on the Forgeron Property. The evidence before the Court was that these cedar trees, or at least some of them, were able to be re-planted.

[106] The Plan of Survey of Glenn Myra shows that the holes left by the up rooting of three of these cedar trees were not within the ROW but were on Garner Property. Clearly, therefore, Denise Forgeron or Derrick Forgeron, or both, trespassed on Garner Property to plant these cedar trees and to "decorate" them with vines and decorative grasses.

[107] While the evidence of the Forgerons was that they planted these cedar trees to help solve the "blight" on their property and soften the effect of "deforestation" caused by Garner/Reinbold's tree cutting, the Court does not accept that explanation. The cedar trees were not planted anywhere near the land where the Forgerons say the lack of privacy from the tree-cut resulted, but rather were planted close to their house and Garner/Reinbold's Cottage. If the cedar trees were planted to ameliorate the effects of the tree cutting, it makes no sense that they would be planted so close to Garner/Reinbold's Cottage.

[108] Further, Denise Forgeron's note, written to Mausi Reinbold after the initial demand that the trees be removed, showed Denise Forgeron's true intent in planting these trees. She did so in retaliation for Garner/Reinbold's cut of trees on the Forgeron Property.

[109] The Court also does not accept Denise Forgeron's evidence that she believed that she planted the trees in the ROW. If she so thought, she would have said so in her note to Mausi Reinbold.

[110] The Court also notes that the Forgerons served Garner/Reinbold with a notice under the *Protection of Property Act*, RSNS 1989, c. 363, s. 3 on June 1, 2021 after Garner/Reinbold delivered a note to the Forgerons asking them to remove the cedar trees which they had planted. The Forgerons must be taken to have been aware of

the provisions of the *Protection of Property Act* which provides that every person who, without legal justification, without the permission of the occupier (a) enters a lawn or garden, (d) dumps or deposits material of any kind; or (e) enters on premises where entry is prohibited by notice is guilty of an offence on summary conviction and is liable to "a fine of not more than five hundred dollars". (s.3) Yet even then, the Forgerons did not remove the cedar trees.

[111] Garner/Reinbold filled in three of the holes left on their property from uprooting the cedar trees. They do not seek special damages relating to their own labour in removing the cedar trees. However, they ask for general and punitive damages.

[112] The Court will address Garner/Reinbold's claim for damages later in this decision.

Issue 3: The Construction of a Retaining Wall by Garner/Reinbold

[113] In the summer of 2021 Garner/Reinbold began construction of a retaining wall around their circle driveway close to, or slightly within, the ROW. The construction of the retaining wall was complete, or largely complete, by April 2022.

[114] Mausi Reinbold attached a series of photos to her January 27, 2023 Reply Affidavit which show the retaining wall during its construction. Her evidence is that she and Christopher Garner lined out where they were going to build the retaining wall and sprayed the area with orange paint.

[115] Garner/Reinbold say that the purpose of building the new retaining wall was to place it no further into the ROW than was an old stone wall. Garner/Reinbold say that they took significant care not to exceed where the old stone wall was or had been.

[116] The Forgerons claim that the retaining wall juts into the ROW and obstructs larger vehicles when those vehicles use the shared driveway.

[117] Derek Forgeron says that photographs in evidence show the retaining wall intruding about 1 ½ feet into the 7 ½ feet wide ROW.

[118] In his affidavit, Derek Forgeron's evidence is that "The retaining wall obstructs larger vehicles when those vehicles use the driveway within the right-of-way which larger vehicles often have in the past".

[119] Derrick Forgeron's evidence at trial was to the same effect. However, when pressed, Derrick Forgeron admitted that he had never seen a larger vehicle be obstructed. This negatively affected his credibility.

[120] At this point the Court notes that it appears that Garner/Reinbold's retaining wall does intrude somewhat into the ROW. However, intrusion into someone's dominant tenement is not necessarily a trespass, unlike an intrusion onto someone else's own property.

[121] In *Romkey v. Osborne*, 2019 NSSC 56 Justice Arnold notes that the grantee of a right-of-way does not necessarily have the right to demand that the entire width of the right-of-way be kept free of any obstructions, referring in that regard to the decision of Hood J. in *Landry v. Kidlark*, 2014 NSSC 154:

> 76 The plaintiffs claim that various actions of Kidlark and McKale have narrowed the right-of-way. This claim is based upon the notion that the entire width of the right-of-way must be kept free of obstructions. That is not so.
>
> 77 In *Foster v. McCoy* (1988), 203 N.B.R. (2d) 252 (NBQB), the court in para. 28 quoted from an older English decision:
>
> > 28 In the case of Keefe v. Armor (1964), [1965] 1 Q.B. 334 (Eng. Q.B.), Lord Justice Russell said:
> >
> > > Where a right of way exists in respect of a strip of land it is not necessarily open to the grantee to complain of obstacles on every part of the strip; <u>he can only complain of such obstacles as impede the user of the strip for such exercise of the right granted as from time to time is reasonably required by the dominant tenant. …</u>
> >
> > [Emphasis added]

[122] There is no evidence that "larger vehicles" have actually been obstructed by the Garner/Reinbold retaining wall.

[123] The Forgerons have not proven that the retaining wall practically or substantively obstructs the ROW.

[124] All claims, however framed in this proceeding relating to Garner/Reinbold's construction of the retaining wall, are therefore dismissed.

Issue 4: The Construction of the Fence by the Forgerons

[125] In April 2022, several months after commencing this lawsuit, months after Garner/Reinbold filed their claim against the Forgerons (which included a claim to

restore access to Porters Lake) and after the Forgerons contested that claim, the Forgerons began construction of an approximately six-foot-tall Fence up the middle of the shared ROW on a grassy slope towards Porters Lake.

[126] The Forgerons say that they built the Fence for privacy purposes.

[127] The Fence is approximately one hundred feet long and spans the length from the edge of Porters Lake to the edge of the paved driveway between the Properties.

[128] While the Fence was under construction, Garner/Reinbold contacted the Forgerons, through counsel, to demand that construction cease, but it did not. The Forgerons said that the Fence was a "replacement fence" for a much older fence.

[129] In July 2022 Garner/Reinbold amended their pleadings to include a claim related to the Forgeron Fence. The Forgerons then amended their pleadings to include a claim about Garner/Reinbold's retaining wall. The Forgerons had not complained about the retaining wall before this point in time.

[130] The parties agree that the Forgeron Fence is at least a few inches inside the Forgerons' boundary and clearly within the ROW.

[131] Garner/Reinbold have a dominant tenement interest on the Forgerons' side of the Fence. Garner/Reinbold say that the Fence not only obstructs their dominant tenement rights, it effectively eliminates them.

[132] The evidence before the Court was that Denise Forgeron called the RCMP on Mausi Reinbold on one occasion for mowing the lawn along the 7 ½ feet ROW (as the dominant tenant) after the Fence construction was complete. The Forgerons say that Mausi Reinbold mowed the lawn to provoke them deliberately and that is why Denise Forgeron called the RCMP. Mausi Reinbold's evidence is that she mowed the lawn in the very same area in the past before the Fence was erected.

[133] Garner/Reinbold say that the Fence eliminates their dominant tenement rights over the entirety of the 7 ½ feet over which they exercise those rights. They argue that the Fence does not make it less convenient for them to exercise their dominant tenement rights over the 7 ½ foot stretch of land, it makes it near impossible.

[134] The Court notes that one could climb around the rocks where the Fence ends and the waterfront to make your way to the other side of the Fence. However, the one time that Mausi Reinbold did so (to mow the lawn), Denise Forgeron called the

RCMP on her to report a trespass. Clearly, the Forgerons think that by putting up the Fence, they have fenced off their property. They have not.

[135] This Court finds that the fact that the Forgerons built the Fence after the litigation began and they knew that rights over that stretch of land were in contention is egregious. The Court finds it appropriate in the circumstances to denounce the Forgerons for having done so during the litigation.

[136] This Court finds that the Fence is a permanent structure which cannot be moved at will, unlike for example, the gate in a Fence, which one might open and pass through. It is entirely unreasonable to expect Garner/Reinbold to climb over or around the rocks at the end of the Fence near the lake to access their dominant tenement rights to use the ROW on the Forgeron side of the Fence.

[137] The Fence constitutes a permanent trespass to Garner/Reinbold's dominant tenement rights. The remedy they seek is that the Fence be removed.

[138] In *Pink v. Lohnes-Davis*, 2014 NSSC 304 Coughlan J. explained the rights of the servient tenement (i.e. the Forgerons in these circumstances), with reference to *Anger & Honsberger* (*supra*):

> The servient tenement, on the other hand, cannot unduly restrict the use of the right-of-way. An act which substantially interferes with the exercise of a right-of-way is a nuisance. There is an actionable disturbance of a right-of-way if the way cannot be practically and substantially exercised as conveniently as before the interference. To be actionable, the interference must be substantial. Thus the erection of a gate is not necessarily an interference with a private right-of-way if the owner of the dominant land has reasonable access to the way. In determining the degree of interference, the nature of the obstruction is relevant. Thus, where the obstruction is permanent this may be seen as creating the requisite degree of obstruction although the actual interference with the right-of-way is not great:
>
> > [W]here the thing that is complained off is the erection of a substantial and permanent structure upon the land over which the grantor has already given a right of way, it appears…to be almost impossible to say that there is not a real and substantial interference with the right conveyed.
>
> If the owner of the servient tenement obstructs the right-of-way, the owner of the dominant tenement may remove as much of the obstruction as is necessary in order to exercise the right-of-way or may deviate and go around the obstruction if it cannot be easily removed. The right to deviate must be exercised in a reasonable manner.
>
> [Emphasis added]

[139] The Forgerons, as the servient holder of the land in question, must ensure that the ROW is substantially free of obstructions such that the dominant holder (Garner/Reinbold) may enjoy access over the land in question. The dominant holder does not have the right to demand that the entire ROW be kept free of any obstructions (see *Romkey v. Osbourne*, 2019 NSSC 56 at para. 139). However, the location and nature of the Fence is such that it prevents Garner/Reinbold from enjoying any meaningful access over the ROW that they once enjoyed.

