



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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The inconsistent use test, as a part of determining whether a claim based in adverse possession will succeed or not, has been treated in jurisdictions across Canada in a manner that is, well, inconsistent. The test has been rejected in western provinces where adverse possession itself is much limited¹ but remains alive and well in Ontario and the Maritimes. That said, the test, which focuses on the future intentions of the true owner has seen modification and restriction since the principles enunciated in the House of Lords decision in *Leigh v. Jack*² were recognized as part of Ontario law in *Masidon Investments Lt. v. Ham*.³ In this month's issue we explore a recent decision of the Supreme Court of Nova Scotia involving an adverse possession claim to a small swath of land abutting a residential property in *Urban Farm Museum Society of Spryfield v. Auby*.⁴ The court, in rejecting the adverse possession claim (and the claim to a prescriptive easement also argued in the case) explored the nuances of the inconsistent use test where it continues to apply in relation to knowing an unknowing trespasser and the present and intended use of the land. For a land surveyor, understanding the subjective intentions of an owner for the future of a property – that is to say the purpose for which the owner holds it – as opposed the use made at the time of the adverse possession claim may be a bit of a heavy ask.

Continued Relevance of the Inconsistent Use Test in Claims of Adverse Possession

Key Words: *adverse possession, inconsistent use test*

¹ The reasons are many, but for a good treatment of this topic, see: Alberta Law Reform Institute, *Adverse Possession and Lasting Improvements to Wrong Land*, Report 115, Edmonton, April 2020, at:

<https://www.canlii.org/w/canlii/2020CanLIIDocs1431.pdf>

² *Leigh v. Jack* (1879), 5 Ex. D. 264, which has since been limited considerably in its application in the UK by the House of Lords decision in *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30.

<https://publications.parliament.uk/pa/ld200102/ldjudgmt/jd020704/graham-1.htm>

³ *Masidon Investments Ltd. v. Ham* (1984), 1984 CanLII 1877(ONCA), <https://canlii.ca/t/g1h2c>

⁴ *Urban Farm Museum Society of Spryfield v. Auby*, 2021 NSSC 136 (CanLII), <https://canlii.ca/t/jfkp1>

Where a property in an otherwise developed urban area remains in a natural and undeveloped state, it may be so for a variety of reasons: land owners may be simply holding the property for development at a future time when municipal servicing is available and the time becomes right for a major development project. Perhaps the land is protected from development as a result of conservation authority restrictions or the land owners may intend to keep the land in its natural state through conservation efforts out of their own interest or more formally through conservation easements. By their nature, in each of these scenarios, the likelihood that an owner would be aware of, or take action against acts of possession by a trespasser may be different. There are different intentions for the property in each of these scenarios which can inform how the court approaches a fact scenario involving a claim based in adverse possession. Earlier this year, the Supreme Court of Nova Scotia explored questions of intention as they apply to the determination of a claim of adverse possession over a swath of undeveloped land abutting a residential area. The land owner, the Urban Farm Museum Society of Spryfield (UFM) was an incorporated society with a teaching mandate that focused on urban agriculture through providing food growing plots and educational programming on lands which had been donated to it. The court described the two abutting properties as follows:

The “Donated Property”

On July 25, 2016, UFM received, by way of charitable donation from Emscote Limited, the deed to a property (PID 00327452) (“Donated Property”). UFM issued a charitable donation tax receipt to Emscote in exchange for the property.

The Donated Property is approximately 2.14 acres in size and is bordered to the north-west, in part, by residential lots located on Heather Street, including Lot 31, owned by the Aubys, in Spryfield, Nova Scotia. The lots are identified as part of the “William J. Olie Subdivision” on a survey plan prepared by James McIntosh N.S.L.S. of Servant, Dunbrack, MacKenzie & MacDonald Ltd. dated July 30, 2018 (McIntosh Survey).

The Donated Property was migrated into the Land Registry system on October 11, 2016.

The Donated Property was former farmland that had become untended and grew forested over time. UFM began constructing walking trails on the Donated Property in 2017 for use by visitors to the farm and for use by the Farm-Forest School program.

