



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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Adverse possession claims remain alive and well in Ontario despite the large scale shift in land registration to *Land Titles* from *Registry* over the past few decades. With additional claims coming before the courts, there is continuing clarification and refinement in how the longstanding basic principles of an adverse claim (or a claim of a prescriptive easement in some cases) are applied. Historic urban neighbourhoods – where space is a premium and residential structures are either in close proximity or physically joined - will force neighbours to come to arrangements for use and access that may or may not be reflected in the title documents. The dispute in the recent Ontario decision *Macquarrie v. Singh*¹ centred on a sliver of land along the boundary of two residential properties with a common wall. At issue was the status of the land occupied by the front porch of one home that encroached over the property line of its neighbour. In addressing this question, the court relied on the decision in *Condos and Castles Realty Inc. v. Janeve Corp.*,² which was discussed in *Expired Easements Still Openly Used*³, and revealed how the shifting burden of proof in cases of adverse possession and prescriptive easement claims can unfold. How does one prove that use or an encroachment was by permission and whose responsibility is it to show this? The adverse possession claim was successful. The court noted that while the burden of proof rests upon the claimant to prove every element of the test, it does not require them to “exclude every hypothetical possibility.” There is a shifting of the burden to the respondent to lead evidence to show that use was by permission rather than acquiescence.

The Shifting Burden of Proof in Adverse Possession Claims: Discerning Acquiescence from Permission

Key Words: *adverse possession, acquiescence, consent, burden of proof*

¹ *Macquarrie v. Singh*, 2021 ONSC 3896 (CanLII), <https://canlii.ca/t/jg5m8>

² *Condos and Castles Realty Inc. v. Janeve Corp.*, 2015 ONCA 466 (CanLII), <https://canlii.ca/t/gjnf5>

³ *The Boundary Point*, Volume 4, Issue 2, 2016, [https://4pointlearning.ca/4PL/TheBoundaryPoint_vol4\(2\).pdf](https://4pointlearning.ca/4PL/TheBoundaryPoint_vol4(2).pdf)

In Ontario, the long standing elements of the test for adverse possession for a claim under s. 4 of the *Real Property Limitations Act*⁴ requires that a claimant have actual possession of the property in issue; the intention of excluding the true owner from the property; effectively excluded the true owner from possession of the property. A claimant's possession must be "open, notorious, constant, continuous, peaceful and exclusive of the right of the true owner" for the full term of the ten-year statutory period prior to conversion to *Land Titles*.⁵

In the recent decision of the Ontario Superior Court of Justice in *Macquarrie v. Singh*, readers have another example of how these basic principles are to be applied to the facts of a particular claim and the subtle distinction between acquiescence and permission.

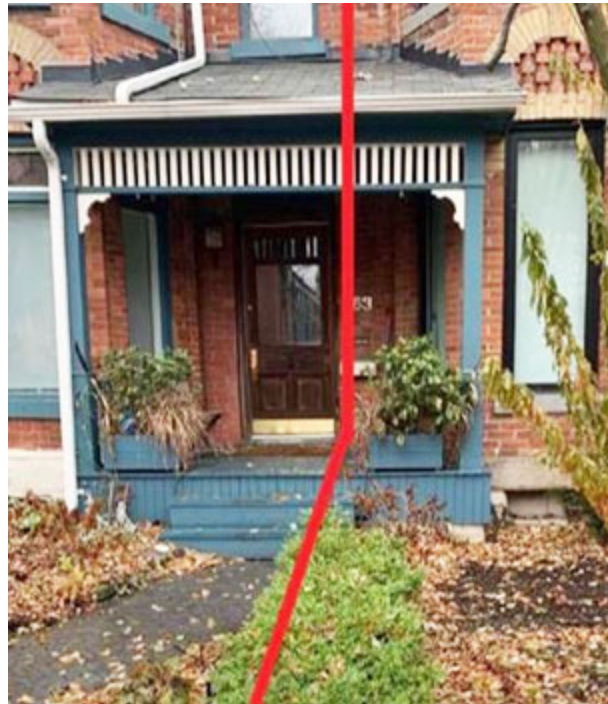
The underlying facts of the claim were set out by the court as follows and several images were included in the body of the decision which aid the reader significantly. These are included in the passage below:

Ms. Macquarrie and Mr. Quain own and live in 163 Pape Avenue in Toronto. It is the northmost of three connected rowhouses.

Mr. Singh owns and lives in 161 Pape Avenue. He is the next door neighbour living immediately to the south of Ms. Macquarrie and Mr. Quain. Their houses are connected by a common wall that is the northern boundary of Dr. Singh's house and the southern boundary of Ms. Macquarrie and Mr. Quain's house.

For as long as anyone knows, four feet of the front veranda of 163 Pape have encroached upon 161 Pape. The veranda leads only to the front door to 163 Pape. It is not accessible from Dr. Singh's house.

The veranda abuts Dr. Singh's outer wall. The veranda is physically attached to Dr. Singh's house on the roof, on the deck, and by concrete steps. Below is a picture of the veranda with a red line running along the legal boundary line.



