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.

The idea that security of tenure can be enhanced by repealing the doctrine of adverse possession has been acted upon in some Canadian provinces. Yet, title can still be lost if a property owner has an honest mistake about their boundaries, and makes a lasting improvement over the property line. The legislation, found in almost every common law province, is a tacit recognition that people make mistakes – and then, what remedies should be available to a court in finding a solution?

Two very recent decisions from courts in Canada illustrate how a solution is found and applied. One, in Saskatchewan, is the result of lasting improvements built by the owner onto what turned out to be the parents' land. The other, in Ontario, resulted from a builder constructing a new home over the property line, despite a property line having been staked out on the ground by a land surveyor.

Building Lasting Improvements over a Boundary: The Problems Continue

Key Words*: honest belief, mistake, lasting improvement*

In *Dunford v. Dunford*,[1] both the parent couple and the son's family shared the same surname so, like the court, resort was, (and now will be) made to first names. The court explained,

> Nathan and Barbara Dunford, the plaintiffs, own an acreage five miles north of Estevan, Saskatchewan. Their acreage is contained within a quarter section of land owned by Nathan's parents, the defendants, Frank and Paulette Dunford. Because the parties share the same surname, I will refer to them by their first names throughout these reasons.

[1] *Dunford v. Dunford*, 2023 SKKB 232 (CanLII), https://canlii.ca/t/k10z0

> Since obtaining title to the acreage in 2005, Nathan and Barbara made improvements to the acreage but they did not check to see if these improvements were on their property or on Frank's and Paulette's property.
>
> In 2013, a land boundary survey was commissioned which brought some surprising news: some of Nathan's and Barbara's improvements were either wholly or partially on Frank's and Paulette's property.
>
> The parties attempted to resolve this but could not. Nathan and Barbara then filed a statement of claim seeking a variety of forms of relief, including an order allowing them to keep the land upon which the improvements were made and to pay compensation to Frank and Paulette.
>
> Frank and Paulette disagree with such an order. They want the improvements removed from their property and damages for trespass.[2]

The claim was based on Saskatchewan's *The Improvements under Mistake of Title Act*,[3] which, at s. 2, states:

> 2. If a person has made lasting improvements on land, under the belief that the land is the person's own, the person or the person's assigns are:
>
> a) entitled to a lien on that land to the extent of the amount by which the value of the land is enhanced by the improvements; or
>
> b) entitled or may be required to retain the land if the Court of Queen's Bench is satisfied that the retention is just and appropriate in the circumstances and, in that case, the court may direct that compensation be paid for the land retained.

The parents' quarter section (160 acres), had been in the family for many years. The court explained the reason for Nathan and Barbara came into ownership of their acreage:

> When Nathan was in university and had a young family, Frank and Paulette suggested he build an acreage on part of their quarter. However, in order to satisfy bank financing requirements for the building of a house, Nathan was required to have legal title to the land upon which the house was located. Therefore, Frank and Paulette subdivided a parcel of 2.22 acres [acreage] on their quarter so Nathan could take title to this parcel. In this way, Nathan was able to obtain financing and build a home on the acreage.
>
> During this time, all parties agreed upon the general location of the acreage; however, there is no evidence that any of the parties referred to, or relied upon, a survey to set out the

[2] *Ibid.*, at paras 1 to 5

[3] *The Improvements under Mistake of Title Act*, RSS 1978, c I-1, https://canlii.ca/t/554sb

> boundaries of this parcel. Nathan describes the process of identifying the boundaries of the acreage with words to the effect that they just "eyeballed" it.[4]

The court described the improvements and how the parents were oblivious to whether they were built on Nathan's and Barbara's acreage, or on their own land. The improvements,

> "…included a large workshop with a concrete foundation, a bunkhouse for employees of Nathan's family business with water and a septic line, and a go-kart track for their children. They also expanded the dugout and installed a pumphouse by the dugout. I refer to these structures – except for the house Nathan and Barbara built – as the "improvements".
>
> Throughout the years, Frank and Paulette knew about the improvements and they helped Nathan and Barbara make them. The parents were involved in discussions about where many of the improvements would be located, and they provided equipment and labour. They even paid for some of the improvements, for example, the workshop. When the improvements were made, no one appears to have considered, or cared, whether they were on Nathan's and Barbara's property, or Frank's and Paulette's.[5]

