

SUPREME COURT OF NOVA SCOTIA
Citation: *Forgeron v. Garner*, 2024 NSSC 355

Date: 20241121
Docket: Hfx No. 509131
Registry: Halifax

Between:

Denise Forgeron and Derrick Forgeron

Applicants/Respondents

- and -

Christopher Tayler Garner and Mausii Reinbold

Respondents/Applicants

DECISION ON COSTS

Judge: The Honourable Justice Ann E. Smith

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

By the Court:**Introduction**

[1] By decision dated March 21, 2024, *Forgeron v. Garner*, 2024 NSSC 80 this Court adjudicated a variety of claims and crossclaims between the parties to this Application in Court.

[2] The parties have been unable to agree on costs. The Court received written submissions on costs from each party as well as the solicitor's affidavit of Samuel Ward, counsel for the Forgerons and the affidavit of Brittany Durnford, legal assistant to counsel for Garner/Reinbold. The Court notes that each party had a senior and less senior lawyer as their legal counsel at the hearing.

[3] To put this costs award in context, the Court quotes from the opening paragraphs of its decision:

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.

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.

...

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 Forgeron's 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.

Each party accuses the other of nefarious spying or watching of the other's 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 belong 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 cans and signpost from the mouth of the shared driveway between the two properties.

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.

...

[4] 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.

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

From counsel for the Forgerons:

- a forty-one page pre-hearing brief with authorities
- a thirty-seven page reply brief with authorities; and

- an eleven page rebuttal brief.

From counsel for Reinbold/Garner:

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

[6] 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 before the Court to review and consider, together with the evidence heard at trial through cross-examination.

[7] The Court reached the following conclusions, as set out in its decision:

The Forgerons are entitled to the sum of \$2,800.00 as special damages for the loss of tress on their property cut by Garner/Reinbold. They are also entitled to the sum of \$2000 as general damages for their loss of privacy and loss of enjoyment of their property.

Garner/Reinbold are entitled to the sum of \$5,000 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 \$2500.00 for nuisance arising from the Forgerons' activity in moving their green bins, for calling the RCMP on Mausie 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.

The Forgerons are entitled to the sum of \$1000.00 in punitive damages arising from Garner/Reinbold's calls to the RCMP concerning their boat shed and backyard suite which were retaliatory in nature.

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 place at the lakefront on Garner/Reinbold's side of the ROW., at their sole expense, by July 31, 2024.

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

[9] The Court identified eight issues arising from the competing claims of the parties: (para 16 of the decision):

1. The tree cutting by Garner/Reinbold
2. The cedar tree planting by the Forgerons
3. The construction of the retaining way 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 share ROW near West Porters Lake Road
8. Remedies sought by each party

[10] The Court will now review each party's success or failure in advancing or defending these issues. However, I do so mainly for the purpose of coming to an

overall, global assessment of the relative success between the parties, and not for the purpose of assessing costs on an issue-by-issue basis.

Issue 1: The tree cutting by Garner/Reinbold

[11] The Forgerons claimed that Garner/Reinbold cut down nine of their trees in October 2020. They sought special damages in the amount of \$17,100 for the loss of nine trees as well as general damages in the amount of \$5,000 for loss of privacy which they say resulted from this “tree cut or “clear cutting”. The Forgerons’ expert, Brian Phelan, an arborist, gave evidence that nine trees were cut and calculated the cost of replacing those nine trees based on the width of the tree and the species.

[12] Garner/Reinbold argued that six, not nine trees were cut, based on the opinion of expert witness Glen Myra, land surveyor. Garner/Reinbold also argued that they had the consent or implied consent of the Forgerons to cut down trees. They further argued that they had an ancillary right to cut down trees in the ROW.

[13] The Court found that the Forgerons proved that Garner/Reinbold cut six spruce trees in the ROW, the largest of which had a six-inch diameter. In so finding, the Court preferred the evidence over Glen Myra, Garner/Reinbold’s expert over that of Brian Phelan, the Forgeron’s expert with respect to the number of trees cut. The Court used Mr. Phelan’s method of calculating the loss of the individual trees.

[14] The Court awarded special damages to the Forgerons for loss of the six trees in the amount of \$2,850.00, which was \$14,250 less than they sought. The Court awarded general damages in the amount of \$2,000 which was \$3000 less than they sought.

