

**SUPREME COURT OF CANADA**

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| **Citation:** Nelson (City) *v.* Mowatt, 2017 SCC 8, [2017] 1 S.C.R. 138 | **Appeal heard:** October 7, 2016  **Judgment rendered:** February 17, 2017  **Docket:** 36999 |

Between:

Corporation of the City of Nelson

Appellant

and

Mary Geraldine Mowatt and Earl Wayne Mowatt

Respondents

- and –

Attorney General of British Columbia

Intervener

**Coram:** McLachlin C.J. and Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

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| **Reasons for Judgment:**  (paras. 1 to 44) | Brown J. (McLachlin C.J. and Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ. concurring) |

Nelson (City) *v.* Mowatt, 2017 SCC 8, [2017] 1 S.C.R. 138

Corporation of the City of Nelson Appellant

v.

Mary Geraldine Mowatt and

Earl Wayne Mowatt Respondents

and

Attorney General of British Columbia Intervener

**Indexed as: Nelson (City) *v.* Mowatt**

2017 SCC 8

File No.: 36999.

2016: October 7; 2017: February 17.

Present: McLachlin C.J. and Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

on appeal from the court of appeal for british columbia

*Property — Real property — Adverse possession — Required elements — Successive occupants — Possessors of land alleging that their predecessors acquired title to disputed lot by adverse possession and seeking declaration that they are owners of lot — Chambers judge found gap in evidence for period of four years interrupted continuity of adverse possession — Whether evidence put before chambers judge was sufficient to bridge evidentiary gap — Whether Court of Appeal erred by substituting its own findings of fact for those properly arrived at by chambers judge — Whether inconsistent use requirement forms part of law of British Columbia.*

The Mowatts claim title to a parcel of land located in Nelson, British Columbia. While they took possession of the disputed lot in 1992, their claim rests upon continuous adverse possession thereof by three families in succession, beginning in the early 20th century. To enforce their claim, the Mowatts brought two proceedings: an action for a declaration that the provincial Crown, which holds registered title, does not own the disputed lot and therefore could not transfer it to the City of Nelson; and a petition for judicial investigation under the *Land Title Inquiry Act* into their title to the disputed lot. The chambers judge granted the City’s summary trial application to dismiss both proceedings, pointing to an evidentiary gap — an interruption in the continuity of adverse possession running from approximately 1916 to 1920. The Court of Appeal reversed, finding that the chambers judge had erred in his treatment of the evidence of continuous occupation, and concluding that continuous adverse possession of the disputed lot was demonstrated from December 1909 to at least February 1923. The Court of Appeal also held that lack of registration did not prevent the transfer to the Mowatts of their predecessor’s interest in the disputed lot, and that the law of British Columbia does not require the Mowatts to demonstrate that their use of the disputed lot was inconsistent with the intended use of the true owner.

*Held*: The appeal should be allowed.

Adverse possession is a long-standing common law device by which the right of the prior possessor of land, typically the holder of registered title, may be displaced by a trespasser whose possession of the land goes unchallenged for a prescribed period of time. To meet the test of establishing adverse possession, the act of possession must be open and notorious, adverse, exclusive, peaceful, actual and continuous. The adverse possessor who successfully obtains title need not always be the same person whose adverse possession triggered the running of the limitation period. The inconsistent use doctrine, that is, that the possessor’s use of the disputed lot must have been inconsistent with the true owner’s present or future enjoyment of the land, does not accord with the legislation in the province of British Columbia and therefore, the inconsistent use requirement forms no part of the law of British Columbia governing adverse possession.

The burden lay with the Mowatts to demonstrate continuous possession on the balance of probabilities, and not with the City to demonstrate abandonment. No legal significance lies in the absence of an explicit finding of abandonment by the chambers judge. It follows from his finding here that continuous possession of the disputed lot was not established beyond January 1916, that it was abandoned. Possession does not require continuous occupation, as the common law recognizes that a person may possess land in a manner sufficient to support a claim to title while choosing to use it intermittently or sporadically. That is, property can be possessed without being at all times occupied. While the chambers judge occasionally referred to possession and occupation seemingly interchangeably, it is apparent that he knew he was to look for continuous possession, not occupation. The meaning of the two concepts essentially overlapped on the facts of this claim, and there is no error in the chambers judge’s application of the test for adverse possession arising from his occasional references to occupation.

While the Court of Appeal’s finding of fact that adverse possession of the dispute lot was continuous from December 1909 to at least February 1923 is not unreasonable, the possibility of alternative findings based on different ascriptions of weight presents no basis for overturning the findings of a fact‑finder. It is not the role of appellate courts to second‑guess the weight to be assigned to the various items of evidence. Absent palpable and overriding error — that is, absent an error that is plainly seen and has affected the result — an appellate court may not upset a fact‑finder’s findings of fact. The Court of Appeal erred by interfering with a factual finding where its objection, in substance, stemmed from a difference of opinion over the weight to be assigned to the evidence. In the context of historical adverse possession claims, the quality of the supporting evidence must be merely as satisfactory as could reasonably be expected, having regard to all the circumstances. The chambers judge in this case, in considering the evidence before him, was carefully attuned to the historical nature of the claim and to its implications for the quality and availability of evidence. The chambers judge, having held two hearings, and having carefully canvassed the evidence in cogent and thorough reasons for judgment, reached findings that were available to him on the evidence. Those findings should not have been disturbed. Given the chambers judge’s finding that no interest in the disputed lot was acquired by adverse possession, it is unnecessary to address whether the Mowatts’ claim was defeated for lack of registration.

