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**** HIGHLIGHTS ****

* The Nova Scotia Court of Appeal has reviewed the law with respect to the ancient and seldom considered property right known as a profit à prendre in relation to a right reserved in a deed to remove hay from farm lands. The Court observed that in order to constitute a valid profit à prendre "appurtenant", the right must be limited to the benefit of another parcel of land -- the dominant tenement. While a profit à prendre "in gross" can be unlimited and need not be connected with a dominant tenement, the person claiming the profit à prendre in gross has to be able to prove valid transfer of ownership from the person who had created it. In this case, the profit à prendre appurtenant could not be established as the right to cut hay was not expressly for the benefit of farm lands which were still owned by the vendor after the Deed (the dominant tenement) and because the hay was no longer used to feed cattle on the farm in any event. The right to a profit in gross belonged to the heirs of the farmer who created the reservation, not the current owner. The current owner of the farm had not established that he owned the haying right, as this right was not conveyed to him with the farm. (Chisholm v. Snyder, CALN/2015-021, [2015] N.S.J. No. 167, Nova Scotia Court of Appeal)

**** NEW CASE LAW ****

Chisholm v. Snyder; CALN/2015-021, Full text: [2015] N.S.J. No. 167; 2015 NSCA 39, Nova Scotia Court of Appeal, L.L. Oland, M.J. Hamilton and D.R. Beveridge JJ.A., April 24, 2015.

Reservation of Rights to take Agricultural Products from Land which is Transferred and Sold -- Profit à prendre -- Validity and Enforceability.

William Patrick Chisholm ("Chisholm") applied to the Supreme Court of Nova Scotia for a declaration of rights with respect to the reservation of rights to harvest a hay crop pursuant to a Deed which transferred land to a predecessor in title of Glenn Snyder and Thelma Snyder (the "Snyders").

In a decision dated January 29, 2014, Justice Margaret Stewart granted an Order for a declaration in the nature of a profit à prendre ([2014] N.S.J. No. 43; 2014 NSSC 36, CALN/2014-009) with respect to the right to cut hay.

The Snyders appealed this decision to the Nova Scotia Court of Appeal.

Pursuant to a 1960 Deed, 2.7 acres of Gordon Chisholm's 150 acre farm lot was conveyed to Ida Durant. The Deed contained the following provision:

> "RESERVING however to the said Gordon Chisholm his heirs and assigns the right and privilege to enter upon the said land from time to time for the purpose of removing hay or other crops or improving the land,.."

Ida Durant subsequently transferred her interest in the land to the Snyders.

Chisholm (the Applicant) was the nephew and successor in title to Gordon Chisholm.

Chisholm sought an order declaring that he had the right to enter the land now registered in the name of the Snyders for the purpose of removing the hay and other crops, and for the purpose of improving the land.

Chisholm also sought a declaration requiring the Snyders to perform certain acts including the removal of a foundation, the return of the land to its former state, and a direction that the Snyders cease to mow the area reserved for agricultural use.

Chisholm argued that the law provides for a grant of a profit à prendre and that the deed created a valid and effectual profit à prendre.

The Snyders wished to build a new home on the land requiring a septic system, convert the old house into a garage, vegetable garden and possibly subdivide the land in order to provide a lot for their son to build on.

Stewart, J. concluded that the Durant Deed created a real property interest in the land in the nature of a profit à prendre. She prohibited the Snyders from subdividing the Durant lot, as doing so would extinguish this right.

The Court of Appeal stated the issue was the legal nature and effect of the reservation in the Durant deed.

Decision: Oland, J.A. (Beveridge and Hamilton JJ.A. concurring) found that Stewart, J. erred in law in concluding that Chisholm had an interest in the land in the nature of a profit à prendre; allowed the appeal and set aside her Order [at para. 48].

Oland, J.A. stated that prior to the appeal hearing, the Court had requested legal counsel for both parties to make oral submissions concerning a number of legal texts and case authorities which discussed the essential characteristics of profit à prendre, none of which had been brought to the attention of Stewart, J. [at para. 16 and 17].

Oland, J.A. reviewed the nature of profits à prendre at para. 18 to 31:

1. The nature of profit à prendre:

Oland, J.A. observed, at para. 18, that:

> "[18] ...A profit à prendre is an incorporeal hereditament; that is, a right annexed to land which is capable of passing by way of descent to an heir, but which itself is not tangible or a thing..."