Issue 2: Cedar Tree Planting by the Forgerons

[15] In November 2020, shortly after Garner/Reinbold cut trees on the Forgeron Property, the Forgerons entered the Garner/Reinbold Property, dug several deep holes and planted six cedar trees there without the consent of Garner/Reinbold. Three of these were planted within Garner/Reinbold's circular driveway. The other three cedar trees were planted on Garner/Reinbold's side of the ROW. The Forgerons also planted tall grasses around the base of certain of the cedar trees.

[16] The Court found that the Forgerons' deliberate planting of the cedar trees within the ROW and on the Garner Property (outside of the ROW) attracted punitive damages. The Court found 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 these trees for over a year, leaving Garner/Reinbold to do so. In fact, the Court found that the Forgerons continued to trespass on Garner Reinbold property in order to "decorate" the cedar trees with vines and decorative grasses. The Court

awarded \$5,000 in punitive damages against the Forgerons as a result of this tree planting, but also because of other activities on their part which I will review below.

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

[17] 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.

[18] The Forgerons claimed that the retaining wall jutted into the ROW and obstructed larger vehicles when those vehicles used the shared driveway. That was the affidavit evidence of Derrick Forgeron. However, when pressed in cross-examination, he admitted that he had never seen a larger vehicle be obstructed.

[19] The Court found that there was no evidence that these “larger vehicles” had actually been obstructed by the retaining wall. Further, the Court found that the Forgerons did not prove that the retaining wall practically or substantively obstructed the ROW, given that it only intruded about 1 ½ feet into the 7 ½ foot wide ROW.

Issue 4: The Construction of the Fence by the Forgerons

[20] In April 2022, several months after commencing this lawsuit, and months after Garner/Reinbold filed their claim against the Forgerons, which the Forgerons contested, the Forgerons began construction of an approximately six-foot tall Fence up the middle of the ROW on a grassy slope towards Porters Lake. The Fence was approximately one hundred feet long.

[21] The Court found that the Fence was erected within the shared ROW. The Court found that the Forgerons wrongly called the RCMP on Mausi Reinbold when she attempted, on one occasion, to mow the lawn on the Forgerons' side of the shared ROW.

[22] The Court ordered the Forgerons to remove the Fence in the ROW at their cost and to do whatever work was required to return the landscape where the Fence was erected to its condition prior to its erection. The Court ordered this work to be complete by July 31, 2024.

[23] The Court's punitive award against the Forgerons included their erection of the Fence within the ROW following the commencement of the lawsuit.

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

[24] Garner/Reinbold claimed that the Forgerons interfered with and trespassed upon the ROW by placing large boulders in the ROW where it meets the lake which they claimed blocked their water access. This was after Hurricane Juan in 2004 destroyed parts of this boat launch area, primarily on the Forgerons' side of the ROW. Garner/Reinbold 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 accessing the lake. They also alleged that the Forgerons did not have proper permits to carry out this work. They sought a positive injunction requiring the Forgerons to restore the termination of the ROW at the waterline to "its original state" at the Forgerons' expense.

[25] The Forgerons responded to these claims by arguing that Garner/Reinbold had acquiesced to the changes to the rock wall and that their claim was out of time pursuant to section 8(1) of the *Limitation of Actions Act*, SNS 2014, c 35 (*LAA*). Garner/Reinbold responded that the applicable limitation statute was the *Real Property Limitations Act*, RSNS 1989, c 258, c 10 (*RPLA*).

[26] The Court ruled in Garner/Reinbold's favour on all of these claims, i.e., that they had not acquiesced to the changes to the waterfront area, that the *RPLA* was the applicable statute and further, that the Forgerons' unilaterally altered the boat slip area in a way that interfered with Garner/Reinbold's use of the ROW.

[27] The Court did issue a positive injunction requiring the Forgerons to restore the termination of the ROW at the waterline to “its original state” at their own expense, but it did order the Forgerons to 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. The Court stated that Garner/Reinbold could then, if they wished, do their own work in this area, at their own expense.

Issue 6: Various Claims in Nuisance Going Both Ways

[28] Here the Court dealt with a number of claims that the parties made against each other. Each said that the other’s behaviour rose to the level of “harassment” and constituted actionable nuisance. The Forgerons claimed that in addition to being actionable nuisance, this behaviour constituted actionable intrusion upon seclusion.

[29] The Court noted that most of the conduct complained of amounted to trivial interference with the other’s property or chattels, at best, and that even if all such trivial conduct was lumped together, with few exceptions, none of this conduct amounted to an actionable tort.

