The Boundary Point
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Case Commentaries on Property Title and Boundary Law

The Boundary Point is published by Four Point Learning as a free monthly e-newsletter, providing case comments of decisions involving some issue or aspect of property title and boundary law of interest to land surveyors and lawyers. The goal is to keep you aware of decisions recently released by the courts in Canada that may impact your work.

A basic element of a surveyor's work in evaluating evidence is the ability to trace the origin of specific elements back in time to when they were first established. Whether it was a post planted, or a fence erected or a hedge first planted, the ability to understand the provenance of the survey evidence is critical to an ability to view the element with a level of confidence necessary to accept it. Likewise, the significance of other elements of boundary and title evidence depends on an ability to draw linkages back in time to when these elements were first established. For survey evidence, there may be "presumptions" that apply, and inferences that can be made, in order to assist in the drawing of connections over time. In contrast, evidence of title – especially adverse possession – has evolved with seemingly more rigorous demands on the evidence: a continuous, uninterrupted chain of possession must be shown back in time to when occupation is said to have first started.

However, this onus may be easier to state in concept than in practice. What happens if there is a gap in the evidence needed to show an uninterrupted chain? The issue arose in a decision from the British Columbia Court of Appeal in *Mowatt v. British Columbia (Attorney General)*.[1]

How Can Continuity of Possession be Proven?

Key Words: *adverse possession, proof, occupation, evidence, title*

The appellants in *Mowatt* claimed title to a disputed area based on adverse possession. Their predecessors in title settled on the subject property in 1909. In asserting a claim to title, the appellants submitted that the paper title owner's interest had been extinguished in 1929. Based in the City of Nelson, British Columbia, on the shore of Kootenay Lake, the location can be seen in Figure 1 below, shaded in red.

[1] *Mowatt v. British Columbia (Attorney General)*, 2016 BCCA 113 (CanLII), http://canlii.ca/t/gnnlt

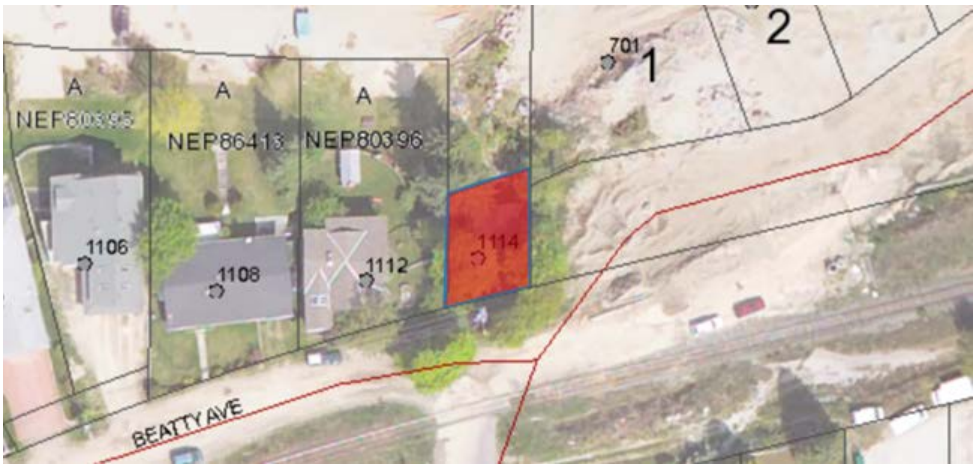

Figure 1: Illustration of disputed lands in Mowatt[2]

The court identified several issues that were "alive" in the trial proceeding below, but most interesting is the observation that this was the first case involving adverse possession in British Columbia in over 60 years. The reason for this passage of time without incident was explained by the court as a direct result of a result of legislative changes.[3] However, the rarity of adverse possession cases was stated as an opportunity for explaining the legal framework governing claims to title based on adverse possession before turning to the specific facts of this case.

Continuity of possession over the requisite time period has been long recognized as an essential element in order to succeed in an adverse possession claim. As the court explained, this continuity need not be while the ownership is with a single party, but rather may be held by successive parties who, in the aggregate, satisfy the requisite time period.

