Citation: *Temple v. Feniuk*, 2021 YKSM 2

Date: 20210423
Docket: 19-S0019
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before His Honour Chief Judge Cozens

KAREN DIANA TEMPLE and
WILLIAM CHANCE LOGAN TEMPLE

Plaintiffs

v.

MICHAEL WISHART FENIUK

Defendant

Appearances:
Karen Diana Temple and
William Chance Logan Temple — Appearing on their own behalf
Arthur Mauro — Counsel for Defendant

REASONS FOR JUDGMENT

[1] The Plaintiffs seek the amount of $25,000, plus costs, from the Defendant for him having entered onto the property of the Plaintiffs and, without their permission, cut down two of their trees (the "Trees"). In the Claim, the Plaintiffs claim damages amounting to $39,900 for the value of the Trees, $8,977.50 for tree replacement and stump removal, $8,032.50 for fence installation, as well as punitive damages based upon wrongful harassment and intimidation. However, the Plaintiffs are prepared to seek only the maximum of $25,000 in damages allowable under the *Small Claims Court Act*, RSY 2002, c. 204, as amended, (the "*Act*").

[2] In his Reply, the Defendant, while admitting to an "accidental trespass" onto the Plaintiff's property, denies that the Plaintiffs suffered any harm giving rise to damages against the Defendant, or, if damages are found to have been incurred, these are of a strictly nominal nature.

[3] The trial took place on December 15 and 16, 2020. Judgment was reserved *sine die*. This is my Judgment.

Trial

[4] The issue of liability for the cutting down of the Trees was not in dispute. However, the Plaintiffs claim that the Defendant deliberately, rather than accidentally, cut down the Trees. They argue that the deliberate cutting down of the trees was part of a period of harassment of the Plaintiffs by the Defendant that continued after the cutting of the Trees.

[5] The Plaintiff, Karen Temple, and the Defendant had previously been in a common-law relationship from 2009 to 2012. They had resided together at Lot 1120-1. The adjacent Lots, 1120-1 and Lot 1120-2, had been subdivided in 2007 from Lot 1120.

[6] In the spring of 2012, the Defendant built a cabin on Lot 1120-2. In April 2019, the Defendant moved this cabin to a location very proximate to where the Trees had been cut down.

[7] In April 2019, the Defendant, without the permission of the Plaintiffs, entered onto the property of the Plaintiffs at Lot 1120-1 and cut down the Trees. The Plaintiffs were away from their home between April 7 and April 19, 2019. The cutting of the Trees

occurred while they were away. At the request of the Plaintiffs, the Defendant provided them the lengths of at least one, and perhaps both, of the Trees.

Verna Mumby

[8] The Plaintiffs filed a report prepared by a qualified expert, Verna Mumby, dated June 12, 2019 (the "Report"). Ms. Mumby also testified at trial.

[9] Ms. Mumby is the owner/operator of Mumby's Arboriculture Consulting Division of Mumby's Tree Services Ltd. She is a Consulting Arborist, and a Qualified Plant Appraiser, as well as a Certified Arborist/ISA Tree Risk Assessment Qualified Member, American Society of Consulting Arborists. She has 30 years experience providing valuations in her field across western Canada. I note from my review of case law that Ms. Mumby has provided expert testimony in other similar cases.

[10] Ms. Mumby did not visit the site of the Trees. Instead, she prepared her Report based upon photographs and location measurements. She also received replacement tree costs from Ms. Temple, and called some garden centers in Whitehorse on her own to get a general sense of the area, the costs for trees, and other related information.

[11] As the information Ms. Mumby obtained from the nurseries was very broad and not clear, she relied on the information Ms. Temple was able to provide in regard to the actual costs.

[12] Ms. Mumby also, in November 2020, was able to view the site location virtually via ZOOM.

[13] Ms. Mumby testified, however, based upon the information about the Trees that she received, she is confident in the accuracy of her findings, notwithstanding her not attending the site location.

[14] At the time that she prepared the Report, Ms. Mumby used the *Guide for Plant Appraisal*, *9th Edition*, written by the Council of Tree & Landscape Appraisers (CTLA) (Champaign, IL.: International Society of Arboriculture, 2000).

