



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.

Adverse Possession may no longer be possible in most *Torrens* land title systems; yet, it seems to remain as a continuing point of litigation across Canada. In this issue of *The Boundary Point* we consider a case in Ontario in which the judge stated, “The cases on adverse possession are legion and each case turns on its own set of particular facts.” Why does adverse possession persist? Is the outcome of these disputes always the result of a particular set of facts or are there common principles? These questions are explored in the context of a review and discussion of *Osman v Heath*.¹

This issue of *The Boundary Point* will be of interest to lawyers and land surveyors alike; questions of title and boundary are both very alive in the decision reviewed and will be relevant to all professionals dealing with real estate.

Possession: When is it Adverse and When is it Evidence of the Boundary?

Key Words: *evidence, adverse possession, inconsistent use, occupation*

The location for the dispute in *Osman v Heath* is the small town of Kemptville in eastern Ontario. The parties were owners of properties sharing a common rear boundary and fronting on opposite sides of the same block. Their relative position to one another can be seen below in Figure 1, but the issue of contention was the right to legal ownership of a large building that straddled the common boundary. This required the court to evaluate evidence how the building was used, how it was accessed and whether or not there was an interior dividing wall that separated one half from the other.

Many facts were agreed to before trial, but there remained a number of key elements that required the court to hear evidence from the parties and several witnesses. Osman owned the commercial property used as a pizza restaurant, fronting on Prescott Street. Heath owned the

¹ *Osman v Heath*, 2016 ONSC 4812 (CanLII), <http://canlii.ca/t/gsr7s>

residential property to the north, fronting on Thomas Street; the straddling building is a surprisingly large structure. It would be difficult to ignore.

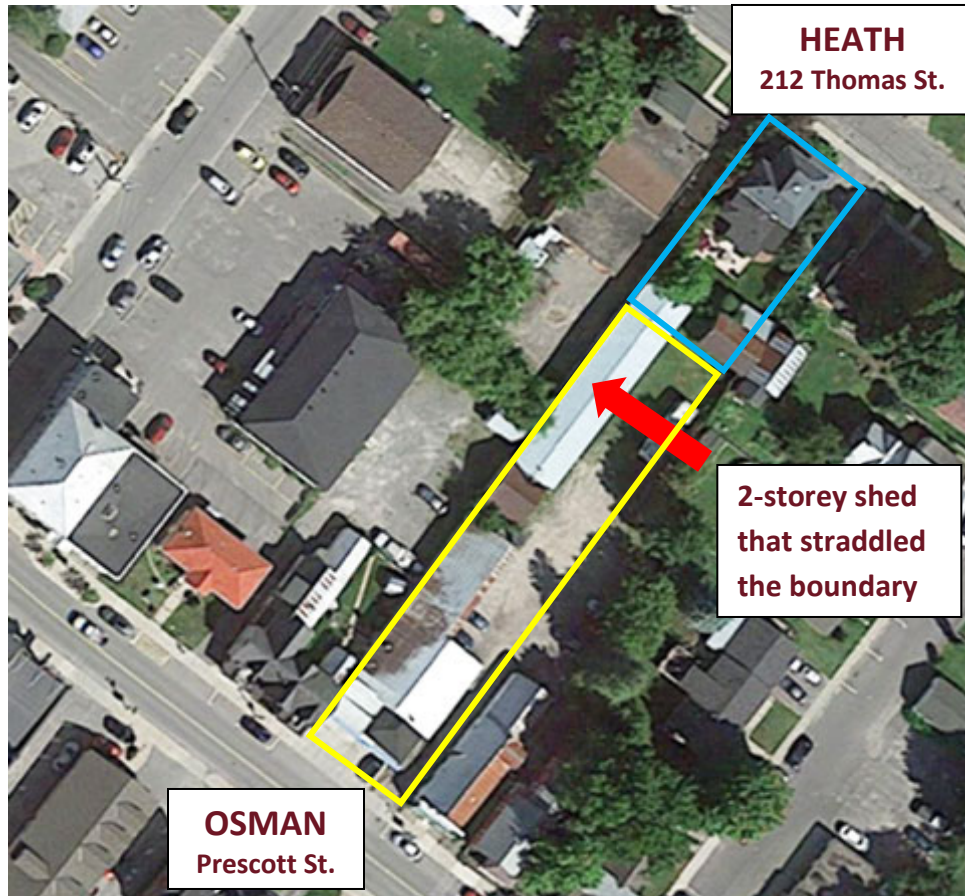


Figure 1: The light roof of the large shed straddling the boundary appears prominently²

