SUPREME COURT OF CANADA

CITATION: Kosicki *v.* Toronto (City), 2025 SCC 28

APPEAL HEARD: January 16, 2025
JUDGMENT RENDERED: September 19, 2025
DOCKET: 40908

BETWEEN:

Pawel Kosicki and
Megan Munro
Appellants

and

City of Toronto, formerly the Corporation of the Borough of York
Respondent

- and -

Attorney General of Ontario,
Attorney General of British Columbia,
City of Surrey,
Advocates for the Rule of Law and
City of Ottawa
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

REASONS FOR JUDGMENT: (paras. 1 to 85)

O'Bonsawin J. (Wagner C.J. and Côté, Rowe and Moreau JJ. concurring)

DISSENTING REASONS: Kasirer J. (Karakatsanis, Martin and Jamal JJ. concurring)
(paras. 86 to 208)

Pawel Kosicki and
Megan Munro *Appellants*

v.

City of Toronto, formerly the Corporation of the Borough of York *Respondent*

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2025: January 16; 2025: September 19.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Property — Real property — Adverse possession — Public land — Municipal parkland — Municipality holding title to portion at back of applicants' backyard designated in municipal plans as parkland for public use — Applicants seeking possessory title to disputed portion of backyard on basis of exclusive use for more than 10 years — Application judge denying claim for reasons of public policy — Court of Appeal denying claim on basis of reframed common law test for adverse possession of public land — Whether common law basis to exempt possessory claims to public land should be recognized in addition to existing statutory exceptions — Whether disputed portion of backyard is shielded from claim for adverse possession by virtue of being municipal parkland — Whether applicants' claim for possessory title should succeed — Real Property Limitations Act, R.S.O. 1990, c. L.15, ss. 4, 5(1), 15, 16.

In 2017, the applicants purchased a residential property in Toronto. The property backs onto a laneway owned by the municipality, which separates the property and its neighbouring properties from a large municipal park. Several years after purchasing the property, the applicants learned that the municipality was the title holder of a portion of their backyard ("disputed land"). The tract of land made up of the disputed land, the laneway, and the park had been expropriated by a conservation authority in 1958 and conveyed to the municipality in 1971. Sometime between 1958 and 1971, a fence was erected around the property's backyard, preventing public access to the disputed land.

The applicants enquired about purchasing the disputed land from the municipality, but it refused based on a policy discouraging the sale of lands, such as the park and the disputed land, that were registered in its green space. The applicants therefore sought an order for possessory title to the disputed land. The application judge identified that a public benefit test for adverse possession of public land had been articulated in certain other lower court decisions, and considered whether it had been met in the instant case to defeat the applicants' possessory claim. She concluded that the public benefit test was not satisfied because of the municipality's failure to demonstrate that the disputed land had ever been used by the public before the erection of the fence. Despite this conclusion, she dismissed the application, holding that the disputed land was originally acquired for an important public interest purpose and that, as a matter of public policy, a private landowner may not fence off public lands and exclude the public and then succeed in a claim for adverse possession.

The majority of the Court of Appeal upheld the application judge's decision, but reframed the public benefit test, removing the requirement of actual use. It stated that adverse possession claims 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. The majority found that Ontario's *Real Property Limitations Act* ("*RPLA*") did not preclude the further development of the common law in relation to lands not explicitly addressed in s. 16 of the *RPLA*, which immunized certain lands from adverse possession, and that the refinements made to the public benefit test did not contravene s. 16 as they did not provide an absolute immunity

from possessory claims for municipal parkland, but created a rebuttable presumption that such land is unavailable for adverse possession. The dissenting judge would have confirmed the applicants' title to the disputed land since they had satisfied the requirements contained in the *RPLA* to establish possessory title. In his view, a common law public benefit test would inappropriately amend the provisions of the *RPLA*, and there was no sound basis for the creation of a broad immunity from adverse possession for municipal parkland.

Held (Karakatsanis, Martin, Kasirer and Jamal JJ. dissenting): The appeal should be allowed.

Per Wagner C.J. and Côté, Rowe, **O'Bonsawin** and Moreau JJ.: Recognizing a novel common law immunity for municipal parkland from matured possessory claims cannot be reconciled with the relevant statutory scheme and would defeat the legislature's intent. The legislature, having turned its mind to those public lands that would be exempt from the operation of the *RPLA* in the *RPLA* itself and in other statutes, clearly intended to preserve matured possessory claims. Accordingly, the *RPLA*, which extinguishes both the title and the right of the paper title holder to recover the land 10 years after dispossession, governs the dispute in the instant case. It is undisputed that the applicants have established that there has been open, notorious, peaceful, adverse, exclusive, actual and continuous possession for 10 years in accordance with ss. 4 and 5(1) of the *RPLA* and there is no applicable exception, in either s. 16 of the *RPLA* or other statutes, to bar the possessory claim to municipal parkland. The municipality's title to the disputed land was extinguished pursuant to

s. 15 of the *RPLA* over four decades ago. According to s. 44(1) of the *Land Titles Act*, the disputed land became subject to the applicants' title upon registration. The applicants should be declared the fee simple owners of the disputed land.

In Ontario, the *RPLA* sets out rules governing claims for possessory title, commonly known as adverse possession or squatters' rights. Where a claim for adverse possession is available, courts apply the relevant statutory provisions to determine if it is made out. By the operation of ss. 4, 5(1) and 15 of the *RPLA*, a true owner's interest in land is extinguished in favour of the possessory title acquired by a trespasser when the latter establishes 10 years of dispossession, the elements of which are established in the jurisprudence: (1) actual possession of the land by the trespasser for the required statutory period; (2) an intention to exclude the true owner from their property; and (3) effective exclusion of the true owner from their property. Actual possession is established where the act of possession is open and notorious, adverse, exclusive, peaceful, actual and continuous.

Courts must resort to the common law to apply the clear but undefined terms of the relevant provisions of the *RPLA*, but the law of adverse possession is also marked by a long history of statutory enactments, which have codified parts of the common law and modified others. 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. In s. 16 of the *RPLA*, the legislature has exempted certain public lands from the application of the *RPLA* for over a century, including waste or vacant Crown land, road allowances, and public highways. However, these

amendments expressly preserved rights, title, and interests that had been acquired as of 1922 for road allowances and highways. While new exceptions for additional categories of public land have been enacted in related statutes since the last amendments to the *RPLA*, they do not mention municipal parkland.

Attempting to create a common law exception for municipal parkland undermines the legislature's clear policy choice to only confer immunity to certain categories of public land and preserve matured possessory title. It is necessary for a court to closely examine the statute in order to determine whether legislative intent would be undermined by recourse to a novel common law rule such as the public benefit test. A reading of the relevant provisions in the context of the broader statutory scheme governing adverse possession in Ontario reveals that the legislature did not intend to exempt municipal parkland from the *RPLA*'s effects. The legislature preserved matured possessory claims, despite prospectively abolishing the possibility of acquiring possessory title for land registered under the *Land Titles Act*, which is consistent with the *RPLA*'s purpose as a statute of repose. It is of crucial importance that the legislature has listed the categories of public lands exempt from the application of the *RPLA* in the *RPLA* itself and in other statutes. The ordinary language of s. 16, which establishes a closed list of exceptions that do not include municipal parkland, creates a strong expectation that the legislature would have made express reference to municipal parkland in that provision had it intended it to be excepted. It is significant that the provision expressly includes road allowances or highways that have vested in a municipality, but no other municipal property. In addition to the adoption of a Torrens-based land title system under the *Land Titles Act*, the legislature also amended

the *Public Lands Act* and the *Provincial Parks and Conservation Reserves Act, 2006* in 2021 to exempt certain categories of public lands from the application of the *RPLA*, but preserved matured possessory claims.

The application of a common law exception for municipal parkland would conflict with the legislature's treatment of possessory title. That the legislature has not completely ousted the common law does not permit courts to supplement a statute in a manner that is inconsistent with legislative intent. The public benefit test elaborated by the majority of the Court of Appeal would effectively bar all possessory claims for municipal parkland. A claim would only succeed if the municipality explicitly consented to the possession, which is irreconcilable with the general principles of adverse possession and effectively ousts the legislation's operation. Requiring clear knowledge and an agreement on the part of the municipality not to disrupt possession in effect requires that a trespasser have permission to adversely possess, and yet one cannot adversely possess with permission. If acknowledgement or acquiescence is required, little role would be left for the remaining requirements of adverse possession, as a transfer of title in such cases would in substance be consensual.

Per Karakatsanis, Martin, **Kasirer** and Jamal JJ. (dissenting): The appeal should be dismissed. The disputed land was not acquired by the applicants as an extension of their backyard by adverse possession. The position most consistent with both the jurisprudence and the legislative context is that the public benefit test at common law remains operative alongside the *RPLA*. While the applicants met the requirement of constructive notice for adverse possession, they failed to meet the more

stringent test that, at the relevant time, the municipality acquiesced to private use of the public land.

There is agreement with the majority on much of the common law test for adverse possession, but disagreement on whether claims of adverse possession of public lands, and in particular municipal lands, are distinct in a way that reflects the nature of that land. While the acquisition of title to land by adverse possession can, in the proper circumstances, be a social good, the traditional explanations of adverse possession have limited resonance when the titled owner of the land is a public entity, holding the property for the benefit of the community. It will be difficult for a private possessor to show that their personal claim to municipal parkland is more productive than the use or benefit that the whole community derives from a public green space. That a municipality should be penalized for its failure to patrol or monitor the boundaries of thousands of acres of heritage parkland in hundreds of parks ignores the social and economic costs to the public of that monitoring, including costs to taxpayers.

The common law can and does acknowledge the distinct nature of municipal public lands as it relates to limiting the doctrine of adverse possession. In Ontario, land set aside by a municipality for the use or benefit of the public as a park should be treated as presumptively in use by the public and shielded from adverse possession. To overturn this presumption, a claimant must show that the municipality has changed the vocation of the land from that designated for public use as a park or has acknowledged or acquiesced to its private use. The evidentiary bar associated with the inquiry is a high one. Acquiescence generally requires proof of knowledge on the

part of the municipality. Given the nature of the public interest in the land, and the exigencies of monitoring parkland by the municipality, when proof of constructive knowledge serves to rebut the presumption, it must meet a high bar.

The majority of the Court of Appeal distilled a general rule applicable to the common law of Ontario; it refined the common law requirements for what acts will constitute dispossession in the context of municipal parkland in the instant case, rather than adding a new exception akin to the classes of public land exceptions in the list in s. 16 of the *RPLA*. The refinement of the case law has two main features. First, it consolidated the previous formulation into a single question: whether the municipal land at issue was dedicated for the benefit of the public. Second, recognizing that the cases did not consecrate an immunity, it explained that they rest on a rebuttable presumption that lands acquired or dedicated for the public benefit are used as such until proven otherwise, as there are circumstances under the common law in Ontario in which it has always been difficult to acquire municipal land by adverse possession. This refinement exemplifies a well-known characteristic of common law reasoning whereby judges may arrive at a principle by a process of induction from a series of judicial decisions in individual cases. The jurisprudence reflected a recurring pattern of judicial discomfort in granting claims for adverse possession by private landowners against municipal public land and the majority of the Court of Appeal made sense of that series of disparate cases that have said similar things in different ways: municipal land, by reason of its nature and vocation, is not subject to acquisition by adverse possession in the same way as land held by a private owner.

This common law rule has not been ousted by statute in Ontario, including by the *RPLA*. Properly interpreted, the *RPLA* does not give rise to the inference that, by omitting municipal parkland in the named statutory exemptions, the legislature intended to have that land treated, for the purposes of adverse possession, as if it were held by a private landowner. The *RPLA* is not a complete code for adverse possession of land, given that the measure of adverse possession is itself a common law test, sitting outside of the rules of limitation in the statute. The *RPLA* could oust the common law rule on public land if the legislature chose to do so expressly or by necessary implication. There is agreement with the majority that legislative intent must be respected, but disagreement that under the legislation, the common law relating to municipal land presumptively held for the use or benefit of the public has in this regard been left untouched by the legislature.

The *RPLA* does not reveal a legislative purpose in favour of ousting the common law. The *RPLA*'s statutory scheme exhibits internal inconsistencies and therefore evidences limited and shifting legislative purposes. The *RPLA* inherited an amalgamation of provisions that were preserved without substantial legislative revision and appears to be a patchwork quilt of disparate enactments that was constructed in fits and starts and over long periods of time. Section 16 of the *RPLA* reflects different amendments made over several decades, and in at least one of those instances, the legislature acted only when the courts would not do so. There is disagreement with the majority's position that s. 16 operates as a closed list of property exempted from adverse possession and that the legislative evolution reflects a deliberate and concerted process to displace or oust the common law as it applies to municipal parkland. The

language and structure of s. 16 do not indicate an intention to define all lands as immune from adverse possession exhaustively, to the exclusion of the common law treatment of categories of public land not on the list, nor does s. 16 oust the common law power to recognize, parallel to the categories of land with full immunity that are expressly recognized, other categories of public land. Section 16 is best understood as a provision that introduced specific statutory exemptions that continue to operate within the broader framework of the common law.

Because it has not been ousted by statute, the common law rule relating to municipal parkland thus applies to the disputed land in the instant case. While the applicants and their predecessors possessed the disputed land for a period of time that would have given rise to acquisition by adverse possession had the land been owned by a private landowner rather than the municipality as parkland, and while it may well be a relatively small piece of land, the disputed land formed part of the precious green space designated by the municipality for the use or benefit of the public as part of the park during the whole period of possession. Awarding the land to the applicants would deprive the community of this part of the park in perpetuity. The public would make a more socially valuable use of this land over time than could any one person: that is the very principle of public use or benefit upon which parkland is predicated. That public interest is amplified in a densely populated urban setting such as the municipality where publicly accessible green space has significant natural heritage and recreational value that benefits the public.

The evidentiary record falls short of what is required to rebut the presumption or to ground a claim preserved under s. 51(2) of the *Land Titles Act*. The disputed land has been designated as parkland during the whole of the relevant period. The pre-existing fence may preclude public use of the land, but does not change the park's vocation to the benefit of the public, nor does it give rise to a settled expectation that the municipality acquiesced to the possession. The disputed land's public character, reinforced by its designation as green space remains undisturbed. This understanding of the public benefit presumption against adverse possession of a municipal parkland visits no unfairness on the applicants in the instant case. The applicants cannot say that they have a valid adverse claim based on their exclusive possession when that exclusivity is a consequence of the very fence that excluded the public from use of land designated for community benefit. Because the principle explained by the majority of the Court of Appeal was not new law but simply a plainer articulation of a longstanding common law rule, the applicants cannot say that their claim had crystallized as a mature right to title before a notional change in the law.

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(3d) 481; *Gooderham v. The City of Toronto* (1895), 25 S.C.R. 246; *Bailey v. City of Victoria* (1919), 60 S.C.R. 38; *Di Cenzo Construction Co. Ltd. v. Glassco* (1978), 21 O.R. (2d) 186; *Canada 3000 Inc. (Re)*, 2006 SCC 24, [2006] 1 S.C.R. 865; *Durrani v. Augier* (2000), 50 O.R. (3d) 353; *Lawrence v. Maple Trust Co.*, 2007 ONCA 74, 84 O.R. (3d) 94; *Frazer v. Walker*, [1967] 1 A.C. 569; *Barbour v. Bailey*, 2016 ONCA 98, 66 R.P.R. (5th) 173; *Sipsas v. 1299781 Ontario Inc.*, 2017 ONCA 265, 85 R.P.R. (5th) 24; *Pepper v. Brooker*, 2017 ONCA 532, 139 O.R. (3d) 67; *Aragon (Wellesley) Development (Ontario) Corp. v. Piller Investments Ltd.*, 2018 ONSC 4607, 94 R.P.R. (5th) 236; *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180; *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1, 37 E.R. 527; *Harris v. Mudie* (1882), 7 O.A.R. 414; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6; *Telus Communications Inc. v. Federation of Canadian Municipalities*, 2025 SCC 15; *Hamilton v. The King* (1917), 54 S.C.R. 331; *Armstrong v. Moore*, 2020 ONCA 49, 15 R.P.R. (6th) 200; *Wright v. Village of Long Branch*, [1959] S.C.R. 418; *Gibbs v. Grand Bend (Village)* (1995), 26 O.R. (3d) 644; *Waterstone Properties Corporation v. Caledon (Town)*, 2017 ONCA 623, 64 M.P.L.R. (5th) 179; *Zeitel v. Ellscheid*, [1994] 2 S.C.R. 142.

By Kasirer J. (dissenting)

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APPEAL from a judgment of the Ontario Court of Appeal (MacPherson, Brown and Sossin JJ.A.), 2023 ONCA 450, 167 O.R. (3d) 401, 43 M.P.L.R. (6th) 1, 50 R.P.R. (6th) 173, 483 D.L.R. (4th) 583, [2023] O.J. No. 2835 (Lexis), 2023 CarswellOnt 9689 (WL), affirming a decision of Donohue J., 2022 ONSC 3473, 32 M.P.L.R. (6th) 306, 43 R.P.R. (6th) 118, [2022] O.J. No. 2708 (Lexis), 2022

CarswellOnt 8307 (WL). Appeal allowed, Karakatsanis, Martin, Kasirer and Jamal JJ. dissenting.

Sarah J. Turney, *Daniel T. Richer* and *Jasmeen Kabuli*, for the appellants.

Michele Brady, *Alison Mintoff* and *Amy Tieu*, for the respondent.

Michael J. Sims and *Michael Saad*, for the intervener Attorney General of Ontario.

Heather Cochran, *Phong Phan* and *Tim Quirk*, for the intervener Attorney General of British Columbia.

Allan Wu, *Philip C. M. Huynh* and *Benjie Lee*, for the intervener City of Surrey.

Gregory Ringkamp, *Connor Bildfell* et *Adam Goldenberg*, for the intervener Advocates for the Rule of Law.

Anne Tardif, for the intervener City of Ottawa.

The judgment of Wagner C.J. and Côté, Rowe, O'Bonsawin and Moreau JJ. was delivered by

O'BONSAWIN J. —

I. Overview

[1] The issue in this appeal is whether the appellants, Pawel Kosicki and Megan Munro, can succeed in their claim for possessory title under the *Real Property Limitations Act*, R.S.O. 1990, c. L.15 ("*RPLA*"). Since 2017, the appellants have jointly owned a residential property in Toronto. Several years after purchasing the property, they learned that the respondent, the City of Toronto ("City"), is the title holder of a portion of their backyard, which is enclosed by a chain link fence.

