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While adverse possession may remain unpopular in many Provinces – even attracting a certain degree of notoriety – there seems to be no shortage of reported cases in which adverse possession served as a basis for claiming relief. The results are sometimes successful and sometimes not. In the *Cardoso v. Benjamin*¹ case decided in early 2021, part of the claim succeeded and part did not.

Adverse Possession and Elements of the Test

Key Words: *adverse possession, occupation, possession, inconsistent use*

The claim in *Cardoso v. Benjamin* was supported by a plan of survey. A partial copy of the survey was attached as an appendix to the reported decision and appears below at Figure 1. The court provided a high-level summary at the start of the reported case:

The parties to this application are the registered owners of adjoining residential properties on Mountain Street in Grimsby. The residences are at the front (north end) of the properties, facing the street. The back portions of the properties ascend the Niagara Escarpment, up a steep incline.

The applicants (or members of their family) have owned and occupied 46 Mountain for 55 years. The applicants claim ownership by adverse possession of a triangular parcel of land on their property's eastern border, facing the street (referred to as the "Disputed Lands"). The respondent, the registered owner of 48 Mountain, holds legal title to the Disputed Lands. The northeast corner of the 46 Mountain residence encroaches on the Disputed Lands. The Disputed Lands also include additional property extending to the south and east of the 46 Mountain residence.

The applicants say that their family had (and continues to have) actual possession of the whole of the Disputed Lands, to the exclusion of the registered owners, for the required

¹ *Cardoso v. Benjamin*, 2021 ONSC 13, <https://canlii.ca/t/jczjt>

ten-year period prior to the property’s transfer to the Land Titles system in March 2003. On that basis, the applicants say they are the rightful owners of the Disputed Lands by adverse possession.

The respondent agrees in part. She concedes that the applicants have a lawful possessory claim to the following property (referred to in the respondent’s submissions and these Reasons as the “Common Grounds”): (i) the street-facing land on which the 46 Mountain residence encroaches, and (ii) a 10 foot side-yard to the east of the residence, running parallel to the residence from the street and meeting the (paper title) property line just beyond the end of the residence. The respondent is also prepared to provide the applicants an easement to and over stone steps providing access to the elevated back portion of the applicants’ property. However, the respondent disputes that the applicants have established continuous use of the balance of the Disputed Lands.

For the reasons below, I have concluded that the applicants have established adverse possession of the Common Grounds (as the respondent concedes) but not the balance of the Disputed Lands.²

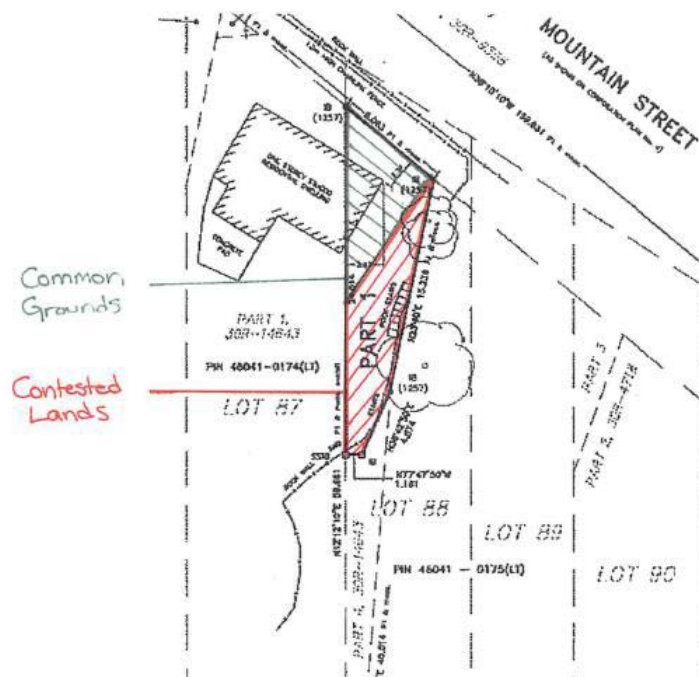


Figure 1: Appendix

Cardoso v. Benjamin makes for intriguing reading because the court states the legal analysis and relevant principles with considerable clarity. While the details of the evidence remain important, the statement of the test to be used in evaluating whether a claim based in adverse possession will succeed or not is very helpful.

