Osgoode Hall Law Journal

Volume 47, Number 3 (Fall 2009)

Article 3

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Abstract
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Keywords
Adverse possession; Ontario

Adding Epicycles: The Inconsistent Use Test in Adverse Possession Law

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The common law courts in Ontario developed the Inconsistent Use Test (IUT) to assess claims of adverse possession. The IUT, however, often produces counter-intuitive results, which has led other jurisdictions to reject it and caused the Ontario courts to craft numerous exceptions and qualifications to the test that have left the state of the law on adverse possession very unclear. This article argues that the IUT actually represents an unconscious attempt by the Ontario judiciary to develop a functional equivalent to the civil law principle of "interversion," currently found in article 923 of the *Civil Code of Quebec* (CCQ). It further explores how the rise and fall of the IUT in a single generation reveals some of the weaknesses of inductive law-making under the common law tradition.

Les tribunaux de *common law* de l'Ontario ont élaboré le *Inconsistent Use Test* (IUT) en vue d'évaluer les revendications de possession adversative. Mais l'IUT produit souvent des résultats contre-intuitifs, ce qui a mené les autres juridictions à le rejeter, et a poussé les tribunaux de l'Ontario à élaborer de nombreuses exceptions et qualifications au test. Celles-ci ont laissé l'état de droit très obscur en matière de possession adversative. Cet article argue que l'IUT représente en fait un essai inconscient du pouvoir judicaire de l'Ontario de développer un équivalent fonctionnel du principe, inscrit dans le droit civil, de « l'interversion », figurant actuellement à l'article 923 du Code civil du Québec (CCQ). Il examine plus en profondeur comment l'avènement et la chute de l'IUT, en l'espace d'une seule génération, met à nu certaines des faiblesses de la confection inductive des lois dans cadre de la tradition de *common law*.

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IN THE COMMON LAW LEGAL SYSTEM, judges "make law" to resolve cases that appear before them. Faced with a live dispute, judges review the case law for a similar factual situation that they then "apply" or "distinguish" from the case before them. This article aims to illustrate the workings of this methodology by considering, in detail, a particular line of Ontario jurisprudence that has sparked controversy across the country.

In a series of three decisions beginning in 1977, the Ontario Court of Appeal added the "inconsistent use test" (IUT) to Canada's law of adverse possession.[1] Later judges, however, discovered that the IUT produces counterintuitive and even outrageous results when applied in certain situations.[2] In response,

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1. See *Keefer v. Arillotta* (1976), [1977] 13 O.R. (2d) 680 (C.A.) [*Keefer*]; *Fletcher v. Storoschuk* (1981), [1982] 35 O.R. (2d) 722 (C.A.) [*Fletcher*]; *Masidon Investments Ltd. v. Ham* (1984), 45 O.R. (2d) 563 (C.A.).

2. For criticisms of the IUT, see Brian Bucknall, "Two Roads Diverged: Recent Decisions on Possessory Title" (1984) 22 Osgoode Hall L.J. 375; P.F. Smith, "A Check on Leigh v. Jack?"

judges grafted a growing number of exceptions and qualifications onto the IUT, which have made the law in this area increasingly unclear.

The controversy surrounding the IUT begs the question of whether a different analytical approach would have proven more useful. A careful look at all of the IUT jurisprudence reveals that the relatively innocuous civil law principle of "interversion," currently codified under article 923 of the *Civil Code of Quebec*[3] (CCQ), elegantly explains the outcome of virtually all the cases that have considered the IUT. The common law lacks a concept analogous to interversion, and it seems that the IUT, as amended and qualified over the years, represents an attempt to create some functional equivalent.

Further, the adoption of the IUT and its subsequent evolution over the past thirty years exemplifies one of the key disadvantages of common law methodology: when an established legal principle fails in a subsequent case to produce a result that the judge considers just, the judge will qualify it rather than identify a completely different principle that adequately justifies the results in both the past and present cases. This process of ongoing refinement makes common law rules increasingly—and unnecessarily—cumbersome and confusing.

In support of this argument, this article briefly reviews the law of both acquisitive prescription and adverse possession (Part I), and then the doctrine of interversion along with its closest common law equivalent (Part II). It then outlines the development of the IUT and summarizes the various currents of jurisprudence it has engendered (Part III). An empirical analysis follows, which applies the interversion principle to the entire corpus of Canadian IUT cases, and shows how it produces much clearer and more consistent results (Part IV). Finally, the article outlines a theory of "effective" inductive reasoning and illustrates how common law law-making deviates from it (Part V).

I. ACQUISITIVE PRESCRIPTION AND ADVERSE POSSESSION

Western property law has long included mechanisms that allow for the acquisition of title to land through possession and use. Roman property law featured *usucapio* and *præscriptio*, which merged to become "acquisitive prescription" in

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(1978) 41 Mod. L. Rev. 204; Martin Dockray, "Adverse Possession and Intent — II" (1982) The Conveyancer 345; Jeffrey W. Lem, Annotation of *Murray Township Farms Ltd. v. Quinte West (City)* (2006), 50 R.P.R. (4th) 266 (Ont. Sup. Ct.) [*Murray Township Farms*].

3. Art. 923 C.C.Q.

the modern civil law.[4] The common law, in addition to adopting a form of prescription from the civil law,[5] developed the comparable institution of "adverse possession." Analogous (if somewhat more limited) institutions appear in other legal traditions, such as *chazaka* in Talmudic law[6] and *moulkya* in Islamic law.[7]

Acquisitive prescription and adverse possession (collectively, "AP") aim primarily to promote the stability and certainty of landholdings. The French legal scholars Terré and Simler describe the institution as "one of the masterpieces of our system of justice," since without it every landowner faces the spectre of dispossession stemming from the discovery of some long-forgotten defect in the title associated with their property.[8] AP serves the additional purpose, which has arguably received greater attention in American legal discourse, of promoting more efficient use of scarce resources by motivating owners to control the use of their property and to periodically make their status as owners known.[9]

To claim title to a particular piece of property, AP claimants must prove that they have conducted and represented themselves to the world as the property's owner for a required period of time.[10] AP claims tend to be extremely fact-dependant, and different jurisdictions have developed different ways to organize and assess the relevant factors. The civil law generally works with a two-part

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4. *Usucaption* was originally a legal action, while prescription was a discretionary prætorian remedy. See Gérald Cornu, *Droit civil,* 10th ed., t. 1 (Paris: Montchrestien, 2001) at 623, n. 1.

5. Common law prescription today applies generally to the creation of easements, rights-of-way, and profits-à-prendre. See Sandra Petersson, "Something for Nothing: The Law of Adverse Possession in Alberta" (1992) 30 Alta. L. Rev. 1291 at 1293.

6. See generally Solomon Zeitlin, "Studies in Talmudic Jurisprudence: I. Possession, Pignus and Hypothec" (1969) 60 Jewish Q. Rev. (New Series) 89 at 95-100.

7. Daniel Saurin, *La Propriété dans le droit musulman particulièrement au Maroc* (Paris: Comité du Maroc, 1906) at 17-18, 40.

8. François Terré & Philippe Simler, *Droit civil: Les biens,* 7th ed. (Paris: Dalloz, 2006) at para. 456. For common law perspectives, see *Raso v. Lonergan* (1998), 114 O.A.C. 335 at para. 5 [*Raso*]; Petersson, *supra* note 5 at 1318. Similarly, the preamble to England's statute of limitations of 1540 explains that it had become "a great occasion of much trouble, vexation and suits to the King's loving subjects" that they could lose their landholdings after they "have been in peaceable possession of a long season." *The Act of Limitation* (U.K.), 32 Hen. VIII, c. 2, preamble [*The Act of Limitation*].

9. Thomas W. Merrill & Henry E. Smith, *Property: Principles and Policies* (New York: Foundation Press, 2007) at 201. See also Petersson, *ibid.* at 1319.

10. A variety of special rules aim to prevent the unjust dispossession of vulnerable landowners such as minors. See *e.g.* Art. 2906 C.C.Q.

framework of factual possession and *animus domini* (see Part I(A), below), while common law courts generally opt for a two, three, or five-part paradigm (see Part I(B), below). However, given that the underlying concept of AP does not differ significantly from one jurisdiction to another, the panoply of analytical approaches typically produce similar results.

A. ACQUISITIVE PRESCRIPTION

The civil law boasts a comprehensive framework that aspires to exhaustively characterize the rights that individuals may have in relation to objects of property. The regime centres on "ownership," defined in Quebec civil law as "the right to use, enjoy and dispose of property fully and freely, subject to the limits and conditions for doing so determined by law."[11] The CCQ prescribes six mechanisms for the acquisition for ownership, and, when faced with a legal dispute over property rights, identifying the owner(s) constitutes the starting point of any analysis.

Alongside ownership, the civil law also recognizes "possession,"[12] defined as "the exercise *in fact* ... of a real right, with the intention of acting as the holder of that right."[13] The use of the words "in fact," as opposed to "in law," recognizes that the law, as articulated, does not always correspond to the realities of those who live under it.[14] In some cases, a person other than the legal owner exercises the rights and derives the benefits inherent to ownership. The possession regime provides a vehicle for such *de facto* owners to protect themselves from thieves and other wrongdoers, and to formalize their legally precarious status.[15] To be a possessor, a person must demonstrate two elements: (a) factual

11. Art. 947 C.C.Q.

12. Art. 911 C.C.Q.

13. Art. 921 C.C.Q. [emphasis added].

14. Pierre-Claude Lafond, *Précis de droit des biens* (Montreal: Thémis, 2000), s. 2.2.1.1.2; Jean Carbonnier, *Droit civil: Les biens*, 16th ed., t. 3 (Paris: Presses Universitaires de France, 1995) at 217-19.

15. It bears note that possession applies to real rights other than ownership (known as "dismemberments" in the civil law). For example, if a plot of land falls under a usufruct (the civilian equivalent of a lease), and a person other than the legal *usufructuary* exercises the *usufruct* rights, he or she could become the "possessor of the usufruct." These cases, however, are rather unusual (though see *Rheault c. Fouquette* (1985), 37 R.P.R. 298 (Qc. C.A.)). See also Cornu, *supra* note 4 at 623; Terré & Simler, *supra* note 8 at para. 459; Lafond, *supra* note 14, ss. 2.2.1.1.1, 2.2.1.1.3; and Denys-Claude Lamontagne, *Biens et propriété*, 5e éd.

control over the property in question, and (b) *animus domini*—an intention to actually *be* the owner of the property in question.[16] Without *animus domini*, a person exercising physical control is a mere "detainer."[17]

The civil law distinguishes "good faith" from "bad faith" possessors, defining the "good faith" possessor as one "justified in believing he holds the real right he is exercising."[18] Good faith possessors include those whose adverse possession claims are based on mistaken belief of ownership,[19] and those whose rights become retroactively voided. In contrast, bad faith possessors include those who make possessory claims knowing that they are not the lawful owners and those who have been proven negligent in formulating their claims to title. It bears emphasis, however, that bad faith possession does not necessarily imply blameworthy conduct; the jurisprudence has held, for example, that the category of bad faith possessor also includes a finder of lost goods who aspires to acquire ownership should the police fail to locate the true owner.[20]

Under civil law, a possessor, whether in good or bad faith, enjoys a number of rights, including a *prima facie* presumption of ownership (*i.e.*, the actual owner has the burden of proof in any legal action over title), the right to undertake conservatory acts (*i.e.*, the possessor can forbid other non-owners from making use of the goods in question), the right to reimbursement of certain expenses from the true owner, and, in some cases, the right to enjoy fruits and revenues.[21] Furthermore, after a prescribed period of time, the possessor can become the owner of the object in question through acquisitive prescription.[22] For immov-

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(Cowansville, QC: Yvon Blais, 2005) at para. 713. In the interest of simplicity, this article will deal with possession as it relates to *ownership* rather than to its dismemberments.

16. Arts. 921-23 C.C.Q. See Lafond, *supra* note 14, s. 2.2.1.1.4.; Lamontagne, *ibid.* at paras. 656-69.

17. Arts. 921-23 C.C.Q.

18. Art. 932 C.C.Q.

19. This could include someone who purchased land from a person other than the rightful owner. See Art. 1714 C.C.Q.

20. *Malette c. Québec (Sûreté)*, [1994] R.J.Q. 2963 at 2965 (C.S.).

21. See generally Lafond, *supra* note 14, s. 2.2.1.3.2. See also Lamontagne, *supra* note 15 at para. 649.

22. Art. 930 C.C.Q. Note that, under the *Civil Code of Lower Canada* (CCLC), acquisitive prescription of immovable property occurred automatically after the requisite passage of time. Under the CCQ, however, acquisition of immovable property occurs only after judicial homologation. See Québec, Ministère de la justice, *Commentaires du ministre de la justice*

able property, Quebec now has a single prescription period of ten years.[23] France has a prescription period of thirty years that can shorten to ten or twenty years, depending on the proximity of the true owner, the good faith of the possessor, and whether the possessor holds some kind of "*juste titre*" to the land (such as a deed issued from the wrong person).[24]

B. ADVERSE POSSESSION

The common law organizes its property law very differently from the civil law. Real property and chattels traditionally fall under separate legal regimes and forms of action. English land law starts from the premise that the Queen "owns" all real property and that all other rights in land, today known as "estates," derive from grants.[25] In disputes over land use, the medieval courts distinguished "proprietary actions," which determined lawful title to land, from "possessory actions," which recognized rights of possession.[26] For a variety of procedural and jurisdictional reasons (not the least of which being that proprietary actions could involve trial by battle), the possessory actions proved more popular, and the proprietary actions fell into disuse.[27] As a result of this history, when faced with a legal dispute over land today, common law courts seek (in principle) to determine who has the best right of possession rather than who is the rightful "owner."[28] Even so, the common law does recognize a number of estates, particularly the fee simple absolute, that confer rights and privileges virtually identical to ownership under civil law.[29] Consequently, common law jurists do regularly speak of "ownership" of land, even though the term has no legal significance.

(Québec: Publications du Québec, 1993), s. 2918 [*Cómmentaires du ministre*]; Lafond, *ibid.*, s. 2.2.5.1.

23. Art. 2918 C.C.Q.; Lamontagne, *supra* note 15 at para. 712.

24. Cornu, *supra* note 4 at 632-34; Terré & Simler, *supra* note 8 at paras. 462-70.

25. See E.H. Burn & J. Cartwright, eds., *Cheshire and Burn's Modern Law of Real Property*, 17th ed. (Oxford: Oxford University Press, 2006) at 27-28.

26. *Ibid.* at 27-29.

27. *Ibid.* at 28-29. See also F.W. Maitland, *The Forms of Action at Common Law: A Course of Lectures* (Cambridge: The University Press, 1936) at 21-23.

28. See Burn & Cartwright, *supra* note 25 at 28.

29. In jurisdictions that prohibit the fee simple absolute, another kind of estate will serve as the equivalent to ownership, such as renewable Crown leases in the Australia Capital Territory. See Austl., Commonwealth, *Australian Capital Territory (Planning and Land Management) Amendment Bill 1997*, Bills Digest No. 135 (1997), online: <http://www.aph.gov.au/

Similar to civil law, the common law operates on the assumption that the person currently in *seisin* (possession) has the best right to continued possession, and whoever claims the contrary bears the burden of proof. Early common law courts, however, established that a person seised of land could lose possession if a claimant could prove prior seisin.[30] This "prior seisin" principle underlays a number of "actions for recovery of land," such as *novel disseisin*, *mort d'ancestor*, entry, and ejectment.[31] However, while the prior seisin principle protected those dispossessed by usurpers, it created the spectre of longstanding and good-faith possessors losing their lands when confronted with age-old seisin claims. Consequently, the courts and legislature intervened at a very early date to set time limits on actions for recovery of land.