[2] The City concedes that the appellants have satisfied the test for adverse possession. It is undisputed that the parcel of land at issue has been fenced off, openly and continuously, since at least 1971. However, the City argues that the claim cannot succeed at common law because the disputed parcel of land is designated in municipal plans as parkland for public use. The application judge concluded that the City had not established that the property was immune from adverse possession under the "public benefit test" articulated in certain other lower court decisions. However, she determined it was nonetheless inappropriate for the City's title to be extinguished as "a matter of public policy" (2022 ONSC 3473, 32 M.P.L.R. (6th) 306, at paras. 76-78). The Court of Appeal upheld the decision, but reframed the public benefit test. It held that adverse possession claims will fail where the municipality has not waived its rights over the property, or acknowledged or acquiesced to its use.

[3] In my view, the *RPLA*, which extinguishes both the title and the right of the paper title holder to recover the land 10 years after dispossession, governs this

dispute. The legislature has exempted certain public lands from the application of the *RPLA* for over a century. New exceptions for additional categories of public land have been enacted in related statutes since the last amendments to the *RPLA*. Although these new exceptions grant explicit protection to provincial parkland from the application of the *RPLA*, they do not mention municipal parkland. Moreover, despite prospectively abolishing the possibility of acquiring possessory title for land registered under the *Land Titles Act*, R.S.O. 1990, c. L.5 ("*LTA*"), the legislature has preserved matured possessory claims. The preservation of acquired possessory title is also consistent with the *RPLA*'s purpose as a statute of repose. In this statutory context, to recognize a new common law exception in addition to the exceptions the legislature has set out in s. 16, which would serve to retroactively deprive a claimant of acquired possessory title, would defeat the legislature's intent.

[4] For the reasons that follow, I would allow the appeal. Under the applicable statutory rules, the City's title to the land was extinguished over four decades ago. To accept the City's argument would be to interfere with the appellants' matured possessory claim and disregard the applicable statutory scheme.

II. Background

[5] In 2017, the appellants purchased a residential property in Toronto. The property includes a backyard and backs onto a laneway owned by the City, which runs along the south side of several properties and is used to access rear-facing garages. The City is also the registered owner of a parcel of land, Parts 2 and 3 on Plan 66R-23112

registered at the Toronto Land Registry Office, roughly in the shape of a trapezoid, forming a portion of the property's backyard ("disputed land").

[6] The laneway separates the property and its neighbouring properties from Étienne Brûlé Park, a large municipal park that stretches along the Humber River. The tract of land made up of the disputed land, the laneway, and the park was expropriated by the Metropolitan Toronto and Region Conservation Authority in 1958 and conveyed to the City in 1971. The record did not disclose when the park was established. In 2003, the City's Planning Division crafted the City's Official Plan, which designated the park and the disputed land as part of its "Green Space System", and specifically as "Parks and Open Space Areas" intended for public parks and recreational opportunities.

[7] In 1971, a survey plan was created and deposited with the land registrar, in preparation for the conveyancing of the tract of land described above to the City. The survey shows a fence around the backyard of the property that was erected sometime between 1958 and 1971, and has prevented public access to the disputed land for at least 54 years. The City did not produce evidence that the disputed land had any public use before 1971. A neighbour of the appellants, and owner of the residential property directly next door, recalled that the fence has been there since she purchased her property in 1975.

[8] After purchasing the property, the appellants paid property taxes calculated on the basis of a lot size that included the disputed land until 2020. They maintained the land as their own, and have used it as a play area for their children. In 2021, after

finding out that the disputed land was registered as municipal land, the appellants enquired about purchasing it from the City. The City refused, based on a policy discouraging the sale of lands registered in its Green Space System. The City indicated that, if it were to recover possession, the disputed land could be used to expand the existing access point to the park and install additional signage to improve wayfinding.

III. Judicial History

A. *Ontario Superior Court of Justice, 2022 ONSC 3473, 32 M.P.L.R. (6th) 306 (Donohue J.)*

[9] Before the application judge, the appellants sought an order for possessory title to the disputed land. The application judge recognized that the appellants' claim would have succeeded on an application of the "traditional" test for adverse possession (at para. 68), but concluded that the claim could nevertheless not succeed in the circumstances.

[10] The application judge first reviewed a number of cases dealing with possessory claims to municipal lands. She noted that the test for adverse possession had not been made out in the majority of the cases referenced, with the result that possessory title had not been established. But she observed that the cases expressed the common sentiment that more stringent requirements should apply to extinguish a municipality's title to land used for the benefit of the public.

[11] Specifically, the application judge identified that a "public benefit test" had been articulated in *Oro-Medonte (Township) v. Warkentin*, 2013 ONSC 1416, 30 R.P.R. (5th) 44, and considered whether it had been met in the present case, which would defeat the appellants' possessory claim. Given the City's failure to demonstrate that the disputed land had ever been used by the public before the erection of the fence, the application judge concluded that the public benefit test was not satisfied.

[12] However, noting that the City had only recently discovered that it had been excluded from its land, the application judge continued the analysis and held that it would be unfair to demand of a public entity "the same vigilance of a private landowner to watch its borders" (para. 74). Concluding that the disputed land was originally acquired for an important public interest purpose, the application judge decided that, in such circumstances, a "private landowner may not proceed to fence off public lands and exclude the public and succeed in a claim for adverse possession" (para. 77). She further stated that as "a matter of public policy, this would be a dangerous precedent if allowed" (para. 78).

B. *Ontario Court of Appeal, 2023 ONCA 450, 167 O.R. (3d) 401*

(1) Majority Reasons (MacPherson and Sossin JJ.A.)

[13] Like the application judge, the majority of the Court of Appeal for Ontario concluded that the appellants' claim to the disputed land could not succeed. Reviewing

the traditional rationales identified by scholars in support of the doctrine of adverse possession, the majority determined that they did not apply to municipal parkland.

[14] The majority determined it was appropriate to "reframe" the test for adverse possession of public land, establishing a general rule that "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" (para. 47). In doing so, the majority removed the requirement of actual use from the public benefit test that was set out in previous authorities. It determined that land acquired by a municipality for the purposes of creating a public space should be treated as presumptively in use for the public benefit.

[15] Finally, the majority found that the *RPLA* did not preclude the further development of the common law in relation to lands not explicitly addressed in s. 16 of that statute, which immunized certain lands from adverse possession. It concluded that the refinements made to the public benefit test did not contravene s. 16, as they did not provide an absolute immunity from possessory claims for municipal parkland, but created a rebuttable presumption that such land is unavailable for adverse possession.

(2) Dissenting Reasons (Brown J.A.)

[16] The dissenting judge would have allowed the appeal and confirmed the appellants' title to the disputed land. In his view, the legislature had undertaken a statutory codification and reformation of the law of adverse possession almost 200 years ago, which had culminated in the *RPLA*. Given this statutory context, the dissenting judge concluded that a common law public benefit test would inappropriately amend the provisions of the *RPLA*. It was undisputed that the appellants had satisfied the requirements contained in the *RPLA* to establish possessory title to the disputed land. The dissenting judge further critiqued the jurisprudential foundations of the public benefit test, noting the emergence of the test from a handful of lower court decisions rendered over the last 25 years. After examining the relevant cases, the dissenting judge concluded that none provided a sound basis for the creation of a broad immunity from adverse possession for municipal parkland.

IV. Issue

[17] The sole issue before this Court is 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. The parties agree on the legal effect of ss. 4, 5(1) and 15 of the *RPLA*. There is no debate that, on a strict application of the statute, the appellants would be entitled to the disputed land. However, the parties disagree as to whether the land is nevertheless immune from the operation of the statute as a matter of common law. Resolving the issue therefore also requires that we consider whether, in light of

the governing statutory scheme in Ontario, it is appropriate to recognize a new common law basis to exempt possessory claims in addition to those set out in statute.

V. Positions of the Parties

[18] In the view of the appellants, the *RPLA* is a complete code governing adverse possession in the province and applies to all lands, except for those expressly exempted. They argue that the legislature expressly preserved matured possessory claims when enacting the *LTA* and recognized the immunity of certain public lands from possessory claims under the *Public Lands Act*, R.S.O. 1990, c. P.43 ("*PLA*"), and the *Provincial Parks and Conservation Reserves Act, 2006*, S.O. 2006, c. 12 ("*PPCRA*"). The appellants urge upon this Court the impropriety of creating a common law immunity in this statutory context, and argue that the case law cited by the courts below in support of the public benefit test does not support the immunity of municipal parkland in any event.

[19] The City responds that the *RPLA*, which is made up of a set of archaic rules, is not a complete code and recourse to the common law is required to apply its provisions. Given that the *RPLA* was "imported" into the law of Ontario and has since been amended in piecemeal fashion, the City argues it is not possible to discern a legislative intent to enact a complete code of adverse possession. As such, the City says, the *RPLA* does not preclude the law of adverse possession from further development and the refined public benefit test developed by the majority of the Court of Appeal is a permissible and necessary common law evolution. The City characterizes

the test as ushering in incremental and predictable change, and argues that the rationales of adverse possession do not support the application of the doctrine to municipal parkland in light of a "modern view of fairness and justice" (R.F., at para. 131, citing *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, at para. 94).

VI. Analysis

[20] The question raised in this appeal requires this Court to interpret the text of the relevant provisions of the *RPLA* in their entire context and in light of their purpose (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87). In my view, while the common law continues to play a role in the law of adverse possession in Ontario, the majority of the Court of Appeal erred in exempting the present possessory claim from the provisions of the *RPLA*. It is clear from a contextual assessment of the provisions that the legislature did not intend to exempt municipal parkland from the *RPLA*'s operation and intended to preserve matured possessory claims.

[21] Below, I will first consider the interaction of the common law and the *RPLA*, which collectively govern claims of adverse possession in Ontario. I will then explain why, on a proper interpretation of the *RPLA*, its provisions govern the appellants' possessory claim.

A. *The Law of Adverse Possession in Ontario*

[22] In Ontario, the *RPLA* sets out rules governing claims for possessory title, also commonly known as adverse possession or squatters' rights, including the rights of the prior possessor of land, who is typically the paper title holder and therefore referred to as the "true owner", to recover land. By the operation of ss. 4, 5(1) and 15 of the *RPLA*, a true owner's interest in land is extinguished in favour of the possessory title acquired by a trespasser when the latter establishes "dispossession". A review of the *RPLA* and jurisprudence indicates that courts must resort to the common law to apply the clear but undefined terms of the relevant provisions. It is for this reason that I cannot accept the proposition of the dissenting judge of the Court of Appeal that "[n]o residual common law of adverse possession remains extant today" (para. 197). However, the law of adverse possession is also marked by a long history of statutory enactments, which have codified parts of the common law and modified others, including in recent years. 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 (*Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138, at para. 27).

[23] This Court has observed that the doctrine of adverse possession is a "long-standing common law device", which serves to determine when dispossession has occurred (*Mowatt*, at para. 17). This view is shared in the literature where the doctrine has been described as having "a long pedigree in the common law" (E. Kaplinsky, M. Lavoie and J. Thomson, *Ziff's Principles of Property Law* (8th ed. 2023), at p. 164).

The doctrine remains "alive and well" in parts of Canada even after having been the subject of English statutory codification, which was largely reproduced in provincial legislation (*ibid.*; A. W. La Forest, *Anger & Honsberger Law of Real Property* (3rd ed. (loose-leaf)), at § 29:8; G. Mew, D. Rolph and D. Zacks, *The Law of Limitations* (4th ed. 2023), at pp. 504-5; *Mowatt*, at para. 17).

[24] The English statutory codification described above took place under the imperial *Real Property Limitation Act, 1833* (U.K.), 3 & 4 Will. 4, c. 27, the provisions of which formed the basis of Ontario's *An Act to amend the Law respecting Real Property, and to render the proceedings for recovering possession thereof in certain cases, less difficult and expensive*, S.U.C. 1834, 4 Will. 4, c. 1. Notably, the limitations statutes abolished some remedies for the recovery of land and technical actions available under the common law (La Forest, at §§ 29:9-29:10). For example, at common law, the true owner was still able to recover adversely possessed land if it could be done peaceably, even if the right to sue was lost (Kaplinsky, Lavoie and Thomson, at p. 165). This type of recovery was precluded by limitation statutes (*ibid.*). Sections 4, 5(1) and 15 of the *RPLA* closely replicate the provisions of the imperial statute, which provide that the right of recovery of an owner is barred following the prescribed statutory period, at the conclusion of which the owner's title to the land is extinguished. Although the limitation period has varied in length since the introduction of these provisions, the relevant wording has remained unchanged (*Bank of Montreal v. Iskenderov*, 2023 ONCA 528, 168 O.R. (3d) 1, at para. 17).

[25] The Ontario legislation was amended in the early 20th century to specify exceptions to the application of the provisions described above for waste or vacant Crown land, road allowances, and public highways. However, the amendments expressly preserved rights, title, and interests that had been acquired as of June 1922 in respect of road allowances and highways. Together, these amendments form s. 16 of the *RPLA*.

[26] Substantial efforts to reform the law of limitations in Ontario were undertaken as early as 1969, which eventually culminated in the enactment of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B (see, e.g., Ontario Law Reform Commission, *Report on Limitation of Actions* (1969)). However, the law of limitations governing real property was left undisturbed by this enactment and attempts at reform were abandoned (Mew, Rolph and Zacks, at p. 10). As I will discuss further below, subsequent legislative enactments in the area of property rights, including the *LTA*, *PLA*, and *PPCRA*, have nevertheless significantly impacted the operation of adverse possession by eliminating the ability to acquire possessory title under the *RPLA*, but preserving matured possessory claims.

[27] Where a claim for adverse possession is available, courts apply the relevant statutory provisions to determine if it is made out. The *RPLA* provides that the limitation period will start running at the time of "dispossession" (s. 5(1)), the elements of which are established in the jurisprudence. For a claim to succeed, the trespasser must establish: (1) actual possession of the land by the trespasser for the required statutory period; (2) an intention to exclude the true owner from their property; and (3)

effective exclusion of the true owner from their property (*Pflug v. Collins*, [1952] O.R. 519 (H.C.J.); *Keefer v. Arillotta* (1976), 13 O.R. (2d) 680 (C.A.); *Teis v. Ancaster (Town)* (1997), 35 O.R. (3d) 216 (C.A.)). Actual possession is established where the act of possession is open and notorious, adverse, exclusive, peaceful, actual and continuous, all of which must be present for the claim to succeed (*Mowatt*, at para. 18; *Masidon Investments Ltd. v. Ham* (1984), 45 O.R. (2d) 563 (C.A.), citing *Fletcher v. Storoschuk* (1981), 35 O.R. (2d) 722 (C.A.)).

[28] As this Court recognized in considering British Columbia's equivalent legislation, "[w]hile courts have a role in defining what constitutes dispossession under British Columbia's limitations legislation, legislative intent must be respected" (*Mowatt*, at para. 27). While the legislature may redefine the meaning of a common law term (*Giffen (Re)*, [1998] 1 S.C.R. 91, at para. 26), it must signal its intention to do so; otherwise, the word will be understood to have retained its common law meaning (*R. v. Holmes*, [1988] 1 S.C.R. 914, at pp. 929-30; *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 20; R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at § 17.01.Pt2[1]).

[29] While the statute has preserved common law rules for defining dispossession, it is nevertheless clear from the history of legislative amendment in this area that courts must proceed with caution to respect legislative intent (see *R. v. Basque*, 2023 SCC 18, at paras. 40 and 45). In this respect, I note that the public benefit test considered by the courts below is of relatively recent vintage. Unlike in *Basque*, where the Court considered the impact of a statutory provision on an *existing* common law

rule, in this case we must consider the impact of case law which post-dates the enactment of the relevant provisions of the *RPLA*. In such a case, the appropriate starting point is the statutory scheme. It is necessary for a court to closely examine the statute in order to determine whether legislative intent would be undermined by recourse to a novel common law rule (see Sullivan, at § 17.02[1]).

B. *Matured Claims for Possessory Title Are Not Defeated by a Common Law Immunity for Municipal Parkland*

[30] The City concedes that municipal parkland does not fall within the expressly legislated exceptions to the operation of ss. 4, 5(1) and 15 of the *RPLA*, which are set out in s. 16, but argues that the courts below were entitled to develop and apply a public benefit test to deny the appellants' matured claim (R.F., at paras. 48 and 72). In my view, a reading of the relevant provisions in the context of the broader statutory scheme governing adverse possession in Ontario reveals that the legislature did not intend to exempt municipal parkland from the *RPLA*'s effects. 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.

(1) <u>The *RPLA* Creates Only Limited Exceptions, Which Do Not Include Municipal Parkland</u>

[31] As a starting point, I look to the ordinary and grammatical meaning of the relevant provisions of the *RPLA*, which is "'the natural meaning' that appears when the provision is simply read through as a whole" (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43 ("*CISSS A*"), at para. 28, citing *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735). In this case, the text of the provisions suggests that ss. 4 and 15 have a broad reach. Further, the undefined term, "dispossession", in s. 5(1) may be contrasted with the use of specific terminology in s. 16, which confers a special status to limited categories of public lands.

[32] Section 4 of the *RPLA* provides for a 10-year limitation period within which a title holder must bring an action for the recovery of land, and in broad language subjects all persons and all lands to the operation of the *RPLA*:

> **4** No person shall make an entry . . . or bring an action to recover any land . . . but within ten years next after the time at which the right to make such entry . . . or to bring such action . . . first accrued to the person making or bringing it.

[33] By use of the word "any", the *RPLA* does not distinguish between categories of lands, and notably it does not distinguish between public or private entities: in this general provision, the limitation period applies to all lands and persons equally. The term "land" is defined under s. 1 of the *RPLA*; its definition is expansive and all encompassing. Had the legislature intended to exclude public lands from the application of s. 4, it could have done so by employing a narrower term. Further, the use of the word "person", a necessarily broad term, encompasses municipalities

(*Municipal Act, 2001*, S.O. 2001, c. 25, s. 9). Again, had the legislature not intended for the *RPLA* to be of such broad application, it could have employed "individual" in the place of "person" (*British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, [2017] 2 S.C.R. 795, at para. 34).

[34] Section 5(1) of the *RPLA* further clarifies that the 10-year limitation period governing the right of recovery begins to run "at the time of the dispossession":

> **5 (1)** Where the person claiming such land . . . has, in respect of the estate or interest claimed, been in possession . . . of the land . . . and has, while entitled thereto, been dispossessed, or has discontinued such possession . . ., the right to make an entry or . . . bring an action to recover the land . . . shall be deemed to have first accrued at the time of the dispossession or discontinuance of possession . . . .

As discussed above, the *RPLA* does not define the term "dispossession", which retains its common law meaning as determined by the courts (*Mowatt*, at para. 27). I will return to this below, where I consider the closed list in s. 16.

[35] Like s. 4, s. 15 of the *RPLA* uses the term "any", indicating the sweeping application of this rule, extinguishing the title of "any person" who has failed to bring an action to recover land within the 10-year limitation period:

> **15** At the determination of the period limited by this Act to any person for making an entry . . . or bringing any action, the right and title of such person to the land . . . for the recovery whereof such entry . . . or action, respectively, might have been made or brought within such period, is extinguished.