**Cases Cited**

**Considered:** *Dominion Atlantic Railway Co. v. Halifax and South Western Railway Co.*,[1947] S.C.R*.* 107; *Ocean Harvesters Ltd. v. Quinlan Brothers Ltd.*,[1975] 1 S.C.R. 684; **referred to:** *The Queen v. Lincoln Mining Syndicate Ltd.*, [1959] S.C.R. 736; *Leigh v. Jack* (1879), 5 Ex. Div. 264; *Keefer v. Arillotta* (1976), 13 O.R. (2d) 680; *Fletcher v. Storoschuk* (1981), 35 O.R. (2d) 722; *John Austin & Sons Ltd. v. Smith* (1982), 35 O.R. (2d) 272; *Masidon Investments Ltd. v. Ham* (1984), 45 O.R. (2d) 563; *Gorman v. Gorman* (1998), 110 O.A.C. 87; *Brisebois v. Chamberland* (1990), 1 O.R. (3d) 417; *Hodkin v. Bigley* (1998), 20 R.P.R. (3d) 9; *Elliott v. Woodstock Agricultural Society*, 2008 ONCA 648, 92 O.R. (3d) 711; *Spicer v. Bowater Mersey Paper Co.*, 2004 NSCA 39, 222 N.S.R. (2d) 103; *MacKinnon, Re*, 2003 PESCAD 17, 226 Nfld. & P.E.I.R. 293; *Lutz v. Kawa*, 1980 ABCA 112, 23 A.R. 9; *Maher v. Bussey*, 2006 NLCA 28, 256 Nfld. & P.E.I.R. 308; *J. A. Pye (Oxford) Ltd. v. Graham*, [2002] UKHL 30, [2003] 1 A.C. 419; *Lord Advocate v. Lord Lovat* (1880), 5 App. Cas. 273; *Sherren v. Pearson* (1887), 14 S.C.R. 581; *Handley v. Archibald* (1899), 30 S.C.R. 130; *Wood v. LeBlanc* (1904), 34 S.C.R. 627; *Hamilton v. The King* (1917), 54 S.C.R. 331; *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Canada* (*Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 S.C.R. 720; *Tweedie v. The King* (1915), 52 S.C.R. 197; *Attorney‑General for British Columbia v. Canadian Pacific Railway*, [1906] A.C. 204.

**Statutes and Regulations Cited**

*Escheats Act*, R.S.B.C. 1924, c. 81, s. 3A [am. 1924, c. 18, s. 2].

*Escheats Act Amendment Act, 1924*, S.B.C. 1924, c. 18, s. 2.

*Land Act*, R.S.B.C. 1996, c. 245, s. 8

*Land Act*, S.B.C. 1970, c. 17, s. 6.

*Land Title Act*,R.S.B.C. 1996, c. 250, s. 20.

*Land Title Inquiry Act*, R.S.B.C. 1996, c. 251, ss. 8(c), 11.

*Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 2.

*Limitation Act*, R.S.B.C. 1996, c. 266, s. 14(5).

*Limitation Act, 1623* (Eng.), 21 Jas. 1, c. 16.

*Limitation of Actions (Realty) Act*, R.S.N. 1952, c. 145.

*Limitations Act*, S.B.C. 1975, c. 37.

*Real Property Limitation Act, 1833* (U.K.), 3 & 4 Will. 4, c. 27.

*Statute of Limitations*, R.S.B.C. 1897, c. 123.

*Statute of Limitations*, R.S.B.C. 1924, c. 145, ss. 16, 17.

*Statute of Limitations*, R.S.B.C. 1960, c. 370, s. 48.

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Lubetsky, Michael H. “Adding Epicycles: The Inconsistent Use Test in Adverse Possession Law” (2009), 47 *Osgoode Hall L.J.* 497.

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APPEAL from two judgments of the British Columbia Court of Appeal (Saunders, Chiasson and Harris JJ.A.), 2016 BCCA 113, 83 B.C.L.R. (5th) 396, 384 B.C.A.C. 101, 663 W.A.C. 101, 395 D.L.R. (4th) 432, 46 M.P.L.R. (5th) 27, 63 R.P.R. (5th) 8, [2016] 8 W.W.R. 63, [2016] B.C.J. No. 474 (QL), 2016 CarswellBC 611 (WL Can.), setting aside two decisions of Kelleher J., 2014 BCSC 988, 25 M.P.L.R. (5th) 79, 46 R.P.R. (5th) 217, [2014] B.C.J. No. 1104 (QL), 2014 CarswellBC 1580 (WL Can.), and 2014 BCSC 2219, [2014] B.C.J. No. 2907 (QL), 2014 CarswellBC 3538 (WL Can.). Appeal allowed.

*Ryan D. W. Dalziel*, *A. Scott McW. Boucher* and *Daniel R. Bennett*, *Q.C.*, for the appellant.

*K. Michael Stephens*, *Stephanie McHugh* and *Ryan J. M. Androsoff*, for the respondents.

*Barbara Carmichael* and *Cory R. Bargen*, for the intervener.