² *Ibid.*, at paras. 1-5

Land ownership carries with it the right to occupy and make lawful use of the land. The legal owner is in constructive possession of the land even if not in actual possession of the whole of the land: see *Fletcher v. Storoschuk* (1981), 1981 CanLII 1724 (ON CA), 35 O.R. (2d) 722 (C.A.), at p. 725. However, the legal owner may be deprived of title by someone occupying the land who is able to establish adverse possession for the required statutory period.

The statutory period to establish title by adverse possession is determined by ss. 4 and 15 of the *Real Property Limitations Act*, R.S.O. 1990, c. L.15, and s. 51 of the *Land Titles Act*, R.S.O. 1990, c. L.5.

Under s. 4 of the *Real Property Limitations Act*, a landowner's ability to bring an action to recover land from someone occupying it (and able to establish adverse possession) expires ten years after the date when the landowner's right to bring the action first arose. At the expiry of that period, the legal owner's title to the property is extinguished: *Real Property Limitations Act*, s. 15. However, an occupier's ability to claim adverse possession is significantly restricted for property in the Land Titles system. Property in Land Titles cannot be acquired by adverse possession unless the right arose from a valid adverse claim that existed at the time of first registration of the property in the system: see *Land Titles Act*, s. 51.

In this case, the property at 48 Mountain was first registered in the Land Titles system on March 24, 2003. Therefore, in order to succeed, the applicants must establish that their right to possessory title existed as of that date.

The ten-year period to establish adverse possession need not be the ten years immediately preceding the property's first registration in the Land Titles system. Any ten-year period ended by that date is sufficient, since the registered owner's right to recover the property is extinguished once the requirements for adverse possession are met for the statutory period: see *Real Property Limitations Act*, s. 15; *Skraba v. Crisafi*, 2014 ONSC 6780, 49 R.P.R (5th) 248, paras. 22-23.

To constitute adverse possession, the possession must be "open, notorious, constant, continuous, peaceful and exclusive of the right of the true owner" throughout the statutory period: see *Fletcher*, at p. 725; *Masidon Investments Ltd. v. Ham* (1984), 1984 CanLII 1877 (ON CA), 45 O.R. (2d) 563 (C.A.), at p. 567, leave to appeal refused, [1984] S.C.C.A. No. 232; and *Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138, at para. 18.

To succeed, the claimant must establish, on a balance of probabilities:

- a) Actual possession throughout the statutory period;
- b) The claimant's intention to exclude the true (paper title) owner from possession or use to which the true owner intended to put the land during that period (referred to as the "inconsistent use" criterion), unless there is mutual mistake about the true ownership of the property (as discussed further later in these Reasons); and

- c) Effective exclusion of the true owner throughout the statutory period: see *Shennan v. Szewczyk*, 2010 ONCA 679, 96 R.P.R. (4th) 190, at para. 18; *Bellini Custom Cabinetry Ltd. v. Delight Textiles Ltd.*, 2007 ONCA 413, 225 O.A.C. 375, at para 32.

The claimant must meet each of these criteria, and time will begin to run against the true owner from the last date when all three are satisfied: see *Masidon*, at p. 567.³