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

- a) The Forgerons' allegation that Garner/Reinbold verbally abused and berated each of Denise and Derrick Forgeron;
- b) The Forgerons' allegation that Reinbold/Garner abused and berated the Forgerons' children, leading the Forgerons' daughter to fear for her safety while at home alone;
- c) The Forgerons' allegation that Garner/Reinbold abused and berated independent contractors the Forgerons hired to carry out work on their Property;
- d) The Forgerons' allegation that Garner/Reinbold slashed the tires of vehicles belonging to guest attending their Property;
- e) The Forgerons' allegation that Garner/Reinbold trespassed on the Forgeron Property in violation of the Protection of Property Act and otherwise. This allegation in the end related to the single incident when Mausie Reinbold attempted to mow the lawn on the Forgerons' side of the ROW close to the Fence;
- f) The Forgerons' claim that Garner/Reinbold built the retaining wall "squarely within the ROW;
- g) The Forgerons' claim that "fairy-lights" strung around their cottage by Garner/Reinbold caused "light pollution"
- h) Garner/Reinbold's allegation that the Forgerons unilaterally graded and paved the shared driveway in June 2017 such that the driveway was then sloped so as to drain onto their Property, causing water damage to the foundation of the Garner/Reinbold Cottage that required extensive remediation;
- i) Garner/Reinbold's allegation that the Forgerons allowed brush, shrubs and trees on their property to interfere with the safe operation of power lines entering the Garner/Reinbold Property from West Porters Lake Road;
- j) Garner/Reinbold's allegation that the Forgerons extended the Forgeron Property into Porters Lake by construction and in-fill on Crown land;
- k) Garner/Reinbold's allegation that the Forgerons recklessly drove their vehicles along the shared ROW in a dangerous and intimidating manner;

- l) Claims by Garner/Reinbold that Mausi Reinbold abused the Forgerons' dog, Milo;
- m) Claims by Garner/Reinbold that the Forgerons allowed Milo to trespass on Garner/Reinbold Property;
- n) Claims by Garner/Reinbold and by the Forgerons that each defaced, moved or damaged their real and personal property.
- o) Claims by Garner/Reinbold and the Forgerons that the other party spied on them, or had security systems or cameras directed towards the other;
- p) The Forgeron allegation that Mausi Reinbold instructed her tenants to spy on the Forgerons.

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

[31] This Court found that whether by prescriptive rights, the doctrine of lost modern grant, or the doctrine of mutual and reciprocal easement, Garner/Reinbold were entitled to a declaration that they enjoy the right to continue using the portion of the shared driveway that exists outside of the legally deeded ROW by virtue of the right of way reduction agreement executed by the parties' predecessors in title in 1978.

Issue 8: Remedies Sought by Each Party

[32] The Court found that certain behaviour on the part of both parties rose to a level which required condemnation and outrage on the Court's behalf, leading to an award of punitive damages. Most, but not all of this behaviour, was that of the Forgerons. However, certain behaviour on the part of Garner/Reinbold also attracted

punitive damages. The quantum of punitive damages awarded by the Court reflects that difference in the amount of misconduct carried out by the party.

[33] The Court awarded \$5,000 in punitive damage against the Forgerons for the following behaviour, as described in the Court's decision:

[320] The Forgerons' deliberate planting of cedar trees within the ROW and on Garner/Reinbold 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.

[321] The Forgerons then built a 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.

[322] Before they purchased the surplus Crown land at the top of the driveway, the Forgerons took Garner/Reinbold's green bins. The 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.

[333] The Forgerons also blocked Garner/Reinbold's civic address on what had been a shared signpost (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.

[34] The Court awarded \$1,000 in punitive damages against Garner/Reinbold for making repeated calls to the RCMP about the Forgerons' shed and back yard suite and the supposed lack of permits for these structures. The Court described these circumstances in its decision, as follows:

- [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 1970's. 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 Derrick 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 the HRM. While Garner/Reinbold said that they felt the Forgerons' backyard suite affected their privacy and resulted in increased noise, Ms. Reinbold's evidence on discovery 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.
- [249] 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.

[35] With that review of the “success” or “failure” of each party on each issue, the Court turns to the question of the assessment of costs which flows from the Courts findings.

Analysis

[36] In the Court’s decision, I said that success was somewhat divided, but on balance, Garner/Reinbold were entitled to “some costs”. The Forgerons say that the use of the word “some” tempers the amount otherwise to be awarded to a party who is said to be simply entitled to costs. Garner/Reinbold, on the other hand, say that “some costs” simply means “their costs”.

