

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Buggie v. McCabe*, 2016 NSSM 61

Claim No: SCCH-455813

Registry: Halifax

Between:

Brian Buggie and Sharon Buggie

Claimants

- and -

Robert McCabe and Bonnie McCabe

Defendants

Adjudicator: Eric K. Slone, Adjudicator
Heard: November 15, 2016
Appearances: Claimants, Self-Represented
Defendants, Self-Represented
Date of Decision: December 7, 2016

DECISION

Introduction

[1] This is a claim and counterclaim arising from a boundary dispute between two parcels of lands in Meagher's Grant, a rural part of Nova Scotia in the Musquodoboit Valley region near the eastern edge of Halifax Regional Municipality. The location of the true border will point the way to which of the parties acted within their legal rights, and which did not, in the fact situation that I will be describing.

[2] I am mindful of the limits of this Court's jurisdiction. Under the *Small Claims Court Act*, there are certain types of actions that are expressly excluded, including s.10 (a) which reads:

10 Notwithstanding Section 9, no claim may be made under this Act
(a) for the recovery of land or an estate or interest therein;

[3] As such, I do not have the power that the Supreme Court would have, in an appropriate case, to make a declaration that a party has acquired an interest in land as a result of adverse possession (colloquially "squatters' rights.") In matters of title and boundaries, this court must accept the borders of land on the legal title as it may appear from survey or title documents.

The Facts

[4] The dispute is between two families. The McCabes (the Defendants) are long-time residents, while the Buggies (the Claimants) are only recently arrived.

[5] Robert and Bonnie McCabe have been on their property at 196 Lay's Lake Rd. ("the 196 property") - in the case of Mr. McCabe - for decades, and in the case of Ms. McCabe for just over a decade.

[6] Brian and Sharon Buggie moved onto the adjacent property at 188 Lay's Lake Rd. ("the 188 property") in 2014. The 188 property had previously been owned by Mr. McCabe's sister in-law (Marie Dickie) from his first marriage. The 188 property is 36 acres, while the 196 property is only about one acre.

[7] Sometime in the 1970s, Mr. McCabe and Ms. Dickie decided to plant a row of cedar trees along their property dividing line. As described by Mr. McCabe, they tried to do so precisely on what they believed to be the property line. They took a long string, or rope, and attached each end to existing boundary markers, and pulled it tight. They spaced fifteen cedar seedlings along that boundary of some 200 feet. Over the some 40 years, those trees matured into large specimens, many or all of which had multiple trunks and wide spans of branches. It does not appear that anyone did any significant pruning of the trees over the years.

[8] The location of these trees, and the right to prune the spreading branches, became one of the issues in this dispute.

The Garden

[9] In about the early 2000s (after Bonnie McCabe married the widowed Robert McCabe), the McCabes received permission from Ms. Dickie to create a large kitchen garden on the grounds of the much larger 188 property. That garden was bountiful. It had mature raspberry and blueberry bushes, fruit trees and also grew many annual crops. The McCabes erected a chain link fence around the garden to keep out the deer that would otherwise have feasted on the bounty.

[10] When 188 was sold, the purchasing Buggies had no objection to allowing the McCabe garden to continue, but on the advice of their lawyer they insisted that the McCabes put in writing a formal request to be allowed to continue using it. Such a procedure was proper and necessary. The lawyer was rightly concerned that the McCabes might later establish title to that garden by adverse possession. One of the things that defeats a claim for adverse possession is evidence that the land is being used with permission, and that the occupiers (the McCabes) know and acknowledge that the land is actually owned by the titled owner (here the Buggies). Such protections may not be necessary when the landowners are all family members, but the Buggies were coming into the area as strangers who hoped for, but could not be guaranteed, good relationships with their neighbours.

[11] The McCabes signed the acknowledgement but, I gather from the evidence, were slightly offended by being asked to do it.

[12] The trouble appears to have begun in the spring of 2015 when the Buggies decided to plant a row of small spruce trees along the fence inside of the garden, including (as it appears) along the section of the fence that served as a gate. As shown in the photos introduced as evidence, the trees were perhaps 2 to 3 feet high, and were planted just a few feet apart. The Buggies' reason for doing this was to create a privacy screen, which would presumably only be needed when the McCabes were actually in the garden.