The court began its fact finding function by considering the sworn affidavits. In considering the two declarations from the former owner of the Osman property, the court noted,

The evidence establishes that Kamal Osman was highly insistent upon receiving a declaration of possession from Douglas DePencier. His evidence was that he asked Mr. DePencier for the declaration “many times; so many times; probably for more than five; he yells whenever I ask him”. In his evidence at trial, Mr. Osman denied that he yelled at Mr. DePencier. In any event, a declaration of possession was obtained, as referenced earlier. The declaration states that:

When my father sold the property at 212 Thomas Street, the boundary shared with the lands retained on Prescott Street bisected a large frame shed on Lot 8. A wall was constructed in the ground floor of the shed in approximately the location shown by Plans 15R-10442 and 15R-10725 as

² From Googlemaps ©Google Inc. 2016; all rights reserved.

the shared boundary. The owners of each property enjoyed exclusive use of that part of the shed located on their side of the partition wall. This use was continuous and undisputed during my, and my late father's tenure as to that area now shown as Part 1, on Plan 15R-10725.

The second floor of the shed was not partitioned and my father's use of the entire second floor was also undisputed.

The surveys also show that a large metal clad shed along the north limit of the subject lands encroaches approximately 1.3 feet onto the lands described in the conveyance of 212 Thomas Street, by my late father. This encroachment is shown as Part 3 on Plan 15R-10725. I can affirm that the shed had remained in its present location for over 40 years.

As noted previously, the declaration was sworn before a lawyer.

The 2007 declaration contradicts Douglas DePencier's 2004 declaration when he sold the property and swore that he or his tenants had been "in continuous, exclusive, undisturbed possession and occupation of the buildings used in connection with the property throughout my period of ownership, that the buildings used in connection with the [Applicants'] premises are wholly situated within the limits of the lands" and that he was "unaware of any person having any claim or interest adverse or inconsistent with the registered title".

In the admitted facts in this case, it is stated that "Douglas DePencier was aware of and made no objection to the Doucettes' renovations to the building" during 1995 to 1997. At that time, the Doucettes exclusively possessed both floors of the entire building.

In addition, paragraph 4 of the 2007 declaration of Douglas DePencier stated that after relocating his business in 1995 he continued to make active use of the entire property until he sold it in 2004. The entire property includes the pizza store, the design store, and the metal storage sheds. This statement is contradicted by Kamal Osman and one of his witnesses, John Smith, who both stated that the Applicants rented and operated the pizza restaurant from and after 1995, and that all of the metal sheds and warehouses were rented out to a third party from and after 1995, specifically for nine years before Mr. DePencier sold the property in 2004.

Respecting the portion of Mr. DePencier's 2004 declaration stating that he had continuous and exclusive use of the entire rear one half of the shed during the entirety of his tenure until 2004, this cannot be the fact.³

The relationship of this large structure to the property fabric can be seen in Figure 2. However, the building appears to be situated entirely on the Osman property.

³ *Ibid.*, paras. 20 to 25

Heath, like Osman, obtained a sworn declarations from the seller, Doucette, when the 212 Thomas St. property was bought in 2006. Doucette's declaration included the following language:

We have carefully examined reference Plan 15R-10725 and confirm that Parts 1, 4, 5 and 6, shown on Plan 15R-10725 accurately depict the lands which we have openly, continuously and exclusively occupied and possessed by us since August 29th, 1995. The building was constructed at least 40 years ago, and occupies the same land as when constructed. We and our predecessors on title have openly, continuously and exclusively occupied and possessed the building since its construction. At no time did the neighbours to the south or their predecessors on title occupy the whole, or any part thereof.⁴

