



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.

You are welcome to show your appreciation for this free resource:

[Contribute](#)

The notion that all fences and occupation left alone for many decades, will mature into the legal boundary between neighbours, is simply not correct. Despite its attraction, the challenges to a property owner seeking such a result are many. This month we consider the result of such kind of an application – which was refused. Despite evidence from many witnesses, including testimony from a lawyer and a land surveyor, the court was not satisfied that the application should succeed. This case is an important reminder to real estate lawyers and land surveyors alike about the difficulties faced in this kind of a proceeding.

A “Boundary by Adverse Possession”? Think Twice Before Using this Phrase

Key Words: *fence, adverse possession, mutual mistake, expert evidence*

In *Swrjeski et al. v. Legris*,¹ an application for a declaration of ownership was dismissed. While the claim appears as one framed in adverse possession, there was extensive explanation in the reasons for decision about the significance of a fence, mutual mistake and the evidence forming the record before the court.

The court gave a brief summary of this application:

The parties own adjoining pieces of land. They are disputing the ownership of a section of land between their respective properties (the “Disputed Lands”). Both sides of this litigation purchased their land from historical owners.

...

The Disputed Lands lie within the boundaries of the Respondents’ property; however, the Applicants take the position that they are the rightful owners of this property through adverse possession. As a result, the Applicants seek the following [order]:

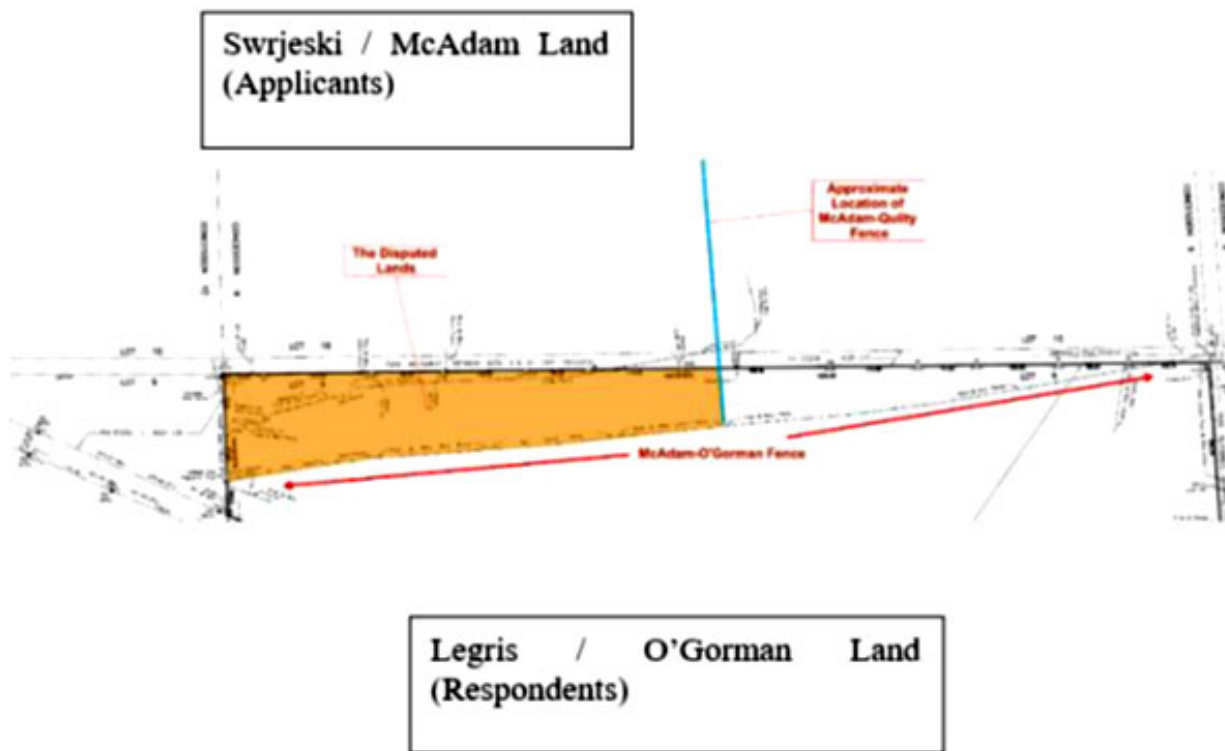
¹ *Swrjeski et al. v. Legris*, 2026 ONSC 1862 (CanLII), <https://canlii.ca/t/kk3rh>

