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 long-awaited decision in *Kosicki v. Toronto (City)*,[1] dealing with a claim based in adverse possession to a portion of a municipal park, has arrived! In a 5:4 split decision, the majority allowed the appeal, and gave the private owners success in their claim to a portion of the parkland. The fact that the court's order was as close as it was (i.e., 5:4) underscores just how fraught this area of law had become. Originating in Ontario, this ruling has implications across Canada. The court held that an emerging element in the common law known as the "public benefit" test to insulate certain public lands from loss due to adverse possession could not prevail in the face of legislation that established certainty and offered predictability for adverse possession claimants.

The dissenting judgment emphasized the public interest in parks serving as an important community resource, and a need to recognize that municipal parks are not just "other lands."

Adverse Possession to Municipal Parks: The "Public Benefit" Test does not Insulate Parkland from Loss

Key Words: *adverse possession, parkland, "public benefit" test, notice, acquiescence*

In *Kosicki v. Toronto (City)*, the facts were straightforward and summarized in the Court's Judgement. The Kosicki applicants had bought a residential property in Toronto in 2017. Much like their neighbours, the property backed onto a laneway owned by the City of Toronto, which separated their property from a large municipal park. Their backyard was enclosed with a fence. However, a few years after buying the property, the Kosickis learned that Toronto was the title holder of a portion of their backyard (also referred to as the "disputed land"). In 1958 a conservation authority had expropriated the disputed land, as well as a laneway behind the Kosicki backyard, and transferred ownership to Toronto in 1971. The fence enclosing the

[1] *Kosicki v. Toronto (City)*, 2025 SCC 28 (CanLII), https://canlii.ca/t/kfgtp

backyard of the Kosickis was built around their backyard at some point in time between 1958 and 1971. This fence blocked public access to the disputed land.[2] After learning that Toronto owned the disputed land, the Kosickis inquired about buying the disputed land from Toronto. Toronto refused on the basis of a policy designed to retain lands located in its green space.

The Kosickis then applied to the courts for a vesting order declaring and finding them to be owners of the disputed land. The application judge noted that certain other lower court decisions had described a public benefit test for adverse possession of public land, and then explored whether this test had been met by Toronto to defeat the Kosickis' adverse possession claim. She concluded that the public benefit test was not satisfied because of the municipality's failure to prove that the disputed land had ever been used by the public before the erection of the fence.

Despite this finding, the Kosickis' application was dismissed; she held that the disputed land was first expropriated for an important public interest purpose. As a matter of public policy,[3] a private landowner may not fence off public lands and exclude the public and then succeed in a claim for adverse possession. The Kosickis appealed.

In the Court of Appeal, Toronto's ownership of the disputed land was upheld, but the public benefit test was restated. The court held that adverse possession claims will fail where a municipality has not waived its rights over the property, or acknowledged or acquiesced to its use. The Kosickis appealed again.

The Supreme Court of Canada decision noted that Toronto had admitted that the Kosickis had met the test for adverse possession.[4] But Toronto had argued that the public benefit test prevented the Kosickis from succeeding; the disputed lands were necessary for public park use and should not be lost by the City. As noted, the Supreme Court decision was a bare majority (5:4), but that majority disagreed with the municipality's arguments. Perhaps the best insight for readers in understanding this outcome lies in the words of the court:

> …In my view, while the common law continues to play a role in the law of adverse possession in Ontario, the majority of the Court of Appeal erred in exempting the present possessory claim from the provisions of the *RPLA*. It is clear from a contextual assessment of the

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[2] *Ibid*, at para 7: "*In 1971, a survey plan was created and deposited with the land registrar, in preparation for the conveyancing of the tract of land described above to the City. The survey shows a fence around the backyard of the property that was erected sometime between 1958 and 1971, and has prevented public access to the disputed land for at least 54 years. The City did not produce evidence that the disputed land had any public use before 1971. A neighbour of the appellants, and owner of the residential property directly next door, recalled that the fence has been there since she purchased her property in 1975.*" Surveyors will appreciate that a deposited Reference Plan of Survey may or may not serve as "notice" to the world of information shown on such a plan.

[3] *Kosicki v. City of Toronto*, 2022 ONSC 3473 (CanLII), https://canlii.ca/t/jps9f, at paras. 76-78

[4] *Kosicki v. Toronto (City*), s*upra,* at paras 2, 17, and 30

provisions that the legislature did not intend to exempt municipal parkland from the *RPLA*'s operation and intended to preserve matured possessory claims.[5]

The extent to which the common law can, and will, impact a statutory scheme is always interesting.[6] The *Real Property Limitations Act* (*RLPA*) sets out a scheme in Ontario whereby ownership of land can be extinguished and, despite the conversion of title from the *Registry Act* to the *Land Titles Act*, those rights which had become established ***before*** the date of conversion are preserved. The *RLPA* was noted by the Supreme Court as having a number of exceptions that applied to municipally owned property, such a public roads.[7]

The court explained the basis for its analysis of the statutory scheme of the RPLA in order to determine the intent of the legislature. The following paragraphs are helpful in setting this stage:

