



*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 continues to appear in the reported case law in Canada – even as boundaries are mistakenly believed by adjoining owners to be in a particular location and such errors interplay with intention to exclude. Waterfront cottage owners need be no less vigilant in knowing where the true location of a boundary is, even as the boundary drops out of view over a steep embankment.

How important is the need for knowledge of a boundary's true location when making a claim based in adverse possession? The question appears in the case law under different guises: must the trespasser's use be inconsistent with the intended use to be made by the true owner? Can intention to exclude be formed if the trespasser is ignorant of the true location of the boundary? Can adverse possession even begin to run if both the trespasser and true owner are ignorant of the boundary location? These kinds of questions come to mind as one reads the decision of the Ontario Court of Appeal in *Pepper v. Brooker*.<sup>1</sup>

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## Mutual Mistake of the True Boundary and Adverse Possession

**Key Words:** *mistake, adverse possession, trespass, boundary, intention to exclude*

The reversal on appeal of a trial decision is often an excellent opportunity to consider the evaluation of evidence and the application of legal principles to the facts. This is especially the case when a decision articulates the principles themselves and weaves together several earlier cases that are germane to our understanding of the law.

The trial decision in *Brooker v Pepper et al*<sup>2</sup> described, as an overview, a series of events that centred on the Peppers gaining title from Mrs. Pepper's mother in 2002:

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<sup>1</sup> *Pepper v. Brooker*, 2017 ONCA 532 (CanLII), <http://canlii.ca/t/h4hgp>

<sup>2</sup> *Brooker v Pepper et al*, 2015 ONSC 142 (CanLII), <http://canlii.ca/t/gh670>

The claim by the Peppers is that James and his wife, Marion Pepper understood from the previous owner of Lot 2 and 3, Marion's mother, that the lot line between Lots 3 and 4 (the Brooker property) followed a line as the property descended sharply down to the shore of Lake Erie from a pine tree at the top of the cliff to a willow tree at the bottom near the shoreline.

With this knowledge of the lot line, the Peppers started a regular and lengthy process of dumping fill from the top of the steep slope on their property from the pine tree down to the willow tree near the Lake Erie shoreline. The purpose of dumping the fill was to change the grade of the slope in order to make the Lake Erie shoreline accessible. According to the Peppers, this dumping and grading took place over a 10 year period, before 2007. This is significant because once the properties in that area were registered into Land Titles System; they could no longer be obtained by adverse possession.

In addition to the years of dumping, the Peppers constructed stairs and a break wall that was built in two sections and over different time periods in order to protect the property from shoreline erosion.<sup>3</sup>

The configuration of the two properties owned by the Peppers (Lots 2 and 3) and Brooker (Lot 4) as it appeared in aerial photography in 2002 can be understood by considering Figure 1.

