



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 affect your work.

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Land fronting on water continues to generate disputes that often result in litigation. But unlike reported decisions which use only text to describe the spatial relationship of shoreline, fences and boundaries, this month's issue is a comment on a case that is replete with photographs, and historic surveys.

In this issue, we consider again questions about the waterfront, but especially where a dry land boundary between neighbours intersects with the shoreline area – a space that can be vulnerable to damage from storms and erosion. And if that dry land boundary is uncertain, what happens at the waterfront when a retaining wall structure is built by one neighbour first and the other neighbour seeks to “tie in” their own structure? Each case is of course unique, but the applicable principles remain the same.

The Importance of a Fence and Safeguarding a Shoreline from Erosion

Key Words: *shoreline protection, adjoining land, fence adverse possession, water access*

In *Malcolm v. Schreiber*,¹ the court considered an application for a declaration of title to a strip of land that had attracted little attention for decades. The strip was a long narrow triangle with a maximum width of just over 4 feet at the waterfront. Viewed from the upland of Malcolm's backyard, the decision included a picture put into evidence and with Burlington Bay in the background.



¹ *Malcolm v. Schreiber*, 2026 ONSC 961 (CanLII), <https://canlii.ca/t/kj927>

Both neighbours had retaining walls as a form of shore protection, built decades ago, but when the applicant's wall needed to be replaced, it was preferred that the new wall extend to the end of the neighbour's existing wall. This necessitated the court application because on paper, the title extended about 4' short of a fence. The strip was occupied by the applicant Malcolm, but the paper title to the land was held by the respondent Schreiber.

In this decision, the court offered a clear depiction of circumstances on the ground, including pictures, old aerial photography and surveys:

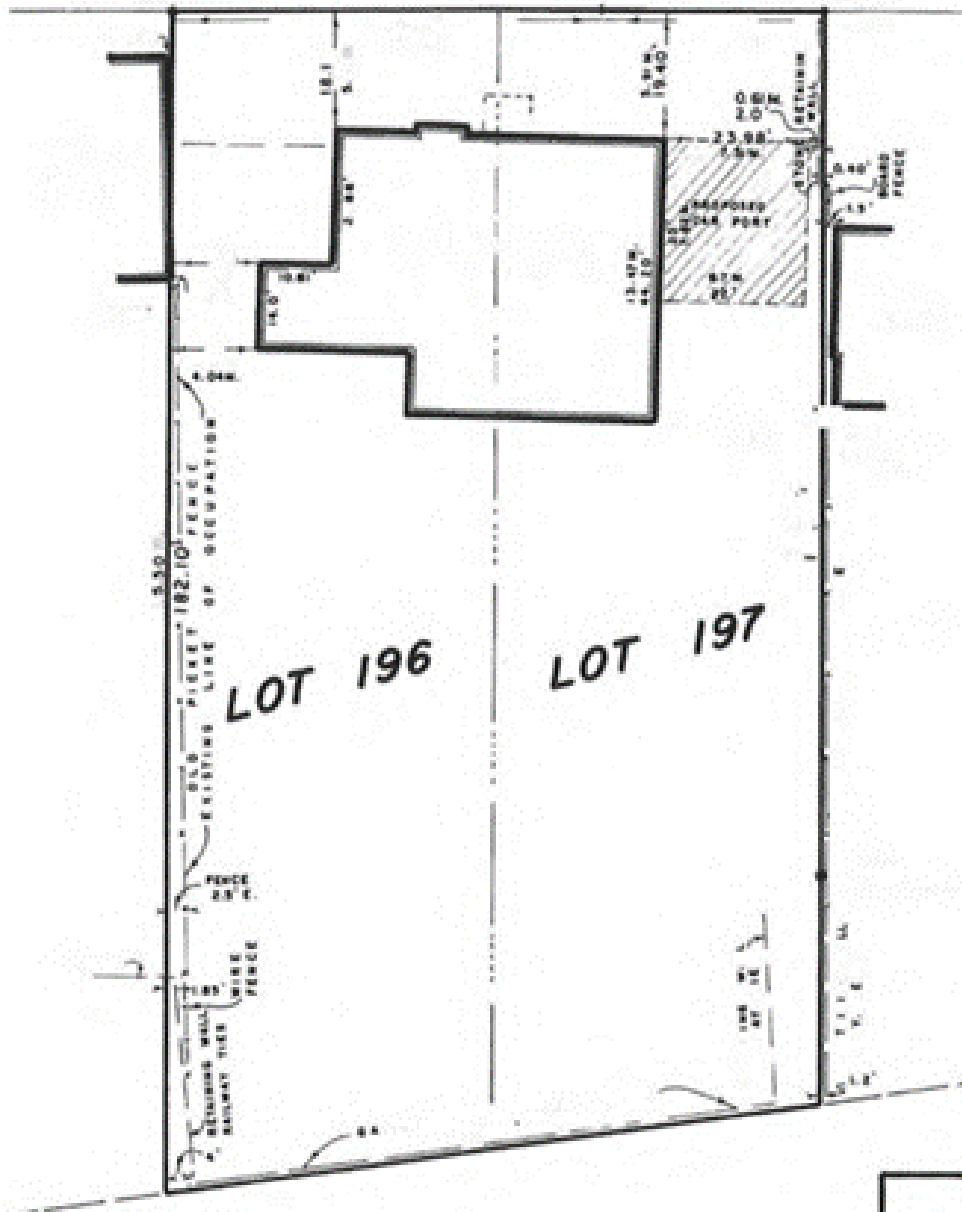
"... The Malcolm property sits to the west, the Schreiber property the east. Both properties extend to the Burlington Bay shoreline. In the below photograph, the Malcolm property is the lot to the left, and the Schreiber property the lot to the right (with the pool):