The judgment of the Court was delivered by

Brown J. —

1. Introduction
2. This appeal concerns the law of adverse possession in British Columbia. The respondents, Mary Mowatt and Earl Mowatt, claim title to a parcel of land located at 1114 Beatty Avenue, in Nelson, British Columbia (“disputed lot”). While they took possession of the disputed lot in 1992, their claim rests upon what they say is continuous adverse possession thereof by three families in succession, beginning in the early 20th century. To enforce that claim, the Mowatts brought two proceedings: an action for a declaration that the provincial Crown, which holds registered title, does not own the disputed lot and therefore could not transfer it to the appellant, City of Nelson (“City”); and a petition for judicial investigation under the *Land Title Inquiry Act*, R.S.B.C. 1996, c. 251, into their title to the disputed lot.
3. The chambers judge granted the City’s summary trial application to dismiss both proceedings, pointing to what he characterized as an “evidentiary gap” — that is, an interruption in the continuity of adverse possession, running from approximately 1916 to 1920. The Court of Appeal reversed, finding that the chambers judge had erred in his treatment of the evidence of continuous occupation, and concluding that continuous adverse possession of the disputed lot was demonstrated from December 1909 to at least February 1923. In response to the City’s submissions, the Court of Appeal also held that lack of registration did not prevent the transfer to the Mowatts of their predecessor’s interest in the disputed lot, and that the law of British Columbia does not require the Mowatts to demonstrate that their use of the disputed lot was inconsistent with the intended use of the “true owner”.
4. For the reasons that follow, I would allow the appeal. The Court of Appeal correctly held that the inconsistent use requirement forms no part of British Columbia law governing the proof of adverse possession. That said, the Court of Appeal, in my respectful view, erred by substituting its own findings of fact for those properly arrived at by the chambers judge. In light of that conclusion, it is unnecessary for me to address arguments regarding the significance, if any, of the fact that the purported transfer of the disputed lot was not registered in accordance with British Columbia’s land titles system.
5. Overview of Facts and Proceedings
   1. Background
6. The Mowatts are the registered owners of 1112 Beatty Avenue (“registered lot”), situated immediately to the west of the disputed lot. No visible boundary separates the lots. Indeed, both lots had originally comprised part of a larger single lot, title to which was registered in absolute fee in 1891 by the Nelson City Land and Improvement Company (“land company”). That registration showed the lot as being located in Fairview, which was incorporated into the City of Nelson in April 1921.
7. In 1920, the land company transferred a parcel of land, including what is now the registered lot, to John Annable, who registered his title in indefeasible fee. Annexed to the deed on registration was Reference Plan No. 89281, which purported to dedicate the disputed lot as a road allowance. Unbeknownst to both the land company and Mr. Annable, that dedication was invalid for lack of compliance with the relevant statutory requirements, leaving the land company as the registered owner of the disputed lot in absolute fee.
8. In 1922, Mr. Annable transferred a portion of his lot to Herbert Thorpe. This transaction created the registered lot.
9. Still operating under the misapprehension that it had validly dedicated the disputed lot as a road allowance, the land company in 1929 notified British Columbia’s registrar of companies that it had “disposed of its assets several years ago to [Mr. Annable]”. The land company dissolved in 1930, and the disputed lot escheated to the Crown in 1930 or 1931.[[1]](#footnote-1)
10. The Mowatts’ claim to ownership of the disputed lot rests substantially upon what they say was its continuous adverse possession by three successive families: the Coopers, the Gouchers, and the Thorpes. There is no dispute that each of these families resided on the disputed lot, although for just how long they did so is contested in the case of the Coopers and the Gouchers. Certain findings by the chambers judge, however, help to establish a general chronology:
    * + 1. From as early as 1909 until January 1916 (when he moved to Australia), George W. Cooper (“George W.”) lived in a residence on the disputed lot with his family.
        2. After George W. moved to Australia, his son George R. Cooper (“George R.”) remained in the Kootenay region of British Columbia with his wife Carrie and their children. George R. worked at the smelter in Trail, British Columbia from February 1917 until his death in February 1918.
        3. Frank and Mary Goucher lived in the residence on the disputed lot for some period after the Coopers left, and before the Thorpes arrived in 1922. Evidence before the chambers judge (the Fairview voters’ list) placed them in Fairview in November 1920, while a record of their son’s attendance at school in Fairview as well as their absence from the Nelson voter’s list suggested their presence in Fairview in 1919.
        4. In 1922, Herbert Thorpe purchased the registered lot. While building the stone house that currently stands there, he rented the residence on the disputed lot from Mr. Goucher and lived there until the residence burnt down in 1923.
        5. In 1959, Mr. Thorpe transferred the registered lot to his children. His daughter, Gwen Marquis, transferred it to the Mowatts in 1992.
    1. Judicial History
       1. Supreme Court of British Columbia — 2014 BCSC 988, 25 M.P.L.R. (5th) 79 and 2014 BCSC 2219
11. Acquisition of title to land in British Columbia by adverse possession was abolished on July 1, 1975 with the coming into force of the *Limitations Act*, S.B.C. 1975, c. 37. Title to land acquired by adverse possession *before* July 1, 1975, however, was preserved and could continue to be claimed, subject to the ability of the holder of registered title to bring a proceeding enforcing his or her rights within the applicable limitation period: *Limitation Act*, R.S.B.C. 1996, c. 266, s. 14(5).
12. Two applicable limitation periods were identified at first instance.[[2]](#footnote-2) The limitation period which all parties were agreed could apply is contained in s. 16 of the *Statute of Limitations*, R.S.B.C. 1924, c. 145, which prescribed that an action to recover land had to be brought within 20 years. This would allow the Mowatts to succeed by showing continuous adverse possession of the disputed lot for 20 years preceding its escheat in 1930 or 1931.
13. Additionally, the Mowatts pointed to s. 48 of the *Statute* *of Limitations*, R.S.B.C. 1960, c. 370, which barred the Crown from suing for the recovery of land after the expiration of 60 years. Given the abolition of acquiring title by adverse possession on July 1, 1975, this provision, if applicable, would allow the Mowatts to succeed by establishing continuous adverse possession for 60 years before that date. The City and the Crown, however, argued that adverse possession was actually abolished *as against the Crown* on May 1, 1970 by operation of s. 6 of the *Land Act*, S.B.C. 1970, c. 17 (now s. 8 of *Land Act*, R.S.B.C. 1996, c. 245), which precluded the acquisition of an interest in Crown land “by prescription, or by occupation not lawfully authorized, or by any colour of right”. If applicable, this provision would require the Mowatts to establish adverse possession for 60 years prior to May 1, 1970.