[15] In the Report, Ms. Mumby stated that trees have four functions, Architectural, Engineering, Esthetic, and Climate Control. She stated her opinion that the Trees performed all four of these functions.

[16] She also stated that three accepted methods of valuing trees are the Cost, Income, and Market Approaches.

[17] The Income Approach is used to appraise income-producing properties, while the Market Approach relies on comparing property sales. The Cost Approach provides an indication of the value of the Trees, and utilizes four types of cost methods:

- Replacement cost;
- Trunk Formula;
- Cost of Repair; and
- Cost of Cure.

[18] Ms. Mumby stated that the Trunk Formula Method is the appropriate method for calculating the value of the Trees.

[19] Ms. Mumby stated that she originally intended to use the Cost of Cure Method. However, she decided that the Trunk Formula Method would provide the more appropriate value for what had happened. She stated that the Cost of Cure method is more suitable where there is a large area that has been damaged, and in this case there were only the two Trees, and they were in a small area.

[20] The Replacement Cost approach did not apply as this was not a situation where the Trees could be replaced as they were, given the height of the Trees.

[21] I note that the Cost of Repair approach was not raised, likely I suspect due to the fact that there were no trees to repair.

[22] The Trunk Formula Method starts with determining the cost of buying and installing the largest available replacement tree. The next step is determining the cost per unit area for the rest of the tree that is gone. Species rating, tree condition, and location factors are taken into account. This Method looks at what function the tree is providing at its site at the time that its value is being assessed.

[23] The Trees were rated as an 85 for condition, which is an indicator of being in good condition. The larger tree had an important screening function architecturally, as well as a quite high aesthetic and environmental contribution.

[24] The Trees were also given high ratings of 90 for the contribution they were providing in the location they were at.

[25] Using the Trunk Formula Method, Ms. Mumby assessed the value of Tree 1 (46 cm diameter) as $31,200. The value of Tree 2 (25 cm diameter) was $8,700. The

Trees, with estimated heights in excess of 50 and 20 feet, were not capable of being replaced.

[26] Ms. Mumby stated that a variation of 5 cm in diameter would not make a significant difference in the value she placed on the Trees.

[27] Following questions asked of the Plaintiffs by previous counsel for the Defendant in correspondence dated March 16, 2020, after the Defendant received a copy of the Report, Ms. Mumby provided the following information via correspondence dated March 20, 2020.

[28] She stated that she used the newly released *Guide for Plant Appraisal*, *10th Edition*, written by the Council of Tree & Landscape Appraisers (CTLA) (Champaign, IL.: International Society of Arboriculture, 2018), to revise her calculations of the value of the Trees.

[29] She revised her estimated valuation for Tree 1 to $27,800 and for Tree 2 to $10,560.

[30] While replacing the Trees with smaller trees may serve a functional purpose of creating screening, this does not have an impact upon the actual valuation of the loss of the Trees.

[31] Using a replacement tree with a height of 15 feet, the largest size available locally, based upon information provided by Ms. Temple, Ms. Mumby estimated that it would take decades for it to reach the height of the larger Tree 1.

[32] Bilsten Creek Tree Services provided the Plaintiffs an estimate of $7,500 for three 15 feet Calliper Stock Alpine fir trees, which was in turn provided to Ms. Mumby.

[33] At the conclusion of the Report, Ms. Mumby states:

> My research found the replacement cost and installation costs to be twice the costs found in other parts of the chapter. Factors are increased costs for fuel, plant material, labour and equipment. The growing zone for trees in rated as 1a therefore the most difficult area to grow trees. Tree 1 was semi mature providing many functions and benefits with Tree 2, a younger tree, provided the same to a lesser state. To justify the valuations, I looked at the cost estimates obtained by my client to remove, replace the trees. Because the trees removed provided a definite screen from the neighbour, there will have to be three trees planted to begin some form of screening.
>
> Costs are:
>
> 1. Grind out the stumps: $1050.00
>
> 2. Purchase, transport and install three new conifers: $7,500.00
>
> 3. Maintenance costs to insure the survival of the newly planted trees is a cost factor. I suggest providing $500.00 per year for five years to cover additional watering and fertilizing. $2,500.00.
>
> The total out of pocket costs is estimated at $11,050.00
>
> Tree 1 removed was 15 meters tall (50 feet) and Tree 2 had a height of 6 meters (20 feet). The replacement trees will be 4.5 (15 feet) meters tall. Because of the short growing season it will take decades for the trees to reach parity. The value of $31,200 for Tree 1 and $8,700 for Tree 2 are reasonable in consideration of the location in Canada, the direct functions and benefits provided by the two trees.