...

It is undisputed that the fence separating the properties – first, a white picket fence, later replaced by a chain link fence – was erroneously placed on the Respondent's property, to the east of the boundary line, unintentionally ceding a portion of the Schreiber's property. This portion is the disputed land at issue.

The disputed land runs north to south to the immediate east of the Malcolm's property line, beginning at the southeast corner of the Malcolm garage, which is in the northeast corner of their property. This garage – installed well before either litigant's family owned either property – encroaches as well on the Schreiber's lot. The parties have described the disputed land as "an elongated triangle shaped parcel that is approximately fifty metres long and 1.28 metres at the widest point [which is the shoreline]". That is an accurate description. The triangle-shaped parcel can be seen running along the left side in this 1979 Survey of the Schreiber property:



The white picket fence is visible in this 1977 photo from the Schreiber's backyard, looking towards the water:



In 1981, a pool was installed at the Schreiber property and a chain link fence replaced the picket fence along the same line towards the water. The chain link fence can be seen in the below photograph, taken at some point between 2015 and 2017 from the Schreiber property looking towards the Malcolm's backyard and the water:



Owners of waterfront properties reasonably worry about soil erosion. Every metre of land matters. Seawalls, a physical boundary, are often utilized to prevent land from being lost to

waves, storms, and ongoing erosion. A seawall is a shore-protection structure; a fixed barrier designed to absorb or deflect the force of ice and wave action, for a time.

Both the Malcolm and Schreiber properties contained such structures. The original Malcolm seawall was made of stacked dry concrete bags that had cured in place. This original seawall pre-existed the Malcolm purchase of the property in 1974 and extends past the legal boundary line between the two properties, as seen in the below photographs. The first picture is taken from the Malcolm backyard looking towards the water with the concrete bags visible, and the second picture is of the concrete bags extending into the disputed area along the shoreline:



The Schreiber waterfront included a gabion retaining wall and a wooden dock, as seen in the photograph below para. 13 of these Reasons.