It is important to note that, rather than confer title to the adverse possessor, s. 15 extinguishes the rights of the paper title holder. This gives the adverse possessor the strongest claim to the land by virtue of their possession (La Forest, at § 29:14). The legislature has codified into statute the common law "rule allowing for [a] later possessor [to] acquir[e] ownership of land after the passage of a certain time" (*Mowatt*, at para. 17).

[36] However, the rule is not absolute; exceptions to its application are found in the *RPLA* and across other statutes. Importantly for present purposes, the *RPLA* sets out at s. 16 several exceptions relating to lands of a public nature, which the parties and courts below describe as immunities:

> **16** Nothing in sections 1 to 15 applies to any waste or vacant land of the Crown, whether surveyed or not, nor to lands included in any road allowance heretofore or hereafter surveyed and laid out or to any lands reserved or set apart or laid out as a public highway where the freehold in any such road allowance or highway is vested in the Crown or in a municipal corporation, commission or other public body, but nothing in this section shall be deemed to affect or prejudice any right, title or interest acquired by any person before the 13th day of June, 1922.

[37] The grammatical and ordinary meaning of the text of s. 16, read as a whole, is that ss. 4, 5(1) and 15 of the *RPLA* cannot operate to extinguish title to specific types of land, which are expressly delineated. On its face, s. 16 contains a closed list. The provision uses clear and precise language to list and describe the exceptions. As this Court recently noted, the text acts as an interpretive anchor and this is particularly true where the words of a statute are "precise and unequivocal" (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10; *CISSS A*, at para. 24).

[38] The precisely worded list of exceptions in s. 16 of the *RPLA* is to be contrasted with the broad application contemplated in ss. 4 and 15. 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.

[39] The maxim of interpretation *expressio unius est exclusio alterius* ("to express one thing is to exclude another") is also of particular relevance here. An inference of implied exclusion may be drawn where there is an expectation that "if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly" (Sullivan, at § 8.09[1]; see *R. v. Wolfe*, 2024 SCC 34, at para. 25; *Canada v. Loblaw Financial Holdings Inc.*, 2021 SCC 51, [2021] 3 S.C.R. 687, at para. 59; *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63, [2011] 3 S.C.R. 721, at para. 108).

[40] In my view, the ordinary language of the provision, which establishes a closed list of exceptions, creates a strong expectation that the legislature would have made express reference to municipal parkland in s. 16 of the *RPLA* had it intended it to be excepted. I agree with the dissenting judge of the Court of Appeal that it is significant that the provision expressly includes certain municipal property, that is, road allowances or highways that have vested in a municipality, but no others (see para. 101). I also note that s. 16 sets out specific and explicit exceptions to the application of otherwise broadly framed rules barring recovery to "any land" of "any person" outside

of the limitation period (*RPLA*, ss. 4 and 15) (see *Bishop v. Stevens*, [1990] 2 S.C.R. 467, at pp. 480-81).

[41] I acknowledge that implied exclusion reasoning should not be treated as determinative, as the City argues (R.F., at para. 68). However, it continues to be a relevant tool of interpretation, and, where relevant, its weight will vary when considered in light of contextual factors and the purpose of the scheme (see Sullivan, at § 8.09[5]; *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360, at para. 37). I am of the view that it carries significant weight in this case, particularly, as I will explain below, since the inference is reinforced by other statutes that exempt certain categories of land from the application of the *RPLA*.

(2) The Legislative Evolution of Section 16 of the *RPLA* Indicates a Pattern of Codification of Immunities

[42] Before turning to the broader statutory context and legislative purpose, I will address the City's argument that the implied exclusion inference is not available here because the legislature was simply reflecting the common law's treatment of specific categories, and there is no reason to believe all exempted lands would be listed (R.F., at para. 69). Contrary to the City's assertion, a historical review of the legislative evolution of s. 16 of the *RPLA* provides a compelling basis to conclude that the legislature turned its mind to the common law and chose to integrate the aspects it deemed desirable into its scheme. In light of this pattern, I agree with the appellants that it is significant that the legislature has not sought to codify an exception to the application of the *RPLA* for municipal parkland.

[43] Reliance on the legislative evolution of a provision is accepted as an important tool of statutory interpretation (Sullivan, at § 23.02[2]), as prior enactments, including their common law origins, can help shed light on the intention of the legislature in repealing, amending, replacing or adding to a statute (*Gravel v. City of St-Léonard*, [1978] 1 S.C.R. 660, at p. 667; *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867, at para. 33; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 43). It is also well accepted that the maxim of implied exclusion takes on additional relevance when dealing with codification of the common law: ". . . a court may rely on implied exclusion reasoning to conclude that the part of the law not codified was meant to be excluded" (Sullivan, at § 17.02[5]; see *McClurg v. Canada*, [1990] 3 S.C.R. 1020). This is in keeping with the presumption that the legislature is presumed to know the existing law, including the common law (Sullivan, at § 8.02[1]).

[44] With respect to s. 16, as the City notes, the legislature enacted the exceptions slowly over a period of 20 years. In 1902, Ontario enacted *The Statute Law Revision Act, 1902*, S.O. 1902, c. 1, s. 19, which introduced the first statutory exception to the application of the *RPLA* to protect "waste lands of the Crown". The provision was revisited in 1910 to extend the protection from possessory claims to vacant Crown lands (*The Limitations Act*, S.O. 1910, c. 34, s. 17). The provision was revisited for a third and final time in 1922 to extend the statutory protection from adverse possession to road allowances and public highways (*The Limitations Act, 1922*, S.O. 1922, c. 47, s. 2).

[45] I agree these enactments largely reflect the jurisprudence and common law rules of the time, but in legislating the exceptions to the acquisition of possessory title, the legislature also opted to modify, or in some instances reject, the common law.

[46] For example, the first exception added to the *RPLA*, which exempts Crown waste lands from its application, was introduced to address an incommensurable gap between a lower court decision and the Judicial Committee of the Privy Council ("JCPC") (see generally *Attorney General of Ontario v. Walker*, [1975] 1 S.C.R. 78, at pp. 82-84). In *R. v. McCormick* (1859), 18 U.C.Q.B. 131, the Court of Queen's Bench of Upper Canada considered the application of the *Crown Suits Act, 1769* (U.K.), 9 Geo. 3, c. 16, commonly known as the *Nullum Tempus Act*, to a claim of adverse possession. The *Crown Suits Act* established a 60-year limitation period for Crown actions, with some exceptions (*Walker*, at p. 82). The court in *McCormick* held that the statute did not bar the Crown's right of recovery to waste land, which was described as land not surveyed and laid out for occupation. However, in *Attorney-General for New South Wales v. Love*, [1898] A.C. 679 (P.C.), the JCPC came to the opposite conclusion and allowed the claim for adverse possession against the Crown. The legislature thus opted in the 1902 enactment to codify the holding in *McCormick*, contrary to the conclusion of the JCPC.

[47] The statutory protection from possessory claims was later extended to "vacant" Crown land, which does not appear to have any clear common law foundation, unlike the other exceptions in s. 16 of the *RPLA*. Although there is little consideration

of this type of land in the jurisprudence, our Court noted in *Walker* that it may apply to property that is not waste land (pp. 84-85).

[48] The *RPLA* was further amended in 1922 to introduce statutory protections from possessory claims for both road allowances and public highways. Under the common law doctrine of dedication, illustrated by the maxim "once a highway always a highway", a public highway receives protection from adverse possession (*Household Realty Corp. Ltd. v. Hilltop Mobile Home Sales Ltd.* (1982), 136 D.L.R. (3d) 481 (Ont. C.A.), at p. 489, citing I. M. Rogers, *The Law of Canadian Municipal Corporations* (2nd ed. (loose-leaf)), at p. 1096; see generally D. J. Manderscheid, "Dedication of Public Highways at Common Law" (1997), 37 M.P.L.R. (2d) 215). The 1922 legislative amendments expanded the categories of land benefitting from this protection, something not possible at common law, while preserving any possessory title validly acquired before 1922. While only highways received protection at common law, the amendment extended the protection to road allowances. Previously, a road allowance that had never been opened or used by the public for that purpose would not constitute a public highway (*Gooderham v. The City of Toronto* (1895), 25 S.C.R. 246, at p. 260). The doctrine of dedication requires actual acceptance by the public of the dedication, or the acceptance of a public authority exercising its statutory powers on behalf of the public (see *Bailey v. City of Victoria* (1919), 60 S.C.R. 38, at p. 53). Accordingly, an unopened road allowance, which by implication would never have been used by the public, could not have benefitted from protection against adverse possession at common law. Further, as the Court of Appeal for Ontario has recognized, the amendment allowed for the acquisition of possessory title prior to its coming into

force (*Di Cenzo Construction Co. Ltd. v. Glassco* (1978), 21 O.R. (2d) 186 (C.A.); *Household Realty*, at pp. 489-90).

[49] As Thorson J.A. recognized in *Household Realty*, "if a mere codification of the common law had been the legislature's intention, then the amendment would have simply provided that ss. 1 to 15 do not apply and shall be deemed never to have applied to highways" (p. 490). Rather, s. 16 of the *RPLA* provides that "nothing in this section shall be deemed to affect or prejudice any right, title or interest acquired by any person before the 13th day of June, 1922".

[50] Given this legislative pattern of codifying common law rules in statute, but with modifications, it is significant that the legislature has not expressly legislated an immunity from adverse possession for municipal parkland. Moreover, I disagree with the City's suggestion that the legislature's silence is of little relevance because s. 16 of the *RPLA* has not been amended since 1922, or because of the difficult language of the statute, which reflects its historical origins (see R.F., at para. 43). While s. 16 itself has not been amended, a number of legislative enactments have impacted the operation and application of the *RPLA*, which I will consider below. In such a legislative context, I would not summarily dismiss the absence of an express exception for municipal parkland.

(3) <u>The Broader Legislative Context Confirms the Pattern of Codification and Supports the Preservation of Acquired Possessory Title</u>

[51] I turn now to the broader legislative treatment of adverse possession, which has significantly impacted the application of the doctrine in Ontario. The legislature has repeatedly turned its mind to claims for possessory title, including with respect to public lands, and has specified where the acquisition of possessory title is no longer available. In light of this, there is strong reason to believe that the legislature would have expressly exempted municipal parkland from the application of the *RPLA* if it so intended. As Professor Sullivan writes, the expectation of express reference on which implied exclusion operates need not arise from a single Act; it may arise from the examination of "related Acts within the statute book of the enacting jurisdiction or other jurisdictions as well" (§ 8.09[3]). This Court has also recognized "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter" (*Ulybel*, at para. 52; *Bell ExpressVu*, at para. 27; *Canada 3000 Inc. (Re)*, 2006 SCC 24, [2006] 1 S.C.R. 865, at para. 54).

[52] A review of related statutory schemes reveals that the legislature has turned its mind to the continued application of the *RPLA* and preserved matured possessory title under that Act, despite having made the choice to prospectively abolish the doctrine of adverse possession in Ontario through the enactment of the *LTA*.

[53] The adoption of a Torrens-based land title system under the *LTA*, the successor of the land registry system under the *Registry Act*, R.S.O. 1990, c. R.20, achieves a simplified way of certifying title that "provide[s] the public with security of title and facility of transfer" (*Durrani v. Augier* (2000), 50 O.R. (3d) 353 (S.C.J.), at para. 41; *Lawrence v. Maple Trust Co.*, 2007 ONCA 74, 84 O.R. (3d) 94, at para. 30).

The Torrens land title system guarantees that the person named in the register has indefeasible title: the parcel register should be a perfect mirror image of the state of title; no searches behind title should be required; and the accuracy of the register is guaranteed by the state (M. Neave, "Indefeasibility of title in the Canadian context" (1976), 26 *U.T.L.J.* 173, at p. 174; Kaplinsky, Lavoie and Thomson, at pp. 546-47). Indefeasibility has been described as "immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys" (*Frazer v. Walker*, [1967] 1 A.C. 569 (P.C.), at p. 580).

[54] The acquisition of possessory title by trespassers undermines the indefeasibility of title, and as a result, s. 51(1) of the *LTA* eliminates this possibility with respect to land registered under the land titles system, despite the *RPLA*. Under the heading "No title by adverse possession, etc.", s. 51(1) provides:

> Despite any provision of this Act, the *Real Property Limitations Act* or any other Act, no title to and no right or interest in land registered under this Act that is adverse to or in derogation of the title of the registered owner shall be acquired hereafter or be deemed to have been acquired heretofore by any length of possession or by prescription.

[55] By virtue of this provision, all land registered in the land titles system, including municipal parkland, receives protection against possessory claims. Through s. 32(1) of the *LTA*, which enables a land registrar to register any land registered under the *Registry Act* in the land titles system, Ontario has converted virtually all land title in the province to electronic land titles (J. R. Wood, "Understanding Electronic Registration: Rights of Way and Property Rights Generally" (2014), 38 R.P.R. (5th) 4,

at p. 72). As of 2013, less than 0.1 percent of titles in Ontario were still governed by the *Registry Act* (p. 4, fn. 1).

[56] I note that the municipal land in the present case was converted to the land titles system on October 22, 2001 (A.R., vol. I, at p. 155), at which point Étienne Brûlé Park became protected from all future claims of adverse possession by virtue of s. 51(1) of the *LTA*. In light of the protection against adverse possession conferred by s. 51(1) of the *LTA*, there is no evidence to support the City's contention that it would require extensive resources and efforts to protect parkland from possessory claims (R.F., at paras. 10 and 95).

[57] Under the *LTA*, however, the legislature has subordinated the accuracy of the land titles system to competing priorities, notably the preservation of acquired possessory title. Section 51(2) of the *LTA* provides that possessory claims that have matured prior to the registration of the property are preserved and possessory title may be obtained (*Barbour v. Bailey*, 2016 ONCA 98, 66 R.P.R. (5th) 173, at para. 31; *Sipsas v. 1299781 Ontario Inc.*, 2017 ONCA 265, 85 R.P.R. (5th) 24, at para. 18; *Pepper v. Brooker*, 2017 ONCA 532, 139 O.R. (3d) 67, at para. 42). Matured possessory title to land may be lost if the adverse possessor does not contest the registration of the land under the land titles system to the paper title holder after receiving notice of the registration (*Aragon (Wellesley) Development (Ontario) Corp. v. Piller Investments Ltd.*, 2018 ONSC 4607, 94 R.P.R. (5th) 236, at para. 125).

[58] The legislative policy choice to preserve matured possessory claims is reaffirmed by s. 44(1) of the *LTA*, which provides that upon first registration, the registered land remains subject to certain liabilities, rights and interests, regardless of whether they are registered on title. This includes possessory title acquired by an adjoining land owner (s. 44(1) 3). In the present case, the disputed land's parcel register explicitly states that the registration is subject to rights to the land acquired by "adverse possession" (A.R., vol. II, at p. 78).

[59] More recently, the legislature again turned its mind to the *RPLA*, notably in amending statutes dealing with public lands in Ontario, namely, provincial parkland, conservation reserves, and other public lands. In 2021, the legislature amended both the *PLA* (s. 17.1) and the *PPCRA* (s. 14.5) to exempt certain categories of public lands from the application of the *RPLA*, but preserved matured possessory claims (*Supporting People and Businesses Act, 2021*, S.O. 2021, c. 34).

[60] The *PLA* protects "public lands" from the acquisition of possessory title under the *RPLA* (*PLA*, s. 17.1). Public lands are defined as including "lands heretofore designated as Crown lands, school lands and clergy lands" (*PLA*, s. 1). Section 17.1(2) of the *PLA* further clarifies that for the purpose of the exemption from possessory claims, public lands include "lands acquired by the Crown in right of Ontario at any time for the purposes of a past or current program of the Ministry". For its part, the *PPCRA* exempts from the application of the *RPLA*: (1) public lands that are within a provincial park or conservation reserve; and (2) public lands acquired for the purposes of the *PPCRA* that are not in a provincial park or conservation reserve (*PPCRA*, s.

14.5(1)). Provincial parks and conservation reserves are designated by regulation (*PPCRA*, s. 54(1)). The *PPCRA* also expressly deems any land that is part of a municipality, but which has been designated as a provincial park or conservation reserve, as separated from that municipality, for as long as it is designated as such (s. 31(1)).

[61] These recent amendments undermine the City's suggestion that the legislature has not turned its mind to s. 16 of the *RPLA* for over a century (R.F., at para. 69). Although these new "immunities" do not appear in the text of s. 16, in effect they statutorily expand the categories of land exempt from the application of the *RPLA*. They do not include municipal land, unless such land is designated under the *PPCRA* (see *Designation and Classification of Provincial Parks*, O. Reg. 316/07).

[62] Consistent with the *LTA*, the legislature also preserved possessory claims that matured prior to the coming into force of the *Supporting People and Businesses Act, 2021*. Both s. 17.1(1) of the *PLA* and s. 14.5(1) of the *PPCRA* state in identical language that "no person may acquire a right, title or interest . . . by or through the use, possession or occupation of the lands or by prescription on or after the day the *Supporting People and Businesses Act, 2021* receives Royal Assent". Although the legislature has removed the possibility of acquiring possessory title to the public lands described above, it has decided to do so on a prospective basis.

[63] At the second reading of the *Supporting People and Businesses Act, 2021*, the responsible Minister identified the objective of the amendments as "prevent[ing]

people from unlawfully claiming ownership of public lands for the benefit of Ontarians" (Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, No. 10A, 2nd Sess., 42nd Parl., October 26, 2021, at p. 396 (Hon. Nina Tangri)). Although statements of purpose may be vague or imprecise, "providing information and explanations of proposed legislation is an important ministerial responsibility, and courts rightly look to it in determining the purpose of a challenged provision" (*R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180, at para. 36). From the responsible Minister's statement of purpose, it is fair to conclude that the legislature turned its mind to the need to protect *certain* additional categories of public land from possessory claims for the benefit of the public. At the time of these amendments, the public benefit test had already been the subject of many lower court decisions (see, e.g., *Prescott & Russell (United Counties) v. Waugh* (2004), 15 M.P.L.R. (4th) 314 (Ont. S.C.J.); *Woychyshyn v. Ottawa (City)* (2009), 88 R.P.R. (4th) 155 (Ont. S.C.J.); *Oro-Medonte*; *Richard v. Niagara Falls*, 2018 ONSC 7389, 4 R.P.R. (6th) 238).

[64] Notably, there is no mention of exempting municipal parkland from adverse possession in other relevant statutory enactments (see, e.g., *Municipal Act, 2001*; *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A). I note that Alberta has expressly created immunity from possessory claims for municipal land (see, e.g., *Municipal Government Act*, R.S.A. 2000, c. M-26, s. 609).

[65] In Ontario, the legislature has made a policy choice to confer special legislative treatment to a limited class of public lands and preserve matured possessory title. Considering the recent statutory enactments specifically dealing with the

availability of adverse possession for public lands, I am of the view that recognizing a common law protection against such claims for municipal parkland would run contrary to legislative intent.

