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.

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While the test to be met by a claimant seeking a declaration of title based in adverse possession continues to evolve, Ontario may have reached a time when there are only 3 elements (or prongs) to that test:

1) actual possession of the property over a ten-year period;
2) the intention to exclude the true owner; and,
3) effective exclusion of the true owner.

In the Ontario Court of Appeal decision, *MacQuarrie v. Proulx*,[1] we see a short set of reasons in disposing an appeal from a trial decision[2] which had been unsuccessful for the claimant.

A Simplified Test for Adverse Possession in Ontario

Key Words*: possession; fence; adverse possession*

The Town of Port Stanley on the north shore of Lake Erie is a picturesque community; many homes are enjoyed during vacations and the waterfront and harbour are natural attractions.

Nonetheless, a dispute between neighbours over a very small area of land between them led to litigation. As the court described it,

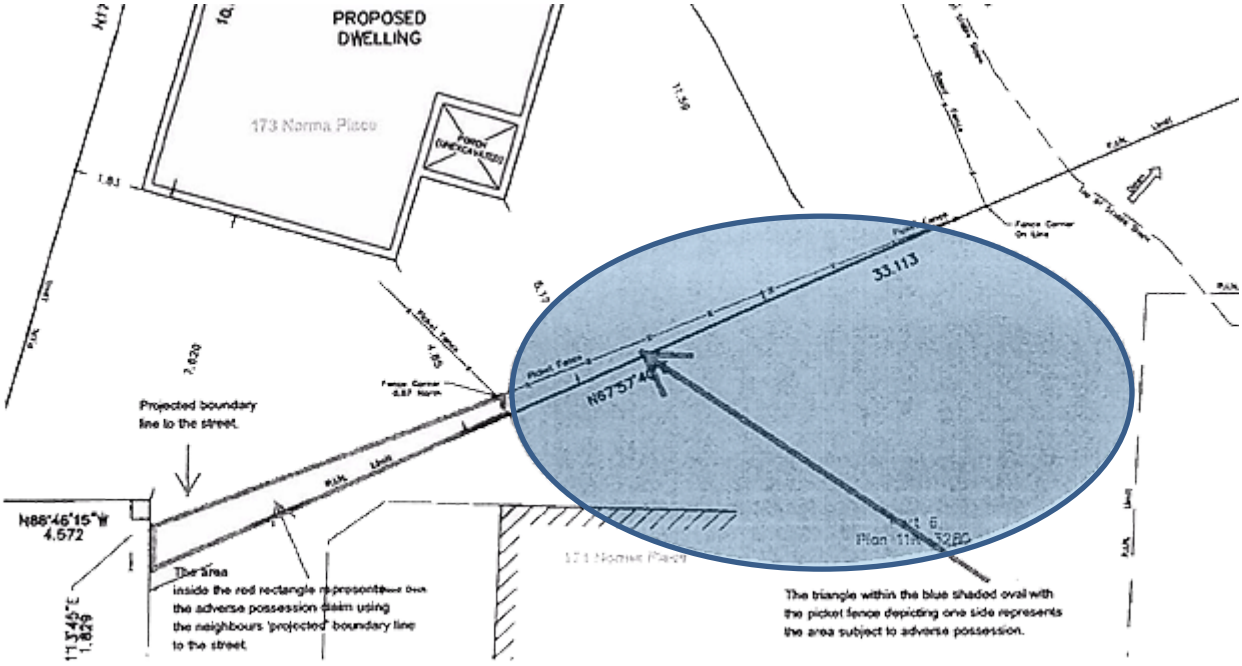
> The boundaries of the disputed triangular strip are the actual property line between 171 and 173 Norma Place on one side, the road on one side, and a white fence that runs along approximately half of the strip on the third side. The triangular strip was addressed as two separate parcels: a triangular parcel that is bordered by the property line on one side and the

[1] *MacQuarrie v. Proulx*, 2023 ONCA 625 (CanLII), https://canlii.ca/t/k09q1

[2] Despite a reference in *MacQuarrie v. Proulx* to the order of Justice Scott K. Campbell of the Superior Court of Justice, dated December 19, 2022, with reasons reported at 2022 ONSC 4087, the order and reasons are not available in CanLII.

white fence on the other, and a roughly rectangular parcel that begins where the white fence stops and runs to the road. The appellant claimed adverse possession over the entire strip consisting of both parcels (attached in Schedule A).[3]

The schedule referred to was a sketch that had been attached by the court to its Reasons, and is reproduced below:



In order to view the site in an airphoto, the following image is available:

[3]*MacQuarrie v. Proulx*, *supra.*, footnote 1 at para. 2

The airphoto[4] appears to show a new home to the north of the triangle, while the sketch attached a s a Schedule to the decision depicts a "proposed dwelling."