King Henry II (r. 1154-1189) established England's first limitations legislation, which barred a putative claimant of land from invoking a prior seisin dating from before his last voyage to Normandy. Effectively, this measure crystallized the rights of possessors each time the King travelled overseas. Subsequent legislation established fixed limitation dates, the most enduring of which, the 1275 *Statute of Westminster*,[32] barred all claims of seisin dating from before the coronation of King Richard I (3 September 1189).[33] Parliament switched to a variable-date regime when it enacted the *Statute of Limitations, 1540*, which barred actions for recovery if the plaintiff could not show seisin within the previous sixty years (or a shorter period in some cases).[34] Additional legislation in 1623, known today as the *Statute of James*,[35] reformulated the rule to the effect that a plaintiff could lose the right to recover land after twenty years (for possessory actions), or forty years (for proprietary actions) following dispossession by another person.[36]

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library/Pubs/bd/1997-98/98bd135.htm>.

30. Burn & Cartwright, *supra* note 25 at 28. A discussion of the history and scope of the term "seisin" goes beyond the scope of this article. See *Black's Law Dictionary*, 8th ed., *s.v.* "seisin." Mary Jane Mossman & William F. Flanagan, *Property Law: Cases and Commentary*, 2d ed. (Toronto: Emond Montgomery, 2004) at 145-47.

31. Maitland *et al.*, *supra* note 27 at 27-33; Burn & Cartwright, *ibid.* at 28-29.

32. *Statute of Westminster, The First*, 1275 (U.K.), 3 Edw. I., c. 5.

33. Note that for some specific forms of action, the limitation date would differ. Petersson, *supra* note 5 at 1296-97, nn. 14-15; Henry W. Ballantine, "Title by Adverse Possession" (1918) 32 Harv. L. Rev. 135 at 137.

34. *The Act of Limitation*, *supra* note 8; Ballantine, *ibid.* at 138.

35. *Act for Limitation of Actions, for avoiding of Suits in Law* (U.K.), 21 Ja. I, c. 16 [*Statute of James*].

36. Ballantine, *supra* note 33 at 138.

The different limitation periods for proprietary and possessory actions created the peculiar situation whereby a plaintiff could invoke a thirty-year-old prior seisin to defeat a landholder's right of possession, but not the latter's title.[37] More troublingly, the passing of even the full forty-year limitation period did not create or extinguish any legal title; it merely prevented a legal titleholder from ejecting the possessor or demanding rents. If an adverse possessor abandoned the disputed land, the legal titleholder could retake possession without further consequence. The persistence of title gave incentives for titleholders to take "self-help" measures to harass possessors to leave so that they could reclaim the land for themselves.[38] The precarious nature of the possessor's rights even after the limitation period had passed largely undermined the policy objectives behind AP that sought to quiet titles and ensure greater security of ownership.

Consequently, it became necessary to supplement the adverse possession regime with provisions that definitively extinguished a dispossessed titleholder's rights upon passage of the limitation period. In the United States, these innovations came largely from the judiciary;[39] in England, they came in the *Real Property Limitation Act, 1833*.[40] The English reforms were followed by essentially identical legislation in the Canadian colonies.[41] Since the extinguishment of the titleholder's rights still did not invest legal title in the possessor, the legislature intervened again with "quieting titles" legislation that permitted adverse possessors to register their claims and become full legal titleholders in their own right.[42]

Although the doctrine of adverse possession originated in legislation, the courts have retained the responsibility of determining what conduct starts the

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37. *Ibid.* at 139.

38. Alberta Law Reform Institute, *Limitations Act: Adverse Possession and Lasting Improvements* (Edmonton: Alberta Law Reform Institute, 2003) at paras. 14-15, 83-85, online: <http://www.law.ualberta.ca/alri/docs/fr89.pdf> [Alberta Law Reform Institute, *Limitations Act Report*].

39. Ballantine, *supra* note 33 at 139-40. See also Roger A. Cunningham, "Adverse Possession and Subjective Intent: A Reply to Professor Helmholz" (1986) 64 Wash. U.L.Q. 1 at 5, nn. 10-11.

40. *Act for the Limitation of Actions and Suits Relating to Real Property and For Simplifying the Remedies for Trying the Rights Thereto* (U.K.), 3 & 4 Will. IV., c. 27 [*Real Property Limitation Act, 1833*]; Petersson, *supra* note 5 at 1296.

41. For a discussion of early Canadian jurisprudence, see H.D. Anger & J.D. Honsberger, *Canadian Law of Real Property* (Toronto: Canada Law Book Co., 1959) at 784-85. See also *Beaudoin v. Aubin* (1981), 33 O.R. (2d) 604 (Sup. Ct.) at para. 24 [*Beaudoin*]. On the reception of the law in Alberta, see Petersson, *ibid.* at 1296.

42. Mossman & Flanagan, *supra* note 30 at 171.

clock running against a legal titleholder, and a variety of frameworks have emerged in the jurisprudence. The courts in Ontario have settled on a three-part test that assesses (a) physical possession, (b) *animus*, and (c) dispossession of the legal titleholder. The courts of England now adhere to a two-part framework, of *factual possession* and *animus*, reminiscent of the civil law. Another widespread approach, dominant in the United States, mandates a five-part inquiry, according to which a claimant's possession must be actual, exclusive, open and notorious, continuous, and adverse under a claim of right (the exact meaning of which varies from one jurisdiction to another, but generally means that the possessor lacks permission).[43] Some American states add further statutory requirements, such as the payment of taxes over the requisite period.[44] Canadian jurists typically add that the physical possession must be "adverse" or "hostile" to the actual titleholder,[45] a requirement that echoes the civil law rule that the claimant's acts must go beyond those performed with the permission or neighbourly acquiescence of the titleholder.[46]

Whatever the framework, the common law has essentially the same physical possession requirement as civil law. A claimant needs to demonstrate "exclusive, continuous, open or visible and notorious" possession of the property in question, and not simply possession that is "equivocal, occasional or for a special or temporary purpose."[47] The exact acts required to ground possession can, however, vary according to the situation;[48] the acts required to possess a house differ from those required to possess a shipwreck.[49] Because the common law has no formal notion of land ownership, however, it has no notion of *animus domini* as

43. Merrill & Smith, *supra* note 9 at 198-99. R.H. Helmholz, "Adverse Possession and Subjective Intent" (1983) 61:2 Wash. U.L.Q. 331 at 334-35.

44. Indiana, for example, has such a statutory requirement. For a recent exposition on its history and scope, see *Fraley v. Minger*, 829 N.E.2d 476 (Ind. Ct. App. 2005).

45. *Sherren v. Pearson*, [1887] 14 S.C.R. 581 at 585 [*Sherren*]. See also *R. B. Ferguson Construction Ltd. v. Nova Scotia (A.G.)* (1989), 4 R.P.R. (2d) 89 at para. 6 (C.A.).

46. Bruce Ziff, *Principles of Property Law*, 4th ed. (Toronto: Thomson Canada, 2006) at 128. See also Art. 924 C.C.Q.

47. *Sherren*, *supra* note 45 at 586.

48. Ziff, *supra* note 46 at 128.

49. *The Tubantia*, [1924] All E.R. Rep. 615 (Adm. U.K.). See also Burn & Cartwright, *supra* note 25 at 123; Anger & Honsberger, *supra* note 41 at 787-92; and Mossman & Flanagan, *supra* note 30 at 172.

found in civil law.[50] Instead, the common law requires *animus possidendi*—an intention to possess and exclude all others.[51] This "intention to exclude" requirement has long created difficulties—particularly when applied to what the civil law would call "good faith" adverse possession—because of the following issue: how can possessors have an intention to exclude the lawful titleholder when they believe *themselves* to be the lawful titleholder? Faced with this conundrum, one line of jurisprudence, seen in some jurisdictions in the United States (where it is called the "Maine rule"),[52] has deduced that adverse possession cannot correct mutual misunderstandings over land boundaries. Other jurisdictions take a different approach, holding variably that: (a) there is no need to prove the *animus possidendi* when the possessor's claims are "unequivocal" (the preferred approach in Ontario);[53] (b) the *animus possidendi* refers to an intent to exclude *everyone*, not the true titleholder specifically (England and Alberta);[54] or even (c) the claimant's state of mind is completely irrelevant to adverse possession—all that matters are the acts of possession (the "Connecticut rule" in the United States).[55]

The third component of adverse possession in the Ontario framework—actual exclusion of the titleholder—displays the origins of adverse possession as a defence to actions to recover land. To a civil law jurist, the exclusion requirement is redundant and covered by the principle that a claimant's factual possession must be unequivocal.[56] Under civil law, if a legal titleholder continues to effectively exercise significant rights of ownership over disputed land, the

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50. Kevin Gray & Susan Francis Gray, *Land Law*, 5th ed. (Oxford: Oxford University Press, 2007) at 138-39; *J.A. Pye (Oxford) Ltd v. Graham*, [2003] 1 A.C. 419 (H.L.) at paras. 42-43 [*Pye*].

51. *Clarke v. Babbitt*, [1927] S.C.R. 148 at 163, Newcombe J., dissenting; *Halsbury's Laws of England*, 4th ed. Reissue (London: Butterworths, 1997) vol. 28 at para. 977, n. 7; A.J. Oakley, ed., *Megarry's Manual of the Law of Real Property*, 8th ed. (London: Sweet & Maxwell, 2002) at 552.

52. Note that the State of Maine abolished the principle by statute in 1993 and now allows for adverse possession in cases of longstanding boundary errors. See *Dombkowski v. Ferland* 893 A.2d 599 at paras. 13-14 (Me. Sup. Ct. 2006) [*Dombkowski*]. The Maine rule persists, however, in other states like Nebraska. See *e.g. Pettis v. Lozier*, 290 N.W2d 215 (Neb. Sup. Ct. 1980).

53. *Beaudoin*, *supra* note 41 at para. 40.

54. *Pye*, *supra* note 50 at para. 43; *Lutz v. Kawa* (1980), 112 D.L.R. (3d) 271 at para. 34 (Alta. C.A.), rev'g (1979), 98 D.L.R. (3d) 77 (Alta. D.C.J.).

55. Merrill & Smith, *supra* note 9 at 199. See also Helmholz, *supra* note 43 at 331-32; *Dombkowski*, *supra* note 52 at para. 12. For a Canadian example, see *e.g. Teis v. Ancaster (Town)* (1997), 35 O.R. (3d) 216, 13 R.P.R. (3d) 55 at para. 16 (C.A.) [*Teis*].

56. Art. 922 C.C.Q.

possessor's claim of unequivocal factual control becomes less credible. In England, the House of Lords in 2003 came to much the same conclusion, explaining that the exclusion of the titleholder is synonymous with the claimant being in possession.[57].

Except in a few American states,[58] the common law makes no formal distinction between "good faith" or "bad faith" possession. Although generations of common law judges have opined that the criteria for adverse possession must be construed "in the very strictest manner" for an intentional trespasser,[59] the classical adverse possession regime does not mandate any inquiry into the possessor's *justification* for claiming possession.[60] As explained in Part IV of this article, however, the issue of good and bad faith bubbles under the surface in many adverse possession cases.[61]

It bears note that the implementation of the Torrens system, devised in Australia (under which registration in an official registry normally constitutes an indefeasible and irrefutable proof of title), has essentially abolished adverse possession in some common-law jurisdictions and significantly reduced its scope in others. As Ontario switches over to a Torrens system, adverse possession should likewise become decreasingly relevant.[62]

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57. *Pye, supra* note 50 at para. 38.

58. A few states, like Iowa and Washington, require good faith from adverse possession claimants. See *e.g. Carpenter v. Ruperto*, 315 N.W. 2d 782 (Iowa Sup. Ct. 1982); Merrill & Smith, *supra* note 9 at 199, 207; and Helmholz, *supra* note 43 at 337, n. 22. In Hawaii, a good faith requirement for adverse possession appears in the state constitution. See Hawaii Const. art. XVI, § 12.

59. *Harris v. Mudie* (1882), 7 O.A.R. 414 at 421 (C.A.) [*Harris*], cited in *Masidon, supra* note 1 at para. 33. See also *Campeau v. May* (1911), 19 O.W.R. 751 at 752 (H.C.), cited in *Giouroukos v. Cadillac Fairview Corp.* (1982), 37 O.R. (2d) 364 at para. 52 (H.C.), rev'd on other grounds (1983), 3 D.L.R. (4th) 595 (Ont. C.A.), aff'd [1986] 2 S.C.R. 707 [*Giouroukos*]. For a discussion in the American context, see Helmholz, *ibid.* at 332.

60. As Bruce Ziff has noted, there is an exception to this idea. If a claimant is claiming an entire tract of land, but only physically using a piece of it, the adverse possession claim will include the *entire tract* if the claim is based on a "colour of right," such as a defective land title. If the claim is not based on a colour of right, then the claim will only cover the land that is physically occupied. See Ziff, *supra* note 46 at 127.

61. See *e.g. Wood v. LeBlanc*, [1904] 34 S.C.R. 627 at par. 42 [*LeBlanc*]; *Teis, supra* note 55 at para. 28; and Helmholz, *supra* note 43.

62. For a discussion and references to the continuing role of adverse possession under a Torrens system, see Peterssen, *supra* note 5 at 1294-96; Jeremy S. Williams, "Title by Limitation

II. INTERVERSION AND OUSTER

A. CIVIL LAW INTERVERSION

The two-part civil law test for acquisitive prescription—factual control with *animus domini*—raises one particular dilemma: what happens when a detainer *changes* intention vis-à-vis the property under detention? Since the *animus* constitutes the only difference between possession and detention, a true owner has no way to know that a tenant, lessee, or asset manager has formulated an *animus domini* and started the clock running on acquisitive prescription. To protect owners in these situations, the civil law has developed the notion of "interversion" (also known as "inversion of title")—a rule that requires a detainer to manifest any change of intention with "unequivocal facts" and thereby give notice to the true owner that their legal relationship has changed. Proof of interversion may include legal measures, such as registering a claim at the land registry office, or factual measures, such as refusing to pay rent. The determination of whether a claimant's conduct suffices to constitute interversion is a question of fact within the domain of the trial judge.

Article 923 of the CCQ articulates the inversion principle at a relatively high level of abstraction, whilst article 2914 reiterates the rule more concretely in the context of acquisitive prescription:

> **923.** A person having begun to detain property on behalf of another or with acknowledgement of a superior domain is presumed to continue to detain it in that quality unless inversion of title is proved on the basis of unequivocal facts.
>
> **923.** Celui qui a commencé à détenir pour le compte d'autrui ou avec reconnaissance d'un domaine supérieur est toujours présumé détenir en la même qualité, sauf s'il y a preuve d'interversion de titre résultant de faits non équivoques.
>
> **2914.** A precarious title may be interverted by a title proceeding from a third person or by an act performed by the holder which is incompatible with precarious holding. Interversion renders the possession available for prescription from the time the owner learns of the new title or of the act of the holder.

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in a Registered Conveyancing System" (1967) 6 Alta. L. Rev. 67; Ziff, *supra* note 46 at 125-26; and *Lutz*, *supra* note 54 at paras. 15-19. See also Alberta Law Reform Institute, *Limitations Act Report*, *supra* note 38. For a discussion of Ontario's transition to the Torrens system, see Greg Taylor, *The Law of the Land: The Advent of the Torrens System in Canada* (Toronto: University of Toronto Press, 2008) c. 6. On the residual role of adverse possession in those parts of Ontario that have converted to the Torrens system, see *Cantera v. Eller* (2007), 56 R.P.R. (4th) 39 at para. 40 (Ont. Sup.Ct.). On England, see *Pye*, *supra* note 50.