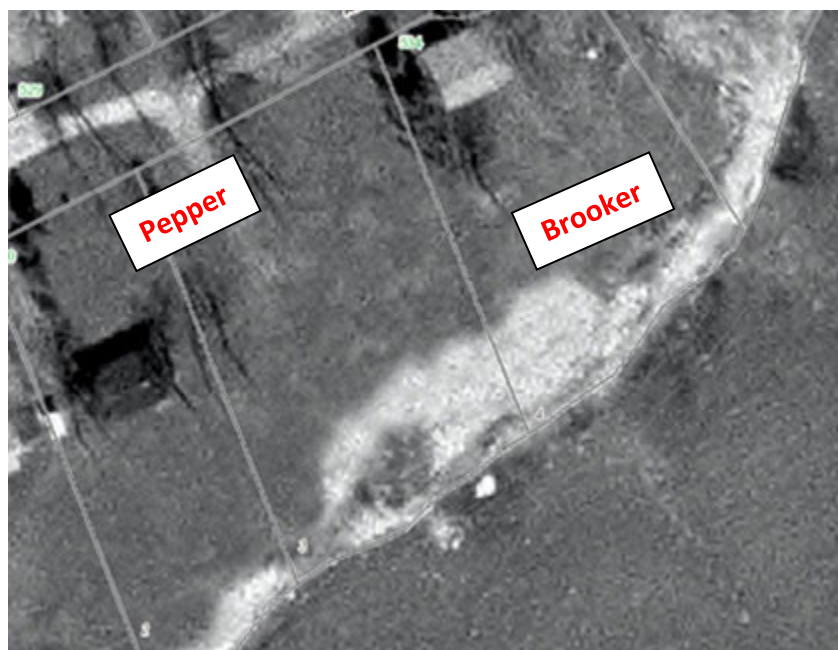


Figure 1: Waterfront Lots owned by parties in 2002 and disturbed soil along shoreline.<sup>4</sup>

By 2015 the activity along the shoreline and the dumping of fill over the bank had continued and is more prominent in Figure 2.

<sup>3</sup> *Ibid.*, at paras. 3-5

<sup>4</sup> From: Norfolk GIS at:

<http://norfolk.maps.arcgis.com/apps/webappviewer/index.html?id=c6683057b83744dfb36afb773ba09135> 2002 Air Photo Base map © Queen's Printer for Ontario. All Rights Reserved and subject to EULA terms.



Figure 2: Waterfront Lots owned by parties in 2015 and activity over the top of bank and along the shoreline.<sup>5</sup>

The trial judge made findings of fact and referenced the applicable legal principles by quoting from several often-cited cases:

In the case of *Teis v. Ancaster (Town)*, (1997) [1997 CanLII 1688 \(ON CA\)](#), CarswellOnt 2970, [1997] O.J. No. 3512, 103 O.A.C 4, 13 R.P.R. (3d) 55, 152 D.L.R. (4<sup>th</sup>) 304, 35 O.R. (3d) 216 the Ontario Court of Appeal commented at para.13:

The first requirement is actual possession for the ten-year period. To succeed, the acts of possession must be open, notorious, peaceful, adverse, exclusive, actual and continuous.

And at para. 14:

Possession must be open and notorious, not clandestine; for two reasons. 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 has 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: Ziff, *Principles of Property Law*, 2nd ed. (Toronto: Carswell, 1996) at pp. 118-26.

At para. 25 Laskin J.A. stated:

Even accepting, however, that the test applies to cases of knowing trespass, it cannot apply to cases of mutual mistake. If it did apply, every adverse possession claim in which the parties were mistaken about title would fail. Inconsistent use means that the claimant's use of the land is inconsistent with the true owner's

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<sup>5</sup> From: Norfolk GIS at: <http://norfolk.maps.arcgis.com/apps/webappviewer/index.html?id=c6683057b83744dfb36afb773ba09135> 2015 Air Photo Base map © Queen's Printer for Ontario. All Rights Reserved and subject to EULA terms.

intended use. If the true owner mistakenly believes that the claimant owns the disputed land, then the owner can have no intended use for the land and, correspondingly, the claimant's use cannot be inconsistent with the owner's intended use.

At para 27 Laskin J.A. stated:

It makes no sense to apply the test of inconsistent use when both the paper title holder and the claimant are mistaken about their respective rights. The application of the test would defeat adverse possession claims in cases of mutual mistake, yet permit such claims to succeed in cases of knowing trespass. Thus applied, the test would reward the deliberate squatter and punish the innocent trespasser. Policy considerations support a contrary conclusion. The law should protect good faith reliance on boundary errors or at least the settled expectations of innocent adverse possessors who have acted on the assumption that their occupation will not be disturbed.

In *Mueller v. Lee* (2007) CarswellOnt 4194, [2007] O.J. No. 2543, Justice Perrel also commented on the law with respect to what "possession" means, he stated at para 15:

What is sufficient to establish possession will vary depending upon the nature of the property and the natural uses to which it can be put: *Walker v. Russell*, [1965 CanLII 250 \(ON SC\)](#), [1966] 1 O.R. 197 (H.C.J.); *Laing v. Moran*, [1951 CanLII 74 \(ON CA\)](#), [1952] O.R. 215 (C.A.)