The court explained further,

> When the respondents purchased their property, they obtained a declaration of possession from the vendor attesting that there was no adverse possession of any part of the property. However, because of the partial fence, the respondents decided to concede in their written materials that the area enclosed on one side by the fence had been effectively possessed by the appellant's mother as his predecessor in title, and therefore they conceded possessory title to that portion of the claimed land.
>
> The appellant's position was that an imaginary projected line from the fence should be drawn to the road and the area enclosed by that imaginary line was also adversely possessed by his predecessor in title, prior to 2007. His evidence was that his mother possessed the property by including it in her lawn cutting, general maintenance, planting of vegetation, weed control and snow removal. Further, the respondents ought to have been aware of his mother's expenditures, and by failing to object, they encouraged her to believe she was performing work on her own property.
>
> The respondent, Ms. McQuarrie, resided on the property from 2006 to 2008. Her evidence was that she regularly maintained her lawn including the disputed area. She also regularly walked across the disputed land from her driveway when she brought her groceries into the house. There was never any objection from the appellant's mother, his predecessor in title. After 2008 the respondent had a tenant. Her understanding was that the tenant and his father socialized with the appellant's tenant, and to that end went back and forth over the disputed property. During the last few years of the tenancy, the appellant's tenant maintained the lawn for both properties as a thank you for kindness and used the lawnmower that belonged to the respondent's tenant's father to do it.
>
> The boundary dispute only arose in 2019 when the respondents demolished their home to build a new one.[5]

The court provided a helpful summary of the trial judge's findings and reasons. Note that the initial effort to bring a resolution by conceding the fenced area to the neighbours was then resiled from when the neighbours "wanted it all:"

> Although the respondents had conceded the claim with respect to the area bounded on one side by the fence, they tried to resile from that position at the application hearing because the appellant was non-conciliatory. As a result, the application judge applied the three-

[4] From Kettle Creek Conservation Authority Using SWOOP 2020 imagery from "Map my Property" at https://map.kettlecreekconservation.on.ca All rights reserved.

[5] *MacQuarrie v. Proulx*, *supra.*, footnote 1 at paras. 4 to 7

pronged test to both disputed areas. With respect to the fenced area, he found that the appellant had met all three prongs of the test. That finding is not under appeal.

With respect to the unfenced area, on the first issue, actual possession, he first observed that the disputed area is open land between the two houses. He concluded that there was use of the disputed property by both sides' predecessors and by the parties during the relevant period and that the use did "not appear to be problematic". He also found that the declaration of possession that the respondents obtained from the vendor on closing supported their position that they were not aware of any claim for possession or exclusion when they purchased the property.

On the second prong, intent to exclude, the application judge found that there was little direct evidence from the appellant of any intention to exclude and there was no actual exclusion. Nor was there any mutual mistake regarding the boundary − at best there was "mutual disinterest."

On the third prong, effective exclusion, the application judge rejected the appellant's argument that exclusion should be inferred for the area demarcated by the imaginary projected fence line to the road, based on the failure of the respondents to object. He found that the evidence of effective exclusion before 2007 was inconclusive, but that "given the open nature of the property, the inference may well be considered to be to the contrary."

The application judge concluded his analysis by finding that the appellant had not met his onus to prove any of the three prongs of the test and rejected the claim. The final paragraph of the analysis states:

> To be clear, when I apply the test to the evidence in this case, I find there has been no actual possession by the [appellant] nor were the [respondents] and their predecessors in title effectively excluded. The [appellant's] possession was not open, notorious, constant, continuous, peaceful, and exclusive of the rights of the owner. I would reiterate the titled owner does not need to exercise the same degree of control over the property as someone claiming adverse possession.

The application judge also rejected the appellant's claim for proprietary estoppel. He found that the respondents did not encourage the appellant to believe the property was his, there was no detrimental reliance by the appellant and no unconscionable advantage taken by the respondents.[6]

In dismissing the appeal, the court's well written reasons make sense and are easily understood:

> The appellant's main submission on the appeal is that the application judge was required to draw the inference that once the appellant had established adverse possession of the area bordered by the fence, that possession extended to the other contiguous area demarcated by the imaginary projection of the fence line to the road. He argues that it was an error for

[6] *Ibid.*, paras. 9 to 14

the trial judge to treat the claimed area as two separate areas, one bounded by the fence and the other not.

There is no merit to this submission. The application judge considered this submission and rejected it based on the evidence before him. He carefully applied the three-pronged test and considered the relevant evidence regarding the parties' use of the disputed, unfenced area over the relevant period, and came to the conclusion that the evidence did not establish adverse possession of that area.

