Possessory Title Post *Kosicki v Toronto (City)*

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Introduction

Kosicki v Toronto (City)[2] ("***Kosicki***") confirms that the doctrine of adverse possession remains relevant and that municipal parklands are not immune from its application. While *Kosicki* provides much needed clarity in these areas, which are described in further detail below, it also serves as a timely reminder to pause and think about title security.

Kosicki exemplifies the importance of ensuring that clients understand what they are purchasing. For some clients, title insurance will be sufficient, but for others, that may not be enough. Title insurance insures, but does not assure, title.

Boundary disputes, such as the one in *Kosicki*, are not uncommon. While title insurance remains an effective and important way of safeguarding against title defects, it does not always address the complexities of boundary-related conflicts, thus emphasizing the significance of other remedies available through the legislation and equitable doctrines in common law, such as adverse possession and section 37 of the *Conveyancing and Law of Property Act* (the "**CLPA**")[3], which are explored in further detail below.

Part I – Title Insurance

Title insurance is a specialized indemnity policy designed to protect residential and commercial property owners, as well as their lenders, against losses arising from certain defects in title or legal ownership. Unlike traditional insurance products, such as casualty or health insurance, that cover future events, title insurance provides retrospective coverage from the date the policy is issued and remains in effect for as long as the insured retains an interest in the property.

There are many benefits to obtaining title insurance. In real estate transactions (residential or commercial), title insurance has become increasingly prevalent for its cost effectiveness and expediency in closing deals, among other things. Lenders frequently require borrowers to obtain a lender's title insurance policy as a condition precedent to closing. These policies offer several practical advantages. For instance, insurers may waive certain off-title searches, such as building and zoning inquiries. This can significantly streamline due diligence and facilitate quicker closings, particularly in multi-jurisdictional or cross-border transactions.

Similarly, an owner's title insurance policy provides many benefits. One of the key benefits is its ability to insure over defects that would otherwise delay closing. In contrast to a lawyer's title opinion, which may be limited by the nature of the defect, title insurance can provide coverage

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2 2025 SCC 28.

3 *Conveyancing and Law of Property Act*, RSO 1990, c C. 34.

that enables the transaction to proceed. The insurer also assumes a duty to defend the insured's interest in title, covering legal costs and expenses associated with defending against claims based on covered risks. This duty may be terminated if the insurer chooses to settle the claim or compensate the insured for the actual loss. Coverage typically includes protection against defects not evident in the public record, such as forgery, survey errors, and adverse possession claims. Encroachment issues, errors in public records or surveys, and title fraud are also commonly covered by title insurance.

However, title insurance is not a perfect solution. Standard policies exclude coverage for certain title defects, environmental hazards (e.g., soil contamination), Indigenous land claims, and – importantly – issues revealed only through new surveys or inspections, including certain discrepancies in property boundaries. Moreover, even where an insurance policy covers a boundary dispute, the remedy (which is often money – not land) may not satisfy the client.

Part II – The Doctrine of Adverse Possession

Overview of the Doctrine of Adverse Possession

Colloquially referred to as squatter's rights, the doctrine of adverse possession is a tool to determine when a paper title holder has "disposed" of its land such that its title to the land has been extinguished in favour of the possessor. The doctrine helps provide a method to resolve ownership disputes. It preserves the status quo, where the statutory requirements have been met.

What began as a "long-standing common law device"[4] has been since codified in Ontario's legislation, including the *Real Property Limitations Act* (the "**RPLA**")[5]. Sections 4, 5(1) and 15 of the RPLA establish the required elements to meet the test for adverse possession, which are:

1. actual possession of the property for ten years;

2. intention to exclude the true owner; and

3. possession without consent.

Possession must be open, notorious, continuous and exclusive and, in Ontario, the use must be inconsistent with the use that the paper title holder wishes to make of the property,[6] unless there has been a mutual mistake as to the location of the boundary line. Once these requirements are met, section 15 of the RPLA extinguishes the paper title holder's right to recover possession, vesting title in the adverse possessor. Although the availability of this doctrine as a remedy has been restricted by Ontario's transition to the land titles system, it remains relevant for claims that matured prior to such transition.

Certain lands, however, are expressly exempt from adverse possession. Under section 16 of the RPLA, highways, road allowances, waste lands and lands vested in the Crown are exempt from adverse possession. These exemptions reflect the legislature's intent to protect certain lands from

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4 *Kosicki, supra* note 2 at para 23.