14. Ultimately, the chambers judge did not have to decide whether adverse possession was abolished as against the Crown in 1970 or 1975 because, in two sets of reasons, he found that the Mowatts had not demonstrated continuous adverse possession for 20 years preceding 1930 or 1931, or for 60 years preceding 1970 or 1975. In the first set of reasons, he explained that the Mowatts could not overcome what he described as an “evidentiary gap” regarding possession between the last evidence of George W. living on the lot in 1916 and the Gouchers’ arrival in Fairview in 1920 (2014 BCSC 988 (“BCSC #1”), at para. 107). He was also unconvinced that the Gouchers had ever resided on the disputed lot. The second set of reasons (2014 BCSC 2219 (“BCSC #2”)) arose from the conclusion to the first set of reasons, in which the chambers judge — in accordance with s. 11 of the *Land Title Inquiry Act*[[3]](#footnote-3) — granted the Mowatts 30 days to provide further evidence. The Mowatts did so, re-appearing before the chambers judge with further evidence about the relationship of the Coopers and the Gouchers to the disputed lot, which evidence they say bridged any “gap” in the continuity of adverse possession between 1916 and 1920. While this evidence satisfied the chambers judge that the Gouchers had indeed resided on the disputed lot, he remained of the view that continuity of possession was not made out from 1916 to 1920, and he dismissed the Mowatts’ action and petition.
    * 1. Court of Appeal for British Columbia — 2016 BCCA 113, 83 B.C.L.R. (5th) 396
15. The Mowatts appealed, arguing that the chambers judge had erred in law by conflating continuous *possession* with continuous *occupation*, and erred in fact by finding a gap in possession between 1916 and 1920 in the absence of any evidence of re-entry by the land company or of abandonment by the Coopers. While contesting these grounds, the City advanced two other bases upon which it also relies at this Court for upholding the decisions of the chambers judge: that the Mowatts could not have acquired an interest in the disputed lot, and therefore lacked standing to advance their claim; and that the adverse possession claim must fail because it did not fulfill the inconsistent use requirement — meaning, that the Mowatts did not prove that the successive adverse possessors’ use of the disputed lot was inconsistent with the land company’s or the Crown’s enjoyment of the land.
16. The Court of Appeal first considered the question of whether Ms. Marquis transferred her possessory interest to the Mowatts. This was framed as an issue of standing because the City did not raise it before the chambers judge. In the Court of Appeal’s view, the evidence was sufficient to show that the Mowatts had acquired a possessory interest in the disputed lot from Ms. Marquis, and that no formalities were required for such a transfer. Further, it said that the transfer of an interest in “possessory title” was not subject to s. 20(1) of the *Land Title Act*,R.S.B.C. 1996, c. 250 (which addresses registration of instruments purporting to deal with land). It concluded that s. 20 applies only to land held in indefeasible fee simple, and not to land such as the disputed lot which is held in absolute fee. The Court of Appeal further found on the basis of English and Canadian jurisprudence that the inconsistent use requirement forms no part of the law of British Columbia governing adverse possession.
17. Finally, the Court of Appeal found that the chambers judge made several errors in deciding the Mowatts’ claim. Specifically, he erred in appearing to require continuous occupation, whereas sporadic occupation could suffice to ground possession. Further, in finding an “evidentiary gap”, the chambers judge “short-changed the application of the standard of proof” by “hold[ing] back from full consideration of the reasonable inferences available on the evidence before the court” (para. 87) relating to the period from 1916 to 1920. In light of the historical nature of the Mowatts’ claim, the chambers judge should have applied “a broad elliptical assessment of the available evidence consistent both with established deduction processes used in historical and scientific study, and with the curious-minded view reflected in jurisprudence of claims involving long ago events” (para. 89).
18. The Court of Appeal therefore allowed the appeal, set aside the chambers judge’s orders, declared that the possession of the disputed lot had begun no later than December 1909 and continued until at least February 1923 (when the residence on the disputed lot burnt down), and remitted the Mowatts’ proceeding under the *Land Title Inquiry Act* back to the Supreme Court of British Columbia for final determination of the proceedings.
19. Analysis
    1. Inconsistent Use
20. Adverse possession is a long-standing common law device by which the right of the prior possessor of land, typically the holder of registered title and therefore sometimes referred to as the “true owner”, may be displaced by a trespasser whose possession of the land goes unchallenged for a prescribed period of time. From as early as *The* *Limitation Act, 1623* (Eng.), 21 Jas. 1, c. 16, the prior possessor’s right to recover possession was curtailed by limitation periods. This rule allowing for the later possessor acquiring ownership of land after the passage of a certain time was codified in English law by the *Real Property Limitation Act, 1833* (U.K.), 3 & 4 Will. 4, c. 27, which was received into the law of British Columbia on November 19, 1858 by operation of what is now s. 2 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253. Since then, British Columbia’s successive limitation statutes, including the provisions which I have already canvassed and which govern the Mowatts’ claim, have effectively reproduced the 1833 English statutory codification of adverse possession. Under those statutes, the limitation period began to run at the point in time at which the true owner’s right to recover possession first arose: the date of dispossession or discontinuance of possession (see for example s. 17 of the *Statute of Limitations* (1924)), as determined by the test for adverse possession.
21. As to that test, the elements of adverse possession, all of which must be present to trigger the running of the limitation period against the “true owner”, are explained by Professor Ziff in *Principles of Property Law* (6th ed. 2014), at p. 146. In brief, the act of possession must be “open and notorious, adverse, exclusive, peaceful (not by force), actual (generally), and continuous” (*ibid.* (footnote omitted)). Significantly for this case, the adverse possessor who successfully obtains title need not always be the same person whose adverse possession triggered the running of the limitation period; successive adverse possessors can “tack” on to the original adverse possession, provided that the possession is continuous in the sense that there is always someone for the true owner to sue (*Anger & Honsberger* *Law of Real Property* (3rd ed. (loose-leaf)), by A. W. La Forest, ed., at §28:50).
22. To these elements of adverse possession the City would add: that the possessor’s or possessors’ use of the disputed lot must have been inconsistent with the “true owner’s” present or future enjoyment of the land. Alternatively put, possession, to be truly adverse, must entail a use of the property that is inconsistent with the true owner’s intended use of the land. This “inconsistent use” requirement was stated by Lord Bramwell in *Leigh v. Jack* (1879), 5 Ex. Div. 264 (C.A.), at p. 273:

I do not think that there was any dispossession of the plaintiff by the acts of the defendant: acts of user are not enough to take the soil out of the plaintiff and her predecessors in title and to vest it in the defendant; 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: that is not the case here, where the intention of the plaintiff and her predecessors in title was not either to build upon or to cultivate the land, but to devote it at some future time to public purposes. The plaintiff has not been dispossessed, nor has she discontinued possession, her title has not been taken away, and she is entitled to our judgment. [Emphasis added.]

1. The inconsistent use requirement appears in the jurisprudence of Ontario (i.e., *Keefer v. Arillotta* (1976), 13 O.R. (2d) 680 (C.A.); *Fletcher v. Storoschuk* (1981), 35 O.R. (2d) 722 (C.A.); *John Austin & Sons Ltd. v. Smith* (1982), 35 O.R. (2d) 272 (C.A.); *Masidon Investments Ltd. v. Ham* (1984), 45 O.R. (2d) 563 (C.A.); *Gorman v. Gorman* (1998), 110 O.A.C. 87; *Brisebois v. Chamberland* (1990), 1 O.R. (3d) 417 (C.A.); *Hodkin v. Bigley* (1998), 20 R.P.R. (3d) 9 (Ont. C.A.); *Elliott v. Woodstock Agricultural Society*, 2008 ONCA 648, 92 O.R. (3d) 711) and has also been applied in the appellate jurisprudence of Nova Scotia (*Spicer v. Bowater Mersey Paper Co.*, 2004 NSCA 39, 222 N.S.R. (2d) 103) and Prince Edward Island (*MacKinnon, Re*, 2003 PESCAD 17, 226 Nfld. & P.E.I.R. 293). Its application has, however, been rejected in Alberta (*Lutz v. Kawa*, 1980 ABCA 112, 23 A.R. 9) and restricted in Newfoundland and Labrador to consideration as a relevant but not a required factor in determining whether adverse possession has been established (*Maher v. Bussey*, 2006 NLCA 28, 256 Nfld. & P.E.I.R. 308, at paras. 50-52). Before us, the City argued the merits of considering the (in)consistency between the putative adverse possessor’s intended use and the true owner’s intended use of land. I note that counter-arguments have been made to the effect that the inconsistent use requirement is unnecessary and undesirable (M. H. Lubetsky, “Adding Epicycles: The Inconsistent Use Test in Adverse Possession Law” (2009), 47 *Osgoode Hall L.J.* 497, at pp. 523-25). Indeed, it is no longer required in England, having been denounced as “heretical and wrong” by Lord Browne-Wilkinson in *J. A. Pye (Oxford) Ltd. v. Graham*, [2002] UKHL 30, [2003] 1 A.C. 419, at para. 45.
2. In my view, the question properly before this Court is not whether the inconsistent use requirement is necessary or desirable; we have received no submissions, for example, on whether it should continue to apply to claims based on adverse possession in Ontario. Rather, the question properly before us is whether it forms part of the law of British Columbia and therefore ought to have been applied by the courts below. I am of the opinion that the City cannot demonstrate that it does.
3. As Lord Browne-Wilkinson observed in *J.A. Pye*, the inconsistent use requirement stated in *Leigh* appeared to revive the pre-1833 doctrine of adverse possession, under which “the rights of the paper owner were not taken away save by a ‘disseisin’ or an ouster and use of the land by the squatter of a kind which was clearly inconsistent with the paper title” (para. 33). That former concept of adverse possession had, however, been abolished in England by the *Real Property Limitation Act,* *1833*, under which “the only question was whether the squatter had been in possession in the ordinary sense of the word [for the prescribed period of time]” (para. 35). Consequently, the requirement of showing an inconsistent use, not having formed part of the law of England at the date of its reception in British Columbia, was never necessary to establish dispossession under British Columbia’s subsequent limitations statutes, which essentially reproduced the 1833 English legislation.
4. Nor has the inconsistent use requirement been imported into British Columbia by the courts. The Court of Appeal’s thorough review of this issue contains no suggestion that British Columbia’s courts have adopted the requirement of inconsistent use, and the City does not suggest otherwise. The City does, however, point to two decisions of this Court as “reflecting” the inconsistent use requirement (*Dominion Atlantic Railway Co. v. Halifax and South Western Railway Co.*,[1947] S.C.R*.* 107; and *Ocean Harvesters Ltd. v. Quinlan Brothers Ltd.*,[1975] 1 S.C.R. 684).
5. *Dominion Atlantic* involved a dispute over ownership of lands between the “true owner” and a lessee who had continued to use the land after the lease had expired. In a brief judgment for the Court, Kellock J. cited two alternative tests for possession (pp. 109-10): Lord O’Hagan’s statement in *Lord Advocate v. Lord Lovat* (1880), 5 App. Cas. 273, at p. 288, that possession must be considered in each case with reference to the peculiar circumstances, and Lord Bramwell’s inconsistent use requirement stated in *Leigh*. Neither test, however, was endorsed or applied, since Kellock J.’s decision hinged on the finding that the lessee had not maintained exclusive possession (p. 110), which would defeat an adverse possession claim under either test.
6. In *Ocean Harvesters*, oceanfront land was used by the true owner for receiving fresh fish. He permitted his company (he was president and controlling shareholder) to occupy it during the fishing season each year, and the question arose whether he was barred from asserting title to the land by operation of *The Limitation of Actions (Realty) Act*, R.S.N. 1952, c. 145, after the company had been in possession thereof for more than 21 years. While this Court considered the intended use of the true owner, this was due to the unusual circumstance in which *his* intention was also animating the *later possessor*, which he controlled. That is, in order to determine the company’s intention in this case, the Court had to consider the true owner’s intention so that it could be imputed to the company. But this is not the same thing as assessing the true owner’s intention so that it can be measured against the later possessor’s intention for inconsistency. In any event, the adverse possession claim in *Ocean Harvesters*, like that in *Dominion Atlantic*, was dismissed not for a lack of inconsistent use but for want of exclusive possession (*Ocean Harvesters*, p. 691; *Dominion Atlantic*, p. 110).