> 2914. Un titre précaire peut être interverti au moyen d'un titre émanant d'un tiers ou d'un acte du détenteur inconciliable avec la précarité. L'interversion rend la possession utile à la prescription, à compter du moment où le propriétaire a connaissance du nouveau titre ou de l'acte du détenteur.

Article 2914 of the CCQ and its French equivalent (article 2238 of the *Code civil* (C. civ.)) present two forms of interversion: (a) "a title proceeding from a third person," or (b) "an act performed by the holder which is incompatible with precarious holding." The former refers to situations where a possessor has received some kind of defective title, such as a deed of sale from the wrong owner. The latter refers to unilateral acts by the possessor—"juridical, judicial or material"[63]—that deny the owner's rights and purport to usurp them.[64] The difference between the two categories of interversion has no legal significance in Quebec, but in France it can affect the relevant prescription period and the kind of owner-notification required.[65]

Prescription between undivided co-owners ("tenants in common" in common-law terminology) also falls under the interversion rule.[66] When a co-owner exercises factual control over a particular piece of property, the co-owner *simultaneously* exercises control rights belonging to the other co-owners. If a co-owner exercises the latter rights with the appropriate *animus*, he or she becomes a possessor of those rights and can acquire them through prescription. In practice, however, such prescription can only occur in truly exceptional situations. A co-owner has the right to use the entire property in question, and therefore acts of use do not typically manifest the intention to extinguish the rights of the co-owners. To obtain full ownership through acquisitive prescription the co-owner must openly act in ways that contradict the rights of the other owners, which effectively constitutes interversion as described in Art. 923 and 2914 CCQ. The codal provisions on interversion, whether in Quebec or France, today receive

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63. *Lessard c. Meldrum*, [2003] R.D.I. 323 (C.S. Qc.) at 327 [*Lessard*]. See also P.-B. Mignault, *Le droit civil canadien*, t. 9 (Montreal: Wilson & Lafleur, 1916) at 395-96; Witold Rodys, *Traité de droit civil du Québec*, t. 15 (Montreal: Wilson & Lafleur, 1958) at 113.

64. Terré & Simler, *supra* note 8 at para. 170; Lafond, *supra* note 14, s. 2.2.2.2.

65. Denis Vincelette, *En possession du Code civil du Québec* (Montréal: Wilson & Lafleur, 2004) at para. 185, cited in *Commentaires sur le Code civil du Québec (DCQ)* (Cowansville, Qc: Yvon Blais, 2007), s. 923 [*Commentaires sur le CcQ*]; *Commentaires du ministre*, *supra* note 22, s. 923. Note that the two categories were left out of the CCLC entirely.

66. See *e.g. Lessard*, *supra* note 63; see also *Commentaires sur le CcQ*, *ibid.*, s. 923.

scant treatment in the doctrine and jurisprudence, which suggests that they do not prove particularly controversial.[67]

B. COMMON LAW OUSTER

Although the common law lacks a general category of "detainer" as found in the civil law,[68] it used to have a notion of "non-adverse possessor," meaning a person presumed to possess land on behalf of the legal titleholder. For example, if a person inherited land and a relative took possession, the relative was deemed to possess the land on behalf of the heir. Because a non-adverse possessor occupied the land on behalf of the titleholder, the titleholder was never dispossessed and, thus, not subject to the *Statute of Limitations.*

However, the courts also deduced that a non-adverse possessor could change into an adverse possessor through *ouster*—a clear and overt demonstration that he or she no longer recognized the rights of the person on whose behalf he or she supposedly possessed the property.[69] Ouster would thereby allow a relative to adversely possess against an heir, or a co-tenant to adversely possess against fellow co-tenants.

The *Real Property Limitation Act, 1833*, however, significantly modified the judge-made law of ouster by abolishing the various presumptions underlying it. Subsequent jurisprudence in Canada[70] and England[71] interpreted the statute as abolishing ouster altogether and mandating identical treatment for all possessors,

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67. The only major doctrinal controversies over inversion were mostly settled a century ago and they related primarily to cases where a detainer purports to acquire the property in question from a person who is not the owner. French jurists have debated over whether such an act of interversion is effective without the knowledge of the actual owner and/or whether it required good faith. Quebec jurists debated over whether such an act of interversion was contemplated at all by the wording of Art. 2205 C.C.L.C. See Mignault, *supra* note 63 at 393-95; Rodys, *supra* note 63 at 110-12.

68. Common law jurists sometimes use the terms "custodian" or "occupant" to contrast a possessor from a non-possessing user of land, but the terms have no formal meaning. See Ziff, *supra* note 46 at 119-20.

69. For an example of the differential treatment that is afforded to people subject to the ouster rule, see *Scott v. McLeod*, [1856] 14 U.C.R. 574 (U.C. Q.B.).

70. *Ibid.* See also *Lutz, supra* note 54 at paras. 22-24; *Plant v. Plant* (1993), 48 R.F.L. (3d) 82 (Ont. Unif. Fam. Ct.) at paras. 36-38; and *Bentley v. Peppard Estate*, [1903] 33 S.C.R. 444 at para. 5.

71. *Paradise Beach and Transportation Co., Ltd. v. Price-Robertson*, [1968] 1 All E.R. 530 (H.L.); *Pye, supra* note 50 at paras. 33-36.

no matter how they originally came into possession of the property.[72] This understanding effectively precluded the development of a doctrine resembling interversion and, as later judges discovered, left behind a significant hole in adverse possession law.

III. DEVELOPMENT OF THE INCONSISTENT USE TEST

The classical formulation of AP in both the civil and common law requires no evaluation of the state of mind of the legal titleholder.[73] The IUT modified this principle by requiring an adverse possessor to prove that he or she frustrated the titleholder's actual designs for the land in question. This necessitated, for the first time, an inquiry into the titleholder's intentions.

A. ORIGINS OF THE IUT

The IUT originated in the 1879 case of *Leigh v. Jack*,[74] which involved a strip of land reserved for road development that a neighbour used as a foundry dump.[75] The court rejected the neighbour's adverse possession claim on the grounds that dumping garbage did not disrupt the titleholder's project of holding the land for a future road. Lord Bramwell summarized the court's view that "in order to defeat a title by dispossessing the former owner, acts must be done which are *inconsistent* with his enjoyment of the soil *for the purposes for which he intended to use it.*"[76]

Leigh and its progeny did not appear in the leading Supreme Court of Canada adverse possession cases;[77] therefore, the test did not arrive in Canada until 1977, when the Ontario Court of Appeal's Justice Wilson (as she then was)

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72. The abolition of "non-adverse possession" has arguably made the term "adverse possession" obsolete, and it would, perhaps, be more accurate to speak of "possessory title" or "title based on possession." Nevertheless, the term has persisted until this day.

73. Note, however, that a titleholder's state of mind may indirectly relate to the issue of whether the claimant was acting with permission. See Art. 924 C.C.Q. See also *supra* notes 43, 46, and accompanying text.

74. (1879), 5 Exch. Div. D. 264 (U.K. C.A.) [*Leigh*].

75. Burn & Cartwright, *supra* note 25 at 125.

76. *Leigh, supra* note 74 at 273 [emphasis added].

77. Particularly *Sherren, supra* note 45; *Handley v. Archibald*, [1899] 30 S.C.R. 130; and *LeBlanc, supra* note 61. *Leigh, ibid.*, was referenced in the rarely-cited case of *Dominion Atlantic Railway Co. v. Halifax and South Western Railway Co.*, [1947] S.C.R. 107 at 110.

adopted it in *Keefer v. Arillotta*.[78] *Keefer* involved a strip of land over which a neighbour held a right-of-way.[79] The neighbour made increasingly intensive use of the strip of land that exceeded the rights included in a right of way, including installing a shed and building an ice rink.[80] Eventually, the neighbour claimed the strip of land by adverse possession. The Court of Appeal, however, rejected the claim, holding that the claimant's acts did not frustrate the titleholder's intentions for the land (which were necessarily quite limited, since the titleholder could not build on the land without blocking the right-of-way).[81]

A surprising element of *Keefer* involved how Justice Wilson integrated the IUT into established adverse possession theory. As discussed above, Ontario courts apply a three-part framework in which an adverse possessor must demonstrate (a) factual control, (b) *animus possidendi*, and (c) actual exclusion of the titleholder.[82] Intuitively, it would seem that the IUT should fall into the third branch, insofar as frustrating a titleholder's intentions would seem to suggest exclusion. However, for reasons not given, Justice Wilson considered the IUT a question of *animus possidendi*, holding that the failure to frustrate the owner's intentions evidenced a lack of *intention* to possess the land to the exclusion of all others.[83]

Two subsequent Court of Appeal cases, *Fletcher v. Storoschuk*[84] and *Masidon v. Ham Investments*,[85] reaffirmed the IUT and firmly established it as an essential element of Ontario adverse possession law. *Fletcher* involved a farmer who had installed a fence *within* his own land to prevent his cattle from wandering too close to the land boundary.[86] His neighbours performed various acts of cultivation on the strip of land between the fence and their mutual land boundary, even though they knew they did not own it.[87] The neighbours eventually made a claim for the strip based on adverse possession, which the court rejected on

78. *Supra* note 1.
79. *Ibid.* at 683.
80. *Ibid.* at 684-85.
81. *Ibid.* at 690-93.
82. *Ibid.* at 692.
83. *Ibid.* at 691.
84. *Fletcher*, *supra* note 1.
85. *Masidon*, *supra* note 1.
86. *Fletcher*, *supra* note 1 at para. 2.
87. *Ibid.* at paras. 3-4.

the basis that their acts did not interfere with the titleholder's *intended* use of the strip, which was to keep cattle away from their mutual border.[88]

Masidon, the most storied example of the IUT, involved a large tract of land held for speculation by a developer.[89] The claimant, a former tenant of the land under the previous owner, erected fences, built a dam, and even built and operated a two-runway private airport listed on various official publications.[90] Even so, he also lost his adverse possession claim, ostensibly because his acts of use—intensive though they were—did not interfere with the titleholder's intention of holding the land for speculation.[91]

It bears note that Justice Blair in *Masidon*, unlike Justice Wilson in *Keefer*, considered the IUT a matter of *exclusion*, not *animus*.[92] The difference in approach left behind considerable confusion and gave rise to three separate schools of jurisprudence: one treating the IUT strictly as a matter of intention,[93] a second treating it as an element of exclusion,[94] and a third treating it as a matter of both.[95]

After *Masidon*, the IUT made a brief appearance in New Brunswick during the 1980s, although it disappeared as the province changed over to the Torrens system. The test received a more enthusiastic welcome in Prince Edward Island, where the Court of Appeal adopted it in *Re Squires*[96] and *Re MacKinnon*.[97] The

88. *Ibid.* at paras. 8-9.

89. *Masidon*, *supra* note 1 at paras. 10, 25.

90. *Ibid.* at paras. 4-7.

91. *Ibid.* at para. 25.

92. This comes out most clearly in *ibid.* at para. 36.

93. *Gorman v. Gorman* (1998), 110 O.A.C. 87 at paras. 9-17; *Raso*, *supra* note 8 at paras. 3-5; *Bruce v. Follis*, [1990] O.J. No. 2546 at paras. 28-30 (Ct. J. (Gen. Div.)) (QL); and *Galati v. Tassone*, [1986] O.J. No. 698 at para. 11 (S.C. Ont. (H.C.J.)) (QL) [*Galati*].

94. *Penwest Development Corp. Ltd. v. Youthdale Ltd.* (2005), 46 R.P.R. (4th) 124 at para. 8 (Ont. Sup. Ct. J.) [*Penwest*]; *McElwain v. White*, [1996] O.J. No. 280 at para. 20 (Ct. J. (Gen. Div.)) (QL) [*White*].

95. *Georgco Diversified Inc. v. Lakeburn Land Capital Corp* (1993), 31 R.P.R. (2d) 185 at paras. 13-17 (Ont. Ct. J. (Gen. Div.)) [*Georgco Diversified*]; *Bradford Investments (1963) Ltd. v. Fama* (2005), 77 O.R. (3d) 127 at paras. 76-101 (Ont. Sup. Ct.) [*Bradford Investments*]; *Laurier Homes (27) Ltd. v. Brett* (2005), 42 R.P.R. (4th) 86 at para. 29 (Ont. Sup. Ct.) [*Laurier Homes*]; *Marotta v. Creative Investments Ltd.* (2008), 69 R.P.R. (4th) 44 at para. 101ff (Ont. Sup. Ct.) [*Marotta*]; and *Rowe-Wilkinson v. Wright* (2004), 27 R.P.R. (4th) 267 at paras. 16-22 (Ont. Sup. Ct.).

96. *Squires (Re)* (1999), 182 Nfld. & P.E.I.R. 318 (P.E.I. S.C. (A.D.)) [*Squires*].

test was also recently accepted in Nova Scotia in *Board of Trustees of Common Lands v. Tanner*.[98]

The IUT has not, however, found favour in all of Canada's common law provinces. Alberta bluntly rejected it in *Lehr v. St. Mary River Irrigation District*,[99] while Newfoundland, in *Fitzpatrick's Body Shop Ltd. v. Kirby*, held that the intended use of the titleholder was simply one factor among many to consider.[100]

While these developments were taking place in Canada, English courts were decisively moving away from the IUT. Following *Leigh*, the IUT gradually evolved into a theory that titleholders gave an "implied licence" to any intruder using their lands in ways that did not frustrate their plans.[101] This "implied licence" theory so eviscerated adverse possession—the English Law Reform Committee described it as a "judicial repeal" of the *Statute of Limitations*[102]—that Parliament intervened to abolish it by statute.[103] Subsequently, in *J.A. Pye (Oxford) Ltd. v. Graham*, the House of Lords denounced *Leigh* and England's entire line of IUT jurisprudence as "heresy."[104] The developments in England did not pass unnoticed in Ontario, where the IUT began creating quandaries for judges even before the ink in *Masidon* had time to dry.

B. EVOLUTION OF THE IUT IN ONTARIO

Following the implantation of the IUT in Ontario, courts soon found themselves confronted with cases that tested the limits of the doctrine. The problematic cases fell into the three broad categories of mutual mistake, unilateral mistake, and manifestly apathetic titleholders. In all of the three categories, judges were divided on whether to create categorical exceptions to the IUT, or else impute some kind of fictitious intention to the titleholder that the claimant's actions could frustrate.

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97. *MacKinnon (Re)* (2003), 226 Nfld. & P.E.I.R. 293 (S.C. (A.D.)) [*MacKinnon*].

98. *Board of Trustees of Common Lands v. Tanner*, 2005 NSSC 245 at paras. 60-75 [*Tanner*].

99. [1993] A.J. No 1411 at para. 86 (Q.B.) (QL).

100. (1992), 99 Nfld & P.E.I.R. 42 at para. 32 (Nfld. S.C. (T.D.)). The Newfoundland & Labrador Court of Appeal confirmed this view of the IUT in *Maher v. Bussey* (2006), 256 Nfld. & P.E.I.R. 308 at paras. 50-51.

101. Burn & Cartwright, *supra* note 25 at 126.

102. Mossman & Flanagan, *supra* note 30 at 196.

103. *Ibid.* at 197-99. See also Burn & Cartwright, *supra* note 25 at 126; *Limitations Act 1980* (U.K.), 1980, c. 58, Schedule 1, s. 8(4).

104. *Pye*, *supra* note 50 at paras. 44-45.

