

# KEEPING CURRENT

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## Neighbour entitled to retain land upon which lasting improvements were made (*Margaritis v. Milne*)

By James R.G. Cook

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**James R.G. Cook**  
Partner  
416.865.6628  
jcook@grllp.com

A dispute between neighbours over a strip of land between their properties no wider than 21.9 centimetres resulted in years of litigation supported by no less than ten affidavits. A fence and retaining wall had been in place for more than twenty years by the time of the litigation. In a decision upheld on appeal by the Divisional Court, the Ontario Superior Court of Justice addressed whether the doctrine of adverse possession applied and, if not, how to sort out the issues between the parties over the location of the improvements made upon the disputed land: *Margaritis v. Milne*, [2023 ONSC 5943 \(CanLII\)](#).

The applicant (Milne) bought his property in 1996. At the time, his neighbour's property was owned by the respondent's father, who lived there from 1956 to his death in 2017. The respondent (Margaritis) lived there for some of his childhood and visited regularly at other times.

The apparent dividing line between the properties was marked with a wooden fence followed by a stone retaining

wall. A large maple tree was located near the border of both properties directly across the boundary line.

After acquiring his property in 1996, Milne carried out extensive work in both the house and the backyard area. This work included removing the existing fence, raising the level of the end of the yard, pouring concrete to create a car pad, and building stairs, a gate, a retaining wall and a new fence.

When his father passed away in 2017, Margaritis inherited his property and sought to use it as his family home. His wife, an architect, sought to design a new plan for their backyard. A survey they commissioned to assist in this purpose revealed that there was a small encroachment from Milne's property into their backyard.

Since the Margaritis family wished to make use of the entire deeded area, they approached Milne about alterations to the gate, stairs, and fence to reflect the correct property line. When negotiations broke down, litigation ensued.

In February 2023, the dispute was heard by the Ontario Superior Court of Justice: *Milne v. Margaritis*, [2023 ONSC 1375 \(CanLII\)](#). Milne sought title to the disputed strip of land that was 18.2 metres long but never wider than 21.9 cm, and often much thinner than that (totalling two square metres).

The court first considered whether Milne had acquired title to the disputed strip of land by way of adverse possession, which requires proof of the following (*Mueller v. Lee* [2007 CanLII 23914](#) (Ont. S.C.J.):

1. The claimant and/or their predecessors must have actual possession for ten years;
2. the claimant's possession must be with the intention of excluding the owner or persons entitled to possession; i.e. the claimant must have an *animus possidendi*; and
3. the owners and any others entitled to possession must be out of possession (discontinuance of possession) for the statutory period.

Margaritis argued that Milne had moved the fence line to its current location in 1996, whereas Milne argued that he re-built the fence on the pre-existing fence line.

In Ontario, land that is registered in the Land Titles system cannot be obtained by adverse possession unless the ten-year exclusion period ran before the land was registered. The properties at issue were converted to the Land Titles system in 2002. Accordingly, if Milne moved the fence line in 1996, he and his predecessors would not have had actual possession of the disputed property for the ten-year period necessary to acquire possessory title before the conversion date in 2002.

Upon reviewing all the evidence, the court was unable to determine where the effective boundary was before the 1996 renovations. Milne was not able to produce any surveys, plans, permits, or engineering drawings reflecting the work he did. As a result, Milne's claim to title by way of adverse possession failed.

Nevertheless, the court exercised its discretion and granted title to the wedge of land to Milne on the basis that Milne had made lasting improvements to the strip of land under the honest and *bona fide* belief that it belonged to him.

The court's authority to do so arises from [section 37](#) of the Ontario *Conveyancing and Law of Property Act*, which provides as follows:

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.

The discretion of the court to allow the honestly mistaken person to retain the land on paying compensation is not one that is to be lightly exercised: *Gay v. Wierzbicki*, [1967 CanLII 352 \(ON CA\)](#). The courts apply a three-part test (e.g. *Armstrong v. Penny*, [2023 ONSC 2843](#), at paragraph [100](#)), requiring that:

- a. the party must have genuinely believed that he or she owned the land;

- b. the improvements must be of a lasting nature; and
- c. 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.

The key finding was that Milne had an honest and *bona fide* belief that the land was his, and that he made lasting improvements on the land based on such belief. While there was no serious dispute that Milne believed that he owned the strip of land, Margaritis argued that the work done did not represent “lasting improvements.” In the courts’ view, however, a retaining wall, fencing, sea channel, and concrete pour and raising of the car pad did in fact represent lasting improvements pursuant to [section 37](#) of the [Conveyancing and Law of Property Act](#).

Further, the court found that the balance of convenience strongly favoured Milne retaining the disputed area since the boundary had existed in its current location for more than 20 years without complaint before the litigation.

Conversely, granting the disputed area to Margaritis would require significant renovations to the Milne’s backyard including modifying a gate and stairs and potentially a retaining wall for the purpose of adding an “objectively insignificant area” to the Margaritis property. There did not appear to be any compelling reason why Margaritis truly required the strip of land at issue.

In exchange for obtaining title to the trip, Milne was required to compensate Margaritis for the value of the strip of land. The method of calculating the value was yet to be determined. Neither party was awarded costs for the hearing given the result.

On appeal, the Divisional Court affirmed that a “lasting” improvement is an addition to a property that has permanence, in the sense of not being easily removable, amounting to more than mere repair or replacement of waste. In the appellate court’s view, the application judge exercised his discretion on appropriate principles, considering all of the relevant circumstances, and did justice to the circumstances of the case. The appeal was therefore [dismissed](#).

The decision shows that even if the doctrine of adverse possession does not apply, a property owner may acquire title to neighbouring land upon which lasting improvements were made under a truly honest but mistaken belief as to where the boundary line was located.

### **Contact us**

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact [James Cook](#), at 416.865.6628 or [jcook@grllp.com](mailto:jcook@grllp.com).

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