Karen and William Temple

[34] Ms. Temple stated that she noticed the Trees were missing as soon as they returned home from being away.

[35] She said that the Trees were very important to her, especially the larger one, and that she was heartbroken for the first week. She stated that the larger of the Trees was one of only several on the property of that size.

[36] Her two Doberman retrievers had been buried under the shade of the Trees, in ground located on what is now the Defendant's property. At least one of these burials was done when Ms. Temple and the Defendant were in a relationship, and was done with the Defendant present. The Defendant was aware of the burial mounds and the importance of this location to Ms. Temple.

[37] The survey peg that marked the property boundary was visible, and the Defendant would have known that the Trees were on the Plaintiffs' property.

[38] She said that she believed the Defendant would have known that she would be upset by the cutting of the Trees, and that she would have refused to give him permission to cut them.

[39] The Plaintiffs' property, and the associated amenities, is very important to them. The Plaintiffs constructed a fence to provide some of the screening between the two residences that was lost as a result of the Trees being cut.

[40] Ms. Temple testified that there had been some previous concerns about the Defendant's encroachment onto the Plaintiffs' property. In particular, in August 2016 the Defendant had, while using a brusher mower, ripped out a survey peg between the properties, that the Plaintiffs then replaced, and in August 2017, the Defendant, again

using the brusher mower, mowed over several small trees that had been planted on the Plaintiffs' property.

[41] The Plaintiffs filed messages between Ms. Temple and the Defendant from 2015 to 2017. It is clear in these messages that the Plaintiff was expressing concern about the Defendant being aware of where the property line was when he was working near it. These messages included raising the Plaintiffs' concerns about the two August incidents just mentioned.

[42] Ms. Temple stated that the Plaintiffs were aware that the Defendant intended to move his cabin into the area of the Trees. They informed the Defendant in March 2019 that they had no concern, but reminded him to respect the boundaries of the shared property line.

[43] Ms. Temple obtained a quote from Bilsten Creek for supplying and planting new trees. This amount included $7,500 for three Alpine fir trees, as well $1,050 for grinding the stumps.

[44] Ms. Temple stated that Yukon Gardens would not provide her a written quote.

[45] Ms. Temple provided a photograph taken April 20, 2019, that shows there was no snow cover on the ground in the immediate vicinity of the stump of the larger of the Trees.

[46] The Plaintiffs state that because of the actions of the Defendant, they have suffered discomfort, loss of enjoyment of their property, and a loss of security. The cutting of the Trees was part of what has caused this impact on the Plaintiffs. What

Ms. Temple described as the harassment and other objectionable conduct of the Defendant, has also been a significant contributing factor.

William Temple

[47] Mr. Temple provided an affidavit in which he attested to the truthfulness of the background statement, documents, photos, and text messages submitted with the Claim. In addition, he stated that he was present and witnessed incidents that occurred on May 23, 27, and 29, 2019, that the Plaintiffs claim were insulting and harassing by the Defendant towards the Plaintiffs.

Marc Perreault

[48] The Defendant provided a letter from Mr. Perreault, a Realtor/Owner with Remax. This letter stated that there was no economic value provided by the trees to the property, and no decrease in property value. He stated that any loss of amenities would be considered to be subjective to individual taste.

[49] Mr. Perreault also testified to the same.

Michael Feniuk

[50] Mr. Feniuk testified that he was moving a mobile home to go where the cabin on his property was located. He was planning on moving the cabin to the area in the proximity of the Trees. He stated that he had told the Plaintiffs in advance of his plan to do so, and that there was no complaint.

[51] He stated that he removed a number of trees in order to accommodate his plans. He agreed that the location of the Trees did not impact upon his ability to move the cabin.

[52] He stated that he had no idea that the Plaintiffs were not in town when he cut down the Trees.