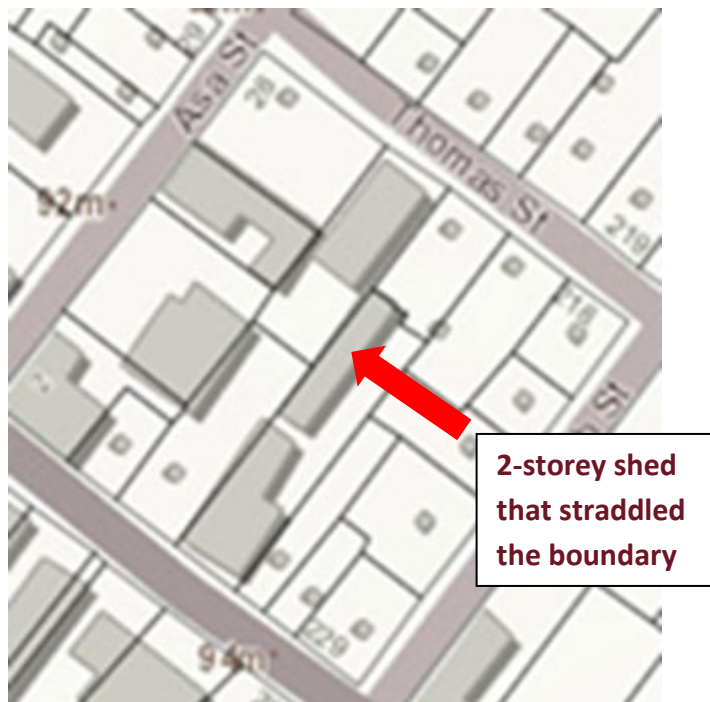


Figure 2: Large building and parcel mapping⁵

The Doucettes, during their term of ownership, had constructed renovations to the building – even after being informed by their lawyer that they lacked paper title to a portion of the land on which the structure sat. The court observed:

The metes and bounds description in the deed does not include the rear portion of the large shed now indicated as Part 1 on Plan 15-R10725. Ms. Doucette was aware when she

⁴ *Osman v Heath*, 2016 ONSC 4812, at para. 27

⁵ From *Municipality of North Grenville Zoning Map*, available at: <http://mng.maps.arcgis.com/apps/Viewer/index.html?appid=85221d03d5a04c7084c1fc18592c66bb>
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purchased the Residential Property that the property line went through the middle of the large shed. In a reporting letter from her lawyer dated August 31, 1995, Ms. Doucette was informed that there was an issue with a portion of the shed and that she did not have paper title to Part 1 on Plan 15-R10725. Specifically she was told the following:

*As we discussed prior to closing, upon reviewing the building location survey, it was obvious that the frame shed at the rear of the lot clearly straddled the property line separating your property and the property behind yours. You are aware of this from your personal inspection of the lands and were prepared to accept the situation as it existed with the inherent risk arising from same. I have however been able to obtain declarations of possession for more than 10 years back which purport to indicate that the said shed has been possessed by your predecessors in title for more than 10 years. This possessory title does not give you paper title to the shed or the land that it sits upon which are not part of your legal description, but does provide you with a defence to any action to have the building moved or to dispossess you of same.*⁶

Part 1 on Plan 15R-10725 is the rear portion of the large shed, the land in dispute. Perhaps the following observations of the court about some of the evidence was the most telling:

It is also clear that when the Respondent Ms. Heath purchased the Residential Property she made it known to Mr. Osman that she must own the entire shed otherwise she wasn't interested in purchasing the Residential Property. She also agreed that when she first met with Mr. Osman, she asked him what his understanding of the shed was and he told her that he owned part of it and stated that he had never been inside it. Ms. Heath was satisfied to rely on her lawyer's advice with respect to the declarations of possession that she in fact had title to the entire shed through adverse possession.

It was Mr. Osman's testimony that after the purchase of the residential property, Ms. Heath told him that she knew that he owned the rear portion of the shed but it no longer belonged to him because it had been added to the Residential Property by way of survey. This confirms Ms. Heath's testimony that she believed she owned the property through adverse possession.⁷

Against this factual background, the court turned to an application of the legal principles. Adverse possession was the basis for ultimately finding in favour of the Respondent, Heath. This case arose because there was a dispute over the access to and use of the shed in its entirety. While the question that first arises might therefore be: *Does the construction /placement of the building redefine the spatial limits of the extent of title?*, if the shed had not

⁶ *Osman v Heath*, 2016 ONSC 4812, at para. 8. [Emphasis added]

⁷ *Ibid.*, paras. 45 and 46

been there, there might not have been a question about the boundary location. With the shed present, the spatial extent of title (or at least rights of access and use) get questioned. The court stated,