[13] Ms. McCabe was troubled by the trees as she believed that she would not be able to get her gardening equipment through the gate in the wire fence. This led to heated arguments, and the McCabes decided then and there that they would move their garden over to their own property.

[14] I will observe, at this point, that things might have turned out differently had Ms. McCabe simply asked if one or two of the trees could be removed to make the path

through the gate wider. While one cannot know what the answer would have been, the result would either have been “problem solved” or “now we know we are not welcome.” While the planting of the trees so close together may have signalled to the McCabes an unfriendly attitude on the part of the Buggies, that conclusion was by no means the only possible one.

[15] What followed thereafter was a series of moves and countermoves, and differing versions of the facts, culminating in numerous police involvements and this claim and counterclaim.

[16] The McCabes say that after announcing that they were going to move their garden, they were “ordered” to remove their fence and given two days to complete the task. They rounded up the help of some neighbours, even asking for help on Facebook, and in broad daylight, proceeded to remove the fence.

[17] The Buggies say that they did not want the fence removed, and that the taking of the fence by the McCabes was tantamount to theft.

[18] The McCabes say that they asked for permission to remove their perennial plants, but were refused.

[19] The Buggies say that they did not refuse, and that the McCabes did take some plants, including (at least) their blueberry bushes.

[20] The McCabes came to court determined to vindicate their honour. They resent being called thieves, and brought witnesses to court who were prepared to testify that they helped take down the fence under the belief that the McCabes had been ordered to do so.

[21] Who is correct? The short answer is that it is far from black and white. I am prepared to give all parties the benefit of the doubt on this point about the removal of the garden fence. I believe that the McCabes thought they had to remove it. I also believe that the Buggies did not believe that they had given such an order.

[22] Regardless of who said what, or believed what, I find as a fact that the fence itself belonged to the McCabes. I accept their evidence that they had erected it to keep out the deer from their garden. It was the type of fence that was not all that difficult to remove. I find that it did not become a “fixture” on the land, such that it would have belonged to the Buggies. As such, they had a right to remove it. The Claimants’ claim to be compensated for the removal of this fence is rejected.

[23] But this fence is not the only issue.

The boundary trees

[24] Not long after the garden dispute arose, the McCabes took it upon themselves to perform some fairly drastic trimming of the 15 mature cedars along the supposed border between the two properties. They sawed off all of the spreading branches that they thought had gradually encroached over the believed property line, on their property. Many of the multiple trunks were removed altogether. This was not the type of pruning that was designed to make the trees more attractive. From the photos in evidence, I find that the pruning was so drastic as to make the trees quite ugly. One would even question whether the trees would remain viable after such a drastic pruning.

[25] At the same time the McCabes erected a chain link fence along that entire boundary, just on their side of the now-trimmed cedars. Their stated motive for pruning the trees and erecting the fence was to keep out the Buggies’ dogs. I am deeply sceptical of this explanation. I find that the pruning of the trees and the erection of the

fence was a bold and aggressive statement of how negatively the McCabes felt about their neighbours.

[26] The response of the Buggies was to commission a boundary survey to ascertain where the line actually is. Although no survey sketch has yet been generated, the surveyor (using modern methods) planted new boundary stakes and discovered that the line was a few feet deeper (eastward) into the 196 property than the McCabes had believed. The difference was great enough that it was learned that one of the McCabes' outbuildings was half sitting on Buggie property. It has since been removed.

[27] This new survey is the best evidence available to the court. The McCabes could have, but did not, seek to verify the lot line with a surveyor of their choosing. They seem resigned to the fact that the line is not where they thought it was, and definitely not where Mr. McCabe and Ms. Dickie believed it to be when the row of cedars was planted some 40 years ago. In other words, the trees were all well within the boundaries of the 188 property, which was then Ms. Dickie's, and the trees technically belonged to her.

[28] When the Buggies bought the 188 property, they acquired ownership of the trees.