5 *Real Property Limitations Act*, RSO 1990, c L.15.

6 *Nelson (City) v Mowatt*, 2017 SCC 8 at para 20.

the application of adverse possession. New exceptions for additional categories of public land have been enacted in other statutes. Notably absent from the codified list of exemptions is any mention of municipal parkland. As the Supreme Court of Canada (the "**SCC**") found in *Kosicki*, municipal parklands are not immune from adverse possession.

Kosicki v Toronto (City), 2025 SCC 28

In *Kosicki*, the applicants, Pawel Kosicki and Megan Munro (the "**Kosickis**"), bought a residential property in Toronto in 2017. At the rear of their property, a fenced strip of land (the "**disputed land**") was used by the applicants as part of their backyard for several years, and was later discovered to be municipally owned parkland. Historical evidence demonstrated that the fence, which enclosed the land and excluded it from public access, had been in place since at least the early 1970s. The applicants and their predecessors maintained and used the land exclusively, and paid property taxes on the area of the disputed land.

Upon discovering that the ownership of the disputed land laid with the City of Toronto (the "**City**"), the Kosickis tried to purchase the strip of land from the City. The City declined, citing its policy to preserve public green space. The Kosickis then brought an application for possessory title under the RPLA. The application judge found, and the City conceded, that the elements of adverse possession were made out. The application judge further found that the City had not established that the property, being a municipal parkland, was immune from adverse possession under the "public benefit test" articulated by other lower courts; nonetheless, the judge determined that it was inappropriate for the City's title to be extinguished as "a matter of public policy."[7]

The Ontario Court of Appeal affirmed the application judge's dismissal of the case, but reframed the "public benefit test" by removing the requirement for actual use, such that land acquired by a municipality for the purpose of creating a public space should be treated as *presumptively* in use for the public benefit. The majority also found that the RPLA did not preclude the further development of the common law in relation to those lands that are *not* specifically covered by section 16 of the RPLA. It concluded that the common law public benefit test did not contravene section 16 of the RPLA because the modified test did not provide an absolute immunity from possessory claims but created a "rebuttable presumption" that such land is unavailable for adverse possession.[8]

In a 5-4 decision, the SCC allowed the Kosickis' appeal and declared them the fee simple owners of the disputed land. The issue on appeal was "whether the appellants' claim for possessory title, which otherwise satisfies the requirements of the RPLA, can be defeated because the disputed land forms part of a larger tract of land that eventually became a municipal park."[9]

Writing for the majority, Justice O'Bonsawin held that section 16 of the RPLA, which set out a list of statutory exemptions, is an exhaustive list, and municipal parkland is not a listed exemption.[10] The Court further clarified that courts do not have authority to create new exemptions based on

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7 *Kosicki, supra* note 2 at para 2.

8 *Ibid* at para 15.

9 *Ibid* at para 17.

10 *Ibid* at paras 30 and 50.

policy considerations or implied public benefit principles. The majority emphasized the primacy of legislative supremacy, writing that any expansion of the exempted categories must come from the legislature. "Determining a possessory claim thus requires courts to ensure legislative intent is respected and apply common law principles in a manner consistent with the statutory scheme."[11] At para 30, the Court states:

> *… The legislature, although having done away with adverse possession, codified certain common law immunities from adverse possession, while protecting title acquired from matured possessory claims. By attempting to create a common law exception for municipal parkland, the Court of Appeal's decision undermines the legislature's clear policy choice to only confer immunity to certain categories of public land and preserve matured possessory title.*

As such, the Court rejected the public benefit test as inconsistent with the doctrine of legislative supremacy.[12] In this respect, the court considered that creating a new common law immunity for municipal parkland would undermine legislative intent and judicially expand the scope of the statutory exemptions. Public policy considerations, however compelling, must be addressed through legislative amendment rather than through the courts. At para 38, the Court states:

> *…While it is uncontroversial that courts have a role in determining what constitutes "dispossession" in s. 5(1), which is left undefined by the legislature, there is no indication in the text of s. 16 that the legislature intended that courts should supplement the statutory exceptions.*

The SCC also reaffirmed that adverse possession claims that matured prior to land titles conversion remain enforceable.[13] The Court observed that "the disputed land's parcel register explicitly states that the registration is subject to rights to the land acquired by 'adverse possession.'"[14] Because the Kosickis' claim satisfied all common law and statutory elements prior to the land's transition to the land titles system, they were entitled to the disputed land. Since the adoption of the land titles system, "all land registered in the land titles system, including municipal parkland, receives protection against possessory claims."[15]

The Court's decision also sheds light on the need to preserve matured possessory title through the remedy of adverse possession. The Court observes that "[i]n the common law tradition, possession is a fundamental concept and functioned to support a better claim to title based in fact, when accuracy of a registry was not assured"[16] and "disagreement with the doctrine's rationales is not a valid basis for denying the [Kosickis'] claim."[17] It affirms that:

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11 *Ibid* at para 22.