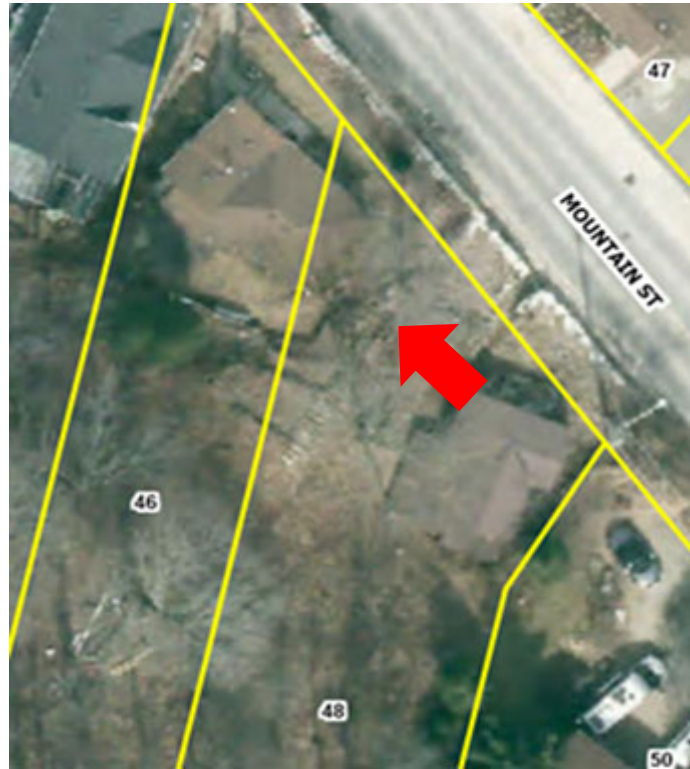


Figure 2: 2018 airphoto imagery with assessment fabric overlay from: Niagara Peninsula Conservation Authority and its *NPCA Watershed Explorer*⁴

After setting out the position of the applicants and the respondent, the court summarised its analysis, leading to the partial success for the applicants as follows,

On the evidence before me, taking into account the respondent's concession relating to title to the Common Grounds, I have concluded that the applicants have established their claim to adverse possession of the Common Grounds. However, I also find that they have not established possessory title to the balance of the Disputed Lands.

Addressing initially the issue of mutual mistake, I am satisfied that the evidence establishes mutual mistake on the part of the Cardosos and the Robinsons as to the true (paper) ownership of land that the Cardoso family occupied and used beyond the (paper) border of

³ *Supra*, footnote 1, at paras. 12-19

⁴ <http://camaps.maps.arcgis.com/apps/webappviewer/index.html?id=c7555050c8f24a7cbc829395557a7988> All rights reserved.

46 Mountain. Maria's evidence was that neither the Cardosos nor the Robinsons (now long deceased) were aware that the Robinsons were the true (paper) owners. She also deposes that the Robinsons never objected to their use of that area. There is no evidence to the contrary. In these circumstances, consistent with *Teis*, at p. 224, and *Key*, at para. 18, it is not necessary for the Cardosos to establish the second "inconsistent use" element of adverse possession, which would require proof of the Robinsons' intended use of the area and the Cardosos' intention to exclude them from that use. Put another way with the same result, the Cardosos' "inadvertent conduct" (in making use of property which they and the true paper owners mistakenly believed was the Cardosos' property) was sufficient to establish by inference the "inconsistent use" element of adverse possession: see *Cantera v. Eller* (2007), 56 R.P.R. (4th) 39 (Ont. S.C.), at paras. 44-45, *aff'd* 2008 ONCA 876, 74 R.P.R. (4th) 162. However, contrary to the submissions of applicants' counsel, mutual mistake does not affect the requirement to establish the other elements of adverse possession: see *Shennan*, at para. 20, referring specifically to the third "effective exclusion" element.

Turning to the first element of the cause of action, based on Maria's undisputed evidence (including the photographs and other documentary evidence attached to her affidavit) and given the respondent's concession relating to title to the Common Grounds, I am satisfied that the Cardosos have established actual possession of the Common Grounds for a period of at least ten years ending prior to March 24, 2003. That finding is based on their use of the area adjacent to the east side of the 46 Mountain residence as an "amenity area" (in Maria's words), which included use for a family outdoor eating area, a children's play area, a clothesline and a flower garden. I am also satisfied that by reason of the Cardosos' use of that area, the Robinsons (being the true owners of the paper title) were effectively excluded from possession or use of the Common Grounds, satisfying the third element of adverse possession.

