The Boundary Point

Volume 12, Issue 2, February 2024

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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Losing land as a result of adverse possession may well deserve to be eliminated, as was recently done in Alberta.[1] But does this mean neighbours will change their behaviour and never trespass onto another's land? Will it ensure that encroachments never occur again? Of course not. Legislation cannot force property owners to stop building encroaching structures onto neighbours' land any more than legislating speed limits will stop some drivers from speeding. But there may be consequences. In *Margaritis v.Milne*,[2] we consider a case in which a claim to land based in adverse possession failed… but the alternative remedy under Section 37 of *Ontario's Conveyancing and Law of Property Act*[3] was successful.

Mistaken Belief as to Title and Lasting Improvements as a Basis for Claiming Title

Key Words*: mistake; encroachment; belief; fence; licence;* Conveyancing and Law of Property Act (Ontario)

The first decision in *Margaritis v. Milne* was released in February, 2023 but following an appeal, the ruling from Divisional court came out last October.

The court at first instance explained,

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[1] *Law of Property Act*, RSA 2000, c. L-7, at s. 69.1, as amended in 2022 by SA 2022, c. 23, s. 2

[2] *Margaritis v. Milne*, 2023 ONSC 5943 (CanLII), https://canlii.ca/t/k0qqn

[3] *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34, s. 37 states:

> 37 (1) Where a person makes lasting improvements on land under the belief that it is the person's own, the person or the person's assigns are entitled to a lien upon it to the extent of the amount by which its value is enhanced by the improvements, or are entitled or may be required to retain the land if the Superior Court of Justice is of opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the court directs.

> This is a case about a very unfortunate property dispute between next door neighbours. The Applicant seeks an order recognizing him as the owner of a narrow strip of land along the border between his backyard and the Respondent's backyard. He does so on two alternative bases: first, that the previous owners of his property and him as their successor acquired possessory title over the disputed area through adverse possession; and second, that he has made lasting improvements to the disputed area in the belief that it belonged to him, and accordingly should be granted title pursuant to s. 37 of the *Conveyancing and Law of Property Act*, R.S.O. 1990, C.34.[4]

Although quite fact specific, the court decided on the first claim (adverse possession), that the application could not succeed. Citing another recent decision, the court explained,

> As Dawe J. reviewed in *McCracken Estate et. al. v. Gatt et. al.* 2023 ONSC 105 at para. 66-68:
>
> > A person who acquires possessory title over land, and in so doing extinguishes the original owner's legal title, is said to acquire the land through "adverse possession".
> >
> > The doctrine of adverse possession only applies to lands governed by the *Registry Act*. Section 51(1) of the *Land Titles Act,* R.S.O. c L.5 states that notwithstanding the *Real Property Limitations Act*:
> >
> > > … no title to and no right or interest in land registered under this Act that is adverse to or in derogation of the title of the registered owner shall be acquired hereafter or be deemed to have been acquired heretofore by any length of possession or by prescription.
> >
> > However, s. 51(2) preserves adverse possession claims that crystallized before the land at issue was registered under the Land Titles system. As the Ontario Court of Appeal recently explained in *Billimoria v. Mistry*, 2022 ONCA 276, at para. 28, "land that is registered in Land Titles cannot be obtained by adverse possession unless the ten-year exclusion period ran before the land was registered."
>
> In this case, the properties at issue were converted to the Land Titles system in 2002. Accordingly, the dispute between the parties hinges on whether the Applicant moved the fence line in 1996. If he did, as the Respondent contends, he and his predecessors would not have had actual possession of the disputed property for the ten-year period necessary to acquire possessory title before the conversion date.
>
> On the other hand, if the Applicant's position that he rebuilt the fence in 1996 to follow the pre-existing fence line is correct, this would support the inference that previous owners of 81 Pears acquired possessory title over the disputed property, extinguishing the legal title of the then-owner of 83 Pears."[5]

[4] *Milne v. Margaritis*, 2023 ONSC 1375 (CanLII), https://canlii.ca/t/jvwjh, at para. 1

[5] *Ibid.*, at paras 10 to 12.