12 *Ibid* at para 83.

13 *Ibid* at para 30.

14 *Ibid* at para 58.

15 *Ibid* at paras 54 and 55.

16 *Ibid* at para 66.

17 *Ibid* at para 71.

> *Although a successful claim under the RPLA deprives the paper title holder of their land in favour of the adverse possessor, this should be understood as a consequence of the operation of the statute and not its primary objective:*
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> > *The policy was, in the interest of the community, not to allow a possession to be questioned after it had been enjoyed for such a length of time as rendered it unreasonable in the eye of the law to require evidence aliunde that it was holden under a title derived from some other and sufficient source, when such evidence by reason of the lapse of time might not be easily attainable. It never could have been the intention of the Legislature to encourage persons wrongfully to enter on the land of others, although from the frame of the enactment it sometimes operates to protect a possession under bad title, or no title at all; but such operation is, I apprehend, a consequence of the enactment and not an object of it.*[18]

Justice Kasirer, writing in dissent, concluded that municipal parkland is held in trust for the public and should not be subject to private acquisition through adverse possession without clear evidence of municipal acquiescence. The dissent thus advocated for a more flexible and context-sensitive approach that balanced private expectations with the public interest in preserving parkland, arguing that public land serves a collective purpose that calls for judicial protection.

The *Kosicki* decision represents an important clarification in the law of adverse possession. The majority's reasoning reinforces the modern approach to statutory interpretation, which begins with the text of the statute. If land is not expressly exempt by the RPLA, it remains subject to the doctrine of adverse possession, provided such right matured before its transition to the land titles system. This approach reaffirms legislative supremacy and narrows the judiciary's ability to invoke public policy as an interpretive tool.

For municipalities, *Kosicki* creates potential exposure for parcels, particularly older parklands, that have been encroached upon for decades without enforcement. Regular inspections, boundary surveys, and clear enforcement of property lines will become essential risk management tools.

For private property owners, the decision confirms that mature adverse possession claims remain legally viable. Long-standing, open, and exclusive use of municipal land may result in ownership where the statutory period elapsed before conversion. More importantly, the decision reaffirms that the doctrine of adverse possession remains a powerful remedy favouring possession as a fundamental concept used to support a better claim to title based in fact, provided the statutory test has been met.

Part III – Section 37 of the *Conveyancing and Law of Property Act*[19]

Section 37 of the CLPA is another powerful remedy to resolve boundary disputes, such as encroachments. It permits a person who has made a lasting improvement on another person's land under a mistaken belief of ownership, to seek a court-ordered sale or lien. In such situations, courts

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[18] *Ibid* at para 67.

[19] RSO 1990, c C. 34.

are empowered to either force a sale of the disputed portion of another person's land upon payment of compensation, grant a lien for the value of the improvements made thereon or require that the improvement be removed. In this regard, section 37 operates as an exception to the general principle that registered title boundaries are definitive; specifically, the boundaries of a property are as described in the deed, subject only to matured rights.

Statutory Framework and Underlying Principles

Section 37(1) of the CLPA provides:

> *Lien on lands for improvements under mistake of title*
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> 37 (1) Where a person makes lasting improvements on land under the belief that it is the person's own, the person or the person's assigns are entitled to a lien upon it to the extent of the amount by which its value is enhanced by the improvements, or are entitled or may be required to retain the land if the Superior Court of Justice is of opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the court directs. [Emphasis added.]

This section empowers the court to award relief where a person makes lasting improvements on land believing it to be their own. To succeed on a section 37 application, the court must be satisfied that:[20]

(i) the party has a genuine belief that it owned the land,

(ii) the improvements were lasting (meaning permanent or substantial rather than temporary), and

(iii) the court must weigh the equities between the owner and the person making the improvements to determine whether it is appropriate to transfer the land to the person making the improvements.