> The Ontario legislation was amended in the early 20th century to specify exceptions to the application of the provisions described above for waste or vacant Crown land, road allowances, and public highways. However, the amendments expressly preserved rights, title, and interests that had been acquired as of June 1922 in respect of road allowances and highways. Together, these amendments form s. 16 of the *RPLA*.
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> Substantial efforts to reform the law of limitations in Ontario were undertaken as early as 1969, which eventually culminated in the enactment of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B (see, e.g., Ontario Law Reform Commission, *Report on Limitation of Actions* (1969)). However, the law of limitations governing real property was left undisturbed by this enactment and attempts at reform were abandoned (Mew, Rolph and Zacks, at p. 10). As I will discuss further below, subsequent legislative enactments in the area of property rights, including the *LTA*, *PLA*, and *PPCRA*, have nevertheless significantly impacted the operation of adverse possession by eliminating the ability to acquire possessory title under the *RPLA*, but preserving matured possessory claims.
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> Where a claim for adverse possession is available, courts apply the relevant statutory provisions to determine if it is made out. The *RPLA* provides that the limitation period will start running at the time of "dispossession" (s. 5(1)), the elements of which are established in the jurisprudence. For a claim to succeed, the trespasser must establish: (1) actual possession of the land by the trespasser for the required statutory period; (2) an intention to exclude the true owner from their property; and (3) effective exclusion of the true owner from their property (*Pflug v. Collins*, 1951 CanLII 80 (ON SC), [1952] O.R. 519 (H.C.J.); *Keefer v. Arillotta* (1976), 1976 CanLII 571 (ON CA), 13 O.R. (2d) 680 (C.A.); *Teis v. Ancaster (Town)* (1997), 1997 CanLII 1688 (ON CA), 35 O.R. (3d) 216 (C.A.)). Actual possession is established where the act of possession is open and notorious, adverse, exclusive, peaceful, actual and continuous, all of which must be present for the claim to succeed (*Mowatt*, at para. 18; *Masidon*

[5] Para 20

[6] So too is its corollary: How does legislation impact or reform the common law?

[7] See Section 16 of the *RPLA*

> *Investments Ltd. v. Ham* (1984), 1984 CanLII 1877 (ON CA), 45 O.R. (2d) 563 (C.A.), citing *Fletcher v. Storoschuk* (1981), 1981 CanLII 1724 (ON CA), 35 O.R. (2d) 722 (C.A.)).
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> As this Court recognized in considering British Columbia's equivalent legislation, "[w]hile courts have a role in defining what constitutes dispossession under British Columbia's limitations legislation, legislative intent must be respected" (*Mowatt*, at para. 27). While the legislature may redefine the meaning of a common law term (*Giffen (Re)*, 1998 CanLII 844 (SCC), [1998] 1 S.C.R. 91, at para. 26), it must signal its intention to do so; otherwise, the word will be understood to have retained its common law meaning (*R. v. Holmes*, 1988 CanLII 84 (SCC), [1988] 1 S.C.R. 914, at pp. 929-30; *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 20; R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at § 17.01.Pt2[1]).
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> While the statute has preserved common law rules for defining dispossession, it is nevertheless clear from the history of legislative amendment in this area that courts must proceed with caution to respect legislative intent (see *R. v. Basque*, 2023 SCC 18, at paras. 40 and 45). In this respect, I note that the public benefit test considered by the courts below is of relatively recent vintage. Unlike in *Basque*, where the Court considered the impact of a statutory provision on an *existing* common law rule, in this case we must consider the impact of case law which post-dates the enactment of the relevant provisions of the *RPLA*. In such a case, the appropriate starting point is the statutory scheme. It is necessary for a court to closely examine the statute in order to determine whether legislative intent would be undermined by recourse to a novel common law rule (see Sullivan, at § 17.02[1]).[8]

The court embarked on an exercise of statutory interpretation which began with a consideration of the ordinary and grammatical meaning of the relevant provisions of the *RPLA*. This is understood to mean, "'the natural meaning' that appears when the provision is simply read through as a whole".[9] In this regard, the court explained the result of its analysis in finding that the categories of owners of land who were immune from loss of title through adverse possession was in fact a "closed list" and municipalities owning parkland were not in that list.

> Section 4 of the *RPLA* provides for a 10-year limitation period within which a title holder must bring an action for the recovery of land, and in broad language subjects all persons and all lands to the operation of the *RPLA*:
>
> > **4** No person shall make an entry ... or bring an action to recover any land ... but within ten years next after the time at which the right to make such entry ... or to bring such action ... first accrued to the person making or bringing it.
>
> By use of the word "any", the *RPLA* does not distinguish between categories of lands, and notably it does not distinguish between public or private entities: in this general provision, the limitation period applies to all lands and persons equally. The term "land" is defined under s. 1 of the *RPLA*; its definition is expansive and all encompassing. Had the legislature intended to exclude public lands from the application of s. 4, it could have done so by employing a narrower term. Further, the use of the word "person", a necessarily broad term,

[8] *Kosicki v. Toronto (City*), s*upra,* at paras 25 to 29 (hyperlinks to citations omitted)

[9] *Ibid* at para 31

encompasses municipalities (*Municipal Act, 2001*, S.O. 2001, c. 25, s. 9). Again, had the legislature not intended for the *RPLA* to be of such broad application, it could have employed "individual" in the place of "person" (*British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, [2017] 2 S.C.R. 795, at para. 34).

Section 5(1) of the *RPLA* further clarifies that the 10-year limitation period governing the right of recovery begins to run "at the time of the dispossession":

> **5 (1)** Where the person claiming such land ... has, in respect of the estate or interest claimed, been in possession ... of the land ... and has, while entitled thereto, been dispossessed, or has discontinued such possession ..., the right to make an entry or ... bring an action to recover the land ... shall be deemed to have first accrued at the time of the dispossession or discontinuance of possession ...

As discussed above, the *RPLA* does not define the term "dispossession", which retains its common law meaning as determined by the courts (*Mowatt*, at para. 27). I will return to this below, where I consider the closed list in s. 16.