[53] He said that he did not know that the Trees were on the Plaintiffs' property. At the time, he felt that it was fine to act as he did in cutting down the Trees.

[54] Mr. Feniuk said that he had no idea as to what the Plaintiffs' reaction to the cutting of the Trees would be. He said that he did not think it would be an issue, and he had no idea that it would result in ending up in court.

[55] He stated that the Trees provided little in the way of privacy and that they did not block the line of sight to the Plaintiffs' cabin deck. He provided two pictures taken from his deck to support this line-of-sight assertion.

[56] He said that he later provided the Plaintiffs with 12 to 16 foot tree lengths.

[57] In his Reply, Mr. Feniuk denied that the two incidents in August 2016 and 2017 involving the brusher mower and the ripping up of the survey peg, and mowing down of the spruce trees occurred.

[58] Mr. Feniuk said he did not believe that he had any real interactions or communications, including by text message, with the Plaintiffs after the Trees were cut.

At various points in his testimony, Mr. Feniuk did not recall having certain communications with the Plaintiffs that he was specifically asked about.

[59] However, he acknowledged that if documentation of these conversations were in evidence, they had occurred.

[60] In cross-examination, Mr. Feniuk acknowledged that he knew a survey pin was near the location of the Trees, but that he was unaware of exactly where it was because of the snow on the ground.

[61] Mr. Feniuk also acknowledged that on several previous occasions he had asked the Plaintiffs for permission when he was going to do something that potentially could affect them, but that he did not do so before cutting the Trees.

[62] The Defendant filed an affidavit that included an estimate from local business Jat's Backyard Landscaping dated December 20, 2020. This estimate was based upon supplying and planting two burlap and basket, 1.5 to 2 metre tall White Spruce trees, and watering and fertilizing them until they took hold and were living in the ground. The amount of the estimate was $4,018.25.

Law

[63] ***Lahti*** v. ***Chateauvert***, 2019 BCSC 1081, was an action in trespass. The defendant had hired a contractor to cut down 14 trees on the plaintiff's property. The defendant asserted that he had the consent of the plaintiff to do so. The plaintiff denied that consent had been given.

[64] Young J. found that the defendant's mistaken belief in consent was not a defence to trespass. The issue then became damages.

[65] Based upon the condition of the neighbouring trees and the lack of any disease in the remaining stumps, the trees were assessed as having been in good condition at the time they were cut down.

[66] Young J. found that the trees were located in a suburban/rural setting, which is a factor in assessing damages (para. 101), and that the plaintiff had suffered the loss of amenities because of the cutting of the trees.

[67] The expert evidence assessed the value of the 14 trees using the Trunk Formula Method as being $64,780, using the Landscaper Appraiser's *Guide for Plant Appraisal (9th Edition)*. In addition, the expert evidence was that there should be consideration for additional compensation for loss of aesthetics, wildlife value, privacy, wind protection, shading and noise buffering.

[68] The cutting of the trees did not reduce the property value.

[69] The Court applied the Trunk Formula Method as a starting place to assess damages, stating in paras. 95 to 99:

> 95 The Trunk Formula Method has been recognized by this court as a method for assessing compensatory damages for the loss of trees: *Gibson v. F.K. Developments Ltd.*, 2017 BCSC 2153 para. 40 and *Ovens v. Kirkman*, 2006 BCSC 394. In *Ovens*, Justice Macaulay described the Trunk Formula Method at para. 35 as follows:
>
> > The approach to assessing damages for the loss of mature trees is well established. It would be prohibitively expensive to replace the three trees with comparable growth Douglas

> fir trees. Accordingly, the arborist calculated the value of the lost trees using the Trunk Formula Method. That formula is based on the cost of purchasing and installing the largest commercially available transplantable tree plus an increase in value due to the larger size of the original trees. The values are then adjusted to reflect amenity factors such as species, condition and landscape location. …

96 The defendants urge the court to exercise caution when assessing damages for trespass. They rely on *Kates v. Hall* (1991), 53 B.C.L.R. (2d) 322, aff'd (1991), 53 B.C.L.R. (2d) 322 (C.A.), which says that the appropriate award for damages in trespass is the amount required for remedial work that a reasonable person would have incurred to address the loss and the amount needed to compensate fairly the loss of use and enjoyment of the land.