At para. 21, Justice Perrel comments of the cases of mutual mistake as follows:

In cases of mutual mistake, the intention to exclude requirement has a low threshold because where both the claimant and also the true owner mistakenly believe that the claimant owns the disputed land, the law acknowledges the settled expectations of the parties and infers that the claimant occupied the lands with the intention of excluding all others, including the true owners: *Teis v. Ancaster*, *supra*; *Carrozzi v. Guo* [2002 CanLII 42513 \(ON SC\)](#), 2002 CanLII 42513 (Ont. S.C.J.).<sup>6</sup>

These principles led the trial judge to conclude:

I find that the Peppers occupied the lands in question in an open and notorious manner from at least 1982 until at least 2007. The Peppers were of the mistaken opinion that the property line from the top of Lot 3 at the maple tree ran down to the bottom of the property near the shoreline to the willow tree. This was the line that they accepted as coming from the previous owners that had always been talked about amongst family members. Armed with that knowledge, the Peppers started to use that property line as

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<sup>6</sup> *Brooker v Pepper et al*, 2015 ONSC 142 (CanLII), paras 25-30.

their own. They dumped fill for many years commencing in 1982 in order to change the grading of a steep slope from the top of the property at the maple tree down to the willow tree in order to make the shoreline accessible.

When Mr. Brooker bought his property he could see the dump trucks dumping the dirt from the same spot over a number of years. He also saw the graders in action. It was obvious for all to see that the grade of the slope had changed significantly from 1982 until 2003. That was the point that the Peppers had a family reunion and the property was now accessible by use of the road that had been constructed by the Peppers over the years as a result of the fill dumping and grading done by the Peppers. At no time did Mr. Brooker complain to the Peppers that they were conducting all of this activity on his land.

...

I find that Mr. Brooker's failure to say anything to the Peppers over far in excess of the ten year period allows me to draw the inference that he was mistaken with respect to the lot lines of Lot 3 and Lot 4. I find that this mutual mistake allows me to draw the inference that the Peppers intended to occupy parts of Lot 4 in which they built the sea wall and stairs with the intention to exclude all others, including the owner Mr. Brooker. As a result of my findings, I am satisfied that the Peppers have obtained title to the parts of lot 4 that are outlined in yellow in the survey filed by the Peppers as Exhibit 1. This part of Lot 4 represents the area in which all of the improvements that were made by the Peppers are situated. The Peppers are to obtain a proper survey to provide a metes and bounds description that will allow for the appropriate order to be drafted and registered on title.<sup>7</sup>

Mr. Brooker appealed.

The Ontario Court of Appeal focused on the ground that the claim for adverse possession ought to have failed because the Peppers did not establish that they had effectively excluded him from the disputed lands. This ground was considered in the context of other evidence elicited at trial, but not referred to by the trial judge. In particular, the sentence in the trial judge's decision in the paragraph last noted was emphasized:

*I find that this mutual mistake allows me to draw the inference that the Peppers intended to occupy parts of Lot 4 in which they built the sea wall and stairs with the intention to exclude all others, including the owner Mr. Brooker.*

Not surprisingly, the **intention** to exclude is not the same as **effective** exclusion. The Court continued by explaining,

The critical issue is whether the Peppers' modifications to the disputed lands on Lot 4 effectively excluded Mr. Brooker from possession of those parts of his property. Although

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<sup>7</sup> *Ibid.*, at paras. 31, 32 and 34

the trial judge found that the Peppers *intended* to exclude “all others, including the owner Mr. Brooker”, he failed to find that the Peppers had effectively excluded Mr. Brooker from the property. There was no evidence to support the claim that they had effectively *excluded* him, nor anyone else for that matter. The evidence suggests the opposite. This is fatal to the Peppers’ claim.

As noted in para. 29 above, the trial judge relied heavily on parts of *Teis*. The issue in *Teis* was whether the inconsistent use requirement – a facet of the intention to exclude criterion requiring the claimant’s use of the land to be inconsistent with the title holder’s intended use – applies in cases of mutual mistake. After reviewing the development of the concept of inconsistent use, Laskin J.A. held, at p. 224-25, that it does not. Rather, “in cases of mutual mistake the court may reasonably infer, as indeed I infer in this case, that the claimants...intended to exclude all others, including the paper title holder”: *Teis*, at pp. 226-27.