[140] The Court finds that the Forgerons have continued to block this section of the ROW by planting decorative grasses and by piling wood or other objects within the area.

[141] The Court notes that Garner/Reinbold have provided particular evidence regarding their inability or difficulty bringing Mausi Reinbold's motorcycle up to the road or navigating their wheelbarrow.

[142] If Garner/Reinbold choose to make changes to the boat slip/launch area, their workers may have difficulty bringing heavy equipment to the waterfront for this purpose. The Court heard the evidence of Shawn Savoy in this regard, who testified that his crew might be able to bring heavy equipment down the slope to the lake, if trees on Garner Property would bend.

[143] The Fence and the Forgerons' conduct in calling the RCMP on Mausi Reinbold for mowing the grass on the Forgerons' side of the fence demonstrates a clear intention to oust Garner/Reinbold from this section of the ROW.

[144] Also in evidence is a text message exchange between Denise Forgeron and her son in which she tells him that "[n]ext time [Mausi Reinbold] steps a foot on <u>our property</u>" to "call 911". The Court rejects the Forgerons' statements that they built the Fence for privacy. If they were so concerned about privacy, they could have built the same Fence outside the servient lands of Garner/Reinbold's right-of-way. They chose to build the Fence where they did and continued building it in spite of Garner/Reinbold's protests.

[145] The Court also rejects the Forgerons' argument that the fence is merely a "replacement fence" of an old fence erected by Garner/Reinbold's predecessors in title, which used to be in the same location. There is insufficient evidence before this Court to show where exactly this old fence was situated.

[146] The best evidence showing the location of the old fence is the Forgerons' 2000 Location Certificate (plot plan) which was obtained before the old fence came down. The Plot Plan is not as detailed as a survey, although it can be relied upon to show the location of things like boundaries and structures, including the old fence. The old fence appears to be located more or less along the outer limits of the Forgerons' right-of-way on Garner/Reinbold's land, albeit on a slight angle. A portion of it angles toward the Forgerons' Property where it was closest to the driveway and appears to have obstructed an insignificant portion of the ROW there. A portion of the old fence appears to have angled away from the Forgerons' Property where it was closest to the lake, and there it is clearly outside the ROW.

[147] Clearly, the location of the old fence (shown by photographs) did not obstruct the Forgerons' construction vehicles from travelling up and down the shared ROW in 2004 when the Forgerons' did repairs to the boat slip/launch after Hurricane Juan. The old fence appears to have been roughly waist high and easy to look through given its sparse, horizontal slats. There is no evidence that it obstructed the Forgerons' use of the ROW, nor could it have offered any amount of privacy for either party. Clearly, the new Fence and old fence are not equivalents in location, purpose, or size.

[148] Further, even if the old fence was in the ROW and obstructed it (which I find has not been proven), an old, now-discontinued trespass by Garner/Reinbold into the Forgerons' ROW, is not a defence to Forgerons' current trespass into Garner/Reinbold's ROW.

[149] Although the Court heard a significant amount of evidence about the ways in which Garner/Reinbold say the Fence obstructs the ROW, and the arguments of the Forgerons that the Fence has not really obstructed the ROW to any degree given those stated obstructions, the fact remains that the Forgerons have unilaterally appropriated a stretch of the servient tenement to their own exclusive use, ejecting Garner/Reinbold from it and effectively repealing the ROW over that portion.

[150] This Court notes that from its very inception, different parts of the ROW were used for different purposes. That part of the ROW which became the shared driveway leading from West Porters Lake Road towards the residential structures on each property was used for vehicular traffic to access those residences. However, the evidence discloses that the part of the ROW at the end of the paved driveway down to the lake was a grassy sloped lawn and was not used for vehicular traffic on a regular basis. The Court accepts the evidence of Mausi Reinbold that she had

mowed the lawn in the area where the Fence is constructed many times in the past. There is no reason to not believe this evidence, and her evidence was not disturbed on cross-examination.

[151] This Court orders that the Forgerons remove the Fence from the ROW. They are to do so entirely at their own cost. They are to do whatever work is required to return the landscape where the Fence was erected to its condition prior to the Fence being erected. All of this work must be completed by July 31, 2024.

Issue 5: The 2004 Repairs to the Boat Launch/Slip, including which Limitation Statute Applies

[152] Garner/Reinbold plead that the Forgerons interfered with and trespassed upon the ROW by placing large boulders in the ROW where it meets the lake which they claim blocks their water access. They plead that the Forgerons altered the waterfront, including what they describe as the "joint boat launch" causing loss of their enjoyment of the swimming area.

[153] They also allege that the Forgerons did not have proper permits to carry out this waterfront work.

[154] Garner/Reinbold seek a positive injunction requiring the Forgerons to restore the ROW's termination at the waterline to "its original state" at their own expense.

[155] Counsel for Garner/Reinbold say that this claim is for the recovery of land. They say that the limitation period which governs the claim is found at section 10 of the *Real Property Limitations Act*, RSNS 1989, c 258, c. 10 ("*RPLA*") and that their claim was started on time, i.e., within twenty years.

[156] The Court notes that the terminology here is controversial. In their claim for reinstatement of the area, Garner/Reinbold use the terminology, "boat launch". The Forgerons call it a "boat slip", saying that the area was a "parking spot" for boats rather than a place where boats enter and exit the water.

[157] The Forgerons' response to these claims is that they repaired the boat slip after it was destroyed by Hurricane Juan which hit the area in the fall of 2003. They say that they had the necessary permits to do this work.

[158] They also say that Garner/Reinbold's claim is out of time, that they delayed in bringing of this claim and/or that their conduct constitutes acquiescence of the changes they made to the boat slip. They say, contrary to what is alleged by

Garner/Reinbold, that section 10 the *RPLA* has no application to these claims. They rely upon the two year limitation period set out in section 8 of the *Limitations of Actions Act*, SNS 2014, c 35 ("*LAA*").

[159] The evidence discloses that until approximately 2004, the grassy end of the ROW contained a cement slab or pad in the lakebed that angled into the water, which was protected on either side by wooden cribs. This concrete slab or pad had been there at least since 1978. The boundary between the properties roughly bisects a u-shaped portion of land at the point it approaches the lake. On either side of the concrete pad were two outcroppings of land, creating a u-shape that is seen on each party's Plans of Survey (the Myra Plan and the Owen Plan).

[160] The evidence of Garner/Reinbold describes wading into the water here and calling the area the "Little Beach". They say they launched several small boats from this area over the years, including kayaks, paddle boats and Mr. Garner's "old Sunfish", hence their terminology "boat launch".

[161] The Forgerons say that in the years between when the boat slip/launch was installed (1978) and Hurricane Juan in the Fall of 2003, "the soil underneath the concrete slab had already started to erode" which "caused the concrete to angle or fall" to a "steep angle". The Forgerons say that no large boats requiring the use of a trailer have ever entered the lake there. They concede, however, that small boats such as kayaks or paddle boats have been launched from there.

[162] The evidence of Leslie Harlow, the Forgerons' predecessor in title, is that vehicles rarely, if ever, drove down to the waterfront within the ROW. Mr. Harlow says that the original intent of establishing the ROW "never had anything to do with a boat launch, or even waterfront access".

[163] There was photographic evidence that this area of the ROW was different than the grassy lawn on either side of it, containing grass mixed with rock and gravel.

The Nature of the 2004 Repairs

[164] The Forgerons carried out repairs to the boat slip/launch area in 2004. These repairs affected both sides of the ROW as it leads into the lake. They did not have Garner/Reinbold's consent to carry out the repairs on their side of the ROW. In fact, Garner/Reinbold knew nothing about the repairs until they arrived at their Cottage in the spring of 2004.

[165] Garner/Reinbold now claim and complain about the 2004 repairs. They plead that the Forgerons unilaterally and without their knowledge or consent totally altered the area by removing the angled cement slab and replacing it with a rock wall of large boulders. Garner/Reinbold say that this rock wall spans the mouth of the water entrance at the bottom of the ROW. They say the rock wall is a few feet high and a few feet deep such that one can no longer gradually wade in on foot or easily drag a boat into the water, rather that one must now climb over these rocks and down the "harsh drop" before reaching the waters of Porters Lake.

[166] The Forgerons point out that Garner/Reinbold have been wading into the water and launching kayaks from the area throughout the intervening 18 years or so before this litigation commenced.

[167] Garner/Reinbold submit that the Forgerons' repair work to the boat slip/launch has unreasonably interfered with and made their access to the lake more difficult. They say that where, as here, the express grant is silent on what maintenance may be performed or what use is reasonable to the ROW, the ancillary rights associated with this ROW "must be necessary for the use or enjoyment of the easement, not just convenient or even reasonable" (see *Fallowfield v. Bourgault*, 2003 CarswellOnt 5194 (Ont. C.A., per Feldman, J.A. for the majority). Counsel for Garner/Reinbold submits that if such "repair work" interferes with or renders exercising access more difficult, then the Court will restrain such interference by injunction.

[168] Further, counsel for Garner/Reinbold says that the repairs which the Forgerons did to the boat slip/launch in 2004 did not constitute proper maintenance to the ROW because "maintenance should not make access more difficult than it was before the maintenance" and that "rather than facilitate access" to the boat slip, the Forgerons' repairs "obstructed and interfered with it".

[169] Garner/Reinbold also say that the Forgerons carried out the boat launch work without the proper permits. While the Forgerons claim that they had permits, Garner/Reinbold say that they have not provided any details about these permits, such as "what government departments they were from". Garner/Reinbold say that permits would have required their consent or at least their awareness of them, on whose land this work was conducted.