Like s. 4, s. 15 of the *RPLA* uses the term "any", indicating the sweeping application of this rule, extinguishing the title of "any person" who has failed to bring an action to recover land within the 10-year limitation period:

> **15** At the determination of the period limited by this Act to any person for making an entry ... or bringing any action, the right and title of such person to the land ... for the recovery whereof such entry ... or action, respectively, might have been made or brought within such period, is extinguished.

It is important to note that, rather than confer title to the adverse possessor, s. 15 extinguishes the rights of the paper title holder. This gives the adverse possessor the strongest claim to the land by virtue of their possession (La Forest, at § 29:14). The legislature has codified into statute the common law "rule allowing for [a] later possessor [to] acquir[e] ownership of land after the passage of a certain time" (*Mowatt*, at para. 17).

However, the rule is not absolute; exceptions to its application are found in the *RPLA* and across other statutes. Importantly for present purposes, the *RPLA* sets out at s. 16 several exceptions relating to lands of a public nature, which the parties and courts below describe as immunities:

> **16** Nothing in sections 1 to 15 applies to any waste or vacant land of the Crown, whether surveyed or not, nor to lands included in any road allowance heretofore or hereafter surveyed and laid out or to any lands reserved or set apart or laid out as a public highway where the freehold in any such road allowance or highway is vested in the Crown or in a municipal corporation, commission or other public body, but nothing in this section shall be deemed to affect or prejudice any right, title or interest acquired by any person before the 13th day of June, 1922.

The grammatical and ordinary meaning of the text of s. 16, read as a whole, is that ss. 4, 5(1) and 15 of the *RPLA* cannot operate to extinguish title to specific types of land, which are expressly delineated. On its face, s. 16 contains a closed list. The provision uses clear and precise language to list and describe the exceptions. As this Court recently noted, the text acts as an interpretive anchor and this is particularly true where the words of a statute are

> "precise and unequivocal" (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10; *CISSS A*, at para. 24).
>
> The precisely worded list of exceptions in s. 16 of the *RPLA* is to be contrasted with the broad application contemplated in ss. 4 and 15. While it is uncontroversial that courts have a role in determining what constitutes "dispossession" in s. 5(1), which is left undefined by the legislature, there is no indication in the text of s. 16 that the legislature intended that courts should supplement the statutory exceptions.[10]

After further review of instances of statutory amendments to what is today the *RPLA*, the court gave a number of examples in which the common law was often codified in the legislation – but also with frequent exceptions or further amendments. Importantly, the legislature was seen to have chosen to not create an immunity from loss of title due to adverse possession for municipal parkland. The conclusion that followed was therefore inevitable:

> Given this legislative pattern of codifying common law rules in statute, but with modifications, it is significant that the legislature has not expressly legislated an immunity from adverse possession for municipal parkland. Moreover, I disagree with the City's suggestion that the legislature's silence is of little relevance because s. 16 of the *RPLA* has not been amended since 1922, or because of the difficult language of the statute, which reflects its historical origins (see R.F., at para. 43). While s. 16 itself has not been amended, a number of legislative enactments have impacted the operation and application of the *RPLA*, which I will consider below. In such a legislative context, I would not summarily dismiss the absence of an express exception for municipal parkland.[11]

There have been recent opportunities for the legislature to protect public land – whether owned by the Province, a municipality or other public authority. The court gave many examples to illustrate these opportunities and noted that, despite stated policy goals, not once did Ontario enact legislation to protect municipal parkland:

> More recently, the legislature again turned its mind to the *RPLA*, notably in amending statutes dealing with public lands in Ontario, namely, provincial parkland, conservation reserves, and other public lands. In 2021, the legislature amended both the *PLA* (s. 17.1) and the *PPCRA* (s. 14.5) to exempt certain categories of public lands from the application of the *RPLA*, but preserved matured possessory claims (*Supporting People and Businesses Act, 2021*, S.O. 2021, c. 34).
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> The *PLA* protects "public lands" from the acquisition of possessory title under the *RPLA* (*PLA*, s. 17.1). Public lands are defined as including "lands heretofore designated as Crown lands, school lands and clergy lands" (*PLA*, s. 1). Section 17.1(2) of the *PLA* further clarifies that for the purpose of the exemption from possessory claims, public lands include "lands acquired by the Crown in right of Ontario at any time for the purposes of a past or current program of the Ministry". For its part, the *PPCRA* exempts from the application of the *RPLA*: (1) public

[10] *Ibid* at paras 32 to 38

[11] *Ibid* at para 50

lands that are within a provincial park or conservation reserve; and (2) public lands acquired for the purposes of the *PPCRA* that are not in a provincial park or conservation reserve (*PPCRA*, s. 14.5(1)). Provincial parks and conservation reserves are designated by regulation (*PPCRA*, s. 54(1)). The *PPCRA* also expressly deems any land that is part of a municipality, but which has been designated as a provincial park or conservation reserve, as separated from that municipality, for as long as it is designated as such (s. 31(1)).

These recent amendments undermine the City's suggestion that the legislature has not turned its mind to s. 16 of the *RPLA* for over a century (R.F., at para. 69). Although these new "immunities" do not appear in the text of s. 16, in effect they statutorily expand the categories of land exempt from the application of the *RPLA*. They do not include municipal land, unless such land is designated under the *PPCRA* (see *Designation and Classification of Provincial Parks*, O. Reg. 316/07).

Consistent with the *LTA*, the legislature also preserved possessory claims that matured prior to the coming into force of the *Supporting People and Businesses Act, 2021*. Both s. 17.1(1) of the *PLA* and s. 14.5(1) of the *PPCRA* state in identical language that "no person may acquire a right, title or interest ... by or through the use, possession or occupation of the lands or by prescription on or after the day the *Supporting People and Businesses Act, 2021* receives Royal Assent". Although the legislature has removed the possibility of acquiring possessory title to the public lands described above, it has decided to do so on a prospective basis.

