

The Boundaries of Common Law: Parkland is Not Immune from Adverse Possession

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Is municipal parkland immune from claims of adverse possession, and what role does the common law have in claims of adverse possession? In *Kosicki v Toronto (City)*, [2025 SCC 28](#) (*Kosicki*), the Supreme Court of Canada (the SCC) answered these questions in a decision that likely has broader implications on the application of statutory law in Canada.

Factual Background

The appellants (*Kosicki*) acquired a residential property near the Humber River in 2017 (the Appellant Property). The Appellant Property backed on to a public laneway owned by the City of Toronto (the City). A municipal park (Étienne Brûlé Park) separates the laneway from the Humber River. The Appellants were unaware that the City had paper title to a portion of the property around which the appellants' predecessors in title had placed a fence since at least 1971 (Disputed Land).

The Disputed Land was originally expropriated by a conservation authority in 1958, which was later transferred to the City in 1971 and designated as part of a larger public park. After *Kosicki* discovered the City owned a portion of the backyard, *Kosicki* attempted to purchase it from the City. The City refused, taking the position that it would not sell part of a municipal park. *Kosicki* launched a claim that it had acquired the Disputed Land through “adverse possession.”

Legal Background

“Adverse possession” is a common law test that has been codified into statute in Ontario by way of the *Real Property Limitations Act*, R.S.O. 1990, c. L.15 (the RPLA). Adverse possession dispossesses a landowner of their lands where a trespassing third party can successfully establish that they have (1) had actual possession of the land for the required statutory period, (2) intended to exclude the landowner from the property, and (3) effectively excluded the landowner from their lands. There are exceptions to adverse possession within several Ontario statutes, including the RPLA.

The City and *Kosicki* agreed that the statutory requirements to claim adverse possession were met.

Cassels

Question before the SCC

The SCC was asked whether a statutory claim in adverse possession could be defeated by the common law. A principle was established by the courts which states that land used as a public park is presumptively immune from claims of adverse possession because it is held in trust for a public benefit, subject to exceptional circumstances (the Public Benefit Test).

The SCC Confirms the Boundaries of Common Law

In a 5–4 decision, the SCC held that (1) there is no statutory exception for municipal parks in the RPLA or other statutes and (2) it was not open to the Court to create an exception through common law.

The majority of the Court focused on statutory interpretation. Based on the scheme of the RPLA, the majority stated that municipal parkland is not exempted by applicable statutes from adverse possession claims. The Court found:

- The statutory scheme only contains limited exceptions to adverse possession claims, including specific public lands exemptions which do not include municipal parkland;
- A broad common law exception for municipal land would be inconsistent with the RPLA's purpose. The RPLA prevents unfairness where a possessor has relied on land for a certain length of time. The Ontario legislature has chosen to deviate from that purpose only for specific types of public land that do not include municipal parkland; and
- The Public Benefit Test is irreconcilable with the general principles of adverse possession. A requirement showing clear knowledge and agreement from the municipality requires permission, and it is impossible to adversely possess land *with permission*.

The dissenting opinion would have applied the Public Benefit Test, concluding that parks are subject to a rebuttable presumption that they are immune from adverse possession claims. The dissenting justices reasoned that the Disputed Lands were for public use and that the City had not acquiesced to its private use. They reasoned that municipalities should not be penalized for failing to monitor the boundaries of thousands of parks given the significant social and economic costs this imposes on taxpayers.

Takeaways

Kosicki stands for several important principles of which municipalities, landowners, and courts should be

aware:

- Absent a legislative amendment, municipal parkland is not immune from crystallized adverse possession claims in Ontario. These claims are subject to the limitation periods in the RPLA and the *Land Titles Act*, S.O. 1990, c. L. 5;
- Other types of land not specifically referenced in Ontario's broader statutory scheme are similarly not exempt; and
- Courts themselves cannot independently supplant or add new exemptions to the RPLA, although the common law still plays a role in interpreting the statute itself.

The SCC's decision confirms the common law's limits. In the context of adverse possession, the legislature's policy decisions — including whether public parkland should be exempt from possessory claims — can be found in applicable legislation. More broadly, and therefore in all contexts, it is critical to consider the statutory scheme itself to determine the scope of applicable common law. The Court's decision places emphasis on considering and applying the legislative scheme and shows some reluctance to displace legislative policy decisions with common law principles.

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