Prior Use of the Donated Property

Emscote Limited (“Emscote”) acquired the Donated Property on December 31, 2013, when it amalgamated with Seaway Holdings Limited (“Seaway”). Seaway had acquired the Donated Property on January 20, 1986.⁵

[...]

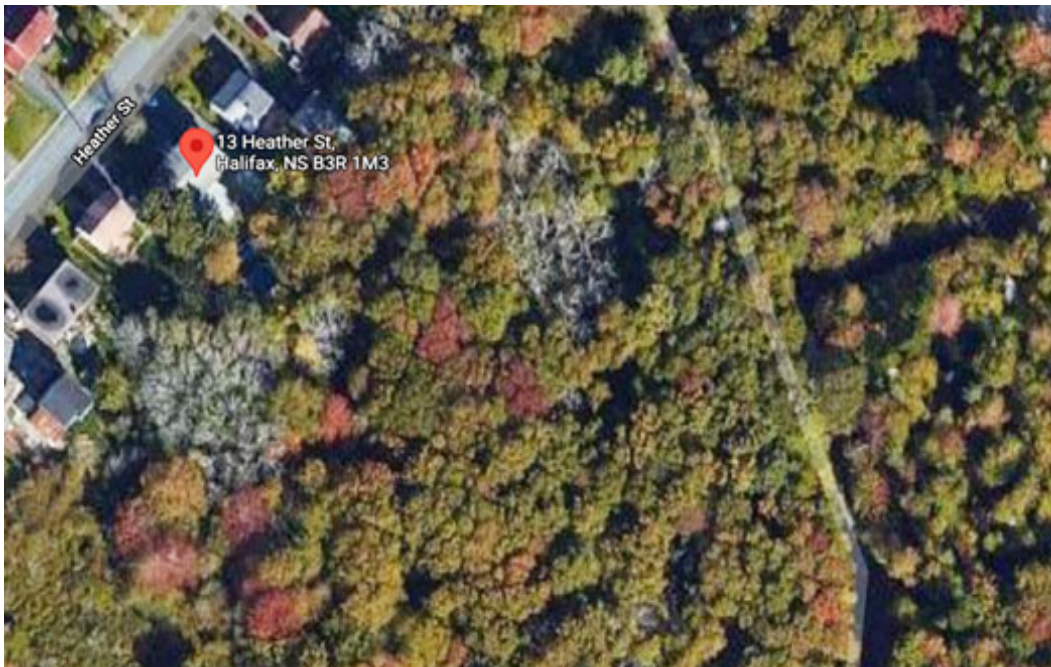
⁵ *ibid.*, at paras 12-16

Don and Anne Auby are the joint tenant owners of 13 Heather St. in Spryfield, (PID 00327338) (“Auby Property”) (“Lot 31”), which they purchased from Mr. Gerald Slade and Ms. Corinne LaCroix on June 25, 1987.

The dimensions of the Auby Property as described in Schedule “A” to the Aubys’ deed are 96.5 feet (southerly along eastern boundary of Lot No. 27), by 60 feet (easterly along lands of John Kidston)(now the Donated Property), by 94 feet (northerly along western boundary of Lot No. 35), by 60 feet (westerly along southern boundary of Elizabeth St. to place of beginning). That is, the property is an approximate rectangle 60 feet wide on the short ends by 94 feet on one side and 96.5 feet on the sides.

The Auby Property was migrated into the Land Registry system on July 22, 2005. The migration file includes the property description excerpted from the deed to the property, as described above. The migration file notes that the property is 5760 square feet (approximately 0.13 acres), which is consistent with the deed description of the property (that is, 60 feet wide by approximately 96 feet long). The graphic representation of the 13 Heather St. property included with the migration file is consistent with the deed description and the McIntosh survey; that is, a nearly rectangular property bounded on the short sides by Heather St. and by the Donated Property.⁶

The “Auby Property” backs onto the UFM property, a mostly treed area in the image below.⁷



⁶ *Ibid.*, at paras 20-22

⁷ From Google maps® All rights reserved.