- (a) A Declaration that by virtue of adverse possession, the Applicants are the owners in fee simple of the Disputed Lands, being that part of PT LT 9, CON 9 ADMASTON AS IN R311781; TWP OF ADMASTON/BROMLEY (part of PIN 57259-0031); and

...

The Disputed Lands are an uninhabited portion of the Respondents' property. Neither side intends to develop the land. The only use of this land since 1987 has been for two weeks per year during hunting season when hunting groups, including Mr. Swrjeski, used the land to hunt deer. When the Respondents purchased the property, they initially allowed hunting to continue on this land but withdrew that permission in 2008.²

Also included in the reported decision was a diagram describing the Disputed Lands and annotated by the court:³



The ochre shaded area represents the Disputed Lands while the “McAdam-O’Gorman Fence” next to the red arrows was claimed as the boundary between the parties. Referring to the diagram, the court explained further:

The parties agree that the shaded box depicts the Disputed Lands. The Disputed Lands are approximately 16 acres in size. The Applicants take the position that the red line named “McAdam-O’Gorman Fence” is the true property line. That name, “McAdam-O’Gorman”, referencing the fence at issue, was inserted by the Applicants. It has no legal meaning. I have

² *Ibid.*, at paras 1 to 3 (citations omitted)

³ *Ibid.*, at paras 5

decided to use it to refer to this fence for consistency; however, if I decline to find adverse possession, that fence will be wholly on the Respondents' property.

There is no question that when the Respondents purchased their property, they paid for acreage including the Disputed Lands. It is also not disputed that the Applicants purchased 200 acres and received 200 acres of land. The Applicants are now claiming that, given the historic usage between the properties, their 200 acre property is really 216 acres because their property lines should be extended by the Disputed Lands.

Neither party conducted a survey of their property before they purchased it.⁴

Because the present owners acquired title to their respective properties in the last two decades, much of the evidence of what occurred before that time had to be pieced together from old records, maps, and expert (opinion) evidence. As the court observed, this was an effort "to piece together the history of the lands through affidavit evidence, expert reports, and historical documentation."⁵

This posed a challenge for the applicants. The owners of the land during the ten year relevant period (1955-1965) were gone, so facts needed to be proven based on the remaining evidence available. The court approached this evidence with appropriate care and reservations, noting that,

I have reviewed the affidavits before me with extreme caution as there is considerable hearsay evidence contained therein. While I recognize that some hearsay evidence may be receivable, meeting the test of necessity and reliability, the vast majority of the hearsay evidence before me is not.⁶

Examples then followed, explaining why some of this evidence needed to be rejected. Experts were also called, including an experienced real estate lawyer from the same firm acting for the applicants. The court did not accept parts of this evidence, including the statement:

Evidence of possession was registered in 1963 and crystalized the possessory title acquired by the McAdam family, whereafter the Legris Respondents took title subject to this possessory interest.

This is stated as a fact. It is not. It is opinion evidence as Ms. Bellinger suggests that Mary Clare McAdam's declaration describing fencing must be in reference the McAdam-O'Gorman Fence.

