Public land, private boundaries: Adverse possession and the reassertion of legislative supremacy in Kosicki v. Toronto (City)

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Introduction

Few decisions in recent times have meaningfully challenged long-held assumptions about the security of public land as *Kosicki v. Toronto (City)*, 2025 SCC 28 ("*Kosicki*").[1] For generations, municipalities, conservation agencies and the provincial Crown have acted on the assumption that once land had been expropriated or otherwise dedicated for public use, it was effectively immune from private use through adverse possession. The Supreme Court of Canada's ruling in *Kosicki*, however, erodes that assumption, holding that no such immunity exists unless the Legislature has expressly provided it.

In doing so, the Court has re-established a fundamental principle of Ontario's property law regime: that the *Real Property Limitations Act*, R.S.O. 1990, c. L.15 (the "RPLA")[2] operates as a comprehensive statutory code regulating the extinguishing and acquisition of title by possession. To all members of the expropriation community, including lawyers, appraisers and municipal authorities, *Kosicki* is more than a case about adverse possession. It serves as a measured reminder about the long-term management of public holdings and the limits of judicial policymaking in the presence of explicit statutory language.

Factual and procedural background

In *Kosicki*, the lands in dispute originated from a 1958 expropriation by the City of Toronto's (the "City") predecessor, undertaken for conservation purposes and later incorporated into what became municipal parkland. In the ensuing decades, a chain-link fence was erected, enclosing a portion of the parklands and effectively converting it into part of an adjoining private backyard. Successive owners, including the plaintiff, Mr. Kosicki, treated the enclosed area as a part of their private property, exercising

exclusive control over the fenced area. When the City later made efforts to reassert control over the lands, Mr. Kosicki applied for possessory title under the RPLA, asserting that the City's title had been extinguished by adverse possession.

At first instance, the trial court rejected the claim, holding that municipal land, like Crown land, is generally regarded as implicitly immune from adverse possession as a matter of public policy.[3] Subsequently, the Ontario Court of Appeal affirmed that ruling, articulating what came to be known as the "public benefit test," a doctrine under which public land devoted to community use could not be lost through governmental inaction.[4] In dissent, however, Justice Brown cautioned that this approach amounted to a judicially crafted amendment of the RPLA, noting that the statute's text contained no provisions for implied exemptions.[5]

The lower court's reasoning set the stage at the Supreme Court of Canada for a clear examination of legal principle: could municipal parkland, once expropriated for public purposes but left unattended, fall within the reach of private possession under the RPLA?

The statutory framework: *Real Property Limitations Act*

The RPLA provides the time periods under which an owner may bring an action to reclaim ownership of land. Under Section 4, "no person shall make an entry or distress, or bring an action to recover any land," after ten years from the date on which the right first accrued, and section 15 provides that once the period of limitation has ended that, "the right and title of the person … shall be extinguished".[6] Thus, the statute does more than bar a remedy; it may also operate to transfer ownership to the adverse possessor.

Section 16, however, carves out a narrow list of exempt lands, such as lands in the possession of His Majesty, public highways, and lands controlled by government institutions (railways, universities and the like).[7] Crucially, municipal parkland is not enumerated among them. Although the shift of most Ontario lands into the Land Titles system has reduced the modern scope of adverse possession, a substantial portion of public holdings originate from pre-conversion acquisitions and may therefore continue to be governed by the RPLA regime.

This absence lay at the heart of *Kosicki*. The RPLA's silence on municipal parkland from its list of exemptions casts doubt on the long-accepted view that such lands were immune from adverse possession. It was that uncertainty that ultimately prompted the Supreme Court's intervention.

The Supreme Court's analysis

Despite long-standing jurisprudence suggesting that municipally owned parkland was immune from adverse possession, the Supreme Court ultimately allowed the appeal. In a notable departure from precedent, the Court rejected the prevailing assumption that parkland was inherently protected from private claims of possession.

Writing for the majority, Justice O'Bonsawin, (Wagner C.J, and Co Côté, Rowe, and Moreau JJ. concurring) adopted a textual and structural approach. She held that the RPLA represented "a complete code governing the acquisition of title by possession" and that "courts are not free to graft new common-law immunities onto a regime the Legislature has deliberately confined to specified categories".[8] The majority's decision therefore rejected the "public benefit test" established by the Ontario Court of Appeal, holding that it constituted impermissible judicial intervention:

> "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".[9]

The Court stressed that adverse possession, while commonly considered to be an undesirable practice, plays a systemic role in that it provides for the finality of land titles and is based on the conscientious application of land management. Thus, extending immunity beyond the explicit categories identified in section 16, the majority reasoned, would invite uncertainty and undermine the uniformity the RPLA was intended to establish. Legislative silence, the majority determined, cannot effectively mean an unarticulated omission.

In dissent, Justices Karakatsanis, Martin, Kasirer, and Jamal took a more purposive approach. In their view, the RPLA is not a deliberate or comprehensive codification of adverse possession law, but instead a patchwork of limitation provisions that coexist with longstanding common-law principles.[10] The dissent reasoned that parkland was presumptively "in use" by the public, and thus incapable of being possessed adversely, much like highways or public squares.[11] Recognizing such immunity, they reasoned, aligns itself to the constitutional significance of shared ownership of public places and deters private appropriation through neglect or administrative oversights.[12]

The dissent therefore favoured the maintenance of the "public benefit test", affirming that land dedicated to community use should not lose its public character merely because a fence was left standing or a by-law was ignored.