1. THE MUTUAL MISTAKE CASES

The first challenge to the IUT emerged with "mutual mistake" cases—disputes involving neighbours mistaken as to their mutual boundary and adhering to a *de facto* border different from the legal one. Under civil law, mutual mistake cases pose no controversy and serve as *the* archetypical case of acquisitive prescription: after the requisite limitation period, legal title to the strip of land between the legal and *de facto* border passes to the neighbour believed to be the legal owner.[105] Common law courts, in contrast, have long disagreed over whether adverse possession could correct boundary errors,[106] as seen in the United States in the debate between the Maine Rule and the Connecticut Rule.[107] Ontario only took a position in 1981, when *Beaudoin v. Aubin* applied adverse possession to a mutual mistake situation.[108]

Beaudoin was decided around the same time as the early Canadian IUT cases, and although many subsequent cases simply followed the decision without much reflection (including the Court of Appeal in *Keil v. 762098 Ontario*, a ruling that led one commentator to suggest that the IUT had been repealed),[109] the issue of how to reconcile *Beaudoin* with the IUT jurisprudence quickly arose. Courts faced the challenge of explaining how an adverse possessor could frustrate a titleholder's intentions with respect to land that the latter did not even know that he or she owned.

Palis v. Benedetti,[110] *Murdoch v. Kenehan*,[111] and *Hoffele v. Bernier*[112] dealt with this quandary by imputing some form of intended use to the titleholder. *Palis* and *Murdoch* took a *hypothetical* approach, applying the IUT based on what

105. Lamontagne, *supra* note 15 at para. 714.

106. See *supra* note 52 and accompanying text. For an early discussion in the American context that lists relevant jurisprudence, see generally Ralph W. Aigler, "Possession Under Mistake as Adverse Possession" (1912) 11 Mich. L. Rev. 57. For a Canadian example, compare the Divisional Court and Court of Appeal judgments in *Lutz*, *supra* note 54.

107. See *supra* notes 52, 55, and accompanying text.

108. *Beaudoin*, *supra* note 41. See also *Martin v. Weld* (1860), 19 U.C.Q.B. 631 at 632, cited in *Lutz*, *supra* note 54 at paras. 22-23 (C.A.).

109. John Mascarin, Annotation of *Keil v. 762098 Ontario Inc.*, [1992] 91 D.L.R. (4th) 752 (Ont. C.A.), aff'g [1989] O.J. No. 866 (H.C.J.) [*Keil*].

110. [1989] O.J. No. 128, 1989 CarswellOnt 2614 (Dist. Ct.) [*Palis*].

111. (2003), 8 R.P.R. (4th) 257 at para. 47 (Ont. Sup. Ct.) [*Murdoch*].

112. [1992] O.J. No. 1231 at para. 11 (Ont. Ct. J. (Gen. Div.)) (QL) [*Hoffele*].

the titleholders *would have wanted to do*, had they known that they were the actual titleholders of the lands in question.[113] *Hoffele*, on the other hand, featured a *potestative* approach, imputing intent based on what the titleholder *could have done* with the claimed strip of land, had he known about his title.

Instead of imputing intent, however, most courts simply exempted mutual mistake cases from the IUT altogether, justifying the exemption in different ways. Under one approach, seen in *Walker v. Brickman*,[114] the *animus possidendi* can be "presumed" when the acts of possession are "unequivocal," and insofar as the IUT forms part of the *animus*, the presumption dispenses with the IUT altogether.[115] Other cases adopting this general approach included *Raso v. Lonergan*[116] and *Jeffbrett Enterprises Ltd. v. Marsh Bros. Tractors Inc.*[117]

A very different approach appears in *Wood v. Gateway of Uxbridge Properties Inc.*.[118] Positing that the IUT sought "to prevent the unjust enrichment of wanton trespassers,"[119] Justice Moldaver held that the test only applied to claims involving what the civil law would consider bad faith possessors.[120] Echoing the English jurisprudence later judged "heretical," Justice Moldaver suggested that acts by a trespasser could not frustrate the titleholder's intentions because they occurred with implied permission, and thus could not support any adverse possession claim.[121] Similar reasoning appears in *Cunningham v. Zebarth Estate*.[122]

The issue of how to reconcile mutual mistake adverse possession with the IUT finally arrived before the Court of Appeal in *Teis v. Ancaster (Town)*,[123]

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113. *Palis*, for example, involved a titleholder using his plot of land as a landfill dump while his neighbour used his for residential purposes. Justice Fleury deduced that the titleholder would have wanted to use the disputed land for more dumping had he known about his title to it, and that the claimant's use of the land as a residential backyard was clearly inconsistent with industrial dumping. See *Palis*, *supra* note 110 at paras. 12, 18.

114. 1988 CarswellOnt 2860 (Dist. Ct.) [*Walker*].

115. *Ibid.* at paras. 37-39.

116. *Raso*, *supra* note 8 at para. 3.

117. (1996) 5 O.T.C. 161 (Gen. Div.) at para. 55 [*Jeffbrett*].

118. (1990), 75 O.R. (2d) 769 (Ont. Ct. J. (Gen. Div.)) [*Wood*].

119. *Ibid.* at para. 45.

120. *Ibid.* at para. 42.

121. *Ibid.* at para. 53.

122. (1998), 18 R.P.R. (3d) 299 at paras. 54-57 (Ont. Ct. J. (Gen. Div.)) [*Cunningham*].

123. *Teis*, *supra* note 55.

which unanimously held that the IUT simply does not apply in cases involving mutual boundary errors. Justice Laskin's analysis synthesized both the *Wood* and *Walker* lines of jurisprudence, explaining that: (a) mutual mistake adverse possessors can benefit from a presumption of *animus*; and, (b) as a matter of policy, the IUT aimed to increase the evidentiary burden upon intentional trespassers.[124] It bears note, however, that Justice Laskin did not discuss, much less endorse, the more radical "implied license" theory mooted in *Wood*.

2. THE UNILATERAL MISTAKE CASES

Teis divided adverse possession cases into two categories: the "advertent trespasser" group, which was subject to the IUT, and the "mutual mistake" group, which was not. As foretold in academic commentary following the decision,[125] the decision left open a group of "unilateral honest mistake" scenarios in which both the claimant and titleholder believe themselves the legal titleholder, and where the actual titleholder does not object to the mistaken titleholder's acts of possession. Such cases often involve disputes involving family members, friendly neighbours, or absentee titleholders.

Unilateral mistake cases often involve boundary misunderstandings, and a number of IUT cases, including *Pinder v. Aregers*,[126] *Brodie v. Flake*,[127] and *DiGenova v. Hotchkiss*,[128] have featured claimants who performed various grounds-keeping acts on strips of their neighbour's land that they believed they owned. The courts have generally rejected such claims, invoking the IUT to find that their acts of possession did not defeat their neighbour's title. In *Penwest Development Corp. v. Youthdale Ltd*,[129] the court even rejected such a claim when the claimant built a minor structure on the disputed land.

A change in attitude appears, however, if the mistaken claimant encloses the disputed land with a fence. The courts have generally allowed adverse possession claims under such circumstances, although they disagree over whether to create another IUT exception or impute some intent to the titleholder. The latter ap-

124. *Ibid.* at paras. 27-29.

125. Brian Bucknall, "*Teis v. Ancaster*: Knowledge, the Lack of Knowledge and the Running of a Possessory Title Period" (1998) 13 R.P.R. (3d) 68.

126. [1986] O.J. No. 973 (Sup. Ct.) (QL), var'd (1988), 30 O.A.C. 137 (Div. Ct.) at para. 17.

127. (1999), 28 R.P.R. (3d) 87 at paras. 12-14 (Ont. Sup. Ct.) [*Brodie*].

128. (2001), 105 A.C.W.S. (3d) 968 at paras. 10-13 (Ont. Sup. Ct.) [*DiGenova*].

129. *Penwest*, *supra* note 94 at para. 8.

proach appears in *Georgco Diversified v. Lakeburn Land Capital Corp*,[130] which involved several residents who mistakenly encroached upon lands owned by a developer because an old fence gave an incorrect impression about where the true border lay. The title-holding developer knew about the encroachments, but took no action for over thirty years. When considering the IUT, Justice Ground held that it produced a "ludicrous" result to expect claimants to contradict the intended use of a titleholder who did not care about the land under dispute. Consequently, he imputed an obviously fictitious intent to the developers to the effect that "no one else make use" of the land in question.[131] Since fencing the land frustrated this imputed intention, the claimants were found to have excluded the titleholder and were thus successful in their claims.

Bradford Investments (1963) v. Fama also involved a homeowner who claimed several strips of developer-owned land beyond his legal boundary.[132] The titleholder had "lost interest" in the land,[133] while the homeowner, assuming himself responsible for the neglected land, fenced and cultivated it.[134] The court eventually granted the homeowner's claim to the land, but rather than impute an intention to the titleholder, Justice Cullity carved out a wordy exception to the IUT: the test does not apply to a neighbour who encloses lands under a *bona fide* belief of ownership where the titleholder raises no objection and has no physical contact with lands. This exception for the "good faith enclosure unopposed by the absent neighbour" might be called the "GEUAN exception."[135] Other cases, including *Arnprior (Town) v. Coady*[136] and *Tucker v. Moffatt*,[137] have

130. *Georgco Diversified, supra* note 95.

131. *Ibid.* at paras. 16-17. The intent was obviously fictitious since the titleholders knowingly tolerated the claimant's incursions for three decades.

132. *Bradford Investments, supra* note 95.

133. *Ibid.* at para. 16.

134. *Ibid.* at para. 30.

135. *Ibid.* at para. 97. See also *Murray Township Farms, supra* note 2 at paras. 18-21 (which endorsed the GEUAN exception in upholding a farmer's claim against another absentee titleholder). The decision in *Murray Township Farms* does not make clear on what basis the claimant entered and enclosed the land in question. However, the judge did find the claimant "not a knowing trespasser ... whose actions were not dishonest in any sense" (at para. 21). This suggests that the claimant was acting on the basis of a mistake about land borders.

136. (2001), 42 R.P.R. (3d) 188 (Ont. Sup. Ct.), aff'd 2002 CarswellOnt 1292 (C.A.) at para. 48 [*Arnprior*]. Justice Aiken had previously articulated this theory in *Cunningham, supra* note 122 at para. 54.

taken similar approaches, essentially extending the GEUAN exception to all cases of good faith adverse possession.

3. THE APATHETIC TITLEHOLDER CASES

As seen in the cases involving mutual or unilateral mistake, the IUT produces counter-intuitive results with titleholders who genuinely do not care how their land is used. Applied in its most extreme sense, the IUT makes it impossible for an adverse possessor to claim title to land held for speculation or long-term development. Some judges welcomed this result on the grounds that a developer should not have to incur the cost of frivolous acts of possession just to prevent the loss of their lands to squatters.[138] On the other hand, barring claims against developers frustrated meritorious suits and thereby undermined the policy objectives underlying adverse possession. Consequently, some judges modified the IUT to allow certain proceedings to succeed.

In addition to the mutual mistake and GEUAN exceptions, some judges exempted claimants from the IUT when they could show a "colour of right"—some kind of documentary basis (valid or otherwise) for claiming possession of the whole plot of land.[139] *Murray Township Farms Ltd. v. Quinte West (City)*, for example, involved a farming corporation that incorporated a plot of neighbouring land held by an absentee titleholder into its operations. After decades of cultivation, the corporation communicated an adverse possession claim to the titleholder who, rather than dispute it, simply stopped paying taxes and attempted to precipitate a tax sale.[140] When the corporation's claim came to the court over ten years later, Justice Hackland rejected the titleholder's argument that her "intended use" of the land was to maximize its tax sale proceeds, and held that the farming corporation's written assertion of title gave its possession a "colour of right" that exempted it from having to satisfy the IUT.

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137. (2007), 64 R.P.R. (4th) 313 (Ont. Sup. Ct.), rev'd on other grounds (2008) 73 R.P.R. (4th) 247 at para. 31 (Ont. C.A.) [*Tucker*].

138. *Tasker v. Badgerow* (2007), 60 R.P.R. (4th) 79 at paras. 124-26 (Ont. Sup. Ct.) [*Tasker*]; *Masidon*, *supra* note 1 at para. 30.

139. See *supra* note 60. It bears note that judges use the term "colour of right" to mean different things in different circumstances. In *Hamson v. Jones*, for example, the judge essentially assimilates "colour of title" with good faith. See *Hamson v. Jones* (1988), 65 O.R. (2d) 304 (Sup. Ct.) at para. 37 [*Hamson*]. For a broader discussion in the American context, see Cunningham, *supra* note 39 at 10-12.

140. *Murray Township Farms*, *supra* note 2 at paras. 9-10.

Another recognized exception to the IUT involves titleholders whose apathy reaches such an extreme level that it effectively constitutes *de facto* abandonment of the land in question. Such a scenario occurred in *Galati v. Tassone*, where the titleholder admitted that the disputed land was of more use to his neighbour than to him.[141] In this case, Justice Anderson declined to apply the IUT, deeming it "so preposterous that I decline to entertain the suggestion" to require a claimant to frustrate the intention of a titleholder who clearly had none.[142] The *de facto* abandonment exception to the IUT also attracted discussion in *Elias v. Coker*,[143] *Skoropad v. 726950 Ontario*,[144] and in the trial decision of *Elliott v. Woodstock Agricultural Society*.[145]

Rather than create more exceptions to the IUT, other judges chose to impute intentions to absentee or apathetic titleholders, and no less than six different imputation theories have appeared in the jurisprudence. A number of early cases endorsed a *future use* approach, applying the IUT based on the titleholder's long-term plans for the land. *Giouroukos v. Cadillac Fairview Corp.* involved a plot of land that a developer was holding for future development and the claimant was using as a parking lot.[146] The trial judge allowed the adverse possession claim, deducing that using the land as a parking lot was inconsistent with future plans to build upon it.[147] The future use approach did not last very long—the Ontario Court of Appeal expressly rejected it in *Masidon*,[148] and the Supreme Court of Canada later reversed the decision in *Giouroukos* (although on other grounds).

The Court of Appeal, however, did approve the *potestative* approach, which imputes intent based on what tasks the titleholder *could do* with the disputed land. For example, *Tigwell v. Castle Village Shops Ltd.*[149] considered a claim for land that was subject to a right-of-way and upon which the claimant had built two large walls to prevent land slippage. The Court of Appeal deduced that,

141. *Galati*, *supra* note 93 at para. 4.

142. *Ibid.* at para. 11.

143. [1990] O.J. No. 982 at para. 88 (Dist. Ct.) (QL).

144. (1990), 12 R.P.R. (2d) 225 (Ont. Gen. Div.) at para. 37 [*Skoropad*].

145. 2008 ONCA 648 at para. 17, rev'g (2007), 60 R.P.R. (4th) 55 (S.C.J.) [*Elliott*].

146. *Giouroukos*, *supra* note 59 at paras. 1-4, 9.

147. *Ibid.* at paras. 24-28.

148. *Masidon*, *supra* note 1 at para. 29.

149. (1984), 6 O.A.C. 1.

since the right-of-way prevented him from building anything on the land, the titleholder could only use the land as a cross-over from one part of his property to another. Since the walls made such a use impossible, the Court allowed the adverse possession claim on the ground that the building of the walls frustrated any *possible* use by the titleholder.[150] Similar deductions appear in *Vaz v. Jong*[151] and *Hoffele*.[152]

A variant of the *potestative* approach presumes that a titleholder would never intend to use his or her land for unlawful purposes; consequently, any unlawful use of the land by the claimant can serve as a basis for adverse possession.[153] *Hamson v. Jones*[154] dealt with a titleholder who sold a piece of his land to his uncle, yet was prevented by the municipality from severing the plot. The uncle nevertheless constructed a home and installed electricity on the land purchased. Because local by-laws only allowed single dwellings, the uncle's home-building resulted in charges against the titleholder.[155] When the uncle later made an adverse possession claim for the land, Justice Parker concluded that, because his activities violated municipal by-laws, they had to be inconsistent with whatever use the titleholder could possibly have intended.[156]

In adverse possession claims against legal persons, the *teleological* approach imputes an intended use based on the legal person's constitutive act. *Orangeville Raceway (Ontario), Inc. v. 450919 Ontario Inc.*[157] involved a claim to a plot of land owned by a conservation authority. For various reasons, the authority could not develop the land into a conservation area, and it became a local dumping site. After the dump filled up, the claimant used the land as a parking lot.[158] Even though the authority consented to both uses of the land, Justice McGarry held

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150. *Ibid.* at paras. 3-4..

