

AN INCONSISTENCY IN THE CANADIAN LAW OF ADVERSE POSSESSION?

Jordan English* and Mohammad Jaamae Hafeez-Baig**

INTRODUCTION

In the law of adverse possession, the “inconsistent use test” requires that the adverse possessor’s use of the land be inconsistent with the documentary owner’s present or future enjoyment of land. In English law, the concept was finally buried in 2003 by the House of Lords in *J A Pye (Oxford) Ltd v Graham*.¹ In *Nelson (City) v Mowatt*,² the Supreme Court of Canada held that it formed no part of the law of British Columbia. Notwithstanding that adverse possession in British Columbia was abolished in 1975 by the *Limitations Act*, S.B.C. 1975, c 37, this is a significant development which has ramifications for other Canadian provinces where adverse possession claims are still possible.³ Although the Court did not consider the position in the remaining provinces, we suggest that a similar result would obtain. Using the law of Ontario as a case study, we submit that the existence of the inconsistent use test is itself inconsistent with legal history and principle.

BACKGROUND

Facts

The respondents, Mary and Earl Mowatt, claimed title to a parcel of land located in the City of Nelson, British Columbia (the “disputed lot”), on which they had constructed their home. Their claim was based upon continuous adverse possession of the land from around 1901 by themselves and a number of other families. The Mowatts were the registered owners of a lot adjacent to the disputed lot (the “registered lot”).

Originally, the two lots had been part of a single parcel of land which was owned in absolute fee simple by the Nelson City Land and Improvement Company (the “land company”). In 1920, the land company transferred a parcel of land, including what later became the registered lot, to John Annable. As part of that transfer, the land company purported to dedicate the disputed lot as a road allowance. However, owing to noncompliance with statutory requirements, the dedication was invalid and the effect of this was that the land company remained the owner of the fee simple in the disputed lot. In 1922, Mr Annable transferred a portion of his parcel of land to Herbert Thorpe. This created the registered lot which would eventually come to be owned by the Mowatts.

The land company remained unaware that the dedication of the disputed lot as a road allowance had been invalid. Consequently, in 1929 it notified the Registrar of Companies that it had “disposed of its assets”. In 1930, the land company dissolved and the disputed lot escheated to the Crown in 1930 or 1931.⁴ The result was that until 1930 or 1931 the disputed lot was, at all material times, owned by the land company, and after that it was owned by the Crown.

¹* LLB (Hons I)/BCom (Accounting) (University of Queensland), GDLP candidate (College of Law).

^{**} LLB (Hons I) (University of Queensland), LLM (University of Queensland), GDLP (Queensland University of Technology).

[2003] 1 AC 419.

² 2017 SCC 8.

³ See, eg, in Ontario, the *Real Property Limitations Act*, R.S.O. 1990, c. L. 15.

⁴ There was a dispute before the chambers judge as to whether the land escheated to the Crown on the dissolution of the company in 1930 or one year later in 1931. Nothing turned on the issue.

The Mowatts sought a declaration that the Crown, which held the registered title, was not the owner of the disputed lot and therefore could not have transferred it to the respondent, the City of Nelson (the “City”).⁵

The adverse possession claim

Notwithstanding that adverse possession in British Columbia was abolished on 1 July 1975 by the *Limitations Act*, S.B.C. 1975, c. 37, claims to title acquired by adverse possession before that date remain unaffected and can still be claimed “subject to the ability of the holder of registered title to bring a proceeding enforcing his or her rights within the applicable limitation period”.⁶

The Mowatts claimed that there had been continuous adverse possession of the disputed lot by three successive families beginning as early as 1909. In order to succeed, they needed to demonstrate either continuous adverse possession *as against the land company* for 20 years prior to the disputed lot’s escheat in 1930 or 1931,⁷ or alternatively, continuous adverse possession *as against the Crown* for 60 years prior to 1 July 1975.⁸

The chambers judge⁹ dismissed the action and petition, finding that the Mowatts had not been able to demonstrate continuous adverse possession for either 20 years prior to 1930 or 1931, or for 60 years prior to 1975. His Honour was of the view that the Mowatts could not overcome an “evidentiary gap” in the continuity of possession between 1916 and 1920.