In Ontario, adverse possession claims are governed by sections 4, 13, and 15 of the *Real Property Limitations Act*, R.S.O. 1990, c. L.15, which establishes a ten-year limitation period in which a dispossessed owner must bring an action to recover possession once a right to possession has accrued. By section 15, when a person has not attempted to recover the land within ten years after the right to bring an action or make entry or distress accrued, the right and title of the owner of the land is extinguished. A person claiming a possessory title as against the legal owner must establish the following:

1. Actual possession for the statutory period;
2. That such possession was with the intention of excluding the true owner; and
3. That the true owner's possession was effectively excluded for the statutory period: *Pflug v. Collins*, 1951 CanLII 80 (ON SC), [1952] O.R. 519 (Ont. H.C.); *Marotta v. Creative Investments Ltd.* (2008), 69 R.P.R. (4th) 44 (Ont. S.C.); *Keefer v. Arillotta* (1976), 1976 CanLII 571 (ON CA), 13 O.R. (2d) 680 (C.A.).

The claimant must meet each of these three criteria and time will begin to run against the owner from the last date when all three are satisfied: *Masidon Investments Ltd. v. Ham* (1984), 1984 CanLII 1877 (ON CA), 45 O.R. (2d) 563 (C.A.).

Marotta is a particularly helpful decision; it sets out in detail the applicable law, and I shall briefly follow the analysis employed in that decision.

Actual possession

The claimant must establish actual possession for the ten-year period and the acts of possession must be open, notorious, constant, continuous, adverse and exclusive of the right of the true owner. In *Teis v. Ancaster (Town)* (1997), 1997 CanLII 1688 (ON CA), 35 O.R. (3d) 216 (C.A.), at paras. 14, 16, Laskin J.A. explained the requirement of open and notorious possession in these words:

First, open possession shows that the claimant is using the property as an owner might. Second, open possession puts the true owner on notice that the statutory period had begun to run. Because the doctrine of adverse possession is based on the true owner's failure to take action within the limitation period, time should not run unless the delay can fairly be held against the owner....

The element of adversity means that the claimant is in possession without the permission of the owner. If the claimant acknowledges the right of the true owner then the possession is not adverse.

It is clear from the evidence in this case that there has been actual possession of the large shed by the Respondents and their predecessors in title at least since the year 1990, and permission was never an issue. It was never sought. The claimants and their predecessors in title never acknowledged the right of possession of the true owner.

Possession with the intention of excluding the true owner

There must exist what is referred to as *animus possidendi*, meaning the claimant must have the intention to exclude the true owner. The threshold is high in the case of a trespasser and lower in a case where the occupier and true owner are mistaken as to the ownership of the land. The use by the claimant must be inconsistent with the use of the true owner. The *animus possidendi* which a person claiming a possessory title must have is the intention to exclude the owner from such use as the owner wants to make of the property. In *Masidon Investments Ltd. v. Ham* (1984), 1984 CanLII 1877 (ON CA), 45 O.R. (2d) 563, Blair J.A., speaking for the Court of Appeal, described the “inconsistent use” test as one where the possession effectively excludes the true owner and the entitled use which the true owner intended for the disputed land.

The difficulty in this case is that there is no evidence whatsoever as to the use intended by the Applicants. Historically, the use to which the large shed had been put was for storage during the period a commercial enterprise was being carried out on the land. That use, the evidence suggests, ended entirely when the business was moved to another location in the Town of Kemptville in 1995. Thereafter, the large shed was effectively abandoned by the true owner.

In addition, the evidence established that, at its very highest, the large shed might have been used for the storage of insulation on the second floor of the shed, with access by ladder from the Commercial side of the property. The evidence of Ms. Sutherland establishes that following the year 1990, the large shed was never used by the Commercial owners. In this case, there is no “inconsistent use”, there is only one use, and that is the use of the entire shed by the Respondents and their predecessors in title. No use has been asserted or established by the Applicants, other than the wish to possess the disputed land, unlike in the case of *Masidon*, in which the true owner was holding the land in dispute with the intention of future commercial development.

Further, the “inconsistent use” test does not apply to cases of honest unilateral mistake: *Cunningham v. Zebarth Estate* (1998), 71 O.T.C. 317 (Ont. Gen. Div.). The “inconsistent use” test does not apply in circumstances in which the person in possession operates under the honestly held belief that he or she is the rightful owner of the property or in cases where the legal owner and person in possession operate under a mutual mistake as to title or boundaries. In such cases, an inference may be drawn that the occupier is in possession of the land with the intention of excluding all others including the legal owners.