151. (2000), 32 R.P.R. (3d) 271 at para. 102 (Ont. Sup. Ct.).

152. *Hoffele, supra* note 112 at para. 11.

153. The policy implications of this principle are particularly interesting, since it suggests that the adverse possessor is rewarded for unlawful conduct. On the other hand, it is hard to hold blameless a titleholder who tolerates the use of his or her land for unlawful purposes.

154. *Hamson v. Jones* (1988), 65 O.R. (2d) 304 (Sup. Ct.) [*Hamson*].

155. *Ibid.* at paras. 2-24.

156. *Ibid.* at para. 52.

157. (1987), CarswellOnt 3333 (Dist. Ct.) (WLeC), rev'd pursuant to settlement, [1990] O.J. No. 1476 (C.A.) (QL).

158. *Ibid.* at paras. 4-12.

that such activities were fundamentally inconsistent with using the land for conservation purposes and, therefore, sufficient to support an adverse possession claim.[159]

The *objective* approach to the IUT does not consider the titleholder's subjective intentions, but rather the probable uses of an ordinary person holding title to the land in question. If the claimant's acts of possession would frustrate the intentions of an ordinary person holding title to the land—if not necessarily the actual titleholder—they can support an adverse possession claim. Echoes of this form of analysis appear in the Prince Edward Island Court of Appeal decision in *MacKinnon (Re)*,[160] which concerned a claim to a rural plot of land which neither the titleholder nor claimant used extensively. The Nova Scotia case of *Duggan v. Nova Scotia (A.G.)* understood the IUT in this way as well.[161]

Finally, the *evacuative* approach applies the IUT based on a presumption that the titleholder intends that "no one else use the land"—that it be kept "vacant"—a presumption that makes almost any act of possession by a clamant sufficient to support adverse possession. This approach appeared in *Georgco Diversified v. Lakeburn Land Capital Corp*,[162] as well as in *Ontario (Minister of Natural Resources) v. Holdcroft*,[163] a case against the Crown that involved the settlement of a small island over a century ago.

It bears emphasis that, in many cases involving apathetic titleholders such as *Masidon*,[164] the court eschews the imputation of an intended use and simply rejects the adverse possession claim. No coherent framework has arisen to explain when an imputation is justifiable and when it is not.

C. DISCONTENT WITH THE IUT

It took three decisions from the Ontario Court of Appeal in relatively close proximity (*Keefer* in 1977, *Fletcher* in 1981, and *Masidon* in 1984)[165] to firmly entrench the IUT as part of the law of adverse possession in Ontario. However, the various problems and ambiguities with the doctrine quickly engendered rum-

159. *Ibid.* at paras. 19-20.

160. *MacKinnon, supra* note 97 at para. 12.

161. (2004), 222 N.S.R. (2d) 229 at para. 103 (S.C.) [*Duggan*].

162. See *supra* note 130 and accompanying text.

163. (2004), 19 R.P.R. (4th) 70 at paras. 57-58 (Sup. Ct.), aff'd (2004), 27 R.P.R. (4th) 257 (C.A.).

164. *Masidon, supra* note 1.

165. *Keefer, supra* note 1; *Fletcher, supra* note 1; and *Masidon, ibid.*

blings of discontent, as judges decried the "preposterous"[166] and "ludicrous"[167] exercise of requiring meritorious claimants to frustrate non-existent intentions. In the 1996 *Jeffbrett Enterprises Ltd. v. Marsh Bros. Tractors Inc.* decision, Justice Crane lamented the "significant degree of unnecessary confusion" that had arisen in adverse possession cases.[168] Pointing out that the law of adverse possession does not distinguish between mutual mistakes and intentional squatters,[169] he reformulated the IUT as a rule of evidence rather than a test, suggesting that failure to frustrate the titleholder's plans for the land only evidenced an underlying intent "to stay until removed by the true owner."[170]

In *Teis*, the Ontario Court of Appeal recognized the IUT was not living up to initial expectations when Justice Laskin acknowledged that the test had become "a controversial element" of adverse possession, which, taken to its extreme, completely abnegated the institution.[171] The first sign of open revolt against the IUT appeared in *Bradford Investments*,[172] where Justice Cullity delivered a searing critique of the theory, pointing out that it had become "thoroughly discredited" in the United Kingdom and undermined adverse possession's fundamental purpose of protecting settled expectations.[173] He also derided the premise—which underlay *Masidon* and other developer cases—that holding land for development constituted a "use."[174] Although Justice Cullity did not feel himself entitled to follow the House of Lords and declare the IUT dead, he expressly declined to apply *Masidon* and created a new exception.[175]

The IUT recently came up again before the Court of Appeal in *Elliott v. Woodstock Agricultural Society*, which featured a neighbour intentionally encroaching upon land owned by a developer in a deliberate attempt to appropriate it through adverse possession.[176] The neighbour fenced the land, cleaned up

166. *Galati*, *supra* note 93 at para. 11.

167. *Georgco Diversfied*, *supra* note 95 at para. 17.

168. *Jeffbrett*, *supra* note 117 at para. 44.

169. *Ibid.* at paras. 46-47.

170. *Ibid.* at para. 54.

171. *Teis*, *supra* note 55 at para. 24.

172. *Bradford Investments*, *supra* note 95.

173. *Ibid.* at paras. 79, 100.

174. *Ibid.* at para. 99.

175. See *supra* note 135 and accompanying text.

176. *Elliott*, *supra* note 145 at paras. 2-4.

trees, and installed sprinklers.[177] The Court of Appeal nevertheless cursorily denied the adverse possession claim on the grounds that the use of the land did not frustrate the titleholder's plans to hold the land for development.[178] Although *Elliott* did not add anything new to the law of adverse possession, it did contain a subtle hint that the Court would be willing to reconsider the IUT should a suitable case arise.[179]

There seems little doubt that the IUT in Ontario has reached a point of crisis.[180] If the doctrine does not die a natural death once the province completely implements the Torrens system, the Court of Appeal may well review the doctrine when an appropriate case appears on its docket. The rise and fall of the IUT in the course of a single generation, however, begs the question of how it managed to catch on in the first place. Ontario's adverse possession law was apparently missing *something* important that the IUT seemed to address, and a closer inspection suggests that the "something" was the civil law principle of interversion.

IV. THE EMPIRICAL STUDY

A comprehensive review of the cases that either apply or discuss the IUT—"the IUT jurisprudence"—suggests the IUT represents an unconscious attempt by the Ontario courts to develop a functional equivalent to interversion, the common law version of which had been abolished by statute in 1833.

A. CASE SELECTION

As shown in the Appendix, tables A (for Ontario) and B (for the rest of Canada) list all of the reported Canadian jurisprudence on the IUT. Table A starts with *Keefer*[181] and continues to the November 2008 Court of Appeal decision in

177. *Ibid.*

178. *Ibid.* at paras. 21-28.

179. *Ibid.* at para. 30.

180. It bears note that not all discussion of the IUT has proven negative. One recent decision defended the doctrine, opining that:

> Indeed, it would be strange if an encroachment on vacant land that has no adverse impact on the use of the true owner and is not inconsistent with the intended uses of the true owner either now or in the future could amount to the kind of possession that would enable a successful claim for adverse possession.

See *Tasker, supra* note 138 at para. 124.

181. *Keefer, supra* note 1.

Tucker.[182] The compilation process began with database searches for jurisprudence containing the expressions "adverse possession" and "inconsistent use," which created a preliminary list of about two dozen cases. Noting up the cases expanded the list considerably. Several additional searches conducted in French attempted to locate cases from the francophone regions of Ontario or New Brunswick that had not otherwise been included.

The final list of IUT jurisprudence contains eighty-two cases, including seventy-three from Ontario, four from Prince Edward Island, two from New Brunswick, one from Newfoundland, one from Nova Scotia, and one from Alberta. The list excludes, however, cases that allude to the existence of the test, but neither apply nor comment on it.[183]

B. FORMULATION OF HYPOTHESES

Tables A and B review all of the IUT cases and speculate on the treatment they would have received in Quebec under article 923 of the CCQ. The tables consider whether (a) the original claimant took physical possession of the land in question "on behalf of another or with acknowledgement of a superior domain"; and, if yes, (b) whether the claimant demonstrated interversion through "unequivocal facts." It then lists whether the trial judge applied some form of the IUT or else found some reason to dispense with it.

Several hypotheses help to determine whether the IUT actually represented an unconscious effort by the common law judiciary to deal with interversion issues:

Hypothesis 1: The proportion of adverse possession cases that apply the IUT should approximate the proportion of acquisitive prescription cases that make use of article 923 of the CCQ. This hypothesis reflects that interversion is only necessary to resolve a relatively small fraction of total acquisitive prescription cases. If the IUT has a similar vocation, it should prove decisive with approximately the same frequency.

Hypothesis 2: Cases where the courts apply the IUT (as opposed to making a categorical exemption) should correspond to cases where the claimant took initial factual possession with "acknowledgement of a superior domain." This hypothesis reflects the assumption that the IUT aims to deal with interversion scenarios, not non-interversion scenarios. Cases where the courts have made

182. *Tucker*, *supra* note 137.

183. See *e.g. Duggan*, *supra* note 161.

principled exceptions to the IUT should correspond to cases that have not raised interversion issues.

Hypothesis 3: In cases where a claimant took possession "with acknowledgement of a superior domain," and where courts apply the IUT and find for the claimant, the claimant should have demonstrated interversion through unequivocal facts. This hypothesis aims to show that the IUT, when applied to the appropriate kind of case, produces more or less the same results as the interversion doctrine.

If Hypotheses 1, 2, and 3 are all true, they provide strong evidence that the IUT serves as a common law proxy for article 923 of the CCQ, even though they ostensibly deal with very different things.

The classification of the various cases has required several methodological assumptions:

Acknowledgement of a superior domain: Under civil law, most people who use land "with acknowledgement of a superior domain" fall into three categories: (a) titularies of a real right less than ownership, such as usufruct or servitude, (b) those aware of the owner's rights and acting with permission, and (c) undivided co-owners. In common law terminology, these three categories correspond roughly to (a) a grantee, (b) a licensee, and (c) a co-tenant.[184]

Interversion through unequivocal facts: Because interversion constitutes a question of fact that the common law judges do not assess, some cases do not lend themselves to ready classification. Whether interversion took place in the civil law sense remained particularly unclear in *Elliott*, where the claimants enclosed the land with a locked gate,[185] and *Marotta*, where the claimant's lawyer advised the titleholder of her adverse possession claim.[186] This study will assume that interversion occurred in the latter case, but not the former, since the courts in Quebec have generally proven sceptical of "factual" interversion, such as ceasing rent payments, and have been more amenable to "juridical" interversion, such as a notarized declaration.[187]

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184. A few other possibilities appear in the jurisprudence. For a vendor who retains physical custody of the land, see *Skidmore v. Parkin* (2002), 5 R.P.R. (4th) 53 (Ont. Sup. Ct). For superficiaries, see *John Austin & Sons v. Smith* (1982), 13 D.L.R. (3d) 59 (C.A.).

185. *Elliott, supra* note 145 at para. 10.

186. See *Marotta, supra* note 95 and accompanying text.

187. Lafond, *supra* note 14, s. 2.2.2.2(B) *in fine*.

Application of the IUT: In many of the IUT cases, judges offer a number of possible justifications for their decisions. This article will generally consider the IUT "applied" whenever a judge finds that the claimant frustrated an intended use of the titleholder. However, when the judge makes it clear that the IUT is not necessary to resolve the case, and he or she is using it purely on an alternative or hypothetical basis, the case will be classified as not applying the test.

C. TESTING THE HYPOTHESES

1. HYPOTHESIS 1

A brief analysis suffices to assess Hypothesis 1. According to data collected from Quicklaw and Westlaw/eCarswell and cross-referenced with the IUT cases, 13 percent and 16 percent of all Ontario and Prince Edward Island adverse possession cases, respectively, apply the IUT.[188] In Quebec, data from DCL/REJB and Azimut, covering similar time periods, show that about 9 percent of cases involving acquisitive prescription invoke article 923 of the CCQ, or article 2008 of the *Civil Code of Lower Canada* (CCLC). Table C summarizes the data and the methodology of its collection.

The higher figures from the common law provinces make sense, given the Ontario Court of Appeal's early insistence that the IUT constitutes an integral aspect of all adverse possession claims.[189] The perceived importance of the IUT motivated many common law judges to discuss and apply it where not strictly necessary to resolve the dispute.[190] In contrast, the civil law acquisitive prescription framework affords interversion only a peripheral role; it comes up when necessary, and is generally ignored otherwise.

Looking at Table C, it seems that IUT cases in Ontario and Prince Edward Island and interversion cases in Quebec both make up roughly a tenth of the total AP caseload. Further research may assess the statistical significance of this value, but it seems to be prima facie evidence that the IUT and interversion aim to resolve the same kinds of cases.

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188. Hypothesis 1 was only tested in Ontario and Prince Edward Island since they are the only provinces where the IUT has been consistently used for a significant period of time. See discussion above.

189. See *e.g. Keefer*, *supra* note 1 at 691 ("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 test for adverse possession since the leading case of *Leigh v. Jack*").

190. See *supra* note 190 and accompanying text.

TABLE C: PREVALENCE OF INTERVERSION & IUT CASES (1990-PRESENT)

Province	Cases with phrase "adverse possession" (QL & eC average)	Cases discussing IUT	Cases applying IUT	Percentage
Ontario	283.5	54	35	12%
P.E.I.	25	4	4	16%

Province	Cases with phrase "acquisitive prescription" (DCL/REJB & SOQUIJ Summaries Average)	Cases citing Art. 923 CCQ or Art. 2208 CCLC (DCL/REJB & SOQUIJ Summaries Average)	Percentage
Quebec	174.5	15.5	9%

2. HYPOTHESIS 2

Hypothesis 2 was confirmed by 80 per cent of the IUT jurisprudence. Where the claimant originally took physical possession "with acknowledgement of a superior domain," judges typically invoked the IUT to resolve the case; in cases where the claimant took possession without acknowledgement of a superior domain, judges typically created exceptions to the test.

Most of the sixteen cases that failed to confirm Hypothesis 2 applied the IUT unnecessarily. Five (possibly six) cases involved claims where the court invoked the IUT, even though the claimant's acts of possession could not possibly have grounded an adverse possession claim under traditional principles.[191] Four other cases involved mutual mistake scenarios where the judge applied the IUT with an imputed intention instead of waiving the test entirely.[192]

Two exceptional cases involved registration errors that occurred during the termination of a co-tenancy, leaving a former co-owner on title accidentally.[193]

191. *Leichner v. Windy Briars Holdings Ltd.* (1996), 31 O.R. (3d) 700 (C.A.); *MacKinnon, supra* note 97; *Henderson v. Wilson*, [1989] O.J. No. 35 (Dist. Ct.) (QL); *Brodie, supra* note 127; and *Penwest, supra* note 94. A sixth case also probably enters this category. See *DiGenova, supra* note 128.

192. See *Palis, supra* note 110; *Hoffele, supra* note 112; *Murdoch, supra* note 111; and *Guild v. Mallory* (1983), 41 O.R. (2d) 21 (Sup. Ct.).