At the second reading of the *Supporting People and Businesses Act, 2021*, the responsible Minister identified the objective of the amendments as "prevent[ing] people from unlawfully claiming ownership of public lands for the benefit of Ontarians" (Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, No. 10A, 2nd Sess., 42nd Parl., October 26, 2021, at p. 396 (Hon. Nina Tangri)). Although statements of purpose may be vague or imprecise, "providing information and explanations of proposed legislation is an important ministerial responsibility, and courts rightly look to it in determining the purpose of a challenged provision" (*R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180, at para. 36). From the responsible Minister's statement of purpose, it is fair to conclude that the legislature turned its mind to the need to protect *certain* additional categories of public land from possessory claims for the benefit of the public. At the time of these amendments, the public benefit test had already been the subject of many lower court decisions (see, e.g., *Prescott & Russell (United Counties) v. Waugh* (2004), 15 M.P.L.R. (4th) 314 (Ont. S.C.J.); *Woychyshyn v. Ottawa (City)* (2009), 88 R.P.R. (4th) 155 (Ont. S.C.J.); *Oro-Medonte*; *Richard v. Niagara Falls*, 2018 ONSC 7389, 4 R.P.R. (6th) 238).

Notably, there is no mention of exempting municipal parkland from adverse possession in other relevant statutory enactments (see, e.g., *Municipal Act, 2001*; *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A). I note that Alberta has expressly created immunity from possessory claims for municipal land (see, e.g., *Municipal Government Act*, R.S.A. 2000, c. M-26, s. 609).

In Ontario, the legislature has made a policy choice to confer special legislative treatment to a limited class of public lands and preserve matured possessory title. Considering the recent

> statutory enactments specifically dealing with the availability of adverse possession for public lands, I am of the view that recognizing a common law protection against such claims for municipal parkland would run contrary to legislative intent.[12]

The result therefore was that the court could not impose the common law in the area of property rights when the legislative treatment had left no opening for the common law to fill. The court framed the result of its analysis thus:

> Given my conclusions on the statutory interpretation of the *RPLA*, I am of the view that the courts below erred in exempting the appellants' claim from the operation of its provisions by creating a novel immunity from adverse possession for municipal parkland. Contrary to the reasoning of the application judge, the question before this Court is not whether recognizing possessory title in this case is good public policy (para. 78). Rather, this Court must ask itself whether the manner in which the courts below exempted the present claim, on the basis of a judge-made rule, can be reconciled with the legislature's treatment of immunities from adverse possession (see Sullivan, at § 17.02[1]; *Basque*, at paras. 40 and 45). Pursuant to the principle of legislative sovereignty, "validly enacted legislation is paramount over the common law", and courts must give effect to legislative intent, "regardless of any reservations they might have concerning its wisdom" (Sullivan, at § 17.01.Pt1[1]).
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> That the legislature has not completely ousted the common law does not permit courts to supplement a statute in a manner that is inconsistent with legislative intent. As Professor Sullivan writes, when considering whether common law may be relied on to supplement legislation, "[r]esort to the common law is impermissible if it would interfere with the policies embodied in legislation or defeat its purpose" (§ 17.02[3]). Ontario has actively legislated with respect to possessory claims to title, including with respect to certain public lands. Commenting on the role of the courts in such a context, Professor Ziff has explained that, unlike other areas of private law, the area of property law has been extensively and substantively altered by statutory changes. As a result, when addressing questions of statutory interpretation, it is to be expected that courts' "creative capacity is abridged" (B. Ziff, "Property Law and the Supreme Court: Of Gardens and Fields" (2017), 78 *S.C.L.R.* (2d) 357, at p. 365).
>
> This Court recognized this necessary restraint in *Mowatt*, where it clarified that the question properly before the Court was not whether the inconsistent use requirement was "necessary or desirable", but "whether it forms part of the law of British Columbia and therefore ought to have been applied by the courts below" (para. 21). Justice Brown, writing for a unanimous court, expressly considered the contrary legislative intent in determining that it did not form part of the law (para. 27).[13]

[12] *Ibid* at paras 59 to 65

[13] *Ibid* at paras 72 to 74. See also para 83

Does this mean that the public benefit test forms no part of the law of adverse possession in Ontario? This question was not necessarily argued in this appeal, but the question was alluded to when the court wrote,

> Moreover, if, as my colleague concludes, the evidence in this case is insufficient to make out constructive knowledge, it is unclear what evidence could support a successful claim, short of evidence that City officials were aware of the possession. Plain evidence of the appellants' adverse possession was apparent in the survey plan deposited with the land registrar, a survey plan that was explicitly referred to in the deed used to convey the land from the Conservation Authority to the City (A.R., vol. II, at pp. 72-76). With respect, the public benefit test elaborated by the majority of the Court of Appeal and adopted by my colleague would appear to effectively bar all claims for municipal parkland.
>
> Given my conclusions on statutory interpretation, it is unnecessary to further address the substantive merits of a public benefit test, as it has been discussed in various lower court decisions (see *Waugh*; *Woychyshyn*; *Richard*; *Oro-Medonte*). However, I highlight briefly the unsettled foundation of the test. The appellants are correct to note that in the majority of cases where the test was advanced to defeat a possessory claim, the claim failed on other grounds (A.F., at para. 52).
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> In both *Waugh* and *Woychyshyn*, the possessory claims failed due to the insufficiency of the evidentiary record (*Waugh*, at para. 8; *Woychyshyn*, at para. 11). In *Richard*, the possessory claims failed because the public was found not to have been excluded from the municipal land (para. 33). Likewise, in *Oro-Medonte*, a possessory claim to municipal land could not be established, as exclusive possession had not been made out (para. 134). In *Mowatt*, this Court found that decisions where possessory claims had failed due to a lack of exclusive possession were an insufficient basis to conclude that the law of British Columbia on adverse possession had adopted the inconsistent use requirement, despite suggestions that the courts had considered the intentions of the paper title holders in relation to the use of the land (paras. 24-26). This reasoning equally applies to the present public benefit test.[14]