97 In *Ovens*, Justice Macaulay considered *Kates* at para. 37 and interpreted the decision as follows:

> [37] *Chan* involved the application of the principles respecting assessment of damages set out in *Kates v. Hall* (1991), 53 B.C.L.R. (2d) 322. I summarize the principles as follows. Damages may extend to the cost of restoration, within reasonable bounds, together with compensation for loss of amenity to the extent that complete restoration cannot reasonably be effected. The trespasser is not required to finance restorative measures which are plainly unreasonable. The damages must represent what is reasonable, practical and fair in all the circumstances, not just from the perspective of the plaintiff.

98 Although Justice Macaulay relied on the Trunk Formula Method, he did not adopt the expert's calculation outright. Rather, he reduced the value slightly from $16,523 to $16,000 for the cost of replacement and loss of amenities.

99 Justice Gerow also considered *Kates* in *Heuser v. Carnovale*, 2016 BCSC 2620. She noted that damages in trespass must have an element of reasonableness and fairness. An award of damages should include: (1) the amount necessary for remedial work that a reasonable person would have incurred to address the loss and, (2) where remedial work cannot fully replace the loss, the amount required to fairly compensate the plaintiff for the loss of use and enjoyment of the land (para. 47). This latter portion of the award is for loss of amenity. Relying on *Graw v. Rockwell*, 2010 BCSC 1295, Justice Gerow noted that damages for loss of amenity "are at large and based on an estimate of the value of the loss of amenities for the plaintiffs" suffered as a result of "the less than perfect restoration"

> (para. 92). Justice Gerow said that the diminution in the value of the property as well as the cost of reasonable repairs should be considered. The injured party's actual use of the property is also a factor to be considered.

[70] From the value of $64,780 arrived at using the Trunk Formula Method, Young J. deducted $18,000 for a tree that was compromised due to leaning, and another $3,250 for a smaller tree that had been struck by lightning. She also deducted $386 that the plaintiff had received for the wood from the trees.

[71] Young J. awarded damages of $50,000, which included unspecified amounts for the loss of amenities, and for future removal of the stumps, clearing of the area and landscaping.

[72] Young J. also noted, in paras. 112 to115, that there had been many cases involving tree cutting in which punitive damages had been awarded.

[73] In para. 111 she stated that "…punitive damages arise when the court finds a defendant's conduct calls for rebuke".

[74] Young J. awarded $2,000 in punitive damages, stating in para. 116:

> I find that a low award of $2,000 for punitive damages is appropriate in this case. As I found earlier, Mr. Chateauvert believed he had permission to cut the trees and his doing so in the plaintiffs' absence was not part of a scheme to get away with the act. However, I find he was reckless in jumping to conclusions about the plaintiffs' permission. He cut the trees when he knew the Lahtis were not home and could not object without clarifying whether he had permission to do so, and if so, which trees could be cut. He and Ms. Chateauvert have benefited from removing the trees that shaded their deck. I find Mr. Chateauvert's reckless disregard for the plaintiffs' interests to be worthy of some rebuke.

[75] In ***Gibson*** v. ***F.K. Developments Ltd.***, 2017 BCSC 2153, involving the cutting down of one tree in the plaintiff's backyard, Punnett J. awarded the $9,100 cost of the tree as calculated by the expert, in that case also Ms. Mumby, using the Trunk Formula Method, as well as $900 for loss of amenities, and additional special and punitive damages.

[76] Interestingly, it was the defendants who argued that the Trunk Formula Method was the appropriate means of calculating damages, in attempt to circumvent the awarding of additional general damages. Punnett J. stated in paras. 51 and 52:

> 51 The defendants rely on a number of authorities in support of their submission that the amount for the loss of the tree proposed by the expert of $9,100 is sufficient: *Ovens, Hanna v. Muir*, 2000 BCSC 1288, *Bowbrick v. Jakob*, 2017 BCPC 194, *Rowe v. Thompson*, 2011 BCSC 430 and *Muncaster*.
>
> 52 In my view an award of $10,000 for general damages is appropriate, taking into account the importance to the plaintiff of her backyard, the fact that only a single tree was removed but it was substantial, was one of only four, and the fact that its removal has left a large gap in the trees partially screening the back of the plaintiff's property; and as well taking into account the authorities referred to and the dates of those authorities relating to compensatory damages.

