***Kosicki v Toronto*: An Update from the Ontario Court of Appeal Regarding Adverse Possession of Municipal Lands**

By: Sarah Knibutat

In the recent decision of *Kosicki v Toronto*,[1] the Ontario Court of Appeal updated the common law test for adverse possession of municipal lands, making it increasingly difficult for individuals to advance such claims. A split panel of Ontario's highest Court rejected the idea that municipal parklands are automatically immune to claims for adverse possession, but upheld the application Judge's finding that adverse possession had not been established in respect of the segment of parkland at issue. A summary of the relevant lower and appellate court decisions is provided below.

The Facts

The facts in *Kosicki* were as follows: the appellants owned a single family home located on the southeast corner of Lundy Avenue and Warren Crescent in Toronto. Since at least 1971, a trapezoid-like parcel of land owned by the City of Toronto ("**City**") had been fenced off and used exclusively by the owners of the appellants' property as part of their backyard. Under the City's Official Plan, the disputed lands were designated as part of its "Green Space System" and were located adjacent to Étienne Brûlé Park, which runs along the Humber River. The appellants paid taxes on the disputed lands until 2020 and attempted to purchase them in 2021. Despite consenting to transfer a similarly situated (albeit smaller) portion of land to the appellants' easterly neighbour, the City refused to sell the disputed lands to the appellants in accordance with its policy of discouraging the sale or disposal of Green Space System lands. The appellants accordingly brought an application for adverse possession, i.e. a declaration that they now owned the disputed lands. There was no evidence that the City was aware of the lands being public prior to the appellants' application, however, on learning that the disputed lands were City property, the City developed plans proposing to use the lands for public benefit by expanding access to the Humber River Recreational Trail.

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[1] *Kosicki v Toronto (City)*, 2023 ONCA 450 ["***Kosicki*, ONCA**"].

Application Decision

On the application before Justice Donohue of the Ontario Superior Court of Justice, the parties agreed that the applicants' conduct in respect of the disputed lands satisfied the traditional test for adverse possession claims between private landowners, given that they/previous owners maintained possession of the lands for over ten years, during which time the possession was open, notorious, peaceful, adverse, actual, and continuous.[2] The key issue was whether the disputed lands, comprising of City property, were *immune* from claims for adverse possession.

Public Benefit Test

Noting that no Ontario statute expressly prevents adverse possession claims in respect of municipal parklands and recounting a line of Canadian jurisprudence addressing such claims,[3] Justice Donohue considered the "Public Benefit Test" proposed by Justice Howden in *Oro-Medonte (Township) v Warkentin*[4] and subsequently applied in *Richard v Niagara Falls*.[5] The Public Benefit Test provides that municipal lands (other than public road allowances)[6] which satisfy the following criteria are immune from claims of adverse possession by neighbouring landowners:[7]

1. the land was purchased by or dedicated to the municipality for the use or benefit of the public, or for the use or benefit of an entire subdivision as well as the public at large; and,
2. since its acquisition by the municipality, the land has been used by and to the benefit of the public.

Justice Donohue concluded that the disputed lands satisfied the first element of the Public Benefit Test as they were historically expropriated by the Metropolitan Toronto and Region Conservation Authority in 1958 for public use (later becoming part of Étienne Brûlé Park) and had been conveyed to the City for nominal consideration in 1971. She accepted that the lands were purchased for the use or benefit of the public and in fact "had a very high public interest".[8]

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[2] *Kosicki v City of Toronto*, 2022 ONSC 3473 ["***Kosicki*, ONSC**"] at paras 3-4.
[3] *Ibid* at paras 6-14.
[4] *Oro-Medonte (Township) v Warkentin*, 2013 ONSC 1416 at para 119.
[5] *Richard v Niagara Falls*, 2018 ONSC 7389 at para 27.
[6] Public highways are protected from claims of adverse possession– see *Kosicki,* ONSC, *supra* note 2 at para 6.
[7] Kosicki, ONSC, *supra* note 2 at para 12, internal citations omitted.
[8] *Ibid* at para 28.

However, the second element of the Public Benefit Test was not met as the disputed lands had been fenced off for at least 50 years, blocking public access to them completely. Accordingly, the Public Benefit Test had not been established.