On the facts presented in these various cases, the court has pointed out that adverse possession failed for other reasons – and not because of the public benefit test. In *Kosicki*, Toronto (and the conservation authority before it) were found to have had knowledge of the fence around the disputed land as early as 1971. Neither took any steps to reclaim occupation. While the public benefit test may not be a basis to resist a claim against municipal parkland, the other cases cite many instances where little evidence was needed to defeat a claim based in adverse possession to a park.

The majority of the court then set aside the decisions below, awarded title to the Kosicki appellants and ordered the land registrar to amend the description of the Kosicki land to include the disputed land.

[14] *Ibid* paras 78 to 80

The dissenting reasons (4:5) are useful to bear in mind. The application of the decision is based on facts and legislation in Ontario, but other provinces of Canada have similar challenges; the ruling deserves consideration across all of Canada. The dissent approached the facts and the relevance of the public benefit test differently. The framework also respected the paramountcy of the legislature, but underscored the common law as having entrenched the public benefit test – and the legislation had not been amended to repeal its operation. The dissenting ruling explained,

> Awarding the land to the appellants would deprive the community of this part of the park in perpetuity. The public would make a more socially valuable use of this land over time – postage stamp or not – than could any one person: that is the very principle of public use or benefit upon which parkland is predicated. For municipal parkland, that public interest is, if anything, amplified in a densely populated urban setting like the City. While I respectfully disagree with the dissenting judge's proposed conclusion in this case, I share his view that Toronto parkland is "vital to maintaining one's sanity and socializing with one's neighbours in an urban sea of steel and glass" (C.A. reasons, at para. 77). Moreover, there is no disagreeing with the fact, as the majority judges below observed, that Toronto's publicly accessible green space has "significant natural heritage" and "recreational" value that benefits the public (para. 3). While current land titles legislation precludes new adverse possession claims on registered land, granting the appellants' application based on their supposedly acquired rights would deprive the public of this benefit. And the cost to the City of monitoring 8,000 hectares of municipal property scattered over 1,500 parks — for that is what the record reveals is the land designated for this purpose — against potentially thousands of similar postage-stamp encroachments across hundreds of Toronto parks — would be prohibitive.
>
> Under the common law as it has developed in Ontario, land set aside by a municipality for the use or benefit of the public as a park should be treated as presumptively in use by the public and shielded from adverse possession. To overturn this presumption, a claimant must show that the municipality has changed the vocation of the land from that designated for public use as a park or has acquiesced to its private use. Acquiescence generally requires proof of knowledge on the part of the municipality. As I will explain, proof of constructive knowledge may suffice but the bar is a high one, given the public interest at issue.
>
> This common law rule has not been ousted by statute in Ontario, including by the *Real Property Limitations Act*, R.S.O. 1990, c. L.15 ("*RPLA*"), which sets out instances in which certain other public land is exempt from adverse possession. Properly interpreted, the *RPLA* does not give rise to the inference that, by omitting municipal parkland in the named statutory exemptions, the legislature intended to have that land treated, for the purposes of adverse possession, as if it were held by a private landowner. The *RPLA* is not a "complete code" for adverse possession of land, given that the measure of adverse possession is itself a common law test, sitting outside of the rules of limitation in the statute. However, I recognize that, complete code or not, the *RPLA* could oust the common law rule on public land if the legislature chose to do so expressly or by necessary implication (*R. v. Basque*, 2023 SCC 18, at para. 40, citing *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 21, per Cromwell J.). Legislative intent must, of course, be respected. But under the legislation, the

> common law relating to municipal land presumptively held for the use or benefit of the public has in this regard been left untouched by the legislature.
>
> Because it has not been ousted by statute, this common law rule relating to municipal parkland thus applies to the disputed land in this case.[15]

The dissent then explained how the analytic framework for reconciling a purported conflict between common law and legislation involves a two-step process:

> The legislature may, of course, oust the common law and if that is its intent it must be respected. But the applicable framework does not presume conflict. Statutory provisions and common law rules may "coexist harmoniously" unless the legislature indicates otherwise with requisite precision (*Basque*, at para. 6). At the same time, the approach reinforces the importance of interpretive discipline: courts must be attentive to legislative text and purpose, and avoid introducing changes to statutory regimes through untoward judicial innovation. This also reflects the principle articulated in *R. v. Salituro*, 1991 CanLII 17 (SCC), [1991] 3 S.C.R. 654, that structural reform is the responsibility of the legislature, while courts are limited to incremental developments necessary to maintain coherence in the law (p. 670).
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> At step one, the appellants argue that the common law test for adverse possession is clear: citing this Court's judgment in *Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138, at para. 18, the appellants rightly recall that adverse possession must be open, notorious, adverse, exclusive, peaceful, actual and continuous to trigger the commencement of the limitation period. However, the appellants dispute the authorities cited by the Court of Appeal that suggest that the common law of adverse possession treats public land differently from land owned by a private party, arguing that all of those cases were or could have been decided on this traditional common law test.
>
> At step two, the appellants rightly adopt the modern method for statutory interpretation endorsed by this Court in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, and subsequent cases, for discerning the meaning of the *RPLA*. Fixing in particular on ss. 4, 15 and 16, they say the meaning to be given to the *RPLA* is plain: the legislature has not directed that municipal parkland be exempted from the common law rules of adverse possession applicable to land held by a private landowner whereas other public land has been expressly treated as immune. They say this reinforces the inference that the legislature did not intend municipal parkland to be shielded from adverse possession. Moreover, the appellants argue that the *RPLA* is part of a broader legislative scheme in Ontario that preserves mature claims of adverse possession. In the result, there is no doubt, say the appellants, that they have possessed the disputed land for the requisite time and in a manner consonant with the principles of adverse possession. Their application for an order that they own the land should have been granted.
>
> I propose to follow the *Basque* framework suggested by the appellants. I will review, first, the common law rules for adverse possession applicable to the disputed land, owned by the City