[170] Garner/Reinbold have not further articulated what legal effect they say the supposed lack of permits has on their claims.

[171] This Court notes that Garner/Reinbold seek an order requiring the Forgerons to restore the boat slip, in essence, to its pre-Hurricane Juan condition. They want the Forgerons to remove the rock wall and reinstall a gradual incline into the Lake.

[172] The Forgerons say that there are a number of problems with Garner/Reinbold's claim. They note at the outset that Garner/Reinbold's claim is not for the recovery of land. They say that Garner/Reinbold have not been dispossessed of their land and the Forgerons are not attempting to claim title over their land. They say that the claim in relation to the boat slip/launch is framed in nuisance and trespass upon or interference with a ROW.

[173] The Forgerons note that Garner/Reinbold do not seek an order requiring the Forgerons to restore the boat slip to its original state, because the "original state" of the boat slip, i.e., before the Forgerons carried out post-Hurricane Juan repairs, was a state of wreckage, caused by the hurricane.

[174] The Forgerons also note that Garner/Reinbold do not seek an order that the Forgerons remove an obstruction from the ROW, which is the usual remedy sought when there is an allegation that a ROW has been obstructed.

[175] Further, the Forgerons say that what Garner/Reinbold seek is for them to build a new boat slip, at the Forgerons' expense, that more resembles the one that existed prior to Hurricane Juan in 2003, i.e., one akin to the concrete slap which sloped into the Lake.

[176] While Garner/Reinbold say that the repairs were a trespass or interference with their ROW, the Forgerons say that to the extent that this is true, and they are required to take some form of remedial action, such should be limited to returning the boat launch to the state it was in before they took their impugned actions, i.e., returning the boat launch to its post-hurricane state which was a state of wreckage.

[177] The Forgerons say that the boat slip/launch continues to be able to be used to put canoes, kayaks or paddle boats into the lake. The Forgerons say that since 2004, Garner/Reinbold have continued to be able to use the boat slip/launch for all of the same purposes they have always used it for.

[178] In terms of permits to carry out the repairs to the area, the Forgerons say that they did have permits, but given the passage of time, have not been able to obtain copies of same.

[179] The Forgerons submit that they have not committed any tort or any other form of actionable conduct by carrying out repairs to the boat slip/launch in 2004, but argue that if this Court finds otherwise, then there is still no basis for this Court to require them to pay for the return of the boat slip/launch to its pre-hurricane condition.

Which Limitation of Actions Legislation Applies

[180] As noted above, the Forgerons say that the Garner/Reinbold claims related to the boat slip are statute-barred. They rely on section 8(1) of the *LAA*. Garner/Reinbold say that the *LAA* does not apply to real property claims such as the one before the Court.

[181] Section 10 of the *RPLA* provides:

> **10. Action respecting land or rent**
>
> 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.
>
> [Emphasis added]

[182] Garner/Reinbold say that if the *RPLA* applies, the Forgerons' removal of the boat slip/launch occurred approximately 18 or 19 years before their Notice of Claim was filed on January 13, 2022 and it therefore is within the 20-year limitation period set out above.

[183] Garner/Reinbold have not provided any case law to support their contention that s. 10 of the *RPLA* applies in circumstances such as this, where a claim is being made for trespass upon and interference with a right-of-way or in nuisance, rather than for the recovery of land.

[184] As counsel for the Forgerons point out, this is not a claim for recovery of land. Garner/Reinbold have not been dispossessed of their land and the Forgerons are not attempting to claim title over Garner/Reinbold's land.

[185] The parties have identified some relevant caselaw. Section 10 of the *RPLA* was considered in *Urban Farm Museum Society of Spryfield v. Auby*, 2021 NSSC

136 at paras 51-53, in the context of the recovery of land. This decision does not address the scope of section 10. Nor does *MacDonell v. M & M Developments Ltd*. (1998), 165 (2d) 115 (CA).

[186] *Williams v. Mulgrave (Town)*, 2000 NSCA 24 (NSCA), also referenced by the parties, is more instructive.

[187] In *Williams*, the Court of Appeal briefly considered the idea that s. 10 of the predecessor *LAA*, the equivalent to s. 10 of the *RPLA*, could apply in a situation where "a trespass consists of a permanent installation on another's land".

[188] The dispute in *Williams* arose from the presence of an underground drain from a CN right-of-way on the plaintiff's property. She brought an action, alleging nuisance due to overflow from the drain, and trespass due to the presence of the drain itself.

[189] The trial judge held that s 2(1) of the *LAA* 1989 barred the trespass claim because the drainpipe had been installed more than six years (the applicable limitation period at that time) before the action was commenced (para 13).

[190] Cromwell JA (as he then was), for the Court, held that the trial judge erred in failing to find that there was a continuing trespass due to the ongoing presence of the drainpipe, resulting in the running of the limitation period as long as the drainpipe remained in place (paras 23-33). He noted in *obiter* that he had "assumed, as have counsel, that the applicable limitation period is six years under s. 2(1)(e)" (para 35).

[191] Cromwell JA added that "where, as here, a trespass consists of a permanent installation on another's land and the plaintiff is the owner, there is perhaps something to be said for the view that section 10 of the Statute, relating to actions to recover possession of land governs the case" (para 35). It was "clear, in any event, that the twenty year period set out in s.10 is an absolute cut off for an action in continuing trespass where the trespasser's acts are such that they would constitute adverse possession" (para 35). However, Cromwell JA added that "[o]f course, not all acts of trespass constitute acts of adverse possession and I reach no conclusion on this point in this case, the matter having been neither raised nor argued" (para 36).

[192] It is well established that a claim for recovery of land arises where the owner has been "excluded from his land": *Fralick v. Dauphinee*, 2003 NSCA 128 at para 40, citing, *inter alia*, *Brown v. Phillips* et al (1953), 42 DLR (2d) 38 (Ont CA) at 42.

[193] Here, there is no serious contention that the lakefront rock wall had the effect of wrongfully dispossessing or excluding Garner/Reinbold. Setting aside Cromwell JA's *obiter* comments about the possible application of section 10, *Williams* indicates that the pre-amendment limitation period governing trespass to land by installing a structure would have been section 2(1)(e) of the *LAA* 1989. The successor provision in the *LAA* 2014 is section 8(1), which provides a limitation period of the earlier of two years from the day on which the claim was discovered, or fifteen years from the day on which the act or omission on which the claim is based occurred. It cannot seriously be argued that the claim was not discoverable by Garner/Reinbold from the time of the construction of the rock wall in 2004.

[194] It is necessary at this point to consider the potential effect of the transitional provisions found at section 23 of the *LAA* 2014:

> 23(1) In this Section,
>
> "effective date" means the day on which this Act comes into force;
>
> "former limitation period" means, in respect of a claim, the limitation period that applied to the claim before the effective date.
>
> (2) Subsection (3) applies to claims that are based on acts or omissions that took place before the effective date, other than claims referred to in Section 11, and in respect of which no proceeding has been commenced before the effective date.
>
> (3) Where a claim was discovered before the effective date, the claim may not be brought after the earlier of
>
> (a) two years from the effective date; and
>
> (b) the day on which the former limitation period expired or would have expired.

[195] If the claim was discovered in 2004, it would follow that the discovery pre-dated the "effective date" that is, the entry into force of the *LAA* 2014. The claim would have been barred at two years from the effective date, September 1, 2015. The application was commenced in 2021. In that case, section 23(3) indicates that the claim is barred.

[196] However, if this is a case of "continuing trespass", the outcome is different. *Williams* indicates that in those circumstances, as long as the structure remains, the limitation period will renew itself each day, though damages will be limited to the limitation period itself.

[197] In *Williams*, Cromwell JA proceeded on the assumption that "actions in trespass to land fall within the words" direct injuries to real or personal property…" under section 2(1) of the *LAA* 2014. He reviewed a line of authorities for the proposition that "for limitation purposes, the continuing trespass of failing to remove the structure gives rise to a new cause of action each day it is not removed" (para 23), concluding that he was "bound to apply the long standing rule that an action in trespass relating to the presence of structures unlawfully on Mrs. Williams' land is not barred by s. 2(1)(e)….The cause of action arises each day the objects are not removed; the effect of the limitation period is to limit damages to six years preceding the commencement of the action" (para 33).

[198] More recently, in *Peter Ballantyne Cree Nation (Attorney General)*, 2016 SKCA 124, leave to appeal denied, 2017 CarswellSask 289 (SCC), the plaintiff brought an action for damages arising from flooding on reserve lands caused by a hydroelectric plant. The defendants did not dispute that the flooding and failure to remove the water constituted a trespass. The issue on summary judgment was whether it was "a continuing trespass so as to defeat limitation period" (para 94). The chambers judge had held that there was "no new harm…because the same 240-600 acres of land continued to be flooded in more or less the same way since 1942". Finally, the Chambers judge, stating that water is not a "chattel", found that no "structure or object" had been left on the land which the defendants have failed to remove. Therefore, there was no continuing trespass…" (para 99). Herauf JA set out the parameters of continuing trespass:

> 135 Next, trespass is actionable *per se* in that it does not require proof of actual damage to render a wrong actionable…Trespass is concerned primarily with interference of possessory rights. As a tort of strict liability, it acts as a remedy against dispossession, vindicating a propriety interest rather than a tort obligation…A classic example of this aspect of trespass is illustrated by the old case of *Basely v. Clarkson* (1681), 83 E.R. 565 (Eng. J.B.) [*Basely*]. In *Basely*, the defendant was liable in trespass to land for innocently mowing the plaintiff's grass in belief it was his own. However, he intentionally (perhaps should be read as "voluntarily") acted which interfered with the property of another…
>
> 136 An aspect of trespass that is of particular importance in this case is that the tort may "continue" if the interference is not dealt with by the defendant. This characteristic is explained in Fleming's, *The Law of Torts*, 10th ed at 53…
>
> > If a structure or other object is placed on another's land, not only the initial intrusion but also failure to remove it constitute an actionable wrong. There is a "continuing trespass" as long as the object remains; and on account of it both a subsequent transferee of the land may sue and a purchaser of the

> offending chattel or structure be liable, because the wrong gives rise to actions *de die in diem* until the condition is abated…In all these cases, the plaintiff may maintain successive actions, but, in each, damages are assessed only as accrued up to the date of the action. This solution has the advantage to the injured party that the statute of limitations does not run from the initial trespass, but entails the inconvenience of forcing him to institute repeated actions for continuing loss.