British Columbia Court of Appeal

The Mowatts appealed to the British Columbia Court of Appeal on the grounds that the chambers judge had erred (i) in requiring the Mowatts to establish continuous occupation, as opposed to possession, and (ii) in finding the evidentiary gap between 1916 and 1920. The City contested these grounds of appeal and advanced two further arguments in support of the decision of the chambers judge.¹⁰ First, it argued that the Mowatts had not acquired an interest in the disputed lot when they purchased the registered lot and accordingly, did not have standing to bring the claim. Second, the City argued that the adverse possession claim could not succeed because the Mowatts were unable to demonstrate that their use of the disputed lot (that is, construction and occupation of a home) was inconsistent with the true owner’s intended use of the lot as a road allowance.¹¹ It is the final aspect of the decision which is the focus of this note.

The Court of Appeal accepted the Mowatts’ submissions on both grounds of appeal. At the same time, it rejected the City’s further arguments in support of the decision of the chambers judge. As for the City’s

⁵ They also petitioned for an investigation into their title to the disputed lot. The jurisdiction to investigate fee simple title and make a declaration as to its validity is conferred on the Supreme Court by ss 1 and 2 of the *Land Title Inquiry Act*, RSBC 1996, c 251.

⁶ 2017 SCC 8 at [9].

⁷ See s 16 of the *Statute of Limitations*, RSBC 1924, c 145; 2017 SCC 8 at [10].

⁸ See s 48 of the *Statute of Limitations*, RSBC 1960, c 370; 2017 SCC 8 at [11]. The City had argued that adverse possession was abolished against the Crown on 1 May 1970 by operation of s 6 of the *Land Act*, SBC 1970, c 17. It was ultimately unnecessary for the Court to resolve this point.

⁹ 2014 BCSC 988, 25 MPLR (5th) 79 and 2014 BCSC 2219.

¹⁰ In the Court of Appeal there were actually *three* grounds advanced: 2016 BCCA 113, 83 BCLR (5th) 396 at [43]. However, only two were relied upon in the Supreme Court: 2017 SCC 8 at [13].

¹¹ 2016 BCCA 113, 83 BCLR (5th) 396 at [43].

second argument, while the Court expressed its sympathy for the Mowatts' submission that "construction and occupation of a home on the [disputed lot] clearly was inconsistent with the intention to dedicate the land as a road allowance", it chose instead to resolve the issue on the broader basis that the inconsistent use requirement did not form part of the law of British Columbia.¹² The City appealed to the Supreme Court of Canada.

DECISION

Although the appeal was ultimately allowed by the Supreme Court on the basis that the Court of Appeal had erred in substituting its own findings for that of the chamber's judge, the aspect of the decision that is of most interest is the Court's affirmation that "the law of British Columbia [did] not require the Mowatts to demonstrate their use of the disputed lot was inconsistent with the intended use of the 'true owner'."¹³

The Court (in reasons given by Brown J) began by noting that, as early as 1623 in England, an owner's right to recover possession was subject to a limitation period. Further, it observed that adverse possession had been codified in English law by the *Real Property Limitation Act 1833* (UK) and "received into the law of British Columbia on November 19, 1858 by operation of what is now s. 2 of the *Law and Equity Act*" ([17]). The Court then proceeded to outline the elements of adverse possession. Quoting from Professor Ziff,¹⁴ the Court stated that "the act of possession must be "open and notorious, adverse, exclusive, peaceful (not by force), actual (generally), and continuous".¹⁵