It was the back yard boundary between the two properties at Nos. 81 and 83, in Toronto, which was the focus of this dispute. An image in Figure 1 from a GIS mapping application shows the relative position of the two backyards:

Figure 1: Property line between Nos. 81 and 83 as depicted in GIS application[6]

In concluding that the adverse possession claim failed, the court noted,

> The main direct evidence on the issue is the testimony of the Applicant and Fraser that in carrying out the renovations they respected the existing indications of the boundary line. I accept that they intended to do this and that they sincerely believe that they did so – it is obvious that both parties are sincerely convinced of the correctness of their position. I further accept the Applicant's evidence that he had no intention of making a "land grab" and Fraser's evidence that Kyrkarios was frequently present and witnessed much of the work with no objection. However, I am not convinced that their memories of these events from more than 20 years ago, recalled through the lens of this dispute, are sufficiently accurate to give me any confidence that the 1996 renovations did not move the effective boundary by a very small margin to the west.
>
> As the Respondent notes, the Applicant and Fraser have been able to produce no surveys, plans, permits, or engineering drawings reflecting the work they did. A simple examination of the boundary left after the 1996 work does not give the appearance that a straight and simple fence-line was followed. The Applicant himself aptly referred to the concrete pour done for the car pad around where the tree used to stand as a "zig zag mess."[7]

[6] From https://www.arcgis.com/home/webmap/viewer.html?layers=2d70a43f0db74d16b2780a39264a95ba All rights reserved.

[7] *Supra*, footnote 4, at paras 23 and 24

The alternative claim under s. 37(1) was considered next. In contrast with the claim in adverse possession, the Applicant was successful. The court reasoned,

> As discussed above, I accept that the Applicant honestly believed that the improvements he made were on his property. This was not seriously disputed at the hearing. The Respondent did however contend that the work done did not represent "lasting improvements." In my view, the retaining wall, fencing, sea channel, and concrete pour and raising of the car pad represent lasting improvements permitting the application of s. 37(1).
>
> I accept the Applicant's position that the balance of convenience strongly favours permitting him to keep the disputed area. The boundary stood for more than 20 years with no complaint. I would also observe that both lots appear to have minor encroachments from neighbours on the other side and that the evidence suggests some minor encroachments have been normal on Pears Ave. historically.
>
> Awarding the disputed area to the Respondent would require significant renovations to the Applicant's backyard including modifying a gate and stairs and potentially a retaining wall for the purpose of adding an objectively insignificant area to the Respondent's property. When the Respondent's wife Paola was cross-examined about her plans for the backyard, she was given every opportunity to explain why the disputed area was essential to them, and she could not articulate any compelling reason beyond wanting all of the space they were entitled to given that they have a large family. While this is an understandable point of view, I do not believe it is reasonable at this point in time to force the Applicant to do extensive work to undo the renovations he did in the honest belief that he was respecting the existing property line.
>
> The Respondent is entitled to compensation for the land retained by the Applicant. In oral argument, the Applicant's counsel suggested that this should be calculated by determining the lot's value in 1996 and assessing the percentage of the lot that has been lost. The Respondent's counsel did not propose a method or amount.[8]

The Respondent appealed. In dismissing the appeal, the court cited several leading cases[9] for what defined the test to be met by an applicant in order for a court to be satisfied that its discretion ought to be exercised:

a. the party must have genuinely believed that he or she owned the land;

b. the improvements must be of a lasting nature; and

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[8] *Ibid*., at paras 28 to 31

[9] *Armstrong, et al. v. Penny*, et al., 2023 ONSC 2843, at para. 100; *Dupuis-Bissonnette v. WM. J. Gies Construction*, 2010 ONSC 3680; *Corkery v. Moffitt*, 2022 ONSC 105; *Gay v. Wierzbicki*, 1967 CanLII 352 (ON CA), [1967] 2 O.R. 211 (C.A.); *McGuire v Warren* (2006), CanLII 23923 (Ont. S.C.), at para. 7; and, *Ryan in Trust v. Kaukab*, 2011 ONSC 6826, at para. 217

c. the court must weigh the equities between the owner and the person making the improvements to determine whether it is appropriate to transfer the land to the person making the improvements.[10]

Each element of the test was considered in turn and the court declined to interfere with the decision below. It really boiled down to a challenge of the reasonableness of the discretion that was exercised. This is often a difficult concept for laypersons to grasp, but the appellate decision emphasized:

> The discretion under s. 37 of the *Act* is not to be exercised lightly. The court is required to use its discretion to grant the relief that is most just in the circumstances of the case. In my view, Dineen J. exercised his discretion on appropriate principles, considering all of the relevant circumstances, and did justice to the circumstances of this case.[11]

It is not often that we read about cases in which a remedy for an encroachment under s. 37(1) of the *Conveyancing and Law of Property Act* is pursued as an alternative to a claim in adverse possession. As adverse possession becomes more difficult to prove with fading memories in Ontario – or not at all, as in Alberta – we may see more such claims in the future.

Editor: Izaak de Rijcke

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

The subject matter considered in *Margaritis v. Milne* is discussed in section 6: *Honest but Mistaken Belief Regarding the Boundary and Ownership*, 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

[10] *Supra*, footnote 2, para 7

[11] *Ibid.*, at para 19 [citation omitted]

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.

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ISSN: 2291-1588

[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.