7. In neither of these decisions, therefore, can this Court be said to have adopted, whether explicitly or by implication, the inconsistent use requirement. It also bears mentioning that this Court has also considered adverse possession claims on several occasions since *Leigh* (i.e., *Sherren v. Pearson* (1887), 14 S.C.R. 581; *Handley v. Archibald* (1899), 30 S.C.R. 130; *Wood v. LeBlanc* (1904), 34 S.C.R. 627; and *Hamilton v. The King* (1917), 54 S.C.R. 331), without ever expressing or applying an inconsistent use requirement.
8. Further, introducing the inconsistent use requirement into the test for adverse possession would revive the pre-1833 necessity of showing a disseisin or an ouster, explicitly removed by statute. While courts have a role in defining what constitutes dispossession under British Columbia’s limitations legislation, legislative intent must be respected. The Court of Appeal was correct to hold (at para. 68) that “the [inconsistent use] doctrine does not accord with the legislation in this Province which has continued to accord with the 1833 English limitations legislation”. It follows that the inconsistent use requirement forms no part of the law of British Columbia governing adverse possession. Whether the requirement is properly applicable in other provinces remains an open question subject to examination of their respective legislative histories, the wording of their particular limitations statutes, and the treatment of these matters by the courts of those provinces.
   1. The Evidence on Continuity of Adverse Possession
9. This leaves the issue of whether the evidence put before the chambers judge by the Mowatts was sufficient to bridge any “evidentiary gap” from 1916 to 1920 that the chambers judge found had interrupted the continuity of adverse possession of the disputed lot. The Mowatts say the chambers judge erred in several respects, and that those errors justified reversal by the Court of Appeal. Specifically, they say the chambers judge (1) erred by confusing continuous possession with continuous occupation; and (2) failed to properly consider material evidence, in keeping with the historical context of the claim.
   * 1. Continuous Possession vs. Continuous Occupation
10. First of all, the Mowatts say the chambers judge erred in assessing continuous adverse possession by confusing *possession* with *occupation*, requiring them to show continuous occupation when the central question went to continuity of possession. Relatedly, they say that, since property can be possessed without being at all times occupied, the chambers judge’s finding of discontinuity of possession from 1916 to 1920 required a preliminary finding that he did not make — specifically, that the disputed lot had been abandoned by the Coopers in 1916.
11. I will first dispose of the argument regarding abandonment. It was unnecessary for the chambers judge to make an explicit finding that the Coopers had abandoned the disputed lot as a precondition to a finding of discontinuity of possession. The burden lay with the Mowatts to demonstrate continuous possession on the balance of probabilities, and not with the City to demonstrate abandonment. Moreover, an end to possession, and abandonment, are simply two sides of the same coin. Where possession ends, abandonment begins. No legal significance, therefore, lies in the absence of an explicit finding of abandonment; it follows from the finding that continuous possession of the disputed lot was not established beyond January 1916, that it was abandoned.
12. As to whether the chambers judge confused possession with occupation, I acknowledge that “possession” does not require continuous occupation. The common law recognizes that a person may possess land in a manner sufficient to support a claim to title while choosing to use it intermittently or sporadically (*R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220, at para. 54). In short, property can be possessed without being at all times occupied. And, I also acknowledge that the chambers judge’s repeated use of the term “occupation” (as opposed to “possession” — see, e.g., BCSC #1, paras. 109 and 112, and BCSC #2, paras. 3, 46 and 52 (CanLII)) lends support to the Mowatts’ argument that he confused these two distinct concepts.
13. I am not, however, persuaded that this supports upsetting the chambers judge’s decisions. While the chambers judge occasionally referred to “possession” and “occupation” seemingly interchangeably, it is apparent that he knew he was to look for continuous possession, not occupation. And, he cited the correct legal test (BCSC #1, paras. 22-23). Further, the distinction between these two concepts was, on the facts of this case, insignificant. The evidence led by the Mowatts respecting the Coopers, Gouchers, and Thorpes generally went to their *occupation* of the disputed lot. No form of possession by any of them short of occupation during the “evidentiary gap” was posited to the chambers judge as being supported by the evidence. In short, the meaning of the two concepts essentially overlapped on the facts of this claim, and I see no error in the chambers judge’s application of the test for adverse possession arising from his occasional references to occupation.
    * 1. Consideration of the Evidence
14. The critical consideration underlying the “evidentiary gap” is the evidence relating to the activities of the Coopers and the Gouchers between 1916 and 1920, inclusive. More particularly, both the parties and the chambers judge were focussed upon the evidence in relation to whether any of the Coopers continued to possess the disputed lot after George W.’s departure in January 1916; and whether and for how long the Gouchers possessed the disputed lot prior to their appearance on the Fairview voters’ list in November 1920.
15. As to the Coopers, it will be recalled that George W. moved to Australia in January 1916. His son George R. married Carrie in May 1915, and a daughter, Delores, was born that same month. A son, George S., followed in October 1916. From February 1917 until his death in February 1918 in an industrial accident, George R. worked at a smelter in Trail, British Columbia. It is likely that, by December 1917 at the latest, Carrie and the children had joined him in Trail.