Applying *Teis*, the trial judge reasoned that because the parties were mutually mistaken about the boundary between Lots 3 and 4, he could “draw the inference that the Peppers intended to occupy parts of Lot 4...with the intention to exclude all others, including the owner Mr. Brooker.”

This finding was not challenged on appeal. However, I pause to observe that this finding – an intention to exclude – appears to be at odds with the evidence. No one, and certainly not Mr. Brooker, was prevented from using the road and steps to access the shoreline. This ought to have led the trial judge to conclude that the Peppers had failed to establish an intention to exclude.<sup>8</sup>

So too, readers may recall that “inconsistent use” has been somewhat controversial in Canadian jurisprudence – even if not treated in the same manner in all jurisdictions. The Court of Appeal continued:

But even assuming that finding can stand, there exists a more fundamental problem. An intention to exclude the true owner of a property is just one part of the adverse possession equation. An adverse possession claimant must succeed in his or her intention by achieving effective exclusion from the property, even in cases of mutual mistake: *Shennan v. Szewczyk*, [2010 ONCA 679 \(CanLII\)](#), 96 R.P.R. (4th) 190.

In *Shennan*, the court dealt with a property dispute between cottage owners. The trial judge had dismissed a claim for adverse possession. He found that it was not a case of mutual mistake because, over the critical years, nobody really cared where the boundary separating the two cottage properties was situated. On appeal, the trial judge’s finding on the mutual mistake issue was affirmed. However, the court addressed the issue of effective exclusion (at para. 20):

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<sup>8</sup> *Pepper v. Brooker*, 2017 ONCA 532 (CanLII), at paras. 33-36

In any event, the criterion of effective exclusion of the true owner throughout the 10-year period remains a requirement, even in cases of mutual mistake. We do not read the decisions of this Court in *Key* [*Key v. Latsky* (2006), 2006 CanLII 271 (ON CA), 206 O.A.C. 116] and *Teis* as reading the “effective exclusion of the true owner” criteria out of the adverse possession requirements in cases involving mutual mistake. Neither case dealt with the effective exclusion requirement, and nothing was said in the reasons of the Court in either case to rule it out in cases of mutual mistake. [emphasis added]

The court upheld the trial judge’s finding that there was no evidence that the true owners were excluded from the land, noting: “That is what was required.”<sup>9</sup>

A survey was not obtained until 2012 when Mr. Brooker hired a land surveyor. It was at that time that the knowledge of the boundary’s true location was ascertained. If anything, the mutual mistake over the erroneous boundary location ended and this litigation was started. It is unclear whether or not a survey plan being available much earlier would have made a difference.

*Editor:* Izaak de Rijcke

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

Chapter 4: Adverse Possession and Boundaries, in *Principles of Boundary Law in Canada* explores a number of different examples of how the elements of the test for adverse possession are applied in practice. At page 117 the element of effective exclusion of the true owner from possession is discussed. The decision in *Pepper v. Brooker* will serve as an example of how this element of the test failed.

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## 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.<sup>10</sup> These resources are configured to be flexible with your schedule, range from only a

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<sup>9</sup> *Ibid.*, at paras. 37-38

<sup>10</sup> 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

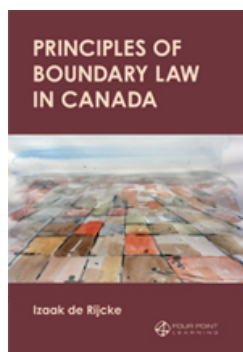
few hours of CPD to a whole year's quota, and are expanding in number as more opportunities are added. Only a select few and immediately upcoming CPD opportunities are detailed below.

### **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 now available and *early bird* registration ends September 30th.<sup>11</sup>

### ***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 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**

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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.

<sup>11</sup> This conference qualifies for 12 *Formal Activity* AOLS CPD hours.



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