The Court considered whether the inconsistent use requirement, which it traced to the judgment of Bramwell LJ in *Leigh v Jack*,¹⁶ was part of the law of British Columbia. The Court referred to academic arguments against the requirement,¹⁷ and its rejection in English law,¹⁸ but ultimately did not purport to determine whether the inconsistent use requirement *should* be part of the law of British Columbia; rather whether, as a matter of legal precedent, it *was*. It found that the requirement as stated in *Leigh* revived a historical version of the doctrine of adverse possession which had been abolished by the *Real Property Limitation Act 1833* (UK). As a result, the requirement could not have formed part of the law which was received by British Columbia, nor could it be required by the relevant statutes which had essentially reproduced the 1833 English Act. The Court also analysed its decisions in *Dominion Atlantic Railway Co v Halifax and South Western Railway Co*¹⁹ and *Ocean Harvesters Ltd v Quinlan Brothers Ltd*²⁰ and confirmed that neither decision adopted the inconsistent use requirement.²¹

The Supreme Court therefore concluded that the inconsistent use requirement did not form part of the law of British Columbia but noted that:

¹² 2016 BCCA 113, 83 BCLR (5th) 396 at [55].

¹³ 2017 SCC 8 at [2].

¹⁴ Bruce Ziff, *Principles of Property Law* (Carswell, 6th ed, 2014) at 146.

¹⁵ 2017 SCC 8 at [18]. For an Australian exposition of this test in similar terms, see *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464 at 475 (Bowen CJ in Eq).

¹⁶ (1879) 5 Ex Div 264 at 273.

¹⁷ Michael Lubetsky, 'Adding Epicycles: The Inconsistent Use Test in Adverse Possession Law' (2009) 47 *Osgoode Hall Law Journal* 497 at 523-25.

¹⁸ *J A Pye (Oxford) Ltd v Graham* [2003] AC 419 at [45] (Lord Browne-Wilkinson).

¹⁹ [1947] SCR 107.

²⁰ [1975] 1 SCR 684.

²¹ 2017 SCC 8 at [22]-[26].

[w]hether the requirement is properly applicable in other provinces remains an open question subject to examination of their respective legislative histories, the wording of their particular limitations statutes, and the treatment of these matters by the courts of those provinces.²²

COMMENT

The most important aspect of the decision in *Nelson* is the finding that the inconsistent use requirement does not form a part of the law of British Columbia. The decision, in this respect, resolves any uncertainty which may have existed about the test to be applied in cases of adverse possession. However, as we noted above, the Supreme Court left open the question of whether the inconsistent use requirement applies in the remaining provinces of Canada. Nonetheless, the result in this case is consistent with the approach taken in other common law jurisdictions and, we respectfully submit, is the approach that would be taken in the other provinces. Below we explain why the same result would be reached in Ontario.

Although the Court did not purport to determine whether the inconsistent use requirement is necessary or desirable, the decision is not so limited, for two reasons. First, the decision makes clear that to the extent that the requirement has been imported into the provinces in reliance on *Leigh v Jack*, that decision is no longer to be followed. Second, because the requirement was abolished by the *Real Property Limitations Act 1833* (UK), limitation statutes based on that Act (which, as we explain below, is the case in Ontario) are also unlikely, in the absence of other considerations, to support any requirement to prove that the adverse possessor's use of the property is inconsistent with the documentary owner's present and future enjoyment of the land. Far from being neutral and merely descriptive of British Columbia's institutional history, the decision of the Supreme Court strikes at the very foundations of the inconsistent use requirement, namely, the decision in *Leigh v Jack*.