137 A similar passage is found in *Salmond on the Law of Torts* (R.F.V. Heuston, 17th ed (London: Sweet & Maxwell, 1977)) at 42:

> That trespass by way of personal entry is a continuing injury, lasting as long as the personal presence of the wrongdoer, and giving rise to actions *de die in diem* so long as it lasts, is sufficiently obvious. It is well settled, however, that the same characteristic belongs in law even to those trespasses which consist in placing things upon the plaintiff's land. Such a trespass continues until it has been abated by the removal of the thing which is thus trespassing; successive actions will lie from day to day until it is so removed; and in each case only up to the date of the action.
>
> …

139 However, as recognized by the Chambers judge, this is not the same where a plaintiff fails to restore land to the same condition as he found it. Citing Fleming, the Chambers judge stated it is not a continuing trespass for a neighbour to dig a pit in a neighbour's garden and then leave. There is nothing that is brought onto the land which remains after the neighbour leaves. Similarly, *Salmond on the Law of Torts* distinguishes continuing trespass from cases where there are continuing consequences from an initial trespass.

[199] This Court concludes that the allegations concerning the rock wall at the lake front are in substance a claim of continuing trespass, with the result that the limitation period will be continuously restarted each day the Forgerons' structures remain in place. Accordingly, Garner/Reinbold's claim was started in time.

[200] The Forgerons have not shown that Garner/Reinbold acquiesced to the changes to the rock wall; they have not proven that Garner/Reinbold knew their legal rights had been violated until the within matter.

[201] Mew et al state that acquiescence is "a form of estoppel that may operate to bar both legal and equitable claims", though in most cases it "arises in conjunction with laches" (Graeme Mew, Debra Rolph, and Daniel Zacks, *The Law of Limitations*, 4th edn (Toronto: LexisNexis, 2023) at 72-73. The authors add, at 74-75:

> The Supreme Court of Canada held in *Taylor v. Wallbridge* [(1879), 2 SCR 616] that simply neglecting to enforce a claim via legal proceeding was not acquiescence. The acquiescing party must probably do more than merely passively accept the existence of a certain state of affairs; although the passage of time between knowledge of a right and action to enforce it will influence the drawing of an inference of conduct amounting to acquiescence. Acquiescence denotes a plaintiff's behaviour in refraining from seeking redress once he knows his or her rights have been violated, and denotes his or her acceptance of the fact that those right have been violated…
>
> Generally speaking, equivocal or ambiguous acts of a party will not amount to acquiescence…
>
> [Emphasis added]

[202] The Court will now consider the appropriate remedy, if any, for the Forgerons' continuing trespass.

[203] In a perfect world, after the area around the boat slip/launch over which both parties enjoy rights was damaged, they would have discussed the options together and come to an agreement as to how the boat launch/slip would be repaired. However, the Forgerons chose to unilaterally alter this land in a way that interferes with Garner/Reinbold's ROW.

[204] The Court grants injunctive relief to Garner Reinbold and orders that the Forgerons remove the boulders and any other structures or materials that they placed on Garner/Reinbold's side of the ROW in the area of the boat/slip launch, at their own expense by July 31, 2024. Garner/Reinbold then may, if they wish, do their own work in this area, at their own expense. Because this Court has ordered that the Forgerons must also remove the Fence, Garner/Reinbold's concerns that contractors will not be able to reach the waterfront area or do repairs to the boat slip/launch or to do so without damaging their trees, should be alleviated.

Issue 6: Various Claims in Nuisance Going Both Ways

[205] Each party claims that the other's level of "harassment" and conduct amounts to actionable nuisance. They also claim in negligence or trespass for this activity. Each seeks punitive and other damages against the other for the tort of nuisance.

[206] The Court notes that the Forgerons say that their claim in nuisance is a combination of Garner/Reinbold's behaviour which they say was designed to provoke and harass them since the tree cut in October 2020. The Forgerons' counsel concedes that taken individually the conduct the Forgerons say constitutes nuisance

would not amount to that tort. However, counsel says that when all such conduct is considered, a claim in nuisance is made out.

[207] The Forgerons state that this conduct was so egregious that they were "forced to erect privacy fencing in an attempt to shield and protect themselves from the Respondents". This Court has previously dealt with the issues arising from the Forgerons' erection of the Fence in the ROW.

[208] The Forgerons say that, in addition to being actionable nuisance, this behaviour also constitutes actionable intrusion upon seclusion.

[209] The Court notes at this point that most of the conduct complained of amounts to trivial interference with the other's property or chattels, at best. Even if all such trivial conduct is lumped together and consideration is given as to whether, collectively, a claim in nuisance is made out by either party; with few exceptions, it is not.

[210] Further, some of these annoying or trivial acts or conduct were not proven to have been carried out by one of the parties, unless the Court makes an inference that that party did so. For the most part, the Court is not prepared to do so, even in the context of the clearly toxic relationship between the parties.

[211] The following acts of alleged nuisance, negligence or trespass which were plead by the Forgerons against Garner/Reinbold, but not proven, are dismissed:

(a) That Mausi Reinbold and Christopher Garner verbally abused and berated each of Denise and Derrick Forgeron;

(b) That Mausi Reinbold and Christopher Garner abused and berated the Forgerons' children, leading the Forgerons' daughter to fear for her safety while at home alone;

(c) That Mausi Reinbold and Christopher Garner abused and berated independent contractors hired by the Forgerons to carry out work on the Forgeron Property;

(d) That Mausi Reinbold or Christopher Garner slashed the tires of vehicles of guests attending the Forgeron Property;

(e) That Mausi Reinbold and Christopher Garner trespassed on the Forgeron Property in violation of the *Protection of Property Act* and otherwise [This allegation only relates to the single incident when Mausi Reinbold

attempted to mow the lawn on the Forgerons' "side" of the ROW, close to the Fence]. Mausi Reinbold did not trespass in so doing as discussed earlier in this decision.

(f) That Garner/Reinbold built the retaining wall "squarely within the ROW. [This claim was dismissed earlier in this decision]

[212] The following acts of alleged nuisance, negligence or trespass which were plead by Garner/Reinbold against the Forgerons are dismissed:

(a) That the Forgerons unilaterally graded and paved the shared driveway on June 13, 2017 such that the driveway is now sloped so as to drain onto their property, causing water damage to the foundation of the Garner/Reinbold Cottage that required extensive remediation;

(b) That the Forgerons allowed brush, shrubs and trees on their property to interfere with the safe operation of power lines entering the Garner Property from West Porters Lake Road;

(c) That the Forgerons extended the Forgeron Property into Porters Lake by construction and in-fill on Crown Land;

(d) That the Forgerons recklessly drove their vehicles along the shared ROW in a dangerous and intimidating manner.

[213] There are certain claims in nuisance which each have against the other and which arise from the same circumstances. The Court will deal with these together:

(a) Claims about Milo, the Forgerons' dog;

(b) Repeated calls to the RCMP and other authorities to complain;

(c) Defacing, Moving and Damaging Personal and Real Property.

[214] Before reviewing the evidence relating to these allegations, the Court will review the elements of the torts of private nuisance and intrusion upon seclusion.

The Tort of Private Nuisance

[215] The leading case regarding private nuisance is the decision of the Supreme Court of Canada in *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, 2013 SCC 13. Justice Cromwell, speaking for the Court discussed the elements of a private nuisance as follows:

> 18. The Court of Appeal concluded that a nuisance consists of an interference with the claimant's use or enjoyment of land that is both substantial and unreasonable: … In my view, this conclusion is correct.

[216] Justice Cromwell then discussed the test to be applied in determining whether or not the tort of nuisance has been made out:

> 19. The elements of a claim in private nuisance have often been expressed in terms of a two-part test of this nature: to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both *substantial and unreasonable.* A substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether this non-trivial interference was also unreasonable in all of the circumstances… (Emphasis by Cromwell J.)

[217] Justice Cromwell continued at para. 21:

> 21. … Retaining a substantial interference threshold underlines the important point that not every interference, no matter how minor or transitory, is an actionable nuisance; some interferences must be accepted as part of the normal give and take of life. Finally, the threshold requirement of the two-part approach has a practical advantage; it provides a means of screening out weak claims before having to confront the more complex analysis of reasonableness.

[218] Justice Cromwell then considered the requirement of "substantial harm":

> 22. What does this threshold require? In *St. Lawrence Cement* [2008 SCC 64], the Court noted that the requirement of substantial harm "means that compensation will not be awarded for trivial annoyances": para. 77. *In St. Pierre*, [[1987] 1 SCR 906] while the Court was careful to say that the categories of nuisance are not closed, it also noted that only interferences that "substantially alte[r] the nature of the claimant's property itself" or interfere "to a significant extent with the actual use being made of the property" are sufficient to ground a claim in nuisance. One can ascertain from these authorities that a substantial injury to the complainant's property interest is one that amounts to more than a slight annoyance or trifling interference. (Emphasis of the Court in *St. Pierre*).

The Tort of Intrusion Upon Seclusion

[219] The tort of intrusion upon seclusion is made out where a person intentionally or recklessly invades the claimant's private affairs or concerns and where the reasonable person would regard that as highly offensive, causing distress, humiliation or anguish.