[77] Punnett J. also awarded $10,000 in punitive damages due to the intentional, high-handed and reprehensible conduct of the defendants.

[78] The nature of the trespass is a relevant factor in deciding whether to award punitive damages.

[79] Four types of trespass were noted in ***Avender*** v. ***Western Canadian Timber Products Ltd.***, 2018 BCSC 1711. As stated by Butler J. in paras. 7 and 14:

> 7 Other cases have wrestled with the characterization of a defendant's actions in awarding damages for trespass. In *Konno v. Harrison-Jones*, 2010 BCSC 1034, the court referred to the decision in *Voss v. Crooks et al.*, 2002 BCPC 3, in which Judge Brecknell set out four types of trespasses as described in *Arboriculture and the Law in Canada*:
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> > *Technical trespass, where boundary lines are crossed accidentally with minimal damage;
> >
> > *Inadvertent trespass, where boundary lines are crossed by mistake when the trespasser believed it to be at a different location;
> >
> > *Wrongful trespass, where a boundary line is crossed because of indifference or negligence in determining its location; and
> >
> > *Wilful trespass, where a boundary line is crossed deliberately and damage is inflicted in full knowledge of being beyond the boundary line.
>
> …
>
> 14 Applying the reasoning in *Kates*, I need not consider the nature of the trespass when determining a fair award for compensatory damages. Instead I must arrive at an award that is fair and reasonable between the parties applying common sense and taking into account the basic principles of *restitutio in integrum*. However, the nature of the trespass remains an important issue in considering the plaintiff's claim for punitive damages.

[80] In awarding punitive damages, Butler J. stated in para. 69:

> I have already set out my findings about the steps taken by the defendants to determine the location of the property line between the Tamihi and Avender properties. My findings mirror those made by the courts in *Cook, Kranz* and *Kachanoski*. The defendants made no attempt to obtain survey information, look for survey markers or make reasonable inquiries to determine property boundaries. They simply wanted to harvest the timber that they assumed was on the Tamihi property. Their actions can be fairly described as reckless and high-handed. Their failure to take any reasonable steps before harvesting timber with a feller buncher in that setting represents a marked departure from the standard of behaviour expected from a neighbour or a logging contractor. The defendants' actions are deserving of an award of punitive damages.

Analysis

[81] The cutting of the Trees was clearly a trespass and gives rise to liability on the part of the Defendant.

[82] There was no appreciable benefit to the Defendant in cutting the Trees, and it was not a necessary action.

[83] There was detrimental loss to the Plaintiffs as a result of the cutting of the Trees.

[84] I find the evidence of the Plaintiffs, including that of Ms. Mumby, to be both credible and reliable. I find the evidence of the Defendant to be somewhat less so.

[85] I find that Ms. Mumby's evidence is not challenged in any meaningful way with respect to her methodology or valuation results. The Trunk Formula Method is a widely accepted methodology for valuing the loss of trees in litigation in circumstances such as exist here. There is no reason to doubt Ms. Mumby's findings.

[86] I appreciate that the Trees were located in a general area which is quite forested, and not in an urban setting. However, the Trees were not lost in the middle of the forest, so to speak; they were somewhat separated out by their location at the outside edge of the treed area. The larger of the Trees, being somewhat distinct in its size on the property of the Plaintiffs, further separated it out from the "pack".

[87] Further, I accept the Plaintiffs' evidence that the Trees were blocking the line of sight between the Plaintiffs' front deck of their residence and the deck of the Defendant's cabin. Ms. Mumby also testified that during the ZOOM call, it was clear to

her that the Trees had been in the line of sight between the two residences, as Ms. Temple testified to.

[88] The photographs provided by the Defendant are clearly not taken from the part of the deck that would have been most useful when assessing the line of sight, but rather from an angle that provides a somewhat disingenuous result. I reject his testimony on this point.

[89] I accept Ms. Temple's evidence that the Defendant should have known that the cutting of the Trees would be disturbing to her, given the proximity of their location to where two of her dogs were buried.