(4) A Purposive Interpretation Supports the Preservation of Matured Possessory Title

[66] Recognizing an additional common law exception to the operation of ss. 4 and 15 of the *RPLA* would also be inconsistent with its purpose as a statute of limitations. Primarily being a statute of repose, the *RPLA*'s aims have long been understood as preventing unfairness where a possessor has come to rely on land for a certain length of time (see *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1, 37 E.R. 527, at p. 577). In 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 (see C. M. Rose, "Possession as the Origin of Property" (1985), 52 *U. Chicago L. Rev.* 73; Kaplinsky, Lavoie and Thomson, at p. 164). The *RPLA*, *LTA*, *PLA*, and *PPCRA* are all consistent in this respect: they seek to preserve possessory title validly acquired prior to a particular date.

[67] 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:

> 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.
>
> (Mew, Rolph and Zacks, at p. 509, citing *Harris v. Mudie* (1882), 7 O.A.R. 414 (C.A.), at p. 421.)

[68] This is consistent with what this Court has identified as the underlying purposes of limitations statutes generally, which are tied to certainty, evidentiary, and diligence rationales (*M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6). Actions should be commenced within a reasonable time to ensure that a potential defendant does not live under the perpetual shadow of liability and the quality and availability of the relevant evidence remains intact for the adjudication of the claim (Mew, Rolph and Zacks, at pp. 19-21).

[69] I emphasize that while there is some overlap between the rationales of limitations statutes and the doctrine of adverse possession, they remain distinct. In this case, the majority of the Court of Appeal declined to apply the *RPLA* on the basis that the rationales justifying the existence of the doctrine of adverse possession do not support its application to municipal parkland (paras. 16-19). It posited that "it is difficult to identify *any* rationale for adverse possession against municipal parkland" (para. 20 (emphasis in original)). The City has largely reasserted this argument before this Court (R.F., at paras. 93 et seq.).

[70] However, the City's argument overlooks one of the most persuasive rationales of the doctrine, that is, the protection of settled expectations (Kaplinsky, Lavoie and Thomson, at p. 167; J. W. Singer, "The Reliance Interest in Property" (1988), 40 *Stan. L. Rev.* 611; M. H. Lubetsky, "Adding Epicycles: The Inconsistent Use Test in Adverse Possession Law" (2009), 47 *Osgoode Hall L.J.* 497, at p. 532; S. E. Hamill, "Common Law Property Theory and Jurisprudence in Canada" (2015), 40 *Queen's L.J.* 679, at p. 695). This justification is especially compelling where the possessory claim has arisen from a *bona fide* error. Professor Singer explains that as time passes, the adverse possessor's interest in the land grows, bolstered by his legitimate expectations, while the true owner's interest diminishes as a result of his acquiescence to the possessor's use of the land (pp. 665-69).

[71] It bears mentioning that the traditional rationales argued by the City have been the subject of academic criticism as they relate to the adverse possession of *any* kind of land (see, e.g., Kaplinsky, Lavoie and Thomson, at pp. 165-67). However, given the statutory treatment of adverse possession and the legislature's choice to preserve its ongoing relevance to matured claims, disagreement with the doctrine's rationales is not a valid basis for denying the appellants' claim. There may be good public policy reasons to ensure that Crown and public lands are not subject to possessory claims and, as noted, one jurisdiction has expressly protected all municipal lands by statute (see S. Petersson, "Something for Nothing: The Law of Adverse Possession in Alberta" (1992), 30 *Alta. L. Rev.* 1291, at p. 1314). Ontario has chosen to extend protection to certain public lands, but preserve matured claims. Whether the doctrine of adverse possession retains its utility in the current landscape is a policy question for the

legislature (see *Telus Communications Inc. v. Federation of Canadian Municipalities*, 2025 SCC 15, at para. 32, citing Sullivan, at § 6.01[3]), and one which it has continued to consider in recent statutory enactments that balance different interests and considerations.

C. *Application of a Common Law Exception for Municipal Parkland Conflicts With the Legislature's Treatment of Possessory Title*

[72] Given my conclusions on the statutory interpretation of the *RPLA*, I am of the view that the courts below erred in exempting the appellants' claim from the operation of its provisions by creating a novel immunity from adverse possession for municipal parkland. Contrary to the reasoning of the application judge, the question before this Court is not whether recognizing possessory title in this case is good public policy (para. 78). Rather, this Court must ask itself whether the manner in which the courts below exempted the present claim, on the basis of a judge-made rule, can be reconciled with the legislature's treatment of immunities from adverse possession (see Sullivan, at § 17.02[1]; *Basque*, at paras. 40 and 45). Pursuant to the principle of legislative sovereignty, "validly enacted legislation is paramount over the common law", and courts must give effect to legislative intent, "regardless of any reservations they might have concerning its wisdom" (Sullivan, at § 17.01.Pt1[1]).

[73] That the legislature has not completely ousted the common law does not permit courts to supplement a statute in a manner that is inconsistent with legislative intent. As Professor Sullivan writes, when considering whether common law may be relied on to supplement legislation, "[r]esort to the common law is impermissible if it

would interfere with the policies embodied in legislation or defeat its purpose" (§ 17.02[3]). Ontario has actively legislated with respect to possessory claims to title, including with respect to certain public lands. Commenting on the role of the courts in such a context, Professor Ziff has explained that, unlike other areas of private law, the area of property law has been extensively and substantively altered by statutory changes. As a result, when addressing questions of statutory interpretation, it is to be expected that courts' "creative capacity is abridged" (B. Ziff, "Property Law and the Supreme Court: Of Gardens and Fields" (2017), 78 *S.C.L.R.* (2d) 357, at p. 365).

[74] This Court recognized this necessary restraint in *Mowatt*, where it clarified that the question properly before the Court was not whether the inconsistent use requirement was "necessary or desirable", but "whether it forms part of the law of British Columbia and therefore ought to have been applied by the courts below" (para. 21). Justice Brown, writing for a unanimous court, expressly considered the contrary legislative intent in determining that it did not form part of the law (para. 27).

[75] In the case at hand, it is of crucial importance that the legislature has listed the categories of public lands exempt from the application of the *RPLA* in the *RPLA* itself and in other statutes. The legislature has turned its mind to the availability of adverse possession for both municipal lands and parkland in Ontario through the enactment of protections for *certain* municipal lands and *certain* parkland. Moreover, insofar as the public benefit test would retroactively deprive the appellants of their possessory title, it would defeat the legislature's clear policy choice to preserve matured possessory claims. It would seem most unfair to deny the appellants' possessory claim

on the basis of a common law test that emerged *after* s. 15 of the *RPLA* extinguished the City's title to the disputed land. I note that in *Hamilton v. The King* (1917), 54 S.C.R. 331, this Court refused to give retroactive effect to statutory amendments that would have defeated possessory title acquired against the Crown, concluding that "it would seem most unreasonable to give a retroactive effect to the statute of 1902 which would operate to destroy a complete statutory title gained years before, and resurrect an extinguished one" (p. 346).

[76] The City, like the majority of the Court of Appeal, contends that the public benefit test does not undermine legislative intent as it operates as a rebuttable presumption rather than an immunity, meaning that the acquisition of possessory title remains possible (see C.A. reasons, at paras. 62 and 69-70). I disagree with this proposition and agree with the appellants that the effect of the Court of Appeal's decision is not appreciably different from an immunity (A.F., at para. 63).

[77] Under the test elaborated by the majority of the Court of Appeal, a possessory claim would only succeed if the municipality explicitly consented to the possession, that is "by acknowledging a private landowner's adverse possession and consenting to a transfer of title . . . or simply by a municipality acquiescing to adverse possession, where it has clear knowledge of its parkland property being adversely possessed by private landowners, and agreeing to take no steps to interfere with that adverse possession" (para. 33). Such a test is irreconcilable with the general principles of adverse possession and effectively ousts the legislation's operation. Requiring clear knowledge and an agreement on the part of the municipality not to disrupt the

appellants' possession in effect requires that they have permission to adversely possess, and yet one cannot adversely possess *with permission* (Kaplinsky, Lavoie and Thomson, at p. 172; *Teis*, at pp. 221-22; *Armstrong v. Moore*, 2020 ONCA 49, 15 R.P.R. (6th) 200, at paras. 21-24). If acknowledgement or acquiescence is required, little role would be left for the remaining requirements of adverse possession, as a transfer of title in such cases would in substance be consensual.

[78] Moreover, if, as my colleague concludes, the evidence in this case is insufficient to make out constructive knowledge, it is unclear what evidence could support a successful claim, short of evidence that City officials were aware of the possession. Plain evidence of the appellants' adverse possession was apparent in the survey plan deposited with the land registrar, a survey plan that was explicitly referred to in the deed used to convey the land from the Conservation Authority to the City (A.R., vol. II, at pp. 72-76). With respect, the public benefit test elaborated by the majority of the Court of Appeal and adopted by my colleague would appear to effectively bar all claims for municipal parkland.

[79] Given my conclusions on statutory interpretation, it is unnecessary to further address the substantive merits of a public benefit test, as it has been discussed in various lower court decisions (see *Waugh*; *Woychyshyn*; *Richard*; *Oro-Medonte*). However, I highlight briefly the unsettled foundation of the test. The appellants are correct to note that in the majority of cases where the test was advanced to defeat a possessory claim, the claim failed on other grounds (A.F., at para. 52).

[80] In both *Waugh* and *Woychyshyn*, the possessory claims failed due to the insufficiency of the evidentiary record (*Waugh*, at para. 8; *Woychyshyn*, at para. 11). In *Richard*, the possessory claims failed because the public was found not to have been excluded from the municipal land (para. 33). Likewise, in *Oro-Medonte*, a possessory claim to municipal land could not be established, as exclusive possession had not been made out (para. 134). In *Mowatt*, this Court found that decisions where possessory claims had failed due to a lack of exclusive possession were an insufficient basis to conclude that the law of British Columbia on adverse possession had adopted the inconsistent use requirement, despite suggestions that the courts had considered the intentions of the paper title holders in relation to the use of the land (paras. 24-26). This reasoning equally applies to the present public benefit test.

[81] Further, a review of these lower court decisions reveals that the public benefit test largely stems from two sources, the first of which was the *obiter* commentary of Laskin J.A. in *Teis*: "Whether, short of statutory reform, the protection against adverse possession afforded to municipal streets and highways should be extended to municipal land used for public parks, I leave to a case where the parties squarely raise the issue" (p. 229). Justice Laskin recognized the potential relevance of statute in this area and did not decide the issue.

[82] The second set of sources, passages from the textbooks *Anger & Honsberger Law of Real Property* and *The Law of Canadian Municipal Corporations*, refers to this Court's decision in *Hackett v. Colchester South*, [1928] S.C.R. 255. Since the municipal land in *Hackett* was granted on terms of an express trust (at p. 256), I

agree with the dissenting judge of the Court of Appeal that it does not necessarily stand for the broad proposition advanced by textbooks cited above (para. 167). Further, Duff J.'s *obiter* remarks in *Hackett* suggest that he was "very much impressed" with the proposition of extending the doctrine of dedication and acceptance to lands other than public highways (p. 256). This much is clear when he speaks of "lands . . . dedicated to a public use" and "a dedication which was accepted by the public", which "gave rise to rights of enjoyment by the public, closely analogous to the rights of the public in respect of a public highway" (*ibid.*). Justice Duff was ultimately correct in his assertion that "there is a great deal to be said for that view" (*ibid.*), as our Court accepted to extend the application of the doctrine of dedication beyond public highway in *Wright v. Village of Long Branch*, [1959] S.C.R. 418. However, unlike the requirements of dedication, the public benefit test has no requirement for actual acceptance and use by the public (*Bailey*, at p. 53; *Wright*, at pp. 422-23; see also *Gibbs v. Grand Bend (Village)* (1995), 26 O.R. (3d) 644 (C.A.), and *Waterstone Properties Corporation v. Caledon (Town)*, 2017 ONCA 623, 64 M.P.L.R. (5th) 179, applying the doctrine of dedication to parkland).

[83] Given the statutory scheme and existing common law described above, the application judge's recognition of a novel retroactive blanket immunity in favour of municipal parkland had the effect of undermining legislative intent. Despite the majority of the Court of Appeal's attempt to frame its decision in a different light, by characterizing the public benefit test as a rebuttable presumption (at para. 62), I conclude that it also improperly resorted to expanding the common law where the legislature, having turned its mind to those public lands that would be exempt from the

operation of the *RPLA*, clearly intended to preserve matured possessory claims. As this Court stated in *Zeitel v. Ellscheid*, [1994] 2 S.C.R. 142, a case also involving a claim to possessory title, "[i]t is beyond the power of a court to interfere in a carefully crafted legislative scheme merely because it does not approve of the result produced by a statute in a particular case" (p. 152). Recognizing a novel common law immunity for municipal parkland from matured possessory claims cannot be reconciled with the relevant statutory scheme.

VII. Application

[84] On a proper interpretation of the *RPLA*, I conclude that ss. 4 and 15 apply to the present case, and there is no applicable exception, in either s. 16 or other statutes, to bar the appellants' possessory claim. It is undisputed that the appellants have established that there has been open, notorious, peaceful, adverse, exclusive, actual and continuous possession for 10 years in accordance with ss. 4 and 5(1) of the *RPLA*; the City's title to the disputed land was extinguished pursuant to s. 15 of that same statute. Importantly, pursuant to s. 44(1) of the *LTA*, the disputed land became subject to the appellants' possessory title upon registration. The City's title to the disputed land has long been extinguished; its title cannot be resurrected.

VIII. Disposition

[85] For these reasons, I would allow the appeal with costs throughout. The order of the Court of Appeal and the judgment of the Ontario Superior Court of Justice

are set aside and the appellants' application is allowed. It is declared that the appellants are the fee simple owners of the disputed land and the registrar for the Land Registry division of Toronto is directed to amend the parcel register for PIN 10526-0078 (LT) to include the disputed land.

The reasons of Karakatsanis, Martin, Kasirer and Jamal JJ. were delivered by

KASIRER J. —

I. Overview

[86] I have had the advantage of reading my colleague Justice O'Bonsawin's reasons and, with the utmost respect for contrary views, I would dismiss the appeal. I agree with the Court of Appeal that the disputed land in this case — part of Étienne Brûlé Park in the City of Toronto — was not acquired by the appellants as an extension of their neighbouring backyard by adverse possession.

[87] It has long been understood that acquisition of title to land by adverse possession can, in the proper circumstances, be a social good. This is true even if, as was once famously said, adverse possession is "an anomalous instance of maturing a wrong into a right contrary to one of the most fundamental axioms of the law" (H. W. Ballentine, "Title by Adverse Possession" (1919), 32 *Harv. L. Rev.* 135, at p. 135). Resting on what are sometimes called adverse possession's moral or utilitarian justifications, the rationale for the rule that allows a trespassing possessor to acquire

title to land over time is well known. Adverse possession legitimately champions the productive use of land by a possessor at the expense of an indolent holder of paper title. It discourages the titled landowner from sleeping on their rights and spurs them to socially valuable monitoring of the property line to fend off unwanted encroachment. Additionally, the recognition of a possessor's rights offers a promise of stability by curing defects to quiet title over the long term (see, generally, E. Kaplinsky, M. Lavoie and J. Thomson, *Ziff's Principles of Property Law* (8th ed. 2023), at pp. 164-70; J. E. Stake, "The Uneasy Case for Adverse Possession" (2001), 89 *Geo. L.J.* 2419, at pp. 2434 et seq.).

[88] These justifications reflect decades of adjudication of competing claims between possessors and holders of title to land who are very often contiguous private landowners who disagree where the boundary between their properties should be drawn. But this appeal does not stem from a dispute between two private landowners. The land the appellants seek to acquire that would extend their backyard is owned by the respondent, the City of Toronto ("City"). The disputed land is not just municipal land, it is land designated for the use or benefit of the public as an urban park.

[89] The traditional explanations of adverse possession have limited resonance when the titled owner of the land is a public entity, holding the property for the benefit of the community. Most obviously, it will be difficult for a private possessor to show that their personal claim to the City parkland is a more productive use than the use or benefit that the whole community — potentially scores of adults and children, residents and visitors to Toronto — derives from a public green space. Similarly, the idea that

the City should be penalized for its failure to patrol or monitor the boundaries of thousands of acres of heritage parkland in hundreds of parks across Toronto ignores the social and economic costs to the public of that monitoring, including costs to taxpayers. As one author wrote about the exemption of certain public land from the rules of adverse possession in Alberta, "Crown and public lands are held for the benefit of all citizens and it would be unjust for one to deprive all or part of this benefit [and,] given the vast acreage of such land, it is impossible to patrol against adverse possessors" (S. Petersson, "Something for Nothing: The Law of Adverse Possession in Alberta" (1992), 30 *Alta. L. Rev.* 1291, at p. 1314).

[90] It is true that appellants Pawel Kosicki and Megan Munro possessed the disputed land for a period of time that would have given rise to acquisition by adverse possession had the land been owned by a private landowner rather than the City as parkland. And it may well be a relatively small piece of land — a "postage stamp" fenced off from the rest of the park by the appellants and their predecessors, in the words of the dissenting judge in the Court of Appeal (2023 ONCA 450, 167 O.R. (3d) 401, at para. 82). But the disputed land formed part of the precious green space designated by the City for the use or benefit of the public as part of Étienne Brûlé Park during the whole period of possession.

[91] Awarding the land to the appellants would deprive the community of this part of the park in perpetuity. The public would make a more socially valuable use of this land over time — postage stamp or not — than could any one person: that is the very principle of public use or benefit upon which parkland is predicated. For municipal

parkland, that public interest is, if anything, amplified in a densely populated urban setting like the City. While I respectfully disagree with the dissenting judge's proposed conclusion in this case, I share his view that Toronto parkland is "vital to maintaining one's sanity and socializing with one's neighbours in an urban sea of steel and glass" (C.A. reasons, at para. 77). Moreover, there is no disagreeing with the fact, as the majority judges below observed, that Toronto's publicly accessible green space has "significant natural heritage" and "recreational" value that benefits the public (para. 3). While current land titles legislation precludes new adverse possession claims on registered land, granting the appellants' application based on their supposedly acquired rights would deprive the public of this benefit. And the cost to the City of monitoring 8,000 hectares of municipal property scattered over 1,500 parks — for that is what the record reveals is the land designated for this purpose — against potentially thousands of similar postage-stamp encroachments across hundreds of Toronto parks — would be prohibitive.

[92] Under the common law as it has developed in Ontario, land set aside by a municipality for the use or benefit of the public as a park should be treated as presumptively in use by the public and shielded from adverse possession. To overturn this presumption, a claimant must show that the municipality has changed the vocation of the land from that designated for public use as a park or has acquiesced to its private use. Acquiescence generally requires proof of knowledge on the part of the municipality. As I will explain, proof of constructive knowledge may suffice but the bar is a high one, given the public interest at issue.