[15] *Ibid* paras 91 to 94

> and designated as part of Étienne Brûlé Park. Second, I will consider how the common law rules interact with statute and, in particular, whether the common law regime for adverse possession of municipal land has been ousted by the *RPLA*. I end by applying the law to the land in dispute here.[16]

Interestingly, the minority reasons of the court then framed the 2-step analysis, beginning with a summary of the common law of adverse possession and agreed with the majority decision in the Court of Appeal below as written by Sossin, J.A.. The minority reasons in the Supreme Court continued,

> The majority in the Court of Appeal agreed with the application judge's conclusion that the appellants did not acquire the disputed land by adverse possession. But the majority judges disagreed with her view that the "public benefit test" required the City to show that the land had been used by the public before it was fenced in (see para. 41; 2022 ONSC 3473, 32 M.P.L.R. (6th) 306, at paras. 69 and 77-79). Writing for himself and his colleague MacPherson J.A., Sossin J.A. stated the common law test as follows:
>
> > Therefore, I would reframe the test for adverse possession of public land developed in cases such as *Warkentin* and *Richard* adopted by the application judge, as follows: <u>adverse possession claims which are otherwise made out against municipal land will not succeed where the land was purchased by or dedicated to the municipality for the use or benefit of the public, and the municipality has not waived its presumptive rights over the property, or acknowledged or acquiesced to its use by a private landowner or landowners</u>. [Emphasis added; para. 47.]
>
> The appellants' fundamental argument before this Court is that, "[i]n Ontario, the law of adverse possession is codified in the *RPLA*" (A.F., at para. 25). They say that their acquisition of the disputed land flows from the ordinary application of the statute. They argue that the majority judges below misinterpreted the common law to create a rule that would exempt or immunize municipal parkland from claims of adverse possession permitted under the *RPLA*. Moreover, they submit that the cases cited by the majority are inapplicable, distinguishable or wrongly decided (para. 52).
>
> I agree with the appellants that courts should tread carefully before changing the common law relating to real property in a fundamental way — a task best left to the legislature. But the appellants misread the judgment on appeal when they assert that "the Majority exceeded the Court of Appeal's jurisdiction when it established a novel immunity from claims in adverse possession" (A.F., at para. 6). The majority exposition of the common law is not one that, properly understood, amounts to a "novel immunity" from adverse possession for municipal land or even one that materially changed the law based on distinguishable or wrongly decided cases. As the City rightly suggests, Sossin J.A.'s enunciation of the common law test presented a "clarification of Ontario precedent" which "synthesized" prior decisions relating to the public benefit test as it pertains to adverse possession of municipal land (R.F., at paras. 110 and 120). Justice Sossin was acutely aware of this when he wrote that his

[16] *Ibid* paras 100 to 103

purpose was to "reframe the test for adverse possession of public land" developed in the relevant cases (para. 47 (emphasis added); see also para. 48).

The common law is, of course, not static. It evolves best through careful, reasoned judgments adjudicating live disputes. This evolution can proceed in different ways. Sometimes decided cases can properly bring incremental change to the law. But very often, including in areas where a dispute shows the common law to be unclear, courts content themselves with a restatement, in plainer form, of the law as it stands. In *Salituro*, this Court held that judges "can and should" recognize incremental changes to the common law to bring legal rules into step with a changing society (p. 666). But as "custodians of the common law" (p. 678), courts can also refine the law without changing it materially. Through a more cogent expression of existing principles, they thereby show that the law did not need change, but simply requires a plainer exposition of a principle that had previously been imperfectly stated in the cases.

Refining the law requires a careful understanding of the way in which past courts explained the law in different factual settings, in addition to identifying the finding upon which the disposition of the cases rested. This often means going behind the *ratio decidendi* that judges have later drawn from them and reified. In discharging their responsibilities as custodians of the common law, courts must, of course, apply a precedent precisely, but they are not confined to that work when they seek to understand the importance of a case to what the law says. Making sense of a legal doctrine will at times require tracing the lineage of a common law principle critically over time.

Sometimes, the exercise of refining the law draws into focus aspects of one case that, on the facts of that dispute, took on less importance, but can nevertheless speak to a similar matter as it arises before another court. Some judicial statements, initially viewed as *obiter*, gain precedential weight because they are repeatedly relied upon and shown to be workable in practice (R. J. Sharpe, *Good Judgment: Making Judicial Decisions* (2018), at pp. 150-51).

The City rightly suggests that this exercise was properly undertaken by the majority here. With respect, I disagree with the dissenting judge's view, embraced by the appellants, that the majority decision below "represents one of the clearest examples of the court using the common law to veer into the role of policy-maker" (A.F., at para. 61). The Court of Appeal did not "exceed its jurisdiction" by making radically new law for adverse possession in a manner that is the proper province of the legislature. On the contrary, as the City argues, the majority of the Court of Appeal contented itself with a "refinement of the common law requirements for what acts will constitute dispossession in the context of municipal parkland" in this case, rather than adding a new exception akin to the classes of public land exceptions in the list in s. 16 of the *RPLA* (R.R.F. (Amended), at para. 9 (emphasis in original)).