It provides the court with broad discretion to determine what is most just under all circumstances, including whether to order a lien or a conveyance of the land itself (in exchange for compensation). The provision operates to prevent unjust enrichment while recognizing the importance of registered title. The section 37 remedy may be available in situations where the remedy for adverse possession is not.

Judicial Interpretation and Application

Because the relief envisioned by section 37(1) is discretionary, its availability differs based on the surrounding circumstances of each case, the behavior and reasonableness of the parties, and the fairness of the result, among other things. Ontario courts have consistently treated section 37 as an exceptional remedy that is granted only when equitable considerations favour the applicant.

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20 *Margaritis v Milne*, 2023 ONSC 5943 at para 7.

The following decisions outline the court's treatment of various claims for relief under section 37.

In *Noel v Page*,[21] the defendant extended his cottage and drilled a well that encroached upon the plaintiff's land. The plaintiff sought an injunction against the defendant to remove the defendant's improvements from its property. The defendant counterclaimed, seeking a declaration that he was entitled to the portion of the plaintiff's land that he improved. Despite the defendant having ignored his lawyer's advice to obtain a survey, the Court found that his belief in ownership of the land he improved was genuinely held, supported by a treeline that appeared to mark the property boundary. The court also noted that the plaintiff and his family maintained their property up to, but not past, that tree line. Recognizing the permanence of the improvements and the impracticality of removing the well (which may require tearing down the house), the Court ordered conveyance of the disputed area.

A similar outcome was reached in *Dupuis-Bissonnette v Gies Construction Ltd.*,[22] where the applicants built a stone retaining wall (which supported an in-ground swimming pool) that encroached slightly onto their neighbour's land. Having relied on a survey and contractor advice, the applicants were found to have acted reasonably and in good faith. The court concluded that the wall represented less than 1.5% of the owner's land, removal would impose substantial costs, the owner failed to provide evidence of any negative impact on the market value or marketability of its land and, accordingly, conveyance of the disputed land was ordered subject to the payment of fair market compensation.

More recently, in *Corkery v Moffitt*,[23] the defendants' garage partially encroached onto the neighbour's property. A prior encroachment of the garage was believed to have been cured until a new survey was obtained, which showed that the garage still encroached onto the neighbor's property. The Court found that the defendants held an honest belief of ownership and that the garage was a lasting improvement and its removal would be disproportionately costly. The court did not find any prejudice or devaluation of the neighbour's property. Adverse possession was not available as the 10-year statutory period was not met, but the Court relied on section 37 of the CLPA to order conveyance of the area upon payment of compensation.

In *Margaritis v Milne*,[24] the Court permitted the retention of a fence and retaining wall encroachment of twenty-one square feet. The court found that the balance of convenience favoured allowing the Applicant to retain the land, as removing the encroachments would require significant renovations for an objectively minor area. The Court balanced the minimal prejudice to the neighbour, the lasting nature of the improvement, and the impracticality of removal to conclude that compensation was the most equitable remedy between the parties.

In *Armstrong, et al. v Penny, et al.*,[25] the Court invoked both section 37 of the CLPA and section 99 of the *Courts of Justice Act (RSO 1990, c C.43)* to address a significant residential encroachment of approximately thirty-five feet onto a neighbouring property. The Court found that the

[21] [1995] O.J. No. 2441, 47 R.P.R. (2d) 116.

[22] 2010 ONSC 3680.

[23] 2022 ONSC 105.

[24] 2023 ONSC 1375, aff'd 2023 ONSC 5943.

[25] 2023 ONSC 2843.

encroachment was the result of an honest mistake, and that removal of the structure, a fully constructed residence, would be oppressive. Consequently, the Court ordered conveyance of the affected portion of the land for fair market value, observing that in limited cases, section 37 operates almost as a form of "private expropriation."[26] This decision, again, emphasizes the Court's willingness to apply equitable discretion where the balance of hardship necessitates such relief.

Courts have declined to apply section 37 where the claimant's belief was not genuinely mistaken or where reasonable diligence would have revealed the true boundary. In *Metzger Estate v Gardiner*,[27] relief was denied where tenants claimed compensation for improvements but never believed the land was theirs. Similarly, in *Olson v Olson*,[28] the plaintiff advanced several arguments, with the goal of taking ownership over a portion of the land that had been transferred to his brother by their father. One of these arguments was his invocation of section 37(1) to seek compensation for the improvements he had made to the land. The plaintiff claimed that his father verbally gifted him the land, and thus he had an honest belief that his father would transfer him the land. The court found the evidence did not support the plaintiff's allegation that such a gift had been made to him, particularly given the lack of relationship between the plaintiff and his father, and other contradictory facts that did not align with a true honest mistaken belief, and the application of section 37(1) to this case.