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[2] From: the Central Kootenay Web Map at https://maps.rdck.bc.ca/ A detailed explanation of the relationship between the disputed area and the neighbouring registered lot to which title absolute is held was outlined in *Mowatt v. British Columbia (Attorney General)*, 2016 BCCA 113 (CanLII), at paras. 25-27, as:

> The Disputed Area lies within the present boundaries of the City of Nelson in an area known as Fairview. Fairview was incorporated into the City in April 1921. The Disputed Area, which borders on Kootenay Lake to the north, is about 40 feet wide and 52 feet deep. It now has a civic address: 1114 Beatty Avenue.
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> To the west, the Disputed Area borders on what the parties call the Registered Lot which has the civic address 1112 Beatty Avenue. The Disputed Area and the Registered Lot are integrated in the sense that there is no visible boundary between them and the landscaping creates a harmonious whole. There is no dispute over the appellants' ownership of the Registered Lot, purchased by them in 1992.
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> Both the Registered Lot and the Disputed Area border on Beatty Avenue immediately to their south. Beatty Avenue runs along a Canadian Pacific Railway right-of-way next to the railway line. The Registered Lot and the Disputed Area lie between the railway line and the lakeshore, east of Nelson Avenue. The Disputed Area lies north of the end of 4th Street, which runs south to north ending with a "T" intersection at Beatty Avenue adjacent to the railway right-of-way.

[3] As jurisdictions in Canada with a registration of deeds system of land registration move to a system on registration of title, the new regime typically provides for a "grandfathering" of rights acquired before conversion into the new land titles system. Similar to British Columbia, Nova Scotia and Ontario have adopted comparable provisions.

> The doctrine of adverse possession does not require that the adverse possessor be the same person, provided adverse possession is continuous. Possession by different squatters can be "tacked" on one after the other, provided there is always someone for the true owner to sue. *Anger & Honsberger, Law of Real Property*, loose-leaf (consolidated December 2015), 3rd ed. by Anne W. La Forest (Toronto: Canada Law Book, 2006) at §28:50 states:
>
> > Once adverse possession has commenced, thus causing a right of action to accrue in some person with a superior right to possession, the time will continue to run against that person so long as there is continually some person in adverse possession who may be sued. Thus, either successors by transfer or by devolution to the title of the original adverse possessor, or a subsequent adverse possessor who is acting independently to dispossess the original adverse possessor or those claiming under them, may add together, or tack, all the prior periods of time together to extinguish the superior claim. However, if the original adverse possessor or those claiming title under them should abandon possession before the superior right of possession is extinguished, and there should be a gap before a subsequent adverse possessor acquires possession, no tacking is possible. During the period when no one was in adverse possession, the person with the superior right to possession would have no person to sue. Accordingly, time ceases to run against that person and, when the subsequent adverse possession occurs, time starts running anew.
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> As we shall see, this case failed in the Supreme Court of British Columbia on the proof offered for continuity of possession as between at least two families during the material period. In other words, this is a tacking case.[4]

Characterizing the case as one of "tacking" is a direct result of the appellant's inability to complete the needed chain of continuity in possession almost a century ago. This may not be unusual given the passage of time: no person is still alive who can testify through *viva voce* evidence. A claimant must therefore resort to other forms of evidence. Similar to other jurisdictions in Canada in which the title to land is registered under a *Torrens*-type of land title registration statute, adverse possession is not permitted in British Columbia, but there are provisions for the "grandfathering" of claims brought forward through elements of legislative reform. The court below had summarized the operation of the law in this respect as follows:

> The *Statute of Limitations* was in effect between 1897 and 1975. The acquisition of title by adverse possession was abolished on July 1, 1975, with the coming into force of the former *Limitations Act*, S.B.C. 1975, c. 37 (subsequently retitled the *Limitation Act*). However, that does not apply here, where the land was acquired before 1975: *Limitation Act*, R.S.B.C. 1996, c. 266, ss. 12, 14(5). Similarly, s. 28 of the current *Limitation Act*, S.B.C. 2012, c. 13, provides as follows:

[4] *Mowatt v. British Columbia (Attorney General)*, 2016 BCCA 113 (CanLII), at paras. 8-9

1) Except as specifically provided by this or any other Act, no right or title in or to land may be acquired by adverse possession.