This does not seem remarkable. Of course, everything changed when Nathan's and Barbara's plans changed in choosing to pursue a career opportunity out-of-Province. This event was described as,

> In 2013, the relationship between the parties changed. Nathan and Barbara decided to pursue a business opportunity in the Yukon and wanted to sell their acreage. Frank and Paulette disagreed with this decision and were upset. At this point, questions were raised for the first time about whether some of Nathan's and Barbara's improvements were on Frank's and Paulette's property. These questions would, of course, impact the ability of Nathan and Barbara to sell their acreage. Therefore, at this point, a legal survey was commissioned.
>
> The survey, completed in June 2013 and tendered as Exhibit P-8, established that everyone misunderstood the legal boundaries of the acreage. All of the improvements (except the house that was built on the acreage) were either wholly or partially on Frank's and Paulette's property.
>
> The plaintiffs, Nathan and Barbara, now seek an order pursuant to s. 2 of the Act permitting them to retain the land upon which the improvements were made and to provide compensation to Frank and Paulette for this additional land. They tendered into evidence a proposed survey to allow them to retain the land (Exhibit P-8). Alternatively, they seek compensation from Frank and Paulette for the value of the improvements they made to their parents' quarter.
>
> The defendants, Frank and Paulette, submit they are the registered owners of the land upon which the improvements were made and, because of this, Nathan and Barbara are

[4] *Dunford v. Dunford, supra*, footnote 1, at paras 8 and 9

[5] *Ibid.*, at paras 11 and 12

> trespassers. Frank and Paulette argue they are entitled to damages for the trespass and that the improvements must be removed from their quarter.
>
> For the reasons that follow, I conclude Nathan and Barbara are entitled to an order pursuant to s. 2(b) of the Act which permits them to retain the land upon which the improvements were made and to pay compensation to Frank and Paulette.[6]

Section 2 of *The Improvements under Mistake of Title Act* has been interpreted by courts in Saskatchewan in the past. As the court explained,

> There are two pre-requisites to obtaining relief under s. 2 of the *Act*.
>
> The first pre-requisite regards the nature of improvements to the land. A plaintiff must establish that "lasting improvements" were made… not every change made to a property constitutes a lasting improvement under the *Act*. The case law draws an important distinction between an improvement that is "lasting" and an improvement that simply adds to the value of the land. …
>
> The second pre-requisite regards the plaintiff's belief about ownership of the land upon which improvements are made. A plaintiff must establish they made improvements "under the belief that the land is the person's own"… the plaintiff must establish (1) he has made lasting improvements on land; (2) under the belief that the land is his own. G.H.L. Fridman and J.G. McLeod, *Restitution* (Toronto: Carswell, 1982) at p. 475 puts it as follows:
>
> > The scope of the legislation turns largely on the meaning of the phrase "under the belief that it is his own". The improver, in order to fall within the scope of the legislation, initially must establish that he believed that he had at least equitable title to the land at the time he made the improvements ...
> >
> > Secondly, the plaintiff must establish that the mistaken belief was an honest or bona fide belief. So long as the mistake is an honest mistake it would appear that it is not necessary to prove that it was founded on reasonable grounds although the reasonableness of the mistake may be considered in determining whether or not the mistaken belief truly existed. On the other hand, however, where the improver is wilfully blind as to the true facts there can be no bona fide mistake if he proceeds to make the improvements. [Emphasis added][7]

The decision in *Dunford* is very readable – and only 30 pages long. The discussion of how the court determined that the test to be satisfied had been met by Nathan and Barbara had been satisfied is illuminating and helps one understand what last improvements are "permanent" and which are not.

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[6] *Ibid.*, at paras 13 to 17

[7] *Ibid.*, at paras 20 to 24

In contrast, we turn to the Ontario decision of 135 pages in *Armstrong, et al. v. Penny, et al.*,[8] involving the construction of a new home with a 2-car garage encroaching over the property line.

The home was built in 1998 but the fact of the encroachment was not discovered until 2003. The court included a graphic to illustrate the amount of the encroachment early in the decision.[9] It appears below in Figure 4.

