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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This month's issue follows on the same theme as last month in which a Manitoba court ordered a property owner to give up a portion of the property. This month we feature a similar case in Ontario. What is going on? The construction of improvements over a property line, thereby causing an encroachment, seems to be occurring with increasing frequency across Canada. While this observation may be only anecdotal, it is certainly to be expected when two developments converge: *First*, surveys are obtained less frequently and certainly no longer when a home is purchased. Title insurance, as a measure to guard against risk, has become the norm. *Second*, adverse possession is increasingly difficult (and more expensive) to prove. Coupled with land title legislation which restricts (or prohibits outright) the acquisition of a title based in adverse possession, and legislative amendments[1] which seek to curtail adverse possession even more makes adverse possession not an option. The shift in focus of case law from adverse possession to the pursuit of remedies based on honest belief of boundary location and building lasting improvements that encroach, becomes inevitable.

The opening sentence says it all: "This is a case about a very unfortunate property dispute between next door neighbours."[2] In this issue we review an Ontario decision that was appealed further, but the appeal was dismissed.

Construction of an Encroachment Leads to Court Order Awarding Title

Key Words*: encroachment, discretion, mistake, honest belief*

[1] See, for example, the law reform initiative studied in, Alberta Law Reform Institute*, Adverse Possession and Lasting Improvements to Wrong Land*, April 2020, Edmonton, at https://www.alri.ualberta.ca/wp-content/uploads/2020/05/FR115.pdf

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

As mentioned last month, courts continue to play a role when a structure is built by a neighbour and is subsequently "discovered" to be encroaching. The remedy in the courts is entirely based on legislation and is discretionary; success can never be guaranteed.

The proceeding in *Milne v. Margaritis*[3] was based on two alternative theories. The court explained them:

> 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.

Interestingly, the claim based under the *Conveyancing and Law of Property Act*, is in the alternative to adverse possess. The area of land at issue is small: barely more than 20 square feet. The strip of land is located between 81 and 83 Pears Avenue and can be found pointed out in the image to the left.[4]

The circumstances that gave rise to the dispute were essentially driven by the renovation and reconstruction of the home at No. 81. The court described these improvements as including,

> After acquiring 81 Pears, the Applicant carried out extensive work in both the house and the backyard area. His brother Fraser served as his contractor. This work included removing the existing fence, raising the level of the south end of the yard and pouring concrete to create a car pad, and building stairs, a gate, a retaining wall and a new fence.
>
> …the Respondent inherited 83 Pears and sought to use it as his family home. His wife, an architect, sought to design a new plan for their backyard. A survey they commissioned to assist in this purpose revealed that there was a small encroachment from 81 Pears into

[3] *Ibid*

[4] Image from TRCA map viewer site: https://trca.ca/conservation/flood-risk-management/flood-plain-map-viewer/

their backyard. She wished to make use of the entire deeded area and approached the Applicant about alterations to the gate, stairs, and fence to reflect the correct property line.[5]

Insofar as adverse possession was concerned, the court dismissed the application based on this theory. Most of the difficulty was evidentiary in that there was no basis by which the Court could make a determination. In its own words,

> 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."
>
> It is certainly possible that the effective boundary before this work was the same or to the west. But I am not satisfied of this on a balance of probabilities and accordingly the adverse possession claim fails.[6]

This left the alternate claim based on having 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*. The section deserves repeating:

> 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.

After accepting that the encroaching work was done innocently and with an honest belief it was theirs, the court awarded ownership to the Applicant, reasoning as follows:

> The Applicant relies on the decision of Flynn J. in *Dupuis-Bissonnette v. WM. J. Gies Construction*; *WM. J. Gies Construction v. Dupuis-Bissonnette* 2010 ONSC 3680, a case with factual similarities to the case at bar. In that case, the applicants built a retaining wall on the property of a neighbouring lot in the belief that the land was theirs. The encroachment was only discovered six years later. Flynn J. noted that the area in dispute was less than 1.5% of the neighbouring lot's proper size and found that the applicants should be entitled to retain the land in exchange for compensation. See also *Corkery v. Moffitt* 2022 ONSC 105, where a similar result was reached, for a detailed review of the relevant authorities.
>
> 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

[5] *Supra*, footnote 2 at paras 6 & 7

[6] *Ibid* at paras 24 & 25

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.[7]

The Respondent appealed.[8]

Speaking for the panel in Divisional Court, Justice Centa explained,

Mr. Margaritis appeals the order of Justice Dineen to this court as of right. At their core, his submissions invite the court to reweigh all of the evidence before the application judge and to make different findings of fact.

In my view, Justice Dineen correctly interpreted s. 37 of the *Act*. Justice Dineen's findings of fact, including that Mr. Milne had an honest and bona fide belief that the land was his, and that Mr. Milne made lasting improvements on the land, were reasonably open to him based on the record before him. I see no palpable and overriding error. Justice Dineen also properly exercised his discretion when considering what relief would be most just in the circumstances. Finally, I see no reason to interfere with Justice Dineen's discretionary decision to have each party bear their own costs of the applications. I would dismiss the appeal.[9]

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[7] *Ibid* at paras 27 to 31

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

[9] *Ibid* at paras 3 & 4

A key element of test to be met in an application under s. 37 of the *Conveyancing and Law of Property Act*, is what is called, the "balance of convenience."

> Third, Justice Dineen considered the equities and concluded that the balance of convenience strongly favoured allowing Mr. Milne to retain the land:
>
> > I accept [Mr. Milne'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 [the street] historically.
> >
> > Awarding the disputed area to [Mr. Margaritis] would require significant renovations to [Mr. Milne's] backyard including modifying a gate and stairs and potentially a retaining wall for the purpose of adding an objectively insignificant area to [Mr. Margaritis's] property. When the [Mr. Margaritis'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 [Mr. Milne] to do extensive work to undo the renovations he did in the honest belief that he was respecting the existing property line.
>
> 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.[10]

The appeal was dismissed. The outcome is consistent with other cases decided in Ontario and elsewhere in Canada. Unlike last month's issue in which a Manitoba decision also took into account the presence of title insurance, insurance was not mentioned in this decision.

Editor: Izaak de Rijcke

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

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

[10] *Ibid* at paras 18 & 19

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