[37] The Court used the phrase ‘some costs’ to recognize Garner/Reinbold had advanced a number of claims which had been dismissed by this Court. These are outlined above.

[38] Further, the Court found that Garner/Reinbold had engaged in certain activity which attracted punitive damages. This was not simply a situation where success was divided. Specifically, the Court found that the Forgerons were entitled to punitive damages in the amount of \$1,000.00 arising from Garner/Reinbold’s repeated calls to HRM concerning the Forgeron’s supposed lack of permit to build a boat shed and backyard suite which this Court found were “retaliatory in nature”.

[39] How should the Court calculate costs to be awarded to Garner/Reinbold in the circumstances?

[40] The starting point in determining the amount of costs is the *Tariffs of Costs and Fees* under *Rule 77*. *Rule 77.01* outlines that the Court may address party and party costs, solicitor and client costs as well as fees and disbursements.

[41] Costs remain in the discretion of the Court so as to “do justice between the parties” (*Rule 77.02(1)*).

[42] The Court has discretion to raise or lower the tariff costs applying factors such as those listed in *Rule 77.02*:

- 77.07(1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.
- (2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:
- (a) the amount claimed in relation to the amount recovered;
 - (b) a written offer of settlement, whether made formally under *Rule 10 – Settlement* or otherwise, that is not accepted;
 - (c) an offer of contribution;
 - (d) a payment into court;
 - (e) conduct of a party affecting the speed or expense of the proceeding;
 - (f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect, or unnecessarily;
 - (g) a step in the proceeding a party was required to take because the other party unreasonably withheld consent;

(h) a failure to admit something that should have been admitted.

[43] Party and party costs of an Application in Court must, unless the judge who hears the Application orders otherwise, be assessed by the judge in accordance with Tariff A as if the hearing were a trial: *Rule 77.06(2)*.

[44] A judge has the discretion to add or subtract from the tariff amount: *Rule 77.07(1)*. Furthermore, a judge “may award lump sum costs instead of tariff costs”: *Rule 77.08*. Tariffs are the norm, and there must be a reason to consider a lump sum: *Armoyan v. Armoyan*, 2013 NSCA 1136 at paras. 14-15.

[45] *Civil Procedure Rule 77.18 (c)* describes claims involving non-monetary issues:

In these Tariffs unless otherwise prescribed, the “amount involved” shall be

...

(c) where there is a substantial non-monetary issue involved and whether or not the proceeding is contested, an amount determined having regard to

(i) the complexity of the proceeding, and

(ii) the importance of the issues;

[46] In *Henneberry v. Compton*, 2014 NSSC 412, Justice Wright addressed the in the following paragraph he commented on the difficulty in using Tariff A in the context of a boundary line dispute:

14. The difficulty with the utilization of Tariff A in a case such as this is that the claim is a completely non-monetary one. Although it is provided in the

tariffs under Rule 77 that where there is a substantial non-monetary issue involved, the "amount involved" is to be determined having regard to the complexity of the proceeding and the importance of the issues, those guidelines are of little practical assistance in assessing costs following the adjudication of a boundary line dispute.

[47] The basic principle is that a costs award should afford a substantial contribution to, but not amount to a complete indemnity to, the party's reasonable fees and expenses: *Armoyan, supra*, at para. 16.

[48] The tariffs deliver the benefit of predictability by limiting the use of subjective discretion: *Armoyan, supra*, at para. 17.

Position of the Parties in Detail

The Forgerons

[49] The Forgerons say that the tariffs presumptively apply and should be used whenever possible, with reference to Rule 77.06(1) and (2) and case law such as the decision of Wood, J (as he then was) in *Homburg v. Stichting Autoriteit Financiële Markten*, 2017 NSSC 52.

[50] In *Homburg*, Wood J stated that the “substantial contribution principle underlies the tariffs but does not supersede them. Most cost matters should be disposed of based upon an application of the tariffs with the built-in discretion to adjust amounts for the factors identified in Rule 77” (para 9). Justice Wood also

noted that “[T]he mere fact that the party’s actual legal account is significantly more than the tariff does not automatically justify a departure”.

[51] The Forgerons also submit that in the circumstances before the Court it is appropriate to apply the tariffs “because most of the claims being advanced related to the parties’ respective claims for damages and therefore it is possible to determine an “amount involved” by looking at the damages being claimed and/or the damages that were awarded”.

[52] The Forgerons say that they claimed a total of \$34,600 in damages, while Garner/Reinbold did not specify the monetary amounts they were seeking for damages in advance of the hearing.