[29] Had the trees been planted precisely on the property line, as they believed at the time, they would have been true "straddle" trees and would have belonged equally to both landowners. Neither owner would have had any right to remove them, but both would have been entitled to trim branches or roots encroaching on their property. This is more or less what the McCabes did.

[30] Where the trunks are on one side of the border, as they are here, the trees are better characterized as "border trees" and the rights of the adjoining landowners are more limited.

[31] To put it bluntly, the McCabes had no legal right to trim, let alone butcher, the 15 cedar trees, except to a very limited extent. It is possible, but not certain, that a few branches may have grown out enough horizontally to have encroached on their land, in which case they would have had a right to do some minor pruning, but the branches are long gone and the photos are inconclusive on this point. I find as a fact that the McCabes unlawfully trespassed on the Buggies' land and effectively destroyed the trees that belonged to the Buggies. They also placed their boundary fence on land that belonged to the Buggies.

The boundary fence

[32] Once the line was established, and it was determined that the McCabes had put up this boundary fence on land that did not belong to them, Mr. Buggie took it down. He has it rolled up and stored on his property, and awaits the decision of the court before doing anything with it. The McCabes want it returned to them.

The Claim

[33] The Claimants (Buggies) are seeking damages of just over \$17,000.00 for the removal and replacements of the 15 cedar trees, plus one pine tree that they say was also damaged by the McCabes. That figure includes what they believe to be the cost to replace the garden fence, which they believed was unlawfully removed by the McCabes, but which I have already found belonged to the McCabes.

The Counterclaim

[34] The Defendants (McCabes) have counterclaimed for \$15,806.50 which is mostly the cost to replace the fence that the Buggies removed. Included in that total is \$500.00 which they estimate to be the value of the plants that the McCabes say they were not

allowed to remove, including berry bushes, peach trees and other plants. They also fault the Claimants for removing or destroying some peonies.

Disposition

[35] I find that the Claimants have made out a good case for the unlawful damaging of their trees, but not for the removal of the garden fence.

[36] Had the boundary been where the McCabes believed it to be, they would have been (largely, at least) within their rights. While the shifted boundary may have still left a few branches encroaching on the McCabe property, there is no surviving evidence of that. Had the McCabes only pruned branches encroaching on their property, the Buggies might not have liked the result, but it would have been within the McCabes' rights. But that is not what happened.

[37] The McCabes cannot succeed in their counterclaim for \$15,000.00, or any sum, for the removal of the boundary fence by the Buggies, as they erected it on the Buggie's land without permission or any other legal justification. They are entitled to have the fence material returned to them, as the Buggies have no good claim to keeping it. I got the impression that the Buggies would be only too happy to return the fence to the McCabes, once this case is done.

Damages

[38] The big question is how to compensate the Claimants for the damage done to their trees.

[39] I disallow any claim to replace the pine tree. I do not accept that the Defendants damaged it. It does not appear to have been part of their pruning effort. Even had it

been touched by the McCabes, I find that the damage said to be shown on the photograph is not serious enough to justify removing and replacing that tree.

[40] The 15 cedar trees were over 40 years old, and had grown to a significant height. The Claimants propose to have them removed and replaced with new, 10 foot emerald cedars. They produced an estimate from Lakeland Plant World, which is a highly reputable nursery. The 15 cedars will cost \$7,499.85 (essentially \$7,500.00). The estimate for the labour planting the trees is \$2,300.00, including HST. That estimate includes the pine tree, which I have found not to be legitimately part of the claim, so I will reduce the labour estimate proportionately by 1/16. I will round it down to \$2,150.00.

[41] While it might seem extravagant to purchase expensive, mature trees, there is no real other way to restore the privacy that the Claimants previously enjoyed by having attractive, mature trees along the border. I expect this will come as a shock and impose a hardship on the Defendants. They appear to have acted within the belief that they were in the right, but they acted impulsively and made a grave error for which this order is the consequence.

[42] The Claimants are entitled to damages in the total of \$9,650.00 plus costs of \$386.35, for a total of \$10,036.35.

Eric K. Slone, Adjudicator