[220] The tort of intrusion upon seclusion was recognized by the Ontario Court of Appeal in *Jones v. Tsigne*, 2012 ONCA 32 and described as follows at para. 71:

> The key feature of this cause of action are, first, that the defendant's conduct must be intentional, within which I would include reckless; second that the defendant must have invaded without legal justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action. I return below to the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum.
>
> [Emphasis added]

[221] This Court is not aware of any Nova Scotia Court which has recognized the tort of intrusion upon seclusion. The Court does not find that any of the conduct complained of by the Forgerons involves the "invasion" of their private affairs; nor have they proven that that alleged conduct caused them "distress, humiliation or anguish" to the extent referenced by the Ontario Court of Appeal in *Jones*. Even if this Court was prepared to recognize a tort of intrusion upon seclusion, which it is not, the evidence does not support the claim they have advanced.

Milo the Forgerons' Dog – Complaints Going Back and Forth Between the Parties

[222] Apparently, prior to the "tree cut" in October 2020, Garner/Reinbold welcomed Milo onto their property. They fed him treats and gave the dog affection. Since Milo was a puppy, he had been welcomed into the Cottage. Clearly, Milo had become accustomed to wandering from the Forgeron Property over to the Garner Property.

[223] At some point after the tree cutting Garner/Reinbold no longer wished Milo to be on their property.

[224] The evidence at trial showed that the Forgerons tried to train Milo to stay on their property, initially by using a "clicker" to attempt to deter him from leaving the property and eventually by installing an invisible fence. However, apparently it was still hard to break Milo from the habit she had developed of wandering onto the Garner Property.

[225] On August 16, 2021, the Forgerons' son says that he witnessed Mausi Reinbold grab Milo by his collar, and when Milo slipped out of the collar, allegedly grabbed the dog by the scruff of the neck and dragged her from the Garner Property to the Forgeron Property. Denise Forgeron says that she was very upset about this event and that when she confronted Mausi Reinbold about it, Mausi Reinbold cursed at her to keep the dog off the Garner Property.

[226] Garner/Reinbold's claim is that the Forgerons "allowed" Milo to leave their property, "unleashed and to defecate on their property" repeatedly, and on an ongoing basis since commencing this litigation.

[227] This Court finds that Mausi Reinbold did not "abuse" Milo. She removed the dog from her property, initially by pulling her on her leash, and when the dog freed itself from the leash, by pulling her by the scruff of her neck. I heard no evidence that Milo was injured as a result of this event, and indeed, Garner/Reinbold say that Milo continued to return to their property since their claim is that she has done so on an "ongoing basis". It is hard to believe that an "abused" dog would voluntarily return for more abuse.

[228] Further, I find that the Forgerons did not "allow" Milo to continually go to the Garner/Reinbold Property, including to defecate, once they knew that she was no longer welcomed by Garner/Reinbold, as she had been for many years since a puppy. They took reasonable steps to try to keep her own their own property, but these steps were not one hundred percent successful.

[229] The claims of each party against the other relating to Milo, however framed, are dismissed.

Defacing/Damaging Each Other's Personal and Real Property

[230] The Forgerons admit that shortly after the tree cut in October, 2020, they spray painted (white) an area of the ROW in order to "educate" Garner/Reinbold as to where the boundary line was situated. However, Mausi Reinbold admitted on cross-examination that Garner/Reinbold do not seek compensation for this. This claim is dismissed.

[231] Garner/Reinbold also claim that someone came onto their property and dumped a Greek salad in their bushes on July 25, 2021. They assume that this was a Forgeron. Garner/Reinbold did not witness this. The Forgerons deny doing so. Despite the bad feelings between the parties at this point in time, the Court is not

prepared to assume that this act of trespass accompanied by the dumping a salad on the Garner Property was carried out by the Forgerons. This claim is dismissed.

[232] Garner/Reinbold also say that in August 2021 they found red sprayed marks on the stumps of the trees they cut in October 2020. They assumed that this was in conjunction with survey work that the Forgerons were having conducted. It turns out that Brian Phelan painted these stumps red, not the Forgerons, as part of his retainer for them to locate the trees cut. There is nothing about this spray painting which constitutes a tort, and this claim is dismissed.

[233] There is some photographic evidence before the Court that on one occasion a guest of the Forgerons parked their car on the Garner Property outside of the ROW for a few hours. Garner/Reinbold have not proven other acts of trespass and the Court dismisses this particular trespass as being *de minimis*.

[234] Then there is Garner/Reinbold's claim in nuisance relating to two parties they say the Forgerons had. The first was their son's graduation party in July 2021. The respondents' pleading also references a party on October 2, 2021, but there was no evidence before the Court relating to an October 2 party. Accordingly, this claim in nuisance is related to a single high school graduation the Forgerons had for their son. Garner/Reinbold say that guests of the Forgerons blocked the shared driveway with their cars, and some of those guests parked under Garner/Reinbold's "No Trespassing Sign" on Garner Property. This Court finds that these claims relating as they do to a single night's party to not rise to the level of the tort of nuisance, and they are dismissed.

[235] Garner/Reinbold also say that contractors engaged by the Forgerons at times blocked the ROW, including for two days in August 2022 when employees of Eastern Fence blocked the shared ROW and the bottom of Garner/Reinbold's circle driveway. The events in support of this claim does to not rise to the level of the tort of nuisance, and they are dismissed.

[236] Garner/Reinbold also ask the Court to assume that a golf ball, hockey pucks and empty beer bottles which they found on their property were put there by the Forgerons. Denise Forgerons suggested that the golf ball may have simply fallen out of her golf bag and found its way onto the Garner Property. The Forgerons say that they sometimes played ice hockey on the lake when it froze over in the winters and suggest that that likely was the source for the hockey pucks Garner/Reinbold found on their property. These claims are all dismissed on the basis that

Garner/Reinbold have not proven that it was the Forgerons who deliberately placed these items on their property.

[237] Garner/Reinbold also claim that the Forgerons recklessly drove their vehicles in the ROW in a dangerous and intimidating manner. The evidence on this point is scant and speculative, and in any event does not rise to the level of a substantial interference. This clam is dismissed.

Wreaths Placed and Removed from the Forgerons' Signpost; Blocking of Civic Numbers and Sawing off Garner/Reinbold's Sign Post

[238] The Forgerons say that in December 2021, Denise Forgeron put a holiday wreath on the signpost at the top of the driveway and that she has been putting a wreath there for more than 20 years without complaint. The Forgerons say that Garner/Reinbold tore it down and left it on the Forgerons' garbage box along with an angry letter accusing the Forgerons of blocking their civic address number. Garner/Reinbold have claimed that this wreath was placed by the Forgerons on the signpost/planter to block their civic number.

[239] The Forgerons claim that Garner/Reinbold also tore down the spring wreath which Denise Forgeron hung on the signpost in April 2022 and that she had been putting a spring wreath there for 20 prior years without complaint.

[240] This Court finds that the Forgerons deliberately blocked Garner/Reinbold's civic address on what had been a shared signpost area (erected by the Forgerons) at the top of the driveway by deliberately putting wreaths and other decorations on it, in such a way that Garner/Reinbold's civic address was covered. Garner/Reinbold asked that these decorations be removed, and when they were not, removed them themselves. The Forgerons then called the RCMP on Garner/Reinbold.

[241] The Forgerons' actions in placing decorations on the signpost in a way that covered the civic numbers of Garner/Reinbold is a substantive and unreasonable interference with Garner/Reinbold's private property. Garner/Reinbold had reason to remove these wreaths.

Complaints made by the Forgerons

[242] Garner/Reinbold also claim in nuisance regarding calls made to the RCMP on them. The Forgerons say that these calls were done in the good faith belief that Garner/Reinbold had violated the law. The Court does not accept the Forgerons'

contention in this regard relating to Denise Forgeron calling the RCMP to remove Mausi Reinbold from the ROW when she was mowing the lawn there.

[243] There were also numerous calls made by the Forgerons relating to Garner/Reinbold's placement of garbage and green bins around the mouth of the shared driveway. The Court will deal with this claim later in this decision.

The Forgerons' Boat Shed and Back-Yard Suite – Complaints made by Garner/Reinbold

[244] The Forgerons say that in the spring of 2021, they began receiving correspondence from HRM regarding whether or not they had a permit for their boat shed. The evidence at trial showed that it was Garner/Reinbold who made these complaints. The Forgerons say that there has been a boat shed in their backyard since the 1970s. They say that they rebuilt this boat shed around 2015 and that Garner/Reinbold never complained about the boat shed or alleged that they did not have a permit for it, until the Forgerons asked them to replace the trees that they cut down in October 2020.

[245] The Forgerons made efforts to locate the permit which they say they had obtained for the boat shed but were unable to find it. Denise Forgeron did locate a plot plan for the Forgeron Property from November 2000 which apparently showed the location of the shed. An official for HRM supposedly was satisfied that there had been a shed in the location for many years and advised the Forgerons that they did not need a copy of the permit. Despite this, the Forgerons say that Garner/Reinbold continued to complain about the supposed lack of permit and in the end, the Forgerons obtained a fresh permit for the boat shed.

[246] The Forgerons say that the existence of the boat shed did not cause any issues for Garner/Reinbold and that they made these complaints to the HRM for the purpose of antagonizing them.

[247] This Court finds that Garner/Reinbold had no good reason to continue to complain to HRM about the Forgerons' supposed lack of a permit for their boat shed. That shed was not in the ROW and did not otherwise affect Garner/Reinbold at all. The Court finds that these repeated complaints constitute actionable nuisance on the part of Garner/Reinbold.