193. See *Downer v. Karatnyk* (2001), 18 R.F.L. (5th) 264 (Ont. Sup. Ct.) [*Downer*] (which involved a matrimonial home, following a divorce, in which the ex-wife's name remained on the title even though their divorce agreement gave sole title to her former husband). See also *Key v. Latsky* (2006), 39 R.P.R. (4th) 160 (Ont. C.A.) [*Key*] (which involved two men who

In both cases, decades later, the party in physical possession sought to extinguish the rights of the other through adverse possession. Under civil law, both cases fall under the interversion rule insofar as the claimant originally held the disputed land in conjunction with the titleholder, and thus recognized a superior domain; however, the termination of co-ownership constituted an act of interversion that started the clock running on acquisitive prescription. Hypothesis 2 suggests that such cases should be resolved using the IUT. Yet, in both cases, the court applied *Beaudoin* and the other mutual mistake cases and dispensed with the test entirely.[194] Nevertheless, although the two cases do not align with Hypothesis 2, they still confirm the broader thesis that IUT attempts to articulate a functional equivalent to article 923 of the CCQ. Since the IUT usually operates against claimants, it stands to reason that cases in which interversion operates to benefit claimants might manifest themselves as exceptions to the IUT.

Of the remaining exceptional cases, one involved an unclear factual situation that may not have been properly classified,[195] and three that were potentially eligible for the IUT were resolved based on relatively exotic and unrelated aspects of adverse possession law.[196]

3. HYPOTHESIS 3

In 98 per cent of all identified cases where the claimant took possession "in acknowledgment of a superior domain," success depended on whether interversion took place in the civil law sense. With interversion, the claim succeeded; without interversion, it did not.

The only exception to Hypothesis 3 appears in *Marotta v. Creative Investments Ltd.*,[197] a recent decision that reviewed a wide range of IUT jurisprudence. Marotta involved a claim to a small, vacant lot that was left over from the development of the area. A neighbour made extensive use of the lot for years, although

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purchased a tract of land and divided it in two, but a metes and bounds error left a serious divergence between the *de facto* and the *de jure* boundary).

194. *Downer*, *ibid.* at para. 22; *Key*, *ibid.* at para. 18.

195. *Peters v. Palmer* (2000), 34 R.P.R. (3d) 143 (Ont. Sup. Ct.).

196. See *Giouroukos*, *supra* note 59 (deciding primarily on whether adverse possession can run against land that is subject to a lease to a third-party); *Moran v. Pappas* (1997), 34 O.R. (3d) 251 (Ct. J. (Gen. Div.)) (dealing with whether the adverse possession period must start anew following transfer of the land from the Crown to a private party); and *Arnprior*, *supra* note 136 (dealing primarily with certain provisions of railway legislation).

197. *Marotta*, *supra* note 95.

she knew that she was not the owner.[198] She twice had her lawyer advise the title-holder of her intention to assert title through adverse possession.[199] The title-holder knew that the claimant was on the lot, but raised no objections for over twenty years following the initial letter from her lawyer.[200] When the adverse possession claim reached the court, however, Justice Tulloch rejected it on the grounds that Marotta's decades of land use did not frustrate the developer's plan to hold the plot in inventory.[201]

The correctness of Justice Tulloch's decision remains debatable. The title-holder's refusal to even answer the claimant's letters, and its conscious acceptance of her using the land as her backyard for over twenty years, would seem to constitute the lack of owner vigilance often invoked in support of the AP institution. In the civil law, Marotta's claim would likely have had a good chance of success, since the letters sent from her solicitor could constitute "juridical acts" of interversion. On the other hand, interversion is a question of fact, and even a Quebec judge could, conceivably, have found the letters insufficient in the absence of stronger measures, such as attempts to change the tax rolls, register a claim, or fence in the property.[202] In that light, *Marotta* possibly does not really constitute an exception to Hypothesis 3.

D. COUNTER-ARGUMENT: THE IUT AS "BAD FAITH"

Although this article argues that the IUT constitutes an unconscious attempt of the judiciary to create a functional equivalent to article 923 of the CCQ, it is also possible to construe the IUT as a move towards the judicial abolition of bad faith adverse possession, a development already seen in the American states of Washington and Iowa.[203] England's common law courts undertook similar initiatives on multiple occasions, but found themselves overruled by Westminster.[204]

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198. *Ibid.* at paras. 14-18.

199. *Ibid.* at paras. 19-20.

200. See generally *ibid.*

201. *Ibid.* at para. 91.

202. Justice Tulloch distinguished Marotta's claim from the trial judgment in *Elliott*, *supra* note 145, precisely on the grounds that Marotta never paid the relevant taxes on the land. See *Marotta*, *supra* note 95 at para. 97.

203. See *supra* note 58.

204. See discussion at Part II(B), above. See also *supra* notes 101, 102, and accompanying text.

This article does not attempt to test the counter-hypothesis empirically, since most IUT cases lack the findings of fact that are necessary to evaluate the good or bad faith of the claimants. While most decisions note whether the claimant believed he or she had title to the disputed land, very few contain findings on the objective reasonableness of the belief, which constitutes another essential element of good faith. In the absence of sufficient data, however, it suffices to observe that, since interversion explains the outcome of virtually all of the IUT cases, it seems unlikely that "good faith" can offer any greater explanatory power.

Also, the complete abolition of bad faith adverse possession would run counter to the objectives of AP, which no doubt explains why so few American states have endorsed the idea, and why Westminster intervened twice to curtail it in England. AP aims to protect settled expectations, including those of third parties, and to motivate titleholders to maintain some basic vigilance over the use of their land. To achieve these objectives, bad-faith possessors have always been able to acquire land through AP, even when it appears to reward wrongful conduct. Although no examples appear amid the IUT jurisprudence, one American study has observed that successful bad-faith adverse possession cases typically feature vulnerable or disadvantaged claimants, anonymous or mean-spirited titleholders (such as abusive spouses), very prolonged periods of possession, and significant improvements on the disputed land undertaken at the claimant's expense.[205] The abolition of bad faith adverse possession would frustrate these meritorious claims.

Interversion offers a theoretically and empirically more satisfying model for the results of the IUT cases than good faith. It accounts for the outcome of virtually all the IUT jurisprudence, while reinforcing the basic adverse possession principle that a claimant must notify the titleholder of any potential claim. Recognizing that a grantee, licensee, or conscious intruder remains a grantee, licensee, or conscious intruder in the absence of clear contradictory acts reinforces the settled expectations of the parties, rather than undermining them. At the same time, interversion keeps the door open to bad-faith possession in extreme cases of titleholder apathy, thereby allowing for the vesting of land title in those who are ready to actually use it, rather than those who sit idly by while it is plundered.[206]

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205. Helmholz, *supra* note 43 at 347-49 (listing a number of examples).

206. Note, however, that because of the development of modern technology (which has made it easier to definitively record and determine who owns a piece of land) and the introduction of the Torrens system, it is possible that the land registry better reflects "settled expectations"

E. EMPIRICAL STUDY CONCLUSIONS

The empirical study demonstrates that the Ontario courts have misarticulated the rule of law that appears to have subconsciously guided their decision-making. The courts posited the IUT to deal with adverse possession claims that the civil law jurist immediately recognizes as interversion cases. Since the common law has no notion of interversion, the courts have had to develop alternative legal theories to resolve these kinds of cases to their satisfaction. The IUT, coupled with its various exceptions, serves as a fairly reliable proxy for article 923 of the CCQ. However, all proxy indicators have their limits, which past cases have revealed and future cases will no doubt continue to expose.

A defender of common law methodology could blame the legislature for the confusion and point to the *Real Property Reform Act, 1833*, which abolished ouster and, thus, seemed to close the door on interversion.[207] The fact that American courts have carved out interversion-like rules for specific situations, such as co-tenancies and grantors remaining in possession, suggests that the Canadian courts may have followed suit in the absence of legislative intervention.[208] On the other hand, the courts often find ways of mitigating the impact of statutory provisions, particularly ones dating from the distant past, that today prove unduly broad and inflexible. The Ontario courts could, no doubt, have found a way to carve out a space for some sort of interversion doctrine had they realized its utility.

Rather than pointing fingers, however, it is more useful to consider why the common law remained settled on the proxy test for interversion, even when its problems started to become apparent. As Part V demonstrates, the use of increasingly-complicated proxy theories constitutes a foreseeable and practically inevitable consequence of the common law's inductive methodology.

V. REFLECTIONS ON INDUCTIVE LAW-MAKING

A. NOTION OF INDUCTIVE LAW MAKING

In civil law, legislative instruments establish laws which judges apply to the various cases before them. The civil legal system presumes the completeness of

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of land ownership than the facts that exist on the ground. In this light, the abolition of bad faith adverse possession could help reinforce settled expectations rather than undermine them.

207. See the discussion in Part II(B), above.

208. Helmholz, *supra* note 43 at 351-56.

legislation and mandates judges to derive from the enacted law the precise rule that resolves the case at hand.[209] A judge's deductions in a particular case do not constitute a primary source of law and do not bind subsequent tribunals. Civil law jurisdictions generally standardize application of the law, not through *stare decisis*, but through *cassation*, which quashes aberrant decisions and sends them back to another court for rehearing.[210]

Common law judges, in contrast, settle disputes based not only on laws promulgated by the legislature, but also on their personal assessments of situations, as guided by the collective experience of the judiciary. Common law judges "make law" insofar as they formulate new rules, or revise old ones, as novel situations arise. At the same time, however, the common law places a large premium upon predictability and consistency, and therefore it adheres to the principle that the *ratio decidendi*—the underlying legal rule that ties the relevant facts to the outcome—of a court decision binds the court when faced with essentially similar scenarios.[211] The common law balances predictability and flexibility by construing *rationes decidendi* as narrowly as possible and relegating the rest of a judge's commentary to non-binding *obiter dicta*.[212] As jurisprudence accumulates on a particular subject, jurists survey the various *rationes decidendi* and articulate broader principles of law.[213] Common law law-making is therefore *inductive*, as it works from individual judgements to general principles.

The inductive nature of common law law-making resembles how scientists infer laws of nature based from the observation of discrete natural phenomena.

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209. This is true notwithstanding the residual role of "custom" as a source of law. See John E.C. Brierley & Roderick A. Macdonald, *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993) at 118-21; Louis Baudouin, *Les aspects généraux du droit privé dans la Province du Québec* (Paris: Dalloz, 1967) at 55-60.

210. See generally Alain Lacabarats, "The State of Case Law in France" (2005) 51 Loy. L. Rev. 79; Sofie M. F. Geeroms, "Comparative Law and Legal Translation: Why the Terms Cassation, Revision and Appeal Should Not Be Translated..." (2002) 50 Am. J. Comp. L. 201 at 203.

211. For a review of the history of *stare decisis* and a summary of its application in Canada, see Debra Parkes, "Precedent Unbound? Contemporary Approaches to Precedent in Canada" (2007) 32 Man. L.J. 135.

212. For discussion of the nature of *rationes decidendi* and *obiter dicta*, see Ian McLeod, *Legal Method* (Basingstoke: Palgrave Macmillan, 2005) at 121-47.

213. A particularly storied example of this practice can be found in *Donaghue v. Stevenson*, [1932] A.C. 562 (H.L.). In this seminal case, Lord Atkin proposed a generalized duty of care from the list of duty relationships previously recognized by the jurisprudence.

As explained by epistemologist Karl Popper,[214] the articulation of a law of nature necessarily starts with a problem, such as an unanswered question or an unexplained observation. Scientists then start proposing testable solutions to the problem; an untestable theory—such as that the various celestial bodies are pushed around by angels—cannot provide a basis for inquiry.[215] The proposed model then faces testing and critique. If the postulated model has equal or superior explanatory power than what came before, it is deemed a superior model and adopted. The process repeats when a new problem arises.

In the common law law-making process, the Popperian framework translates as follows: the articulation of a new legal principle starts with a "problem," meaning a suit that the judge believes should be decided a certain way, but which lacks (or is contrary to) a clear precedent. The judge then proposes a rule, which may either be an entirely novel legal principle, or a modification or qualification of an earlier one. The rule is "testable" if articulated sufficiently clearly and objectively that judges can apply it in future cases. If the rule resolves future cases to the satisfaction of the judges involved, the rule is proven "true." Otherwise, a new problem arises.

This model of inductive law-making relies on several simplifying assumptions. Most notably, "the law" is seen as something that common law judges ultimately describe rather than "make." In the real world, of course, the law is not exogenous from judges in the same way that the laws of science are exogenous from scientists. Nevertheless, it seems reasonable to hypothesize that the common law judiciary has a strong, shared sense of how disputes should be decided, with appellate courts reining in judges who deviate excessively from the institutional norm. Consequently, the ultimate role of judges is not so much to "make" the law, but to articulate clear principles that allow lay-people to predict how cases will be decided.

B. INDUCTIVE LAW MAKING REVEALED IN THE IUT JURISPRUDENCE

The workings of inductive law-making reveal themselves in the IUT jurisprudence on two distinct levels: the initial adoption of the IUT in the seminal cases

214. See generally David Deutsch, *The Fabric of Reality* (London: Penguin Books, 1997) at 55-72. Note, however, that Popper himself rejected "inductive" reasoning, although he was using the term in a different sense than it is used here (at 56-62).

215. *Ibid.* at 63.

of *Keefer, Fletcher,* and *Masidon*,[216] and the subsequent controversy surrounding the test for three decades afterwards.

1. THE INITIAL ADOPTION OF THE IUT

The IUT has its origins in the "problem" faced by the Court of Appeal in *Keefer, Fletcher,* and *Masidon*. The Court apparently believed that, without some substantive change in adverse possession law, as articulated at the time, the claimants in all three cases would have succeeded, thereby producing results that the Court felt unjust.[217] To deal with this challenge, the Court of Appeal postulated the IUT—the novel principle that, for adverse possession to occur, a claimant must somehow frustrate the titleholder's individual plans with regard to the land.

To merit adoption, a new postulate must be testable and have greater predictive power than what came before it. The IUT ultimately met the first requirement, but not the second. The IUT is testable insofar as it allows for unambiguous conclusions following certain findings of fact. If a finder of fact determines that a claimant did not frustrate an intended use of the titleholder, then the claimant fails the IUT; if a meritorious adverse possessor fails the IUT (as seen soon afterwards in the mutual mistake cases), then the IUT is proven "false."

Unfortunately, the Court of Appeal adopted the IUT without subjecting it to any meaningful assessment of its predictive power. Given that mutual mistake scenarios make up a large proportion of adverse possession cases, it seems almost surprising that the Court of Appeal did not review a single such case when it derived the IUT from *Leigh v. Jack*.[218] Had the Court of Appeal "tested" the IUT by attempting to apply it to other archetypical adverse possession cases, it probably would have realized right away that it had very little explanatory power and, thus, did not merit adoption.

2. JURISPRUDENCE FOLLOWING THE ADOPTION OF THE IUT

The task of testing and critiquing the IUT thus fell to subsequent tribunals, which soon faced the new problem of a large number of meritorious adverse possession claimants who failed the IUT. Consequently, the various lower courts began to postulate new solutions, including no less than four exceptions to the

216. *Keefer, supra* note 1; *Fletcher, supra* note 1; and *Masidon, supra* note 1.

217. The Court may have felt the need to modify the law since, in theory, it generally does not have the power to review questions of fact. See Justice MacKinnon's dissent in *Keefer, ibid.* at 681.

218. *Leigh, supra* note 74.

doctrine (*i.e.*, mutual mistake, unilateral mistake, colour of right, and *de facto* renunciation) and six varieties of imputed intentions (*i.e.*, hypothetical, potestative, objective, teleological, future use, and evacuative). The cases feature a fantastic diversity of approaches that, read as a whole, represent a highly creative brainstorming exercise among the judiciary.