Despite the Public Benefit Test not being met in respect of the disputed lands, Justice Donohue went on to consider whether it was appropriate for the City's rights to be extinguished in the circumstances given that the City had only recently discovered its rights in respect of the lands and they could be put to use for public benefit. In her brief reasons addressing this issue, Justice Donohue provided that there was a "reasonable explanation" as to why no action was taken by the City, as it could not be expected to patrol all of its lands against adverse possession and as courts cannot demand the same vigilance as a private landowner in this regard. Justice Donohue ultimately concluded that a "private individual must not be able to acquire title by encroaching on public lands and fencing off portions for their private use in the manner of two private properties", opining that, as a matter of public policy, "this would be a dangerous precedent if allowed".[9] The homeowners' application was accordingly dismissed and the City retained ownership of the disputed lands.

Appellate Decision

Majority Ruling

At the Ontario Court of Appeal, Justices MacPherson and Sossin agreed to uphold the application decision and dismiss the appeal, though they rejected the idea that municipal parklands have general immunity from claims of adverse possession. The majority decision acknowledged that it is "difficult to identify *any* rationale for adverse possession against municipal parkland," as the following common law rationales for adverse possession between private parties do not apply to such lands:[10]

1. penalizing landowners who sleep on their rights/rewarding the "working possessor";
2. encouraging land being put to its best/most productive use; and,
3. encouraging landowners to monitor their property and resolve boundary/title disputes to protect the "settled expectations for an adverse possessor".

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[9] *Ibid* at paras 73-78.
[10] *Kosicki*, ONCA, *supra* note 1 at paras 15-20.

The Court went on to summarize the historic development of the Public Benefit Test before concluding that land acquired by a municipality and zoned as parkland (or a space to be accessible to the public) should be treated as presumptively *in use* for the public benefit unless there is evidence that the municipality has acknowledged and acquiesced to its private use.[11] The test for adverse possession of public lands was accordingly reframed as follows:[12]

> **… adverse possession claims which are otherwise made out against municipal land will not succeed where the land was purchased by or dedicated to the municipality for the use or benefit of the public, and the municipality has not waived its presumptive rights over the property, or acknowledged or acquiesced to its use by a private landowner or landowners. [Emphasis added.]**

As there was no evidence that the City had consented to, acknowledged, or acquiesced to the appellants' private use of the disputed lands, the new test for adverse possession of public lands was not met in the circumstances and the application Judge's decision was ultimately upheld.

Of interest, the majority decision went on to consider the appellants' submission that the application decision deprived them of the protection afforded by the following provisions of the *Real Property Limitations Act* ("***RPLA***"):

- section 4, which sets out a 10-year limitation period for bringing claims to recover land, including in respect of adverse possession;
- section 15, which extinguishes the "true owner's" title in respect of land following the expiry of the limitation period; and,
- section 16, which provides exemptions to the above-noted regime for certain categories of land, including public highways and Crown waste or vacant land, but **does not** expressly exempt municipal lands such as parklands.

Seemingly circumventing the issue of the *RPLA*'s application, the majority concluded that the fact that section 16 recognizes certain categories of public lands as immune from adverse possession while remaining silent on others "does not preclude the continuing development of the common law of adverse possession in relation to public land."[13] Further, the majority noted that the *Land*

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[11] *Ibid* at paras 38 and 40.
[12] *Ibid* at para 47.
[13] *Ibid* at para 66.

Titles Act leaves open that title to municipal lands can be subject to claims of adverse possession, but only in cases where such claims arose before registration under the Land Titles system.[14]

The Dissent

In a lengthy and impassioned dissent, Justice Brown expressed his view that the application decision ought to be reversed and the appeal allowed in light of the application Judge's failure to engage with the *RPLA*/*LTA*, failure to acknowledge the legal paramountcy of statutes over common law, and reliance on earlier decisions containing similar errors. In his view, the Legislature would be the proper forum for discussing issues including whether the protection offered by section 16 of the *RPLA* ought to be extended to municipal parklands.

Key Takeaways

As it stands, the Ontario Court of Appeal's decision in *Kosicki* bolsters the position of municipalities in respect of claims for adverse possession of municipal lands. As the updated test clarifies that adverse possession of municipal lands, including parklands, will not be established unless there is evidence that the municipality has waived its presumptive rights or acknowledged/acquiesced to the private use of its land, such claims will not easily succeed in the future. While the *Kosicki* decision may have limited application in practice given that most claims for adverse possession of municipal lands would be barred by the *Land Titles Act* and registration regime, it does provide an additional layer of protection to municipalities finding themselves faced with eligible claims.

As the *Kosicki* decision highlights tensions regarding statutory interpretation and the role of the common law in Canada, it will be interesting to see whether it is ultimately appealed to the Supreme Court of Canada and, if heard, how Canada's highest Court disposes of the appeal.

[14] *Ibid* at para 73; *Land Titles Act*, RSO 1990, c. L. 5 ["***LTA***"].