In this case I hold that there is no “inconsistent use”, because there was no use intended for the property by the true owner. It had effectively been abandoned. However, if I am wrong in that conclusion, I would find that there was an honest unilateral mistake on the part of the Respondents and their predecessors in title, and that they at all times believed themselves to be the rightful owners of the large shed, notwithstanding the property line.⁸

The end of this quoted section from the court’s reasons is an exploration of “inconsistent use” and whether or not it exists at law as a necessary element to be proven by a claimant. This issue continues as a source of uncertainty in the law of adverse possession in Ontario and elsewhere in Canada, although the recent decision in *Nelson (City) v. Mowatt*⁹ has assisted in clarifying the debate.¹⁰ Another recent commentary on *Nelson* by Jeffrey Lem offers further insights.¹¹

Editor: Izaak de Rijcke

Cross-references to *Principles of Boundary Law in Canada*

As the court noted in its decision, each adverse possession case turns on its own set of particular facts. However, the legal principles to be applied to the facts are generally uniform; the law seeks a degree of certainty in order to provide for predictable results. Considered as a whole, *Osman v Heath* is an excellent example of the court’s application of legal principles to a specific set of facts. In Ontario (and elsewhere in Canada), these principles are generally uniform and well understood. However, note the careful treatment by the court¹² of “inconsistent use” as a possible element of the larger test to be met in an adverse possession claim. The application of this element is “inconsistent” across Canada and deserves cautious treatment,

In *Chapter 4 – Adverse Possession and Boundaries* (especially at pp. 115 – 116), the element of “inconsistent use” is discussed as a source of uncertainty and includes other references to case law in which this question has been explored further.

⁸ *Ibid.*, paras. 49 to 58

⁹ *Nelson (City) v. Mowatt*, 2017 SCC 8 (CanLII), <http://canlii.ca/t/gxis8>

¹⁰ See also the recent treatment of this decision in [The Boundary Point 5\(3\): Public Authority’s Failed Claim to an Easement over Private Property](#)

¹¹ See Lem, Jeffrey, “The Dirt”, *Law Times*, April 3, 2017, at page 7

¹² *Ibid*

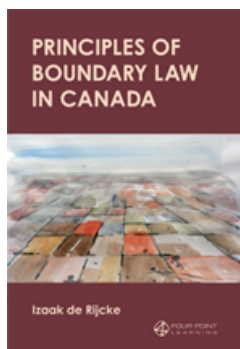
FYI

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.¹³ 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.

Fifth Annual Boundary Law Conference

This year’s conference theme: [Waterfront Properties in Ontario: Best Practices for Reducing Ownership Conflict](#), responds to the confusion created by a series of seemingly inconsistent decisions concerning waterfront properties over the last decade. Presenters – lawyers, surveyors and government representatives – will explore a common set of recent court cases and provide insight and analysis focused on problem-solving waterfront ownership and boundary issues from their unique professional perspectives. The day will end with a multidisciplinary panel discussion that aims to establish broad consensus on emerging best practices to reduce conflicts among stakeholders, mitigate the risk for professionals, and minimize uncertainty for members of the public in this consistently complex area of boundary law. A draft agenda for this one day event (November 13, 2017) is in preparation and *early bird* registration is now open.¹⁴

Principles of Boundary Law in Canada



A boundary is an attribute of every parcel of land in Canada – a parcel cannot exist without boundaries. Providing secure and predictable results in recording title and identifying the extent of title are elements that operate hand in hand in order to give certainty to the immense value tied up in real estate in Canada. In the context of (1) the complex and ever-evolving nature of boundary law, (2) the challenges of doing legal research in this area, and (3) the constant interplay between land surveying practice (as a regulated profession with norms codified in statutes) and common law principles, land surveyors need a current reference work that is principle-based and explains recent court decisions in a manner that is both relevant and understandable. Moreover, the education and training needs of new members to the cadastral surveying

¹³ 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.

¹⁴ This conference qualifies for 12 *Formal Activity* AOLS CPD hours.

profession are best served by a reference work that not only provides comprehensive coverage of the material but is organized and indexed in a manner that supports the formation of professional opinions.

See [Principles of Boundary Law in Canada](#) for a list of chapter headings, preface and endorsements. You can mail payment to: **Four Point Learning** (address in the footer of the first page of this issue of *The Boundary Point*) with your shipping address or [purchase](#) online. (NB: A PayPal account is not needed.)



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