Adverse possession claims frequently require courts to divide disputed areas and conduct distinct analyses: see e.g., *Laing v. Moran*, 1951 CanLII 74 (ON CA), [1952] O.R. 215 (C.A.), at paras. 27-40; and *Mueller v. Lee* (2007), 59 R.P.R. (4th) 199 (Ont. S.C.), at paras. 4-5, 57-61. The cases cited by the appellant in support of the proposition that the two parcels should be considered as a unified whole are readily distinguishable.

In *Laing*, the Court of Appeal held that a driveway and garage constituted a "single entity" for the purposes of the adverse possession analysis because "the driveway was necessary to the use of the garage" (para. 31). Here, by contrast, the use of one part of the lawn does not depend on the other. The *Tramonti v. Lombardi* (1997), 12 R.P.R. (3d) 105 (Ont. C.A.) case is also wholly distinguishable on the facts. There, the trial judge found evidence of intent to exclude the true owners from the barbeque and shed but not from the rest of the fenced-in area in dispute. This court explained that the trial judge erred by failing to treat enclosing the entire area with a fence as evidence of intent to exclude. In the present case, the application judge declined to infer an intent to exclude by an imaginary, projected line with no actual fence.

In respect of the appellant's mother's use as predecessor in title of his lands, the application judge found that what she did with respect to lawn maintenance was not sufficient to meet the test for adverse possession: open, notorious constant use that excluded the true owner. That finding is subject to deference by this court and is borne out by the evidence.

The appellant also submits that the application judge erred by using evidence of activity after 2007 to determine the issue of adverse possession before that date and that he was confused about the evidence. We also reject that submission. The application judge reiterated a number of times that the relevant 10-year period was before 2007 when the lands were converted to the Land Titles system. What he properly used the later evidence for was as circumstantial evidence of the parties' understanding of the ownership and entitlement to the property.

In particular, the appellant submits that the application judge failed to recognize that the respondents did not adduce evidence of use and possession during the relevant 10-year time-period, and therefore the appellant's evidence of use and possession was uncontested. To the contrary, the respondents adduced a sworn declaration from the predecessor title holder regarding her use and possession of the disputed lands, evidence of their use in 2006 after the purchase, as well as post-2007 circumstantial evidence speaking to their

> understanding of their entitlement to the disputed land. But more to the point, even without the respondents' evidence, the application judge reasonably concluded that the appellant's evidence of use during the 10-year period was insufficient to meet his burden of establishing actual possession, intention to exclude, or effective exclusion.
>
> We see no error in the application judge's approach or his findings.[7]

Readers may wonder whether or not we have reached a point where the determination of disputes based in adverse possession can soon be made using sophisticated algorithms and Artificial Intelligence (AI). After all, if adverse possession can succeed by satisfying a 3-pronged test, how complicated can it be? The answer may not be that simple. The determination of facts will still need to be based on the evidence available. "Actual possession, "Intention to exclude," and "Effective exclusion" may involve subjective elements and are far removed from a simplistic determination of, say, liability for a debt. Nonetheless, we can expect in the near future a growing interest for intelligent systems to determine whether or not rights in land may have been gained or lost.

Editor: Izaak de Rijcke

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

Adverse possession is discussed in *Chapter 4: Adverse Possession and Boundaries.*

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.[8] These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year's quota.

[7] *Ibid.*, at paras. 15 to 22

[8] 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.

Course: *Survey Law 2*

Survey Law 2 builds on *Survey Law 1* with a special emphasis on evaluation of evidence and special circumstances encountered in problematic and natural boundaries. This course will be taught online Wednesday evenings by Izaak de Rijcke, starting January 10, 2024. For more information, consult the syllabus. Please go to Four Point Learning to register.

CPD: *Six-Minute Real Estate Lawyer*

The Law Society of Ontario is offering a CPD presentation on November 15, 2023 from 9 am until 1 pm, called the Six-Minute Real Estate Lawyer. Izaak de Rijcke is one of the speakers and will be presenting on the topic, ***Making Application for Absolute Title: Getting it Right and Avoiding Delays.*** This will be a practical guide, and of interest to Real Estate lawyers and Land Surveyors alike.

Coming soon — Introduction to Canadian Common Law

Understanding the workings of the legal system and the legal process is essential for regulated professionals entrusted to make ethical and defensible decisions that have the potential of being reviewed by a court. This short but rigorous self-paced course is intended to immerse current and aspiring cadastral surveyors in the reasoning process and with real-life applications that parallel what courts often do.

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