Referring to the following description Anne Warner La Forest, Anger & Honsberger; Law of Real Property, 3rd ed, vol. 2, loose-leaf (updated December, 2014), (Toronto, Ont: Thomson Reuters Canada, 2014) at para. 17-30:

> "A second category of incorporeal hereditaments is the profit à prendre, which is a right to take something from the land of another person. The subject matter of a profit à prendre must be something capable of being owned, for otherwise the right would be a mere easement..."

2. How are profits à prendre created:

Oland, J.A., quoting from Anger & Honsberger, observed that a profit à prendre may be created by a statute, a grant or a reservation and that since a profit à prendre is an interest in land, to be valid in law it must be created or conveyed by deed [at para. 19].

3. Types of profit à prendre:

Oland, J.A. observed that there are several types of profit à prendre but that only two were relevant in the circumstances of this case: the profit à prendre appurtenant, and the profit à prendre in gross [at para. 20].

4. Profit à prendre appurtenant:

Oland, J.A. referred to the definition of a profit appurtenant from Megarry and Wade, The Law of Real Property, 8th ed., (London: Sweet & Maxwell, 2012) at p. 27-65 which indicated the profit is "annexed to some nearby dominant tenement and runs with it"; which may be enjoyed by one person to the exclusion of others, or by one person in common with others, and which must comply with the following four essential characteristics [at para. 21 and 22]:

(a) there must be a dominant and servient tenement;

(b) an easement must accommodate the dominant tenement;

(c) the dominant and servient owners must be different persons; and

(d) the right over land must be capable of forming the subject-matter of a grant.

Oland, J.A. observed that the distinction between an easement and a profit à prendre, is that an easement benefits the land itself while a profit à prendre is the right of an individual and that there must be a direct nexus between the enjoyment and the right of the user of the dominant tenement [at para. 23 to 24]. Unlimited profits à prendre do not exist in law. They must be measured in nature, size and necessities of the dominant tenement [at para. 25 to 29].

5. Profit à prendre in gross:

Oland, J.A. observed that while a profit à prendre appurtenant could not be unlimited, a profit à prendre can be unlimited and free from the constraints imposed by a dominant tenement if it is a profit à prendre in gross, quoting from the definition in Mcgarry & Wade at p. 27-068 as follows:

> "4. A profit in gross. This is a profit, whether several or in common, exercisable by the owner independently of his ownership of land; there is no dominant tenement. Thus a right to take fish from a canal without stint (i.e. without limit) can exist as a profit in gross, but not as already seen, as a profit appurtenant. A profit in gross is an interest in land which will pass under a will or intestacy or can be sold or dealt with in any of the usual ways, being an incorporeal hereditament."

Oland, J.A. concluded that the reservation in the Deed could not be a valid profit appurtenant because it was not for the benefit of a dominant tenement to which it was annexed, stating at para. 40 after quoting the Deed:

> "[40] In my view, the reservation cannot be a valid profit appurtenant. Such a profit must benefit the dominant tenement to which it is annexed, and must be limited, either to a specific quantity, or by the needs of the dominant tenement: see Harris and Anderson. Here, the reservation does not contain any wording which limits the right to take hay from the Durant lot, which would be the servient land. A profit appurtenant without limit or stint is unknown to the law."

Oland, J.A. observed that even if a limit could be implied, the evidence was that for decades the hay which had been taken off the property did not benefit the Chisholm property, which was the dominant tenement. The Chisholms no longer raised cattle -- they either sold the hay or allowed a third party to harvest it for a fee [at para. 41].

Oland, J.A. concluded [at para. 43] that the reservation in the Durant deed created a profit in gross -- "a right without limit and separate from any land owned by the profit holder" [at para. 43]. However, since a profit is an interest in land, to be valid in law it must be conveyed by deed in order to satisfy the Statute of Frauds. This interest had not been conveyed in the 1972 and 1998 deeds in the chain of title the Chisholm lands from Gordon Chisholm to William Patrick Chisholm. In order for William Patrick Chisholm to claim the profit in gross, he would have to establish that he owned it.

Oland, J.A. concluded at para. 46 and 47 that the right to take the hay had not been transferred to William Patrick Chisholm with the Chisholm land and that William Patrick Chisholm had not established that he owned it, stating at para. 47:

> "[47] Moreover, if the right is a profit in gross, then who is its owner? As explained above, if not disposed of earlier, a profit in gross will pass under a will or, if none, according to the laws governing intestacy. As a result, were he still living, Gordon Chisholm would be the owner of any such profit; since he is not, it may continue to exist as part of the estate of Gordon Chisholm. There is, however, no evidence on the record which would connect it to his nephew, the respondent, William Chisholm."

** CREDITS **

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