Importantly, Sossin J.A.'s explanation of the presumptive character of the public benefit test at common law does not create a new immunity, but instead recognizes that there are circumstances under the common law in Ontario in which it has always been difficult to acquire municipal land by adverse possession. On my understanding, Sossin J.A.'s reasons do not make new law on this point but seek to refine past decisions to make them intelligible in

the present circumstance, exemplifying a well-known characteristic of common law reasoning.

The parties agree on much of the common law test for adverse possession; they agree, for example, on the quality of possession that can ground a claim. What is in dispute is whether claims of adverse possession of public lands — and in particular, municipal lands — are distinct in a way that reflects the nature of that land. In canvassing the cases bearing on this question, Sossin J.A. distilled a general rule applicable to the common law of Ontario, namely that municipal lands accessible to the public are presumptively "*in use* for the public benefit" and therefore shielded from adverse possession, unless the alleged possessor can prove that, in fact, the municipality "acknowledged or acquiesced" to its private use (paras. 38, 41 and 47 (emphasis in original)).

Given the public interest in the land, the majority said that municipal land in Ontario cannot be subject to acquisition by adverse possession in the same way as land held by a private landowner except in a narrow set of circumstances. The majority drew this rule out of cases they carefully identified and gave it intelligible expression. Justice Sossin did not invent, by some kind of illegitimate judicial pronouncement or otherwise, a novel common law exception of municipal parkland from adverse possession. Instead, he undertook a familiar task of synthesizing a series of decided cases that reflected a wholly legitimate dimension of common law reasoning, identified recently by the President of the United Kingdom Supreme Court, whereby "judges may arrive at a principle by a process of induction from a series of judicial decisions in individual cases" (Lord Reed, *Time Present and Time Past: Legal Development and Legal Tradition in the Common Law – The Neill Law Lecture*, February 25, 2022 (online), at p. 2).

In distilling a general rule from Ontario cases bearing on adverse possession claims on public land present in the common law as it stood, Sossin J.A. was indeed reasoning inductively. Adeptly done in this instance, this exercise is not otherwise remarkable as a feature of common law methodology. Reasoning inductively is a technique that is "characteristic of English law", as Professor C. K. Allen once wrote, by which a judge "works forward from the particular to the general" (*Law in the Making* (2nd ed. 1930), at p. 110). Justice Sossin did not break with settled law or even fill an identified gap left by statute in the law. Instead, he made sense of a series of disparate cases that have said similar things in different ways: municipal land, by reason of its nature and vocation, is not subject to acquisition by adverse possession in the same way as land held by a private owner. I respectfully disagree with the view of the dissenting judge who saw this as transgressing a judge's proper role: Sossin J.A. simply synthetically reframed the existing law, rather than crafting a new rule, as part of an exercise of the proper judicial function that was, in Professor Allen's words, an "effort ... to find the law, not to manufacture it" (p. 184).[17]

The analysis continued by addressing the issue of whether or not the *RPLA* reveals a legislative purpose in favour of ousting the common law. The dissent explained,

[17] Ibid paras 104 to 114

It is difficult to ascribe a single overarching purpose for which the *RPLA* was enacted. As noted earlier, the accumulated rules governing limitation periods were eventually amalgamated into the 1960 *Limitations Act*. That statute contained "a collection of provisions drawn from thirteen English statutes enacted between 1588 and 1888", and was "complex, confused and obscure" (Ontario Law Reform Commission, at pp. 7 and 65). The provisions pertaining to real property nevertheless persisted into successor statutes, and have remained virtually unchanged.

This conclusion is further supported by a review of the *RPLA*'s statutory scheme, which exhibits internal inconsistencies and therefore evidences limited and shifting legislative purposes. A prominent example concerns the treatment of Crown land, referred to in at least three distinct provisions. Section 3(1) establishes a 60-year limitation period for actions brought by the Crown for the recovery of land, and s. 3(2) provides expressly for the application of s. 15 to Crown land. Implicit in these provisions is that the Crown's title to land may be extinguished and adversely possessed. At the same time, s. 16 exempts certain Crown land from the application of both ss. 3 and 15. These inconsistent provisions suggest that the *RPLA* consolidates multiple layers of legislative logic that lack a harmonizing principle to bring them into coherence (see, generally, Mew, Rolph and Zacks, at § 12.01; Lee, at pp. 29-30).

Similar observations may be drawn when the *RPLA* is considered within the broader statutory landscape governing real property in Ontario. Section 51 of the *LTA*, provides a good example. That provision states that, with some exceptions, no title to registered land may be acquired by adverse possession after registration. The *RPLA*, however, makes no reference to registration status, nor does it qualify the application of its extinguishment provisions, including ss. 4 and 5, on that basis. These statutes intersect in nuanced ways but contain no harmonization mechanisms (see B. Bucknall, "Limitations Act, 2002 and Real Property Limitations Act: Some Notes on Interpretative Issues" (2005), 29 *Advocates' Q.* 1, at pp. 8-9; V. Di Castri, *Registration of Title to Land* (loose-leaf), at § 18:79). The *Public Lands Act*, R.S.O. 1990, c. P.43, governs land held by the Crown in right of Ontario, and expressly bars the acquisition of any interest in such land by adverse possession or prescription. Notably, the *Public Lands Act* provides that this bar on adverse possession operates despite any other law "including the [*RPLA*] and any other Act or <u>any common law rule</u>" (s. 17.1(1)). Not only does this language sit in apparent tension with the *RPLA*, it also contemplates the continued application of the common law to interests that arise by adverse possession. This reflects a broader pattern of statutory fragmentation and supports the conclusion that the *RPLA* was not designed to function as a comprehensive or exclusive code (Lee, at pp. 29-30 and 32). Rather, it presumes a legal environment in which its provisions operate in parallel with, and are shaped by, other regimes, including the common law (Q. M. Annibale, *Municipal Lands: Acquisition, Management and Disposition* (loose-leaf), at § WP:5.50).