The inconsistent use requirement

The notion that an adverse possessor's use of land has to be *inconsistent* with the rights of the documentary owner (now known as the "inconsistent use test") finds its origins in case law that predates the early nineteenth century. In these cases, courts excluded from the doctrine of adverse possession instances of "non-adverse possession" if the use of the squatter did not conflict with the rights of the documentary owner. In order for possession to be *adverse*, it had to constitute a "disseisin" or an "ouster" (by which the rights of the documentary owner could be taken away).²³ That position was reversed by the *Real Property Limitations Act 1833* (UK),²⁴ which was held to have "done away with the doctrine of non-adverse possession".²⁵ Subsequent decisions confirmed that the relevant inquiry was no longer whether the possession was adverse, but simply whether there was possession for the requisite length of time.²⁶

Regrettably, the inconsistent use test was then revived in 1879 by the decision of the English Court of Appeal in *Leigh v Jack*.²⁷ The plaintiff in that case was the successor in title of Mr Leigh who had, in 1854, conveyed land to the defendant, Mr Jack. To the South was another block of land which was intended by Leigh to be dedicated to the public as streets, although this did not occur. The conveyance

²² 2017 SCC 8 at [27].

²³ See, eg, Martin Dockray, 'Adverse Possession and Intention' [1982] *Conveyancer* 256; *Paradise Beach and Transportation Co Ltd v Price-Robinson* [1968] AC 1072.

²⁴ That Act was later amended by the *Real Property Limitations Act 1874* (UK). Nothing presently turns on those amendments.

²⁵ *Nepean v Doe d. Knight* (1837) 2 M & W 894 at 911 (Denman CJ).

²⁶ *Culley v Doe d. Taylerson* (1840) 11 Ad & E 1008 at 1015 (Denman CJ).

²⁷ (1879) 5 Ex Div 264.

described the land as being bound by the two streets. The defendant subsequently constructed a factory on the land owned by him and placed on the intended streets materials used at his factory to create an obstruction for carts and horses. Later, he fenced in the ends of the intended streets.

The Court of Appeal held that the defendant had not acquired title by adverse possession because his acts were consistent with the intention of Leigh, namely, that the street was to be dedicated to the public as a highway. Bramwell LJ stated that “acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it”.²⁸

Following *Leigh v Jack*, a series of English cases held that, in order for the relevant limitation period to begin, the acts of the squatter had to be inconsistent with the documentary owner’s intended use of the land.²⁹ This gave rise to what became known as the implied licence doctrine, pursuant to which use of land by a squatter which was *not* inconsistent with the intentions of the documentary owner was treated in law as having the implied consent of said owner.³⁰ This doctrine was particularly problematic in cases where the documentary owner did not have an intended use for the land or was reserving it for a future use. In such cases possession “could not be ‘adverse’, because the documentary owner’s present use was not inconvenienced; indeed it could not be inconvenienced because there was no present use for the land, only a future one”.³¹

The implied licence doctrine was subsequently reversed by Parliament.³² The inconsistent use test itself was finally put to rest by the House of Lords in *J A Pye (Oxford) Ltd v Graham*.³³ Lord Browne-Wilkinson condemned the remarks of Bramwell LJ in a passage that is worth setting out in full:

The suggestion that the sufficiency of the possession can depend on the intention not of the squatter but of the true owner is heretical and wrong. It reflects an attempt to revive the pre-1833 concept of adverse possession requiring inconsistent user ... The highest it can be put is that, if the squatter is aware of a special purpose for which the paper owner uses or intends to use the land and the use made by the squatter does not conflict with that use, that may provide some support for a finding as a question of fact that the squatter had no intention to possess the land in the ordinary sense but only an intention to occupy it until needed by the paper owner ... [T]here will be few occasions in which such inference could be properly drawn ...³⁴

The decision in *Nelson* thus brings the law of British Columbia into accord with the English position, and also what appears to be the position in Australia.³⁵ In *Woodward v Wesley Hazell Pty Ltd*, Underwood J considered that even if the cases which had applied the implied licence doctrine were binding on Australian courts “they should no longer be regarded as good law”.³⁶ Similarly in *Monash City Council v Melville*, Eames J said of the rule in *Leigh v Jack*:

²⁸ (1879) 5 Ex Div 264 at 273.

²⁹ *Williams Bros Direct Supply Ltd v Raftery* [1958] 1 QB 159; *Wallis’s Clayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd* [1975] 1 QB 94.