[53] The Forgerons say that since they were ultimately awarded \$5,850 in damages and Garner/Reinbold were ultimately awarded \$7,500 in damages, overall, \$13,350 in damages were awarded.

[54] Accordingly, the Forgerons submit that given that the overall award of damages was less than \$25,000, and that even if the amount sought is included, the amount is still less than \$40,000. They say that pursuant to Scale 2, costs would then initially be either \$4,000 or \$6,250. Since the hearing took place over four days,

and adding \$2,000 for each of those days, total costs are in the range of \$12,000 to \$14,250.

[55] The Forgerons also say that since Garner/Reinbold were “only moderately successful on the application” any costs awarded in their favour “should be modest, even if awarded as a lump sum”. In that regard, they say that any lump sum amount awarded should not represent a “substantial contribution” to Garner/Reinbold’s legal fees.

[56] Further, the Forgerons say that they made reasonable settlement offers and refer to Rule 77.07(2)(b) which provides that the Court may take a written offer of settlement into account when determining costs, whether that offer is made formally under Rule 10, or otherwise, if that settlement offer is not accepted.

[57] The Forgerons say this, even though they recognize that the result obtained by Garner/Reinbold was favourable, i.e., gave them more than had they accepted the settlements offer. The Forgerons say that they made these offers in good faith in order to settle the matter and the Court should still take these offers into consideration.

[58] Ultimately, the Forgerons say that an award of costs to Garner/Reinbold of \$10,000 is appropriate in the circumstances.

Garner/Reinbold

[59] Garner/Reinbold say that, on balance, they were the successful party and ought to be awarded a substantial contribution towards their out-of pocket costs of the litigation. They say that the substantial contribution “ought to be on the high end” because they say that the Forgerons “repeatedly engaged in behaviour, sometimes particularly egregious behaviour, which greatly affected” Garner/Reinbold’s expenses throughout the proceeding.

[60] Garner/Reinbold say that there was no “amount involved” in the vast majority of the parties' respective claims. They say that the application of Tariff A would not do justice between the parties and that this is an appropriate case for the Court to depart from the tariffs and award a lump sum amount.

[61] Garner/Reinbold say that to apply sums to these non-monetary claims, which were extremely important to them and required considerable legal effort to address, would result in an artificial, subjective exercise which the tariffs seek to avoid. In that regard, they point to Keith J’s costs’ decision in *Layton v. Layton*, 2022 NSSC 60 at para 18:

[...]

When this occurs, the Court does not stubbornly adhere to the Tariff and artificially inflate the “amount involved” to somehow conjure a more appropriate cost award. Rather, when this occurs, the subjectivity required to make Tariff A work:

...exceeds a critical level, [and] the tariff may be more distracting than useful. Then, it is more realistic to circumvent the tariffs, and channel that discretion directly to the principled calculation of a lump sum. A principled calculation should turn on the objective criteria that are accepted by the Rules or case law. [*Armoyan v. Armoyan*, 2013 NSCA 136 at para 18]

[62] Counsel says that they invoiced Garner/Reinbold approximately \$260,000 in legal fees and incurred disbursements in the amount of \$4,959.95 (legal counsel fees for law firm first engaged by Garner/Reinbold) and \$4,140.00 for payment of expert Glen Myra. They have reduced \$260,000.00 amount by 15% to allow for what they say was additional time expended by lawyers than would normally be expected in a case of similar complexity.

[63] Garner/Reinbold seek a lump sum award in the amount of 75% of \$222,457.13, which amounts to \$166,842.85, inclusive of disbursements.

[64] They also submit that the settlement offers advanced by the Forgerons were unreasonable, that they achieved results much more favourable than the terms of these offers and the offers should have no impact on the Court’s assessment of costs.

Application of the Civil Procedure Rules

[65] The Court awarded \$5,000 in punitive damages against the Forgerons and \$1000 in punitive damages against Garner/Reinbold.

[66] A party who has \$1,000 in punitive damages awarded against them should not expect the Court to assess their costs at the level of 75% of their legal fees and disbursements incurred, as Garner/Reinbold has done here.

[67] Nor should a party who has had \$5,000 in punitive damages assessed against them, as have the Forgerons, expect to convince a Court that the successful party in this type of dispute, where many non-monetary issues were at play, should be restricted to costs based on the general damages claims only.