There were many details to this case making it more complex than just a question of determining an appropriate remedy. For example, the homeowner also made claims against the builder, municipality, and the land surveyor. It was the builder who argued that the home remain in place and that a remedy be crafted under Ontario's comparable to section 2 of Saskatchewan's *The Improvements under Mistake of Title Act.*

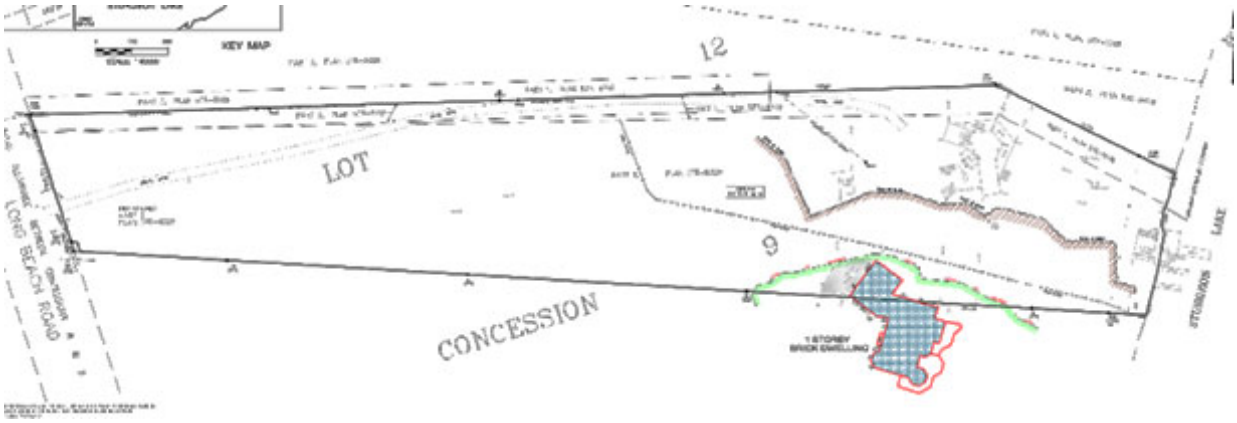

Figure 4: Graphic to show encroachment of house onto neighbours' property[10]

In Ontario, section 37 of the *Conveyancing and Law of Property Act*,[11] states, in part, as follows:

> 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.

[8] *Armstrong, et al. v. Penny, et al.*, 2023 ONSC 2843 (CanLII), https://canlii.ca/t/jxbhv

[9] Ibid., at para 1

[10] All rights reserved.

[11] *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34

Note the difference in wording with the Saskatchewan statute. The court explained that interpretation and application of section 37 in the past has resulted in a 3-part test to be satisfied by a litigant before the court will exercise its discretion. This test was explained,

> The exercise of discretion under s. 37 is not to be exercised lightly. Before granting relief under s. 37, the court must apply a three-part test:
>
> a. The party must have genuinely believed that he or she owned the land;
> b. The improvements must be of a lasting nature; and
> c. The court must weigh the equities between the owner and the person making the improvements to determine whether it is appropriate to grant a lien for the value of the improvements or to transfer the land to the person making the improvements.

After considering all of the evidence, the court did order the transfer of a triangular piece of land on which the encroachment was built, plus an additional strip to permit compliance with zoning setbacks. But, like all cases of this kind, it was neither simple nor straightforward for the parties. Each case is unique and is decided on the equities that are engaged by each situation.

Much can be learned of the risks and potential liability for builders, municipalities and land surveyors in reading the entirety of this carefully written decision.

Did any decision report arguments being raised that "security of tenure" should be respected and that title should not be ordered conveyed from one neighbour to the other? No. The issue was not mentioned once. It leaves one to ponder why "security of tenure" is raised to demonize adverse possession; yet a statutory "private expropriation" prevails.

Editor: Izaak de Rijcke

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

The subject matter considered in *Dunford* and *Armstrong* is discussed in section 6: *Honest but Mistaken Belief Regarding the Boundary and Ownership*, and in Chapter 4: Adverse Possession and Boundaries.

FYI

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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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