Shortly after the UFM received the donated land it came to their attention that there was a significant encroachment onto the donated property and subsequently a survey of the property was completed depicting the following:

The McIntosh survey shows the extent of the Aubys' use of the Donated Property. Specifically, the survey shows a "car tent", "shed", "pool shed", "pool" and "lawn" located on the Donated Property, behind the Auby Property. It shows that the car tent is 14 feet over the boundary line, the shed is 25 feet over the line, and the pool is 40 feet over the line. The survey shows that the current chain link fence behind the Aubys' residence ranges from 34 feet to 58 feet over the boundary line. The survey also shows that the Aubys' fence extends behind the neighbouring Lot 27.

Although the encroached upon area is irregular in shape, the area, by calculation from the survey, is approximately 65 feet by 50 feet (3,250 square feet, or 0.075 acres). This area is approximately 55% the size of the Aubys' Lot 31 as described by their deed, and approximately 3.5% of the area of the Donated Property (which is 93,329 square feet).⁸

In the years after their purchase of the residential property, the Aubys maintained a lawn and planted gardens in the claimed area, altered the grading, installed a retaining wall, erected several sheds, a homemade swing set, a pool, trampoline and wooden fence. A new chain link fence was installed in 2007 to replace the old wooden fence.

UFM sought a declaration as to whether or not the respondents had established possessory title over part of their land and (if not) sought injunctive relief for the removal of the remaining encroachments. The key questions for the court centered on this claim for adverse possession. Before turning to the specific facts of the case, the court summarised the law as applicable in Nova Scotia:

In *National Gypsum (Canada) Ltd. v. Veinot, supra*, at para. 84, Justice Smith quoted the summary of adverse possession provided by Justice Van den Eynden (as she then was) in *Gallagher v Gallagher*, 2015 NSSC 88, para. 49, as follows:

- A true owner is presumed to be in possession of their land. A true owner is not required to show they are in possession by occupation or use;
- To oust a title owner, although the burden is on the balance of probabilities, the court should only act on very cogent evidence that establishes the required possession for the statutory period. (*Cook v. Podgorski*, 2013 NSCA 355, para. 58);
- Possession is fact specific. The acts of possession which must be proved with cogent evidence depends on the circumstances of each case and the nature of the land in issue. (*Cook*, para. 49);

⁸ *ibid.*, at paras 26-27

- The claimant of possessory title... has the burden of proving with very persuasive evidence that he had possession of the land in question for a full 20 years and that his possession was open, notorious, exclusive, and continuous;
- He must also prove that his possession was inconsistent with the true owner's possession and that his occupation ousted the owner from its normal use of the land. As well, possession by a trespasser of part is not possession of the whole. Every time the owner, or its employees or agents stepped on the land, they were in actual possession. When the owner is in possession, the squatter is not in possession. (*Spicer v. Bowater Mersey Paper Co.*, 2004 NSCA 39 and *Bain v. Nova Scotia Attorney General*, 2005 NSSC 355.)
- A true owner interrupts the adverse possession of an occupier the moment a true owner steps upon the lands. The limitation period begins to run from the time the true owner was last upon the lands; *Hatt v. Peralta*, 2014 NSCA 15.

In *Johnston v. Roode*, 2019 NSCA 98, para. 25, Chief Justice Wood quoted with approval *Cook v. Podgorski*, 2013 NSCA 47 as follows:

Even if there was a misunderstanding with respect to the boundary location, the question remains as to what impact that should have on the adverse possession analysis. In *Cook v. Podgorski*, supra, this Court summarized the principles applicable to adverse possession claims as follows:

[49] It will be useful to remind ourselves of the relevant principles before turning to their application to the facts:

[...] (7) The type of possession required varies with the nature of the land:

Whether there has been sufficient possession of the kind contemplated by the statute is largely a question of fact in each case in which due regard is to be had to the exact nature and situation of the land in dispute. Possession must be considered in every case with reference to the peculiar circumstances, for the facts constituting possession in one case may be wholly inadequate to prove it in another. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to their own interests, are factors to be taken into account in determining the sufficiency of possession. Anger and Honsberger, *Law of Real Property*, 3rd Ed., [section] 29:60.80. [emphasis added]

Chief Justice Wood further noted, at para 28:

[28] The elements of a claim for adverse possession were summarized in some detail by this Court in *Cook*. A more concise description is found in the earlier decision of *Spicer v. Bowater Mersey Paper Co.*, 2004 NSCA 39:

[20] From this review of the authorities it is clear that the claimants of possessory title have the burden of proving with very persuasive evidence that

they had possession of the land in question for a full 20 years and that their possession was open, notorious, exclusive and continuous. They must also prove that their possession was inconsistent with the true owner's possession and that their occupation ousted the owner from its normal use of the land. [...] [emphasis added]

The inconsistent use requirement noted in *Spicer, supra*, was recently considered by Justice Chipman in *Pitcher v Merritt Developments Limited*, 2020 NSSC 93. Justice Chipman summarized the inconsistent use requirement, in part, as follows:

As noted in *Spicer* and reiterated in *Johnson*, claimants must prove that their possession was inconsistent with the true owner's possession and that their occupation ousted the owner from its normal use of the land. The "inconsistent use requirement" was described by the Ontario Court of Appeal in *Masidon Investments Ltd. v. Ham*, (1984) 1984 CanLII 1877 (ON CA), 45 O.R. (2d) 563, [1984] O.J. No. 3139 (Ont. C.A.), leave to appeal refused [...]

After reviewing the case law, Blair J.A. concluded [in *Masidon Investments Ltd.*]:

The obvious result of this and other cases I have cited has been stated in *A Manual of The Law of Real Property*, 4th ed. (1969), edited by P. V. Baker, in these words at p. 529:

If the owner has little present use for the land, much may be done on it by others without demonstrating a possession inconsistent with the owner's title ...

It may be wondered why the more limited the use made of land by its owner, the greater is the apparent protection from claims for possessory title. The reason is plain. Whether possession is adverse depends in every case on the circumstances and particularly on the use being made of the land by the owner. As Ormrod L.J. said in the *Wallis* case, *supra*, at p. 590:

The same act or acts of trespass may be highly significant to the owner of a house and garden, yet utterly trivial to a property developer or an industrialist who has no immediate use for the land affected.

There is good sense in his conclusion on the same page that:

This seems reasonable since the interest of justice are not served by encouraging litigation to restrain harmless activities merely to preserve legal rights, the enjoyment of which is, for good reason, being deferred.

The inconsistent use requirement has been consistently applied in Nova Scotia. In *Pettipas v. Hunter Noel Holdings*, 2015 NSSC 313, Boudreau J. wrote:

[45] A claimant's possession must be "adverse" to the true owner; that is to say, their use must be inconsistent with the owner's intended use of the land [ref. omitted]. In *Anger and Honsberger* at page 1515:

Acts which do not interfere with and are not inconsistent with the owner's enjoyment of the soil for the purposes for which he intended to use it are not evidence of "dispossession" or "discontinuance of possession". Hence, merely fencing in land is not enough to give a trespasser title against the true owner.

Justice Boudreau continued:

[62] In *Masidon*, supra, the respondent had purchased land with an eye towards developing it, but he was delayed. The property stood vacant. A neighbour began using part of the land as a garden, and later claimed adverse possession of that part. The Court held that his use was not inconsistent with the owner's intention: which was to hold the land until it was used as an investment.

[63] In other words, even apparent "non-use" by the owner, does not necessarily mean that the owner has no intended purpose for the property.

[64] A claim for adverse possession cannot succeed where an owner is deprived of uses of his property that he never intended or desired [refs omitted]. In light of the owner's intended or desired purpose, the actual uses being made by the claimant must be shown to be inconsistent.⁹

The Aubys then raised the assertion that their actions had been based on an honest unilateral mistake – something that had been accepted in Ontario as a limitation on the inconsistent use test. The court rejected this assertion and further concluded that even in the event that such an exception was part of Nova Scotia law, the facts did not support such a finding.