[90] I find that the loss of the Trees had a detrimental personal impact upon Ms. Temple with respect to the location of the buried dogs, as well as the loss of privacy.

[91] I find that the evidence of Marc Perreault does not particularly assist me. While the fact that the cutting of the Trees did not have the effect of lowering the property value, that is only one aspect of damages, and his evidence left open as being subjective the impact of the loss of the various amenities the Plaintiffs have suffered.

[92] I find that the evidence of the Defendant is not as credible and reliable as that of the Plaintiffs. His evidence did not challenge the evidence of the Plaintiffs in any significant way, and where there is a contradiction in the evidence, I prefer and accept the evidence of the Plaintiffs.

[93] I find that the Defendant's action in the cutting down of the Trees was, at best, extremely reckless, to the extent that it comes perilously close to being able to be considered intentional, or the equivalent of being intentional. He was, or should have been, well aware of the Plaintiffs' previously expressed concerns about making sure that the property lines were known and respected. He does not appear to have made any real effort to ensure he was only doing work on his own property.

[94] I appreciate that the Defendant stated that he did not know that the Plaintiffs were away at the time he cut down the Trees. In light of the entirety of his evidence, I find his evidence in this regard to be somewhat suspect. Regardless, the Defendant should have not assumed anything.

[95] Even were I to accept the evidence of the Defendant that he was unaware that the Plaintiffs were away when he cut down the Trees, I would have expected that by any level of reasonableness, the Defendant should have confirmed that either the Trees were on his property, or that he had the consent of the Plaintiffs to cut down the Trees. He did neither.

[96] His failure to ensure that the Trees were on his property was careless and reckless, at best.

[97] His further failure to communicate with the Plaintiffs to obtain their consent to cut the Trees was, at best, also careless and reckless.

[98] At worst, this is evidence from which I can draw the inference that the Defendant knew that the Trees were not on his property and that the Plaintiffs would object, which is why he acted as he did.

[99] Even assuming that the Defendant was simply unsure whether the Trees were on his property, I can also draw the inference that he was concerned that they might not be, which is why he did not confirm where the property line was and why he did not contact the Plaintiffs, because he wanted to cut down the Trees.

[100] I find that there is no basis in the evidence to support a finding that the Defendant honestly but mistakenly believed that the Trees were on his property.

[101] The amount of $25,000 for general damages claimed by the Plaintiffs is certainly reasonable, and in my opinion based on the law and the evidence, very likely less than they would likely have been awarded if they had pursued this matter in Supreme Court, and chosen not to reduce their Claim in order to fit it within the jurisdiction of this Court.

[102] In saying this, I am not including any damages for the construction of a fence. While the Plaintiffs may wish to build one, and for perhaps good reason, I will not lay the costs of a fence upon the Defendant. The Report allows, within the Trunk Formula Method, for an alternative method to address the loss of screening.

[103] In addition, I find that the Plaintiffs would be entitled to punitive damages as a result of the wilful and reckless action of the Defendant in cutting down the Trees. If I had not already determined that the award for general damages is the maximum

allowable under the *Act*, I would have awarded an additional $4,000 for punitive damages.

[104] There were claims by the Plaintiffs of actions of the Defendant that they considered to constitute harassment, and otherwise generally evidence of the Defendant being a “bad” neighbour in the time frame contemporaneous to the cutting down of the Trees.

[105] I do not find it specifically necessary to address these claims in order to decide this matter. My award of damages in this case is not affected by this aspect of the Plaintiffs’ Claim.

[106] In conclusion, for General Damages for the cutting of the Trees, I award a total of $25,000, the maximum allowable. Based on the law and the evidence before me, a higher amount may have been justified, if such an award of damages was available.

[107] I will not deduct any amount for the length of wood the Defendant provided the Plaintiffs. I do not have a value for these, but suspect that it would be within the value of the Trees that the Plaintiffs have foregone by reducing the amount of their claim.

[108] Although I would have awarded $4,000 in punitive damages, I will not do so due to the jurisdictional limits prescribed by the *Act*.

[109] The Plaintiffs shall have their costs as follows:

- $100 for the filing of the Claim;
- $52.50 for the service of the Claim; and

- $50 for the filing of the Notice of Trial.