[93] This common law rule has not been ousted by statute in Ontario, including by the *Real Property Limitations Act*, R.S.O. 1990, c. L.15 ("*RPLA*"), which sets out instances in which certain other public land is exempt from adverse possession. Properly interpreted, the *RPLA* does not give rise to the inference that, by omitting municipal parkland in the named statutory exemptions, the legislature intended to have that land treated, for the purposes of adverse possession, as if it were held by a private landowner. The *RPLA* is not a "complete code" for adverse possession of land, given that the measure of adverse possession is itself a common law test, sitting outside of the rules of limitation in the statute. However, I recognize that, complete code or not, the *RPLA* could oust the common law rule on public land if the legislature chose to do so expressly or by necessary implication (*R. v. Basque*, 2023 SCC 18, at para. 40, citing *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 21, per Cromwell J.). Legislative intent must, of course, be respected. But under the legislation, the common law relating to municipal land presumptively held for the use or benefit of the public has in this regard been left untouched by the legislature.

[94] Because it has not been ousted by statute, this common law rule relating to municipal parkland thus applies to the disputed land in this case.

[95] The disputed land has been designated as parkland during the whole of the relevant period. While the appellants' fence was recorded on the 1971 survey map, this does not, to my mind, meet the high bar required to overturn the presumption of public use. In addition, despite a 2007 survey map attached to a City by-law noting the fence, the City's dealings with a neighbour with a similar problem and the payment of certain

property taxes on the land as would an owner, all these facts arose after the land was registered under the *Land Titles Act*, R.S.O. 1990, c. L.5 ("*LTA*"), which precludes adverse possession claims from maturing after that date. Those events cannot constitute knowledge, actual or constructive, by the public authority to the claimed adverse possession.

[96] The appellants' pre-existing fence — and the fences abutting on parkland across the City — may preclude public use of the land, but does not change the park's vocation to the benefit of the public, nor does it give rise to a settled expectation that the City acquiesced to the appellants' possession. This understanding of the public benefit presumption against adverse possession of municipal parkland visits no unfairness on the appellants in this case. The appellants cannot say that they have a valid adverse claim based on their exclusive possession when that exclusivity is a consequence of the very fence that excluded the public from use of land designated for community benefit. And because the principle explained by the majority of the Court of Appeal was not "new law" but simply a plainer articulation of a longstanding common law rule, the appellants cannot say that their claim had "crystallized" as a mature right to title before a notional change in the law.

[97] I would accordingly dismiss the appeal. In light of comments made by the City at the hearing, I would, however, reserve the appellants' right to bring a claim against the City for reimbursement of taxes paid on the disputed land by mistake.

II. Appellants' Arguments and Applicable Analytical Framework

[98] Resolving this appeal requires answering a familiar question in Canadian law: How should courts determine whether a statutory scheme displaces, modifies, or coexists with an established common law principle? The issue arises here in assessing whether the public benefit principle — contested by the appellants but which Sossin J.A. recognized as part of the common law of adverse possession — exists and continues to operate, alongside the *RPLA*.

[99] This Court's decision in *Basque*, relied upon by both the appellants and the City in argument, provides the appropriate method for answering this question. The two-step framework used to analyze the interaction between legislation and the common law is well known (*2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 97, per L'Heureux-Dubé J.). First, a court must identify and clearly articulate the applicable common law rule; second, the relevant statutory provision must be examined, using the modern approach of interpretation, to determine whether the legislature intended to codify, displace, limit, supplement, or leave that common law rule intact (*Basque*, at paras. 40, 45 and 52). This framework was already settled law in Ontario when the Court of Appeal addressed the matter (see, e.g., *Zaidan Group Ltd. v. London (City)*, [1991] 3 S.C.R. 593; *Urban Mechanical Contracting Ltd. v. Zurich Insurance Co.*, 2022 ONCA 589, 163 O.R. (3d) 652, at para. 45). While the Court of Appeal did not have the benefit of *Basque* when it rendered its judgment, the majority opinion followed these two steps to the letter in its effort to discern the interaction between the common law and statute in this case.

[100] The legislature may, of course, oust the common law and if that is its intent it must be respected. But the applicable framework does not presume conflict. Statutory provisions and common law rules may "coexist harmoniously" unless the legislature indicates otherwise with requisite precision (*Basque*, at para. 6). At the same time, the approach reinforces the importance of interpretive discipline: courts must be attentive to legislative text and purpose, and avoid introducing changes to statutory regimes through untoward judicial innovation. This also reflects the principle articulated in *R. v. Salituro*, [1991] 3 S.C.R. 654, that structural reform is the responsibility of the legislature, while courts are limited to incremental developments necessary to maintain coherence in the law (p. 670).

[101] At step one, the appellants argue that the common law test for adverse possession is clear: citing this Court's judgment in *Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138, at para. 18, the appellants rightly recall that adverse possession must be open, notorious, adverse, exclusive, peaceful, actual and continuous to trigger the commencement of the limitation period. However, the appellants dispute the authorities cited by the Court of Appeal that suggest that the common law of adverse possession treats public land differently from land owned by a private party, arguing that all of those cases were or could have been decided on this traditional common law test.

[102] At step two, the appellants rightly adopt the modern method for statutory interpretation endorsed by this Court in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, and subsequent cases, for discerning the meaning of the *RPLA*. Fixing in particular

on ss. 4, 15 and 16, they say the meaning to be given to the *RPLA* is plain: the legislature has not directed that municipal parkland be exempted from the common law rules of adverse possession applicable to land held by a private landowner whereas other public land has been expressly treated as immune. They say this reinforces the inference that the legislature did not intend municipal parkland to be shielded from adverse possession. Moreover, the appellants argue that the *RPLA* is part of a broader legislative scheme in Ontario that preserves mature claims of adverse possession. In the result, there is no doubt, say the appellants, that they have possessed the disputed land for the requisite time and in a manner consonant with the principles of adverse possession. Their application for an order that they own the land should have been granted.

[103] I propose to follow the *Basque* framework suggested by the appellants. I will review, first, the common law rules for adverse possession applicable to the disputed land, owned by the City and designated as part of Étienne Brûlé Park. Second, I will consider how the common law rules interact with statute and, in particular, whether the common law regime for adverse possession of municipal land has been ousted by the *RPLA*. I end by applying the law to the land in dispute here.

III. The Applicable Common Law

[104] The majority in the Court of Appeal agreed with the application judge's conclusion that the appellants did not acquire the disputed land by adverse possession. But the majority judges disagreed with her view that the "public benefit test" required the City to show that the land had been used by the public before it was fenced in (see

para. 41; 2022 ONSC 3473, 32 M.P.L.R. (6th) 306, at paras. 69 and 77-79). Writing for himself and his colleague MacPherson J.A., Sossin J.A. stated the common law test as follows:

> Therefore, I would reframe the test for adverse possession of public land developed in cases such as *Warkentin* and *Richard* adopted by the application judge, as follows: 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; para. 47.]

[105] The appellants' fundamental argument before this Court is that, "[i]n Ontario, the law of adverse possession is codified in the RPLA" (A.F., at para. 25). They say that their acquisition of the disputed land flows from the ordinary application of the statute. They argue that the majority judges below misinterpreted the common law to create a rule that would exempt or immunize municipal parkland from claims of adverse possession permitted under the *RPLA*. Moreover, they submit that the cases cited by the majority are inapplicable, distinguishable or wrongly decided (para. 52).

[106] I agree with the appellants that courts should tread carefully before changing the common law relating to real property in a fundamental way — a task best left to the legislature. But the appellants misread the judgment on appeal when they assert that "the Majority exceeded the Court of Appeal's jurisdiction when it established a novel immunity from claims in adverse possession" (A.F., at para. 6). The majority exposition of the common law is not one that, properly understood, amounts to a "novel immunity" from adverse possession for municipal land or even one that

materially changed the law based on distinguishable or wrongly decided cases. As the City rightly suggests, Sossin J.A.'s enunciation of the common law test presented a "clarification of Ontario precedent" which "synthesized" prior decisions relating to the public benefit test as it pertains to adverse possession of municipal land (R.F., at paras. 110 and 120). Justice Sossin was acutely aware of this when he wrote that his purpose was to "reframe the test for adverse possession of public land" developed in the relevant cases (para. 47 (emphasis added); see also para. 48).

[107] The common law is, of course, not static. It evolves best through careful, reasoned judgments adjudicating live disputes. This evolution can proceed in different ways. Sometimes decided cases can properly bring incremental change to the law. But very often, including in areas where a dispute shows the common law to be unclear, courts content themselves with a restatement, in plainer form, of the law as it stands. In *Salituro*, this Court held that judges "can and should" recognize incremental changes to the common law to bring legal rules into step with a changing society (p. 666). But as "custodians of the common law" (p. 678), courts can also refine the law without changing it materially. Through a more cogent expression of existing principles, they thereby show that the law did not need change, but simply requires a plainer exposition of a principle that had previously been imperfectly stated in the cases.

[108] Refining the law requires a careful understanding of the way in which past courts explained the law in different factual settings, in addition to identifying the finding upon which the disposition of the cases rested. This often means going behind the *ratio decidendi* that judges have later drawn from them and reified. In discharging

their responsibilities as custodians of the common law, courts must, of course, apply a precedent precisely, but they are not confined to that work when they seek to understand the importance of a case to what the law says. Making sense of a legal doctrine will at times require tracing the lineage of a common law principle critically over time.

[109] Sometimes, the exercise of refining the law draws into focus aspects of one case that, on the facts of that dispute, took on less importance, but can nevertheless speak to a similar matter as it arises before another court. Some judicial statements, initially viewed as *obiter*, gain precedential weight because they are repeatedly relied upon and shown to be workable in practice (R. J. Sharpe, *Good Judgment: Making Judicial Decisions* (2018), at pp. 150-51).

[110] The City rightly suggests that this exercise was properly undertaken by the majority here. With respect, I disagree with the dissenting judge's view, embraced by the appellants, that the majority decision below "represents one of the clearest examples of the court using the common law to veer into the role of policy-maker" (A.F., at para. 61). The Court of Appeal did not "exceed its jurisdiction" by making radically new law for adverse possession in a manner that is the proper province of the legislature. On the contrary, as the City argues, the majority of the Court of Appeal contented itself with a "refinement of the common law requirements for what acts will constitute dispossession in the context of municipal parkland" in this case, rather than adding a new exception akin to the classes of public land exceptions in the list in s. 16 of the *RPLA* (R.R.F. (Amended), at para. 9 (emphasis in original)).

[111] Importantly, Sossin J.A.'s explanation of the presumptive character of the public benefit test at common law does not create a new immunity, but instead recognizes that there are circumstances under the common law in Ontario in which it has always been difficult to acquire municipal land by adverse possession. On my understanding, Sossin J.A.'s reasons do not make new law on this point but seek to refine past decisions to make them intelligible in the present circumstance, exemplifying a well-known characteristic of common law reasoning.

[112] The parties agree on much of the common law test for adverse possession; they agree, for example, on the quality of possession that can ground a claim. What is in dispute is whether claims of adverse possession of public lands — and in particular, municipal lands — are distinct in a way that reflects the nature of that land. In canvassing the cases bearing on this question, Sossin J.A. distilled a general rule applicable to the common law of Ontario, namely that municipal lands accessible to the public are presumptively "*in use* for the public benefit" and therefore shielded from adverse possession, unless the alleged possessor can prove that, in fact, the municipality "acknowledged or acquiesced" to its private use (paras. 38, 41 and 47 (emphasis in original)).

[113] Given the public interest in the land, the majority said that municipal land in Ontario cannot be subject to acquisition by adverse possession in the same way as land held by a private landowner except in a narrow set of circumstances. The majority drew this rule out of cases they carefully identified and gave it intelligible expression. Justice Sossin did not invent, by some kind of illegitimate judicial pronouncement or

otherwise, a novel common law exception of municipal parkland from adverse possession. Instead, he undertook a familiar task of synthesizing a series of decided cases that reflected a wholly legitimate dimension of common law reasoning, identified recently by the President of the United Kingdom Supreme Court, whereby "judges may arrive at a principle by a process of induction from a series of judicial decisions in individual cases" (Lord Reed, *Time Present and Time Past: Legal Development and Legal Tradition in the Common Law — The Neill Law Lecture*, February 25, 2022 (online), at p. 2).

[114] In distilling a general rule from Ontario cases bearing on adverse possession claims on public land present in the common law as it stood, Sossin J.A. was indeed reasoning inductively. Adeptly done in this instance, this exercise is not otherwise remarkable as a feature of common law methodology. Reasoning inductively is a technique that is "characteristic of English law", as Professor C. K. Allen once wrote, by which a judge "works forward from the particular to the general" (*Law in the Making* (2nd ed. 1930), at p. 110). Justice Sossin did not break with settled law or even fill an identified gap left by statute in the law. Instead, he made sense of a series of disparate cases that have said similar things in different ways: municipal land, by reason of its nature and vocation, is not subject to acquisition by adverse possession in the same way as land held by a private owner. I respectfully disagree with the view of the dissenting judge who saw this as transgressing a judge's proper role: Sossin J.A. simply synthetically reframed the existing law, rather than crafting a new rule, as part of an exercise of the proper judicial function that was, in Professor Allen's words, an "effort . . . to find the law, not to manufacture it" (p. 184).

[115] The distinction is important here. Part of the appellants' grievance comes from what appears to them to be an injustice whereby Sossin J.A. created new law after the moment, they say, when their claim for acquisition of title through adverse possession had ripened. They contend that "pursuant to the law as it existed prior to the Majority's decision, [they] were the owners of the Disputed Land by possession" (A.F., at para. 59). This is predicated, in large measure, on their view that the majority of the court did not have "jurisdiction" to change the common law in such a fundamental way that it did (paras. 60 et seq.). A review of Sossin J.A.'s reasons on this point reveals that the perceived break in the common law is unfounded. The better view is that he restated an existing rule so that, contrary to what the appellants plead, their claim was not ripe at the time the Court of Appeal rendered judgment. Instead, by reason of the law recognized by the majority as part of the common law of Ontario, the appellants' relationship with the land over the years could not be considered to have been maturing adverse possession at all. This is not a case of retrospective application of new law to a property right that had already crystallized.

A. *The Common Law Lineage of the Public Benefit Test*

[116] In his review of the common law cases, Sossin J.A. was right to identify a longstanding theme that municipal land is generally, but not always, shielded from a claim for adverse possession by a private possessor. The hesitation to allow the acquisition of public land by adverse possession in Ontario and beyond is not merely a matter of pragmatic concern or judicial discomfort. It is also grounded in foundational common law principles about the nature of public ownership. As he wrote at para. 23,

"where it is generally not available for adverse possession but where no complete bar or immunity is applicable, courts have developed a 'public benefit' test to determine whether the municipal land at issue is immune from adverse possession". I disagree with the appellants' depiction of this view as a misreading of the relevant authorities.

[117] Courts have often commented on the unique place that public lands occupy within the doctrine of adverse possession in Ontario law. In *Hackett v. Colchester South*, [1928] S.C.R. 255 ("*Hackett SCC*"), this Court affirmed a decision of Hodgins J.A. in favour of the municipality and against a claim of adverse possession ([1927] 4 D.L.R. 317 (Ont. S.C. (App. Div.)) ("*Hackett CA*")). The land was granted to the municipality by the Crown in right of Ontario, and the terms of that grant provided that the municipality was to hold the land "forever in trust for a public wharf and public purposes connected therewith" (*Hackett CA*, at p. 323).

[118] On that basis, Hodgins J.A. remarked that the municipality's title over the property was as a "trustee for the public" (*Hackett CA*, at p. 320), and that "[h]aving in view the public rights involved, . . . it must be made clearly to appear that these public rights were invaded" (p. 322). He then analogized lands held for the public benefit to Crown lands, observing that "[t]he reasons which make the Statute of Limitations inapplicable to the Crown would seem to apply equally when the rights of the public are those common to all subjects of the Crown" (p. 323). Therefore, "to apply [the Statute of Limitations] to those rights would allow the negligence of the trustee to result in the alienation of the trust property and the destruction of the public right, which the trustee could not legally do directly" (*ibid.*). That said, Hodgins J.A. found that it was

ultimately unnecessary to dispose of the appeal on those grounds, as it was sufficient to conclude, as he did, that the alleged possession in this case was not actual, constant, and visible (p. 324).

[119] Justice Duff, writing on behalf of this Court, agreed with the reasons of Hodgins J.A. He stated that he was "very much impressed" with the proposition that the municipality's lands were "dedicated to a public use"; that "this dedication gave rise to rights of enjoyment by the public, closely analogous to the rights of the public in respect of a public highway"; and that "such rights are not . . . capable of being nullified, in consequence of adverse possession" (*Hackett SCC*, at p. 256). Still, as with the appellate division, Duff J. declined to decide the appeal on that basis, affirming instead that no dispossession had taken place (p. 257).

[120] Plainly, *Hackett SCC* is not in itself a binding authority on the inapplicability of adverse possession to municipal public lands. Neither the appeal that was before this Court nor that before the appellate division turned on that question. Nevertheless, the *obiter* remarks of Duff J. and Hodgins J.A. expressed a concern that land held for public use, bearing a legal character akin to that of a trust, may be incompatible with private acquisition by adverse possession. While *Hackett SCC* addresses the doctrine of dedication, Duff J.'s reasons nevertheless send a strong signal that public use stands in conflict with the application of ordinary rules leading to private acquisition based on possession. This is the basis upon which Sossin J.A. treated it as *obiter* but relevant to the development of the common law. Indeed, this reasoning in *Hackett SCC* would later be cited in *Oro-Medonte (Township) v. Warkentin*, 2013

ONSC 1416, 30 R.P.R. (5th) 44, where the contours of the public benefit test would begin to take definite shape.

[121] The distinct nature of public lands was subject to a renewed focus in *Teis v. Ancaster (Town)* (1997), 35 O.R. (3d) 216 (C.A.). In that case, Laskin J.A., writing on behalf of the court, upheld the trial judge's finding that the plaintiffs were the owners by adverse possession of two strips of municipal parkland adjacent to their lot. The municipality had not argued that its title to public lands was shielded from adverse possession or otherwise subject to unique considerations. Thus, the starting premise of the parties' submissions was that municipal lands were subject to the same test for adverse possession as privately owned lands. The municipality's position was simply that the plaintiffs' conduct failed to meet that test, and on that narrow question, Laskin J.A. held in favour of the plaintiffs.