2) Nothing in this *Act* interferes with any right or title to land acquired by adverse possession before July 1, 1975.[5]

The difficulty with the appellants' claim lay not only in the lack of clarity, but in needing to establish continuity of possession, they went to extraordinary lengths to adduce evidence. The court described a truly remarkable effort which clearly drew on archival research and resulted in a record that sounded like a forensic exercise:

> The judge was presented with a variety of documentary evidence bearing on the issues before him. The evidence … includes contemporary records such as British Columbia and City of Nelson voters lists, the 1910 Henderson's BC Gazetteer and Directory, the 1911 Census of Canada, Nelson and District Directories for years such as 1913, 1914 and 1915, school records, employment records, vital statistics records, and newspaper reports. The evidence requires interpretation and demands the drawing of inferences because the evidence is not unequivocal. For example, during the material period, there were no civic addresses, and so the 1913 Nelson and District Directory describes George W. Cooper as a storekeeper working for the shipyards (which were located a block from the Disputed Area) and shows him living in a house on 4th Street, north of the railway tracks in Fairview. Maps of the area show that location corresponding to the Disputed Area. *Unsurprisingly, given the era in which the events occurred and our distance in time from the events, the records are neither comprehensive nor uniformly complete*.[6] [*emphasis* added]

Describing continuity of possession as "the nub of the case," the court affirmed that the standard of proof was "on a balance of probabilities," and that the onus of proof was with the appellants. However, especially troubling to the appellate court was the degree of proof which the trial court seemed to require from the appellants. The court summarized this as follows:

> The appellants challenge the judge's conclusion that they had not shown the continuous possession required to establish their claim in adverse possession to the Disputed Area. That conclusion is found in paras. 107 to 109 of the first reasons for judgment and restated in para. 52 of the second reasons for judgment:
>
> > [107] However, in this case, there is a sizeable evidentiary gap in relation to the adverse possession of the Disputed Area. There is an approximate four year period between the last evidence of Mr. Cooper arguably living on the Disputed Area in August 1916, and the first evidence of the Gouchers as residents of Fairview "near [the] Shipyard" in November 1920.

[5] *Mowatt v. British Columbia (Attorney General)*, 2014 BCSC 988 (CanLII), at para. 19

[6] *Mowatt v. British Columbia (Attorney General)*, 2016 BCCA 113 (CanLII), at para. 33

> [108] Putting the petitioners' case at its highest again, even if I find the Cooper and Goucher residences were one and the same and on the Disputed Area, there is no evidence of continuity of the Coopers' adverse possession with the Gouchers.
>
> [109] Again, it is possible that the Gouchers moved in the same day the Coopers moved out. But the evidence does not establish that. The evidence before me falls short of proving continuous occupation of the Disputed Area on a balance of probabilities.

and

> [52] The evidence establishes on a balance of probabilities that the Coopers and the Gouchers lived on the Disputed Area. However, for the reasons I have expressed, I remain of the view that the petitioners have not shown continuous occupation of the Disputed Area.[7]

Does "proof" of events having occurred long ago, and outside living memory, allow for a greater weight to be attached to circumstantial evidence? Can more inferences be made? These questions are commonly encountered by land surveyors when engaged in the activity of retracing an existing cadastral boundary. In *Mowatt*, the ***degree of proof*** of a required continuity of possession was squarely before the court as a key issue in this appeal.

> …The appellants' claim depends upon a web of circumstantial evidence, some of the threads mere shadows and others quite sturdy, from which inferences must be drawn by the application of judgment on the probability of the asserted fact. The approach of Mr. Justice O'Halloran in *Faryna v. Chorny* (1951), 4 W.W.R. (N.S.) 171 at 174 (B.C.C.A.), in discussing the credibility of interested witnesses, with modification, is apt: "… the real test of the truth of [the theory] must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."
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> The critical issue in this case concerns continuous possession, not continuous user or occupation. This question is qualitative and circumstance dependent. The general approach to possession is described in *Kirby*, where at 603 in his advice given for the Privy Council, Lord Shaw cited with approval, language from *The Lord Advocate v. Lord Lovat* referred to earlier but replicated here again for convenience:
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> > On the general subject of possession, the language of Lord O'Hagan in *The Lord Advocate v. Lord Lovat* (…) – language cited with approval by Lord Macnaghten in *Johnston v. O'Neill* (1911, A.C. 583) – appears to be applicable to the present case. Possession "must be considered in every case with reference to the peculiar circumstances … the character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests; all these things, greatly varying as they must under various conditions, are to be taken into account in