[248] The evidence shows that Mausi Reinbold also made repeated complaints to HRM regarding the Forgerons' backyard suite and that these complaints were in

response to the litigation. The Forgerons say that Mausi Reinbold admitted in her evidence on discovery that she made complaints to HRM. While Garner/Reinbold said that they felt the Forgerons' backyard suite affected their privacy and resulted in increased noise, Ms. Reinbold's discovery evidence was that these issues were not present in the last few years. The Forgerons say that while Ms. Reinbold stopped short of admitting such on cross-examination, these complaints to HRM were a form of retaliation against them.

The Court agrees. These complaints constitute actionable nuisance on the part of Garner/Reinbold. They constitute a substantial and unreasonable affront to the Forgerons right to enjoy their property. The Forgerons are entitled to punitive damages in the amount of $1,000.00.

Protection of Property Act Notice by the Forgerons

[249] The Forgerons served a *Protection of Property Act* Notice on Garner/Reinbold in July 2021. The Forgerons say that Mausi Reinbold entered onto their property without their consent at least three times since the Notice was served:

- On May 26, 2022, Mausi Reinbold supposedly entered onto the Forgeron Property to mow the Forgeron's lawn, something which the Forgerons say she had never done until this litigation started. The Forgerons say that while she may have been within the shared ROW, there was no reason for her to mow their lawn. Denise Forgeron asked her to stop mowing, but Mausi Reinbold continued to do so. Denise Forgeron then called the RCMP, asking that Ms. Reinbold be removed from the property.
- On June 14, 2022, Denise Forgeron says that she witnessed Mausi Reinbold come onto the Forgeron Property and wave to Derrick Forgeron who was inside their home at the time.
- On June 19, 2022, the Forgerons' son says that he witnessed Ms. Reinbold come onto the Forgeron Property and took pictures of him and his sister while they were inside their home.

[250] This Court has already dealt with the occasion when Mausi Reinbold mowed the lawn on the Forgeron side of the fence in the ROW. The June 14 and 19, 2022 incidents of alleged trespass are trivial and do not rise to the level of the tort of nuisance in that there was no substantial interference proven.

Slashing of Tires

[251] The Forgerons say that one of their guests who parked his car near the top of the driveway on West Porters Lake Road that night found the tires of his car slashed the morning after the party.

[252] Garner/Reinbold deny that they slashed the tires of this guest's car. The Forgerons ask this Court that given the tension between the parties by this point in time, that the Court may draw an inference that Garner/Reinbold, or one of them, was responsible for slashing the guest's tires. The Court is not prepared to do so, and this claim is dismissed.

Signage Issues, "Defacing" of the Forgeron Property by Garner/Reinbold

[253] The Forgerons claim that in the spring and summer of 2021, Garner/Reinbold started plastering the trees and utility polies within the ROW with enlarged signs, some of which were painted bright orange. They say that Garner/Reinbold posted a series of "No Trespassing" signs facing directly toward the Forgeron Property, none of which they say are visible from West Porters Lake Road. The Forgerons say that these signs are all aimed directly at their property.

[254] The Court finds that these signs were posted on the Garner Property.

[255] The Forgerons also say that they own a wooden pole structure with a planter at the top of the driveway and they claim that in the spring or summer of 2021, Garner/Reinbold painted their civic number "340" in bright orange on that structure. In response, Garner/Forgeron say that this is a "shared signpost" and that it is on Crown land.

[256] The Forgerons also say that Garner/Reinbold spray-painted the number "340" on their green bin and on their garbage bin at the top of the driveway, first in black and then, in the summer of 2022, in bright orange. The Forgerons say that around the same time, Garner/Reinbold spray-painted a large sign reading the name "Reinbold" (which had previously been black wrought iron) bright orange, as well as a sign that says, "Slow Down". The Forgerons say that, as is the case with the Garner/Reinbold's "No Trespassing" signs, those signs are aimed squarely at the Forgeron Property and are not visible from West Porters Lake Road.

[257] The evidence of Garner/Reinbold is that after the Forgerons served them with a *Protection of Property Act* notice on June 1, 2021, they posted their own notice,

under that legislation, as well as a "No Trespassing" sign and their civic address "340" on a utility pole located on their property in their circular driveway. They admit that they posted another "No Trespassing" sign on a maple tree on their property by Porters Lake. Garner/Reinbold's evidence is that the locations where they posted these notices are locations where the Forgerons or their guests trespassed on their property in the past. Garner/Reinbold claim that even after they posted these signs, guests of the Forgerons would continue to trespass in these locations, by parking in their driveway or by urinating on their trees.

[258] The Forgerons refer to the decision of Coughlan J. in *Pink v. Lohnes-David*, 2014 NSSC 304, aff'd 2015 NSCA 110 with respect to the sign posting by Garner/Reinbold. In that case the respondents erected a fence within their neighbour's right-of-way, which he found substantially obstructed the applicants' use of same. Further, the respondents placed lights on the fence which shone directly into the cottage windows of the applicants. The respondents also placed signposts and signs on or near the respondents' property.

[259] This Court finds that *Pink v. Lohnes-David* is distinguishable from the present case in that Garner/Reinbold placed the signs on their own property, not that of the Forgerons. Nor did Garner/Reinbold deliberately shine lights onto the Forgeron Property, as did the respondents in *Pink v. Lohnes.*

[260] This Court finds that seeing these "No Trespassing" signs and the civic address posted on the Garner/Reinbold Property, whether in bright orange or otherwise, does not amount to a "substantial interference" with the Forgerons' use and enjoyment of their land. All claims relating to signage erected by Garner/Reinbold are dismissed.

Fairy Lights – "Light Pollution" and Vandalism

[261] Garner/Reinbold strung "fairy-lights" around their cottage in June 2022. The Forgerons claim that these lights are bright and constitute "light pollution". Garner/Reinbold said that the Forgerons cut these lights, but they did not see them do so.

[262] The Court finds that these lights are located on the Garmer Property and do not shine into the windows of the Forgerons' house. Garner/Reinbold have not proven that it was the Forgerons who cut them and the Court is not prepared to presume that it was them that did so. The claim in nuisance is dismissed.

The Forgerons' Purchase of Crown Land and Trespass to Garner/Reinbold's Green and Garbage Bins at the Mouth of the Driveway

[263] On December 7, 2022, the Forgerons advised Garner/Reinbold that they had purchased Crown land around the mouth of the shared driveway. The Forgerons, while denying that the matter was relevant to this proceeding, required that Garner/Reinbold remove their signpost, green bin, solar light and garbage can from the mouth of the driveway. Garner/Reinbold did not do so, maintaining that these items were not within the boundaries of the Forgerons' newly acquired Crown property.

[264] The Forgerons were entitled to purchase this land and the Court finds nothing actionable arises from their decision to do so.

[265] Garner/Reinbold did not remove the items which the Forgerons had demanded be removed by December 10, 2022, including Garner/Reinbold's green bin.

[266] Garner/Reinbold say that the Forgerons then stole these items and disposed of them. In particular they say that the Forgerons cut down their signpost at ground level with a saw.

[267] Derrick Forgeron admits that on December 10, 2022 he "disposed of the green bin and the Respondents' other items at the top of the driveway".

[268] Derrick Forgeron's evidence was that in late December 2022 representatives of HRM dropped off a new green bin to the Garner Property. His evidence is that the tenants at the Garner Property placed it curbside for pickup on January 3, 2023, which was refuse collection day, after which they returned the green bin to the Garner Property.

[269] Derrick Forgeron says that on January 4, 2023, he saw that Garner/Reinbold's green bin had been spray-painted with the number "340" in "bright orange and placed at the top of the driveway", despite the fact that it would not be collected again for another 13 days". Derrick Forgerons states that the green bin had been placed at the top of the driveway "either on our property or just outside of our property line on Crown land".

[270] Derrick Forgeron's evidence is that he and Denise Forgeron viewed this as "an act of antagonism". He states, "we removed the green bin, as we indicated we would in our letter, and I took it to my business for storage".

[271] Derrick Forgeron's evidence on this point continues. He says that in January 2023 another green bin was delivered to the Garner Property. He says that again Garner/Reinbold wheeled it up to the top of the driveway on a day on which there was no municipal refuse collection. He states, "I removed the green bin on January 25, 2023, and took it to my business". He then states, "the green bin had a tracking device inside". Derrick Forgeron states, "At all times, I intended on returning the green bins to their owner, the Halifax Regional Municipality, upon request".

[272] The evidence of Garner/Reinbold is that the Forgerons stole the second green bin and brought it to Derrick Forgeron's business. They say the same thing happened to their third green bin.

[273] This Court finds that the Forgerons engaged in several acts of trespass to Garner/Reinbold's chattels over the course of this litigation. Trespass to chattels requires a direct, intentional interference with the claimant's chattel. It is not necessary that the claimant be the true owner of the chattel in question as long as the claimant has physical control or intent to control the chattel in question. (*Pelletier v. Forbes,* 2010 NSSC 309, para. 43).

[274] The tort of conversion is defined as a wrongful act involving a chattel, disposing of or destroying the chattel, with the intention or effect of negating another's title to that chattel (*Pelletier*, para. 44).

[275] There is evidence of the Forgerons' trespass and conversion of Garner/Reinbold's chattels at the mouth of the driveway. The Forgerons admitted to taking and disposing of Garner/Reinbold's garbage can, green bin and signpost (Derrick Forgeron sawed off the signpost) on December 14, 2022. The Forgerons apparently disliked the orange paint on Garner/Reinbold's garbage paint and green bin. More importantly, they felt that these items were on their property.

[276] The Forgerons have not proven that these items were on their Property. It is unclear where precisely these items were located. They could have been on Crown land.

[277] There are further incidents of someone touching or tampering with Garner/Reinbold's possessions at the mouth of the driveway. This Court draws the inference that, on a balance of probabilities, the Forgerons were responsible for these other acts of trespass to chattels as well. These are detailed below.