However, these widely varying postulates have also experienced an unfortunate dearth of testing and critique. Although judges prove very adept at articulating principles that resolve cases before them to their satisfaction, they generally do not endeavour to review whether the principles adequately deal with a wide variety of comparable cases that have appeared in the past or may arrive in the future. As seen in Tables A and B, most of the IUT cases, particularly those of the Ontario Court of Appeal, cite, at most, three or four previous IUT cases—a small fraction of the total number available.

On the other hand, the jurisprudence reveals a significant change in approach since 2005, with a number of recent cases surveying a broader spectrum of prior jurisprudence, notably *Bradford Investments* (7 references),[219] *Mueller v. Lee* (8 references),[220] *Laurier Homes* (8 references),[221] *Goode v. Hudon* (12 references),[222] and *Marotta* (15 references).[223] The sudden proliferation of jurisprudence that more extensively reviews what has come before suggests that the IUT jurisprudence may be moving from a postulating to a true testing phase. The Court of Appeal's recent hint that it may be willing to review the doctrine with a bench of five judges may confirm the arrival of a more critical mindset.[224]

If, in fact, the jurisprudence has moved into a more critical phase, then the Ontario judiciary may collectively realize that the IUT, even with something approximating a good faith exception, has limited explanatory power and should be replaced. It may replace the IUT with an interversion rule, particularly if proposed by the counsel appearing at the time. However, such an outcome remains unlikely, since various structural features of the common law judiciary tend to reinforce the retention of old models of legal reasoning, even when novel frameworks can offer much clearer guidance to lower tribunals and the general public.

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219. *Bradford Investments, supra* note 95.

220. *Mueller v. Lee* (2007), 59 R.P.R. (4th) 199 (Ont. Sup. Ct.).

221. *Laurier Homes, supra* note 95.

222. *Goode v. Hudon* (2005), 30 R.P.R. (4th) 202 (Ont. Sup. Ct.).

223. *Marotta, supra* note 95.

224. See *supra* note 180 and accompanying text.

B. COGNITIVE BIASES IN INDUCTIVE LAW MAKING

The failure of the Ontario courts to articulate an interversion principle, and instead extrapolate the IUT with a good faith exception from its interversion-like cases, reveals how inductive reasoning does not always work optimally within a law-making context. A number of cognitive biases manifest themselves that reduce the ability of the courts to articulate concise legal principles with strong explanatory power. Such biases foster the development of complex proxy theories that become increasingly muddled as jurisprudence accumulates.[225] This article has offered the IUT as a case study for this phenomenon, although other common law doctrines, such as valuable consideration and the duty of care, may offer other examples.

First, the IUT jurisprudence evidences a strong *confirmation bias* within common law decision-making. Confirmation bias refers to the tendency to select evidence that supports a theory and to ignore evidence that contradicts it.[226] It creates inaccuracy in model testing and can lead to the adoption of inferior theories. The Court of Appeal exemplified such confirmation bias when it originally adopted the IUT without any consideration of the mutual mistake adverse possession cases, which would have immediately exposed the inadequacy of the theory.

Although confirmation bias occurs naturally in human decision-making, structural factors in the court system magnify its influence. Under the adversarial system characteristic of the common law, responsibility for bringing relevant jurisprudence to the court's attention lies with the parties—and the parties, seeking to limit research costs and to present their own arguments in the most positive light, limit themselves to precedents that best support their particular claims. The problem of how the adversarial system can unduly limit the flow of information to the court came out explicitly in *Murdoch*, where one party was unrepresented by counsel, and Justice Heeney lamented the incompleteness of the authorities presented during the hearing:

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225. For a general introduction to how cognitive biases operate in legal contexts, see Stephen J. Choi & Adam C. Pritchard, "Behavioral Economics and the SEC" (2003) [unpublished, archived at SSRN], online: <http://ssrn.com/abstract=500203>.

226. See *ibid.* at n. 30 and accompanying text. See also Margit E. Oswald & Stefan Grosjean, "Confirmation Bias" in Rüdiger F. Pohl, ed., *Cognitive Illusions: A Handbook on Fallacies and Biases in Thinking* (New York: Psychology Press, 2004) at 79.

> Counsel have an ethical duty to ensure that all of the relevant law, for and against their case, is before the court. Where, as here, the opposite party is unrepresented, it seems to me that that duty is all the more important, since an unrepresented party is unlikely to have the expertise to research the applicable law and assemble the relevant cases. There are many reported cases that deal with the significance of a fence in an adverse possession claim. Unfortunately, those cases were not put before me by Mr. Kratzmann, and in the interests of justice it was necessary for additional research to be done by the court.[227]

Confirmation bias also manifests itself through a tendency by judges, perhaps as a form of professional courtesy, simply to ignore, rather than criticize, unpopular or eccentric theories put forth in other decisions. In the IUT jurisprudence, this tendency appears most visibly in the mutual mistake cases that imputed intent to the titleholder (*Palis, Murdoch, Hoffele*) rather than create an exemption to the IUT (as in *Wood*). As seen in Table A, *Palis*, *Murdoch*, and *Hoffele* found themselves discussed in *no* subsequent jurisprudence, whilst *Wood* alone appeared in over twenty.[228]

Judicial law-making also suffers from a strong *anchoring bias*, which overvalues that which has been said before.[229] It distorts decision-making by affording undue weight to earlier theories and reducing the incentive to formulate completely new ones. Anchoring bias becomes particularly strong when dealing with appellate court judgements, since the judiciary tends to believe and act as if the abstract tests and frameworks proposed by the Court of Appeal form part of the *ratio decidendi* and have binding authority.

However, this expansive understanding of the *ratio decidendi* is not strictly true. In principle, the only truly binding element of a judicial decision is a proposition that a certain set of facts will produce a certain conclusion.[230] The theoretical link between the facts and the conclusion in a given case constitutes speculation and modelling, not an imperative rule of law. In this light, the *ratio decidendi* of *Keefer* becomes as follows: when a titleholder makes occasional use of a strip of land subject to a right-of-way, the building of minor structures upon

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227. *Murdoch*, *supra* note 111 at para. 40.

228. *Palis*, *supra* note 110; *Murdoch*, *ibid.*; *Hoffele*, *supra* note 112; and *Wood*, *supra* note 118.

229. For a general discussion of anchoring bias, see generally Thomas Mussweiler *et al.*, "Anchoring Effect" in Pohl, *supra* note 226 at 183.

230. This understanding of the *ratio decidendi* is generally attributed to the American jurist Herman Oliphant. See Arthur L. Goodhart, "Determining the Ratio Decidendi of a Case" (1930) 40 Yale L. Rev. 163 at 168.

the right-of-way by the right-of-way holder without objection by the titleholder cannot serve as a basis for adverse possession.[231] The *ratio* of *Fletcher* may read: when a titleholder builds a fence within his own land, intentionally leaving a strip between the fence and his neighbour's land, basic grounds-keeping on the strip by the neighbours, who know that the strip does not form part of their property, without objection by the titleholder, cannot serve as a basis for adverse possession.[232] Neither *ratio* says anything about interversion or inconsistent use, and both interversion and inconsistent use offer a reasonable prima facie explanation for why the facts gave rise to the ultimate result. The Court of Appeal, seeking to provide guidance for lower courts, proposed the IUT as the basis for the decisions reached. But nothing in principle forbids a future court, even a trial court, from not following the Court of Appeal's suggested approach and adopting a new one in its place.

Of course, this austere view of the *ratio decidendi* does not apply in practice. Canada's appellate courts have adopted an expansive view of their role that includes the power to prescribe tests and analytical frameworks for lower courts to follow when addressing similar cases. Although lower-level courts in Alberta and Newfoundland felt themselves entitled to reject the IUT entirely, or downgrade its importance,[233] Ontario's judges have not felt themselves so privileged. As Justice Cullity lamented in *Bradford Investments*, Ontario's lower courts have felt themselves obligated to apply the IUT as directed by the Court of Appeal, even when it would produce counter-intuitive results, or was not necessary to resolve the disputes at hand.[234] Only in one Ontario IUT case, *Jeffbrett*, did the trial judge demonstrate a willingness to comprehensively reinterpret the earlier cases (particularly *Masidon*) in a manner that effectively did away with the IUT entirely.[235]

Other structural factors further reinforce the anchoring bias in common law law-making. The casuistic and incrementalist methodology of the common law, according to which judges decide disputes by reviewing past cases and selecting the most similar, strongly motivates judges to use the established frameworks as their own starting points. Whether they "apply" or "distinguish" a precedent,

231. *Keefer*, *supra* note 1.

232. *Fletcher*, *supra* note 1.

233. See *supra* notes 101, 102, and accompanying text.

234. *Bradford Investments*, *supra* note 95 at para. 6.

235. *Jeffbrett*, *supra* note 117 at para. 54.

they implicitly affirm the precedent's reasoning. Moreover, since the common law expects judges to limit their decision-making to the case before them, they only have incentive to comprehensively review and reinterpret past jurisprudence when established doctrines have grown too cumbersome and unwieldy to apply. By this point, however, a bandwagon effect comes into play; individual judges may not feel themselves suitably qualified or able to challenge a theory that has featured in dozens (if not hundreds) of other cases—including cases issued or approved by appellate courts. Under the common law, therefore, the proliferation of problematic cases that involve a questionable legal doctrine ironically contributes to the doctrine's persistence.

The anchoring effect motivates judges to follow existing frameworks instead of proposing new ones. While this conservatism may help to ensure the predictability of the law, it undermines the effective operation of inductive reasoning. A model does not have greater explanatory power simply because it was articulated first. To the contrary, some of the most spectacular advances in human knowledge involved the total replacement of established paradigms, such as when Einstein replaced Newton's venerable laws of motion with special relativity in 1905. Unfortunately, such radical rewriting of principles causes all sorts of havoc in law, insofar as practitioners and the citizenry at large rely on long-settled expectations of how the law operates. Existing theories, therefore, persist under the common law tradition and they become increasingly elaborate and confusing as time passes.

The attempts of early astronomers to model planetary motion exemplify the effect of the same cognitive biases that are present in the common law. Early astronomers subscribed to a principle that celestial objects could only move in perfect circles. Since observed planetary movement did not accord with circular motion, Hipparchus and Ptolemy theorized that planets moved in epicycles—perfect circular orbits around reference points that themselves moved in perfect circular orbits. As later astronomical observations in the Middle Ages proved inconsistent with Ptolemaic theory, astronomers postulated increasing numbers of epicycles—perfect circular orbits around reference points which orbited in perfect circles around other reference points that orbited in perfect circles around further reference points, *et cetera*. The endless iterations of epicycles proved incredibly complex and lacked any intuitive basis. Only when Kepler shocked the scientific world with the suggestion that celestial bodies moved in ellipses, not circles, were epicycles finally replaced by a general theory of planetary mo-

tion that led to the discovery of Neptune and a host of other astronomical advances.

Today, the expression "adding epicycles" has become a term of derision for constantly tweaking a theory to make its predictions match the facts, even when it has become clear that the basic premises of the theory are wrong. Unfortunately, as seen in the IUT jurisprudence, the incrementalist law-making practiced by the common law courts tends to promote the "addition of epicycles" to questionable legal theories, rather than the seeking of better concepts.

VI. CONCLUSION

This article has sought to identify some of the limitations of inductive law-making, using one particular line of jurisprudence to illustrate how various cognitive biases lead the common law judiciary to develop elaborate and convoluted approaches to relatively simple problems. It bears emphasis that this article has not sought to disparage the common law (much less suggest that it is inferior to the civil law, which arguably has the opposite problem of tending to oversimplify complicated problems); rather, it has aimed to increase awareness of the potential side effects of the common law's methodology and to encourage jurists to become more sensitive to its effects.

The results of this article reveal the usefulness of discourse across legal systems. While this article does not advocate the uncritical adoption of civil law principles in the common law, it does suggest that an openness to, and interest in, alternative legal models can help the courts arrive at just decisions and coherent explanations. Had the Ontario Court of Appeal considered how civil law courts would have assessed the claims in *Keefer*, *Fletcher*, and *Masidon*, it would perhaps have articulated an explanatory model more convincing—and less problematic—than the IUT.

APPENDIX: IUT JURISPRUDENCE SUMMARY TABLES†

TABLE A: ONTARIO IUT CASES (IN ORDER OF OCCURRENCE) SUMMARY DATA

	Case / Citation	Acknowledgment of superior domain?	If yes, was there inversion?	Was claim successful?	IUT applied?	H2 confirmed?	H3 confirmed?	Subsequent IUT cases citing decision	Previous IUT cases cited in decision
1	*Keefer v. Arillotta* (1976), 13 O.R. (2d) 680 (C.A.)	Yes	No	No	Yes	True	True	>60	0
2	*Fletcher v. Storoschuk* (1981), 35 O.R. (2d) 722 (C.A.).	Yes	No	No	Yes	True	True	>60	1
3	*John Austin & Sons Ltd. v. Smith et al.* (1982), 35 O.R. (2d) 272 (C.A.).	Yes	No	No	Yes	True	True	5	2
4	*Giouroukos v. Cadillac Fairview Corp. Ltd. et al.* (1982), 37 O.R. (2d) 364 (H.C.), rev'd on other grounds (1983), 3 D.L.R. (4th) 595, (Ont. C.A.), aff'd *Giouroukos v. Cadillac Fairview Corp.*, [1986] 2 S.C.R. 707.	Yes	No	No	No	False	True	2	3
5	*Guild et al. v. Mallory* (1983), 41 O.R. (2d) 21 (H.C.).	No	N/A	No	Yes.	False	N/A	0	2
6	*Masidon Investments Ltd. v. Ham* (1984), 2 O.A.C. 147 (C.A.), leave to appeal to S.C.C. refused, [1984] S.C.C.A. No. 230.	Yes	No	No	Yes	True	True	>60	4

† The data presented below is a summary of a more comprehensive research compilation, available from the author on request.