[122] Noting the deficiency in the municipality's submissions, however, Laskin J.A. observed in *obiter* that several jurisdictions in the United States and one Canadian jurisdiction, Alberta, had insulated municipal property from claims of adverse possession — some by legislation, others by common law developments. He also cited extrajudicial commentary that municipal land held for the public benefit was not amenable to adverse possession "as a general rule", and that legislative intervention had "expressly declared" that rule with respect to road allowances (*Teis*, at p. 229, citing *Household Realty Corp. Ltd. v. Hilltop Mobile Home Sales Ltd.* (1982), 136 D.L.R. (3d) 481 (Ont. C.A.), at p. 489). Justice Laskin then posed and left open the question of whether "short of statutory reform, the protection against adverse

possession afforded to municipal streets and highways should be extended to municipal land used for public parks" (*Teis*, at p. 229). In a comment that has been underscored by others subsequently, Laskin J.A. wrote that he had "some discomfort in upholding a possessory title to land that the Town would otherwise use to extend its public park for the benefit of its residents" (p. 228).

[123] In an effort to place *Teis* in context, Sossin J.A. understood Laskin J.A.'s reasons to mean that a municipality may "waive its presumptive title over public parkland" (C.A. reasons, at para. 33). On those terms, and in that particular case, the waiver occurred when the municipality accepted the application of the "ordinary" rules of adverse possession (*ibid.*). I recognize that this is an expansive reading of the case, but it has the virtue of seeking to reconcile Laskin J.A.'s expressed discomfort for allowing the adverse possession claim to proceed, and his comment in the last paragraph that the issue whether municipal parkland ought to be shielded from adverse possession was not "squarely raised" given the municipality's position in the dispute (*Teis*, at p. 229).

[124] Waiver as such was not the basis for the outcome, at least not expressly so, and I do not take *Teis* as standing for that proposition. Justice Laskin merely took note that he felt limited in his ability to go beyond expressing discomfort given how issues were joined through the parties' submissions. But *Teis* does remain a relevant marker, given Laskin J.A.'s sustained and express *obiter*, acknowledging that there may be more to the common law of adverse possession than the case itself decided. Viewed within the broader jurisprudential trajectory, the significance of *Teis* is best understood

in its express recognition of an unresolved doctrinal question. Whereas *Hackett SCC* identified a distinct, trust-like character to municipal lands dedicated for the public benefit, *Teis* contemplated the possibility that the common law of adverse possession in Ontario may be amenable to developments that acknowledge such a distinction. In that sense, Sossin J.A.'s account of the case does not undermine his ultimate conclusion.

[125] Justice Laskin's discomfort would later be addressed in *Prescott & Russell (United Counties) v. Waugh* (2004), 15 M.P.L.R. (4th) 314 (Ont. S.C.J.). There, the municipality brought an application for vacant possession of two strips of land adjacent to the respondents' property, one of which had been set aside by the municipality for "forestry purposes" (para. 3). The respondents operated a sawmill on their property, but had also erected sheds and other structures on the disputed strips of lands. By way of motion, the parties sought disposition from the court on a threshold legal question that asked in part whether the respondents were barred from acquiring possessory title on account of the "public benefit" for which the lands were held (paras. 8-9). Referencing the land set aside for forestry purposes, Charbonneau J. held that, "in order to protect this vital public interest and as a matter of public policy, lands held by a municipality in such circumstances cannot be the subject of a claim for adverse possession" (para. 21).

[126] Soon after, in *Woychyshyn v. Ottawa (City)* (2009), 88 R.P.R. (4th) 155 (Ont. S.C.J.), the court would also dismiss a claim of adverse possession of municipal parkland, finding that the loss of public parkland through adverse possession would be

contrary to "high public interest" (para. 13). Having considered *Hackett SCC*, *Teis*, and *Waugh*, Ray J. held that the parkland at issue, "being municipally owned land, is exempt from a claim for possessory title" (para. 14). One can observe, then, that according to the emerging view of Ontario's courts, the distinct nature of municipal public lands called for at least some protection from adverse possession.

[127] This view of the public interest connected to certain municipal land and its relevance to adverse possession received its most detailed judicial engagement in *Oro-Medonte*. In that case, the municipality owned a strip of land that separated dozens of privately owned lots from the shorelines of Lake Simcoe. The private owners of the neighbouring properties contested the municipality's ownership, claiming adverse possession. The municipality, in turn, brought an application for declaratory judgment, alleging that the disputed land was acquired for, and served as, a public highway.

[128] Justice Howden held that the municipality could not have validly acquired the land for use as a public highway, as it lacked the authority to do so under provincial legislation (*Oro-Medonte*, at paras. 69-70). Nonetheless, he also found that the land at issue was dedicated by its former owner to the municipality "to serve . . . the public interest as an access way and as a common area for the enjoyment of the lot owners and the public" (para. 69; see also paras. 96-97). On that basis, and after considering *Hackett SCC*, *Teis*, *Waugh*, and *Woychyshyn*, Howden J. set out a framework to determine when municipal land is not susceptible to adverse possession. He decided that a claim for possessory title of municipal public land cannot succeed where: (1) the land is acquired or dedicated to the municipality for the use or benefit of the public;

and (2) the land has been used by and of benefit to the public (paras. 118-19). Applying that standard, he granted the municipality's application for declaratory judgment.

[129] Not unlike this case, *Oro-Medonte* consolidated the existing jurisprudence. As was done in some of the older cases, Howden J. emphasized that the public character of the land — its purpose and availability — and considered it in light of the rationale and justification underlying adverse possession. The framework he developed out of his review of the authorities was dispositive of the application before him. *Oro-Medonte* would later be followed in *Richard v. Niagara Falls*, 2018 ONSC 7389, 4 R.P.R. (6th) 238 (see, generally, paras. 27 and 35-39, aff'd on other grounds, 2019 ONCA 531, 4 R.P.R. (6th) 248).

B. *Synthesizing the Jurisprudence*

[130] Viewed in its entirety, the jurisprudence reflects a recurring pattern of judicial "discomfort" in granting claims for adverse possession by private landowners against municipal public land that has a public interest character. The fact that early expressions of that discomfort were made in *obiter* does not mean, in gauging how the law develops, their influence should be roundly discounted. As Binnie J. explained in *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, "a strict and tidy demarcation" between *ratio decidendi* and *obiter* oversimplifies the process by which legal principles evolve over time (para. 52). Indeed, taken together, the decisions reflect, with increasing firmness, the view that the public character of municipal land will bear on whether it can be lost by adverse possession.

[131] This, in my view, is a strong theme that Sossin J.A. drew from the cases in his reasons. As he rightly noted, the public benefit test as formulated in *Oro-Medonte* was composed of two elements. The first required the land in question to have been acquired or dedicated to the municipality for the use or benefit of the public. The second provided that the land must have actually been used for that purpose (*Oro-Medonte*, at paras. 118-19). Importantly, Sossin J.A. understood that while Howden J. would state in passing that lands that meet these two elements are "immune" from claims of adverse possession (para. 119), the second element of the *Oro-Medonte* formulation would suggest that this "immunity" would be eclipsed should the land in question no longer be used for the use or benefit of the public. The *Oro-Medonte* formulation did not provide, on its own, a roadmap as to how to proceed. It left aside the question of how a municipality can go about proving that the land was in fact used by and for the public when the party claiming adverse possession is simultaneously asserting exclusive possession. In the case at bar, for example, the application judge found that the appellants' extended fencing blocked the public from access (para. 63). Here, Sossin J.A. would draw on and refine the requirements of the *Oro-Medonte* test by observing that lands acquired or designated "to be accessible to the public . . . should be treated as presumptively *in use* for the public benefit" and that "[i]t is not enough to show that the land was rendered in fact unavailable to the public by the actions of private landowners" (para. 41 (emphasis in original)). This was a legitimate part of the "reframing" exercise Sossin J.A. undertook, that plainly draws upon, rather than breaks with, the authorities that came before.

[132] In addition, the *Oro-Medonte* formulation left unanswered the question of whether the municipality may dedicate its own lands for public use in satisfaction of the first element, or if that dedication must occur when the municipality first acquires legal title. In *Hughes v. Fredericton (City)* (1999), 216 N.B.R. (2d) 387 (C.A.), a New Brunswick authority that Sossin J.A. properly considered for its persuasive value, the court held that "at common law, municipal land zoned as parkland is held in trust for the public, and generally not available for adverse possession" (C.A. reasons, at para. 22, citing *Hughes*, at para. 12).

[133] If one accepts, as the jurisprudence would suggest, that (1) a municipality may dedicate its own lands (or lands acquired from or dedicated by another) for public use, and that by doing so (2) such dedication creates a presumption that the land is in fact used for that purpose (C.A. reasons, at para. 42), then the first and second elements of the *Oro-Medonte* formulation simply collapse into a single question: whether the municipal land at issue was dedicated for the benefit of the public. If so, then the second element is *presumptively* satisfied. These connections were implicitly recognized by Sossin J.A. when he observed that "the application judge treated as two separate considerations what should be seen as a single question" (para. 41).

[134] Justice Sossin's refinement of the case law thus has two main features. First, he consolidated the *Oro-Medonte* formulation into a single question. Second, recognizing that the cases did not consecrate an immunity, he explained that they rest on a rebuttable presumption that lands acquired or dedicated for the public benefit are used as such until proven otherwise. These conclusions are not novel, but flow from a

careful and close reading of cases that, taken individually, did not provide guidance that was dispositive for this dispute. These refinements led to Sossin J.A.'s final formulation of the public benefit test: ". . . 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" (para. 47). This is not a rule of immunity because the discomfort expressed in the cases relevant to Ontario falls short of that. His formulation does not bar claims against municipal land in all cases. Rather, it articulates a structured inquiry that had been buried in the jurisprudence bearing on the distinct concerns that arise out of claims of adverse possession against municipal public land.

[135] I pause briefly here to note the finer details of the legal principle articulated by Sossin J.A. and how it fits in the broader jurisprudential trend reviewed above. He suggests that acknowledgement and acquiescence evince a degree of knowledge on the part of the municipality. As a general rule acknowledgement implies an active agreement or waiver while acquiescence indicates tacit but knowing consent. This makes sense if overturning the presumption associated with the public interest test is a high standard, that would stand on notional par with a municipality's decision, through re-zoning for example, to change the vocation of parkland.

[136] Taking Sossin J.A.'s reasons as a whole, he decided that displacing the presumption of public use generally requires an element of knowledge in both

circumstances. He did not discuss whether, in keeping with the idea that constructive notice can ordinarily suffice to establish adverse possession, something short of the municipality's actual knowledge could be enough to overturn the presumption of public use. I would make clear that the doctrine of adverse possession requires specific evidence capable of establishing constructive notice. Given the nature of the public interest in the land, and the exigencies of monitoring parkland by the municipality, when proof of constructive knowledge also serves to rebut the presumption, it must meet a high bar. For example, notice could only be imputed to the municipality where it plainly acquiesced to private use by its conduct. In drawing a rule for municipal land, where such land is designated for the use or benefit of the public, it will be shielded from adverse possession unless the municipality has changed the vocation of the land formally or has knowledge of (either constructively or in actual fact) and has acquiesced to its use by a private landowner. I hasten to say that where the evidence of constructive knowledge is adduced by the adverse possessor, it may be relevant to meeting both the high bar required for rebutting the presumption of public use and the distinct requirement to establish the elements of adverse possession under the ordinary common law test. As I will endeavour to show, the evidence adduced by the appellants in this case met the requirement of constructive notice for adverse possession but failed to meet the more stringent test that, at the relevant time, the City acquiesced to private use of the parkland.

[137] This case is to be resolved by reference to the law of Ontario, and with a particular eye to how common law developments that protect municipal land from adverse possession interact with limitation and other statutes relating to the acquisition

of land in that province. In service of their respective positions, however, both the appellants and the City cite, as persuasive authority, the law from jurisdictions other than Ontario.

[138] The City says that American authorities help explain the position of the majority in the Court of Appeal here that certain types of public land are less, or differently, susceptible to adverse possession than privately held property. The City says that, in the United States, the courts have recognized a longstanding principle that public land is not subject to adverse possession at common law. The traditional common law rules observed for the United States that land owned by a government entity was immune from adverse possession has been explained by the idea that government land is held "in trust" for all citizens: "Thus," wrote John G. Sprankling, "the goal that adverse possession seeks to serve — the overall welfare of society — is best protected by retaining public ownership, not by transferring title to a private owner" (*Understanding Property Law* (5th ed. 2023), at p. 482). As I noted at the outset, the traditional rationale for allowing a productive possessor to acquire land from an inactive paper title holder fails to justify why the law would allow a private possessor to deprive a municipality of land designated for the benefit of the public, like a park. Some American scholars have argued that the very idea of a more productive use may fail to capture the value to the community of the public land. Parkland retains its value to the community because it is not developed productively; values associated with conserving a green, natural environment are the very reason many communities consider parkland in the public interest (see, e.g., A. B. Klass, "Adverse Possession and

Conservation: Expanding Traditional Notions of Use and Possession" (2006), 77 *U. Colo. L. Rev.* 283, cited in Kaplinsky, Lavoie and Thomson, at p. 167).

[139] Strikingly, in their discussion of Canadian law, both the appellants and the City invoke the Quebec law of acquisition of land by acquisitive prescription in support of their views. The appellants point to the rules on acquisitive prescription in the *Civil Code of Québec* ("*C.C.Q.*"), as treated by this Court in *Ostiguy v. Allie*, 2017 SCC 22, [2017] 1 S.C.R. 402, where Gascon J. appropriately recognized that "primary function of acquisitive prescription is to ensure the stability of property rights" (para. 26; see A.F., at para. 99). But however useful *Ostiguy* is in signalling a community of ideas and purpose between the civil law rules on acquisitive prescription and adverse possession in the common law, the appellants fail to note that the appeal concerned a dispute between two neighbouring private landowners and did not concern the acquisition of public or municipal land as in the present appeal. More helpfully, the City notes that art. 916 *C.C.Q.* provides, as part of Quebec's codal "common law", that property of legal persons established in the public interest — including municipalities — cannot be acquired by prescription where the property is "appropriated to public utility" (R.F., at para. 82, fn. 93). Quebec law creates what is sometimes called a "dual domain" for municipalities: a public domain, where land's destination to be used for the public's use or benefit shields it from acquisition by prescription; and a "private domain" of the municipality which, like property held by a private owner, is susceptible to such acquisition.

[140] In a manner similar to the exposition Sossin J.A. has provided in this case for municipal land in Ontario, the appropriation of land to public utility in Quebec law refers to the destination, or mission, given to the land by the municipality or other public authority, and not the actual use made of it (*Douglas Consultants inc. v. Unigertec inc.*, 2021 QCCA 384, at paras. 13-14). Municipal property that has been appropriated to public utility, because it is in a notional public domain, is shielded from acquisitive prescription until the municipality takes measures to allow the land to pass into its private domain, at which point it may be acquired by prescription (see S. Normand, *Introduction au droit des biens* (3rd ed. 2020), at pp. 490-91).

[141] Article 916 *C.C.Q.* has been interpreted to include municipal parkland as land in the public domain in that it enables the protection and conservation of natural areas, for the benefit of all. In that case, parkland is therefore appropriated to public utility and, as such, not susceptible to acquisitive prescription (*Karkoukly v. Westmount (Ville de)*, 2014 QCCA 1816, at paras. 21-24). But in a manner that further echoes Sossin J.A.'s explanation of the common law of Ontario, municipal land in Quebec can lose its status as property in the public domain when its destination is changed by the municipality such that it is no longer appropriated to public utility. This occurs when the appropriation (in French, "*affectation*") of the property is changed by a formal act of the municipality, such as a zoning by-law (*Karkoukly*, at para. 31, citing J. Hétu and Y. Duplessis, with the collaboration of L. Vézina, *Droit municipal: Principes généraux et contentieux* (2nd ed. (loose-leaf)), vol. 1, at para. 7.51).

[142] Justice Sossin's analysis of the Ontario cases gave voice not only to ideas that have animated the common law of Ontario, but also to values associated with the public interest in certain types of municipal land, as recognized in other legal systems. Justice Sossin's reasons engaged with the jurisprudence in its full and occasionally uneven colour and scope, accounting for both *obiter* remarks and binding *dicta*. In doing so, he was able to identify and articulate from the disparate pieces of judicial commentary a workable principle that is dispositive of this appeal. On review of his analysis, I agree that the common law can and does acknowledge the distinct nature of municipal public lands as it relates to limiting the doctrine of adverse possession. Accordingly, under the common law as it has developed in Ontario, land that is set aside by a municipality for the use or benefit of the public as a park should be treated as presumptively in use for the public and shielded from adverse possession. To overturn this presumption, a claimant must show that the municipality has changed the vocation of the land from that designated for public use as a park, or has actual or constructive knowledge of — and has thus acquiesced to — its private use.

[143] With respect, the appellants offer only nominal engagement with Sossin J.A.'s formulation of the public benefit test and the authorities upon which it stands. One cannot fully appreciate whether the common law is completely ousted by the provisions of the *RPLA* without fully engaging with the cases. To do otherwise stands contrary to the long-established view that "[t]o determine what interaction there is between the common law and statute law, it is necessary to begin by analysing, identifying and setting out the applicable common law" (*2747-3174 Québec Inc.*, at para. 97; see also R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at

§ 17.01[1]). Moreover, a review of the *RPLA*'s text, purpose, and context challenges the notion that it is a complete code incompatible with the common law. It is to this exercise that I now turn under the second inquiry set out in *Basque*.

IV. The Applicable Legislation

[144] The appellants observe that the quality of their possession of the disputed land under the applicable common law was sufficient to trigger the statutory limitation period. Thereafter, the *RPLA*, properly understood and applied to their circumstances, resolves the appeal in their favour. They say that pursuant to ss. 4 and 15 of the *RPLA*, their claim to title by adverse possession was mature and, by the effect of ss. 44 and 51(2) of the *LTA*, this mature claim was preserved. Section 16 of the *RPLA* renders certain public land immune from adverse possession, they argue, but the legislature did not intend that exempt status to apply to municipal parkland.

[145] For the appellants, the majority of the Court of Appeal ignored the fact that, through the *RPLA* and the *LTA*, the legislature "codified the law of adverse possession" (A.F., at para. 5). In finding the appellants have no entitlement under the *RPLA*, the majority created a novel immunity from adverse possession for municipal parkland, which had the effect of amending a "competently enacted, comprehensive statutory scheme" (A.F., at para. 3) by illegitimate judicial intervention, thereby acting contrary to the constitutional principle of separation of powers between the legislative and judicial branches of government. The appellants ask this Court for the relief they sought

in first instance, including a declaration that they are owners of the disputed land by adverse possession.