The courts have emphasized that negligence or wilful blindness cannot be disguised as mistake for section 37 of the CLPA to apply. In *Byron v Hilton Beach (Village)*[29] *("**Byron**")*, the applicants' cottage encroached upon a municipal road allowance and the failure to acquire a survey which would have revealed the true boundary lines, defeated their claim.

Similarly, in *Meconi v Crichton*,[30] a hedge planted beyond the lot line without checking survey stakes was insufficient to establish an honest belief. The plaintiff alleged that he was entitled to a lien on the defendant's land for the value of a hedge planted on the defendant's property by the plaintiff, pursuant to section 37(1). The plaintiff argued that he and his wife had an honest but mistaken belief that they planted the trees on their own property. The court found the plaintiff failed to prove this honest belief. Like in *Byron*, the evidence in this case showed that the plaintiff's family and friends were simply "digging holes and flopping trees in" and made no attempt to locate the lot line. An honest belief must be based on fact or logic, which were absent in the plaintiff's case. For instance, the plaintiff could have easily located the property line based on the surveyor's iron bar placed in the ground near the plaintiff's house, but instead chose to plant the trees based on convenience. For this reason, plaintiff's section 37(1) claim for compensation failed.

The permanence of the improvement is a key consideration in the application of this remedy. In *McGuire v Warren*,[31] a deck, walkway, and fence built contrary to a reference plan were deemed

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26 *Ibid* at para 101.

27 [2000] O.J. No. 2280, [2000] O.T.C. 455.

28 [1996] O.J. No. 3964, 18 O.T.C. 373.

29 [2000] O.J. No. 50, 94 A.C.W.S. (3d) 178.

30 [2000] O.J. No. 2457, 35 R.P.R. (3d) 12.

31 2006 CanLII 23923 (ON SC), 46 R.P.R. (4th) 113.

temporary and removable, and the court refused to order relief. Similarly, in *Wigle v Vanderkruk*,[32] the construction of a polyhouse was found to lack permanence and an honest belief of ownership on the part of the defendant. Other restrictions are detailed in the case *Halton Hills (Town) v Row Estate*,[33] where the court held that routine care and maintenance is insufficient to establish a belief in ownership, and *Zegil v Opie*,[34] which confirmed that joint tenants cannot invoke section 37 against each other.

The availability of the section 37 remedy under the CLPA depends on the due diligence of the party, mistaken belief, permanence of the improvement, signs of negligence and wilful blindness, prejudice to the owner of the property, and the balancing of equities.

Part IV – Conclusion

This paper illustrates the importance of legal remedies like adverse possession and Section 37 of the CLPA in resolving boundary disputes and underscores the limitations of title insurance and the necessity for property owners and municipalities to exercise due diligence in managing property boundaries.

Kosicki serves as a landmark clarification of the doctrine of adverse possession, reaffirming its relevance in modern property law and its application to municipal parklands. By upholding legislative supremacy, the SCC has reinforced the importance of adhering to statutory frameworks while limiting judicial discretion to create new exceptions based on public policy considerations. This case not only highlights the enduring significance of adverse possession but also underscores the necessity of safeguarding title through proactive measures, such as by obtaining surveys, conducting regular inspections and enforcing property boundaries in a timely manner.

While title insurance offers valuable protection, it is not a panacea for all title defects, particularly those involving boundary disputes. Professionals and property owners must remain vigilant, employing thorough due diligence, boundary surveys, and legal remedies to mitigate risks and protect their interests.

The *Kosicki* decision is a compelling testament to the enduring strength of statutory remedies in ensuring fairness and justice in property disputes. It emphasizes the importance of legislative clarity and the courts' role in respecting statutory intent while addressing the equitable considerations that underpin property law. As boundary disputes continue to arise, the lessons from *Kosicki* and the remedies explored herein serve as essential tools for navigating the complexities of title and ownership in Canada.

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[32] [2005] O.J. No. 3032.

[33] [1993] O.J. No. 1222, 41 A.C.W.S. (3d) 185.

[34] [1997] O.J. No. 2085, 28 R.F.L. (4th) 405.