This context frames the interpretive posture with which courts must approach the *RPLA*. Unlike the current *Limitations Act, 2002*, which emerged from a sustained modernization initiative (Lee, at pp. 29 and 32), the *RPLA* inherited an amalgamation of provisions that were preserved without substantial legislative revision (Mew, Rolph and Zacks, at § 12.01). The

> *RPLA* contains no preamble or interpretive clause, nor does it expressly articulate an overarching purpose. Far from being a complete code reflective of a deliberate legislative intent, then, the *RPLA* appears instead to be more of a "patchwork quilt of disparate enactments" (§ 1.02) that was constructed in fits and starts, and over long periods of time.
>
> Section 16 is a case in point. As canvassed above, s. 16 consolidated multiple protections enacted by the legislature in the early 20th century against extinguishment and adverse possession. The decision to expressly protect highways and unopened road allowances arose in reaction to, and alongside, developments in the common law. The omission of parkland from s. 16 does not reflect a necessary choice by the legislature to deny further protections should they emerge under the common law. To the contrary, the fact that the impetus for legislative intervention in 1922 appears to have been in response to the evolution of the case law would suggest that s. 16 developed alongside, and not separate from, the common law. Thus, while a nominal purpose may be gleaned with respect to s. 16 – in that it sets aside certain lands as immune from extinguishment and adverse possession – the logic that underlies how those lands were identified reveals an understanding that s. 16 will operate alongside the common law.
>
> On that basis, I respectfully disagree with the view that the legislative evolution of s. 16 reflects a deliberate and concerted process to displace or oust the common law as it applies to municipal parkland. There is no express direction one way or the other, and I see no sign of a legislative design from which to infer that silence in respect of municipal parkland reflects a deliberate intention. While the legislature may have introduced exemptions for specific categories of land — such as Crown waste land, vacant land, and public highways – over time, nothing suggests that the legislature was simultaneously seeking to exclude municipal public land from any common law protections. It simply did not provide statutory immunity to such lands.[18]

An interesting point was then identified as having been made by one intervener – the Attorney General of British Columbia. The dissent explained further,

> The Attorney General of British Columbia asks what purpose would remain for s. 16 in respect of municipal land if all municipally owned land were exempt from adverse possession.
>
> The answer in this case is plain. Justice Sossin did not decide that all municipally owned land was exempt or immune from adverse possession. Instead, he recognized the common law understood that a category of municipal land, and in particular the parkland in this case, should be treated not as immune but as presumptively shielded from adverse possession where it is designated for the benefit and use of the public. Moreover, drawing from the cases, he explained the basis upon which the presumption could be overturned by claimants like Mr. Kosicki and Ms. Munro. His interpretation is fully compatible with s. 16 of the *RPLA*. Under the public benefit test for municipal parkland as explained by Sossin J.A., it remains possible to acquire the public property in question, while the same cannot be said of the

[18] *Ibid* paras 159 to 164

> highways, wasteland or other categories of public land for which s. 16 of the *RPLA* provides complete immunity from adverse possession.
>
> Finally, I agree with the City that an assessment of whether the public benefit test for municipal land as reframed by the majority in the Court of Appeal is consistent with legislative intent cannot ignore other provisions of the *RPLA*. The "dispossession or discontinuance of possession" of the owner of land referred to in s. 5(1) of the *RPLA*, for example — the provision that triggers the commencement of the limitation period under s. 4 — is not defined in the *RPLA*, and the relevant elements of adverse possession have been developed by the courts (*Mowatt*, at paras. 17-18). Not only is the public benefit test spoken to by Sossin J.A. compatible with s. 16, it is also consonant with what constitutes dispossession in circumstances in which the nature of the land — here municipal parkland — cannot be ignored.
>
> I would respectfully conclude that the position most consistent with both the jurisprudence and the legislative context is that the public utility test at common law remains operative alongside the *RPLA*. The next step, then, is to determine whether, on the facts, the City has actual or constructive knowledge of the private use of the land at issue and acquiesced thereto.[19]

This was a lengthy decision. Both the majority and dissent gave much detail for their reasoning. The amount of evidence necessary to establish acquiescence by Toronto to the trespass, and Toronto's consent thereto was treated by the court in disparate ways. Going forward, despite the outcome based on the majority decision, a measure of uncertainty lingers. If clarity in a subject such as property law is needed, legislation responding to this decision and the identified areas of uncertainty would be welcome.

Editor: Izaak de Rijcke

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

The decision in *Kosicki v. Toronto (City)* adds to the discussion 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

[19] *Ibid* paras 171 to 174

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Seminar: The *Boundaries Act* in Practice – What Surveyors Need to Know

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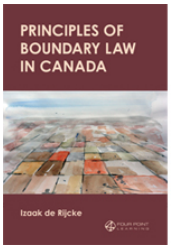
Principles of Boundary Law in Canada



This comprehensive treatment of the principles of boundary law lies at the intersection of law and land surveying. Although the textbook has its foundation in the law of real property in Canadian common law jurisdictions, it is intended as a resource which bridges two professions. For real estate lawyers, it connects legal principles to the science of surveying and demonstrates how surveyors' understanding of the parcel on the ground has helped shape efficient systems for property demarcation, conveyancing and land registration.

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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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