³⁰ See, eg, *Wallis’s Clayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd* [1975] 1 QB 94.

³¹ Peter Butt, *Land Law* (Lawbook Co., 6th ed, 2010) at 907.

³² *Limitation Act 1980* (UK) s 15(6) and Sch 1, para 8(4). These provisions do not, however, prevent the making of a finding of an implied permission “where such a finding is justified on the actual facts of the case”.

³³ [2003] 1 AC 419.

³⁴ [2003] 1 AC 419 at [45].

³⁵ See Peter Butt, *Land Law* (Lawbook Co., 6th ed, 2010) 907; MacDonald et al, *Real Property Law in Queensland* (Lawbook Co., 3rd ed, 2010) at 350-351 [10.410]; Bradbrook et al, *Australian Real Property Law* (Lawbook Co., 5th ed, 2011) at 132-133 [3.105]; Gray et al, *Property Law in New South Wales* (LexisNexis Butterworths, 3rd ed, 2012) at 223-224 [5.107].

[W]here the trespasser had done acts which plainly manifested an intention to dispossess the owner, and where the acts would otherwise lead to the conclusion that adverse possession had been established, the fact that the land was waste land or was set aside for some future public purpose, did not introduce any special rule which gainsaid that conclusion.³⁷

This statement was approved by the Victorian Court of Appeal in *Whittlesea City Council v Abbatangelo*.³⁸ In that case Ashley and Redlich JJA and Kyrou AJA said that there was no separate requirement that the use to which land is put must be inconsistent with the paper owner's present or future use of the land.³⁹ These statements, combined with the significant academic commentary on this issue,⁴⁰ suggest that the inconsistent use requirement forms no part of Australian law.⁴¹

What remains to be seen post-*Nelson* is whether the other provinces will follow suit. Indeed, as the Court acknowledged, the inconsistent use requirement still appears to be a part of the law of Ontario,⁴² Nova Scotia⁴³ and Prince Edward Island.⁴⁴ On the other hand, it is not a part of the law of Alberta⁴⁵ and has been restricted in Newfoundland and Labrador.⁴⁶ Using Ontario as an example, we submit below that the inconsistent use test should be abolished and to the extent that the decision in *Nelson* provides support for this approach, we consider it a welcome development.

The inconsistent use requirement in Ontario

After *Leigh v Jack* was decided, the inconsistent use test was not immediately incorporated into Canadian jurisprudence by the Supreme Court.⁴⁷ It was first applied by Wilson J, delivering the majority opinion of the Ontario of Appeal in *Keefer v Arillotta*.⁴⁸ In that case, a narrow strip of land existed between the properties of the parties. The appellant had a right of way over the strip to the respondent. The use of the right of way changed and it became predominantly used for parking. Wilson J found that this use did not deprive the other party, the documentary owner, of legal title. Her Honour said:

The test is not whether the respondents exceeded their rights under the right of way but whether they precluded the owner from making the use of the property that he wanted to make of it... Acts relied on as dispossessing the true owner must be inconsistent with the form of enjoyment of the property intended by the true owner. This has been held to be the test for adverse possession since the leading case of *Leigh v Jack*.⁴⁹

³⁶ [1994] ANZ ConvR 624 at 627. Cited in Gray et al, *Property Law in New South Wales* (LexisNexis Butterworths, 3rd ed, 2012) at 223-224 [5.107].

³⁷ [2000] V ConvR 54-621 at [34]. Cited in MacDonald et al, *Real Property Law in Queensland* (Lawbook Co., 3rd ed, 2010) at 350-351 [10.410].

³⁸ (2009) 259 ALR 56 at 61 [6(h)]; [2009] VSCA 188.

³⁹ Ibid.

⁴⁰ See footnote 48, above.

⁴¹ Although there is one first instance decision which suggests to the contrary: *South Maitland Railways Pty Ltd* (2009) 14 BPR 26,823; [2009] NSWSC 716 at [17].