Interaction with expropriation law and the public interest

The *Kosicki* decision has significance beyond the realm of private property disputes. For the expropriation community at large, its practical consequences are focused but real. The lands under consideration were not acquired through voluntary conveyance but taken through expropriation – an assertion of governmental power validated by necessity, and enforced, in theory, by the pursuit of permanent public good. Historically, this has been regarded as a process of translating private ownership into public trust, where land acquired for civic purposes is withdrawn from the marketplace and vested in collective care.

However, *Kosicki* highlights a vulnerability in that assumption. The *Expropriations Act, R.S.O.* 1990, c. E.26, vests title in the expropriating authority, "free from all estates, rights, charges or encumbrances," and awards compensation to the dispossessed owner pursuant to section 13.[13] But the Act does not address the post-vesting

management of such lands. It does not offer any express protection against the use of limitation periods, and it does not provide that any land, once expropriated, will continue to be permanently “in use” for public purposes. Once acquired, it is nothing but “land” and, absent continued occupation or active management, it could be within the scope of the RPLA regime.

This silence of the *Expropriations Act* proved significant. The Supreme Court declined to accept the argument that the public character of any expropriated land provides its own immunity. Justice O’Bonsawin’s reasons make a return to the principle that the durability of public ownership is a matter of statute, not judicial implication. The Court rejected the notion that the public purpose underlying an expropriation automatically translates into a continuing public use sufficient to defeat adverse possession. In effect, the decision signals that public status alone may not safeguard land from the running of limitation periods, and that preservation of title requires demonstrable acts of possession unless the Legislature intervenes.

The bottom-line for expropriation practitioners is clear: land acquired many years ago – whether for transit corridors, flood control, utilities, or parkland – and then left unmanaged, enclosed, or used in a manner inconsistent with public access, may now be vulnerable to adverse possession. Public authorities should undertake visible and ongoing acts of possession through occupation, inspection, or enforcement to stop the statutory clock from running under section 4 of the RPLA. The old principle of indemnity — that no one should be disadvantaged by the state without compensation — paradoxically has its flipside, wherein the state could risk losing land itself through inaction without recourse.

Implications for future action

The policy implications of *Kosicki* are undoubtedly being considered across municipal and provincial agencies. However, the majority’s approach is premised on a straightforward reaffirmation of legislative supremacy — a reminder that Courts will not extend statutory exemptions beyond those the Legislature has expressly provided. While this may enhance statutory clarity, it also creates new considerations for public authorities that few would have anticipated.

It is important to acknowledge that the practical exposure arising from *Kosicki* is not uniform across all public lands. While the transition of most Ontario properties into the Land Titles system has significantly narrowed the availability of adverse possession, the greater risk persists for legacy municipal and provincial landholdings acquired prior to conversion, including older expropriations, dedications and boundary adjustments that were never regularized through title absolute applications.

From a governance standpoint, *Kosicki* underscores the need for a reassessment of record-keeping and property management practices. Public authorities should audit the lands acquired through expropriations or dedications, particularly where boundaries are unclear, access has been informal, or private use has been tolerated. Boundaries once thought to be approximate should now be confirmed, and the character of maintenance and access must be unmistakably public. In practical terms, the onus rests on authorities to demonstrate active oversight, as neglect, over time, may be taken as acquiescence.

Public authorities should consider adopting certain proactive measures to mitigate exposure in the interim. These may include: conducting periodic inspections of lands bordering private parcels; installing or maintaining signage or boundary markers; formalizing access rights or permissions where informal use has developed; reviewing historical plans for irregular boundaries or enclaves; and pursuing title absolute conversions where appropriate. These steps need not be undertaken universally, but targeted action in higher risk areas can materially reduce vulnerability.

While such measures can assist in the short-to-medium term, a more durable solution would require legislative clarification. The Legislature may wish to consider whether section 16 of the RPLA, or a companion amendment to the *Expropriations Act*, should be updated to provide express protection for expropriated lands held for ongoing public purposes. Legislated clarity would better align with public expectations regarding the permanence of public ownership and would relieve authorities of the administrative burden of continuous monitoring to avoid unintended loss of title.

Conclusion

Kosicki represents a meaningful clarification in public property law. It reaffirms the RPLA as a comprehensive statutory code, leaving little room for the judicially created exemptions occasionally made in the name of public policy. Yet, its implications reach far beyond statutory interpretation. For expropriating authorities, the decision serves as a reminder that the right to occupy land carries a continuing responsibility for its stewardship, supported by clear and ongoing acts of possession where required.

Overall, the decision highlights a tension long familiar to expropriation practitioners – that is, the delicate balance between the public purpose and private rights. Whereas in the past, public interests were often thought to insulate public bodies from common property law problems, *Kosicki* emphasizes that they stand on the same legal footing as private landowners unless legislation expressly provides otherwise. In a quiet yet notable manner, the Court has underscored that possession is not merely nine-tenths of the law; without ongoing evidence of control, it may, after sufficient time, become all of it.

Footnotes

[1] *Kosicki v. Toronto (City)*, 2025 SCC 28.

[2] *Real Property Limitations Act*, R.S.O. 1990, c. L.15.

[3] *Kosicki*, at para 10-12.

[4] Ibid, at para 13-15.

[5] Ibid, at para 16.

[6] *Real Property Limitations Act*, R.S.O. 1990, c. L.15, s. 4

[7] Ibid, s. 15

[8] Ibid, s. 16

[9] *Kosicki*, at para 29.

[10] Ibid, at para 93 and 162.

[11] Ibid, at para 92 and 122.

[12] Ibid, at para 116-119.

[13] *Expropriations Act*, RSO 1990, c E.26, **s 13**.

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