[146] The appellants are of course right to say that the *RPLA* governs, in different ways and in different contexts, claims for the recovery of land (P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (5th ed. 2024), at ¶2.430). It prescribes, among other things, certain limitation periods for the recovery of land, the effect of which is that a dispossessed property owner cannot take legal action beyond those periods (*RPLA*, s. 4; see also Ontario Law Reform Commission, *Report on Limitation of Actions* (1969), at p. 10). The statute also directs that, in such cases, the original right of the owner becomes extinguished (*RPLA*, s. 15; see also Kaplinsky, Lavoie and Thomson, at p. 164). But in Ontario, the statute does not itself provide all the requirements to convey title to the possessor. As authors Michel Bastarache and Andréa Boudreau Ouellet observe, [TRANSLATION] "[t]he application of the limitation period does not have the effect of granting title to the trespasser; it does not convey title" (*Précis du droit des biens réels* (2nd ed. 2001), at p. 256, citing *Krause v. Happy*, [1960] O.R. 385 (C.A.)). That, they explain, depends on the common law doctrine of adverse possession which coexists with statute (*ibid.*).

[147] Of particular interest for the purposes of this appeal are ss. 4, 15 and 16 of the *RPLA*. Generally speaking, s. 4 sets a limitation period on actions for the recovery of land that expires after 10 years from the dispossession; s. 15 extinguishes title at the expiry of the limitation period; and s. 16 exempts from limitation periods certain Crown lands, lands included in a road allowance, and lands reserved, set apart, or laid out as a

public highway. The practical effect of s. 16 is that the enumerated categories of land are immune from extinguishment and thus from adverse possession.

[148] The outcome of this appeal turns largely on whether s. 16 provides for a closed and exhaustive list intended, by the legislature, to displace and supersede the common law. If so, then the public benefit test does not apply to the land at issue. As this Court affirmed in *Basque*, this question of whether the legislature sought to oust the common law rules must be resolved by statutory interpretation. To that end, I now turn to the text, context, and purpose of s. 16.

A. *The Text of Section 16 Does Not Address the Operation of the Common Law*

[149] Section 16 of the *RPLA* reads:

16 Nothing in sections 1 to 15 applies to any waste or vacant land of the Crown, whether surveyed or not, nor to lands included in any road allowance heretofore or hereafter surveyed and laid out or to any lands reserved or set apart or laid out as a public highway where the freehold in any such road allowance or highway is vested in the Crown or in a municipal corporation, commission or other public body, but nothing in this section shall be deemed to affect or prejudice any right, title or interest acquired by any person before the 13th day of June, 1922.	**16** Les articles 1 à 15 ne s'appliquent ni aux biens-fonds nus ou en friche de la Couronne, qu'ils soient ou non arpentés, ni aux biens-fonds compris dans un emplacement affecté à une route dont on a fait le levé et le tracé avant ou après l'entrée en vigueur de la présente loi, ni aux biens-fonds réservés ou tracés comme voies publiques lorsque la propriété franche de cet emplacement affecté à une route ou de cette voie est dévolue à la Couronne, à une municipalité, à une commission ou à un autre organisme public. Toutefois, le présent article n'est pas réputé porter atteinte à un droit, à un titre ou à un intérêt acquis par

une personne avant le 13 juin 1922.

[150] The text of s. 16 is silent as to whether its list is a limited one. While it exempts certain lands from the application of ss. 1 to 15 of the *RPLA*, and thereby insulates those lands from extinguishment and adverse possession, it does not dictate whether other public land is, or is not, subject to adverse possession. This is true of both the English and French versions of the provision. At the same time, s. 16 does not contain language that contemplates other exemptions at common law. It nevertheless is true that the legislature does not use language such as "not limited to the foregoing" that would suggest the list was an open one.

[151] The appellants argue that the omission of municipal parkland from the list is determinative. In their view, the specificity of s. 16's language, combined with the absence of any signal of openness, means that the legislature deliberately chose not to exempt such land. The City maintains that s. 16's phrasing does not purport to codify the entire scope of what public land is shielded from adverse possession. While s. 16 exempts certain property from the application of the *RPLA*, it does not prohibit courts from developing further limits under the common law.

[152] I respectfully disagree with the view that the interpretative maxim *expressio unius est exclusio alterius* ("to express one thing is to exclude another"), when applied here, suggests that s. 16 operates as a closed list of property exempted from adverse possession. The legislature did not enact the provision with a single or

uniform purpose. Instead, s. 16 reflects disparate amendments made over several decades, and in at least one of those instances, the legislature acted only when the courts would not do so. The maxim should not be applied where legislative intent is best explained otherwise. In *Basque*, the Court made a similar observation, noting that "the context does not always permit assumptions to be made about a legislature's unexpressed thinking" (para. 49). This history of s. 16 of the *RPLA* canvassed below does not permit the inference that by listing examples of public land immune from adverse possession claims, the legislature necessarily intended to recognize other types of public land not mentioned in s. 16 as subject to acquisition in this way.

[153] Read for its plain meaning, the language and structure of s. 16 do not indicate an intention to define all lands as immune from adverse possession exhaustively, to the exclusion of the common law treatment of categories of public land not on the list. Nor does s. 16 oust the common law power to recognize, parallel to the categories of land with full immunity that are expressly recognized, other categories of public land that — like municipal parkland — benefit from a much more stringent test for adverse possession.

B. *The Historical Context Suggests Coexistence With the Common Law*

[154] The *RPLA* reflects the continued influence of 19th century English law. Even today, it has been described as "closely follow[ing] the Imperial Statutes" (G. Mew, D. Rolph and D. Zacks, *The Law of Limitations* (4th ed. 2023), at § 12.01). An examination of its statutory lineage suggests that its roots emerge out of England's

Real Property Limitation Act, 1833, 3 & 4 Will. 4, c. 27. Ontario's legislature would make legislative interventions of its own in 1902, 1914, and 1922, to be amalgamated in 1960 and then again in 1990 (*The Statute Law Revision Act, 1902*, S.O. 1902, c. 1; *The Limitations Act*, R.S.O. 1914, c. 75 ("*Limitations Act, 1914*"); *The Limitations Act, 1922*, S.O. 1922, c. 47; *Limitations Act*, R.S.O. 1960, c. 214; *Limitations Act*, R.S.O. 1990, c. L.15).

[155] As it now stands, the *RPLA* is the successor legislation to Part I of the 1990 statute. Other parts of that statute were modernized and consolidated under the current *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B (J. Lee, "An Overview of the Ontario Limitations Act, 2002" (2004), 28 *Advocates' Q.* 29, at p. 32). However, the real property provisions of the 1990 statute were retained without change (*Marriott and Dunn: Practice in Mortgage Remedies in Ontario* (5th ed. (loose-leaf)), at § 1:8; Mew, Rolph and Zacks, at § 12.01; Lee, at p. 32). In fact, a review of the text of the *RPLA* reveals that its provisions have remained virtually unchanged since 1960.

[156] Far from being ousted by the *RPLA* and its predecessor legislation, the common law continued to operate alongside existing statutes governing real property. Notably, going as far back as the imperial statutes of the 19th century, legislative interventions served only to extinguish the original owner's title. They did not also specify that the squatter would subsequently secure a possessory title in fee simple. Commenting on the English statute of 1833, Professor Luke Rostill makes a compelling case that the source of a squatter's title is not, as is sometimes thought, the operation of the statute upon expiration of the statutory expiration period (*Possession, Relative*

Title, and Ownership in English Law (2021), at p. 85, citing *Tichborne v. Weir* (1892), 67 L.T. 735 (C.A.), at p. 737: ". . . the effect of the statute is not that the right of one person is conveyed to another, but that the right is extinguished and destroyed" (see also p. vi)).

[157] A similar complementary relationship between legislation and the common law is apparent from the history of s. 16 itself. The provision serves as the consolidation of several legislative interventions that shield certain lands from extinguishment and adverse possession. Thus, in 1902, the legislature enacted a statutory 60-year limitation period for recovery of land held by the Crown (*The Statute Law Revision Act, 1902*, s. 17; see, generally, *Attorney General of Ontario v. Walker*, [1975] 1 S.C.R. 78, at p. 82). However, in 1914, it exempted "waste or vacant land of the Crown" from the application of limitation periods, thereby protecting against extinguishment and adverse possession (*Limitations Act, 1914*, s. 17). And in 1922, the legislature expanded the categories of protected land from extinguishment and adverse possession to include public highways and unopened road allowances (*The Limitations Act, 1922*, s. 2).

[158] The legislative intervention in 1922 is particularly noteworthy. By then, common law courts had repeatedly affirmed that a highway will by its nature be protected against extinguishment and adverse possession. For example, in *Hackett CA*, at p. 323, Hodgins J.A. remarked that "once a highway always a highway", quoting Byles J. in *Dawes v. Hawkins* (1860), 8 C.B. (N.S.) 848, 141 E.R. 1399, at p. 1403. However, courts declined to go further and confirm the same with respect to unopened road allowances (see *Household Realty Corp. Ltd.*, at p. 492). It appears that it was

because of this judicial hesitation that the legislature intervened to protect unopened road allowances. The fact that the impetus for this intervention was in response to the evolution of the case law would suggest that s. 16, much like the *RPLA* as a whole, developed alongside, and not separate from, the common law, and that the two continue to operate jointly.

C. *The RPLA Does Not Reveal a Legislative Purpose in Favour of Ousting the Common Law*

[159] It is difficult to ascribe a single overarching purpose for which the *RPLA* was enacted. As noted earlier, the accumulated rules governing limitation periods were eventually amalgamated into the 1960 *Limitations Act*. That statute contained "a collection of provisions drawn from thirteen English statutes enacted between 1588 and 1888", and was "complex, confused and obscure" (Ontario Law Reform Commission, at pp. 7 and 65). The provisions pertaining to real property nevertheless persisted into successor statutes, and have remained virtually unchanged.

[160] This conclusion is further supported by a review of the *RPLA*'s statutory scheme, which exhibits internal inconsistencies and therefore evidences limited and shifting legislative purposes. A prominent example concerns the treatment of Crown land, referred to in at least three distinct provisions. Section 3(1) establishes a 60-year limitation period for actions brought by the Crown for the recovery of land, and s. 3(2) provides expressly for the application of s. 15 to Crown land. Implicit in these provisions is that the Crown's title to land may be extinguished and adversely possessed. At the same time, s. 16 exempts certain Crown land from the application of

both ss. 3 and 15. These inconsistent provisions suggest that the *RPLA* consolidates multiple layers of legislative logic that lack a harmonizing principle to bring them into coherence (see, generally, Mew, Rolph and Zacks, at § 12.01; Lee, at pp. 29-30).

[161] Similar observations may be drawn when the *RPLA* is considered within the broader statutory landscape governing real property in Ontario. Section 51 of the *LTA*, provides a good example. That provision states that, with some exceptions, no title to registered land may be acquired by adverse possession after registration. The *RPLA*, however, makes no reference to registration status, nor does it qualify the application of its extinguishment provisions, including ss. 4 and 5, on that basis. These statutes intersect in nuanced ways but contain no harmonization mechanisms (see B. Bucknall, "Limitations Act, 2002 and Real Property Limitations Act: Some Notes on Interpretative Issues" (2005), 29 *Advocates' Q.* 1, at pp. 8-9; V. Di Castri, *Registration of Title to Land* (loose-leaf), at § 18:79). The *Public Lands Act*, R.S.O. 1990, c. P.43, governs land held by the Crown in right of Ontario, and expressly bars the acquisition of any interest in such land by adverse possession or prescription. Notably, the *Public Lands Act* provides that this bar on adverse possession operates despite any other law "including the [*RPLA*] and any other Act or <u>any common law rule</u>" (s. 17.1(1)). Not only does this language sit in apparent tension with the *RPLA*, it also contemplates the continued application of the common law to interests that arise by adverse possession. This reflects a broader pattern of statutory fragmentation and supports the conclusion that the *RPLA* was not designed to function as a comprehensive or exclusive code (Lee, at pp. 29-30 and 32). Rather, it presumes a legal environment in which its provisions operate in parallel with, and are shaped by, other regimes, including the common law

(Q. M. Annibale, *Municipal Lands: Acquisition, Management and Disposition* (loose-leaf), at § WP:5.50).

[162] This context frames the interpretive posture with which courts must approach the *RPLA*. Unlike the current *Limitations Act, 2002*, which emerged from a sustained modernization initiative (Lee, at pp. 29 and 32), the *RPLA* inherited an amalgamation of provisions that were preserved without substantial legislative revision (Mew, Rolph and Zacks, at § 12.01). The *RPLA* contains no preamble or interpretive clause, nor does it expressly articulate an overarching purpose. Far from being a complete code reflective of a deliberate legislative intent, then, the *RPLA* appears instead to be more of a "patchwork quilt of disparate enactments" (§ 1.02) that was constructed in fits and starts, and over long periods of time.

[163] Section 16 is a case in point. As canvassed above, s. 16 consolidated multiple protections enacted by the legislature in the early 20th century against extinguishment and adverse possession. The decision to expressly protect highways and unopened road allowances arose in reaction to, and alongside, developments in the common law. The omission of parkland from s. 16 does not reflect a necessary choice by the legislature to deny further protections should they emerge under the common law. To the contrary, the fact that the impetus for legislative intervention in 1922 appears to have been in response to the evolution of the case law would suggest that s. 16 developed alongside, and not separate from, the common law. Thus, while a nominal purpose may be gleaned with respect to s. 16 — in that it sets aside certain lands as immune from extinguishment and adverse possession — the logic that

underlies how those lands were identified reveals an understanding that s. 16 will operate alongside the common law.

[164] On that basis, I respectfully disagree with the view that the legislative evolution of s. 16 reflects a deliberate and concerted process to displace or oust the common law as it applies to municipal parkland. There is no express direction one way or the other, and I see no sign of a legislative design from which to infer that silence in respect of municipal parkland reflects a deliberate intention. While the legislature may have introduced exemptions for specific categories of land — such as Crown waste land, vacant land, and public highways — over time, nothing suggests that the legislature was simultaneously seeking to exclude municipal public land from any common law protections. It simply did not provide statutory immunity to such lands.

[165] Section 16 is best understood as a provision that introduced specific statutory exemptions that continue to operate within the broader framework of the common law. As the intervener City of Ottawa notes, s. 16 went beyond the common law in some respects, most notably by exempting vacant Crown land and unopened road allowances from claims for possessory title, but there is no indication that it was intended to displace other settled doctrines, such as dedication (I.F., at paras. 24-25). This is consistent with the legal commentary suggesting that, where legislation does not expressly displace common law principles, it should be read in light of the legal framework within which it was enacted (Sullivan, at §§ 15.05[1] and 17.01.Pt1[4]-[5]).

[166] Where legislation is silent, an intention to displace existing common law principles cannot be presumed, particularly in the absence of clear statutory language or a formulation that, by necessary implication, suggests otherwise (Sullivan, at § 15.05[1]; see *Basque*, at para. 49, citing *D.L.W.*, at para. 21; see also *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306, at para. 36). This understanding aligns with the view, reflected in both judicial and academic commentary, that the *RPLA* operates in tandem with, and does not preclude, the continued operation of common law principles. Whether the omission of municipal parkland reflects legislative intention or historical contingency is a question that must be approached through that broader lens. It is to that relationship between the statute and the common law that I now turn.

V. Discerning the Relationship Between the Common Law and the *RPLA*

[167] As I have said, when read in its breadth and nuance, the jurisprudence supports Sossin J.A.'s recognition of the distinct character of municipal public lands in the context of adverse possession. In my view, that body of case law reflects a settled and intelligible principle: land that is set aside by a municipality for the use or benefit of the public as a park should be treated as presumptively in use by the public and, on that basis, shielded from adverse possession. To overturn this presumption, a claimant must show that the municipality has changed the vocation of the land from that designated for public use as a park, or has actual or constructive knowledge of — and has thus acquiesced to — its private use.

[168] Nothing in the text of s. 16, or the *RPLA* more broadly, suggests a legislative intent to oust the common law's public benefit test. While the text of s. 16 does not offer a clear answer, its context and purpose reflect a recurring legislative concern with safeguarding lands essential to public infrastructure and civic development, not one that excludes the possibility of other common law protections. It follows that there is no discernible legislative intent to displace the common law or render all unenumerated public lands vulnerable to extinguishment and adverse possession of title.

[169] The parties focused much energy on the question whether the *RPLA* constituted a complete code for adverse possession, and in particular whether that meant that the list in s. 16 was a necessarily closed one. But whether the legislature intended s. 16 to be part of a complete code or not, the real question is whether the statute ousted the common law for other categories of public land, expressly or by necessary implication. In my view, much of the law surrounding adverse possession remains anchored in the common law; both the appellants and the City acknowledge that the traditional qualities of possession come from the common law, not from the statute.

[170] As the intervener Attorney General of British Columbia helpfully submitted, "the RPLA need not constitute a complete code to have the effect of limiting or displacing the common law" (I.F., at para. 37). The key is discerning legislative intent to subject municipal public land to adverse possession based on a choice not to include it on the list of exempted property in s. 16. I agree with the appellants: should

legislative intent be that the common law is ousted, as opposed to modified or understood to coexist with statute, that intent must be respected by the courts (A.F., at para. 17; see also *Mowatt*, at para. 27, per Brown J.).

[171] I agree too that courts should avoid deciding matters in a way that would render any part of the *RPLA* meaningless, which could be understood as indirectly transgressing legislative intention. The Attorney General of British Columbia asks what purpose would remain for s. 16 in respect of municipal land if all municipally owned land were exempt from adverse possession.

[172] The answer in this case is plain. Justice Sossin did not decide that all municipally owned land was exempt or immune from adverse possession. Instead, he recognized the common law understood that a category of municipal land, and in particular the parkland in this case, should be treated not as immune but as presumptively shielded from adverse possession where it is designated for the benefit and use of the public. Moreover, drawing from the cases, he explained the basis upon which the presumption could be overturned by claimants like Mr. Kosicki and Ms. Munro. His interpretation is fully compatible with s. 16 of the *RPLA*. Under the public benefit test for municipal parkland as explained by Sossin J.A., it remains possible to acquire the public property in question, while the same cannot be said of the highways, wasteland or other categories of public land for which s. 16 of the *RPLA* provides complete immunity from adverse possession.

[173] Finally, I agree with the City that an assessment of whether the public benefit test for municipal land as reframed by the majority in the Court of Appeal is consistent with legislative intent cannot ignore other provisions of the *RPLA*. The "dispossession or discontinuance of possession" of the owner of land referred to in s. 5(1) of the *RPLA*, for example — the provision that triggers the commencement of the limitation period under s. 4 — is not defined in the *RPLA*, and the relevant elements of adverse possession have been developed by the courts (*Mowatt*, at paras. 17-18). Not only is the public benefit test spoken to by Sossin J.A. compatible with s. 16, it is also consonant with what constitutes dispossession in circumstances in which the nature of the land — here municipal parkland — cannot be ignored.

[174] I would respectfully conclude that the position most consistent with both the jurisprudence and the legislative context is that the public utility test at common law remains operative alongside the *RPLA*. The next step, then, is to determine whether, on the facts, the City has actual or constructive knowledge of the private use of the land at issue and acquiesced thereto.