The Court concludes that the present law in Nova Scotia includes the requirement to prove inconsistent use. Absent appellate authority that unilateral mistake is an exception to this requirement, the Court adopts the law as stated in *Pitcher* and *Pettipas*, adopting the reasoning in *Masidon*.

Alternatively, if unilateral mistake does provide an exception as reasoned in *Bradford*, the Court is not persuaded that the facts support a finding of unilateral mistake for the following reasons:

- a) The deed provided to the Aubys gave specific dimensions of their boundaries. It is logically inconsistent for the Aubys to say their back yard area stretched beyond the boundaries stated in their deed.
- b) The photographs taken of the back yard at the time of the sale to the Aubys support the testimony of Ms. LaCroix that there was approximately 30 feet of open area behind the house in 1987. She testified that there were no trees in the cleared area behind the house. The Aubys' affidavits corroborate this.

⁹ *Ibid.*, at paras 67-70

- c) The tree to which the clothes line was attached was therefore not within the cleared area and, according to the photographs and the MacIntosh survey, was approximately 17 feet beyond the back boundary line.
- d) The Aubys build their wood fence another 17 feet further back from this tree.
- e) The suggestion that the wooden fence was built across the rear of the cleared area shown in Photo 21 is not consistent with later photos of the back yard area. Specifically the wood fence was built 64 feet from the back side of the house.
- f) The Aubys doubled the size of the area behind their house from 30 feet to 64 feet from the time they took possession of the property.
- g) Anne Auby testified that they added an additional room at the back of the house 12 feet in depth (2 feet deeper than the outside deck it replaced). They then added a roofed deck 10'4" deep and then an open deck and steps to the ground another 9'2" deep. In total, the Aubys added 31'6" onto the back of their house. As shown on the McIntosh survey, this additional structure comes to within 1'6" of the rear boundary line.
- h) The Aubys added a garage that is built squarely to the back northeast corner boundary lines as shown on the McIntosh survey. The Aubys' suggestion that this placement was mere coincidence is not accepted by the Court. It is notable that this structure was built by a contractor who obtained a building permit. It is both logical and likely that the Aubys had that structure built within the boundary dimensions stated in their deed.
- i) When Don Auby and his neighbour built the fence between their properties, it ended at the rear boundary line shown on the McIntosh survey. Don Auby extended the fence further back behind his house. It defies belief that he would not have checked the deed dimensions when building the fence deeper than the neighbouring back yard.
- j) The dimensions stated in the deed and the back yard areas shown on the McIntosh survey for Lots 23, 27 and 41 are consistent. Although Lot 35 also encroached on the Donated Lands, there is no evidence as to when that encroachment started.
- k) The Aubys did not obtain building permits for the shed or uncovered deck extension (in contrast to the garage, room extension and covered deck). It is reasonable to infer that they did not do so for fear of having the municipal government determine that they were building beyond the permitted set backs and boundary line.
- l) In 2007 the Aubys extended the area of encroachment when installing a new chain link fence. They pushed the fence back an additional 24 feet to 58 feet beyond the boundary line at the deepest point. Although they do not claim this additional area as part of their claim, it is evidence that they were prepared to encroach on the UFM property where they had no honest belief they had any right to do so.

Considering the totality of the evidence, the Court is unable to accept that the Aubys were innocently or reasonably mistaken about where the back line of their property was.¹⁰

The court, consistent with the policy that opportunistic trespassers will not be rewarded and true owners' interests will be protected, did not accept the argument of the Respondents. Further, on the factual question of inconsistent use and ousting of the true owner, the court distinguished the nature of the trespass at the time the land was being held for development and the time period following the donation of the land to the UFM.

The Court finds that the Aubys' use of the land in no way ousted Seaway Holdings or Emscote from their normal use of the property – that is, holding the land for future development purposes.