During her cross-examination, Ms. Bellinger conceded that portions of her affidavit may be "lay opinion," but it is not expert opinion. Whatever the categorization, it is inappropriate for a party to rely upon the opinion evidence of one of their lawyers as substantive evidence.⁷

⁴ *Ibid.*, at paras 6 to 8 (citations omitted)

⁵ *Ibid.*, at para 10

⁶ *Ibid.*, at para 11

⁷ *Ibid.*, at paras 14 to 16

Likewise, the evidence from an expert land surveyor retained by the applicants was tendered before the court. This too was of limited assistance to the court, which explained,

Land surveyors measure, map and define property boundaries, yet Mr. Broxham goes far beyond this in his affidavit. His affidavit provides opinions on the usage of the property from the 1830's and 1840's onward. He comments on Census data and family genealogy. I agree with the Respondents' submission that this is not within Mr. Broxham's expertise. I have limited my admission of Mr. Broxham's evidence to his evidence as a land surveyor.⁸

What evidence remained? There were doubts expressed by the court in considering the respondents' evidence as well,⁹ but ultimately, the court needed to consider the facts that could be established in light of the applicable law. In this regard, the court cited the recent SCC decision¹⁰ which reiterated the law of adverse possession in Ontario.

The first element of the test in the *Kosicki* decision had been satisfied. However, in finding that the second element of the test had not been met, the court explained as follows in response to arguments about mutual mistake:

Was the open, notorious and continuous usage of the Dispute Lands adverse to the title holder?

In advancing their claim that the historic usage of these lands by the McAdam family excluded or was adverse to the O'Gormans, the Applicants argue there was a mutual mistake between the two owners of the property.

Mutual mistake refers to a circumstance in which adjoining landowners share the same, but incorrect, belief as to the location of their common boundary. Where both parties proceed on that basis, their respective use of the land may reflect that mistaken understanding rather than an intention to assert rights inconsistent with or adverse to the true owner's title.

Mutual mistake is not a separate requirement in a claim for adverse possession. It is relevant only insofar as it informs whether the land's possession was adverse or exclusionary. Where both parties occupy or use land under a shared but mistaken belief as to the boundary, that circumstance may bear on whether the non-title holder's conduct can properly be

⁸ *Ibid.*, at para 17

⁹ *Ibid.*, at para 18 where the difficulties are listed

¹⁰ *Kosicki v Toronto (City)*, 2025 SCC 28 at para. 27:

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 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.)).

characterized as an assertion of ownership inconsistent with the true owner's title: *Teis v. Ancaster (Town of)*, 1997 CanLII 1688 (ON CA) ("*Teis*").

The Applicants submit that both their predecessors and the Respondents' predecessors treated the fence line as the true boundary between the properties. On that basis, they argue that this historic use of the Disputed Lands occurred within a shared understanding of ownership that should be given legal effect.

To rely on mutual mistake in this context, the Applicants must establish that both parties operated under the same mistaken belief as to the boundary during the relevant period. While use of land may be consistent with a particular understanding of ownership, in my view, more is required to support a finding that both parties shared a mistaken belief as to the location of the boundary: *Teis; Wood v. Gateway of Uxbridge Property* (1990), 1990 CanLII 6786 (ON SC).

The Applicants bear the burden of proving mutual mistake. Further, any such shared mistaken belief must be established during the same continuous ten-year period relied upon by the Applicants. All elements for adverse possession must exist for the same ten-year period. They cannot exist at different times. If any one of the elements for adverse possession is missing at any time during the relevant period, in this case 1955-1965, the claim for possessory title must fail: *Teis, supra*.

It is even more difficult for the Applicants to meet their burden in this case because the ownership of their property changed during the relevant period of 1955-1965. James McAdam owned the property from 1928 to 1962. When he died in 1962, his widow, Mary Clare McAdam became the owner. She held the property until 2000.