As well, consistent with the respondent's submissions, I have also concluded that the evidence does not establish continuous, exclusive use of those parts of the Disputed Grounds that are further afield from the 46 Mountain residence. I took into account the following considerations (among others) in reaching that conclusion:

- a) The photographs attached to Maria's affidavit support her evidence as to the use the Cardoso family made of grassy area extending south from Mountain Street to the east of the 46 Mountain residence. However, they provide no real indication as to how far that area extended to the east and south of the residence.
- b) Maria's affidavit states that her father "planted and regularly maintained a row of cedars along what we thought was the lot line, which is the easterly edge of the Disputed Lands." However, the respondent's affidavit calls into question the location of that row of cedars, stating that the remains of those cedars in photographs taken in recent years indicate that the cedars were no more than three metres from the residence. That demarcation would be consistent with

the easterly border of the Common Grounds, rather than that of the Disputed Lands.

- c) I also considered Maria's evidence relating to the rock stairs ascending the escarpment within the Disputed Lands, which were constructed and maintained by her father. As set out in Maria's affidavit, the rock stairs provided access to a plateau area "further up the escarpment with a view of Lake Ontario", which included "a vegetable garden we planted over the years." However, her evidence does not indicate a specific time period relating to use of the plateau area, nor does it indicate with any precision the location of the plateau. As well, it does not specifically state that the plateau is within the Disputed Lands (as opposed to nearby elevated land within 46 Mountain's paper title – see the attached Appendix).
- d) If the plateau area was within 46 Mountain's paper title, it may have been open to the Cardosos to argue they are entitled to an easement by prescription to and over the rock stairs to provide access to the elevated area of their property south of the residence: see *Teis*, at p. 228. That position was not advanced on this application. However, as previously noted, the respondent has expressed her willingness to provide such an easement to the Cardosos.

In reaching the conclusions I have, I took into account the fact that Maria's evidence was not challenged on cross-examination. As well, from the affidavits of the respondent and her husband (and the cross-examinations on those affidavits), I am aware that the respondent's proposed conveyance of the Common Grounds to Cardosos was intended as a fair compromise to settle the Cardosos' property claim, rather than being based on any knowledge as to the Cardosos' historical use of the property.

Nonetheless, the Cardosos had the onus of providing sufficient evidence to establish, on a balance of probabilities, the necessary criteria to extinguish the rights of the legal owners, who had constructive possession of the whole property: *Fletcher*, at p. 725. The remedy of extinguishing title by adverse possession "is not lightly granted": see *Carrozzi v. Guo* (2002), 3 R.P.R. (4th) 203 (Ont. S.C.), at para. 21. Convincing evidence is required to deprive the legal holders of their property rights. The respondent concedes the Cardosos' entitlement to possessory title to the Common Grounds. The evidence supports the Cardosos' claim to adverse possession to that extent. However, the evidence is not sufficient to justify a finding of possessory title to the balance of the Disputed Lands.⁵

That the remedy of extinguishing title by adverse possession "is not lightly granted", may well be an understatement. A claim based in adverse possession requires a court to consider granting a remedy that may, in some instances, be tantamount to a private expropriation.

Editor: Izaak de Rijcke

⁵ *Supra*, footnote 1, at paras. 32-37

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

Chapter 4: *Adverse Possession and Boundaries*, in *Principles of Boundary Law in Canada* is complementary to the kind of analysis and test as stated by the court in *Cardoso v. Benjamin*. See in particular the discussion at page 106 and following.

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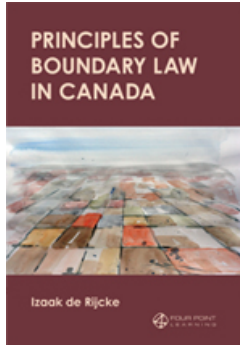
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⁶ Please note that the designation of CPD hours is based on the estimated length of time for the completion of the event. The criteria used are those set out in GeoEd’s [Registered Provider Guide](#) for Professional Surveyors in Canada. Other professions 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.

⁷ This CPD product qualifies for 12 *Formal Activity* AOLS CPD hours.

Principles of Boundary Law in Canada



In the context of (1) the complex and ever-evolving nature of boundary law, (2) the challenges of doing legal research in this area, and (3) the constant interplay between land surveying practice (as a regulated profession with norms codified in statutes) and common law principles, land surveyors would benefit from a current reference work that is principle-based and explains recent court decisions in a manner that is both relevant and understandable. 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 to pay by credit card.)



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