[110] In addition, I award the Plaintiffs costs in the amount of $567 for the preparation of the Report by Ms. Mumby, and for her attendance at trial.

[111] The *Act* states in para. 3 that:

> 3 Subject to this Act and any other Act, the Small Claims Court shall hear and determine in a summary way all questions of law and fact and may make any order that is considered just. *S.Y. 2002, c.204, s.3*

[112] Section 11 of the *Act* allows for the creation of regulations respecting the costs of proceedings.

[113] The *Small Claims Court Regulations,* O.I.C. 1995/152, (the "*Regulations*") provide for certain costs to be awarded as follows:

- Section 36(2) provides for the court to order discovery, including the terms as to costs, as are just;

- Section 38 of the *Act* allows for costs for applications to be recoverable, up to $250, unless the court determines that special circumstances exist;

- Sections 58 to 59 set out the maximum fees that the court can award for the preparation and filing of pleadings, counsel fee at trial, and for inconvenience and expense, including the ability of the court to award counsel fees that exceed the prescribed limits where special circumstances exist;

- Section 74 allows for the clerk of the court to assess and pay out the disbursement costs for the successful party, subject to review by the court; and

- Section 75 states that the prescribed fees are set out in Schedule “A”.

[114] The *Act* and the *Regulations* are otherwise silent on the issue of the awarding of costs for expert reports and testimony.

[115] In ***Learning*** v. ***Glenn Arbour Condominiums Inc.***, 2006 NSSC 5, McDougall J. considered the issue of whether a decision of a Small Claims Court adjudicator to award costs for expert fees was within the jurisdiction of the adjudicator. The adjudicator had awarded full costs in the amount of $8,511.99, over and above the maximum award already given for damages.

[116] After considering statutory authority and case law from several jurisdictions, McDougall concluded that it was, stating in paras. 45 and 46:

> 45 Although the adjudicator is restricted in the type of costs that can be awarded, there is some latitude or discretion to award "additional out of pocket expenses." This exercise of discretion by the adjudicator should not be lightly interfered with unless in the exercise of that discretion the adjudicator has made an obvious error. Otherwise, it should be left to the individual adjudicator to decide on a case by case basis. The fundamental purpose of the legislation which is to provide an informal and inexpensive forum in which to adjudicate matters falling within the jurisdiction of the Court should not be forgotten.
>
> 46 Given the importance of the experts' evidence in assisting the adjudicator to decide this case, it was reasonable for him to award the successful plaintiffs the costs incurred in procuring the two expert reports.
> …

[117] The ability to award “out of pocket expenses” was statutorily prescribed, as noted in para. 11.

[118] McDougall J. noted that in proceedings in British Columbia, the *Small Claims Act*, R.S.B.C. 1996, c. 430, provides in Section 19 and Rule 20 (B.C. Reg 261/93, as amended) for the judge or registrar to make an award for:

> 35 …
>
> (c) any other reasonable charges or expenses that the judge or registrar considers directly relate to the conduct of the proceedings.

[119] In para. 38, McDougall J. concludes that:

> These cases from Ontario and British Columbia suggest a general acceptance of experts’ reports and witness fees provided they are both reasonable and relevant to the case.

[120] I am satisfied that the Report and testimony of Ms. Mumby were essential to the Plaintiffs’ ability to present their case. The costs for the Report and Ms. Mumby’s attendance at trial were reasonable.

[121] As noted, the *Act* and the *Regulations* are silent on the issue of costs being able to be awarded for expert reports and testimony. I note that there remains a discretion in certain circumstances for the court to award costs that exceed a prescribed limit.

[122] Neither does the *Act* or the *Regulations* contain specific provisions such as noted in the British Columbia and Nova Scotia statutes as set out above.

[123] I also note, however, that there are no specific provisions that curtail the ability of the court to award costs related to expert reports and testimony. I am satisfied that s. 3 of the *Act* allows for the court to make any order that is considered just. I am satisfied that ordering the Defendant to pay the costs associated with the Report and testimony of Ms. Mumby is just, and I do so order.

[124] The Plaintiffs shall have post-judgment interest pursuant to the *Judicature Act*, RSY 2002, c. 128.

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COZENS C.J.T.C.