VI. Application

[175] It is true that Mr. Pawel Kosicki and Ms. Megan Munro, and their predecessors, possessed the disputed land for a period of time that would have given rise to acquisition by them by adverse possession, if the land had been owned by a private landowner rather than the City as parkland. However, in light of the fact that the *RPLA* has not displaced the common law in respect of the matter at the heart of this

appeal, the question becomes whether the disputed land satisfies the public benefit test. In other words, was the disputed land designated for the public benefit and, if so, has the City acknowledged or acquiesced to its use by a private landowner, thereby overturning the presumption that the disputed land is parkland held for the use or benefit of the public?

[176] Even if the parkland is partially shielded from adverse possession pursuant to the common law rule as reframed by the majority judges below, the appellants argue that the City cannot oppose their claim for adverse possession because, by its conduct, the City was on notice of their possession and did nothing to assert their title to the land during the limitation period. The appellants say that the character of their adverse use was open, notorious, without permission (and in this sense "adverse"), continuous, exclusive and peaceful for the whole of the statutory period. This was enough to put the City on notice but it failed to assert its rights.

[177] The City answers that it had no knowledge of the appellants' adverse possession and it would be unfair to impute knowledge to them. "The nature of municipal parkland", says the City, "is such that a municipality cannot monitor it for adverse possessors in the way a landowner is both expected and able to monitor private property" (R.R.F. (Amended), at para. 8).

[178] The appellants say that the City had notice of a survey that recorded their fence, dealt with a neighbour who had a similar problem, and willingly collected

property taxes from them on the disputed land. It would be unfair to allow the City to claim that it had no proper notice of the appellants' adverse possession.

[179] I recognize, as the authors of *Ziff's Principles of Property Law* have written, that in respect of a claim brought by a possessor against a private landowner, "the owner need not actually be aware that an adverse claim is afoot. Constructive notice will suffice. To use language now found in relation to the law governing limitations generally, the acts of the squatter must be discoverable" (p. 171).

[180] In my view, in connection with a claim for adverse possession against a municipality for parkland that is held for the benefit or use of the public, the claimant must bring strong evidence of notice or constructive notice to succeed. Given the nature of the land and the difficulty in monitoring its use, the notice requirement from the general law of adverse possession must meet a higher bar than that faced by private landowners before the presumption to which Sossin J.A. alluded is rebutted given the public interests at stake.

[181] Certainly, if the municipality knows of the presence of the squatter and does nothing, this will generally be enough to commence the limitation period. Justice Sossin left open the possibility that the municipality could, "with full knowledge", acknowledge or acquiesce to the use of the land for the benefit of private landowners (para. 42). The City argues that actual knowledge is required in all cases and that it is absent here.

[182] I would not impose a rule that actual knowledge by the municipality is required in all cases. There will be circumstances in which even a municipality with the onerous task of monitoring extensive public land will fairly be considered to be on notice in the absence of actual knowledge, and that its inaction can constitute acquiescence to private use.

[183] It is, in my view, appropriate to say that the evidence of constructive notice that the claimant must bring to overturn the presumption must be compelling. In order to demonstrate that the adverse possession was open and notorious, given the vast territory the municipality must monitor to discover adverse possessors, the possession must be itself strong to justify a finding of constructive notice. Again, the authors of *Ziff's Principles of Property Law*, speaking of private landowners, write that "[t]he adverse possessor must send out a clarion call to the owner who, if listening, should realize that something is awry" (p. 170). In order to justify the dispossession of municipal parkland set aside for the benefit of the public, that clarion call must be loud enough to attract the attention of the municipality, with its responsibility for the whole territory, and signal that a private interest seeks to deprive the municipality of a collective benefit.

[184] How should these principles apply in this instance?

[185] I pause here to underscore that the evidence on the record points to the administrative burden on the City of monitoring against claims based on adverse possession if parkland is not recognized as land presumptively set aside for the benefit

of the public. This remains true notwithstanding the limited scope for recognizing crystallized claims for adverse possession against registered land under s. 51(2) of the *LTA*. As the City says, whether the appellants' right had crystallized prior to land title conversion "is the question at issue" (R.F, at para. 127). In affidavit evidence, Mr. Ronald Ro, a City manager, describes the municipality's real estate portfolio as "one of the largest and most complex . . . in Canada" (A.R., vol. II, tab 12, at para. 3). He explains that, given the size of this portfolio, there are likely "many City-owned parcels of land across the City that are used and/or enclosed by private property owners of which the City has no active knowledge" (para. 31). Like the appellants' land, those parcels could be the subject matter of adverse possession claims notwithstanding the *LTA*. Whether that land is shielded from crystallized possessory claims remains an ongoing concern for the City.

[186] On the facts of this case, the disputed land was acquired and designated for the benefit of the public as early as 1958. This designation was constant and in fact reinforced by the City's Official Plan, published in 2003, and subsequent zoning by-laws. In addition, the disputed land was registered under the *LTA* in October 2001. Section 51(1) of the *LTA* operates to preclude the establishment of adverse possession after the date of registration, yet s. 51(2) preserves claims which have matured before then. As a result, to succeed, the interests in the disputed land must have crystallized before 2001. As I will explain, there is no evidence of any action by the City that served to alter the public nature of this land. Nor is there evidence to meet the high bar to establish knowledge, actual or constructive, that the City acquiesced to its private use

before October 2001. As such, the disputed land retains its public character and remains insulated from the appellants' claim of adverse possession.

A. *The City's Designation of the Land for the Benefit of the Public*

[187] The disputed land was expropriated for conservation purposes in 1958 by a public authority established by the province at the behest of several municipalities, and was subsequently made into a public park (Sup. Ct. reasons, at paras. 17-28). The City's Official Plan, drafted in 2003, designates the disputed land as part of the City's Green Space System, where it is classified as part of the Parks and Open Space Areas category. Development is generally prohibited on land designated as such, except for recreational and cultural facilities, conservation projects, cemetery facilities, public transit and essential public works and utilities. Moreover, pursuant to City policy, no City-owned land in the Green Space System may be sold or disposed of.

[188] The City's zoning by-law was enacted in 2013. Whereas the Official Plan sets out the City's policies and vision for its land use, the zoning by-law implements the plan by prescribing specific and legally enforceable requirements for land use and development. Under this zoning by-law, the disputed land is designated as "Open Space — Natural Zone (ON)". The purpose of the ON zone is to conserve areas such as ravines and waterways that are part of the natural system.

[189] There is no indication in the record that the City has ever rezoned the disputed land or set it aside for different purposes. Therefore, the City's Official Plan

and its zoning by-law illustrate its sustained designation by the City as for the benefit of the public as part of Étienne Brûlé Park. Its zoning as such not only reflects the City's intent to devote the land to a public purpose, but can also be understood as an explicit safeguarding against capture or development by private possessors.

[190] At the hearing, the situation of the appellants' neighbour, Ms. Marie Turek, was raised to suggest that, in fact, land may be adversely possessed notwithstanding the purported purpose for which they are zoned. In 2013, the City consented to Ms. Turek's claim of adverse possession of certain lands abutting the parkland (Sup. Ct. reasons, at para. 55; C.A. reasons, at para. 43). At the Court of Appeal, the City expressed in oral submissions that consent to this declaration may simply have been an error, based on the mistaken belief that this parcel had been zoned for residential use when the land was conveyed to the City's predecessor, the Borough of York (C.A. reasons, at para. 43). Indeed, the affiant Jane Weninger confirmed that the designation for Ms. Turek's parcel was in fact Green Open Space District (G), which was in force until 2013 (R.R., tab 2, at para. 19). Therefore, the dispossession that occurred in Ms. Turek's case was not consistent with the City's public use designation. Though it may be afforded a measure of finality, the City's mistaken decision to consent to Ms. Turek's claim cannot bind the City with respect to future claims of adverse possession.

B. *The 1971 and 2007 Surveys Did Not Amount to Acquiescence*

[191] The appellants submit, additionally, that a 1971 survey deposited with the land registrar depicted a fence which enclosed the disputed land, arguing that the City's inaction in response to its presence on the survey amounts to knowing acquiescence. Relatedly, in oral submissions before this Court, the issue of the City's By-law No. 1021-2007 was raised. That by-law refers to a 2007 survey in which that fence is also noted. It was suggested that the existence of both the 2007 survey and its reference in the by-law indicate that even if the City was not actually aware of the appellants' private use of the disputed land, it should have been. In other words, even if there was no actual knowledge that could support an allegation of acquiescence, there may be a case for constructive knowledge.

[192] The mere fact that the fence in question was noted in the surveys cannot, in my view, resolve the public benefit test in favour of the appellants. I say this, respectfully, for different reasons than the application judge, who arrived at the same conclusion but from the premise that the appellants' possession was not in good faith (para. 77). Rather, my conclusion is grounded on the fact that the appellants' argument advances a view of constructive notice that is inconsistent with the realities of municipal management of public property. The affiant Suzanne Coultes confirms that given the size of the City's real estate portfolio of over 8,000 hectares of parkland, "there can be challenges administering parkland and accounting for every square metre of it" (R.R., tab 1, at para. 19). One cannot therefore fairly impute knowledge to the City based on the mere existence of a survey without further evidence.

[193] It must be recalled that the burden to prove that the City acknowledged or acquiesced lies with the appellants. Without more, the mere existence of a survey with a subtle notation indicating the existence of a fence around the disputed property will not suffice to prove actual or constructive knowledge, and cannot be relied upon to strip the land of its public character. To hold otherwise would effectively require municipalities to scrutinize every detail of every survey, a standard not grounded in the realities of municipal property management.

[194] As counsel for the City noted at the hearing, the circumstances of this appeal can be compared with the facts in *Teis*. In that case, the Court of Appeal noted that the chief administrative officer with the municipality had become aware of the private use at issue. In a memorandum to the municipality's director of culture and recreation, the officer requested that the director "inform the farmer who is occupying 5 metres of our property . . . to stop using the public land" and stated that "if this man can get 10 years of unobjected occupancy from the Town, he might be in a position where we could not actually get him off our property" (p. 219). The director failed to do so. Thus, in that case, evidence existed to indicate that an official acting on behalf of the municipality and with the requisite authority to enforce, or cause the enforcement of, the municipality's title knew of the disputed area's character as municipal public land as well as of its private use. While I would not suggest that this is the standard that must be met to establish knowledge, I draw this example to illustrate the absence of any evidence, in degree or in kind, of any such knowledge in the case at bar.

[195] By contrast, in this case, the application judge held that there was "no evidence that the City was aware of the lands being public" to begin with until the application underlying this appeal was filed (para. 54). There is no reason to interfere with this finding. The lack of evidence as to how and by whom the survey was used means the presumption of public use is not rebutted and the disputed land remains shielded from adverse possession (transcript, at pp. 79-80).

[196] It bears noting here that the 1971 survey is the only evidence tendered that predates the 2001 conversion of the disputed lands to the land titles system. While s. 51(2) of the *LTA* preserves mature possessory claims predating conversion, the tendered evidence is insufficient to support the conclusion that the appellants' title matured prior to that date.

[197] In support of their argument, the appellants also point to the City Council's reference to a 2007 survey noting the fence in the City's By-law No. 1021-2007. Due to the conversion to the land titles system in 2001, whether this survey or the reference in this By-law can sustain a contrary conclusion need not be settled in the context of this appeal. Whether or not the City ought to have become aware of the notation made elsewhere on the survey to mark the fence at issue does not resolve the matter given that the issue arose after 2001. Ultimately, in my view, the appellants' evidence is insufficient to establish actual or constructive knowledge or notice of the use of this land, in order to overcome the presumption protecting the disputed land.

C. *Actual Use Is Not Determinative in the Present Appeal*

[198] Relatedly, the appellants argue that the disputed land was not actually "used" as a park (A.F., at para. 12). The application judge found that the installation of a chain link fence effectively kept the public from using or accessing the disputed land since at least 1971 (para. 50). The appellants are operating on the basis of settled expectations that they may continue possessing the disputed land as part of their backyard.

[199] The response to this argument is that the settled expectations of private users cannot override an otherwise untainted designation of land to the public benefit, which grounds a presumption of use, especially when this purported reliance can be traced back to a unilateral act by a private claimant. There is something inherently incongruous in invoking a settled expectation of private entitlement where that expectation was only made possible by the claimant's exclusion of the public from land designated for their benefit. This tension between private acts imposing exclusivity and land held in trust for the public justifies a more stringent approach in the public context, where the law presumes against dispossession absent clear and compelling evidence of municipal acquiescence. And it is for this very reason that the public benefit test as refined by Sossin J.A. is not premised on proof of use, but on proof of designation, from which use is presumed.

[200] In this light, Mr. Kosicki and Ms. Munro argue that they had a settled expectation that the disputed land would continue to form part of their backyard based on their possession of the property and the City's inaction, notwithstanding constructive notice of their presence. Nonetheless, the onus rests with them to

demonstrate that this sufficed to show the City acknowledged or acquiesced to that expectation. This is not the case here. If anything, the City's zoning choices reflect a continued commitment to the disputed land's public character through its conservation and designation as a park. As canvassed above, neither the existence of the 1971 and 2007 surveys, nor the City's subsequent choices in resolving a similar dispute with the appellants' neighbour, is sufficient to meet the high evidentiary threshold necessary to establish the actual or constructive knowledge necessary for their adverse possession claim to succeed.

D. *The Payment of Taxes Is Not Determinative*

[201] A final point in respect of the City's purported acquiescence levelled by the appellants is that the City collected realty taxes on the disputed land until 2020 (A.F., at para. 10). This fact does not necessarily displace the land's designation for the public benefit, nor does it necessarily amount to acknowledgment or knowing acquiescence. While, depending on the specific factual context, taxation could form part of a broader evidentiary matrix capable of rebutting the presumption, this will not be the case in all circumstances. The difficulty in this case is that the record contains no such broader context that would sustain the appellants' claim. I note in particular that the appellants did not establish any payment of taxes prior to their acquisition of the disputed lands in 2017, well after conversion to the land titles system in 2001. As a result, like the 2007 survey and bylaw, the payment of property taxes by the appellants could not establish constructive or actual knowledge on the part of the City such that the appellants' claim matured prior to 2001.

[202] In *Lake of Bays (Township) v. 456758 Ontario Ltd.*, 2005 CanLII 23096, a similar set of circumstances arose before the Ontario Superior Court of Justice, where a private landowner argued that the payment of taxes meant that the land could not have been dedicated to public use. The application judge concluded that the payment of taxes cannot "take back what had been previously been given away" (para. 27). Put differently, once land is designated for such use, private acts cannot alter its essential character. It remains public, unless the City decides, acknowledges, or acquiesces otherwise.

[203] Although the payment of taxes is not, by itself, determinative, I acknowledge that its continued collection over many years may understandably give rise to a perception of unfairness. To remedy the taxation issue and in light of the observation made by the City at the hearing, I would reserve the appellants' rights to claim taxes paid to the City under a mistake of fact in respect of the disputed land. Although the appellants enjoyed the disputed property since their arrival on it in 2017, at the hearing, counsel for the City agreed that there is a "sense of unfairness if somebody has paid tax on something [that] wasn't actually part of their property" (transcript, at p. 53). The City acknowledged that any perceived unfairness arising out of mistaken taxation can be dealt with separately.

E. *Crystallization Was Not Possible*

[204] Another argument raised by the appellants is that their interests in the disputed land crystallized on the date title was converted under the *LTA*. Therefore,

notwithstanding the validity of the public benefit test writ large, their particular parcel would be shielded from its effects. However, the common law rule clarified by the majority below is not, in character, only of prospective application. The very notion that the disputed land was appropriated to a public purpose has existed since at least 1958, when it formed part of a larger tract of land that was expropriated for public purposes (Sup. Ct. reasons, at paras. 16-18). Since that date, there is no evidence that the City took any action to shed the disputed land of its public nature or render it susceptible to private acquisition. To the contrary, the affidavits of both a Senior Project Manager and Senior Planner of the City demonstrate the myriad of ways in which the City sought to affirm the public nature of the disputed land through zoning and land planning.

[205] At the hearing, counsel for the appellants agreed that if parkland is excluded from the applicability of the *RPLA*, there would be no crystallized right (transcript, at pp. 29-30). In October 2001, the city lands, which include the disputed lands, were converted to the land titles system (see C.A. reasons, at para. 73). As of that date, the land became immune from claims of adverse possession under s. 51(1) of the *LTA*. However, s. 51(2) preserves possessory claims that had already matured prior to the date of conversion. The provision operates to protect crystallized rights that predate registration, but does not lower the threshold required to establish such a right. The statutory immunity is prospective in its effect, and does not extinguish mature possessory rights — but the evidentiary burden to prove such crystallization remains with the claimant.

[206] The appellants rested their claim for adverse possession largely on the 1971 survey, which notes the existence of a fence. Even taking the appellants' position at its highest, that evidence does not demonstrate that a possessory interest had taken shape prior to the land's conversion to the land titles system. As discussed above, the threshold inquiry is whether the presumption that the land is held for a public benefit has been rebutted. That threshold has not been met. In the absence of clear evidence of municipal acknowledgment or acquiescence, the land retains its public character. As previously noted, the possession of the disputed land would have given rise to acquisition by adverse possession if the land had been owned by a private owner. However, the 1971 survey, standing alone, does not demonstrate acquiescence — constructive or otherwise — from the municipality to the private use of the disputed lands. The evidentiary record, even viewed favourably to the appellants, falls short of what is required to rebut the presumption or to ground a claim preserved under s. 51(2) of the *LTA*.

[207] At the end of the day, the appellants have failed, in my respectful view, to meet the requisite threshold on both counts. It bears repeating that the evidentiary bar associated with the inquiry is a high one. Both acknowledgment and acquiescence presume a degree of actual or constructive knowledge of the matter at issue, an element the appellants have not demonstrated. To satisfy the acknowledgment requirement, the appellants must demonstrate that the City has, by an explicit act, recognized the private use of the land. To rely on acquiescence, they must provide evidence that the City, equipped with knowledge — whether actual or constructive — of the private use, tacitly consented to it. The disputed land's public character, reinforced by its

designation within the Green Space System as Parks and Open Space Areas, remains undisturbed.

VII. Disposition

[208] I would dismiss the appeal, with costs.

Appeal allowed with costs throughout, KARAKATSANIS, MARTIN, KASIRER *and* JAMAL JJ. *dissenting.*

Solicitors for the appellants: Fasken Martineau DuMoulin, Toronto.

Solicitor for the respondent: City of Toronto, Toronto.

Solicitor for the intervener Attorney General of Ontario: Ministry of the Attorney General, Toronto.

Solicitor for the intervener Attorney General of British Columbia: Ministry of the Attorney General of British Columbia, Victoria.

Solicitor for the intervener City of Surrey: City of Surrey, Surrey.

Solicitors for the intervener Advocates for the Rule of Law: McCarthy Tétrault, Toronto.

Solicitors for the intervener City of Ottawa: Gowling WLG (Canada), Ottawa.