To succeed in their claim, the Applicants are asking the court to draw an inference that James McAdam was mistaken as to the property line from 1955 until his death in 1962 and Mary Clare McAdam assumed this same mistake from 1962 to 1965. For it to be a mutual mistake, the Applicants must also prove that James O'Gorman (the owner of the Respondents' property during this relevant time period) held this same mistaken belief.¹¹

After then finding that the evidence did not permit a finding that both parties operated under a common mistake as to the boundary during the relevant period, there was only a remaining argument that the applicants could rely on:

... whether the Applicants have otherwise demonstrated possession that was sufficiently adverse and exclusionary to displace the Respondents' title. There was no additional evidence on this issue.

As a result, the Applicants have not met their burden of proving the historic use of the Disputed Lands was adverse to the title holder. Their claim for adverse possession fails.¹²

¹¹ *Ibid.*, at paras 27 to 34

¹² *Ibid.*, at paras 42 to 43

This result followed after the applicants had “set up trailers and other personal belongings on the Disputed Lands in an attempt to assert their property rights.”¹³ These were ordered by the court to be removed within the month.

What can this decision tell us about the challenges of seeking title based on adverse possession when the present use of the land in issue is a couple of weeks a year for hunting? Or, what does it tell us about the expert evidence needed to establish the history, provenance and understandings regarding an old fence? It appears as trite law that for adverse possession to be a legal theory to be relied upon, the boundary *over which* adverse possession is claimed must be known. This contrasts with the less obvious notion that a fence, or other limit of occupation, *becomes* the boundary by adverse possession. The latter focuses on the result; but there cannot be a “leap frogging” over the legal and evidentiary process necessary to arriving at this result. Clarifying our analysis and how title and boundary problems are framed will assist in avoiding traps.

Readers may want to think about how a variety of AI tools may have assisted in evaluating the title (or boundary) problems described in this decision. Can surveyors reliably use AI to solve boundary retracement problems? Can title disputes benefit from AI in finding solutions? We leave you with these points to reflect on.

Editor: Izaak de Rijcke

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

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

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 hours.¹⁴ These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year’s quota.

¹³ *Ibid.*, at para 50

¹⁴ Please note that the designation of CPD hours is based on the estimated length of time for the completion of the event. The criteria used are those set out in GeoEd’s *Registered Provider Guide* for Professional Surveyors in Canada. Other professions may qualify under different criteria. References to AOLS are to its Continuing Education Committee. Elsewhere in Canada, please confirm your eligibility for claiming CPD hours.

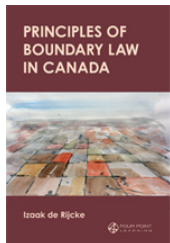
Eastern Regional Group of AOLS “Education Day”

The Eastern Regional Group (ERG) of AOLS is hosting an “Education Day” at the [Donald Gordon Hotel and Conference Centre](#) in Kingston, ON, on May 4, 2026. The Agenda is accessible [here](#). Cost for the day is \$185.00. Please [email](#) the Chair of ERG, Simon Kasprzak, to reserve a space.

Course: *Survey Law 1*

Survey Law 1 provides a foundation for professional surveyors to integrate legal principles, legislation and regulations within the overall framework of property boundary surveys. This course will be taught online Wednesday evenings by Izaak de Rijcke, starting September 9th. For more information, consult the [syllabus](#). Please go to Four Point Learning to [register](#).

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.)



This publication is not intended as legal advice and may not be used as a substitute for getting proper legal advice. It is intended as a service to land professionals in Canada to inform them of issues or aspects of property title and boundary law. Your use and access of this issue of *The Boundary Point* is governed by, and subject to, the [Terms of Access and Use Agreement](#). By using this issue, you accept and agree to these terms.

If you wish to contribute a case comment, email us at TBP@4pointlearning.ca.

If you wish to unsubscribe, please [email](#) us your request. To receive your own issues of *The Boundary Point*, complete a [sign-up](#) form at the Four Point Learning site.

© 8333718 Canada Inc., c.o.b. as Four Point Learning, 2026. All rights reserved.

ISSN: 2291-1588