By 2019 and 2020, storms and rising lake levels made clear that the Malcolm concrete-bag seawall had reached the end of its days. The Applicant took steps to replace it with a more substantial structure. Pictured below is the new Malcolm seawall:



This new seawall, and the gap between it and the Schreiber property, is visible from this 2022 aerial photo. This gap is the shoreline portion of the disputed land:



The seawall restoration work served as the catalyst for the present dispute. The Applicant sought to have the Malcolm seawall tie into the Schreiber seawall, spanning the disputed shoreline area. The Respondent refused, pointing out that her access to the water would be negatively impacted by such an installation.”²

The court then turned to the law, framing the application as was sought by the applicant Malcolm (adverse possession) but also considering the respondent’s position (neighbourly accommodation) and stated the principles as follows:

“The Applicant applies for a declaration that she has a legal right to the triangle-shaped parcel of land in dispute. It is submitted that she has obtained this right through adverse possession because of her actual, exclusive ownership of the property to the west of the chain link fence. Put another way, the Applicant submits that the placement of the fence has created circumstances where, over time, the parties consistently acted as if the Respondent and her family owned everything to the east of the fence line, and the Applicant’s family everything to the west. In these specific factual circumstances, it is submitted that the law should favour the fence line and the parties’ shared possessory understanding, not simply title. A finding of adverse possession would grant the Applicant the lawful ability to complete the Malcolm seawall by covering the disputed shoreline area.

The Respondent’s position is that this Application is brought in bad faith, solely to force completion of the Malcolm seawall on Schreiber property. It is submitted this adverse possession claim is recently conceived for this exclusive purpose. The Schreiber family never considered the disputed land anything other than theirs and benefited from the privacy

² *Ibid.*, at paras. 7 – 19 [references omitted]

afforded by the large hedge that covered much of the space during the critical period of 1987 to 1997. It is submitted that neighbourly co-habitation should not be equated with relinquishment of possession or ownership.

Counsel on this matter – consistent with the high level of advocacy displayed throughout the proceedings – agree on the governing legal principles:

- 1) The disputed land was registered under the *Registry Act* until February 24, 1997. On that date, it was converted to the Land Titles system.
- 2) The doctrine of adverse possession was extinguished by s. 51(1) of the *Land Titles Act*. However, s. 51(2) preserved adverse possession claims that had crystallized *prior* to registration in the Land Titles system.
- 3) As the Court of Appeal for Ontario explained in *Billimoria v Mistry*, 2022 ONCA 276, 470 D.L.R. (4th) 406, 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”. Therefore, *if* the Applicant’s possessory claim crystallized prior to February 24, 1997, she would have a right to the disputed land.
- 4) To establish possession by way of adverse possession, the Applicant bears the burden to establish (i) that she had actual possession of the disputed land for ten years prior to February 24, 1997; (ii) that she intended to exclude the Respondent’s family from the disputed land, and (iii) that the Respondent’s family was effectively excluded from the disputed land during this time period (February 24, 1987 to February 24, 1997): see *Kosicki v Toronto*, 2025 SCC 28, at para. 27; *Barbour v Bailey*, 2016 ONCA 98, 345 O.A.C. 311, at para. 35; *Levy v Stoller*, 2009 CanLII 31603 (Ont. S.C.), at paras. 24-25.

As the title holder in this case knew the true boundary by at least the time of the 1979 Survey, the Applicant must show a use of the disputed land inconsistent with the Respondent’s intended use; tolerated or neighbourly uses or uses consistent with the title holder’s objective – such as maintaining a privacy buffer – are insufficient. This is not a case where the parties were mistaken about the true boundary line, *i.e.*, this is not a case of mutual mistake: *McCracken Estate et al v Gatt et al*, 2023 ONSC 105, at paras. 70-71; *Mueller v Lee*, 2007 CanLII 23914 (Ont. S.C.), at paras. 22-23.

I will now review these three requirements in the context of this Application.”³

The court then applied these 3 requirements to what the evidence could support as fact. On all 3 requirements, the court found that the applicant Malcolm had failed to meet the test, thereby dismissing the application. Readers are encouraged to read this decision. The court offers an extremely helpful description of the fact-finding process.

Editor: Izaak de Rijcke

³ *Ibid.*, at paras. 21 – 25

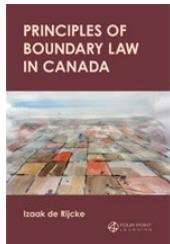
Cross-references to *Principles of Boundary Law in Canada*

A discussion of adverse possession and boundaries can be found in Chapter 4.

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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.

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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