Rather, the Aubys use of the land became inconsistent with the true owner's use of the land only once the land was gifted to UFM. At that point in time, the normal use of the land changed from being held for development purposes to being used for the objectives of UFM, including building trails and use by their Forest-Farm program for children. On this basis, the time period to establish adverse possession began in 2016 (assuming that the Aubys could satisfy the other elements of the test).

Masidon recognized that it may be virtually impossible for a claimant to acquire land by adverse possession in circumstances such as the present, wherein the disputed land is held for the purpose of future development. On this point, Blair J.A. stated (para 33):

there is no policy reason for concern about the rights of the appellant in this case or, indeed, any trespasser seeking to acquire possessory title to land held for development. The appellant deliberately embarked on a course of conduct which ultimately led to an intention to dispossess the respondents of their property.

In *Giouroukos v. Cadillac Fairview Corp.*, (1984), 1983 CanLII 1686 (ON CA), 44 O.R. (2d) 166, the successive proprietors of a restaurant had used adjacent property as a parking lot for many years. The property was part of a parcel which had been acquired for future development as a supermarket in conjunction with a shopping centre. Pending this development the owner had leased the property but neither the owner nor the tenants made any use of the parking lot. Robins J.A. at para 52 stated:

When all is said and done, this is a case of a businessman seeking to expand significantly the size of his commercial land holdings by grabbing a valuable piece of his neighbour's vacant property. The words of Mr. Justice Middleton used in denying the claim of an adverse possessor to enclosed land in *Campeau v. May* (1911), 19 O.W.R. 751 at p. 752, are apposite:

It may be said that this makes it very hard to acquire a possessory title. I think the rule would be quite different if the statute was being invoked in aid of a defective title, but I can see nothing in the policy of the law, which demands

¹⁰ *Ibid.*, at paras 74-76

that it should be made easy to steal land or any hardship which requires an exception to the general rule that the way of the transgressor is hard.

Conclusion on Issue 2

The Court agrees with UFM's submission that the policy considerations noted by Blair J.A. apply equally to the matter before the Court. The Aubys purchased a property, the dimensions of which were well defined in their deed. The property included a small back yard. The Aubys decided to enlarge their house by adding a second storey, an addition on the back, and a deck and stairs to this addition. The deck and stairs were constructed up to 18 inches from their property line, essentially covering the depth of their back yard with the various additions. The Aubys enlarged their house and deck, and similarly enlarged their back yard, in stages, beyond their boundary into a property that was unused, landlocked and seldom if ever visited, but nonetheless not theirs.¹¹

The court went on to reject the alternative claim that the Respondents had acquired an easement by prescription, primarily on the basis that the expansion of the back yard was not necessary to the enjoyment of the property. Trespass was established and the Respondents were required to remove the fencing and other structures.

The inconsistent use test – while overtly rejected or tempered in other jurisdictions – remains alive and well in Nova Scotia. Understanding the activity that is occurring at the boundaries of one's property and dealing with any potential encroachments in a timely fashion is certainly a best practice. Land surveyors will often find themselves in the best position to report on this.

Editors: Izaak de Rijcke and Megan Mills

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

For a discussion of the different provincial approaches to adverse possession in general and the application of the inconsistent use test in particular see *Chapter 4: Adverse Possession and Boundaries*, in particular, subsection 5, *The Importance of Possession*.

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

¹¹ *Ibid.*, at paras 90-92

hours.¹² These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year's quota.

Seventh Annual Boundary Law Conference

We thank all who attended this year's conference: *Complex Cadastral Problems: Searching for Solutions*.¹³ Using the perspective of "surveyor as expert witness" as the overall connector, this series of eight weekly lunch and learn sessions delved into "processes" guided by principles established through legislation, the courts, and standards of practice to address complex cadastral surveying scenarios in a changing environment. The webinar [version](#) of the conference includes the annotated readings, slide decks, and recorded presentations.

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ISSN: 2291-1588

¹² 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.

¹³ This conference qualifies for 12 *Formal Activity* AOLS CPD hours.