⁴ *Real Property Limitations Act*, R.S.O. 1990, c. L.15

⁵ *Fletcher v. Storoschuk* (1981), [1981 CanLII 1724 \(ON CA\)](#), 35 O.R. (2d) 722 (C.A.), at p. 724

One looking at the houses without seeing the boundary line super-imposed can be forgiven for thinking that the veranda belongs to 163 Pape alone. That is what Dr. Singh thought when he bought his house next door in 2016.

The north-facing bay window from Dr. Singh's house looks right out onto the veranda encroachment as can be seen in this picture. Dr. Singh's window looks out onto the back of Ms. Macquarrie's deck chair and through the veranda toward the street.

In addition, at the back of the property, there is a small alcove that runs east and west immediately to the south of the common wall. The picture below shows the little indented alcove with the Macquarrie/Quain house, 163 Pape, on the right and Dr. Singh's house, 161 Pape, straight ahead and on the left. The wall on the right (163 Pape) was built nine inches over the boundary line. The Macquarrie/Quain dryer vent can be seen protruding over Dr. Singh's property. There is an eaves trough overhanging above the pictured scene. The picture also shows the downpipe that Dr. Singh affixed the outer wall of 163 Pape in the back-right corner of the alcove.⁶

It can be noted that the respondent had purchased his property at a time of booming real estate activity and as such did not do his due diligence and did not know at the time that the porch and rear alcove encroached over the lot line. Further, a statutory declaration had been sworn by the previous owner in 1990, stating:

...from 1975 until the present time, I have been in actual possession of the whole of the said lands ***save and except*** for a 9 inch portion of the rear two-storey section of the building municipally known as 163 Pape Avenue, Toronto, and four feet of the front veranda and



⁶ *Macquarrie v. Singh*, 2021 ONSC 3896 (CanLII), at paras. 5-1, <https://canlii.ca/t/jg5m8>

concrete steps of the building municipally known as 163 Pape Avenue, Toronto, which encroach approximately four feet onto my property⁷

It was also sworn that for that period, neither she nor her husband had asked that the nine inch piece of wall at the rear or the four foot section of the veranda be removed or altered and that neither had been altered or changed in any way.

Six years prior, there had been another declaration sworn by the owner. In 1984, she swore a first declaration that was only about the wall that encroached at the rear of the property. After stating the obvious – that neither she nor her husband had ever possessed the land under the wall – and that neither she nor her husband has requested that the wall be removed or altered, Ms. Hegge swore:

...and we are satisfied that we have no claim to the land situate under the 9 inch portion or the rear two-storey section of the building municipally known as 163 Pape Avenue, Toronto...⁸

An eager and hasty purchaser in an active market is not uncommon, though no doubt remains a source of frustration for land surveyors and real estate lawyers alike.

The land had been registered in the Land Titles system in May 2003 and as such it was upon the applicants to establish a ten year uninterrupted period of adverse possession starting no later than May 1993. It would seem that the declarations of the previous owner would provide sufficient evidence in support of the adverse possession claim, and in the end they did. But prior to reaching its conclusion, it was necessary for the court to address the arguments raised by the respondent suggesting that the statutory declaration merely created a license or grant of permission – *permission* of course being inconsistent with *adverse*. And further that there was no evidence that the previous owner never accessed the porch to clean her window or maintain the sill. In addressing these arguments, the court referred to the principles in *Condos and Castles* as they dealt with the burden of proof:

These arguments raise the question of the burden of proof. There is no question that the legal or persuasive burden lies on Ms. Macquarrie and Mr. Quain to prove all of the elements of the three-part test on a balance of probabilities. But that burden of proof does not mean they must exclude every hypothetical possibility.

In *Condos and Castles Realty Inc. v. Janeve Corp.*, [2015 ONCA 466](#), the Court of Appeal discussed the nature of the burden in considering whether acquiescence by an owner is actually a positive grant of permission:

⁷*Ibid.*, at para 14

⁸*Ibid.*, at para 16

[17]...Once the appellant had proven facts that support the inference of acquiesce in 20 years of use, the evidentiary burden passed to the appellant to lead evidence to rebut the inference by proving the use was by permission.

[18] The following facts are sufficient to shift the evidentiary burden in this case:

- the longstanding physical layout of the area by which 842 King Street West abuts the laneway Mr. Chan turned into a registered right-of-way;
- the existence of a garage accessible only over the right-of-way was located at the rear of 842 King Street West for many years until it was torn down by Ms. Pelech;
- the plain and obvious vehicular use of the right-of-way by the occupants of 842 King Street West, as described by witnesses who were present at the time;
- the absence of any evidence of objection or exercise of control by Mr. Chan; and
- the documentary evidence that the owners of 842 King Street West considered that they enjoyed the right-of-way as noted in listing agreements over the years.⁹

The court then, in applying the principles to the facts, explained its analysis as follows:

In my view, like *Condos and Castles*, the longstanding physical layout of the veranda and rear wall, coupled with the clear evidence of Ms. Hegge, readily support an inference that Mr. and Ms. Hegge acquiesced in their exclusion from both slivers of land for more than the requisite ten year period.