[278] Two days after the Forgerons served Garner/Reinbold with a *Protection of Property Act* notice, Garner Reinbold discovered that someone had moved their garbage bin and green bin from near the mouth of the driveway to a location approximately 100 feet onto their property. The Court notes that at that time, the entire area over which the first several meters of the shared driveway travelled was Crown Land (evidence of Allan Owen, surveyor). The evidence before the Court showed that both parties had left their bins in this area for several years without incident prior to this.

[279] The Court finds that the Forgerons then decided to relocate Garner/Reinbold's bins from this area on Crown land to a place several meters inside Garner/Reinbold's boundary.

[280] Garner/Reinbold continued to leave their bins on the Crown land along the shared driveway, next to a wooden box where the Forgerons stored their bins. One day in August 2021 Mausi Reinbold discovered that someone had turned her bins so that the orange civic numbers that they had painted on the bins were turned from facing the roadway to facing the woods.

[281] Garner/Reinbold continued to leave their bins on the Crown land along the shared driveway but moved them to the south side of the shared driveway on Crown land. One day in November 2021, someone again moved the bins from the south side of the Crown land to the north side of the Crown land.

[282] There were other incidents in the spring of 2021 and in 2022 when someone moved Garner/Reinbold's bins.

[283] The Forgerons deny all of this activity involving Garner/Reinbold's bins prior to December 14, 2022.

[284] Although the Forgerons deny moving Garner/Reinbold's bins prior to December 14, 2022, the Court does not accept that evidence. During the same period of time, the evidence shows that Denise Forgerons made multiple calls/complaints to HRM about the location and appearance of Garner/Reinbold's bins.

[285] The Forgerons' own evidence details their issues with Garner/Reinbold's bins and signpost. They say that, "[W]e wanted the Respondents to keep their green bin and garbage bin at their property, rather than keeping it at the top of the driveway, given that the spray-paint on both was gaudy and unsightly".

[286] At this same time, someone was turning the green bins around so that the "gaudy" and "unsightly" orange paint faced the woods and relocating them away from the mouth of the shared driveway.

[287] This Court finds that it was the Forgerons who did so, on a balance of probabilities. It was the Forgerons who clearly disliked the orange paint; the Forgerons who complained multiple times to HRM about the location of the bins, and the Forgerons who actually took the green bins after December 14, 2022. This activity on the part of the Forgerons constitutes actionable trespass to chattels.

Surveillance and Security Cameras

[288] Garner/Reinbold claim that the Forgerons spied on them as they went about their normal business on their property, including by the installation of security cameras. They point to numerous photographs disclosed in the Forgerons' various Affidavits of them and their property.

[289] However, the Court notes that Garner/Reinbold's affidavit evidence also includes numerous pictures of the Forgeron Property that were taken from the Garner/Reinbold Property, including pictures of the Forgerons' back yard, their boat shed, their boat, their deck and the windows of their home.

[290] The Forgerons say that Garner/Reinbold have erected security cameras which are capable of tracking their comings and goings from their property.

[291] The Forgerons say that the allegation relating to the security camera was shown not to be true. With respect to picture-taking, the Forgerons say that this was for the purpose of the litigation.

[292] The evidence disclosed that the Forgerons had a security system installed to protect their home. However, that security system is not capable of monitoring the comings and goings of Garner/Reinbold. Nor, however, have the Forgerons proven that Garner/Reinbold's cameras are capable of capturing their comings and goings.

[293] Derrick Forgeron submitted a video in support of the argument that Garner/Reinbold's security cameras face "partially towards the Forgeron Property and/or the driveway within the Right-of-Way". These cameras do not show the Forgeron Property, but only a small portion of the ROW, including along the shared driveway.

[294] All claims of each party relating to the installation of security systems or cameras to "spy" on the other are dismissed.

[295] The Court also dismisses the claim of the Forgerons that Mausi Reinbold instructed her tenants to spy on the Forgerons in circumstances where those tenants admitted that they knew this would be seen by the Forgerons as an invasion of their privacy. The Forgerons have not proven damages for this activity and the claim in this regard is dismissed.

Issue 7: Garner/Reinbold's Claim for a Prescriptive Easement Over the Top of the Driveway

[296] As noted previously in this decision, in 1978, Garner/Reinbold's predecessors in title (Mausi Reinbold's parents, Martin and Edith Reinbold) purchased the Garner Property and agreed with Les Harlow (the predecessor in title to the Forgeron Property) to reduce the total width of the ROW from 50 feet to 15 feet. The Agreement provides more information regarding the location of the ROW as being along the common boundaries of the Properties, as follows:

> WHEREAS a common Right of Way extends between the two lots which Right of Way is a total of fifty (50) feet.
>
> AND WHEREAS twenty five (25) feet of the said Right of Way extends on either side of the property line;
>
> […]
>
> THAT it is hereby agreed that the width of the Right of Way be and hereby is reduced to seven and onehalf [*sic*] (7 1/2) feet on either side of the common line between the two lots as it presently exists.

[297] It is not disputed by the parties that this agreement had the effect of reducing the right of way that either party enjoyed over the other's lands from 25 feet to 7.5 feet. As a result, a part of the shared driveway near the mouth which was formerly within the ROW was now outside the ROW. This is shown on each party's respective plans of survey, which show a small portion of the driveway as being entirely on the Forgeron's land outside the legally deeded ROW. As well, a portion of the express ROW near the top of the boundary closest to the West Porters Lake Road now contains no driveway at all and instead mainly contains trees.

The Forgerons' Purchase of Crown Land in 2022

[298] On December 7, 2022, the Forgerons sent a letter to Garner/Reinbold through their respective counsel, advising that they had purchased Crown land, abutting the Forgeron Property at the top of the driveway. The newly purchased land has a road frontage of 104 feet. Counsel advised Garner/Reinbold that Garner/Reinbold "may continue to cross the Forgerons' Property on the asphalt driveway for the purposes of accessing their property".

[299] The Forgerons say that they purchased the two lots of Crown land at the mouth of the driveway to ensure that no more tree removal from this area occurred.

[300] Garner/Reinbold say that there is a small portion of the shared driveway which is outside of the 7.5-foot-wide ROW. They seek a declaration that they enjoy a prescriptive easement over this or any portion of the shared, used driveway that is outside of the express grant of ROW. In the alternative, they claim access over this portion of the shared driveway by virtue of lost modern grant or by the equitable doctrine of reciprocal and mutual easement.

[301] To sustain a claim for a prescriptive easement, the claimant must show 20 years of continuous, adverse, peaceful and open use and enjoyment of the land in question. (See *RPLA*, s. 10; *Day v Muir*, 2022 NSSC 20 at para. 21).

[302] In this case, both parties and their predecessors in title, at least since the driveway was laid down in or around 1963, have used and continue to use this same driveway to access their respective properties. In 1978, Mausi Reinbold's parents agreed with Denise Forgeron's father to reduce the width of the ROW from 50 feet in total to 15 feet in total, leaving a portion of the shared driveway outside of the shared ROW. There is no evidence to show that either party had a survey conducted at the time.

[303] The Forgerons say that since Mausi Reinbold's evidence was her visits to the Garner Property were sporadic up until 2016 or 2017, that Garner/Reinbold may be disentitled to a prescriptive easement over the top of the driveway on that basis. This Court finds that Mausi Reinbold's evidence was that she started visiting the Cottage more after the hurricane in 2004 and that from then until approximately 2016 she would visit the cottage on a regular basis but would not spend the night in it. Starting in 2016 she and Christopher Garner started spending more time at the Cottage and residing there during the spring and summer months. Obviously, on each visit to the Cottage, she and her husband would drive over the part of the shared driveway at issue. This Court finds that that use is much more than "sporadic".

[304] Further, although this small portion of the driveway remained on the Forgerons' Property outside of the shared ROW, there is no evidence that the Forgerons or their predecessors in title gave permission to Garner/Reinbold or their predecessors in title to use this portion of the driveway. The owners of the respective properties simply kept using it as they always had without, apparently, any discussion or dispute.

[305] Counsel for the Forgerons also argues that even if ingress and egress formed part of the accustomed use of the area of land for which a prescriptive easement is sought, that the placement of green bins would not be part of the accustomed use.

[306] The Court notes, however, even though the nature of the grant crystallizes when it is created, that does not mean that the nature of the grant is frozen in time. Clearly there was no such thing as a green bin in 1963 or 1978. But now, green bins are taken out to the end of one's driveway in HRM.

[307] The Court notes that ss. 74 and 75 of the *Land Registration Act* provide that a neighbouring owner may acquire an interest in adverse possession or prescription as long as the portion of land claimed does not exceed twenty percent of the whole parcel, even after ten years from migration has passed.

[308] The Court notes that the land that this portion of the shared driveway travels over is less that 20% of the Forgeron Property.

[309] In the alternative, Garner/Reinbold submit that the doctrine of lost modern grant applies to this portion of the driveway. The Nova Scotia Court of Appeal held that the test for lost modern grant and prescriptive easement are effectively the same, except that the 20-year period of use does not have to be immediately preceding the action (*Mason v. Partridge*, 2005 NSCA 144 at para. 18).

[310] In addition, Garner/Reinbold say that they enjoy a reciprocal and mutual easement over this portion of the driveway. This equitable doctrine can apply in situations where the parties intended that each should use of portion of each other's land in a shared manner, but such right was not legally conveyed. Keith J. applied this doctrine in *Day v. Muir*, 2022 NSSC 20, para. 52.

[311] In this case, Leslie Harlow and Bill Jackson, the parties' predecessor in title, intended that the owners of 338 and 340 share the use of a single driveway into their properties. Although the 1978 reduction agreement let out a portion of the used driveway, it was clearly not either grantors' intention that this portion of the

driveway become within the sole control of the owners of 338 West Porters Lake Road.