16. The chambers judge acknowledged that, on this evidence, it was possible to conclude that members of George R.’s family continued to possess the disputed lot after January 1916. He declined to make that finding, however, since in his view it was no more likely than the alternative possibility that George R. had left the disputed lot for other premises upon his marriage. The Mowatts and the Court of Appeal say that, in so finding, the chambers judge did not account for the implication of the statement from George S.’s daughter (that is, George R.’s granddaughter) that she “understood” her mother (George S.’s wife) to have “thought” that George S. had been born “at the bottom of Third or Fourth Street”, which accords with the location of the disputed lot.[[4]](#footnote-4) The suggestion is, of course, that — since George S. was born nine months after George W.’s departure for Australia — George R. and his family must have continued to possess the disputed lot.
17. The chambers judge *did*, however, account for this statement, referring to it (BCSC #2, at para. 38) and then concluding (BCSC #2, at para. 40) that the evidence, taken together, did not persuade him of continuous possession. In light of the equivocal quality of the statement, and the multiple layers of hearsay contained within it, he was manifestly entitled to so conclude.
18. As to the Gouchers, the Mowatts say that the chambers judge failed to consider the significance of the evidence that the Gouchers’ son wrote school examinations in Fairview in December 1919, and of the omission of the Gouchers from the Nelson voters’ list in 1919. The chambers judge specifically took note of that evidence as well as of evidence that the Coopers were known to the Gouchers. The difficulty for the chambers judge was, however, that, while this evidence would place the Gouchers in Fairview as early as 1919, it did not demonstrate to his satisfaction that they possessed the disputed lot at that time. In any event, and as the chambers judge observed, even if the Mowatts could satisfy him that the Gouchers had possessed the disputed lot earlier than 1920, other evidence suggested that the Gouchers were recorded as living in Nelson, not Fairview, in 1916. In other words, even allowing for possession by the Gouchers of the disputed lot as early as 1919, that would still have left a discontinuity of possession, albeit a briefer one, that would have been fatal to the Mowatts’ claim.
19. I acknowledge that the Court of Appeal’s finding of fact that adverse possession of the disputed lot was continuous from December 1909 to at least February 1923 is not unreasonable. It is certainly possible to weigh parts of the evidence differently than the chambers judge did. The possibility of alternative findings based on different ascriptions of weight is, however, not unusual, and presents no basis for overturning the findings of a fact-finder. It is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. Absent palpable and overriding error — that is, absent an error that is “plainly seen” and has affected the result — an appellate court may not upset a fact-finder’s findings of fact (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 6 and 10; see also *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at para. 55). The standard of palpable and overriding error applies with respect to the underlying facts relied upon by the trial judge to draw an inference, and to the inference-drawing process itself (*Housen*,at para. 23). In my respectful view, the Court of Appeal erred by interfering with a factual finding where its objection, in substance, stemmed from a difference of opinion over the weight to be assigned to the evidence. The chambers judge, having held two hearings, the latter of which occurred as a result of his allowing the Mowatts an opportunity to adduce further evidence, and having carefully canvassed the evidence in two sets of cogent and thorough reasons for judgment, reached findings that were available to him on the evidence. Those findings should not have been disturbed.
20. My conclusion is unaffected by the historical nature of the claim, which the Court of Appeal thought merited an assessment of the evidence that is “broad” and “curious-minded”. The City criticizes this aspect of the Court of Appeal’s reasons. It says that, in light of the Court of Appeal’s statement (at para. 74) that “[h]ow [the standard of proof on a balance of probabilities] may be met depends on the proof that is capable of presentation”, the Court of Appeal should be taken as having effectively imported a new standard of proof. This is, the City adds, contrary to this Court’s direction in *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40, that there is “only one civil standard of proof at common law and that is proof on a balance of probabilities”.
21. I do not take the Court of Appeal to have espoused or applied a standard of proof other than the balance of probabilities. The impugned statements go not to the standard of proof, but to the quality of evidence by which that standard is to be met. This Court said in *McDougall* (at para. 46) that “evidence must always be sufficiently clear, convincing and cogent”. Those are relative, not absolute qualities. It follows that the quality of evidence necessary to meet that threshold so as to satisfy a trier of fact of a proposition on a balance of probabilities will depend upon the nature of the claim and of the evidence capable of being adduced (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 82; *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 S.C.R. 720, at para. 36). In the context of historical adverse possession claims, the quality of the supporting evidence must merely be “as satisfactory as could reasonably be expected, having regard to all the circumstances” (Anglin J., as he then was, in *Tweedie v. The King* (1915), 52 S.C.R. 197, at p. 220; see also Sir Arthur Wilson in *Attorney-General for British Columbia v. Canadian Pacific Railway*, [1906] A.C. 204 (P.C.), at pp. 209-10).
22. That said, I respectfully part company from the Court of Appeal in its criticisms of the chambers judge’s assessment of the evidence. In my view, the chambers judge, in considering the evidence before him, was carefully attuned to the historical nature of the Mowatts’ claim and to its implications for the quality and availability of evidence. Portions of his reasons in this regard merit extensive reproduction here (BCSC #1, paras. 105 and 108), as they demonstrate his sensitivity in this respect:

I agree with the petitioners that there need not be evidence of possession for every calendar year of the claim period. Thus, if there were cogent evidence that party A took possession in 1912 and transferred possession to party B in 1914, it is a fair and reasonable inference that party A was in possession in 1913. In the words of *Tweedie*, there is “no reason to suppose” that party A abandoned the lands for a period of time.

. . .

Putting the petitioners’ case at its highest again, even if I find the Cooper and Goucher residences were one and the same and on the Disputed Area, there is no evidence of continuity of the Coopers’ adverse possession with the Gouchers. In arriving at my conclusions, I am cognizant of the standard of record-keeping nearly a century ago; however, I am not satisfied that the evidence is “as satisfactory as could reasonably be expected, having regard to all the circumstances”: *Tweedie* at 220. The fact that the Gouchers are recorded as living back on Baker Street in Nelson in 1916 is not something I can ignore. Further, according to Ms. Mowatt’s Affidavit #1, the 1918 Directory lists neither the Coopers nor the Gouchers. The petitioners have provided no evidence of adverse possession of the Disputed Area for 1917-1919. [Emphasis added.]

1. Given the chambers judge’s finding — untainted by palpable and overriding error — that the Mowatts had not established uninterrupted adverse possession over the disputed lot from 1916 through 1920, it is unnecessary to address the submissions of the City and of the Attorney General of British Columbia regarding whether the Mowatts’ claim was defeated for lack of registration. Ms. Marquis held no interest in the disputed lot and therefore no interest therein passed to the Mowatts.
2. Conclusion and Disposition
3. I would allow the appeal, and restore the decisions of the chambers judge.
4. The chambers judge made no order as to costs, citing the particular circumstances of this dispute, including its long-standing nature, the Mowatts’ knowledge of the dispute at the time of purchase, and the “inconsistent and contradictory” positions taken by the City and the Province over the years with respect to the disputed lot (BCSC #2, para. 57). In light of those circumstances, and of the divided success of the parties on the issues presented by this appeal, I would also direct that each party shall bear its own costs in this Court and in the courts below.

*Appeal allowed.*

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Solicitors for the respondents: Hunter Litigation Chambers, Vancouver.

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

1. Before the chambers judge, the parties were divided as to whether escheat would have occurred immediately upon the land company’s dissolution, or one year later. This issue arose from s. 3A of the *Escheats Act*, R.S.B.C. 1924, c. 81 (as amended by *Escheats Act Amendment Act, 1924*, S.B.C. 1924, c. 18, s. 2), which (1) prohibited the Lieutenant-Governor in Council, for a period of one year from the date of the dissolution of a corporation, from dealing with any of that corporation’s lands which had escheated to the Crown; and (2) provided that, were the corporation to revive within that year, such lands would automatically vest in the corporation. The Mowatts, relying upon *The Queen v. Lincoln Mining Syndicate Ltd.*, [1959] S.C.R. 736, argued that escheat would have occurred only upon the Crown’s interest becoming “absolute” (when the one year period for reversal by corporate revival had passed). The provincial Crown, which (while not an appellant before this Court) was a defendant to the action and a respondent to the petition, says the disputed lot escheated in 1930, although vesting would have been delayed for a year. It suffices here to observe, as the chambers judge did (at para. 51), that the disputed lot became Crown land in 1930 or 1931. [↑](#footnote-ref-1)
2. The applicable limitations provisions remained unchanged from the coming into force of the *Statute of Limitations*, R.S.B.C. 1897, c. 123, until they were repealed by the *Limitations Act* (1975). [↑](#footnote-ref-2)
3. Section 11 provides: “If the court is not satisfied with the evidence of title produced in the first instance, it must give a reasonable opportunity of producing further evidence, or of removing defects in the evidence produced.” [↑](#footnote-ref-3)
4. While this would otherwise be inadmissible hearsay evidence, s. 8(c) of the *Land Title Inquiry Act* states that the court, in investigating title, may receive and act on “evidence, whether it is or is not receivable or sufficient in point of strict law, . . . as long as it satisfies the court of the truth of the facts intended to be made out by it”. [↑](#footnote-ref-4)