⁴² *Elliott v Woodstock Agricultural Society*, 2008 ONCA 648, 92 OR (3d) 711.

⁴³ *Spicer v Bowater Mersey Paper Co.*, 2004 NSCA 39, 222 NSR (2d) 103.

⁴⁴ *MacKinnon, Re*, 2003 PESCAD 17, 226 Nfld & PEIR 293.

⁴⁵ *Lutz v Kawa*, 1980 ABCA 112, 23 AR 9.

⁴⁶ *Maher v Bussey*, 2006 NLCA 28, 256 Nfld & PEIR 308 at [50]-[52].

⁴⁷ A point noted in Michael Lubetsky Lubetsky, 'Adding Epicycles: The Inconsistent Use Test in Adverse Possession Law' (2009) 47 *Osgoode Hall Law Journal* 497 at 512.

⁴⁸ [1977] 13 OR (2d) 680 (CA).

⁴⁹ [1977] 13 OR (2d) 680 (CA) at [42] (citations omitted).

Her Honour's reliance on the inconsistent use test could be understood as a reference to pre-1833 English law, which (as explained earlier) excluded certain acts of "non-adverse" possession from the scope of the doctrine. English law was adopted in Ontario in 1792,⁵⁰ after it split from Quebec in 1791.⁵¹ This can be contrasted with the position in British Columbia, noted by the Court in *Nelson*,⁵² where English law was not received until 1858, after the *Real Property Limitations Act 1833* (UK) had done away with the notion of non-adverse possession. However, as the Court of Appeal acknowledged in *Masidon Investments Ltd v Ham*,⁵³ the language of the *Real Property Limitations Act 1833* (UK) was adopted in the *Limitations Act, 1834* (U.C.), c.1. Her Honour's reliance, as evident from the passage itself, therefore appears to be entirely on the decision in *Leigh v Jack*.

Given the absence of any legislative history that would indicate the pre-1833 position was retained in the law of Ontario, and the fact that the authorities upon which the inconsistent use test is based have now been rejected by English Courts, and implicitly by the Supreme Court, there is good reason to believe that if the matter reached the Supreme Court again, it would follow the spirit of *Nelson* and abolish the inconsistent use requirement. This is further reinforced by the fact, noted by the Court in *Nelson*, that the Supreme Court has never expressed or applied the inconsistent use requirement.⁵⁴

There are good reasons for abandoning any requirement that the possession of a squatter be inconsistent with the documentary owner's intended use of the land. For one, as Lord Browne-Wilkinson observed in *J A Pye (Oxford) Ltd v Graham*, the notion that "the sufficiency of the possession can depend on the intention not of the squatter but of the true owner is heretical and wrong".⁵⁵ Moreover, the inconsistent use test results in an anomaly where "investors with plans to develop land in the future are, vis-à-vis an adverse possessor, in a better position than an owner who is making present use of her land".⁵⁶

To illustrate the absurd result of applying the inconsistent use requirement, one need look no further than the decision of the Ontario Court of Appeal in *Masidon Investments Ltd v Ham*.⁵⁷ In that case, the respondent owned land and held it for the purpose of selling it for development in the future. Meanwhile, the appellant operated an airport consisting of two grass runways on the land. The construction of the runways required extensive ditching, grading and dozens of truckloads of fill. He maintained the runways by cutting the grass regularly and adding fertilizer, loam and seed. The appellant had also constructed a building on the disputed property which operated as an aircraft hangar. He used an area of approximately five to seven acres as a parking space for aircraft and also had a parking lot for cars. The airport was used by the appellant and his friends. The remainder of the property was used by his family for recreational purposes. He had built a dam in a corner of the property and constructed a driveway. Further, one area of

⁵⁰ By virtue of *An Act to repeal certain parts of an Act passed in the Fourteenth Year of His Majesty's Reign, intituled an Act for making more effectual Provision for the Government of the Province of Quebec in North America; and to introduce the English Law, as the Rule of Decision in all matters of controversy relative to Property and Civil Rights*, S.U.C. 1792 (32 Geo. III), c. 1.