	Case / Citation	Acknowledgment of superior domain?	If yes, was there inversion?	Was claim successful?	IUT applied?	H2 confirmed?	H3 confirmed?	Subsequent IUT cases citing decision	Previous IUT cases cited in decision
7	*Tigwell v. Castle Village Shops Ltd.* (1984), 34 R.P.R. 193 (Ont. C.A.).	Yes	Yes	Yes	Yes	True	True	0	1
8	*Zigelstein v. Stobniski* (1985), 51 O.R. (2d) 562 (H.C.).	Yes	No	No	Yes	True	True	1	1
9	*Ray-Don Machinery Ltd. v. Rushmore Investments Ltd.*(1985), 12 O.A.C. 235 (H.C., Div. Ct.).	Unclear (apparently yes)	Unclear (apparently no)	No	Yes	True	True	2	2
10	*Small Estate v. Bouw*, 1986 CarswellOnt 2858 (Dist. Ct.) (WLeC).	Yes	No	No	Yes	True	True	0	2
11	*Galati v. Tassone*, [1986] O.J. No. 698 (H.C.J.) (QL).	Unclear (apparently no)	N/A	Yes	No	True	N/A	0	4
12	*Pinder v. Aregers* [1986] O.J. No. 973 (H.C.) (QL), varied (1988), 30 O.A.C. 137 (Div. Ct.).	Yes	No	No	Yes	True	True	2	3
13	*Bunty Alf Ltd. v. Grace Evangelical Lutheran Church at Oakville* (1986), 42 R.P.R. 1 (Ont. H.C.).	Yes	No	No	Yes	True	True	2	3
14	*Orangeville Raceway (Ontario) Inc. v. 450919 Ontario Inc.*, 1987 CarswellOnt 3333 (Dist. Ct.) (WLeC), rev'd pursuant to settlement [1990] O.J. No. 1476 (C.A.) (QL).	Yes	No	Yes	Yes	True	True	0	2

	Case / Citation	Acknowledgment of superior domain?	If yes, was there inversion?	Was claim successful?	IUT applied?	H2 confirmed?	H3 confirmed?	Subsequent IUT cases citing decision	Previous IUT cases cited in decision
15	*Walker v. Brickman*, [1988] O.J. No. 648 (Dist. Ct.) (QL).	No	N/A	Yes	No	True	N/A	0	3
16	*Hamson v. Jones* (1988), 65 O.R. (2d) 304 (H.C.).	No	N/A	Yes	No	True	N/A	5	4
17	*Palis v. Benedetti*, [1989] O.J. No. 128 (Dist. Ct.) (QL).	No	N/A	Yes	Yes	False	N/A	0	4
18	*Henderson v. Wilson*, [1989] O.J. No. 35 (Dist. Ct.).	No	N/A	No	Yes	False	N/A	0	1
19	*Elias v. Coker*, [1990] O.J. No. 982 (Dist. Ct.) (QL).	Yes	No	No	Yes	True	True	5	6
20	*Brisebois c. Chamberland* (1990), 77 D.L.R. (4th) 583 (Ont. C.A.).	Majority: Yes Dissent: No	Majority: No Dissent: N/A	Majority: No Dissent: No	Yes	True	True	1	3
21	*Skoropad v. 726950 Ontario Ltd.* (1990), 12 R.P.R. (2d) 225 (Ont. Ct. J. (Gen. Div.)).	Yes	No	No	Yes	True	True	4	7
22	*Wood v. Gateway of Uxbridge Properties Inc.* (1990), 75 O.R. (2d) 769 (Ct. J. (Gen. Div.)).	No	N/A	Yes	No	True	N/A	22	4
23	*Bruce v. Follis*, [1990] O.J. No. 2546 (Ct. J. (Gen. Div.)) (QL).	Yes	No	No	Yes	True	True	0	3
24	*Hoffele v. Bernier*, [1992] O.J. No. 1231 (Ct. J. (Gen. Div.)) (QL).	No	N/A	Yes	Yes	False	N/A	0	1

	Case / Citation	Acknowledgment of superior domain?	If yes, was there inversion?	Was claim successful?	IUT applied?	H2 confirmed?	H3 confirmed?	Subsequent IUT cases citing decision	Previous IUT cases cited in decision
25	*Keil v. 762098 Ontario Inc.*, [1989] O.J. No. 866 (S.C.), aff'd (1992), 91 D.L.R. (4th) 752 (Ont. C.A.).	No	N/A	Yes	No	True	N/A	6	3
26	*Plant v. Plant* (1993), 48 R.F.L. (3d) 82 (Ont. Unified Fam. Ct.).	Yes	Yes	Yes	Yes	True	True	0	4
27	*Georgeco Diversified Inc. v. Lakeburn Land Capital Corp.* (1993), 31 R.P.R. (2d) 185 (Ont. Ct. J. (Gen. Div.)).	No	N/A	Yes	No	True	True	5	4
28	*Kreadar Enterprises Ltd. v. Duny Machine Ltd.* (1994), 42 R.P.R. (2d) 274 (Ont. Ct. J. (Gen. Div.)).	Yes	No	No	Yes	True	True	1	4
29	*Cellucci v. Krason*, [1995] O.J. No. 3846 (Ct. J. (Gen. Div.)) (QL).	Unknown	Unknown	No	Yes	N/A	N/A	0	3
30	*Raso v. Lonergan*, [1996] O.J. No. 2898 (Ct. J. (Gen. Div.)), aff'd (1998) 114 O.A.C. 335 (C.A.).	Unclear (apparently yes)	Yes	Yes	No	True	True	7	3
31	*White v. McElwain*, 1996 CarswellOnt 299 (Ct. J. (Gen. Div.)) (WLeC).	No	N/A	No	No	True	N/A	0	1
32	*Jeffbrett Enterprises Ltd. v. Marsh Bros. Tractors Inc.* (1996), 5 O.T.C. 161 (Ct. J. (Gen. Div.)).	No	N/A	No	No	True	N/A	2	2

	Case / Citation	Acknowledgment of superior domain?	If yes, was there inversion?	Was claim successful?	IUT applied?	H2 confirmed?	H3 confirmed?	Subsequent IUT cases citing decision	Previous IUT cases cited in decision
33	*Leichner v. Windy Briars Holdings Ltd.* (1996), 31 O.R. (3d) 700 (C.A.), rev'g [1996] O.J. No. 1172 (Ct. J. (Gen. Div.)) (QL).	Yes	No	CA: No SCJ: Yes	No	False	True	0	2
34	*Teis v. Ancaster (Town)* (1997), 152 D.L.R. (4th) 304 (Ont. C.A.).	No	N/A	Yes	No	True	N/A	23	4
35	*Moran v. Pappas* (1997), 34 O.R. (3d) 251 (Ct. J. (Gen. Div.)).	Yes	No	No	No	False	True	1	0
36	*Dalbello v. Turcato*, [1997] O.J. No. 3858 (Ct. J. (Gen. Div.)) (QL).	Yes	No	No	Yes	True	True	0	3
37	*Campbell v. Nicholson* (1997), 26 O.T.C. 241 (Ct. J. (Gen. Div.)).	No	N/A	Yes	No	True	N/A	0	2
38	*Gorman v. Gorman* (1988), 110 O.A.C. 87 (C.A.).	Yes	No	No	Yes	True	True	2	5
39	*Longo v. C.H. Lager Ltd.* (1998), 20 R.P.R. (3d) 128 (Ont. Ct. J. (Gen. Div.)).	Yes	Unclear	Remanded to trial				0	4
40	*Cunningham v. Zebarth Estate* (1998), 18 R.P.R. (3d) 299 (Ont. Ct. J. (Gen. Div.)).	No	N/A	Yes	No	True	N/A	2	6
41	*Hodkin v. Bigley*, [1998] O.J. No. 4844 (C.A.) (QL).	Yes	No	No	Yes	True	True	3	1
42	*Fazio v. Pasquariello* (1999), 93 O.T.C. 99 (Ct. J. (Gen. Div.)).	No	N/A	Yes	No	True	N/A	2	6

	Case / Citation	Acknowledgment of superior domain?	If yes, was there inversion?	Was claim successful?	IUT applied?	H2 confirmed?	H3 confirmed?	Subsequent IUT cases citing decision	Previous IUT cases cited in decision
43	*Catholic Cemeteries – Archdiocese of Toronto v. Jiwani, Izzast*, [1999] O.J. No. 5644 (Sup. Ct.) (QL).	No	N/A	No	No	True	N/A	0	2
44	*Brodie v. Flake* (1999), 28 R.P.R. (3d) 87 (Ont. Sup. Ct.).	No	N/A	No	Yes	False	N/A	0	6
45	*Peters v. Palmer* (2000), 34 R.P.R. (3d) 143 (Ont. Sup. Ct.).	No	No	No	Yes	False	N/A	3	3
46	*Landmark Management Inc. v. Ouimet*, [2000] O.J. No. 230 (Sup. Ct.) (QL).	No	N/A	Yes	No	True	N/A	0	3
47	*Vaz v. Jong* (2000), 32 R.P.R. (3d) 271 (Ont. Sup. Ct.).	No	N/A	No	No	True	N/A	0	5
48	*Arnprior (Town) v. Coady* (2001), 42 R.P.R. (3d) 188 (Ont. Sup.Ct.), aff'd 2002 CarswellOnt 1292 (C.A.) (WLeC).	Yes	No	No	No	False	True	3	8
49	*Downer v. Karatnyk* (2001), 18 R.F.L. (5th) 264 (Ont. Sup. Ct.).	Yes	Yes	Yes	No	False	True	0	3
50	*DiGenova v. Hotchkiss* (2001), 105 A.C.W.S. (3d) 968 (Ont. Sup. Ct.).	No	No	No	Yes	False	N/A	0	2
51	*Rocca v. Marrocco* (2001), 43 R.P.R. (3d) 95 (Ont. Sup. Ct.), aff'd (2002), 4 R.P.R. (4th) 200 (Ont. C.A.).	Yes	No	No	Yes	True	True	1	2

	Case / Citation	Acknowledgment of superior domain?	If yes, was there inversion?	Was claim successful?	IUT applied?	H2 confirmed?	H3 confirmed?	Subsequent IUT cases citing decision	Previous IUT cases cited in decision
52	*Lafferty v. Brindley* (2001), 8 R.P.R. (4th) 279 (Ont. Sup. Ct.), varied (2003), 13 R.P.R. (4th) 181 (Ont. C.A.).	Yes	No	No	Yes	True	True	0	2
53	*Van Straaten v. Nicholson*, [2002] O.J. No. 3011 (Sup. Ct.) (QL), aff'd 2003 CarswellOnt 1602 (C.A.) (WLeC).	Yes	No	No	Yes	True	True	1	4
54	*Skidmore v. Parkin* (2002), 5 R.P.R. (4th) 53 (Ont. Sup. Ct.).	Yes	No	No	Yes	True	True	0	5
55	*Murdoch v. Kenehan* (2003), 8 R.P.R. (4th) 257 (Ont. Sup. Ct.).	No	N/A	Yes	Yes	False	N/A	0	5
56	*Ontario (Minister of Natural Resources) v. Holdcroft* (2004), 19 R.P.R. (4th) 70 (Ont. Sup. Ct.), aff'd (2004), 27 R.P.R. (4th) 257 (Ont. C.A.).	Yes	Yes	Yes	Yes	True	True	2	4
57	*Rowe-Wilkinson v. Wright* (2004), 27 R.P.R. (4th) 267 (Ont. Sup. Ct.).	Yes	No	No	Yes	True	True	1	4
58	*Key v. Latsky*, 2004 CarswellOnt 5729 (Sup. Ct.) (WLeC), aff'd (2006) 39 R.P.R. (4th) 160 (Ont. C.A.).	Yes	Yes	Yes	No	False	True	0	2
59	*Goode v. Hudon* (2005), 30 R.P.R. (4th) 202 (Ont. Sup. Ct.).	Yes	No	No	Yes	True	True	1	12

	Case / Citation	Acknowledgment of superior domain?	If yes, was there inversion?	Was claim successful?	IUT applied?	H2 confirmed?	H3 confirmed?	Subsequent IUT cases citing decision	Previous IUT cases cited in decision
60	*Bouchard c. Guibord*, 2005 CarswellOnt 10015 (C.S.) (WLeC), aff'd 2007 CarswellOnt 1233 (C.A.) (WLeC).	Yes	No	No	Yes	True	True	0	2
61	*Bradford Investments (1963) v. Fama* (2005), 77 O.R. (3d) 127 (Sup. Ct.).	No	N/A	Yes	No	True	N/A	6	6
62	*Sousa v. Capeloa* (2005), 49 R.P.R. (4th) 256 (Ont. Sup. Ct.).	Yes	No	No	Yes	True	True	0	4
63	*Penwest Development Corp. v. Youthdale Ltd.* (2005), 46 R.P.R. (4th) 124 (Ont. Sup. Ct.).	No	N/A	No	Yes	False	N/A	0	5
64	*Laurier Homes (27) Ltd. v. Brett* (2005), 42 R.P.R. (4th) 86 (Ont. Sup. Ct.).	Yes	No	No	Yes	True	True	1	5
65	*BCM International (Canada) Inc. v. Joannette* (2006), 41 R.P.R. (4th) 218 (Ont. Sup. Ct.), varied (2008) R.P.R. (4th) 212 (Ont. C.A.).	Yes	No	No	Yes	True	True	0	4
66	*Murray Township Farms Ltd. v. Quinte West (City)* (2006), 50 R.P.R. (4th) 266 (Ont. Sup. Ct.).	No	Yes	Yes	No	True	N/A	1	6
67	*1636539 Ontario Ltd. v. W. Bradfield Ltd.* (2007), 55 R.P.R. (4th) 231 (Ont. Sup. Ct.).	Yes	No	No	Yes	True	True	1	6

	Case / Citation	Acknowledgment of superior domain?	If yes, was there inversion?	Was claim successful?	IUT applied?	H2 confirmed?	H3 confirmed?	Subsequent IUT cases citing decision	Previous IUT cases cited in decision
68	*Cantera v. Eller* (2007), 56 R.P.R. (4th) 39 (Ont. Sup. Ct.)	No	N/A	Yes	No	True	N/A	0	5
69	*Tasker v. Badgerow* (2007), 60 R.P.R. (4th) 79 (Ont. Sup. Ct.).	Yes	No	No (except for the well and shed over it)	Yes	True	True	0	5
70	*Mueller v. Lee* (2007), 59 R.P.R. (4th) 199 (Ont. Sup. Ct.).	No	N/A	Yes (except for one structure on titleholder's land)	No	True	N/A	1	8
71	*Elliott v. Woodstock Agricultural Society* (2007), 60 R.P.R. (4th) 55 (Ont. Sup. Ct.), rev'd (2008) 92 O.R. (3d) 711 (C.A.).	Yes	CA: No SCJ: Yes (fencing, physical exhaustion)	CA: No SCJ: Yes	Yes	True	True	1	4
72	*Tucker v. Moffatt* (2007), 64 R.P.R. (4th) 313 (Ont. Sup. Ct.), rev'd (2008), 73 R.P.R. (4th) 247 (Ont. C.A.).	Trial: No CA: Yes	N/A	Trial: Yes CA: No	Trial: No CA: Yes	True	True	0	4
73	*Marotta v. Creative Investments Ltd.* (2008), 69 R.P.R. (4th) 44 (Ont. Sup. Ct.).	Yes	Yes	No	Yes	True	False	0	15

TABLE B: NON-ONTARIO IUT CASES (IN ORDER OF OCCURRENCE) SUMMARY DATA

	Case / Citation	Acknowledgment of superior domain?	If yes, was there inversion?	Was claim successful?	IUT applied?	H2 confirmed?	H3 confirmed?	Subsequent IUT cases citing decision	Previous IUT cases cited in decision
74	*Lacombe c. Pelletier* (1984), 54 N.B.R. (2d) 81 (Q.B. (T.D.)).	No	N/A	No	Yes	True	N/A	1	1
75	*Mallet et al. c. Savoie* (1989), 95 N.B.R. (2d) 192 (B.R. (1re inst.)).	Yes	No	No	Yes	True	True	0	2
76	*Fitzpatrick's Body Shop Ltd. v. Kirby* (1992), 99 Nfld. & P.E.I.R. 42 (Nfld. S.C. (T.D.)).	No	N/A	Yes	No	True	N/A	1	3
77	*Lehr v. St. Mary River Irrigation District*, [1993] A.J. No. 1411 (Q.B.) (QL).	Yes	No	No	Yes	True	True	0	2
78	*Squires (Re)* (1999), 182 Nfld. & P.E.I.R. 318 (P.E.I. S.C. (A.D.)).	Yes	No	No	Yes	True	True	0	2
79	*Roche v. Roche* (2002), 114 A.C.W.S. (3d) 749 (P.E.I. S.C. (T.D.)).	Yes (apparently)	No	No	Yes	True	True	0	1
80	*LeClair Estate (Re)* (2002), 111 A.C.W.S. (3d) 840 (P.E.I. S.C. (T.D.)).	Yes	No	No	Yes	True	True	1	2
81	*MacKinnon (Re)* (2003), 11 R.P.R. (4th) 11 (P.E.I. S.C. (A.D.)).	No	N/A	No	Yes	False	N/A	1	3
82	*Board of Trustees of Common Lands v. Tanner* (2005), 236 N.S.R. (2d) 295 (S.C.).	Yes	No	No	Yes	True	True	0	5