Physically, the veranda belongs to 163 Pape. Its use is to access 163 Pape and as an outdoor sitting area for that property. It is permanently affixed. While it is not a wall with a permanent underground foundation, there is no suggestion that Ms. Hegge used the land under the southern four feet of decking or on top of the roof of the veranda.

The statutory declarations are equally clear. They describe long term exclusion and acquiescence in being excluded. In my view, the permanent physical layout and statutory declarations meet the three parts of the test set out in *Barbour*.¹⁰

In addressing the respondent's argument that the statutory declaration amounted to permission, the court rejected this and noted:

⁹ *Ibid.*, at para 25-26

¹⁰ *Ibid.*, at paras 27-29

The difficulty that I have with the submission is that nothing in the words used by Ms. Hegge says or implies a grant of permission. The declarations are consistent with wording that one would expect to prove the contrary – that adverse possession has been established. It strikes me as particularly unlikely that someone would go to trouble of swearing two declarations to protect her title to land by documenting a license or her grant of permission to the occupation of her land without mentioning that this is what she was doing.

[...]I read the words, “encroach approximately four feet onto my property” as defining the encroachment. Mr. Reinkeluers submits that the words “my property” amount to an assertion of continuing rights. To acquiesce in an encroachment, he would have required Ms. Hegge to say something like, “encroach approximately four feet over the registered lot line onto the land that is registered in my name”.

I do not read the words “my property” as anything more than a description of the fact of the encroachment. Encroachments encroach onto another’s property by definition. Mr. Reinkeluers stretches the import of the words beyond their meaning to find an assertion of ongoing ownership in the highlighted phrase.

In my view, if Dr. Singh wished to show that the Heggess granted a license or permission to the neighbours, he bore an evidentiary burden to raise this issue of fact as discussed in *Condos and Castles*. Dr. Singh could have adduced the evidence of Ms. Hegge to say that her statutory declarations were actually grants or permission or licenses rather than confirmation of the fact of her acquiescence in being excluded as they appear to be.¹¹

Given that both of the parties had accepted the admissibility of the statutory declarations, was it upon one of the parties to call the previous owner who had sworn the declarations? If so, who bore that responsibility? The respondent argued that burden fell to the claimants. In rejecting this submission the court explained,

But, given all parties’ acceptance of the admissibility of the two statutory declarations, there was no point in Ms. Macquarrie and Mr. Quain calling Ms. Hegge just to say that her declarations mean what they say in the context of the obvious inference from the long term physical layout of the property. The burden to adduce evidence to show that Ms. Hegge’s words do not mean what they say or to show that her acquiescence was actually permission lies with Dr. Singh.

I do not need to draw an adverse inference that Dr. Singh’s failure to call Ms. Hegge indicates that her evidence likely would not have supported his theory of the case. Rather, it is enough to say that Dr. Singh bore an evidentiary burden to lead evidence to credibly raise the issue of permission and he failed to do so.

There is no competing evidence to rebut the *prima facie* proof of the three-part test.¹²

¹¹ *Ibid.*, at para 31-37

¹² *Ibid.*, at paras 38-40

Adverse possession and prescriptive easement claims share some aspects in common and which must be satisfied; some of these aspects have evolved together. This shifting burden of proof, the relationship between acquiescence and permission and the inferences of each by the court which had been addressed in *Condos and Castles* was also raised in another recent decision of the Ontario Superior Court of Justice in *Doepner v. Knapp*.¹³ In that decision, which concerned a claim for a prescriptive easement, it was held that once there is evidence of acquiescence, the burden to show some positive act of permission shifts to the party opposing the claim to a prescriptive easement. The outcome was similar to *Macquarrie*, as the party refuting the easement claim had failed to do so.

Editor: Megan Mills

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

A discussion of adverse possession and easements by prescription can be found in Chapters 4 and 5 respectively.

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, ranging from only a few hours of CPD to a whole year's quota.

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 8th. For more information, consult the [syllabus](#). Please note that registration is via [CBEPS](#).

¹³*Doepner v. Knapp*, 2021 ONSC 4636 (CanLII), <https://canlii.ca/t/jgr2g>

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.

Seventh Annual Boundary Law Conference

We thank all who attended this year's conference: *Complex Cadastral Problems: Searching for Solutions*.¹⁵ 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.

Land Registration Research Cybrary

AOLS members can now benefit from a searchable catalogue of material covering the underlying principles of research in the land registration system, what records are available, how they are organised and made accessible, and how the research can be completed in the context of history and a surveyor's quest to find the best evidence of a boundary. Access to the [cybrary](#) requires an enrolment code provided by completing the associated form in the External Training [webpage](#).



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¹⁵ This conference qualifies for 12 *Formal Activity* AOLS CPD hours.