[7] *Ibid.*, at para. 70

> determining the sufficiency of a possession." There does not appear to their Lordships to be much doubt accordingly that possession of this land was, during the years in question, with the Appellant, and no possession of any kind with the Respondent.[8]

The error made by the trial court, as identified on this appeal, was the preoccupation with what the appellants' evidence ***lacked***, as opposed to recognizing what the evidence ***did prove***, under all of the circumstances. The explanation given by the court is especially helpful in how it identifies "proof" of historic fact as a combination of resources based in science and history:

> The judge, however, found more than a lack of evidence of possession for every calendar year; he found a four-year gap in proven occupancy by the Coopers (1916) to occupancy by the Gouchers (1920) which he equated with a gap in possession. This gap, he said, was too long to satisfy the criteria. While acknowledging that record keeping a century ago was not to the standard of today, he said, "I am not satisfied that the evidence is 'as satisfactory as could reasonably be expected, having regard to the circumstances'".
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> In his treatise *An Essay on the Principles of Circumstantial Evidence, 6th ed.* (London: Butterworth & Co., 1912), William Wills explores circumstantial evidence and its relationship to experience. He observes that conclusions are drawn by analogy with similar facts and events, giving at p. 15 as illustrations of knowledge gained by reasoning and extrapolation the example of Georges Cuvier (recognized as establishing the sciences of comparative anatomy and paleontology) who, Wills said, "from a single fossil bone, [described] the structure and habits of many of the extinct animals of the antediluvian world", and the prediction by astronomers, before the discovery of Neptune, that there was a planet beyond Uranus. That scholarly approach is particularly suited to claims dependent on events of long ago.
>
> With respect, as we discuss below, the two sets of reasons for judgment appear to hold back from full consideration of the reasonable inferences available on the evidence before the court by focusing on the absence of evidence, without considering all the positive evidence and the silence on the subject in other evidence. In failing to recognize all the information inherent in some evidence (for example as we will discuss, information implicit in an account of school Christmas examinations in 1919), in failing to relate vital pieces of evidence to other evidence, and in failing to address reasonable inferences, the judge short-changed the application of the standard of proof. The judge's approach did not reflect the cases referred to earlier, e.g., *B.C. v. Canadian Pacific Railway Co.* and *Tweedie*, and is not the approach we have become familiar with in cases involving aboriginal rights and claims. Nor did the judge ask the question whether the Land Company had somebody to sue for ejectment during the gap years had it been minded to address the blatant presence of a structure on its property.

[8] *Ibid.*, at paras. 76-77

> These features, in our view, demonstrate error in the approach applied to the legal issue before the court, and in the exercise of the fact-finding function.
>
> We recognize that the judge's task on this judicial inquiry is directed by the burden of proof which lies always with the party asserting title over the owner of the absolute fee. Yet it appears to us that the judge's view of the evidentiary requirements shouldered by the appellants effectively faults them for an absence of documentary evidence in a case with a remarkable amount of information, considering the times and places of the events, an approach that is discordant with s. 30 of the *Land Title Inquiry Act* replicated earlier which instructs the court to apply the simplest machinery "consistent with reasonable prudence". We note that knowing of the squat and despite municipal taxation of it for years, the Crown did not assert its title until living memory slipped away. While this observation does not shift the burden, it militates in favour of a broad elliptical assessment of the available evidence consistent both with established deduction processes used in historical and scientific study, and with the curious-minded view reflected in jurisprudence of claims involving long ago events.[9]

Turning to (and considering) ***all*** of the evidence which was before the trial court, the Court of Appeal noted its own jurisdiction to make findings of fact on the evidentiary record that was before the court below. In doing so, it revisited the same evidence, and also noted additional evidence before the trial court – but was not referred to in the trial court's reasons. The appellate court asked the question:

> Where does this lead? First, in our respectful view, the judge erred as we have described. This court, by s. 9 of the *Court of Appeal Act*, may make inferences and determinations that could have been made by the trial court. Applying s. 9, we conclude, in consideration of the affidavit evidence of George S. Cooper's daughter, the newspaper account of George R. Cooper's death and his death certificate, the evidence of Gilbert Goucher's education in 1918, and the history of the voting lists, that it is more likely than not that the George R. Cooper family occupied the structure on the Disputed Area until early 1917, and that the Goucher family occupied it at least as early as the fall of 1918. This occupancy gap is from 1917 to 1918, well within the length the judge suggested may be consistent with proof of continuity sufficient for the appellants' claim. Second, there is good reason to consider the structure was not abandoned, that adverse possession continued until it devolved to the Goucher family. Third, we would not describe the evidence assembled in support of this claim as unsatisfactory in the sense that it is less than could reasonably be expected, having regard to the circumstances.
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> The issue is simply whether it is more likely than not that this land was continuously in the possession of someone other than the legal owner. The *Land Title Inquiry Act*, in aid of the inquiry, allows the question to be answered on the basis of material that is not otherwise

[9] *Ibid.*, at paras. 85–89

> admissible in court. In this framework, we conclude it is more likely than not that the Disputed Area was continually in the possession of parties other than the legal owner during the gap years that were identified by the judge. Putting it another way, we conclude that had the Land Company elected to assert its title in the gap years there was always somebody against whom it could have claimed.[10]

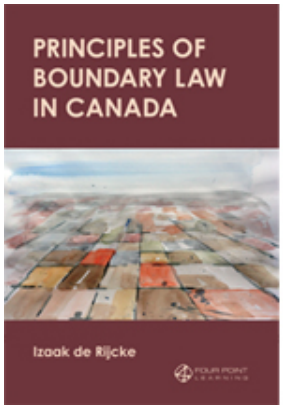
The appeal was allowed. This decision is presently the subject of a further Application for Leave to Appeal to the Supreme Court of Canada by the City of Nelson.[11] While the proceeding runs its course, it remains as an important case to monitor for its treatment of evidence and proof relating to historic claims to interests in land.

Editor: Izaak de Rijcke

FYI

There are many resources available on the Four Point Learning site. These include self-study courses, webinars and reading resources – all of which qualify for *formal activity* AOLS CPD hours.[12] These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year's quota, and are expanding in number as more opportunities are added. Only a select few and immediately upcoming CPD opportunities are detailed below.

HERE NEXT MONTH: *Principles of Boundary Law in Canada*



See Principles of Boundary Law in Canada for a list of chapter headings.

In this book, there is described and developed a concept of the nature of boundaries which will assist in explaining and communicating to clients what we do as land surveyors: the nature of a legal boundary is a containment of rights which the law recognizes and which serve as a cornerstone of prosperity in our society. In today's complex world, the need for a benchmark work is met in this comprehensive book on boundary principles. Boundaries, and how lawyers, the courts, and we think about them, are complex – and becoming increasingly so –

[10] *Ibid.*, at paras. 108-109

[11] See: http://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=36999

[12] Please note that the designation of CPD hours is based on the estimated length of time for the completion of the event. The criteria used are those set out in GeoEd's *Registered Provider Guide* for Professional Surveyors in Canada. Other professions may qualify under different criteria. References to AOLS are to its Continuing Education Committee. Elsewhere in Canada, please confirm your eligibility for claiming CPD hours.

because of the constant progress of the common law prompted by decisions and evolving ideas. This book addresses this phenomenon directly and does not shirk away from tackling some of the most novel ideas which we must understand in our daily work. As a reference work, this book promises to be an indexed, organized and well referenced guide in reaching a deeper understanding of boundary principles in Canada. We know that all jurisdictions in Canada have their unique rules and procedures as determined by history and legislation. These differences are explained and compared, as well as an explanation of the starting point, from which all common law jurisdictions began.

The edited manuscript is now in the final stages of layout for the printers. Printing of the book will begin later this month and prepaid orders will be filled first. Thank you for your support and patience.

If you wish to contribute a case comment, email us at TBP@4pointlearning.ca.

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