[68] I find that it would be artificial to apply the tariffs in a dispute which I find was primarily one where no monetary amount was involved. I am not prepared to use the amount claimed in general damages as an “amount involved”, as proposed by the Forgerons. To do so would be to ignore the majority of disputes which were resolved by the Court without an award of damages.

[69] I am also not prepared, as suggested by counsel for Garner/Reinbold, to take into account legal fees for events which occurred three days after the hearing ended and before the Court’s decision was rendered.

[70] Rather, I prefer to start with Garner/Reinbold’s legal fees incurred. That adjusted amount according to their counsel is in the range of \$222,000.

[71] The affidavits filed by Garner/Reinbold were voluminous. Portions of these were struck, on the Forgerons' successful motion. However, the Court was still left with very lengthy affidavits and certain affidavits that provided little in the way of evidence on key issues. The Forgerons' counsel filed affidavits with far more concise content. The overall approach to the presentation of Garner/Reinbold affidavit evidence would have greatly benefited from a more concentrated focus.

[72] I view legal fees in the range of \$220,000 for a four-day application in Court to be highly excessive.

[73] A costs award in the general range of \$30,000 to \$70,000 is the norm for most fully successful parties on an application in Court.

[74] The Court acknowledges that there were certain complexities to the issues before the Court. Counsel had to deal with claims of prescriptive easements, limitation periods and right-of-ways. Obviously, the matters before the Court were extremely important to each party.

[75] However, Garner/Reinbold added to the amount of evidence contained in the affidavits they filed in this matter, and the cross-examination on those affidavits at trial, by advancing a number of claims that were dismissed by the Court.

[76] Certain of these are set forth above, but the following list of unsupported claims, on which affidavit evidence was presented, are worth repeating:

- Their allegation that the Forgerons unilaterally graded and paved the shared driveway in June 2017 such that the driveway was then sloped so as to drain onto their Property, causing water damage to the foundation of the their cottage that required extensive remediation;
- Their allegation that the Forgerons allowed brush, shrubs and trees on their property to interfere with the safe operation of power lines entering the Garner/Reinbold Property from West Porters Lake Road;
- Their allegation that the Forgerons extended the Forgeron Property into Porters Lake by construction and in-fill on Crown land
- Their allegation that the Forgerons recklessly drove their vehicles along the shared ROW in a dangerous and intimidating manner;
- Their claims that the Forgerons allowed Milo to trespass on Garner/Reinbold Property
- Their claim that the Forgerons painted white lines on the ROW and that guests of the Forgerons urinated on their Property;
- Claims by Garner/Reinbold and the Forgerons had security systems or cameras directed at them.
- An allegation that the Forgerons had diminished the value of their property, but lead no evidence in support
- Allegations that the Forgerons through or left Greek salad and hockey pucks on their property.

[77] Garner/Reinbold also unsuccessfully argued that the Forgerons impliedly consented to the tree cut. They also brought an unsuccessful motion to convert the application in court to an action. Costs of that motion in the amount of \$500, payable in the cause, must be deducted from any amount awarded to Garner/Reinbold.

[78] In order to do justice between the parties, the Court must take all of these various circumstances into account.

[79] I find that Garner/Reinbold are entitled to “some costs” just as I said in the decision on the merits. I find that they are not entitled to 75% of their legal fees incurred, as their counsel suggests, or anywhere near that percent. Reimbursement at that level would not reflect the various claims, admittedly minor in some circumstances, that they unsuccessfully advanced. It would also not be fair to base costs on what I consider to be hugely excessive legal fees.

[80] I agree with counsel for the Forgerons that Garner/Reinbold are not entitled to be awarded any amount for the \$23,000 discount Weldon McInnis gave to their clients resulting from the indemnity costs in the Forgerons’ favour on their successful motion to strike large portions from the affidavits filed by Garner/Reinbold.

[81] I conclude that a lump sum costs award, in the amount of \$40,000 does justice between the parties. I also allow disbursements in the amount of \$3,500.00 as a substantial contribution to the invoice of expert Glen Myra (\$4,140) and the sum of \$2,500 as a contribution to Cox and Palmer legal fees (\$4,959.95) incurred prior to the retention of Weldon McInnis, for total of \$6,000 in disbursements.

Conclusions

[82] Total party and party costs are awarded in the sum of \$40,000. Disbursements are allowed in the amount of \$6,000. From that is deducted \$500 for the unsuccessful motion.

[83] Total costs are payable by the Forgerons to Garner/Reinbold in the amount of \$45,500 within 30 calendar days of the issuance of this decision.

Smith, J.