[312] Whether by prescriptive rights, the doctrine of lost modern grant, or the doctrine of mutual and reciprocal easement, Garner/Reinbold are entitled to a declaration that they enjoy the right to continue using this portion of the shared driveway that now exists outside of the legally deeded ROW by virtue of the right of way reduction agreement the parties' predecessors in title signed in 1978.

[313] In terms of Garner/Reinbold's wish to store their bins close to West Porters Lake Road for pick-up, the Court notes that they may not store them on Forgeron Property, or in such a way as to interfere with ingress and egress over the portion of the shared driveway over which this Court has determined they have prescriptive (or other legal) rights. The Court does not have survey evidence as to exactly where Crown land ends and Forgeron Property is located in this area.

Issue 8: Remedies Sought by Each Party

Punitive and Aggravated Damages

[314] Punitive and aggravated damages may be awarded where a party's conduct is so high-handed that exceptional head of damages must be awarded by the Court to denounce and deter the wrong-doer's bad behaviour.

[315] Aggravated damages are meant to compensate the claimant for actual harms suffered, but many take into account intangible injuries (*Hiltz v. Seamone Co v. Nova Scotia (Attorney General),* 1999 NSCA, para 236).

[316] Punitive damages, however, are meant to punish the wrongdoer. In *Romkey, supra*, Arnold J. discussed the law regarding punitive damages:

> 161 The Romkeys are also seeking an award of punitive damages. In *National Bank Financial Ltd. v. Barthe Estate,* 2015 NSCA 47, [2015] N.S.J. No. 200 (NSCA), Saunders J.A., for the Court, summarized the law on punitive damages:
>
> …
>
> > 439 From these and other leading authorities we know that the discretion to award punitive damages "should be most cautiously exercised" and courts "should only resort to punitive damages in exceptional cases". Punitive damages "are directed to the qualify of the defendant's conduct, not the quantity (if any) of the plaintiff's loss. The aim of punitive damages

"is not to compensate the plaintiff but rather to punish the defendant". They are the "means by which the jury or judge expresses its outrage at the egregious conduct of the defendant". Punitive damages are intended to punish the wrongdoer, express the court's clear denunciation and serve as a deterrent not only to the wrongdoer, but others who may be inclined to follow the same example.

…

441 Justice Binnie (in *Whiten v Pilot Insurance Co.*, 2002 SCC 18) said that the key to any award of punitive damages is that they must be "rationally required to punish the defendant's misconduct" and they must be proportionate to the blameworthiness of the defendant's misconduct.

…

442 Justice Binnie went on to provide a list of the types of factors which might influence the level of blameworthiness assigned to the wrongdoer. As one would expect the more egregious the conduct, the greater the potential award. He said:

…

[113] The level of blameworthiness may be influenced by many factors, but some factors noted in a selection of Canadian cases include:

(1) whether the misconduct was planned and deliberate:

(2) the intent and motive of the defendant:

(3) whether the defendant persisted in the outrageous conduct over a lengthy period of time:

(4) whether the defendant concealed or attempted to cover up its misconduct:

(5) the defendant's awareness that what he or she was doing was wrong:

(6) whether the defendant profited from its misconduct:

(7) whether the interest violated by the misconduct was known to be deeply personal to the plaintiff

443 Later at para 123 of his reasons Binnie, J. added:

[123]…The key point is that punitive damages are awarded "if, but only if" *all* other penalties have been taken into account and found to be inadequate to accomplish he objectives of retribution, deterrence, and denunciation. …

[317] Each party claims punitive damages against the other.

[318] This Court finds that certain behaviour on the Forgerons' part rises to a level which requires condemnation and outrage on this Court's behalf, leading to an award of punitive damages.

[319] The Forgerons' deliberate planting of the cedar trees within the ROW and on the Garner Property (outside of the ROW) attracts punitive damages. I have already found earlier in this decision that this was an act of retaliation on the part of the Forgerons following the tree cut the previous month. The Forgerons refused to remove the cedar trees leaving it to Garner/Reinbold to do so.

[320] The Forgerons then built a wooden Fence in the middle of the ROW after the commencement of this litigation. They refused to remove the Fence. They called the RCMP on Mausi Reinbold for exercising her right to be in the ROW mowing the grass. This behaviour attracts punitive damages.

[321] Before they purchased the surplus Crown land at the top of the driveway, the Forgerons took Garner/Reinbold's green bins. They first they put in a dumpster at the Forgerons' business, the second and third they took to the business for storage. They wrongfully interfered with and converted Garner/Reinbold's personal property. There is no evidence before the Court which shows that these items were on Forgeron Property when they were moved or removed.

[322] The Forgerons also blocked Garner/Reinbold's civic address on what had been a shared signpost area (erected by the Forgerons) at the top of the driveway by deliberately putting wreaths and other decorations on it, in such a way that Garner/Reinbold's civic address was covered. Garner/Reinbold asked that these decorations be removed, and when they were not, removed them themselves. The Forgerons then called the RCMP on Garner/Reinbold.

[323] All of these actions deserve the Court's sanction.

[324] In *Romkey*, Arnold J. awarded $1,000 for punitive damages. He noted, however, that "the award would have been much larger if not for the considerable compensatory damages award I have already made" (which was over $50,000).

[325] In this case, there is no compensation award flowing to Garner/Reinbold for special or general damages resulting from the planting of the cedar trees, or the removal of their green bins. Nor is there any compensation available to Garner/Reinbold by way of special damages for the Forgerons' erection of the Fence.

[326] The Court takes into account all of this behaviour when assessing Garner/Reinbold's entitlement to punitive damages. The Court awards $5,000 in punitive damages against the Forgerons.

[327] In terms of the Forgerons claim for punitive damages against Garner/Reinbold, the Court awards the sum of $1,000.00 because of Garner/Reinbold's repeated calls to HRM related to the issues of the Forgerons supposed lack of permit to build the boat shed and backyard suite which were retaliatory in nature.

Credibility, Generally

[328] Counsel for Garner/Reinbold says that a great deal of this case will come down to the question of credibility.

[329] He suggests that the Forgerons have been at best free and easy when it comes to being truthful with the Court. Counsel says that the allegations in their pleadings and in their evidence often consists of wide-open and either poorly substantiated or unsubstantiated allegations.

[330] In particular, counsel says that the Forgerons' claim that they suffered a loss of privacy following the tree cut and that a large stand of mature trees consisting of spruce, fir, birch, maple and popular trees was cut, was unsupported by the evidence of Brian Phelan, yet remained in their claim throughout the trial.

[331] The evidence before the Court is that there were no fir, popular or maple trees cut from the ROW. Here the Court notes that counsel drafted the pleadings and this error should not negatively effect Denise Forgeron's credibility.

[332] The Court has previously indicated that it does not accept Ms. Forgeron's evidence concerning why she planted the cedar trees.

[333] However, the Court notes that there is an instance where Denise Forgeron's credibility was negatively affected. When asked on discovery examination, under oath, where Garner/Reinbold's first green bin was taken, she initially said that she had no idea. When pressed she said that the bin was "with a friend", or words to that effect. She then admitted that the Forgerons' business was what she meant by "friend".

[334] This evidence demonstrated a lack of complete candour on the part of Denise Forgeron. However, that instance did not impact the Court's overall assessment that Denise Forgeron was a credible witness.

[335] Mr. Forgeron's credibility was also challenged. In 1994 Derrick Forgeron swore an affidavit before the Probate Court saying that he was the spouse and surviving heir of his long-time partner at the time who had been killed in a car accident. It is clear from the Court's review of the documents and the decision of the Probate Court that Derrick Forgeron was passing himself off as the married spouse of his late partner when that was not the case.

[336] However, Derrick Forgeron said that he so swore the affidavit and made these representations on the advice of counsel. The Court accepts this explanation.

[337] Further these events took place thirty years ago. If Derrick Forgeron was deliberately deceitful in his sworn evidence at that time, the Court is not prepared to find that the evidence he gave in this proceeding was also deceitful. The Court finds that Derrick Forgeron was generally a credible witness as were Mausi Reinbold and Christopher Garner.

Conclusions

[338] The Forgerons are entitled to the sum of $2,800.00 as special damages for the loss of trees on their property cut by Garner/Reinbold. They are also entitled to the sum of $2,000 as general damages for their loss of privacy and loss of enjoyment of their property.

[339] Garner/Reinbold are entitled to the sum of $5,000.00 as punitive damages arising from the Forgerons' retaliatory trespass when they planted cedar trees on Garner/Reinbold Property, their erection of the Fence in the ROW and from their theft of Garner/Reinbold's garbage can, green bins and the cutting down of their signpost. Garner/Reinbold are also entitled to the sum of $2,500.00 for nuisance arising from the Forgerons' activity in moving their green bins, for calling the RCMP on Mausi Reinbold when she attempted to mow the lawn on the Forgeron side of the Fence within the ROW and for the Forgerons' tampering with the visibility of Garner/Reinbold's civic numbers on the signpost at the top of the driveway.

[340] The Forgerons are entitled to the sum of $1,000.00 in punitive damages arising from Garner/Reinbold's calls to the RCMP concerning their boat shed and backyard suite which were retaliatory in nature.

[341] The Court issues a mandatory injunction against the Forgerons requiring them to:

(a) Remove the Fence and restore the area around the ROW to the state it was in before the Fence was erected, at their sole expense, by July 31, 2024;

(b) Remove the boulders and other materials they placed at the lakefront on Garner/Reinbold's side of the ROW, at their sole expense, by July 31, 2024.

[342] All other claims of either party, however, framed, are dismissed.

[343] Each party is enjoined from trespassing on the other's property.

[344] The Court notes that although success has been somewhat divided, on balance, Garner/Reinbold are entitled to some costs. If the parties cannot agree on costs, the Court will receive written submissions within thirty (30) calendar days of this decision.

Smith, J.