⁵¹ By virtue of the *Clergy Endowments (Canada) Act 1791* (31 Geo 3 c 31), commonly known as the *Constitutional Act 1791*.

⁵² 2017 SCC 8 at [17].

⁵³ (1984) 45 OR (2d) 563 (CA).

⁵⁴ 2017 SCC 8 at [26].

⁵⁵ *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 at 438 [45].

⁵⁶ See Larissa Katz, 'The Moral Paradox of Adverse Possession: Sovereignty and Revolution in Property Law' (2010) 55 *McGill Law Journal* 47 at [28], although we note that Katz advocates for the adoption of the inconsistent use model as "providing a conceptual basis for distinguishing between owners and adverse possessors" and a "theoretical basis for overcoming the moral paradox of deliberate adverse possession".

⁵⁷ (1984) 45 OR (2d) 563 (CA).

the property was fenced in for pasturing horses and wood was taken from the woodlot for heating his residence.

Despite these extensive activities on the land, the Court held that the claim for adverse possession was not made out as “the use made of the lands by the appellant was not inconsistent with that of the respondents”. The fact that the land was being held for development meant that the acts of the appellant did not interfere with their intended use of the land during the running of the limitation period. The Court cited in support of its conclusion the 4th edition of *Megarry’s Manual on the Law of Real Property* which, at that time, read “[i]f the owner has little present use for the land, much may be done on it by others without demonstrating a possession inconsistent with the owner’s title”.⁵⁸ Indeed, it has been suggested that “it might well be that land being held for development can never be subject to adverse possession”.⁵⁹

In *Elliott v Woodstock Agricultural Society*,⁶⁰ the Court of Appeal affirmed the decision in *Masidon*. It noted that the respondents in that case had put forward an argument that the inconsistent use test ought to be disregarded altogether.⁶¹ However, this was not pressed in submissions. Michael Lubetsky suggests that this was “a subtle hint that the Court would be willing to reconsider the [inconsistent use requirement] should a suitable case arise”.⁶² For the reasons given above, neither history nor principle support the existence of the inconsistent use requirement.

Conclusion

The decision in *Nelson*, while not addressing the applicability of the inconsistent use test in the other provinces, has made clear that it does not form part of the law of British Columbia. The outcome of the decision is desirable, and consistent with the approach taken in both England and Australia.⁶³ Further, the decision, and its implicit rejection of *Leigh v Jack*, may pave the way for the abolition of the inconsistent use test in the other provinces. We submit that this approach should be taken and, by way of example, have argued that the existence of the requirement in the law of Ontario is unjustified both as a matter of legal history and principle. It is hoped that in time the Supreme Court will remove this inconsistency in Canadian law.

⁵⁸ P. V. Baker, *Megarry’s Manual of The Law of Real Property* (4th ed, 1969) at 529.

⁵⁹ *Bradford Investments (1963) Ltd v Fama* (2005), 77 OR (3d) 127, 34 RPR (4th) 16 (Sup. Ct. J.) at [90].

⁶⁰ (2008) ONCA 648, 92 OR (3d) 711.

⁶¹ (2008) ONCA 648, 92 OR (3d) 711 at [30].

⁶² Michael Lubetsky, ‘Adding Epicycles: The Inconsistent Use Test in Adverse Possession Law’ (2009) 47 *Osgoode Hall Law Journal* 497 at 525.

⁶³ As to the desirability of this, see: *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250 at 273 [45]; *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609 at 626 [71]. For another example of this in recent times, see Mohammad Jaamae Hafeez-Baig and Jordan English, ‘The Supreme Court Rectifies a Wrong Turn in Canadian Law’ (2017) 17 *Oxford University Commonwealth Law Journal*.